



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

**ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON**

Illum il-Hamis 4 ta` Ottubru 2018

**Kawza Nru. 1
Rikors Nru. 6/2018 JZM**

HSBC Bank Malta p.l.c. (C-3177)

kontra

**The Golden Shepherd Group Limited
(C-14948)**

Il-Qorti :

Dan huwa provvediment fil-miftuh dwar rikors illi pprezentat HSBC Bank Malta p.l.c. fit-18 ta` Settembru 2018 fejn talbet l-applikazzjoni tal-Art 220 tal-Kap 386 fir-rigward tal-kawza fl-ismijiet “*L-Awditur Emanuel sive Stephen Fenech et noe vs The Golden Shepherd Group Limited*” (Rik. Gur. Nru. 639/2018 LSO) li l-ewwel dehra taghha hija fit-18 ta` Ottubru 2018 quddiem il-Prim`Awla tal-Qorti Civili.

I. Preliminari

Rat ir-rikors.

Rat il-verbal tal-udjenza tal-kawza li saret illum fejn kien trattat ir-rikors.

Rat illi r-rikors thalla ghal-lum stess ghall-provvediment.

Dan huwa l-provvediment.

II. L-Art 220 tal-Kap 386

Id-disposizzjoni taqra hekk :-

F'kull zmien wara li jkun ipprezentat rikors ghal stralc, u qabel ma jinghata ordni ghal stralc, il-kumpannija, jew kull kreditur jew kontributorju, jistghu jaghmlu rikors lill-qorti biex twaqqaf il-procedimenti gudizzjali tal-qorti pendenti kontra l-kumpannija, u l-qorti tista' twaqqaf dawk il-procedimenti b'dawk il-kondizzjonijiet li jidhrilha xierqa.

Fit-test bl-Ingiliz id-disposizzjoni taqra hekk :-

At any time after the filing of a winding up application, and before a winding up order has been made, the company, or any creditor or contributory, may apply to the court for a stay of judicial proceedings pending against the company, and the court may stay those proceedings accordingly on such terms as it thinks fit.

Id-disposizzjoni tghodd ghall-kaz tal-lum ghaliex a) it-talba saret minn HSBC Bank Malta p.l.c. li hija kreditur ta` The Golden Shepherd Group Limited ; b) il-kawza ghax-xoljiment u stralc ta` The Golden Shepherd Group Limited kienet istitwita fid-19 ta` Gunju 2018 u l-ewwel dehra tal-kawza kienet illum ; kwindi ghad m`hemmx ordni la ta` xoljiment u lanqas ta` stralc ; u c) il-kawza fl-ismijiet “L-Awditur Emanuel sive Stephen Fenech et noe vs The Golden Shepherd Group Limited” (Rik. Gur. Nru. 639/2018 LSO) kienet istitwita wkoll fid-19 ta` Gunju 2018 u l-ewwel dehra taghha hija fit-18 ta` Ottubru 2018.

III. L-Art 126(1) tal-Insolvency Act 1986 tal-Ingilterra

Il-mudell ta` l-Art 220 tal-Kap 386 huwa l-**Art 126(1) tal-Insolvency Act 1986** tal-Ingilterra li jghid :-

(1) *At any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, or any creditor or contributory, may*

(a) *Where any action or proceeding against the company is pending in the High Court or Court of Appeal in England and Wales or Northern Ireland, apply to the court in which the action or proceeding is pending for a stay of proceedings therein, and*

(b) *Where any other action or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the action or proceeding ;*

and the court to which application is so made may (as the case may be) stay, sist or restrain the proceedings accordingly on such terms as it thinks fit.

IV. In-natura kollettiva ta` procediment ghal xoljiment u stralc

Fil-pag 501 tal-ktieb “**The Law of Insolvency**” (Sweet & Maxwell - 1998) Ian Fletcher ighid hekk :-

***“The fundamental principle upon which winding up is based is the collective nature of proceedings.** The objective underlying the relevant legal provisions is to ensure that an orderly regime is imposed upon all interested parties, so that none of them individually may contrive to enhance his position by exploiting some fortuitous circumstance which may yield some personal advantage, in the form of a larger proportional return on debts which are due, or a direct and more rapid recovery of payment, than would result from participation in the processes of the winding up, and receiving dividend in common with all other creditors whose debts carry an equal ranking in order of priority ...*

In order to ensure that the above objective is achieved the law establishes a series of barriers to the exercise by a company of its normal rights and remedies when it is prospectively or actually in litigation. By this means, the remaining assets of the company are maintained intact so that they may be administered in accordance with the principles of insolvency law”.

(enfasi u sottolinear ta` din il-qorti).

Issir ukoll riferenza ghal Pg 913-914 ta` **Boyle & Birds` Company Law** – 8th Edition – 2011 fejn jinghad illi :

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 some time ; **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. Oditah “Winding Up Recalcitrant Debtors” 1995 LMCLQ 107)** ... (enfasi u sottolinear ta` din il-qorti)*

V. **Id-diskrezzjoni wiesgha tal-Qorti**

Kif jirrizulta bl-aktar mod car u inekwivoku mit-test tal-ligi stess, il-Qorti ghandha diskrezzjoni wiesgha meta tigi biex tipprovdi dwar talba skont l-Art 220 tal-Kap 386.

VI. **Konsiderazzjonijiet**

Fil-kaz tal-lum, jirrizulta li The Golden Shepherd Group Limited tippossjedi *animus domini* bhala enfitewta s-sit mertu tal-kawza Rik. Gur. Nru. 639/2018 LSO.

Dak li l-atturi qeghdin jitolbu fil-kawza Rik. Gur. Nru. 639/2018 LSO mhuwiex biss li jkun kanonizzati kredituri ta` The Golden Shepherd Group Limited izda li l-qorti tholl il-kuntratt ta` cens bil-konsegwenzi kollha li dan igib mieghu.

Din il-Qorti hija tal-fehma meqjusa illi jekk ma tilqax dak li qed jintalab fir-rikors odjern ikun qed jigi stultifikat l-ghan li ghalih huwa ntiz procediment ta` xoljiment u stralc ta` kumpannija.

Jekk il-kawza Rik. Gur. Nru. 639/2018 LSO tkompli ghaddejja, il-kawza ta` xoljiment u stralc mhux se jibqa` **a collective procedure for the benefit of creditors generally.**

Ghaliex li jigri huwa illi dak li jidher illi huwa l-attiv ewlieni jekk mhux l-uniku li ghandha The Golden Shepherd Group Limited u cioe` ic-cens tas-sit u relattivi benefikati ser imur ghall-beneficcju ta` **a specific creditor individually** bil-konsegwenza li *l-winding up and liquidation procedure* pendenti quddiem din il-Qorti tkun saret ta` xejn ghaliex kreditur partikolari se jkun thalla jdur mal-procediment u jenforza l-pretensjonijiet tieghu a skapitu tal-kredituri l-ohra.

Provvediment

Ghar-ragunijiet kollha premessi, il-Qorti tipprovdi dwar it-talbiet tar-rikorrenti skont ir-rikors taghha tat-18 ta` Settembru 2018 billi :-

Fl-ewwel lok tilqa` l-ewwel talba kif dedotta ;

Fit-tieni lok tipprovdi dwar it-tieni talba billi tordna lir-Registratur tal-Qorti sabiex jassikura li kopja ta` dan il-provvediment tkun inserita b`nota fl-atti tal-kawza fl-ismijiet “*L-Awditur Emanuel sive Stephen Fenech et noe vs The Golden Shepherd Group Limited*” (Rik. Gur. Nru. 639/2018 LSO) li l-ewwel dehra taghha hija fit-18 ta` Ottubru 2018 quddiem il-Prim`Awla tal-Qorti Civili.

L-ispejjez ta` dan il-provvediment jibqghu a kariku tar-rikorrenti.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur