



**QORTI CIVILI
(SEZZJONI TAL-KUMMERC)**

**ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON**

Illum il-Hamis 27 ta` Settembru 2018

**Kawza Nru. 1
Rikors Nru. 123/2018 JZM**

**L-Accountant General u s-Segretarju
Permanenti fil-Ministeru tal-Edukazzjoni u
Impjieġ**

kontra

Master Builders Malta Ltd. (C-38756)

u

**b`digriet moghti fit-22 ta` Frar 2018
minflok “Master Builders Malta Ltd (C-
38756)” dahlu l-kliem “Master Builders
(Malta) Limited (C-15769)”**

u

**b`digriet moghti fid-9 ta` April 2018 in-
numru ta` registrazzjoni “C-15769” ghandu
jaqra “C-15679”**

u

**b`digriet moghti fid-9 ta` April 2018 Dr.
Yanika Camilleri giet mahtura bhala
kuratur *ad litem* tas-socjeta` intimata**

Il-Qorti :

I. Preliminari

Ir-rikors promotur tal-azzjoni odjerna jaqra hekk :-

Din hija azzjoni a tenur ta` l-Artikolu 214 (2)(a)(ii) u 214 (5)(a) tal-Kap 386 tal-Ligijiet ta` Malta.

1. *Illi b`sentenza moghtija fis-17 ta` Ottubru 2012, fl-ismijiet **Accountant General et vs. Master Builders (Malta) Limited (Cit. Nru. 568/04SM) (Dok. AG1)**, il-Prim` Awla tal-Qorti Civili ordnat lill-kumpanija Master Builders Malta Ltd sabix thallas lill-Accountant General u lis-Segretarju Permanenti fil-Ministeru tal-Edukazzjoni u l-Impjieg is-somma ta` mija, disgha u tletin elf, seba` mija u tnejn u sittin Ewro u erbghin centezmu (€139,762.40), l-ispejjez kollha tal-kawza u l-imghaxxijiet b`sehh mis-27 ta` Settembru 1999 ;*

2. *Illi fl-istess sentenza l-kumpanija Master Builders (Malta) Limited giet ordnata li trodd lura lir-rikorrenti l-ammont ta` €57,920.45 li hija kienet iddepozitat fic-cedola ta` depozitu numru 1048/2002. Din is-somma kienet giet depozitata qabel ma nfethu l-proceduri civili permezz tac-citazzjoni 568/2004 ;*

3. *Illi din is-sentenza ma gietx appellata mill-kumpanija Master Builders Malta Ltd u ghalhekk illum din is-sentenza saret finali (**Dok. AG2**) ;*

4. *Illi b`digriet tad-19 ta` April 2013 (**Dok. AG3**), il-Prim` Awla tal-Qorti Civili awtorizzat lill-Accountant General u lis-Segretarju Permanenti fil-Ministeru tal-Edukazzjoni u l-impjieg sabiex jigbdu s-somma ta` €57,920.45 li kienet iddepozitata fic-cedola ta` depozitu numru 1048/2002 u dan biex jigi sodisfat parzjalment il-kreditu li gie stabbilit bis-sentenza tas-17 ta` Ottubru 2012 ;*

5. Illi fit-23 ta` April 2013, l-Accountant General u s-Segretarju Permanenti fil-Ministeru tal-Edukazzjoni u l-impjeg baghtu ittra ufficjali (**Dok. AG4**) lill-kumpanija Master Builders Malta Ltd sabiex ihallsu l-ammont shih ta` €238,882.70 magħmul minn: (i) €81,841.95 bhala bilanc li kien għad fadal jithallas mis-sorti totali ta 139,762.40 deciz fis-sentenza; (ii) €5165.60 bhala spejjez legali marbutin mal-kawza fl-ismijiet **Accountant General et vs. Master Builders (Malta) Limited (Dok. AG5)**; u (iii) €151,875.15 bhala imghaxxijiet b`sehh mis-27 ta` Settembru 1999 ;

6. Illi l-kumpanija Master Builders Malta ltd ma hallset xejn minn dawn l-ammonti u għalhekk fit-22 ta` Mejju 2013, ir-rikorrenti talbu għall-hrug ta` mandat ta` sekwestru (754/13), liema mandat gie akkordat l-ghada mill-Prim Awla tal-Qorti Civili, fit-23 ta` Mejju 2013 (**Dok.AG6**) ;

7. Illi għalkemm fil-mandat ta` sekwestru gew imnizzla għadd kbir ta` banek kummercjali, irrizulta li hadd minnhom ma kien qed izomm flejjes li huma ta` Master Builders Malta Ltd ;

8. Illi issa għaddew iktar minn erbgħa u ghoxrin gimgha mill-ezekuzzjoni tal-imsemmi mandat ta` sekwestru u sal-llum il-kumpanija intimata baqghet ma hallsitx dak kollu li kellha taghti lir-rikorrenti skond is-sentenza fuq indikata, b`dana għalhekk li jezistu c-cirkostanzi msemmija fl-**artikolu 214(2)(a)(ii) u (5) tal-Kap 386 tal-Ligijiet ta` Malta** ;

9. Illi mhabbtin b`din is-sitwazzjoni, ir-rikorrenti ma kellhomx triq oħra hliet li jmexxu b`dawn il-proceduri sabiex din l-Onorabbli Qorti tordna x-xoljiment u l-istralc tal-kumpanija Master Builders Malta Ltd skond l-**artikolu 214(2)(1)(a)(ii) tal-Kap 386 tal-Ligijiet ta` Malta** minhabba li din il-kumpanija mhijiex f`qaghda aktar li thallas id-djun tagħha.

GHALDAQSTANT, għar-ragunijiet hawn fuq imsemmija, ir-rikorrenti qegħdin umilment jitolbu lil din l-Onorabbli Qorti sabiex joghgha :-

1. Tahtar persuna xierqa sabiex tagixxi bhala l-amministratur provizorju tal-kumpanija intimata skond l-**artikolu 228 tal-Kap 386 tal-Ligijiet ta` Malta** qabel ma jigi ordnat ix-xoljiment u l-istralc tagħha u taghtiha

dawk il-poteri u funzjonijiet li din l-Onorabbli Qorti jidhrilha xierqa fic-cirkostanzi.

2. Tiddikjara illi l-kumpanija Master Builders Malta Ltd ma tistax thallas id-djun taghha skont l-artikolu 214(2)(a)(ii) u (5) tal-Kap 386 tal-Ligijiet ta` Malta u ghalhekk tordna x-xoljiment u l-istralc taghha fit-termini tal-artikolu 214(2)(a)(ii) tal-Kap 386 tal-Ligijiet ta` Malta.

Bl-ispejjez ta` din il-procedura jithallsu mill-kumpanija Master Builders Malta Ltd.

Rat l-elenku ta` dokumenti.

Rat id-digriet li tat fid-9 ta` April 2018 fejn ordnat illi in vista tal-fatt illi s-socjeta` intimata m`ghandhiex diretturi u allura m`ghandhiex min jiehu hsieb l-interessi taghha fi procedura tant sensitiva li tista` twassal ghax-xoljiment u l-istralc taghha, ghandu jinhatar kuratur *ad litem* sabiex jirrapprezenta l-interessi tal-kumpanija intimata.

Rat id-digriet li tat fl-udjenza tat-3 ta` Mejju 2018 fis-sens illi l-kawza kienet sejra tkompli tinstema` minn din il-Qorti kif presjeduta bhala Qorti Civili (Sezzjoni tal-Kummerc) u mhux aktar bhala Prim` Awla tal-Qorti Civili.

Rat ir-risposta tal-kuratur *ad litem* li kienet prezentata fl-1 ta` Gunju 2018 u li taqra hekk:

1. *Illi mir-ricerki li ghamel il-Kuratur ad litem mar-Registry of Companies fi hdan il-Malta Financial Services Authority jirrizulta li l-unika zewg azzjonisti huma David Sammut (K.I. Nru: 312064M) u Raymond Sammut (K.I. Nru: 625558M) kif jidher car minn kopja ta` dokument li qiegheed jigi hawn anness u mmarkat bhala Dok. "YC1";*

2. *Illi in vista tal-fatt li wiehed mill-azzjonisti David Sammut kien ukoll Direttur izda skont in-Nota tas-16 ta` Marzu 2018 huwa informa lil din l-Onorabbli Qorti li huwa kien irrizenja mill-kariga ta` Direttur fis-26 ta` Novembru 2012, u spjega a verbatim, "Li hu jaf li l-kumpanija ma ghandiex assi*

u jaqbel ma dak mitlub mill-istess rikorrenti”, il-Kuratur ad litem ipprova jaghmel kuntatt mal-azzjonist l-iehor tal-istess soċjeta`, Raymond Sammut kif jidher car mill-ittra mibghutha lilu fit-28 ta` Mejju 2018, kopja ta` liema qiegħda tigi hawn annessa u mmarkata bhala Dok. “YC2”;

3. *Illi pero` sal-llum il-Kuratur ad litem għad m`għandux risposta minghandu sabiex jecepixxi eccezzjonijiet għat-talbiet rikorrenti u barra minn hekk mhuwiex edott bil-fatti tal-kaz;*

4. *Fl-eventwalita` li l-Kuratur ad litem jircievi risposta minghand Raymond Sammut, ser jinforma lil dina l-Onorabbli Qorti immedjatament u jekk ikun il-kaz jitlob l-awtorita` tagħha sabiex jigu intavolati eccezzjonijiet tas-soċjeta` intimata.*

Daqstant għandu l-Kuratur ad litem x`jissottometti għas-savju gudizzju ta` din l-Onorabbli Qorti.

Rat id-dokumenti illi kien prezentati ma` din ir-risposta.

Rat in-noti li pprezentaw Raymond Sammut u David Sammut rispettivament.

Semgħet ix-xieħda u rat il-provi l-oħra li tressqu fil-kors tal-kawza.

Rat illi l-kawza thalliet għal provvediment għal-lum.

Rat l-atti l-oħra tal-kawza.

II. Analizi tal-provi

B`sentenza ta` din il-Qorti diversament presjeduta tas-17 ta` Ottubru 2012 fil-kawza fl-ismijiet **Accountant General et vs Master Builders (Malta) Limited** (Cit. Nru. 568/04 SM) [**li għaddiet in gudikat**], Master Builders (Malta) Limited (**Master Builders**) kienet ikkundannata thallas lill-atturi s-somma ta` €139,762.40 rappreżentanti *advanced payment* li thallset sabiex tkun

tista` taghti bidu ghal progett ta` bini ta` pixxina, liema progett qatt ma sar, u allura l-flus kellhom jintraddu lura. Bl-istess decizjoni, Master Builders kienet ordnata wkoll sabiex tirrifondi lill-atturi l-ammont ta` €57,920.45 li kienet giet depozitata b`cedola ta` depozitu nru. 1048/2002 qabel saret dik il-kawza.

Bhala segwitu, u wara li kienu kanonizzati kredituri, l-atturi (u cioe` r-rikorrenti fil-kawza tal-lum) ipprezentaw rikors ghal zbank fid-9 ta` Novembru 2012 fejn talbu illi r-rilaxx favur taghhom tas-somma ta` €57,920.45 mertu tac-cedola ta` depozitu nru. 1048/2002 sabiex ikun sodisfatt in parte l-kreditu taghhom skont is-sentenza fuq citata. Billi t-talba ghall-izbank ma kenitx opposta, din il-Qorti diversament presjeduta awtorizzat l-izbank b`digriet li tat fid-19 ta` April 2013.

Il-bqija li kellhom jiehd u r-rikorrenti odjerni baqa` ma thallasx. Ghalhekk b`ittra ufficjali tat-23 ta` April 2013 ir-rikorrenti talbu l-hlas tal-ammont komplessiv ta` €238,882.70 rapprezentanti s-somma ta` €81,841.95 qua bilanc rimanenti mis-*sorte* globali ta` €139,762.40 deciz fis-sentenza tas-17 ta` Ottubru 2012, l-ammont ta` €5165.60 rapprezentanti spejjez legali in konnessjoni mal-kawza nru. 568/04 SM, u s-somma ta` €151,875.15 bhala mghaxijiet legali dovuti mis-27 ta` Settembru 1999.

Master Builders kienet debitament notifikata bl-ittra ufficjali tat-23 ta` April 2013 izda baqghet inadempjenti.

Fit-22 ta` Mejju 2013 ir-rikorrenti talbu l-hrug ta` mandat ta` sekwestru ezekuttiv nru. 754/13.

Il-hrug tal-mandat ezekuttiv kien akkordat fit-**23 ta` Mejju 2016**.

Kienu notifikati seba` sekwestratarji.

Hadd minn dawn is-sekwestratarji ma kien qed izomm flus ta` Master Builders.

Ir-rikorrenti pprezentaw l-affidavit ta` Dr Frans Fabri fil-kariga tieghu ta` Segretarju Permanenti ghall-Ministeru tal-Edukazzjoni u x-Xoghol, u l-affidavit

ta` Paulanne Mamo fil-kariga taghha ta` Accountant General. Dawn il-persuni kkonfermaw il-fatti kif diga` senjalati.

Xehdet ukoll Av. Dr. Claudette Fenech in rapprezentanza tar-Registratur tal-Kumpanniji.

Din stqarret illi Master Builders ma kellhiex diretturi *in office* ghaliex id-direttur David Sammut irrizenja mill-kariga fis-26 ta` Novembru 2012 u d-direttur l-iehor Raymond Sammut irrizenja fil-5 ta` Novembru 2012. Dawn kienu l-unici zewg diretturi u rapprezentati tal-kumpannija. Raymond Sammut kien ukoll *company secretary* pero` rizenja minn din il-kariga wkoll.

Jirrizulta wkoll illi ghal sitt snin shah baqghu ma gewx prezentati *financial statements, annual returns, accounts* u dokumenti ohra.

III. Locus standi

Ir-rikorrenti qeghdin jitolbu x-xoljiment u l-istralc ta` Master Builders abbazi tal-Art. 214 (2)(a)(ii) u 214 (5)(a) tal-Kap 386.

Qabel ma tinoltra ruhha fl-analizi tad-disposizzjonijiet li abbazi taghhom ir-rikorrenti qeghdin imexxdu l-azzjoni tal-lum, il-Qorti trid tirreferi *in primis* ghall-**Art 218(1) tal-Kap 386** billi din id-disposizzjoni tirregola kif u minn min ghandha tigi promossa talba ghax-xoljiment u l-istralc ta` kumpannija.

Id-disposizzjoni taqra hekk :-

Talba lill-qorti (aktar `il quddiem imsejha "rikors ghal stralc") ghal -

(a) stralc ta` kumpannija mill-qorti skont l-artikolu 214(1)(a) ;

(b) xoljiment u stralc ta` kumpannija mill-qorti skont l-artikolu 214(2)(a) ; jew

(c) xoljiment u stralc ta` kumpannija skont l-artikolu 214(2)(b),

ghandha ssir b`rikors li jista` jsir jew mill-kumpannija wara decizjoni tal-laqgha generali jew mill-bord tad-diretturi taghha jew minn xi detentur ta` obbligazzjoni, kreditur jew kredituri, jew minn xi kontributorju jew kontributorji:

Izda rikors skont il-paragrafi (b) jew (c) jista` wkoll isir minn xi azzjonist jew direttur tal-kumpannija.

Jirrizulta illi r-rikorrenti huma kredituri ta` Master Builders.

Billi t-talba ghax-xoljiment u ghall-istralc ta` Master Builders qeghda ssir abbazi tal-Art 214(2)(a)(ii) u tal-Art 214(5)(a) tal-Kap 386, allura ma hemmx dubju li r-rikorrenti ghandhom *locus standi* sabiex jintavolaw l-azzjoni.

IV. L-Art 214(2)(a)(ii) u L-Art 214(5) tal-Kap 386

L-Art 214(2)(a)(ii) tal-Kap 386 jaghti lill-Qorti **d-diskrezzjoni** li xxolji u tistralcja kumpannija jekk issib li din **ma tkunx tista thallas id-djun taghha**.

Sabiex tasal ghal dak l-accertament, il-Qorti trid ta` bilfors tirreferi ghall-Art 214(5) tal-Kap 386 li jistabilixxi meta kumpannija ghandha **titqies ope legis** li ma tistax thallas id-djun taghha.

L-Art 214(5) jirreferi ghal zewg cirkostanzi :-

(a) jekk id-dejn dovut mill-kumpannija jkun baqa` ma thallasx ghal kollox jew f`parti wara erbgha u ghoxrin gimgha mill-ezekuzzjoni ta` titolu ezeuttiv kontra l-kumpannija b`xi wiehed mill-atti ezeuttivi msemmijin fl-artikolu 273 tal-Kodici ta` Organizzazzjoni u Procedura Civili ;

jew

(b) jekk ikun ippruvat ghas-sodisfazzjon tal-qorti li l-kumpannija ma tkunx tista` thallas id-djun taghha, meta din tqis ukoll il-passiv kontingenti u prospettiv tal-kumpannija.

Fil-kaz tal-lum, ir-rikorrenti ddikjara illi qieghed jibbaza l-azzjoni tieghu fuq l-Art 214(5)(a).

Il-fonti tad-dritt soċjetarju taghna hija l-ligi Ingliza. Fuqha tfassal il-mudell ghal-ligi taghna.

Meta fl-1995 kienet varata l-ligi l-gdida taghna dwar il-kumpanniji, li hadet post il-Commercial Partnerships Ordinance (Kap 168), id-disposizzjonijiet li jirregolaw il-process ta` xoljiment u stralc kienu ntegrati fl-Att XXV tal-1995 li llum huwa l-Kap 386.

Fil-ligi Ingliza, ix-xoljiment u stralc ta` kumpanniji kien trattat permezz ta` legislazzjoni *ad hoc* u cioè l-Insolvency Act tal-1986.

B`harsa lejn l-**Art. 123 tal-Insolvency Act** jidher car illi l-insolvenza skont il-ligi Ingliza huwa trattat b`mod aktar wiesgha minn kif jinsab trattat fil-ligi taghna li hadet pozizzjoni aktar stretta tant illi tikkontempla biss zewg istanzi fejn jista` jinghad illi kumpannija ma tistax thallas id-djun taghha, kif mahsuba taht l-**Art. 214 (5) (a) u (b) tal-Kap. 386**.

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

There are two principal, although not exclusive or exhaustive, tests of insolvency : a company is insolvent if it is unable to pay its debts as they fall due (“cash flow insolvency”) ; it is also insolvent if its liabilities exceed its assets (“balance sheet insolvency”) ...

L-Art. 123 tal-Insolvency Act tal-1986 fil-fatt jikkontempla ben erbgha metodi ta` kif jigi ezaminat jekk kumpannija hijiex fi stat ta` insolvenza. It-tlett metodi li jirrafiguraw taht l-hekk imsejjah *commercial* jew *cash flow test* jirreferu ghal sitwazzjonijiet fejn hemm nuqqas ta` hlas wara li ssir talba ufficjali ghall-hlas minn kreditur [Art.123(1)(a)] ; nuqqas ta` hlas hekk ordnat b`sentenza jew b`ordni tal-Qorti (Art.123(1)(b)] ; u *inability to pay debts as they fall due* (Art. 123(1)(e)]. Ir-raba` metodu ta` evalwazzjoni ta` insolvenza huwa mbagħaddak magħruf bhala *balance sheet test* ravnizat taht l-Art 123(2).

Għalkemm kif rajna fil-ligi tagħna l-Art 214(5)(a) ighid xi haga diversa minn *inability to pay debts as they fall due* li nsibu fil-ligi Ingliza, din il-Qorti tislet xebh bejn dak previst fl-Art 214(5)(a) u *cash flow insolvency* fil-ligi Ingliza.

Fil-Boyle & Birds` Company Law (op. cit.) ikompli jingħad hekk –

Failure to pay a debt which is due and not disputed amounts to evidence of cash flow insolvency. Thus a company which has a policy of late payment of bills could find itself the subject of a petition for a winding-up order or administration order. Such a petition will not be struck out at an early stage as a form of improper pressure and an abuse of the process of the court, because, as Staughton LJ explained in Taylor's Industrial Flooring (1990. BBC 44 at 51) creditors, not late payers, are more worthy of insolvency law's protection.

“Many people today seem to think that they are lawfully entitled to delay paying their debts when they fall due or beyond the agreed period of credit, if there is one ... This can cause great hardship to honest traders, particularly those engaged in small businesses recently started. Anything which the law can do to discourage such behaviour in my view should be done.”

Fil-ktieb **Insolvency Law – Corporate and Personal** ta` Andrew Keay u Peter Walton (pubblikat minn Pearson Longman – 2003) pg 17 jingħad hekk dwar *cash flow insolvency* kif mifhuma fil-kuntest tal-Insolvency Act 1986 –

The court, in examining whether a company is suffering cash flow insolvency, will consider whether the company is actually paying its debtors. Courts must take into account what current revenue the company has as well as what the company can procure by realising assets

within a relatively short time ... A company can rely upon money which might be obtained from the sale of assets or upon money which might be obtained on the strength of its assets ... It is possible that sometimes a debtor might be able to establish solvency by demonstrating that funds can be obtained through an unsecured loan. In considering whether a person or a company is insolvent, the debtor's whole financial position must be studied ... and a temporary lack of liquidity does not necessarily mean that the company is insolvent ...

At one time courts were rather strict on what they required to be established before they were willing to deem a person or a company insolvent, but in more recent times they have become more liberal as far as creditors are concerned and have held that a debtor is insolvent if a creditor is able to prove that he or she has not paid an undisputed debt after a demand has been made ... and this is the case even if there is other evidence which suggests that the value of the assets outweighs liabilities ...

Whether a company is cash flow insolvent is principally a question of fact and one which may be established in any number of ways, such as the existence of a large number of outstanding debts and unsatisfied judgments ... or there is lack of assets on which execution can be levied ...

It has been said that a debtor is not regarded as solvent just because if sufficient time were granted the debts could be paid off ...

Ta`nteress u rilevanza ghall-kaz in dizamina huwa dak illi ntqal mill-Court of Appeal Ingliza fil-kaz **Byblos Bank SAL v. Al-Khudhairy [1987]**, fejn fil-paragrafu numru 247 inghad illi :

“If a debt presently payable is not paid because of lack of means, that will normally be sufficient to prove that the company is unable to pay its debts. That will be so even if, on an assessment of all the assets and liabilities of the company, there is a surplus of assets over liabilities. That is trite law.”

Fuq nota simili fil-kaz ***In Re a Company 12209 of 1991*** [1992] BCLC 865, 868, Lord Justice Hoffmann tenna illi :

A company's non-compliance with a statutory demand, or non-satisfaction of execution of a judgment debt, is a matter that can be proved quite simply, usually by a single short witness statement. If proved, it establishes the court's jurisdiction to make a winding up order, even if the company is in fact well able to pay its debts. If however a debt which has been made the subject of a statutory demand is disputed on reasonable grounds, the petitioner is adopting what has been called a high-risk strategy, and the petition may be dismissed with indemnity costs.

Zewg kazi importanti li jfissru bir-reqqa dak illi ghandu jigi investigat meta ssir talba ghal xoljiment u stralc minhabba insolvenza huma daww maghrufa bhala **Cheyne Finance Plc (No2)** deciza fis-17 ta` Ottubru 2007, u **BNY Corporate Trustee Services Ltd vs Eurosail-UK 2007-3BL Plc** deciza fit-30 ta` Lulju 2010. It-tnejn kienu decizi mill-England and Wales High Court (Chancery Division).

Il-punti saljenti illi hargu minn dawn iz-zewg kazi awtorevoli gew sintetizzati fil-kaz ta` **Bucci vs Carman (Liquidator of Casa Estates (UK) Ltd**, Court of Appeal, 3 ta` April 2014 (EWCA Civ 383) fejn inghad:

"In my judgment the following points emerge from the decision of the Supreme Court in Eurosail (and in particular the judgment of Lord Walker) :

- i) The tests of insolvency in s 123(1)(e) and 123(2) were not intended to make a significant change in the law as it existed before the Insolvency Act 1986: para 37.*
- ii) The cash-flow test looks to the future as well as to the present: para 25. The future in question is the reasonably near future; and what is the reasonably near future will depend on all the circumstances, especially the nature of the company's business: para 37. The test is flexible and fact-sensitive : para 34.*
- iii) The cash-flow test and the balance sheet test stand side by side: para 35. The balance sheet test, especially when applied to contingent and*

prospective liabilities is not a mechanical test: para 30. The express reference to assets and liabilities is a practical recognition that once the court has to move beyond the reasonably near future any attempt to apply a cash-flow test will become completely speculative and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test : para 37.

- iv) But it is very far from an exact test: para 37. Whether the balance sheet test is satisfied depends on the available evidence as to the circumstances of the particular case: para 38. It requires the court to make a judgment whether it has been established that, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to meet those liabilities. If so, it will be deemed insolvent even though it is currently able to pay its debts as they fall due: para 42.*

*[28] In the course of his judgment in Eurosail Lord Walker approved what he described as the "perceptive judgment" of Briggs J in **Re Cheyne Finance plc** (No 2) [2007] EWHC 2402 (Ch), [2008] 2 All ER 987, [2008] Bus LR 1562. Two of the points that Briggs J made bear on our case:*

- i) Cash-flow solvency or insolvency is not to be ascertained by a blinkered focus on debts due at the relevant date. Such an approach will in some cases fail to see that a momentary inability to pay is only the result of temporary illiquidity. In other cases, it will fail to see that an endemic shortage of working capital means that a company is on any commercial view insolvent, even though it may continue to pay its debts for the next few days, weeks, or even months: para 51.*
- ii) Even if a company is not cash-flow insolvent, the alternative balance-sheet test will afford a petitioner for winding up a convenient alternative means of proof of a deemed insolvency: para 57."*

Fil-kaz ta' **BNY Corporate Trustee Services Ltd & Ors vs Neuberger**, 9 ta' Mejju 2013, deciza mis-Supreme Court Ingliza, saret analizi fid-dettall tal-izviluppi illi sehhe w fil-ligi Ingliza fir-rigward tal-Art. 123 tal-Insolvency Act.

Ghal dak li ghandu x'jaqsam mal-*cash flow test* f'issret illi :

*“The changes in form served, in my view, to underline that the “cash flow” test is concerned, not simply with the petitioner’s own presently-due debt, nor only with other presently-due debts owed by the company, but also with debts falling due from time to time in the reasonably near future. What is the reasonably near future, for this purpose, will depend on all the circumstances, but especially on the nature of the company’s business. That is consistent with **Bond Jewellers, Byblos Bank and Cheyne Finance**. The express reference to assets and liabilities in my view a practical recognition that once the court has to move beyond the reasonably near future (the length of which depends, again, on all the circumstances) any attempt to apply a cash-flow test will become completely speculative, and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test. But it is still very far from an exact test, the burden of proof must be on the party which asserts balance-sheet insolvency.”*

(ara wkoll: **Ross & Anor vs Gaffney & Anor**, High Court Chancery Division, 2 ta' Gunju 2016 ; **BHS Group Ltd vs Retail Acquisitions Ltd**, High Court Chancery Division, 5 ta' Mejju 2017)

V. **Risultanzi**

It-talbiet tar-rikorrenti skattaw wara xi kisbu titolu eżekuttiv kontra Master Builders.

Kif diga` rajna, ir-rikorrenti ghandhom sentenza kontra Master Builders li ghaddiet in gudikat.

In virtu` tad-dispost tal-**Art. 253(a) tal-Kap. 12**, sentenza tikkostitwixxi titolu ezekuttiv li tigi reza ezegwibbli a tenur tal-**Art. 256 tal-Kap 12** illi jaqra :

(1) *Kull sentenza ohra definittiva illi ma jkunx fiha kondizzjonijiet sospensivi, u li tkun tikkundanna lid-debitur ghal hlas ta` somma likwida, jew biex jaghti jew jitlaq haga certa, jew biex jeseqwixxi fatt jew obbligu partikolari, hija esegwibbli warajumejn minn dak in-nhar li tinghata.*

(2) *L-esekuzzjoni ta` kull titolu ezekuttiv iehor ma tistax issir hlief wara jumejn ghall-anqas min-notifika ta` sejha ghall-hlas maghmula b`att gudizzjarju.*

Mill-provi jirrizulta illi s-sentenza inghatat fis-17 ta` Ottubru 2012. Minnha ma kienx hemm appell u allura saret *res judicata*.

L-ittra ufficjali li permezz taghha r-rikorrenti ghamlu s-sejha ghall-hlas hija datata 23 ta` April 2013. Dan imur ben oltre l-jumejn li jitkellem dwarhom l-Art 256(2). In segwitu sar il-mandat ta` sekwestru datat 22 ta` Mejju 2013 illi jikkostitwixxi titolu ezekuttiv a tenur tal-**Art. 273 tal-Kap 12**.

Il-mandat gie ezegwit bin-notifika lis-sekwestrarji.

Ma jirrizultax mill-atti jekk kenitx notifikata bil-mandat ta` sekwestru l-kumpannija intimata.

Jirrizulta illi l-kreditu ndikata fil-mandat jammonta komplessivament ghal €238,882.70 rapprezentanti :

- a) €81,841.95 qua bilanc rimanenti mis-*sorte* globali ta` €139,762.40 deciz fis-sentenza tas-17 ta` Ottubru 2012;
- b) €5165.60 rapprezentanti spejjez legali in konnessjoni mal-kawza bic-citazzjoni numru 568/04; u

c) €151,875.15 bhala mghaxxijiet legali dovuti mis-27 ta` Settembru 1999.

Ir-rikors promotur jirrizulta illi gie pprezentat fil-15 ta` Frar 2018.

Dan ghalhekk ifisser illi ghaddew aktar minn 24 gimgha mill-ezekuzzjoni tal-mandat, kif irid l-Art. 214(5)(a).

Ghalhekk il-vot tal-Art 214(5)(a) huwa pjenament sodisfatt.

Applikati l-insenjamenti illi johorgu mill-gurisprudenza, il-Qorti tifhem illi f`kazijiet ta` insolvenza skont l-Art. 214(5)(a) tal-Kap 386 fejn jista` jigi applikat *cash flow test*, il-Qorti trid thares lejn il-kwadru generali tas-sitwazzjoni u trid tittratta kull kaz ghalih ghaliex kull kaz ser jikxef sitwazzjonijiet partikolari li l-Qorti trid tizen u tanalizza.

Fl-ezami taghha l-Qorti ma tistax tistrieh fuq incident izolat ta` insolvenza jew fuq perjodu partikolari. Trid thares lejn l-istampa kollha sabiex tara jekk dak illi giet imsejha tinvestiga huwiex biss problema temporanja jew transitorja ta` nuqqas ta` likwidita jew inkella problema ferm wiesgha.

Fil-kaz in dizamina l-Qorti osservat illi fil-perjodu kollu ta` bejn is-17 ta` Ottubru 2012 u t-22 ta` Mejju 2013 il-kumpanija intimata ma kinitx f`qaghda li thallas id-dejn taghha.

Din is-sitwazzjoni ghadha tippersisti hekk sal-lum bil-kreditu tar-rikorrenti baqa` ma thallasx.

Mhux biss.

Izda jirrizulta li z-zewg ex-diretturi mhux talli ma kkontestawx it-talbiet attrici, talli ddikjaraw illi l-kumpannija m`ghandiex mnejn thallas dak dovut lir-rikorrenti.

Inoltre mhumiex kontra x-xoljiment u l-istralc taghha.

Fid-data tal-presentata tar-rikors, Master Builders kienet sprovvista minn diretturi. U hekk baqghet fil-kors tal-kawza tant illi l-Qorti kienet kostretta tahtar kuratur *ad litem* sabiex ihares l-interessi tal-kumpannija.

Tenut kont tal-premess, il-Qorti hija sodisfatta illi s-socjeta` intimata mhijiex fil-qaghda li thallas id-djun taghha abbazi tal-Art 214(5)(a) tal-Kap 386.

VI. Id-diskrezzjoni tal-qorti

Accertat illi Master Builders mhijiex fil-qaghda li thallas id-djun taghha, il-Qorti trid tara jekk ghandhiex tesercita d-diskrezzjoni taghha kif jemergi minn dak li jghid l-Art 214(2)(a)(ii) tal-Kap 386.

Il-Qorti taghmel riferenza ghal Palmer`s Company Law (Edition 25 - Sweet & Maxwell) fejn jinghad hekk –

“The court`s jurisdiction is discretionary and the fact that the petitioner can establish this ground does not give him an automatic right to an order (re. Metropolitan Railway Warehousing Co. Ltd 1887.36.LJCh 827). The court has refused to make an order where there are good reasons for the delay and where the great majority of members desire that the company shall continue. An order may however be made in appropriate circumstances against the majority`s wishes. Where the business has merely been suspended the court must be satisfied of an abandonment or inability to carry on. In ascertaining such intention the court will have regard

to the opinion and wishes of the majority of shareholders whose names appear on the register. Merely abandoning one of several objects is insufficient (re. Norwegian Titanic Iron Co. (1866) 35 Beav.223).

Il-Qorti taghmel riferenza ghal Pg 913-914 ta' Boyle & Birds` Company Law (op. cit.) :-

Unpaid creditors of a company may consider commencing winding-up proceedings against the company as an alternative to suing for payment. As a debt collection mechanism, winding up proceedings may be swifter and, for the individual creditor, less expensive than a claim that may come to trial for sometime ; on the other hand, winding up is a collective procedure for the benefit of creditors generally and it does not benefit specific creditors individually (F. Odith "Winding Up Recalcitrant Debtors" 1995 LMCLQ 107) ...

Dan premiss, il-Qorti tat piz lid-dikjarazzjoni li ghamlu in atti dawk li kienu d-diretturi ta' Master Builders fejn qalu *senza mezzi termini* illi jafu : a) illi l-kumpannija m'ghandhiex assi u b) li mhux qeghdin jopponu x-xoljiment u l-istralc tal-kumpannija kif mitlub mir-rikorrenti.

Il-Qorti ghamlet esami akkurat tad-dokumenti kollha li gew prezentati.

B`effett ta' mandat ta' sekwestru ezekuttiv, ma kinux sekwestrati flus tal-kumpannija ntimata.

Tibqa` njota ghal din il-Qorti l-posizzjoni finanzjarja attwali ta' Master Builders billi baqghet ma pprezentatx il-*financial statements* taghha lir-Registratur tal-Kumpanniji.

Il-Qorti lanqas ma setghet tiset informazzjoni utli mir-risposta tal-kuratur *ad litem* billi Master Builders hallietha sprovvista minn informazzjoni.

Brenda Hannigan fil-ktieb **Company Law** (Lexis Nexis - Butterworths 2003) tghid hekk :

“winding up or liquidation ... is the process by which the assets of the company are collected in and realised, its liabilities discharged and the net surplus, if there is one, distributed to the persons entitled to it. Only when this has been done is the company’s existence finally terminated by a process known as dissolution ... Insolvent winding up occurs essentially when companies are unable to pay their debts in full. When a company cannot pay its debts in full, difficult problems arise as to how the assets that are available should be distributed. In theory, as we shall see, the law tries to maintain an equality between creditors so that assets are pooled and distributed pari passu ie rateably according to the size of each creditor’s claim.”

Brenda Hannigan taghmel referenza ghall-Cork Committee Report (Cmnd 8558, Ch 4) dwar l-ghanijiet ta` *good modern insolvency law*.

Fost ohrajn, inghad li l-ghanijiet huma :

“... to recognise that the world in which we live and the creation of wealth depend upon a system founded on credit and that such a system requires, as a correlative, an insolvency procedure to cope with its casualties; ... to relieve and protect where necessary the insolvent, and in particular the individual insolvent, from any harassment and undue demands by his creditors at the same time, to have regard to the rights of creditors whose own position may be at risk because of the insolvency; ... to realise the assets of the insolvent which should properly be taken to satisfy his debts, with the minimum of delay and expense; to distribute the proceeds of the realisations among the creditors in a fair and equitable manner, returning any surplus to the debtor; to ensure that the processes of realisation and distribution are administered in an honest and

competent manner, ... To recognise that the effects of insolvency are not limited to the private interests of the insolvent and his creditors, but that other interests of society or other groups in society are vitally affected by the insolvency and its outcome and to ensure that these public interests are recognised and safeguarded, ... to provide the means for the preservation of viable commercial enterprises capable of making a useful contribution to the economic life of the country.”

Fil-pag 216 tal-ktieb **Insolvency Law – Corporate and Personal** (op. cit.) jinghad hekk :-

While a creditor is able to establish the fact that a company is unable to pay its debts ... it does not mean that a winding-up order will be automatically made ; the court has an unfettered discretion ... The company might be able to establish that it is solvent thereby rebutting the presumption of insolvency relied on by the creditor. Nevertheless a court may still make a winding up order if the company does not dispute the fact that it owes money to the creditor who has requested payment because non payment gives rise to a legitimate suspicion of inability to pay ...

Jispikka l-fatt li l-procedura ta` xoljiment u stralc ta` kumpannija mhijiex wahda li ghandha tkun istitwita b`mod legger sabiex taghmel pressjoni fuq debitur.

Il-legislatur haseb ghal varji metodi ta` kif kreditur jista` jittenta jigbor il-kreditu tieghu. Dak li trid taccerta ruhha l-Qorti huwa jekk bil-fatt li ssir il-prova li kumpannija mhijiex fil-qaghda li thallas id-djun taghha ghandhiex fic-cirkostanzi tal-kaz tghaddi ghad-dikjarazzjoni ta` xoljiment u stralc.

Huwa bil-wisq evidenti illi r-rikorrenti qua kredituri m`ghamlu ebda tentattiv ta` *arm twisting* fil-konfront ta` Master Builders (Malta) Limited.

Fil-fatt ir-rikorrenti ma marrux mill-ewwel ghall-procedura ta` xoljiment u stralc. Bejn is-sentenza ta` din il-Qorti diversament presjeduta (17 ta` Ottubru 2012) u l-presentata tal-mandat (22 ta` Mejju 2013) ghaddew 7 xhur waqt illi

mid-data tal-mandat sad-data tal-presentata tar-rikors promotur skont il-Kap 386 ghaddew kwazi hames snin.

Minghajr l-icken esitazzjoni, il-Qorti tghid illi l-ahjar haga li tista` taghmel hija tuza d-diskrezzjoni taghha sabiex tordna x-xoljiment u l-istralc tal-kumpannija.

Provvediment

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

Tiddikjara illi l-kumpannija intimata Master Builders (Malta) Limited (C15679) mhijiex f`qaghda li thallas id-djun taghha abbazi tal-Art. 214(5)(a) tal-Kap 386 tal-Ligijiet ta` Malta.

Tordna x-xoljiment u l-istralc tal-kumpannija intimata Master Builders (Malta) Limited (C15679) b`effett mill-15 ta` Frar 2018 abbazi tal-Art. 214(2)(a)(ii) u tal-Art 223(1) tal-Kap 386 tal-Ligijiet ta` Malta.

Tahtar lir-Ricevitur Ufficjali bhala stralcjarju tal-kumpannija intimata Master Builders (Malta) Limited (C15679) bis-setghat u bid-dmirijiet li huma stabbiliti mill-Kap 386 tal-Ligijiet ta` Malta.

Tastjeni milli tiehu konjizzjoni ulterjuri tal-ewwel talba tar-rikorrenti.

Tordna lill-istralcjarju sabiex jipprezenta rapport tal-hidma tieghu sa zmien xahrejn mil-lum.

Tordna lir-rikorrenti sabiex ihallsu l-ispejjez kollha ta` dan il-procediment, l-ispejjez tal-kuratur *ad litem*, kif ukoll l-ispejjez kollha tal-istralc, inkluzi d-drittijiet u l-ispejjez tal-istralcjarju.

**Thalli l-istralc ghall-udjenja ta` nhar il-Hamis 6 ta` Dicembru 2018
fid-9.00 a.m.**

**Onor. Joseph Zammit McKeon
Imhallef**

**Amanda Cassar
Deputat Registratur**