



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

**ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON**

Illum it-Tlieta 30 ta` Ottubru 2018

**Kawza Nru. 1
Rikors Nru. 415/2016 JZM**

Grezzju Barun (167753M)

kontra

**Paul Barun (399863M)
personalment u fil-kwalita` tieghu
ta` direttur u in rapprezentanza
tas-socjeta` Baron Confectionery
Limited (C-5484)**

u

George Barun (555454M)

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentat fil-25 ta` Mejju 2016 li jaqra hekk :-

1. *Illi l-esponent flimkien ma` hutu l-intimati Paul Barun u George Barun huma azzjonisti wahdenin fis-socjeta` intimata Baron Confectionery Limited, b`kapital mahrug u sottoskritt ta` elf (1000) sehem Ordinarju tal-valur ta` €2.33 kull sehem, kollha mhallsin, maqsumin kwantu ghal 333 sehem Ordinarju kull wiehed l-esponent Grezzju Barun u l-intimat Paul Barun, u 334 sehem Ordinarju fuq George Barun.*

2. *Illi l-kontendenti ghamlu snin imexxu flimkien in-negozju ta` confectionery b`success.*

3. *Illi l-intimati Paul Barun u George Barun qeghdin icahhdu lill-esponent milli jippartecipa fin-negozju tal-kumpanija.*

4. *Illi l-kumpanija ilha diversi snin ma taghmel laqghat generali u ma tqassamx dividends. L-intimati Paul Barun u George Barun qed imexxu n-negozju tal-kumpanija qiesu kien taghhom personalment u qed jeskludu lill-esponent minn kull partecipazzjoni, kemm fit-tmexxija, kemm fix-xoghol u kif ukoll mill-qliegħ.*

5. *Illi l-mod kif l-intimati qeghdin imexxu l-affarijiet tal-kumpanija huwa diskriminatorju u ta` pregudizzju mhux gust fil-konfront tal-esponent bhala membru tal-kumpanija intimata Baron Confectionery Limited.*

Ghaldaqstant, ghar-ragunijiet premessi u dawk kollha li jirrizultaw waqt is-smiegħ ta` dan ir-rikors, u prevja kull dikjarazzjoni ohra li tirrizulta mehtiega, l-esponent jitlob bir-rispett li din il-Qorti jogħgobha :

(i) *Tiddikjara li l-intimati qed jagixxu u qeghdin imexxu l-affarijiet tal-kumpanija b`mod li huwa diskriminatorju u ta` pregudizzju mhux gust fil-konfront tar-rikorrent bhala membru tal-kumpanija Baron Confectionery Limited, u kontra l-interessi tal-istess kumpanija ;*

(ii) *Konsegwentament taghti kull ordni u direttiva li jidhrilha xierqa a tenur tal-Artikolu 402(3) tal-Att dwar il-Kumpaniji (Kap 386 tal-Ligijiet ta` Malta) kif ukoll kull direttiva ohra li jidhrilha necessarja kemm biex l-interessi tar-rikorrent ma jkomplux jigu pregudikati kif ukoll biex jigi likwidat u mhallas il-kumpens dovut lir-rikorrent a tenur tal-artikolu 402(3)(f) tal-Istess Att dwar il-Kumpaniji ;*

(iii) *Taghti kull provvediment iehor li jidhrilha opportun a tenur tal-Artikolu 402 tal-Att dwar il-kumpaniji, inkluz kull provvediment provvizorju biex tissalvagwardja l-interessi tar-rikorrent.*

Bl-ispejjez kontra l-intimati li jibqghu ingunti minn issa ghas-subizzjoni.

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

Rat ir-risposta li pprezenta Paul Barun pro et noe fil-21 ta` Gunju 2016 li taqra hekk :-

1. *It-talbiet rikorrenti huma infondati fil-fatt u fid-dritt stante li :-*

(a) *Mhux minnu li l-esponenti qeghdin icahhdu lir-rikorrent milli jippartecipa fin-negozju tal-kumpanija inkwantu kien ir-rikorrent stess li ghazel li jirrizenja minn direttur fis-sena 2012 bi ksur tal-obbligi tieghu, u kien ukoll ir-rikorrent stess li ghazel li jirrizenja mill-impjieg fis-sena 2015, u ghaldaqstant, salv id-drittijiet u obbligi tieghu bhala azzjonist tal-kumpanija intimata, ma baqghalu ebda pozizzjoni li tippermettilu jippartecipa fin-negozju tal-kumpanija kif huwa qieghed jippretendi;*

(b) *Mhux minnu li l-esponenti qed jagixxu u jmexxu l-affarijiet tal-kumpannija b`mod diskriminatorju u ta` pregudizzju mhux gust fil-konfront tar-rikorrent u dan stante wkoll li t-tmexxija tal-kumpannija llum kompliet issir kif kienet issir ghal ghexieren ta` snin shah li fihom ir-rikorrent kien direttur u impjegat; illi fil-fatt, l-esponenti ghandhom aspettattiva legittima li dak li kien japplika ghar-rikorrent fit-tmexxija tal-affarijiet tal-kumpannija meta l-istess rikorrent kien ghadu direttur u impjegat, jibqa` japplika llum ghall-esponenti tenut kont li l-esponent Paul Barun ghadu direttur u impjegat tal-kumpannija;*

Fil-fatt, il-bdil mitlub mir-rikorrent fit-tmexxija tal-kumpannija jkun jikkostitwixxi pregudizzju mhux gust u diskriminazzjoni mhux ghar-rikorrenti imma fil-fatt ghall-esponenti peress li jikser l-imsemmija aspettattiva legittima taghhom;

2. *Ir-rikorrent qiegħed jabbuza mid-drift tieghu li jressaq din l-azzjoni taht l-Artikolu 402 tal-Att dwar il-Kumpanniji peress li, kif ser jigi ppruvat, qiegħed juzaha bhala vendikazzjoni u mhux ghax hija mehtiega jew fondata;*

3. *Illi f`kull kaz, l-azzjoni ai termini tal-Artikolu 402 tal-Att dwar il-Kumpanniji ma tistax titressaq biex issolvi kwistjonijiet personali li jista` jkun hemm bejn il-membri tal-kumpannija;*

4. *Illi lanqas it-talba għall-kumpens ma hija ggustifikata fil-ligi u dan stante li l-esponenti ma kkagunaw ebda telf jew danni lir-rikorrent mentri l-kumpannija baqghet tonora l-ftehim li kien hemm bejn il-kontendenti, anki għall-beneficju personali tal-istess rikorrent avolja fl-assenza tal-kontribut tieghu.*

5. *Illi inoltre, l-esponenti ma jistghux jinzammu responsabbli għal atti jew omissjonijiet li ma humiex fil-kontroll taghhom jew li huma konsegwenza ta` xi att jew ommissjoni tar-rikorrent stess.*

6. *Salvi eccezzjonijiet ohra permessi skont il-ligi.*

Ghal dawn ir-ragunijiet, it-talbiet tar-rikorrent ghandhom jigu michuda bl-ispejjez kontra tieghu.

Rat il-lista tax-xhieda.

Rat illi l-intimat George Barun ghalkemm notifikat ma pprezentax risposta.

Semghet ix-xhieda u rat il-provi l-ohra li tressqu fil-kors tal-kawza.

Rat illi l-kawza thalliet għall-provvediment għal-lum bil-fakolta` li l-partijiet jipprezentaw noti ta` osservazzjonijiet.

Rat in-nota ta` osservazzjonijiet li pprezenta l-intimat Paul Barun.

Rat illi l-partijiet l-ohra baqghu ma pprezentawx nota ta` sottomissjonijiet.

Rat l-atti l-ohra tal-kawza.

II. Xiehda

L-intimat Paul Barun issejjah biex jixhed mir-rikorrent.

Xehed illi huwa kien ilu sentejn direttur tal-kumpannija Baron Confectionery Limited (“**il-kumpannija**”). Id-diretturi li kien hemm qablu kienu rrizenjaw. Huwa kien l-ahhar wiehed li dahal fil-kumpannija.

Stqarr illi huwa jzomm il-*cash sales* u l-*invoices* li jqassmu lill-klijenti. Id-dokumenti jinzammu fl-ufficcju tal-kumpannija.

Fisser illi l-*accountant* u l-awditur tal-kumpannija huwa Joseph Sammut. Ilu jaghmel dan ix-xoghol madwar ghaxar snin. Dan jipprepara l-*accounts* ta' kull sena, l-*annual returns* u r- *returns* tal-VAT. Jiehu hsieb ukoll li jaghmel l-*audit*. Il-kontijiet huma aggornati sal-2014. Huwa ghadda lil Sammut id-dokumenti kollha li ghandu bzonn biex jaghmel l-audit tal-2015 izda Sammut kien ghadu ma lestihomx. Anke l-VAT *returns* tal-2015 qeghdin ghand Sammut.

Kompla spjega illi Sammut jimxi biss fuq il-VAT *returns*. Il-*cash sales* u l-*invoices* izommhom hu stess u jdahhalhom fil-VAT *returns*. Sammut ma jaghmilx verifiki dwar ir-*returns* tal-VAT.

Stqarr illi n-negozju taghhom ma jhallix profitti kbar. Jiehdu paga kull wiehed li titpogga l-bank biex jithallsu l-bolol. Bhala impjegati hemm hu, huh George, ibnu Dylan u persuna li huwa pensjonant u li jmur darbtejn fil-gimgha. Grezzju Barun mhux impjegat ghaliex irtira. Gieli jmorru l-mara tieghu, u l-mara ta' huh George, biex ighinu fl-ippakkjar tal-figolli. Dawn mhux impjegati.

Xehed illi l-inkwiet mar-rikorrent nqala' wara l-Ghid 2014 meta tlewmu u ddecieda li jitlaq. Qabel dakinhar diga' kien hemm inkwiet bejniethom u paroli zejjed.

Fisser illi kien imur maghhom fil-vann u anke jghabbi l-vann. Kien hemm fiducja dwar fuq il-flus. Sal-2015 il-kexxun tal-flus kien f'idejn ir-rikorrent li kien joqghod ighodd il-flus. Il-flus kienu jibqghu in kontanti fil-kexxun biex jahdmu bihom. Sostna li huwa kien jinforma lir-rikorrent kemm kien jigbor flus minghand in-nies, izda r-rikorrent kien joqghod jikteb kollox u johloq problemi anke dwar €5. Sahaq illi kienu ilhom jitlewmu minn zmien missierhom.

Xehed illi bhala qligh jibqa' €5,000 fis-sena.

Stqarr li r-r-rikorrent irrizenja minn direttur ghand Joseph Sammut li rregistra r-rizenja.

Qal li mhuwiex cert jekk kienx ircieva ittra ta' rizenja minghand ir-rikorrent.

Kompla jghid illi l-kumpanija ghandha vannijiet u makkinarju. Il-post huwa proprjeta` ta` l-ahwa izda ommhom ghandha l-uzufrutt. Il-makkinarju kien inxtara mill-ahwa bil-flus tal-kumpanija. Ilu mixtri bejn 15 jew 20 sena. Spjega li l-vannijiet kienu jmorru jixtruhom l-ohrajn u jaghmluhom fuq isimhom. Meta kienet ser tinxtara magna, kienu jmorru kollha flimkien.

Stqarr illi qabel sar direttur huwa kien impjegat tal-kumpanija. Hutu George u Grezzju kienu azzjonisti ma` missierhom fil-kumpanija. Huwa wiret sehem ta` missierhom sabiex b`hekk kellu wiehed mit-tliet ahwa ghandu terz tal-ishma. Ommhom m`ghandhiex ishma. Qal li jekk ikun hemm cans, hu u huh George lesti li jakkwistaw sehem Grezzju ghalkemm qatt ma talab lir-rikorrent biex ibiegh l-ishma tieghu. Huwa kien lest jakkwista skont il-prezz li jintalab.

Fisser illi illum meta jkun hemm aktar xoghol mis-soltu bhal fiz-zmien il-festi l-flus jitpoggew kollha l-bank.

Stqarr illi r-rikorrent ried imur lura jahdem izda ma kienx accettat qabel ihallas s-sehem tieghu mill-materjal li kien inxtara ghall-produzzjoni fiz-zmien li ma marx aktar ghax-xoghol. Ir-rikorrent irrifjuta. Il-materjal jinxtara mill-flus tal-kumpanija.

Qal illi l-kumpanija ghadha thallas dejn li halla warajh ir-rikorrent.

Qal li huwa jithallas paga ta` €250 fil-gimgha.

Fil-**kontroezami**, stqarr illi qabel min ma kienx jahdem ma kienx jithallas. Meta kien ikun imsiefer, huwa ma kienx jithallas. Din is-sistema kienet tapplika ghal kulhadd. Il-persuna li kienet tkun nieqsa meta jkunu ser jinqasmu l-flus ma kienet tiehu xejn. Fis-sajf ir-rikorrent kien imur bil-karavan u ma kienx jithallas.

Xehed illi l-kumpanija qatt ma faddlet jew investiet fil-futur. Il-flus kienu jinqasmu. Qatt ma thallew flus il-bank.

Qal illi sar jaf li r-rikorrent kien irrizenja meta mar l-MFSA. Sab li kienu rrizenjaw kemm ir-rikorrent kif ukoll huh George. Hadd minnhom ma cahad li kien rrizenja. Ghalkemm ma baqghux diretturi, it-tnejn baqghu

jahdmu hemm u baqghu jaqsmu mieghu. Il-kumpannija qed thallas l-arretrati tal-kontribuzzjonijiet tas-sigurta` socjali skont ftehim li kien iffirmit mit-tlieta.

Xehed illi kien ircieva ittra legali minghand iz-zewg hutu fejn avzawh li ma kinux ghadhom diretturi. Ghamlu hekk sabiex ma jkomplux ihallsu. Kull xahar tithallas is-somma ta` EUR 969 ghal arretrati ta` zmien meta r-rikorrent u George kienu ghadhom diretturi. Il-kontribuzzjonijiet waqghu lura ghaliex kienu jaqsmu kollox.

Fisser illi wara r-rikorrent, il-flus beda jzommhom George minhabba li kienu dejjem jitlewmu bejniethom. Meta kienu jithallsu b`cheques kienu jinnegozjaw dawk ic-cheques billi jhallsu lis-suppliers taghhom. Il-flus kontanti kienu jinqasmu.

Qal illi kulhadd kellu access ghall-flus tal-kexxun.

Qal illi l-flus jinqasmu skont min jaghmel ix-xoghol mhux skont l-ishma. Bil-flus li jibqa`, l-ewwel jithallas id-dejn, imbaghad il-bqija jinqasam bejnu u George. Huma jiktbu kollox.

Spjega li r-rikorrent m`ghadux fil-kumpannija.

Xehed illi l-bejgh u xiri jsir fl-isem tal-kumpannija. Ix-xoghol isir kollu fil-fabbrika tal-kumpannija bl-ghodod tal-kumpannija.

Qal illi ma jsirux laqghat generali.

L-intimat George Barun xehed illi huwa dulcier. Kien direttur tal-kumpannija pero` rrizenja. Huwa pensjonant ukoll.

Xehed illi huwa jiehu paga fil-gimgha ta` madwar EUR 220 jew EUR 250. Meta jkun hemm xi festi u jkun hemm ix-xoghol, gieli thallsu xi haga zejda. Il-flus kien izommhom ir-rikorrent u kien iqassam hu. Fi zmien il-Milied huwa ha EUR 500 iktar fuq il-paga ta` EUR 250. Fl-Ghid, gieli qala` EUR 2,000 jew EUR 3,000 iktar.

Spjega li qeghdin ihallsu l-kontribuzzjonijiet tas-sigurta` socjali li thallew b`lura mhux imhallsa. Kulhadd jahdem bil-ktieb tax-xoghol.

Ikkonferma li meta jkun hemm ix-xoghol, gieli marret martu tghinhom fix-xoghol. Fl-Ghid gieli gabu xi zewg studenti jahdmu magghom.

Qal li l-kumpannija ghandha magni biex topera. Ir-rikorrent kien kisser magna minnhom u biex tisewwa kellhom stima ta` EUR 4,800. Il-magna kienet tqatta` l-biskuttini u kienet inxtrat ghal Lm 14,000. Ir-rikorrent kissirha billi beda jaghtiha b` lembuba. Il-magna baqghet ma ssewwietx. mhiex imsewwija.

Huwa xehed illi jircievi EUR 16,000 fis-sena bhala paga flimkien ma` l-bonus.

Qal li l-kumpannija topera minn binja tal-familja u li l-kumpannija ma thallasx kera tali tuza dik il-binja.

Ikkonferma li r-rikorrent ma kien qed jiehu xejn mill-kumpannija.

Sahaq illi r-rikorrent ghandu jaghti lill-kumpannija. Qal li z-zewg hutu dejjem jiggieldu bejniethom dwar kollox. Ir-rikorrent jaqla` l-inkwiet ma` hutu kif ukoll mal-lavranti.

Qal li kellhom xi jghidu ghaliex ir-rikorrent ma riedx johrog l-ispejjez li kienet ser taghmel il-kumpannija biex tahdem it-tieg ta` t-tifel tar-rikorrent.

Spjega li ghal dawn l-ahhar hdax-il sena, il-flus kienu jinzammu mir-rikorrent. Kienu jidhlu fil-kexxun ; imbaghad filghaxija jingabru. L-ewwel kienu jinqatghu l-ispejjez u jekk jifdal jiehd u l-paga.

Qal illi r-rikorrent baqa` jiehu hsieb il-flus sakemm telaq mill-kumpannija fl-Ghid tal-2015. Kien izomm pitazz ta` l-flus li kellhom u iehor tal-flus li kellhom jithallsu minghand in-nies. Kull cheque li kienu jircievi kienu jhallsu lill-kredituri bihom. L-uniku cheque li kien qed jitpogga l-bank huwa dak ta` Chain Market ghaliex l-import tac-cheque jintuza biex jithallsu l-kontribuzzjonijiet tas-sigurta` socjali. Wara li telaq ir-rikorrent, il-flus qed jiehu hsiebhom huh Paul, u huwa jiccekkja warajh.

Ir-rikorrent xehed illi missieru kien fin-negozju ta' *confectioner* u huwa kien jahdem mieghu. Huh George ukoll kien jahdem magghom. Paul ma kienx jahdem magghom.

Qal illi l-kumpannija kienet kostitwita fl-1981. L-azzjonisti kienu hu, huh George u missierhom. L-ishma kienu maqsuma : 668 (missierhom) ; 166 (hu) u 166 George. Wara li miet missierhom fid-29 ta' Lulju 1986, huhom Paul dahal magghom bl-ishma kollha jinqasmu fi tlieta : 333 kull wiehed.

Fisser illi huwa kien jiehu hsieb ix-xiri ta' kull ma kien ikun hemm bzonn. Kien jahdem ukoll fil-fabbrika u fil-hanut li kien hemm maggha. Huh Paul kien iqassam bil-van waqt li huh George kien jiehu hsieb il-flus u l-kotba tan-negozju. Kellhom hafna xoghol u kienu jaghamlu hafna giri. Ghamlu snin imexxu b'success, minkejja li mill-bidu kien hemm kwistjonijiet bejniethom.

Xehed illi l-qligh kien jinqasam regolarment ; gieli fil-gimgha u gieli fix-xahar. Fl-istagun fejn kien ikollhom l-aktar bejgh, kienu jaqsmu b' mod aktar frekwenti.

Stqarr illi huwa beda jinduna li huh George ma kienx qed izomm kontijiet tajba. Id-depoziti tat-tigijiet kien qed izommhom ghalih u meta l-gharajjes kienu jmorru jhallsu kien jghidilhom biex imorru aktar tard meta jkun wahdu. Minkejja dan xorta wahda kien qed ikun hemm qligh tajjeb ; ghalhekk kien ibaxxi rasu.

Qal li xi zmien wara l-Ghid tal-2015, iltaqghu biex jaqsmu l-qligh u wara li hadu parti mill-flus, huh George kien qallu li ried jibdel ic-cwieviet u beda jghid li hemmhekk ma kienx hemm lok ghal tlieta. Tlewmu b'mod li tant kellhom kwistjonijiet li spicca ghamel zmien ma jmurx ghax-xoghol.

Meta ddecieda li jmur lura, iz-zewg hutu ma hallewhx u bdew ikeccuh `il barra.

Xehed illi minn dakinhar `il quddiem, ma rcieva xejn izjed bhala qligh tal-kumpannija.

Sostna li l-kumpannija dejjem ghamlet qligh bizzejjed biex jithallas ix-xoghol u jibqa` profitt ghall-azzjonisti.

Qal illi ghalkemm huwa qatt ma ffirmat xejn, sar jaf li kien registrat bhal li rriżenja minn direttur. Caħad li qatt ried jitleq minn direttur. Ir-registrazzjoni ta` dik li kienet ir-riżenja tiegħu saret minn Joseph Sammut li kien jiehwa hsieb il-karti kollha tal-kumpannija.

Kompla jgħid li l-kumpannija kienet ilha għal diversi snin ma tagħmel laqgħat ġenerali u ma tqassamx dividends b` mod uffiċjali.

Il-qliġ kien jinqasam flok paga.

Sahaq li n-negozju illum kien qed jitmexxa minn hutu Paul u George għaliex huwa kien gie eskluż mit-tmexxija, mit-tqassim tal-qliġ u mix-xogħol tal-kumpannija. Sehmu kien qed jtgħawda minn hutu. Anke meta jkun hemm xogħol zejjed, kien jagħtu l-għajnunha n-nisa u t-tfal ta` hutu u lilu ma jgħalluħ barra.

Qal illi l-binja tal-fabbrika hija proprjeta` tal-familja mhux tal-kumpannija. Huwa għandu sehem mill-binja bħalma għandhom hutu u ommu.

Xehed illi wara l-mewt ta` missierhom, George kien jorndna dak li jkun hemm bzonn. Paul kien jigbor il-flus tal-hwienet u jqassam ix-xogħol. Il-flus kienu jingħataw lil George li kien jagħmel il-kontijiet. George kien jiehwa wkoll l-ordnijiet għal tigijiet u festini.

Stqarr illi huwa ma kienx jingħataw informazzjoni. George kellu ktieb fejn kien jikteb kollox u fl-aħħar tax-xaħar kienu jigbru l-flus. L-accountant Joseph Sammut kien jingħataw dak li jridu hutu l-oħra. Il-kontijiet kienu jingabru u jingħataw lil Sammut. George kien iħallas lill-impjegati mill-flus tal-kexxun.

Il-qliġ kien jinqasam tliet darbiet f` sena : Ġunju, l-Milied u l-Għid.

Spjega li bħala paga kienu jithallsu bejn EUR 200 u EUR 250 fil-ġimgħa. Fil-Milied, kienu jaqsmu bħala qliġ maħwar EUR 3,500. Fl-Għid kienu jiehdu hafna aktar ; ġieli hađu mat-EUR 12,000 kull wieħed. Fi zmien il-precett, kienu jiehdu EUR 2000 jew EUR 2,500. Il-flus ta` l-Għid kien iżommhom hu, iżda matul il-bqija tas-sena, ma kienx iżomm flus.

Xehed li ghandhom diversi tipi ta` makkinarju fosthom magni kbar. Kollox ghadu jahdem.

Ikkonferma li hu qatt ma rrizenja minn direttur. Lanqas saret xi rizoluzzjoni tal-bord sabiex hu ma jibqax direttur.

Xehed li huwa tkecca u ma nghatax paga. Kien ilu sentejn shah ma jiehu paga. Ipprova jerga` jidhol lura.

Qal li ma jithallas xejn ghall-uzu tal-fabbrika, tal-garages u tal-imhazen.

Fil-**kontroezami** xehed illi huwa kellu jhallas minn butu mal-EUR 11,000 bhala kontribuzzjonijiet tas-sigrtà socjali biex seta` jiehu l-pensjoni. Huwa beda jiehu l-pensjoni meta ghalaq 63 sena.

Spjega li l-glieda bejniethom inqalghet meta huwa ha mieghu ammont ta` flus li kienu qalghu fl-Ghid. Sar ilment li huwa ma kienx messu ha l-flus mieghu d-dar.

Stqarr illi huwa qatt ma ddiskuta rizenja ma` Joseph Sammut. Sar jaf li kienet giet prezentata rizenja ghan-nom tieghu mill-MFSA. Mar jivverifika l-MFSA wara li sema` lil huh Paul jghid li huwa ma kienx ghadu direttur tal-kumpannija.

Xehed li huwa kien imkecci fl-Ghid. Rega` mar wara tlett gimghat f` okkazzjonijiet diversi. Meta kien imur, hutu l-ohra kienu johorgu `l barra.

Ippreciza li kull ma ghandha l-kumpannija bhala propjeta` taghha huwa l-makkinarju.

Stqarr illi kien mar l-ETC biex jirrapporta li kien tkecca mill-kumpannija. Kien mar jirrapporta wkoll illi fil-kumpannija kienu qeghdin jahdmu persuni bla ma jithallsu l-kontribuzzjonijiet tas-sigurtà socjali.

Qal li lanqas meta missierhom kien haj ma saru laqghat generali tal-azzjonisti.

Fisser illi meta gieli ssellfu mill-bank biex jixtru xi haga kienu jaghmlu tajjeb ghaliha personalment.

Id-dividends kienu jithallsu lil kulhadd skont sehmu.

Xehed illi ghalkemm huwa ma kienx qed jahdem il-hlas tal-arretrati tal-kontribuzzjonijiet kien qed isir minn sehmu mill-flus tal-kumpannija.

Ikkonferma li huh Paul ried jixtri sehmu mill-kumpannija.

Stqarr illi huwa qatt ma nghata rendikont tad-dhul u hrug. Qatt ma kien involut fil-gbir tal-flus. Il-flus tat-tigijiet qatt ma rahom. Il-flus l-ohra kienu jitpoggew gol-kexxun li ma kienx jissakkar. Xogholu kien li johrog ix-xoghol ghall-klijenti. Huwa sostna li l-kumpannija kellha flus kontanti. Kont bankarju ma kienx hemm. Huh Paul fetah kont personali fejn kien jaghmel il-flus tal-kumpannija fih. Jekk klijent kien ihallas permezz ta` cheque, Paul kien jiffirma ic-cheque u kien imur fil-kont bankarju personali tieghu.

Xehed illi l-vann Toyota u l-vann Transit huma proprjeta` tieghu ghaliex huma registrati f` ismu u l-kumpannija qatt ma hallsitu tagghom.

Qal li huwa jrid li l-bini jinbiegh.

Fisser illi bil-kawza tal-lum huwa qed jitlob li jinghata l-qligh li ghamlet il-kumpannija fit-tliet snin li dam imkecci.

Qal li huwa jrid li l-kumpannija tibqa` topera u jippretendi li jerga` jmur biex jara x` inhu jigri fil-kumpannija.

Spjega li l-mutur tal-gelat li hemm fil-*confectionery* kien gabu wiehed mit-tfal ta` George u kien jithallas talli jsir uzu tieghu.

Sostna li huwa ried isewwi l-magna li kien kisser b` daqqa ta` ponn izda hutu rrifjutaw u qalulu li ma kienx hemm bzonn ta` dik il-magna.

Xehed li huwa qatt ma ha passi kontra Joe Sammut fir-rigward tar-rizenja tieghu.

Sostna li huwa ma kienx hareg flus ghal ishma fil-kumpannija izda kien ghamel hafna xoghol.

Ikkonferma li qabel l-Ghid, huma kienu jiehdu anqas flus biex ikollhom bizzejjed flus biex jixtru l-materjal necessarju ghal figolli.

Joseph Sammut xehed illi huwa l-awditur tal-kumpannija.

Fisser illi huwa jinghata l-bilanci, jaghamel *trial balance* u mbaghad jaghamel l-accounts.

Huwa gab mieghu l-*audit accounts* mill-2010 sal-2013.

Fis-sena 2014 beda d-dizgwid bejn l-ahwa u huwa waqaf milli jaghmlilhom xoghol.

Ma tax ir-rizenja tieghu minn awditur tal-kumpannija ghaliex kien qed jittama li jirrangaw bejniethom.

Qal li m'ghandux *management accounts*.

Spjega li l-figuri jinghataw lilu minn Paul Barun. Il-kumpannija m'ghandhiex *accountant*. Il-figuri jirrizultaw mir-returns tal-VAT. Min-naha tieghu huwa jaghamel verifiki mal-FS7 u FS3. In partikolari huwa jara x'hallsu VAT ; imbaghad jikkalkola xi jkun qalghu skont il-VAT li jkun hallsu. Ikkonferma li huwa jinghata dokumentazzjoni tal-VAT, li jkun fiha informazzjoni dwar *sales, purchases* u *expenses*.

Ikkonferma li darba fis-sena jinghata d-dokumenti tal-VAT. Qal li jista` jkun li l-FS3 jigu sottomessi minnu. Jiehu hsieb ukoll li ssir l-*annual return*.

Sostna li meta jirrizenja xi direttur, huwa jiehu hsieb il-formula izda jkun infurmah bir-rizenja l-istess direttur. Qal li huwa kien jitkellem mat-tlett ahwa u kien jipprova jirrangahom kemm-il darba.

Qal li d-dizgwid kien li r-rikorrent kien qed jigi b` xi mod eskluż mix-xogħol u mill-kontroll tal-kumpannija. Ir-rikorrent kien jilmenta miegħu kontinwament illi ma kienx qed ikun jaf x` qed ikun hemm qligh.

Xehed illi minn mindu telaq ir-rikorrent, huwa ddecieda li ma jkomplix jagħmel l-*accounts* tal-kumpannija.

Qal li r-rikorrent kien jallega li kien qed jigi eskluż mill-gharfien ta` dak li qed jigri fil-kumpannija. Min-naha tiegħu, hu kien ha din il-kwisjtoni bis-serjeta` u kien anke għamel laqqa` lill-ahwa.

Stqarr illi qabel l-2013 b` xi mod il-kumpannija kienet timxi izda wara r-rikorrent beda jigi eskluż.

Stqarr illi r-rikorrent ma ffirmax il-Form K ghax din saret *online*. Seta` jagħti l-kaz li kien qallu verbalment li ma riedx jibqa` direttur.

Ikmkonferma li kien hemm arretrati dovuti ta` *social security contributions* fl-ammont ta` madwar EUR 50,000. Kien sar ftehim mad-dipartiment dwar dan id-dejn.

Spjega li kien hemm xi tlett impjegati fil-kumpannija.

Qal li ma jafx jekk kienx hemm membri tal-familja li kienu jikkontribwixxu ghax-xogħol. Quddiemu qatt ma ssemma li l-familjari ta` r-rikorrent kienu qed jigu esklużi mix-xogħol tal-kumpannija.

Il-bini minn fejn topera l-kumpannija hija proprjeta` tal-familja.

Il-kumpannija ma għandhiex assi immobiljarji.

Bhala assi, il-kumpannija għandha *catering equipment* u *motor vans*.

Qal li huwa qatt ma jkollu kontroll tal-kotba tal-bank tal-kumpanija.

Xehed ukoll illi fl-2013, ir-rimunerazzjoni tad-diretturi kienet ta` EUR 10,500.

Ma dehrlux li kien hemm pagi mhallsa.

Fil-**kontroezami** stqarr li jiftakar li r-rikorrent ried ibiegh l-ishma tieghu u l-azzjonisti kienu marru ghandu biex jivvaluta l-kumpanija. Spjega li huwa kien qalilhom li l-ishma ma jiswew xejn peress li l-kumpanija kellha hafna dejn. Il-*brand* kien jiswa izda dan ma jigix inkluz fl-*accounts*. Il-kumpanija ma kellha l-ebda *net asset value*.

Qal illi seta` gie miftiehem li minflok l-ishma jinbieghu man-*net asset value* li jemani mill-*accounts*, jigu mibjugha skont il-valur tas-suq fejn hemm imbaghad jigi inkluz il-*good will*.

Huwa ma ghamilx studju fuq kemm tiswa il-*good will*.

Xehed illi ma jiftakarx jekk qattx ircieva xi ittra minghand ir-rikorrent fejn dan allega li kien dahhal Form K b` mod abbuziv.

Fisser illi bilfors li xi hadd kien qallu li r-rikorrent irrizenja biex saret il-Form K. Spjega li jekk kienu hut ir-rikorrent illi avzawh, huwa kien ser joqghod fuqhom ghax dak iz-zmien kienu jiftehmu bejniethom.

Qal illi d-dejn mas-*social security* kien ilu jakkumula mill-2003.

Michael Catania xehed illi huwa jahdem ma` Tiger Brand Limited.

Il-kumpanija tbiegh lewz, *spices*, zbib u hwejjeg affini fil-qasam tad-dulciera. Barun kienu ilhom jixtru minghandhom ghal aktar minn ghaxar snin. Qal illi fi zmien il-figolli, ibiegh lil Barun madwar 25 xkora lewz.

Stqarr illi huwa gieli thallas minghand Barun b`cheques ta` terzi persuni.

Xehed illi Barun qatt ma tawh inkwiet fil-hlasijiet. Il-flus dovuti dejjem ingabru. Bhala *turnover* minghandhom ikun hemm mal-EUR 14,000 fis-sena.

Lorenzo Catania xehed illi huwa jahdem mad-ditta ta' Anthony Axisa li tforni d-dqiq lil Barun Confectionery.

Xehed illi fid-29 ta' Jannar 2016 huwa kkonsenja lill-kumpannija 24 xkora tal-50 kilo. Fid-9 ta' Frar 2016, huwa kkonsenja 24 xkora tal-50 kilo.. Fit-3 ta' Marzu 2016, tahom 24 xkora tal-50 kilo ; l-istess fl-24 ta' Marzu 2016. Fid-19 ta' Mejju 2016 ikkonsenja 10 xkejjer ; l-istess fil-25 ta' Awissu 2016 u fl-20 ta' Settembru 2016. Fis-26 ta' Ottubru 2016, huwa tahom 5 xkejjer waqt li fit-22 ta' Novembru 2016 ghaddielhom 10 xkejjer. Fis-27 ta' Dicembru 2016, il-kumpannija hadet 10 xkejjer. Kull xkora tiswa madwar EUR 20 pero` hemm ohrajn li jiswew EUR 23.50. Il-kumpannija gieli hallset b` cheques ta` haddiehor. Ma setax ighid jekk kienx hemm drabi fejn Paul Barun hareg cheque personali biex ihallsu.

Priscilla Attard mill-Bank of Valletta plc xehdet illi li Baron Confectionery u Paul Barun huma klijenti tal-bank - fergħa Zabbar. Il-kumpannija għandha *savings account* u *current account*. Fis-*savings account*, hemm *zero balance* filwaqt li fil-kont l-iehor hemm bilanc ta` EUR 2,087.72. Il-kumpannija ma għandhiex *overdrafts* jew *loans*. Paul Barun għandu *joint accounts* ma` Deborah Barun u għandu *consumer loan personal loan*.

Joseph Saliba minn Job Plus ipprezenta l-*employment history* ta` Paul Barun u ta` Grazio Barun. L-*employer* hija l-kumpannija.

Fil-**kontroezami**, xehed illi direttur ta` kumpannija jigi registrat bhala impjegat fil-kaz li jkun qed jahdem. F` kaz li jkun jircievi *dividends* biss, ma jkunx registrat bhala impjegat.

Ippreciza li l-*commencement date* tal-impjieg ta` Grezzju Barun kienet 28 ta` Frar 1976 u mhux 28 ta` Frar 1975.

Spjega li Grezzju Barun kien mar l-ETC. In segwitu l-ETC bagħtet ittra lil Paul Barun fis-26 ta` Jannar 2016 sabiex timtela` t-*termination form* ta` Grezzju Barun. Wara dik l-ittra, giet ipprezentata *termination form* fid-9 ta` Frar 2016.

III. L-Art 402 tal-Kap 386

Ir-rikorrent ressaq it-talbiet tieghu abbazi tal-Art 402 tal-Kap 386.

Il-Qorti sejra taghmel riferenza ghal dawk mis-subartikoli tal-Art 402 li tqis rilevanti ghall-istanza tal-lum –

(1) Kull membru ta' kumpannija li jilmenta li l-affarijiet tal-kumpannija jkunu tmexxew jew qed jitmexxew jew aktarx jitmexxew b`mod li, jew li xi att jew ommissjoni tal-kumpannija kienu jew huma jew x`aktarx se jkunu, oppressivi b`mod mhux gust diskriminatorji kontra, jew b`mod mhux gust ta` pregudizzju, ghal membru jew membri jew b`mod li jkunu kontra l-interessi tal-membri in general, jista` jaghmel rikors lill-qorti ghal ordni taht dan l-artikolu.

...

(3) Jekk dwar rikors maghmul skond is-subartikolu (1) ... il-qorti tkun tal-fehma li l-ilment ikun bazat sewwa u li jkun gust u ekwu li hekk taghmel, il-qorti tista` taghmel ordni taht dawk il-kondizzjonijiet li jidhrilha xierqa -

(a) li jirregola t-tmexxija ta` l-affarijiet tal-kumpannija fil-futur ; jew

(b) jirrestringi jew jipprojbixxi l-ghemil ta` xi att propost ; jew

(c) jehtieg lill-kumpannija li taghmel xi att li r-rikorrent ikun ilmenta li kienet naqset li taghmel ; jew

(d) jipprovi ghax-xiri ta` l-azzjonijiet ta` xi membri tal-kumpannija minn membri ohra tal-kumpannija jew mill-kumpannija nnifisha u, f`kaz ta` xiri mill-kumpannija, ghat-tnaqqis li jkun mehtieg fil-kapital azzjonarju mahrug tal-kumpannija ; jew

(e) jordna lill-kumpannija li tibda, tiddefendi, tkompli jew ma tkompli procedimenti tal-qorti, jew

jawtorizza lil membru jew membri tal-kumpannija li jibdew, jiddefendu, ikomplu jew ma jkomplux procedimenti tal-qorti f'isem u ghan-nom tal-kumpannija ; jew

(f) jipprovi għall-hlas ta' kumpens minn dik il-persuna li tista' tkun instabet responsabbli mill-qorti għal telf jew danni li jkunu ggarbu minhabba att jew nuqqas li dwaru jkun sar ilment lill-persuna li tkun garrbet dak it-telf jew danni ; jew

(g) ixolji l-kumpannija u jipprovi għall-istralc konsegwenzjali tagħha.

(4) Meta jsir ordni għax-xoljiment ta' kumpannija skond is-subartikolu (3)(g), il-kumpannija għandha titqies li tkun xoljiet fid-data meta jkun sar l-ordni u d-disposizzjonijiet tas-Sub-Titoli I u III tat-Titolu II tat-Taqsima V ta' dan l-Att li jirregolaw l-istralc ta' kumpanniji għandhom japplikaw.

(5) Ordni magħmul taht dan l-artikolu jista' jehtieg lil kumpannija biex ma tagħmilx xi emenda, jew li tagħmel emenda mehtiega, fil-memorandum jew fl-istatut tagħha.

Għalkemm id-dicitura tal-Art 402(1) ittiedet testwalment minn disposizzjoni simili li tirrizulta fil-Companies Act ta' New Zealand, tajjeb jingħad illi l-ligi ta' New Zealand segwiet l-izvilupp legislattiv tar-Renju Unit.

Fir-Renju Unit, id-disposizzjoni li kienet tirregola l-*unfair prejudice action* fil-Companies Act 1985 kienet Sec 459. Meta saret il-Companies Act 2006, l-azzjoni bdiet tigi regolata bl-Art 994(1) fis-sens illi Sec 459 thassret għal kollox mill-Companies Act 1985 u kienet trasposta ezatt kif kienet fis-Sec 994(1) tal-Companies Act 2006.

Fil-pag 485 ta' l-ktieb **Company Law** (Fourth Edition – 2016 – OUP) **Brenda Hannigan** tghid :-

“Where the court is satisfied that a petition under s. 994 is well founded, it may make such order as it

thinks fit for giving relief in respect of matters complained of [s 996(2)]”

Sabiex tinghata ordni skont kif previst fis-subartikoli (3), (4) u (5) ta` l-Art 402, hija tassattiva l-prova tal-att li minnu jkun qed jilmenta r-rikorrent.

Dan ifisser illi jekk abbazi tal-provi, il-qorti tkun sodisfatta li jirrizulta dak previst fis-subartikolu (1), allura tghaddi mbaghad biex taghti l-ordni li jidhrilha opportuna skont is-subartikoli l-ohra.

Jekk il-prova tkun insodisfacjenti ghaliex ma jkunx irrizulta dak previst mis-subartikolu (1), allura l-qorti ghandha tieqaf hemm, u ma tapplikax is-subartikoli l-ohra.

Ghalhekk il-prova tas-sussistenza legali u fattwali ta` dak li jipprovdi s-subartikolu (1) huwa pregudizzjali ghall-prosegwiment tal-azzjoni.

IV. Il-prova

Fil-Pag 970 ta` Principles of Maltese Company Law (MUP – 2007) Andrew Muscat ighid illi fuq ir-rikorrent jistrieħ il-piz tal-prova li l-att jew omissjoni lamentata jaqa` fl-ambitu tas-subartikolu (1).

Ighid –

“This wording (tal-subartikolu 1) clearly suggests that the member need only prove one effect of the conduct, act or omission, that is, that such conduct, act or omission, has been, is or is likely to be “oppressive” or “unfairly discriminatory” or “unfairly prejudicial” (to a member or members) or contrary to interests (of the members as a whole).”

Fis-sentenza li tat din il-Qorti diversament presjeduta fit-30 ta` Jannar 2008 fil-kawza “Cutajar pro et noe et vs S.C. & Company Limited et” inghad hekk –

Illi l-prova biex tirnexxi dina l-azzjoni tispetta lir-rikorrenti li ressqu dina l-azzjoni. Huma jridu jippruvaw li (a) l-affarijiet tal-kumpanija jkunu tmexxew jew qed jitmexxew jew aktarx jitmexxew b`mod li... (b) jew li xi att jew ommissjoni tal-kumpanija kienu jew huma jew x`aktarx se jkunu, oppressivi b`mod mhux gust diskriminatorji kontra, jew b`mod mhux gust ta` pregudizzju, ghal membru jew membri jew b`mod li jkunu kontra l-interessi tal-membri in generali.

Il-ligi taghna ma taghtix spjegazzjoni ta` x`inhu oppressiv b`mod mhux gust diskriminatorji kontra, jew b`mod mhux gust ta` pregudizzju. Kull kaz ghalhekk irid jigi trattat u deciz fuq il-mertu tieghu proprju, u dana kaz b`kaz. L-iskop tal-ligi hu biex il-Qorti tkun tista` tintervjeni f`dawk il-kazijiet fejn hemm bzonn li jinghata rimedju minhabba unfair dealing fejn jigi pruvat li kien hemm azzjonijiet jew ommissjonijiet li ma kienux gusti u li kienu ta` pregudizzju jew li l-affarijiet tal-kumpanija mhux qed jitmexxew sew.

Fil-pag 492 ta' **Company Law** (op. cit.) **Brenda Hannigan** tghid :-

"Whether the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the petitioner's interest is an objective, not a subjective, matter. The prejudice must be real, rather than merely technical or trivial, and the petitioner does not have to show that the persons controlling the company have acted deliberately in bad faith or with a conscious intent to treat him unfairly.

The conduct complained of must be prejudicial in the sense of causing prejudice or harm to the relevant interest of the member (usually, but not limited to financial damage) and also unfairly so (usually connoting some breach of company law or the constitution but not limited to that) and it is not sufficient if the conduct satisfies only one of these tests."

V. **Il-legittimu kontradittur**

Fil-“**Principles of Maltese Company Law**” (op. cit.) **Andrew Muscat** jittratta l-kwistjoni ta` kontra min tista` tkun promossa azzjoni ta` din ix-xorta.

Fil-pag. 995 tal-ktieb ighid hekk :-

The Companies Act does not specify the person or persons against whom an action under article 402 is to be brought. It does well not to do so. The reason is that the choice of the defendant or defendants depends on the facts of the case and on the type of relief sought.

... the persons responsible for the conduct complained of would typically vary from the current or past majority shareholder to the managing director or the controlling directors acting on behalf of company. Control may also be vested in a shadow director, a provisional administrator, a liquidator, an official receiver and even the pledgee of shares in the company, who, in terms of the pledge agreement, may exercise the shareholder's voting rights or appoints directors on the board.

*Moreover, as will be noted in the following pages, the forms of relief that may be granted by the court are considerably wide-ranging; a court order could be issued against a number of persons, typically the company itself and one or more shareholders. In **Joseph Calleja vs Vincent Calleja**, an article 402 was filed only against one of the shareholders. The company itself was not a party. The defendant pleaded that the company itself were wrongly instituted, as the action had to be filed against the company and not against himself as a member. The Court, in a judgement in parte, considered article 402 to provide a flexible and equitable remedy and agreed with the applicant's submissions that an article 402 action had to be instituted against the person or persons who were allegedly responsible for the wrongdoing and that the court's order need not in all cases be issued against the company itself. The Court remarked that as the applicant's allegations of wrongdoing were directed towards the defendant, it was clear that the defendant was a*

proper party to the proceedings. It also stated that the fact that the action was not also filed against the company did not nullify the proceedings.

... Given the fundamental principle of Maltese procedural law that no person can be bound by a court's decision or judgement unless he is a party to the relative proceedings, it is important for the complainant to carefully identify the person or persons against whom the action is to be filed.

Fil-Pag 218 ta' l-Kap 6 ta' l-ktieb **Minority Shareholders : Law, Practice and Procedure, Victor Joffe** jikteb :-

*The petitioner will be the member seeking relief, and the company of which he is a member and in relation to whose affairs he alleges unfairly prejudicial conduct will be made a respondent. Additionally, every member of the company (other than the petitioner) whose interests might be effected by the relief sought should be joined as a respondent, whether or not allegations of unfairly prejudicial conduct are made against him: in the case of a small private company, this will usually mean that every member ought to be joined as a respondent to the petition. The category of potential respondents (other than the company) is not, however, limited to members of the company. In an appropriate case, relief may be sought against a non- or former member. The width of the category of potential respondents is indicated by *Lowe vs Fahey* ((1996) 1 BCLC 262), where it was held that if the unfairly prejudicial conduct alleged was a diversion of corporate funds, a petitioner could seek relief not only against members and former members, but also against directors involved or third parties who knowingly received or improperly assisted in the diversion. Even a person who is not actively involved in the conduct of the affairs of the company complained of may be made a respondent, at least if he would be affected by the relief sought.*

Tenut kont tal-ilmenti li ghamel ir-rikorrent, il-Qorti tqis illi l-intimati hekk kif imharrka huma legittimi kontraditturi taghha ghall-finijiet u effetti kollha tal-ligi. Tajjeb jinghad illi fl-eventwalita' li ssir il-prova tar-rekwiziti

ta` l-Art 402(1), u allura l-Qorti tkun trid tipprovdi skont l-Art 402(3), il-provvediment taghha jolqot ukoll lis-socjeta` intimata.

VI. Gurisprudenza

Fis-sentenza li tat il-Qorti ta` Ghawdex (Gurisdizzjoni Superjuri) fl-4 ta` Frar 2009 fil-kawza “**Ellis vs Ellis**” inghad hekk –

Jibda biex jinghad li dan il-provvediment jista` jigi nvokat mill-membri kollha, u mhux biss minn membri minoritarji u m`hemmx dubju li d-diskrezzjoni u l-poteri moghtija lill-qorti f`dan il-kuntest huma wesghin. Minn dan il-provvediment hu evidenti li :

(a) Dan il-provvediment japplika wkoll f`kaz ta` att jew ommissjoni izolata ;

(b) Ir-rimedju jista` jinghata kemm ghal dak li jkun gara fil-passat u wkoll xi att propost li jsir fil-futur ;

(c) L-ilment jrid ikun fuq it-tmexxija tal-affarijiet tal-kumpannija jew fuq att jew ommissjoni tal-kumpannija.

Fis-sentenza taghha tad-9 ta` Marzu 2007 fil-kawza “**Vella et vs Vella Brothers Ltd et**”, il-Qorti tal-Appell qalet hekk –

*... l-Artikolu 402 ta` l-Att dwar il-kumpaniji jaghti diskrezzjoni pjuttost wiesa` lill-Qrati u dan ghalix dawn il-provvedimenti ghandhom l-ghan li jissalvagwardjaw u jipprotegu lill-azzjonisti ta` socjeta` kummercjali, partikolarment lil dawh li huma minoritarji u li ghalhekk qeghdin fl-impossibilita` li jirregolaw il-mod li bih tkun qed titmexxa s-socjeta` li fiha huma jkollhom interess ...
... din id-disposizzjoni, li hija bbazata fuq l-Art.459 tal-Companies Act (1985) Ingliza, hija ispirata fuq principji ta` ekwita` aktar milli minn drittijiet strettament legalistici biex ikun jista` jigi moghti rimedju. Dak li hu necessarju hu li l-azzjonista jipprova li minhabba l-gestjoni tas-socjeta` partikolari hu qed isofri, jew ukoll jista` jsufri,*

pregudizzju ta` natura oppressiva, ingusta jew diskriminatorja. Tali gestjoni tista` tirreferi sempliciment ghal xi att specifiku jew xi ommissjoni tal-kumpanija. Il-pregudizzju jista` jirreferi ghall-azzjonist li qed jippromwovi l-proceduri, ghal xi azzjonist iehor jew ghall-interess in generali ta` l-azzjonisti. Ma hemmx ghalfejn li huwa jipprova li huwa zgur ser isofri xi pregudizzju fil-futur. Tali prova tista` ssir fuq bazi ragjonevoli ta` possibilita` ("**Vincent Monreal et v. Lino Delia noe**" deciza mill- Prim`Awla tal-Qorti Civili fit-13 ta` Mejju, 1999). Infatti gie deciz mill-Qrati Inglizi fil-kawza in **re Bovey Hotel Ventures Ltd** [(1983) B.C.L.C. 290] li *"the Court will not give a list of situations when this remedy may be resorted to however one principle remains clear. A shareholder may make use of this article when his shareholding in the company has been seriously diminished at least seriously jeopardized by reason of a course of conduct or the part of those who have the de facto control of the company, which has been unfair to the member concerned"*.

... Fid-decizjoni **O'Neill v Phillips** moghtija mill-House of Lords fl-20 ta` Mejju 1999, gie ritenut illi l-legislatur ried illi biex jinghata rimedju taht l-artikolu jigi kkunsidrat il-kriterju ta` dak li huwa `fair`. Izda Lord Hoffman izid ighid li - *"Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used ... The requirement that prejudice must be suffered as a member should not be too narrowly or technically construed."*

Fid-decizjoni **In Re Bovey Hotel Ventures Ltd**. (1983) Slade J ighid hekk dwar *unfair prejudice* :

The test for unfairness must, I think, be an objective, not a subjective, one. In other words it is not necessary for the petitioner to show that the persons who have de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith ; the test, I think is whether a reasonable bystander observing the consequences

of their conduct, would regard it as having unfairly prejudiced the petitioner's interests.

Fis-sentenza “**Monreal et vs Delia noe**” (op. cit.) inghad –

Dawn il-provedimenti huma ta` salvagwardja u ta` protezzjoni għall-azzjonisti ta` socjeta` kummercjali, b`mod partikolari għal dawk li huma minoritarji. Ir-rimedji li johorgu minn dawn il-provedimenti huma mogħtija lil kull azzjonist ta` socjeta` kummercjali. Kull azzjonist, anke jekk hu minoritarju, ta` socjeta` kummercjali, anke jekk hi pubblika, jista` jitlob li jingħataw l-ordnijiet kollha necessarji u opportuni, f`kaz li jirnexxielu jipprova illi minhabba l-gestjoni tal-istess socjeta` huwa qed isofri jew ukoll jista` jsofri xi pregudizzju ta` natura oppressiva, ingusta jew diskriminatorja. Tali gestjoni tista` tirreferi semplicement għal xi att specifiku jew xi ommissjoni tal-kumpanija. Il-pregudizzju jista` jirreferi għall-azzjonist li qed jippromuovi l-proceduri, għal xi azzjonist iehor jew għall-interessi in generali tal-azzjonisti. In vista ta` dan kollu jista` jingħad li hu bizzejjed li l-azzjonista jipprova li huwa qed isofri jew eventwalment jista` jsofri xi pregudizzju minhabba xi agir tas-socjeta` li tagħha huwa jippossjedi xi ishma. Ma hemmx għalfejn li huwa jipprova li huwa zgur li ser isofri xi pregudizzju fil-futur. Tali prova tista` ssir fuq bazi ragjonevoli ta` probabbilita`. Inoltre, skond dak li hemm provdut fis-subartikolu (3) tal-istess artikolu 402, il-Qorti tista` tipprocedi biex tagħmel kull ordni necessarja u opportuna skond dawn il-provedimenti, jekk jirrizulta li l-ilment tal-azzjonista hu sewwa bbazat u jekk il-Qorti thoss li huwa ekwu u gust li tagħmel.

Fis-sentenza tagħha tal-31 ta` Jannar 2003 fil-kawza “**Ellul vs Ellul pro et noe**”, il-Qorti tal-Appell qalet hekk –

... Fil-ligi Ingliza (ara Art 459 tal-Companies Act, 1985) jinstab rimedju simili li hu magħruf bħala “The Unfair Prejudice Remedy”. Il-Qorti ta` l-Appell Ingliza stabbiliet fil-kaz “**in Re Saul D. Harrison & Sons plc** ([1995]) 1BCLC 14)” il-linji ta` gwida dwar kif kellu jkun l-operat biex ikun jista` jigi

*kkwalifikat bhala, “unfairly prejudicial” (fit-test tal-Ligi Maltija din il-frazi hi tradotta “b`mod mhux gust ta` pregudizzju”). Wiehed kellu, fl-ewwel lok, jara jekk dak l-operat kienx jew le skond l-istatut tal-kumpanija. Izda fl-applikazzjoni tal-imsemmija dispozizzjoni – ispirata fuq principji ta` ekwita` aktar milli minn drittijiet strettament legali – il-Qorti tiehu in konsiderazzjoni l-aspettattivi legittimi (“legitimate expectations”) li r-rikorrent jista` jkollu u li sikwiet ikunu ferm aktar wiesgha mid-drittijiet strettament legali li johorgu mill-istatut ta-ssocjeta`. Dawn l-aspettattivi legittimi jitwieldu minn xi relazzjonijiet personali partikolari bejn l-azzjonisti. Fil-kaz **Ebrahimi vs Westbourne Galleries Ltd.** ([1973] AC 360) Lord Wilberforce elenka numru ta` sitwazzjonijiet fejn dan ir-rimedju jista` jinghata, sitwazzjonijiet dawn li x`aktarx jinstabu f` kumpaniji zghar privati li ta` sikwiet jissejhu “quasi partnerhsips”, fosthom is-segwenti :-*

“(i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company

(ii) an agreement, or understanding, that all, or some (for there may be “sleeping members”) of the shareholders shall participate in the conduct of the business ;

(iii) restriction upon the transfer of the members` interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere”.

Fid-decizjoni ta` din il-Qorti diversament presjeduta tas-7 ta` Ottubru 2016 fil-kawza **Av. Dr. Pio M. Valletta noe vs Jenó Torocsik et** inghad illi sabiex ikun hemm *unfair prejudice*, (a) *it-test irid ikun wiehed oggettiv ;* (b) *M`hemmx htiega li l-attur jipprova l-mala fede ;* (c) *M`hemmx htiega li l-attur jipprova li kien hemm intenzjoni li tikkawza pregudizzju ;* (d) *Mhux gust ma jfissirx bilfors li l-agir irid ikun illegali ;* u (e) *L-agir irid ikollu effett negattiv fuq l-attur bhala azzjonist.*

Fid-decizjoni **Re Coroin Ltd** – 2012 – All ER (d) 58(Feb) – EWHC 129 (Ch) – moghtija mic-Chancery Division tal-Ingilterra – David Richards J. qal hekk :-

“630. Prejudice will certainly encompass damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member ... The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in character. A disregard of the rights of a member as such, without any financial consequences, may amount to prejudice falling within the section.

631. Where the acts complained of have no adverse financial consequences, it may be more difficult to establish relevant prejudice. This may particularly be the case where the acts or omissions are breaches of duty owed to the company rather than to shareholders individually. If it is said that the directors or some of them had been in breach of duty to the company but no loss to the company has resulted, the company would not have a claim against those directors. It may therefore be difficult for a shareholder to show that nonetheless as a member he has suffered prejudice ...”

VII. **Dottrina**

Fil-pag. 464 ta' **Ferrar's Company Law** – Third Edition – jinghad hekk –

... The position will vary greatly from the small private companies, commonly called quasi-partnerships, to public companies of considerable size. As a quasi-partnership, the company will usually have been formed or continued on the basis of a personal relationship involving mutual confidence. There may be an agreement or understanding that all or some of the shareholders are to participate in the conduct of the business.

Restrictions on the transfer of shares will be the rule rather than the exception. The individuals involved may also have made relatively substantial capital contributions to the company. Shareholders in such companies will be a small close-knit group, actively involved in many instances in the daytoday operations and financially and personally committed to the company. Here the scope for legitimate expectations beyond their strict legal rights is obviously greatest.

*However, as Lord Wilberforce stressed in **Ebrahimi v Westbourne Galleries Ltd**, the case for giving effect to equitable considerations must be made in each instance and it is not sufficient simply to assert that the company is small or private, for in many cases the basis of the relationship will be adequately and exhaustively laid down in the articles. If it is so defined by the articles or, for example, by the articles supplemented by a shareholders` agreement, then there is little room for finding further legitimate expectations beyond those outlined in the documents.*

The interests of shareholders in larger private and public companies, on the other hand, are likely to be quite different from those of shareholders in quasi-partnerships and considerably more restricted. In these larger companies there is usually no underlying personal relationship, employment is rarely an issue and the shareholders are more interested in such matters as dividend yield and capital appreciation than involvement in the day-to-day running of the company. If they become dissatisfied, especially if it is a public company, they can sell their shares and withdraw from the company. Here the members rarely have expectations beyond their strict legal rights as provided by the articles.

“That is not to say that s.459 does not apply to larger private companies and public companies for the section is clearly not limited to quasipartnerships. The point is that it may be harder to establish conduct which is unfairly prejudicial to the interests of the members in such companies.

Fil-pag. 409 ta` **Cases and Materials on Company Law** (Fifth Edition) l-awturi **Hicks and Goo** jirrimarkaw illi :-

*In the early days of S.459, it was thought that the petitioner must have unfairly suffered prejudice to an interest as a member only (and not eg. as a director). This requirement has never been relaxed in that the Court is prepared to recognise that members may have different interests having regard to their rights, expectations and obligations (**Re a company** (No 00477 of 1986 [1986 BCLC 376; **O'Neill v Phillips**. [1999] 1 WLR 1092). This is particularly so in quasi-partnership cases where a minority is excluded from management. But where the articles make detailed provision for any departing members to sell their shares at a fair price, the position may be different ...Section 459 has proved to be a powerful weapon for minority shareholders, particularly in the case of quasi-partnerships. In such companies, minorities who are excluded from management participation or who unfairly suffer loss as a result of wrongdoing by directors or majority shareholders may get relief under the section.*

Fil-pag. 449 ta` **Farrar's Company Law** (Fourth Edition) jinghad :-

A member's interests are not necessarily limited, therefore, to his strict legal rights under the Articles and the Companies' Act but can extend also to legitimate expectations as to the conduct of the company's affairs arising from the nature of the company and the agreements and understandings between the parties.

Fil-pag. 506 ta` **Company Law** (op. cit.) **Brenda Hannigan** tghid :-

"Mere deadlock between the parties who have lost trust and confidence in one another is insufficient then to merit relief under CA 2006, s 994, in the absence of prejudicial conduct."

Fil-pag. 711 ta` **Boyle & Birds' Company Law** (Eight Edition, 2011 Jordans) jinghad :-

“The term “unfair prejudice” whether analysed as a ‘standard’ or a ‘concept’ is a relatively more objective one which is concerned with running the company in a way that is clearly unfair in its consequences to the complaining shareholder, even if the respondents can claim to have acted in the best of good faith.”

Fil-pag. 691-692 ta' l-ktieb **Gower and Davies - Principles of Modern Company Law** (Eighth Edition – 2008 – Sweet & Maxwell) jinghad illi :-

*“ ... the courts recognised that sec 994 protects expectations and not just rights. Borrowing from public law, it is sometimes said that the section protects the “legitimate expectations” of the petitioner, though more recently the courts have preferred the private law phrase “equitable considerations” [Qorti tal-Appell Ingliza fil-kawza **“Saul D Harrison & Sons plc”** – 1995 – għall-uzu tal-frazi “legitimate expectations”; House of Lords – **“O’Neill vs Phillips”** – 1999 – għall-uzu tal-frazi “equitable considerations”] Whatever the language used, the difficult issue is to distinguish those expectations of the petitioner which are to be classified as “legitimate” or which considerations are to fall within the category of “equitable considerations” and so as deserving of legal recognition and protection from those expectations which the petitioner may harbour as a matter of fact but which the courts will not protect.”*

Fil-pag 569-570 tal-ktieb **Company Law** (26th Edition – 2009/2010 – OUP) l-awturi **Mayson, French & Ryan** ighidu hekk b'riferenza għad-decizjoni ta' *Re Saul D Harrison and Sons* citata aktar kmieni :-

“The words ‘unfairly prejudicial’ are general words and they should be applied flexibly to meet the circumstances of the particular case ... The conduct [being complained of] must be both prejudicial [in the sense of causing prejudice or harm to the relevant interest) and also unfairly so ; conduct may be unfair without being prejudicial or prejudicial

without being unfair, and it is not sufficient if the conducts satisfies only one of these tests.”

Ikompju billi jaghmlu riferenza ghal “**O’Neill vs Phillips**” (op. cit.) in partikolari dwar l-ghazla li ghamel il-Parlament Ingliz –

“Parlament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief ... it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. Although fairness is anotion which can be applied to all kinds of activities its content will depend upon the context in which it is being used.”

(ara wkoll il-provvedimenti ta` din il-Qorti : **Paul Buhagiar Company Limited vs Paul & Rocco (Gzira) Limited** deciza fit-28 ta` Settembru 2017 ; **Haake Torsten pro et noe vs SOS It Business GmbH et** deciza fit-28 ta` Settembru 2017 ; **B.C Investments Limited vs Bag Investments Co Ltd et** deciza fit-30 ta` Marzu 2017 ; u **Joseph Busuttil et vs Suzanne Busuttil et** deciza fit-30 ta` Marzu 2017)

VIII. L-ilmenti tar-rikorrent

Il-Qorti sejra tqis jekk l-ilmenti tar-rikorrent jissodisfawx il-vot ta` l-Art 402(1).

Tajjeb li jkun ribadit illi sabiex ikun sodisfatt il-vot tal-ligi huwa bizzejjed jekk tirrizulta mqar wahda mic-cirkostanzi ndikati fl-Art 402(1). Infatti l-legislatur ghazel il-konguntiv *jew* mhux l-konguntiv *u* fid-disposizzjoni. Ghalhekk ir-rekwiziti huma alternattivi mhux kumulattivi.

a) Eskluzjoni mit-tmexxija

Ir-rikorrent jilmenta li l-intimati Paul u George Barun zammewh mill-jippartecipa fit-tmexxija tal-kumpannija ntimata, tant li ma kienx jaf x` qed jigri fit-tmexxija taghha, u x` inhu jsir mill-assi taghha.

Fil-Pag 509 et seq ta` **Principles of Maltese Company Law** (op. cit.), **Andrew Muscat** jindirizza lment ta` din ix-xorta meta jghid :-

The directors are required to prepare a report ... in respect of each accounting period. The principal purpose of the report is to review the progress of the company's business ... The directors' report is to be approved by the board of directors ... Every copy of the report which is laid before the company in general meeting, or which is otherwise circulated, published or issued, must state the name of the person who signed it on behalf of the board ... The officers of the company should ensure that not less than fourteen days before the date of the general meeting at which the annual accounts are to be laid, a copy of the accounts be sent (a) every member of the company; (b) every holder of the company's debentures and (c) all other persons who are entitled to receive notice of general meetings ... In respect of each accounting period, the directors are obliged to lay before the company in general meeting for its approval, copies of the annual accounts of the company for that period ...

Jirrizulta li bejn it-tliet ahwa Barun kien ilu jinhema l-inkwiet. Ghall-bidu l-inkwiet kien jimmanifesta ruhu fi glied limitat bl-ghajjat u tisbit. Imbaghad wara li jikkalma kollox, kienu jergghu lura ghall-hajja ta` qabel, u jmiddu rashom ghax-xoghol propju ghaliex l-azjenda taghhom trendi, u ilha s-snin maghrufa ghall-prodott taghha speċjalment man-nies tan-naha ta` isfel ta` Malta. Gara izda li minn ghajjat u tisbit, it-tliet ahwa Barun qalbu ghal stat gravi ta` nuqqas ta` fiducja mhux biss dwar tmexxija izda dwar id-dhul tan-negozju.

Issa huwa minnu li t-tlieta huma azzjonisti ta` kumpannija izda fis-sostanza t-tlieta baqghu jahdmu daqs li kieku huma individwi. U meta jigri illi azjenda, ghalkemm fuq il-karta tkun kumpannija, il-komponenti taghha jahdmu b`mod u manjiera bhallikieku ma hemmx kumpannija, billi ma jaccettawx jew jiskartaw ir-regoli stabbiliti mil-ligi, allura jkun qed jistiednu l-inkwiet.

Il-Qorti tosserva li l-kumpanija intimata tahdem l-aktar bil-kontanti. Il-hlasijiet bil-kontanti li jircievu jitqeghdu go kexxun li ma jissakkarx.

Huwa evidenti li din hija procedura primittiva mimlija toqob ghaliex ma tiggarrantix la trasparenza u lanqas kontabilita` anke jekk b`mod daqstant iehor primittiv jinkitbu figuri fi ktieb minghajr kontrolli adegwati.

Il-Qorti tosserva li meta hlas isir b`cheque, il-kumpanija thallas lil-fornituri u terzi ohra bil-girata tac-cheque, procedura skonsiljata mill-procedura bankarja, u mimlija nsidji nkluz mil-lat fiskali.

Il-qorti sabet illi laqghat generali tal-azzjonisti ma jsiru qatt.

Record tad-decizjonijiet li jittiehdu : imkien.

Laqghat tal-bord tad-diretturi, meta d-diretturi kienu tlieta, ma jirizultawx.

Fl-assjem il-metodu ta` tmexxija kien qed jistieden l-inkwiet ghaliex kien kollu kemm hu fondat fuq il-fiducja u xejn aktar.

Mankanti l-fiducja, sfaxxa kollox.

Il-Qorti tghid ukoll li ghandha dubji serji dwar il-mod kif isir l-audit tal-kumpanija. Apparti l-fatt illi fil-kaz tal-lum irrizulta skont kif xehdu l-partijiet illi l-accountant u l-awditur tal-kumpanija kienu l-istess persuna, xejn ma jaghtiha konfort dak mistqarr bil-gurament mill-awditur li l-audit kien isir abbazi tad-dokumenti li kien jghaddilu Paul Barun, ghaliex m`ghandhiex prova sodisfacjenti li ghall-fini ta` audit kull ma kien jasal ghand l-awditur kien soggett ghal verifika akkurata.

b) Rizenja minn direttur

Ir-rikorrent jinsisti illi huwa ma rrizenjax minn jeddu minn direttur.

Isostni li r-rizenja tieghu kienet biss manuvra ohra biex huwa jinqata` ghal kollox milli jkun jaf x` inhu ghaddej fil-kumpanija intimata.

Il-Qorti mhijiex konvinta li r-rikorrent ma rrizenjax jew li r-rizenja saret minn wara dahru.

Bla hsara ghal dak li diga` osservat dwar l-kondotta tal-awditur Sammut dwar il-kontijiet finanzjarji tal-kumpanija, il-Qorti m`ghandhiex fil-pussess taghha provi sodisfacenti bizzejjed biex jikkonvincuha li l-presentata tal-Form K bir-rizenja tar-rikorrent ma kenitx approvata mir-rikorrent, jew fi kliem aktar semplici : illi l-awditur Sammut seta` kien daqstant spregudikat li pprezenta *online* il-formola bir-rizenja tar-rikorrent kontra r-rieda tar-rikorrent.

Jirrizulta li r-rikorrent irrizenja fl-1 ta` Awissu 2012.

Jirrizulta wkoll li fil-31 ta` Ottubru 2012 irrizenja wkoll George Barun minn direttur.

Dawn il-fatti jirrizultaw mill-*audited financial statements* tal-kumpanija ghas-sena li ghalqet fil-31 ta` Dicembru 2012 (fol 89 sa 97) u ghas-sena li ghalqet fil-31 ta` Dicembru 2013 (fol 98 sa 105).

Barra minn hekk kienet esebita ittra li baghat l-avukat tar-rikorrent datat 28 ta` Novembru 2013 fejn issir referenza mir-rikorrent **ghall-fatt li huwa rrizenja** (minghajr kwalifiki) minn direttur tal-kumpanija intimata f` Awissu 2012. (fol 507 sa 508).

Il-Qorti ma ssibx illi l-ligi taghna – iggebbbed kemm iggebbbed fiha – fuq l-iskorta tal-gurisprudenza u tad-dottrina taghna u dik estera - **tesigi** illi r-rikorrent, ghax azzjonista, ghandu jkun ukoll direttur.

Id-diretturi (wiehed jew aktar, mhux importanti) huma obbligati *ex lege* li jahdmu fl-interess tal-kumpanija (li mhux bilfors jaqbel mal-interess tad-diretturi jew tal-azzjonisti).

Jekk dan ma jsirx allura jkollhom jerfghu l-piz.

Issir referenza għall-provvediment li tat din il-Qorti kif presjeduta fit-2 ta' Settembru 2016 fil-kawza fl-ismijiet **Av Jonathan Abela Fiorentino vs Vroon Containers BV et** fejn intqal illi :-

“In-nuqqas ta' rapprezentanza fit-tmexxija ta' kumpanija mhux per se att ta' oppressjoni, ingust jew diskriminatorju. Il-protezzjoni gudiżżjarja tal-membri hija fis-sens li min b' xi mod ikollu kontroll fuq l-ishma ta' kumpanija ma jikkommettix atti li jopprimu b' mod ingust u diskriminatorju lil min jippossjedi ishma ohra.”

Dan ighodd ukoll għall-kaz tal-lum fejn jirrigwarda l-posizzjoni tar-rikorrent.

Fil-kaz odjern irrizulta illi wara l-*ennesima* tilwima ir-rikorrent qabad u telaq il barra u ma marx lura għax-xogħol. Nafu, għax irrizulta, li f' anqas minn xahar li telaq, ir-rikorrent rega' mar lura u kif dahal fil-post tax-xogħol hutu ma rieduhx hemm. Hemm it-tahwid lahaq *boiling point*.

Jekk ir-rikorrent ma kienx baqa' direttur, ma jfissirx illi ma kienx baqa' azzjonista bid-drittijiet u l-obbligi li għandu azzjonista. Fost it-tuteli li għandu, hemm dawk li jahseb għalihom, l-Art 402(1) tal-Kap 386.

c) Nuqqas ta' trasparenza dwar flejjes tal-kumpanija

Inghad illi Paul Barun għamel uzu minn kont tal-bank tiegħu sabiex iqiegħed fih flus tal-kumpanija ntimata.

Inghad ukoll illi George Barun kien jiftiehem ma' klijenti dwar tigijiet fil-hinijiet meta r-rikorrent ma kienx ikun present sabiex izomm mistur l-ammont preciz tal-hlas li jsir għal dak it-tieg.

Ir-rikorrenti ilmenta wkoll li r-rikorrent ma kienx ikun jaf x' kienet qed taqla' l-kumpanija intimata u li meta pprova jivverfika, dejjem sab l-opposizzjoni tal-azzjonisti l-ohra.

Il-Qorti tistqarr illi l-provi li jsostnu dawn l-ilmenti kienu nsodisfacenti. Kien biss ir-rikorrent li xehed dwar dawk l-ilmenti minghajr ma kkorra borahom.

Jigi notat b` mod partikolari li fir-rigward ta` l-ilment tat-tigijiet u l-hlasijiet ta` l-istess il-kumpannija kienet ilha ma tahdem it-tigijiet, u ghalhekk l-ilment ma jimmeritax li jigi investigat.

Il-Qorti hija sprovvista minn provi konvincenti li George Barun kien izzomm parti mill-hlas ghalih.

d) In-nuqqas li jinzammu laqghat generali

Ir-rikorrenti lmentat li l-kumpannija kienet ilha s-snin ma taghmel laqghat generali.

L-Art 128 tal-Kap 386 ighid :-

(1) Kull kumpannija ghandha kull sena zzomm laqgha generali bhala l-laqgha generali annwali taghha b`zieda ma` kull laqghat ohra f`dik is-sena, u ghandha turi illi l-laqgha hija dik annwali fl-avvizi li bihom tissejjah ; u m`ghandhomx jghaddu izjed minn hmistax-il xahar bejn id-data ta` laqgha generali annwali tal-kumpannija u dik ta` warajha:

Izda sakemm kumpannija zzomm l-ewwel laqgha generali annwali taghha fi zmien tmintax-il xahar mir-registrazzjoni taghha ma jkollhiex bzonni izzommha fis-sena tar-registrazzjoni taghha jew fis-sena ta` wara.

(2) Kull laqgha generali li ma tkunx il-laqgha generali annwali tkun laqgha generali straordinarja.

(3) Fin-nuqqas ta` tharis mad-disposizzjonijiet tas-subartikolu(1), kull ufficjal tal-kumpannija li jkun naqas jehel penali u, ghalkull jum li matulu jkompli n-nuqqas, penali ohra.”

Ghandu jinghad li “general meetings are usually summoned by the directors. The articles of a company in fact frequently empower the board of

director to convene general meetings”. (ara : **Andrew Muscat : Principles of Maltese Company Law** : op .cit. : pag 504).

Fil-pag 985 tal-istess ktieb l-awtur ighid :-

“The failure to observe the rules of the memorandum or articles of association may amount to unfairly prejudicial conduct, but a lot will depend on the circumstances of the case, the seriousness of the irregularity and the effect on the complainant (Robin Hollington, Shareholders` Rights (4th ed. 2004) at p 210). In McGuinness vs Bremner plc (1988, BCLC 673) an unreasonable delay in convening a general meeting following a requisition by a member constituted unfair prejudice as “delay is prejudicial to the interests of a person who seeks to work out a legal remedy.” The Court ordered an extraordinary general meeting to be held on a set date. And in Re Nuneaton Borough Association Football Club Ltd., ex p. Shooter and Broadhurst (1990 BCLC 384) the repeated failure to hold annual general meetings and to lay accounts (thereby depriving members of their right to know and consider the state of the company’s affairs) was also held to constitute unfairly prejudicial conduct.”

Dan premiss, din il-Qorti tqis illi ghalkemm il-ligi tesigi li jsiru laqghat generali ta` kumpannija, dak il-fatt wahdu ma kienx manifestazzjoni ta` *unfair prejudice* ghad-dannu tar-rikorrent. Dan qed jinghad ghaliex jekk tabilhaqq il-fatt li ma kienux qeghdin isiru laqghat generali kien ta` pregudizzju ngust, oppressiv jew diskriminatorju ghar-rikorrent, huwa kien messu ha azzjoni skont il-ligi sabiex jassikura ruhu li l-laqghat isiru kif trid il-ligi.

Il-Qorti taccenna biss ghall-**Art 31 tal-Ewwel Skeda tal-Kap 386** li jghid : “*id-diretturi jistghu, kull meta jidhrilhom xieraq, isejhu laqgha generali straordinarja, u laqghat generali straordinarji ghandhom jissejhu wkoll fuq dik it-talba, jew, f`nuqqas, jistghu jissejhu minn dawk li jkunu hekk talbu, kif provdut bl-artikolu 129 tal-Att.*”

L-**Art 129 tal-Kap 386** jaghti dritt lill-membri tal-kumpannija li jitolbu li tissejjah laqgha generali straordinarja :

(1) *Id-diretturi ta' kumpannija fuq talba ta' membru jew membri tal-kumpannija li jkollhom fid-data tal-konsenja tat-talba mhux anqas minn ghaxra wahda minn dak il-kapital azzjonarju imhallas tal-kumpannija li fid-data tal-konsenja jaghti l-jedd għall-vot f'laqgħat generali tal-kumpannija, għandhom jipprocedu minnufih kif jixraq biex isejhu laqgħa generali straordinarja tal-kumpannija.*

(2) *It-talba għandha turi l-iskopijiet tal-laqgħa, u għandha tigiiffirmata minn min jitlob il-laqgħa u konsenjata fl-ufficcju registrattal-kumpannija u tista' tkun magħmula minn diversi dokumenti tal-istess għamla kull wiehied iffirmit minn min ikun qed jitlob il-laqgħa jew jekk ikun hemm iktar minn wiehied li jagħmel it-talbfaxxi dokument minnhom kollha.*

(3) *Jekk id-diretturi fi zmien wiehied u ghoxrin jum mid-data tal-konsenja tat-talba ma jipprocedux kif jixraq biex isejhu l-laqgħa, dawk li jkunu talbuha jistghu huma stess isejhu laqgħa bl-istess mod, kemm jista' jkun, bhal meta laqgħat jigu msejha mid-diretturi, izda laqgħa hekk imsejha ma għandhiex tinzamm wara li jghaddu tliet xhur mid-data tad-depożitu tat-talba.*

(4) *Kull nefqa ragonevoli li ssir minn dawk li jitolbu l-laqgħaminhabba li d-diretturi jkunu naqsu milli jsejhu l-laqgħa kif imiss għandha tithallas lura mill-kumpannija lil dawk li jkunu talbu l-laqgħa, u kull somma hekk imhallsa tkun dovuta personalment mid-diretturi li kienu naqsu u tista' tinzamm mill-kumpannija minn xi ammont dovut jew li għad ikun dovut mill-kumpannija għal drittijiet jew kumpens iehor għas-servizzi tagħhom lil dawk id-diretturi li kienu naqsu.”*

Il-legislatur haseb ukoll għal mezz iehor kif tista' tissejjah laqgħa generali.

Infatti hemm l-**Art 132 tal-Kap 386** li jghid :-

(1) *Jekk ghal xi raguni ma jkunx prattikabbli li tissejjah laqgha ta` kumpannija bil-mod li bih jistghu jissejhu laqghat tal-kumpannija, jew li jitmexxew il-laqghat ta` dik il-kumpannija bil-mod stabbilit bl-istatut jew b`dan l-Att, il-qorti tista`, jew minnrajha jew fuq it-talba ta` xi wahda mill-partijiet fil-procedimenti waqt daww il-procedimenti jew, fin-nuqqas ta` xi procedimenti, fuq rikors ta` xi direttur tal-kumpannija jew ta` xi membru tal-kumpannija li jkollu dritt jivvota fil-laqgha, tordna li laqgha tal-kumpannija tissejjah, tinzamm u titmexxa b`dak il-mod li l-qorti jidhrilha xieraq, u meta jinghata xi ordni bhal dan, tista` taghti daww id-direttivi ancillari jew konsegwenzjali li jidhrilha xieraq, inkluzo d-direttiva illi membru wiehed tal-kumpannija prezentipersonalment jew bi prokura jitqies li jikkostitwixxi laqgha.*

(2) *Id-disposizzjonijiet tas-subartikolu (1) ghandhom japplikaw ukoll ghas-sejhiet ta` laqghat tal-bord tad-diretturi ta` kumpannija, jekk lill-qorti jidhrilha, li c-cirkustanzi jitolbu li tittiehed azzjoni bhal dik.*

Jekk tassew ir-rikorrent ried ikun jaf fejn hu, kellu ghad-disposizzjoni l-mezzi legali kif isejjah laqghat generali tal-kumpannija.

Fl-istess waqt ghal dan l-iskop ma kellux ghalfejn jirrikorri ghal azzjoni skont l-Art 402 tal-Kap 386 li m`ghandhiex titqies bhala azzjoni ordinarja izda pjuttost azzjoni fejn ohrajn ma jirnexxux anke ghaliex ir-*ratio* warajha fuq l-iskorta tad-dottrina u guriprudenza Ingliz tibqa` l-ekwita`.

e) **In-nuqqas ta` tqassim ta` dividends**

Ir-rikorrent ilmenta li ma tqassmux *dividends*.

Fl-M&A tal-kumpannija (fol 9 sa 13) ma hemmx indikat liema organu ghandu jiddikjara l-hrug ta` *dividends*.

Ghalhekk japplika l-**Art 137(3) tal-Kap 386** li jaghti din is-setgħa lid-diretturi.

Il-Qorti tikkondividi l-posizzjoni li ha **Andrew Muscat** meta fil-pag. 756 ta' "**Principles of Maltese Company Law**" kiteb hekk :-

Directors may however be given power to declare dividends as well as, or to the exclusion of, the general meeting. If the articles are silent as to which organ is authorized to declare dividends, it would seem that this power vests in the directors rather than in the general meeting. Again this view relies on the principle in article 137(3) of the Companies Act that the directors may exercise all the powers of the company as are not by law or by the memorandum or articles of association, required to be exercised by the company in general meeting.

Din il-Qorti tishaq dak li diga' kellha okkazjoni tghid fi provvedimenti precedenti tagħha u cioe' illi l-protezzjoni li jrid jaghti l-Art 402 huwa li min ikollu l-kontroll effettiv ta' kumpannija jikkonduci l-affarijiet tal-kumpannija b'mod u manjiera li ma jkunx hemm atti jew omissjonijiet li jopprimu ingustament jew b'mod diskriminatorju lil xi membru tal-kumpannija.

Fil-kaz tal-lum, irrizulta illi minhabba d-disgwid li nqala' bejn l-ahwa, ir-rikorrent, ghalkemm baqa' membru, ma baqax jahdem mal-kumpannija. Min-naha tagħha, il-kumpannija baqghet għaddejja bin-negożju tagħha u milli ddahhal baqghet thallas kull xahar il-pendenzi li għad għandha mal-Kummissarju tat-Taxxi skont ftehim konkordat datat 2 ta' Gunju 2014 (fol 512). Irrizulta li George Barun u Paul Barun baqghu jahdmu fil-kumpannija u qeghdin jithallsu tax-xogħol li jagħmlu. B'kuntrast ma' dan, ghalkemm ir-rikorrenti ma baqax jahdem ma' hutu għar-ragunijiet u cirkostanzi imfissra aktar kmieni, baqa' ma thallasx *dividends* u lanqas ircieva xi introjtu iehor mill-kumpannija.

Effettivament bil-klima konflittwali li ddigenerat fl-azjenda, ir-rikorrent spicca maqtugh barra għal kollox minn kull hjiel ta' kif qeghda titmexxa l-kumpannija.

Anke fuq bazi ta' ekwita', dan l-istat ta' fatt m'għandux ikompli jissussisti.

Is-sitwazzjoni waslet ghal dik attwali tort tat-tliet ahwa u kwindi l-Qorti sejra tintervjeni sabiex iggib ordni fit-tmexxija.

Fil-fehma taghha huma sodisfatti l-elementi li jsawwru l-Art. 402(1) tal-Kap 386.

IX. L-Art 402(3) tal-Kap 386

Accertat il-ksur tal-Art 402(1) tal-Kap 386, il-Qorti sejra tqis ir-rimedju l-aktar opportun li, fil-fehma taghha, jindirizza l-bzonn immedjat tal-kumpannija.

L-ghazla tar-rimedju minn fost dawk indikati fis-subartikolu (3) jimmerita analizi ghaliha.

In primis, il-Qorti tirrileva illi d-disposizzjoni takkorda lill-Qorti diskrezzjoni wiesgha sabiex taghti dik l-ordni li tkun xierqa tenut kont tal-fatti u cirkostanzi tal-kaz (ara d-decizzjoni tal-Qorti tal-Appell tal-31 ta' Jannar 2003 fil-kawza “**Philomena Ellul vs Charles Ellul pro et noe et**”).

Id-diskrezzjoni li ghandha l-Qorti hija talment wiesgha illi sahansitra tista' twarrab t-talbiet specifici li jkunu saru mill-membri li jkun ilmenta minn *unfair prejudice* skont is-subartikolu (1).

Fil-provvediment li tat din il-Qorti fl-1 ta' Awissu 2017 fil-kaz : **Calamatta Cuschieri Investment Services Limited et v. Pefaco International plc et** inghad hekk :-

“ ... kull wahda mid-disposizzjonijiet tal-Art 402(3) hija sottoposta ghad-diskrezzjoni tal-Qorti. Dan ikompli jfisser illi anke jekk issib li jissussisti dak li jghid l-Art 402(1), xejn ma jzomm lill-Qorti milli tapplika rimedju minflok iehor...”

Fil-Pag. 285 ta' “**Company Law – Theory, Structure and Operation**” (OUP – 1998) **Brian Cheffins** ighid illi Sec 459 (illum Art 94 tal-Companies Act 2006) *provides a Judge with broad powers to grant to a successful applicant whatever remedy is appropriate.*

Fir-rikors promotur, ir-rikorrent talab li tinghata kull ordni u direttiva li l-Qorti jidhrilha xierqa ghalkemm talab il-likwidazzjoni u hlas ta' kumpens favur ir-rikorrent skont il-paragrafu (f) tas-subartikolu (3) tal-Art 402.

Tenut kont tal-assjem ta' fatti u cirkostanzi li hargu mill-provi, kif ukoll l-assenza ta' provi kwalifikanti li jindirizzaw lill-Qorti lejn rimedji ohra, il-Qorti hija tal-fehma illi r-rimedju l-aktar indikat u li tqis bhala *fair and equitable* ghandu jkun inkwadrat fl-ambitu tal-paragrafu (a) tas-subartikolu (3) tal-Art 402.

Il-Qorti sejra taghzel din it-triq ghaliex ghandha c-certezza morali illi jekk it-tmexxija tal-affarijiet tal-kumpannija tithalla fl-istat li fih tinsab fil-prezent, karatterizzata kif inhi b'imgieba konflittwali bejn l-azzjonisti, allura l-futur ta' l-kumpannija ma jawgura xejn tajjeb.

Andrew Muscat fil-pag. 1000 tal-ktieb "Principles of Maltese Company Law" (op. cit.) ighid :-

"The court is entitled to make an order "regulating the conduct of the company's affairs in the future". Such a power also pertains to courts in England, New Zealand and Australia. An order of this type was made in re H.R. Harmer Ltd. In that case, the Court made detailed orders for the future regulation of the company's affairs including a requirement that the company's management structure be totally reorganized such that its eighty year old founder would become president of the company without any rights or duties and that he would not be allowed to interfere in the management of the company other than as a member of the board. Other typical orders could involve the appointment or removal of directors, the reduction of capital and the convening of meetings. In MC Guinness vs Bremner plc, for example the Court ordered the directors of a public company to convene an extraordinary general meeting on a particular date and to appoint accountants as scrutineers. And in Caroline Zammit Testaferrata Moroni Viani et vs Testaferrata Moroni Viani (Holdings) Limited et, the Court ordered a restructure of the composition of the board of directors ; the two groups of shareholders each became entitled to appoint two directors and an independent chairman was appointed by the Court."

Provvediment

Ghar-ragunijiet kollha premessi, il-Qorti qeghda tipprovdi dwar it-talbiet u dwar l-eccezzjonijiet billi :-

Tilqa` l-ewwel talba.

Riferibbilment ghat-tieni u ghat-tielet talbiet, tiddikjara li l-ordni li jkun gust u ekwu li taghti ghandu jkun limitat ghall-applikazzjoni ta` l-Art 402(3)(a) tal-Kap 386 tal-Ligijiet ta` Malta. Ghalhekk tordna li t-tmexxija ta` l-affarijiet kollha tal-kumpannija intimata Baron Confectionery Limited (C-5484) ghandha tkun kondotta kif gej :-

1) B`effett mil-lum, il-*memorandum* u l-*articles of association* tal-kumpannija intimata Baron Confectionery Limited (C-5484) huma soggetti ghal dak kollu li qed ikun ordnat li jsir bis-sahha tal-provvediment tal-lum.

2) B`effett mil-lum, b`zieda ma` l-uniku direttur li ghad fadal fil-kumpannija intimata, qeghda tahtar lill-Avukat Dottor Louis Cassar Pullicino bhala Direttur tal-istess kumpannija.

3) Tordna li b`effett mil-lum id-Direttur li qeghda tahtar ikun ukoll ic-Chairman tal-bord tad-diretturi tal-kumpannija intimata.

4) Tordna illi b`effett mil-lum id-direttur attwali tal-kumpannija intimata jkollu jedd jattendi ghal-laqghat tal-bord tad-diretturi izda ma jkollux dritt tal-vot, liema dritt tal-vot ikun jispetta biss lic-Chairman/Direttur li qeghda tahtar.

5) Tordna illi b`effett mil-lum ic-Chairman/Direttur li qeghda tahtar ikollu access shih u liberu ghal dak kollu li jirrigwarda l-kumpannija intimata - xejn eskruz.

6) Tordna illi b`effett mil-lum ebda att ma jista` jsir fil-kumpannija intimata jekk ma jkunx approvat mic-Chairman/Direttur li qeghda tahtar. Jekk l-att ma jkunx approvat, allura l-att ikun null u bla effett ghall-finijiet u effetti kollha tal-ligi.

7) Tordna lic-Chairman/Direttur li nhatar illum biex jassikura li l-kumpannija intimata titmexxa u tkun konformi mal-ligi.

8) Tordna illi b`effett mil-lum ic-Chairman/Direttur li qeghda tahtar ikollu wahdu r-rappresentanza legali u gudizzjarja tal-kumpannija intimata.

9) Taghti lic-Chairman/Direttur li nhatar illum is-setghat u l-fakoltajiet kollha sabiex jinkariga persuni sabiex, spejjez tal-kumpannija intimata, jassistu fit-tmexxija ta` kuljum tal-kumpannija intimata. Jekk ma jkunx hemm assi tal-kumpannija intimata mnejn jithallsu dawn il-persuni, allura l-hlas taghhom ghandu jsir mir-rikorrent, mill-intimat Paul Barun de proprio, u mill-intimat George Barun *in solidum* bejniethom.

10) Tordna li c-Chairman/Direttur li nhatar illum sabiex jissottometti ghall-approvazzjoni jew xort`ohra tal-Qorti r-rimunerazzjoni tieghu ghall-prestazzjonijiet tieghu. Din ir-rimunerazzjoni ghandha tithallas darba kull l-ahhar jum ta` kull xahar mill-assi tal-kumpannija intimata. Jekk jirrizulta li ma jkunx hemm mnejn jithallas minn dawk l-assi, allura il-hlas ghandu jsir mir-rikorrent, mill-intimat Paul Barun de proprio, u mill-intimat George Barun *in solidum* bejniethom.

11) Tordna li revoka jew varjazzjoni ta` dan il-provvediment tkun tista` ssir biss bil-permess tal-Qorti, wara l-presentata ta` rikors mill-azzjonisti kollha, u wara li tkun ghaddiet b`vot unanimu appositata risoluzzjoni waqt laqgħa generali tal-kumpannija intimata.

**Bl-applikazzjoni tal-Art 223(3) tal-Kap 12 tal-Ligijiet ta` Malta,
tordna li kull parti tbatl l-ispejjez taghha fil-kawza tal-lum.**

**Onor. Joseph Zammit McKeon
Imhallef**

**Amanda Cassar
Deputat Registratur**