



**CIVIL COURT
(COMMERCIAL SECTION)**

**HON. MR JUSTICE
JOSEPH ZAMMIT MCKEON**

This day, Tuesday the 11th September 2018

Applic. No. 1089/2017/1 JZM

**Frank Grisar (Pass. Nru. 591-5838189-55)
Kevin Schembri (I.D. nr. 257277M)
Lydon Laudi (I.D. nr. 212985M)**

vs

**Dolittle & Fishmore Limited (C-79128)
Jan Erik Pantzar (Pass. Nr. 89771455)
Acorn Technology AB (556821-1105)
Thomas Stig Pantzar (Pass. Nr. 90621172)**

THE COURT :

Having seen the application filed by Frank Grisar *et* on the 27th July 2018, and documents attached therewith.

Having seen its decree of the 30th July 2018.

Having seen the reply filed by Dolittle & Fishmore *et* on the 3rd August 2018, which reply was brought to the attention of the Court on the 29th August 2018.

Having seen the documents that were filed together with the reply.

Having seen its other decree of the 29th August 2018.

Having heard oral submissions during a hearing held on the 4th September 2018, following which the matter was adjourned for a final decree *in camera*.

CONSIDERS :

The claimants have resorted to the present procedure following the action they had filed as members of respondent company (holding minority shares) alleging unfair prejudice and other breaches of Sec 402(1) of Chap 386, and consequently requesting remedies in accordance with Sec 402(3). This action is pending before this Court.

The scope of the present procedure is not for the Court to decide on the merits of the action. That is a matter which the Court will do in its final ruling after both parties present all their evidence in the action on the merits.

In Pg 959 – 1029 of **Principles of Maltese Company Law** (MUP – 2007) **Andrew Muscat** dwells on the *Statutory Shareholder Remedies : Unfair Prejudice and Winding Up*. He examines the remedies that are available under article 402 and considers the granting of *interim orders*.

He states as follows :-

Before examining the different types of order that can be made by the court, a preliminary question should be considered : whether a court may issue an interim order pending final judgement. The position in English law is that English courts do, where appropriate, have the power to issue interim orders – usually orders for payment on account or orders designed to preserve the status quo. The Maltese Companies Act is silent on the question of whether a court, seized of an issue under article 402, is entitled to issue an interim order. Nor does any jurisdiction result from any general provision in the Code of Organisation and Civil Procedure.

It is significant that where the legislator wished to grant to a court the power to make interim orders, the legislator did so by express provision, as with the power of the court to issue a “provisional order” under article 37(5) of the Merchant Shipping Act (prohibiting dealings in a ship until the court definitely decides on the merits) and the power of the court to initially issue a warrant of prohibitory injunction for an “interim period” under article 873(7) of the Code of Organisation and Civil Procedure. In practice, situations may sometimes arise where the issue of an interim order would be necessary to protect the interests of the complainant or of the company. The introduction of an amendment to article 402 would allow the court to issue interim orders would be another helpful tool in the court’s arsenal against oppressive, unfairly prejudicial or unfairly discriminatory conduct ...

In Pg 587 of **Company Law** (34th Edition – OUP) **Mayson, French & Ryan** argue that :

It is desirable that the status quo should be preserved in the time between presentation and hearing of a petition under CA 2006, s.994, and the court will grant injunctions to achieve this [Re a Company (No 002612 of 1984) (1985) BCLC 80; Re a Company (No 00330 of 191) (1991) BCLC 597; Re a Company (No 00306 of 1993) (1994) BCC 883]

They also state that :

... As usual when considering whether to grant an interim injunction, the court will not do if the balance of probabilities is against it [Rutherford (1994) BCC 876]

In the local scenario, on the strength of various court rulings, there is a consistent acceptance that the Court can grant interim orders or measures while the action filed on the basis of article 402 is still pending.

In its ruling of the 9th June 2011 in re **Lonavi Properties Limited vs Balkan Power Invest Holding Limited et**” this Court affirmed as follows :-

Ghall-kaz tal-lum, *din il-Qorti tghid li ma jidhrilhiex li ghadha tadotta posizzjoni rigida u nflessibbli fl-ghoti ta` interim measures ghaliex the Maltese Companies Act is silent on the question of whether a court, seized of an issue under article 402, is entitled to issue an interim order (kif sostna Prof Muscat).*

Jidher li l-Qrati nghataw diskrezzjoni pjuttost wiesgha, kemm biex jiddeciedu jekk kienx hemm agir “mhux gust ta’ pregudizzju”, u kemm fir-rimedji li jistghu jaghtu. Ghalkemm l-Art.402 isib l-ghajn ta` riferenza tieghu fl-Art.459 tal-Companies Act Ingliza, fejn jidher li dak l-artikolu kien intiz li jipprovdri rimedju definitiv fl-istess waqt irid jinghad li ma jistax jigi eskluż li tenut kont tac-cirkostanzi partikolari ta` kull kaz u sitwazzjoni il-Qrati jistghu u ghandhom jaghtu rimedji temporanji, jekk hekk ikun mitlub jew jekk hekk ikun jidher opportun.

In its judgement of the 9th March 2007 in re **Vella et vs Vella Brothers Limited et** the Court of Appeal remarked that :-

Il-hsieb wara dan l-artikolu (u cioe` l-Art.402) huwa li jiftah l-iskop ta' intervent da parti mill-Qorti, u din il-Qorti tkun qed taghmel "disservice" lill-azzjonisti minoritarji jekk tkun hi li terga` taghlaq parzjalment il-bieb li fetah il-legislatur bl-Artikolu 402. Bis-sahha ta' dak l-artikolu, il-Qorti tista' taghti dak ir-rimedju li jidhrilha li jkun opportun, inkluz allura, rimedji u ordnijiet temporanji li jservu biex jigi rispettati l-istatus quo sakemm tigi mistharga kwistjoni jew sakemm tigi rizolta sitwazzjoni ta' konflitt fi hdan il-kumpannija. Ovvjament, dan ma jfissirx li r-rimedju mitlub se jinghata, ghax il-Qorti ghad trid tisma' l-provi u t-trattazzjoni dwar il-kwistjoni li nqatghet, imma l-Qorti hi tal-fehma li rimedju jista' jinghata ...

In a judgement given on the 5th February 1975 in re **American Cyanamid Co vs Ethicon Ltd** [1975] 1 All ER 504 [1975] AC 396, the House of Lords set guidelines which should be considered before granting an interim order namely : (i) that it is not the courts' role to consider conflicting evidence in respect of an interim application as this is a matter for trial ; (ii) that at this stage of proceedings claimant should limit himself to show that there was a real issue to be tried ; (iii) that the court is to consider whether an alternative remedy is available should the interim order not be granted ; if there is an alternative remedy then the interim order should not be granted. These principles were reaffirmed by the Court of Appeal in England in re **Pringle vs Callard** [2008] 2 BCLC 505.

CONSIDERS :

When an application is filed for the grant of interim measures, the burden rests on the person making the request to prove *prima facie* that, without interim relief, his rights pending final judgement on the merits of the claim risk further prejudice. In the case under scrutiny it was therefore up to applicants to bring forward satisfactory evidence to enable the Court to consider their request.

Applicants claim that considerable activity was going on at the premises of Dolittle & Fishmore Limited in Sliema consisting of works being carried out and moveables being removed. On their part, respondents did not dispute the taking out of moveables from the premises, on the basis of the fact that the company had accumulated huge debts. Judicial proceedings were instituted. Respondents had agreed a compromise with the landlord of the premises in view of the arrears of rent due by virtue of which the lease agreement was terminated, and

possession given back to the landlord. According to respondents, by so doing they minimized the risk of further indebtedness and costly legal proceedings. Although applicants alleged that fixed items were removed from the premises, this was refuted by respondents.

Whether any items were actually removed, and whether any such removal, if proved, does impinge on the merits of the case, and ultimately on the rights of the claimants is a matter still to be determined after all evidence is presented and considered. Therefore any position which this Court could take to address this matter would be premature as it could have a bearing on the merits.

The Court notes that in their application claimants although they did request interim orders did not specify the nature of the measures they were requesting. This omission cannot be supplemented by the Court as by so doing it would be tantamount to undue intervention.

This Court reaffirms the principle that the grant of interim measures is not a matter of course in unfair prejudice proceedings. It is rather exceptional in nature intended primarily to ensure that a *status quo* is maintained within the company until the dispute between the members of the company is decided by the Court.

In the case in question, this Court is of the view that the grievances that are at the basis of the application should not be addressed through the grant of an interim order as the grievances as such do not impact on the underlying *raison d'être* of interim relief. By taking this position, this Court is not excluding that should those grievances result to be proven according to law in the lawsuit between the parties pending before this Court, they could be taken into consideration when deciding the merits. Having made this position clear, the Court shall nonetheless remain vigilant *pendente lite* on the conduct at present of the affairs of the company.

DECISION

For the reasons above, the Court :

REJECTS the applicants` requests as adduced in their application of the 27th July 2018.

RESERVES to rule on the question of costs relating to this procedure when deciding the merits.

Hon. Mr. Justice Joseph Zammit McKeon
Presiding Judge

Amanda Cassar
Deputy Registrar