



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

**ONOR. IMHALLEF  
JOSEPH ZAMMIT MCKEON**

**Illum it-Tlieta 30 ta` Ottubru 2018**

**Kawza Nru. 3  
Rik. Gur. Nru. 335/2017JZM**

**Catherine Buhagiar (K.I. nru. 376163M)**

*u*

**Frank Buhagiar (K.I. nru. 769460M)**

*kontra*

**Claudio Caruana (K.I. nru. 240467M)**

*u*

**Josephine Caruana (K.I. nru. 378043M)  
ghal kull interess li jista` jkollha**

**Il-Qorti :**

## **I. Preliminari**

Rat ir-rikors guramentat prezentat fil-11 ta` April 2017 li jaqra :-

1. *Illi permezz tal-iskrittura privata quddiem in-Nutar Bartolomeo Micallef datata 25 ta` April 2008, kopja hawn annessa u mmarkata bhala Dok CB1, is-socjeta` CNJ International Limited, ikkostitwiet ruhha bhala debitrici a favur ir-rikorrenti Catherine Buhagiar ghas-somma ta` mija u sebat elef u mija u hamsin Ewro (€107,150);*

2. *Illi permezz tad-decizjoni datata 30 ta` April 2015 fl-ismijiet "Catherine Buhagiar u Frank Buhagiar vs CNJ International Ltd", (Rik Gur numru 1013/13), (Dok CB2) il-Prim` Awla tal-Qorti Civili laqghet limitament it-talbiet attrici, l-atturi gew kanonizzati bhala kredituri tas-socjeta` CNJ International Limited fl-ammont ta` tnejn u sebghin elf erba` mija wiehed u sebghin Ewro tnejn u tmenin centezmu (€72,471.82);*

3. *Illi l-imsemmija decizjoni illum tikostitwixxi titolu ezekuttiv;*

4. *Illi nonostante l-hrug tal-mandat ta` sekwestru kawtelatorju bin-numru 1628/2013, mahrug fit-22 ta` Ottubru 2013, kif ukoll mandat ta` sekwestru ezekuttiv li jgib in-numru 809/2015, mahrug fit-22 ta` Mejju 2015, it-tnejn fl-ismijiet "Catherine Buhagiar u Frank Buhagiar vs CNJ International Ltd", hawn annessi u mmarkati bhala Dok CB3 u CB4, ir-rikorrenti baqghet ma thallsitx mis-socjeta` CNJ International Limited stante illi ma kelliex assi x`jigu depozitati;*

5. *Illi permezz tal-provediment datat 29 ta` Frar 2016 fil-kawza fl-ismijiet "Catherine Buhagiar u Frank Buhagiar vs CNJ International Ltd" (Rik Gur 1208/15), il-Prim` Awla tal-Qorti Civili ordnat x-xoljiment tal-kumpannija konvenuta b`effett mill-21 ta` Dicembru 2015 skont l-Art 223(1) tal-Kap 386 (Dok CB5);*

6. *Illi, is-socjeta` CNJ International Limited prezentement ghaddejja minn proceduri ta` stralc quddiem il-Prim Awla tal-Qorti Civili, fl-ismijiet "Catherine Buhagiar u Frank Buhagiar vs CNJ International Ltd" (Rik Gur 1208/15);*

7. *Illi in vista tas-suespost jirrizulta bic-car illi l-kumpanija CNJ International Ltd. ma kienetx qed tigi mexxija b`mod xieraq, stante illi minkejja li sar dan s-self da parti tal-attrici Catherine Buhagiar, lis-socjeta` CNJ International Limited, l-istess socjeta` xorta spiccat bla fondi, li juri li s-socjeta` CNJ International Limited kienet qed titmexxa b`mod frawdolenti ghad-dannu ta` kredituri bhall-attrici, kif ser jigi ppruvat ahjar fit-trattazzjoni ta` din il-kawza;*

8. *Illi kien Claudio Caruana, dak iz-zmien direttur tal-kumpanija CNJ International Limited, li b`malizia u mala fede wassal lill-attrici biex temmen li dan s-self kien necessarju ghas-socjeta` CNJ International Limited, u li eventwalment l-istess socjeta` kienet tiflah troddu lura meta kien jaf tajjeb illi dan ma setghax isir.*

9. *Illi ghaldaqstant, il-mod kif Claudio Caruana ezercita l-kummerc bhala direttur tas-socjeta CNJ International Limited kien qarrieqi u frawdolenti ghal-ahhar fil-konfront ta` l-attrici Catherine Buhagiar u ghaldaqstant ghandu jinzamm personalment responsabbli ghal-azzjonijiet tieghu waqt li kien direttur ta` din is-socjeta`, skond l-Artikolu 315 tal-Kap 386 tal-Ligijiet ta` Malta.*

*Ghaldaqstant, in vista tas-suespost, l-esponenti qed jitolbu lil din l-Onorabbli Qorti :-*

1) *Tiddikjara illi kien hemm ezercizzju ta` kummerc b`mod frawdolenti da parti ta` l-intimati jew min minnhom meta kienu diretturi tas-socjeta` CNJ International Limited, skond l-Artikolu 315(1) tal-Kap 386;*

2) *Tiddikjara lill-intimati jew min minnhom personalment responsabbli, minghajr ebda limitazzjoni ta` responsabbilta` ghal kull jew ghal xi dejn jew responsabbiltajiet ohra assunti minn CNJ International Ltd skond l-Artikolu 315(1) tal-Kap 386, inkluz dak dovut lir-rikorrenti skond id-decizjoni*

*datata 30 ta` April 2015 fl-ismijiet "Catherine Buhagiar u Frank Buhagiar vs CNJ International Ltd", (Rik Gur numru 1013/13);*

*3) Tordna lill-intimati jew min minnhom ihallsu lill-esponenti s-somma ta` tnejn u sebghin elf erba` mija wiehed u sebghin Ewro tnejn u tmenin centezmu (€72,471.82) skond id-decizjoni tal-Prim` Awla tal-Qorti Civili fl-ismijiet "Catherine Buhagiar u Frank Buhagiar vs CNJ International Ltd" (Rik Gur numru 1013/13) datata 30 ta` April 2015;*

*4) Bl-ispejjez tal-istanzi kollha kontra l-intimati, inkluz dak tal-mandat ta` sekwestru kawtelatorju bin-numru 591/2017 intavolat kontestwalment mal-odjerna kawza.*

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

Rat ir-risposta gumentata prezentata fid-19 ta` Gunju 2017 li taqra :-

*1. Illi s-socjeta` kummercjali CNJ International Ltd waqfet l-operat taghha kawza ta` cirkustanzi esterni u diffikultajiet finanzjarji sussegwenti li fuqhom ma kellhiex kontroll;*

*2. Illi d-diretturi tal-istess socjeta` kummercjali agixxew korrettament u ma humiex responsabbli ghall-falliment u ghad-djun tal-istess socjeta`;*

*3. Illi ghall-kuntrarju ta` dak allegat mir-rikorrenti, mill-fatti u s-sentenzi citati fir-rikors promotur ma jirrizulta bl-ebda mod illi s-socjeta` CNJ International Ltd ma kinetx qed titmexxa b`mod xieraq jew li addirittura kienet qed titmexxa b`mod frawdolenti ghad-dannu tal-kredituri;*

*4. Illi pjuttost fis-sentenza tal-Prim`Awla tal-Qorti Civili Catherine Buhagiar et vs CNJ International Ltd moghtija fid-29 ta` Frar 2016, din l-Onorabbli Qorti ma laqghetx l-allegazzjoni tar-rikorrenti li sar xi kummerc bi frodi;*

5. *Illi l-istess attrici Catherine Buhagiar dejjem kienet a konoxxenza tal-profil, tar-riskji u tal-assi li kellha s-socjetà CNJ International Ltd u li ghalhekk ma seta` qatt ikun hemm malizzja jew mala fede minn naha tad-diretturi intimati;*

6. *Illi minghajr pregudizzju ghas-suespost, il-pretensjonijiet tar-rikorrenti huma kkontestati u meqjusa infondati fil-fatt u fid-dritt u fi kwalunkwe kaz ghandhom jigu pprovati mir-rikorrenti;*

*Ghaldaqstant, u in vista tas-suespost, l-esponenti jitolbu lil din l-Onorabbli Qorti joghgobha tichad it-talbiet tar-rikorrenti bhala infondati fil-fatt u fid-dritt, bl-ispejjez inkluzi tal-mandati kontra l-istess rikorrenti.*

Rat il-lista tax-xhieda.

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

Rat id-digriet li tat fl-1 ta` Frar 2016 fejn ordnat li jigu allegati l-atti tal-kawza fl-ismijiet *Catherine Buhagiar et vs CNJ International Limited (Rik. Gur. Nru. 1013/13 JZM)*.

Rat id-digriet li tat fit-22 ta` Gunju 2017 fejn ordnat li jigu allegati l-atti tax-xoljiment u tal-istralc tal-kumpannija CNJ International Limited.

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

Rat in-noti ta` osservazzjonijiet tal-partijiet.

Rat l-atti l-ohra tal-kawza inkluz l-atti allegati.

## **II. Analizi tal-provi**

## 1. Lx-xiehda tal-attrici

L-attrici xehdet illi hija kienet iltaqghet ma` Claudio Caruana (“Caruana”) il-gym li kellu fil-Lukanda Jerma Palace, Marsaskala. Hija kellha hanut tal-istationery u l-konvenut gieli xtara xi affarijiet minghandha ghall-gym. Fil-frattemp l-intimat kien ukoll igib minn barra ATV's u dghajjes. Peress li ma kellux wisgha fejn izommhom, hi u zewgha accettaw li jzommu dghajsa tal-intimat fil-garage taghhom. Wara li biegh din id-dghajsa, Caruana gab ohra u rega` poggiha fil-garage taghhom. Ir-relazzjoni bejn il-partijiet kienet tajba.

Kompliet tixhed illi kien Settembru tal-2004 meta l-konvenut talabha tisilfu s-somma ta` Lm10,000 sabiex ihallas xi dejn illi kellu. Hi accettat u saret skrittura b`dan illi l-ammont misluf kellu jigi restitwit fl-2006 bl-imghax kif miftiehem bejniethom.

Stqarret illi intant Caruana hajjarha biex tikseb self mill-bank biex flimkien mieghu jibdew igibu xoghol minn barra. Il-konvenut ma riedx jidher hu mal-bank ; ghala baqa` ma spjegax. Hi u zewgha accettaw. Ha self mill-bank ta` Lm 30,000 u ghamlu tajjeb bid-dar taz-zwieg. Ftehm u li jibdew jimportaw xoghol mic-Cina. Fl-2005 hi u Caruana marru Taiwan. L-attrici ghamlet tajjeb ghall-ispejjez ghaliex l-intimat ma kellux flus ghall-vjagg. Ghax-xoghol li ordna l-konvenut dejjem hallset hi mill-flus li kienet issellfet mill-bank. L-intiza ma` Caruana kienet illi jhallasha lura l-kapital flimkien ma` percentwali ta` 10%. Ghalkemm irceviet hlasijiet minghand il-konvenut il-pagamenti ma kienux fissi u regolari. Maz-zmien l-intimat beda jaqa` lura ghax kien ighid illi ma kellux flus.

Xehdet illi wara li ghalqet il-Lukanda Jerma Palace l-intimat beda negozju fit-Tunezija. Kien Gunju tal-2006 meta l-konvenut stieden lill-attrici sabiex tmur Tunis ghall-ftuh ta` showroom.

Qalet illi xhin saret taf illi l-kredituri tal-konvenuti bdew jippressaw fuqu biex ihallashom hija nsistiet mieghu li ssir skrittura dwar it-Lm 30,000 li kienet silfet lill-konvenut. Kien biss meta giet biex issir l-iskrittura illi saret taf bil-kumpannija CNJ International Ltd. Meta giet biex tiffirma ma qaghditx tindaga jew tistaqsi dwar il-kumpannija ghaliex ghaliha l-importanti kien illi jkollha bil-

miktub dwar il-flus li kellha tiehu. Lanqas ma indagat jekk in-neozju li l-konvenut kellu fit-Tunezija kienx ghadu ghaddej.

## **2. Il-kuntratt tal-25 ta` April 2008**

Bil-ftehim tal-25 ta` April 2008, CNJ International Ltd ikkostitwiet ruhha bhala debitrici tal-attrici fl-ammont ta` €107,150 (Dok CB1). L-attrici kellha tithallas l-ammont ta` €30,281.95 bi *standing order*, u hlasijiet mensili ta` €931.75.

## **3. Il-hlasijiet**

L-ahhar li thallset l-attrici kien fi Frar 2010 waqt illi l-ahhar komunikazzjoni bejn il-partijiet kienet Lulju tal-2010.

L-attrici tispjega illi hija qatt ma nghatat raguni ghaliex l-intimat ma kellux flus. Ma kenitx edotta mill-qaghda finanzjarja tieghu ; u wisq inqas a konoxxenza tal-qaghda finanzjarja ta` CNJ International Ltd.

## **4. Proceduri gudizzjarji**

### **a) Mandat ta` sekwestru kawtelatorju bin-nru. 1628/2013**

Sar mandat ta` sekwestru kawtelatorju bin-nru. 1628/2013 kontra CNJ International Ltd.

### **b) Ir-rikors guramentat nru. 1013/2013 JZM**

Fit-22 ta` Ottubru 2013, l-atturi pprezentaw rikors guramentat bin-nru. 1013/2013 kontra CNJ International Ltd ghall-hlas tal-ammont ta` €84,076.31.

Fis-sentenza taghha tat-30 ta` April 2015, din il-Qorti kif presjeduta ghamlet dawn il-konsiderazzjonijiet :-

*“Ir-risoluzzjoni tal-kwistjoni li ghandha quddiemha din il-Qorti hija mpernjata fuq l-interpretazzjoni tad-dokument datat 25 ta` April 2008 u esebit mill-atturi a fol 5 tal-process. Fid-dokument jinghad inter alia illi Claudio Caruana ghal CNJ “is to reimburse to Mrs Buhagiar the sum of Euros 107,150.00 ... which sum was invested by Mrs Buhagair in the above mentioned company.”*

*Il-Qorti tinsab rinfaccjata b`zewg verzonijiet konfliggenti : min-naha wahda l-attrici li ssostni li si trattava ta` self u ghalhekk lilha ghandu jigi rifuz l-ammont dovut lilha bl-imghax ta` 8% fis-sena ; u min-naha l-ohra, CNJ rappresentata minn Claudio Caruana li l-flus li harget l-attrici kienu investment u kwindi t-talbiet attrici kienu nfondati.*

...

*Jirrizulta mill-ftehim illi CNJ kellha taghti lura lill-attrici s-somma originali ta` €107,150. Jekk tassew – kif isostni Claudio Caruana – li dak li erogat l-attrici kien investment (mhux self) ma kellu jkun hemm l-ebda ragun ghala CNJ kellha tobbliga ruhha li trodd lill-attrici il-flus li din kienet harget. Jekk dak kien investment, il-fatti kienu jisvolgu xort`ohra.*

*Mid-dokument in kwistjoni tirrizulta l-modalita` ta` kif l-attrici kellha tircievi r-rifuzjoni. Dan ifisser li kien patwit bil-preciz bejn il-partijiet l-ammont li kellha tiehu lura l-attrici u kif. Punti dawn li jikkostitwixxu prova tal-jedd tal-attrici li tiehu lura l-ammont in kwistjoni.*

*Jirrizulta li fuq il-bilanc li kellu jithallas lill-attrici kellu jiddekorri favur taghha imghax a scaletta ta` 8% fis-sena. Investment - kif imfisser minn Claudio Caruana – ma kienx se jirrendi imghax b`rata pre-stabbilita u a scaletta. Meta si tratta ta` investment,*



*kif ried ifissru Claudio Caruana, ghandek riskju qawwi li l-flus investiti ma jigux irkuprati jekk in-negozju jmur hazin.*

*Hemm imbaghad il-konferma da parti ta` Claudio Caruana ghal CNJ illi ... “2. Mr Caruana will do all efforts, possibly to effect a separate substantial payment to reduce the balance as soon as possible.” Investiment ma jahdimx hekk. Hawn si tratta ta` obbligazzjoni li tissupera bil-qabda semplici investiment. Fil-ftehim insibu obbligazzjoni di dare – vera u propja.*

*Huwa altru milli evidenti illi mill-assjem tal-ftehim, CNJ ittentat tiggranfa mal-kliem “which sum was invested by Mrs Buhagiar in the above mentioned company.”*

*Il-Qorti tinnota li l-fatt illi preciz qabel dik il-frazi, hemm imnizzel li CNJ trid taghti lura lill-attrici s-somma ta` €107,150 inehhi kwalunkwe dubju li setghet holqot l-frazi `invested`. Li trid tghid il-Qorti huwa li mhuxwix eskluż li l-ammonti li sborsat l-attrici kienu investiti mill-kumpannija konvenuta fin-negozju taghha. B`daqshekk pero` ma jfissirx li l-attrici saret investitrici fil-kumpannija b`tali mod li l-esbors taghha ta` flus sar haga wahda mal-fondi tal-kumpannija, u allura jekk imur hazin in-negozju tal-kumpannija, tmur hazin l-attrici wkoll.*

*Mhux hekk kien il-kaz. Jirrizulta bl-aktar mod car u inekwivoku illi bl-adezzjoni taghha ghall-iskrittura de qua, il-kumpannija konvenuta kienet qeghda tassumi fuqha l-obbligazzjoni li trodd lura lill-attrici mhux biss il-kapital versat minnha izda anke l-imghax ta` 8% fis-sena a scaletta.*

*Li kieku l-flus li harget l-attrici kienu tassew investiment, CNJ ma kien ikollha l-ebda obbligu li tiffirma il-ftehim de quo.*

***Addirittura** – tirrileva b`enfasi din il-Qorti – jirrizulta li l-ftehim de quo kien abbozzat minn Claudio Caruana*

*stess, li jfisser li Caruana kien edott b`kull ma kien jinvolvi l-ftehim, fejn si trattava tal-obbligazzjonijiet tal-kontraenti.*

*Dan kollu premiss, il-Qorti sejra taghti effett ghall-obbligazzjonijiet kollha li jemergu mill-iskrittura de qua, ladarba kien specificat patwit illi l-attrici kellha tkun rimborsata u ladarba l-validita` tal-iskrittura ma kenitx kontestata.*

...

*L-iskrittura tnehhi kull dubju ghaliex tistabilixxi li l-attrici hija kreditrici ta` CNJ. Din hija l-ottika legali korretta li ghandha tinghata ghar-relazzjoni guridika li twieldet bejn il-partijiet mal-firma tal-iskrittura.*

...

*Din il-Qorti ghandha provi bizejjed li, meta jigu sottoposti ghall-kejl tal-bilanc ta` probabilitajiet, iwassluha biex tikkonkludi li l-attrici hija kreditrici tal-kumpannija konvenuta. Mill-provi rrizulta, li wara li kien konkluz il-ftehim de quo, Claudio Caruana ghal CNJ hallas ratealment sakemm waqaf ihallas ghal kollox meta l-cashflow ta` CNJ marret ghall-aghar.”*

Il-kawza kienet deciza kontra CNJ International ghall-ammont ta` €72,471.82, apparti l-imghax u l-ispejjez skont kif indikat fis-sentenza.

**Minn din id-decizjoni ma kienx hemm appell u ghalhekk saret *res judicata*.**

**c) Mandat ta` sekwestru ezekuttiv bin-nru. 809/2015**

Fil-25 ta` Mejju 2015 l-atturi pprezentaw mandat ta` sekwestru ezekuttiv kontra CNJ International Ltd. Is-sekwestratarji ma ghamlu ebda depozitu.

d) **Ir-rikors nru. 1208/2015 JZM**

Peress illi minkejja n-notifika tal-mandat ta` sekwestru eżekuttiv, CNJ International Ltd baqgħet ma hallset xejn mill-ammont li kien dovut lill-atturi skont is-sentenza fil-kawza nru. 1013/2013 JZM, fil-21 ta` Dicembru 2015, l-atturi pprezentaw procediment għax-xoljiment u l-istralc tal-istess kumpannija fuq il-kawzali li l-kumpannija ma kenitx f`qagħda li thallas id-djun tagħha. Bi provvediment tal-21 ta` Frar 2016 mogħti minn din il-Qorti kif presjeduta, il-kumpannija kienet dikjarat xjolta u nhatar stralcjarju.

Dwar l-istralc, l-attrici rrimarkat illi minkejja dak dikjarat mill-konvenut illi CNJ International Ltd kienet bdiet tiffaccja problemi finanzjarji biss mill-2008, effettivament kif irrizulta mir-rapport tal-istralcjarju tad-29 ta` Settembru 2016, il-problemi finanzjarji bdew aktar lura fis-snin mill-2003. Kien dan iz-zmien meta Caruana beda jitlobha tisilfu l-flus.

e) **Il-kawza tal-lum**

Fl-affidavit tagħha a fol 192 et seq. **l-attrici** tghid :-

*“kien l-istess Claudio Caruana illi allega illi jien kont investajt flus fis-socjeta` CNJ International Ltd, meta l-ewwel nett, hu kien jaf fic-cert illi jien ma kontx għamilt investiment imma self, u fit-tieni stadju nerga nghid illi qatt ma qalli li l-istess socjeta li għaliha kien talabni l-flus ma kinitx qieghda tiggera bizzejjed negozju sabiex tkun tista thallasni lura kif fethimna.*

*Għaldaqstant jien nifhem li Claudio Caruana b`mod dishonest għazel li jissellef flus minghandi biex ikompli jmexxi s-socjeta tieghu bihom minghajr ma jinfurmani b`dan, meta kien jaf li l-kumpanija kienet f`qagħda hazina, konxjament għazel li jiehu riskju bi flusi minghajr ma jinfurmani bil-pjan tieghu.*

*... Ghalkemm Claudio Caruana bhala wiehed mid-diretturi ta` CNJ International Limited kien qalli illi*

*jien kont ser nithallas dak kollu li jien dovuta, hu fl-ebda hin matul is-snin sa kemm bdejt il-kawza ma qalli illi ma kien hemm l-ebda prospett illi jien, bhala kreditrici, nithallas lura, la minghandu u lanqas mill-assi tas-socjeta.*

*Illi Claudio qarraq bija danil-ghaliex jien dejjem sellift il-flus lili u hu meta gie biex ihallasni lura inheba wara l-kumpanija, kumpanija li lili qatt ma semmieli, lanqas meta talabni l-flus.*

*Nghid illi jien qatt ma rajt l-accounts tal-kumpanija CNJ International Limited u ma kont naf xejn dwara. Infatti jien sirt naf li hemm ommu direttura tal-kumpanija CNJ International huwa meta infethu l-proceduri quddiem din l-Onorabbli Qorti. Lili qatt ma semmieli li hu kien se jfalli jew li kien sejjer hazin u li effettivament kien se jaghlaq kollox, lili meta talabni biex insellfu dejjem kien jghidli li se jhallasni lura u bl-interessi.”*

**L-attur** ikkonferma x-xieha tal-attrici martu.

**Claudio Caruana** xehed illi huwa kellu problema ta`cashflow u talab lill-attrici tisilfu Lm10,000. L-attrici accettat u saret skrittura. L-attrici thallset lura.

Xehed illi huwa kien id-Direttur Manigerjali ta` CNJ International Ltd li kellha negozju konsistenti fl-importazzjoni u bejgh ta` jet skis u quad bikes sia Malta kif ukoll fit-Tunezija. Kienet ukoll tiehu hsieb it-tmexxija ta` fitness centres fil-Jerma Palace Hotel u l-Mistra Village. Dan in-negozju kellu jieqaf meta ghalqu l-Jerma Palace Hotel u l-Mistra Village.

Rigward in-negozju fit-Tunezija, dan beda fl-2006. Investa sabiex rama showroom, xtara stock u beda jhaddem in-nies. Minn tieghu hareg Lm50,000 sabiex jiffinanzja dan in-negozju.

Sahaq illi l-attrici kienet taf li kienu qeghdin jigu investiti flus f`dak in-negozju ; sahanitra marret it-Tunezija kemm il-darba sia biex tara x-xoghol u kif ukoll biex tigbor xi flus. Huwa kellu *business cards* bl-isem ta` CNJ International Ltd li gieli qassam minnhom waqt laqghat relatati man-negozju li ghalihom kienet prezenti l-attrici wkoll.

Fisser illi n-negozju fit-Tunezija mar lura meta saret ir-rivoluzzjoni.

Qal illi l-istokk li kellu t-Tunezija hadulu l- *partner* tieghu fin-negozju. Ighid illi ghalkemm irrapporta lill-pulizija go Tunis, u pprova jiehu passi legali kontra l-*partner* tieghu dan baqa` ma nstabx mill-awtoritajiet. Kull ma garrab fit-Tunezija kien minhabba cirkostanzi li fuqhom ma kellux kontroll.

Stqarr illi ghalkemm ma kienx ikun Malta, xorta wahda kien isegwi n-negozju u kien konxju tad-dhul u l-hrug fil-kontijiet tal-kumpanija.

Jishaq illi “*dejjem mexxejt in-negozju bl-ikbar responsabbilita u dan jinkludi t-thaddim tal-flus u tal-kontijiet bankarji.*” (fol. 827)

Rigward l-awditjar tal-kontijiet tal-kumpanija, Caruana jghid hekk fl-affidavit tieghu (ara fol 826 et seq) :-

*“... fir-rigward tal-awditjar tal-Accounts tas-sena 1999, 2000 u 2001, dawn saru mill-awditur Louis Padovani u kont anki hallastu sabiex jipprezenta dawn l-accounts l-MFSA izda jidher li ghal xi raguni ma kienx ghamel dan, sal-punt li minhabba f`hekk kellinsib awditur iehor. Infatti nghid li l-awditjar tas-snin 2002 u 2003 fdajtu f`idejn l-awditur Richard Saliba. Jien ghandi kopji ta` dawn l-accounts kollha li jkopru s-snin 1999-2003.*”

*Imbaghad ghas-snin 2004 u 2005, kont tajt il-files kollha li kelli lill-istess awditur Richard Saliba u dan hejja l-provisional accounts ghal dawn is-snin.”*

Il-konvenut ipprezenta sett ta` dokumenti sabiex juri li kienu gew preparati l-*financial statements* ghas-snin 1998 sa 2003.

Dwar il-kont tal-bank tal-kumpannija izda li kien fl-isem ta` ohtu Nadia Caruana, stqarr illi sar hekk ghall-fini ta` pratticita` bil-ghan li l-pagamenti jibqghu ghaddejjin.

Cahad dak li allegat l-attrici illi huwa prova jiffrodaha.

Sahaq illi sa mill-2004, meta beda n-negozju ta` bejniethom, l-attrici dejjem kienet a konoxxenza tan-negozju kif kien sejjer ghaliex kienet tinteressa ruhha u kienu jiddiskutu sewwa l-andament tan-negozju.

Fil-**kontro-ezami** xehed illi l-operat fit-Tunezija beda ftit xhur wara li ghalqet il-Lukanda Jerma. Wara li din tal-ahhar ghalqet, il-kuntatt mal-attur baqa` ghaddej. Insista li l-attrici kienet taf bin-negozju tat-Tunezija ghaliex meta gietu din l-idea li jiftah negozju hemm kienu btala propju fit-Tunezija bil-familji taghhom.

Qal li n-negozju tat-Tunezija kien jitmexxa minn kumpannija bl-isem CNJ Tunisia, li kienet registrata hemm. Ighid li huwa kien direttur taghha.

Kompla jghid illi C&J International Ltd ma kellha x`taqsam xejn ma` CNJ Tunisia. Din tal-ahhar kellha General Manager, cittadin Tunezin, li kien azzjonista. Stqarr illi ghan-negozju fit-Tunezija huwa kien investa flus li gew kemm minghand CNJ International Ltd kif ukoll minn flus tieghu personalment. L-investment tieghu de proprio kien ta` €50,000.

Spjega illi huwa kien izomm lill-attrici nfirmata bl-andament tan-negozju.

Xehed illi huwa minnu li kien hemm zmien meta ma sarux hlasijiet lill-attrici, pero` stqarr illi kien jaghti lill-attrici taghrif dwar in-negozju ; dan kien

jaghmlu sew meta hi kienet tmur it-Tunezija ; kif ukoll meta huwa kien ikun Malta.

Sahaq li r-rivoluzzjoni gabitu dahru mal-hajt.

Ikkonferma illi l-ahhar *audited accounts* saru fl-2003. Ghalkemm saru kontijiet provvizorji ghas-snin 2004 u 2005, audit baqa` ma sarx, u ghalhekk ma kien prezentat xejn lir-Registratur tal-Kumpanniji.

Stqarr illi hu u l-attrici marru Taiwan fl-2005. La ma kienx sar audit ghal dik is-sena u ta` qabel, ma kellu xejn x`juriha. Spjega illi ghalkemm ma kellux accounts xorta wahda kien jaf ezatt x`kien ghaddej fin-negozju. Zied jghid illi ladarba l-attrici kienet interessata tiftah negozju mieghu ghalih dak kien ifisser li l-attrici kienet taf x`kienet il-qaghda tan-negozju. Kienet taf dan mhux mid-dokumenti izda ghaliex kienet tara l-attivita` ghaddejja.

Fisser illi CNJ International Ltd kienet tesporta x-xoghol lejn it-Tunezija u tithallas tieghu minn CNJ Tunisia. Kien isir hekk ghal skop ta` *invoicing*.

**Prokuratur Legali Quinten Tanti** – Rapprezentant tar-Registratur tal-Kumpanniji – ipprezenta dokumenti.

**Av. Dr. Kevan Azzopardi** – Ricevitur Ufficjali – u – Stralcjarju ta` CNJ International Limited – xehed illi skont id-dikjarazzjoni illi kien ircieva minghand Claudio Caruana *qua* direttur ta` CNJ International Ltd il-kumpannija kienet qeghda tippercepixxi r-rikavat tal-hidma taghha principalment mill-Jerma Palace Hotel.

Kompla jixhed illi meta l-lukanda bdiet sejra hazin, CNJ International Ltd bdiet tiffaccja diffikultajiet finanzjarji u baqghet serja lura sakemm ghalqet fl-2010.

Ighid illi mill-informazzjoni li rcieva minghand Claudio Caruana, il-kumpannija kellha wkoll negozju fit-Tunezija. Milli qallu Caruana, meta bdiet

ir-revoluzzjoni hemm, in-negozju ha daqqa sewwa lura sakemm intilef ghal kollox.

Xehed illi huwa qaghad fuq dak dikjarat minn Claudio Caruana, ghalkemm qies dak li kien riportat fil-*financial statements* ta` CNJ International Ltd. L-ahhar *financial statements* li kienu prezentati kienu daww għall-2003. Għas-snin ta` wara ma kienux prezentati *financial statements*.

Ikkonferma r-rapport tiegħu.

Xehed illi senjatament a fol 493 paragrafu 6 qal hekk :-

*“Fil-fehma tal-esponenti hemm bzonn ta` stharrig ulterjuri dwar xi aspetti li għandhom x`jaqsmu mal-kumpannija u dan peress li l-ufficjali tal-kumpannija xolta għal xi raguni ma mxewx skond ir-regoli u l-ligijiet billi dawn baqghu ma ipprezentawx kontijiet finanzjarji kif mitlub mill-Att dwar il-Kumpannija, Kap 386 tal-Ligijiet ta` Malta, u hallew lil kull min kellu relazzjoni mal-kumpannija fil-ghama.”*

Kompla jixhed illi huwa xtaq jintavola r-rendikonti tat-taxxa li kienu neqsin, pero` sabiex jagħmel dan kien jehtieg il-kollaborazzjoni tad-diretturi għall-fini tal-ghoti ta` dikjarazzjoni dwar l-introjt u meno tal-kumpannija in kwistjoni. Din l-informazzjoni tant mehtiega għalih baqghet ma waslet qatt. Għalhekk ir-rendikonti baqghu ma gewx ipprezentati.

Stqarr illi ma rrizultax li qatt kien hemm xi *cash injection* fil-kumpannija. Il-kapital tal-kumpannija baqa` dak tal-bidu li kienet iffurmata.

Mistoqsi mill-qorti : *jekk inti ndagajtx għaliex il-financial statements ma pprezentahomx, ghax traskurat, ghax irid jahbi xi haga ? Għaliex kien hemm l-awditur u hallewhomlu hemm ? ... Din l-azzjoni. Fraudulent trading qed naghmlu hawn, indagajtx jew le ?”* it-twegiba tal-istralcjarju kienet illi huwa qaghad fuq dak li qallu Claudio Caruana.



**Louis Padovani** xehed illi huwa kien awditur ta` CNJ International Ltd. Ghalkemm kien a konoxzenza tal-fatt illi omm u oht il-konvenut kienu involuti fil-gestjoni tal-kumpannija, effettivament, l-uniku direttur li huwa kellu kuntatt mieghu kien Claudio Caruana.

Xehed illi huwa ghamel biss l-audit tal-1999 ghaliex l-intimat ma kienx jghaddielu d-dokumenti mehtiega sabiex issir l-audit. Abbazi tal-audited accounts tal-1999 il-kumpannija *“kellha turnover ta` Lm70,000 u kellha net profit affarijiet zghar Lm 578, balance sheet was very very small in my opinion, kull ma kellek tangible assets ta Lm9,000. ... u kellha xi shareholder`s loan ta` Lm 43,000 ... Lm 36,000 minnhom kienu bank draft”* (fol. 183).

Mill-**Bank of Valletta plc** kienu prezentati l-istatements tal-kontijiet li kellhom CNJ International Ltd, Claudio Caruana, Josephine Caruana u Nadia Caruana.

Fuq CNJ International Ltd kien hemm diversi kontijiet b`ammonti relattivament zghar, uhud sahanistra b`bilanc ta` ftit centezmi jew addirittura b`bilanc zero.

Fuq isem Claudio Caruana personalment, kien hemm kont wiehed biss li fl-2015 kien fih bilanc ta` €1956.10.

Fuq isem Nadia Caruana personalment, irrizulta illi kien hemm diversi kontijiet bankarji : savings ; overdraft ; u house loans. L-ikbar ammont ta` flus depozitati rrizulta illi kien fis-savings.

Fuq isem Nadia Caruana T/A Societe CNJ Tunisia jidher kont nru 40012209655 b`diversi transazzjonijiet bejn 2009 u 2011. Fid-19 ta` Frar 2011, il-kont kellu zero balance. Skont ma jirrizulta, sar pagament principali wiehed fit-22 ta` Frar 2010 fl-ammont ta` €23,654.83 liema pagament sar lil Societe` Commerciale Euro u huwa deskritt li sar ghal “Import of Bug Racer”. Hlas iehor kien ta` €10,024.15 fis-27 ta` Frar 2010 lil Her Chee Industrial Co Ltd u huwa deskritt bhala *“part payment till receipt of LLC”*. Jidher ukoll illi minn dak il-

kont kienu saru numru ta` pagamenti favur l-attrici fl-ammont ta` €931.75 kull wiehed.

Nadia Caruana xehdet illi hija tigi oht il-konvenut Claudio Caruana u bint il-konvenuta Josephine Caruana.

Xehdet illi kienet impjegata ta` CNJ International Ltd. Parti mix-xoghol taghha kien li tiehu hsieb il-gbir tal-flus u d-depoziti fil-banek. L-accounts kienu jinzammu mill-accountant u l-awditur. Ikkonfermat illi kien hemm kontijiet il-bank sija fl-isem personali taghha kif ukoll fl-isem tal-kumpannija. Kienet tiddistingwi l-appartenenza tal-flus depozitati mill-fatt illi l-kontijiet bankarji taghha ma kienx ikun fihom flus.

Qalet illi fl-isem personali taghha kien hemm kont savings. Dawn kienu flus taghha. Kien hemm kont kurrenti li kien tal-kumpannija. Mill-kont li kien f` isimha izda li kien tal-kumpannija gieli saru xi pagamenti. Kien isir hekk sabiex id-day-to-day business jibqa` tal-kumpannija jibqa` ghaddej meta huha kien ikun imsiefer, haga li kienet tkun ta` spiss.

Dwar ix-xoghol kienet tiehu struzzjionijiet minghand il-konvenuti.

Stqarret illi kienet taf lill-attrici. Bejniethom zviluppat hbiberija kbira li kienet tmur oltre n-negozju. Taf li l-attrici u l-konvenut kien jaghmlu negozju flimkien ; gieli anke ghaddietlu xi flus, sahansitra b`depoziti fil-kont bankarju tal-kumpannija, li kien fuq isimha. Depoziti go dan il-kont gieli saru mill-attrici stess.

Kompliet tixhed illi hija qatt ma kienet involuta fin-negozju ta` bejn l-attrici u l-intimat u ghalkemm taf ukoll bin-negozju li kellu t-Tunezija hija ma kellhiex involvement fih. Taf li l-attrici li l-attrici u l-intimat siefru diversi drabi lejn it-Tunezija u li kull meta tkellmu dejjem deher illi n-negozju fit-Tunezija kien sejjer tajjeb. Baqa` sejjer tajjeb sakemm bdiet ir-revoluzzjoni. Skont it-testi, in-negozju "*sfaxxa*" (fol 812).

Qalet illi safejn taf hi l-qagħda finanzjarja ta` CNJ International Ltd kienet tajba fiz-zmien meta l-attrici silfet il-flus.

Tghid illi n-negozju waqa` mill-ewwel malli bdiet ir-revoluzzjoni t-Tunezija u wara li għalqet il-Jerma Palace Hotel. Safejn taf hi, ir-rivoluzzjoni giet qabel l-gheluq tal-lukanda.

Stqarret illi l-attrici kienet taf li n-negozju kien sejjer hazin tant li offriet illi tagħti għajjnuna finanzjarja.

Il-kuntatt tagħha mal-attrici ntemm għal kollox meta għalqet il-lukanda.

**Richard Saliba** xehed illi l-professjoni tiegħu hija dik ta` accountant u awditur.

Xehed illi Claudio Caruana bhala direttur ta` CNJ International Ltd kien kellmu fl-2004 sabiex ihejji l-accounts, x`aktarx għas-snin 2002, 2003 u 2004 pero` dawn qatt ma gew iffinalizzati għaliex Caruana ma kienx rega` kellmu. Ipprova "jigri wara" Caruana sabiex jagħluq l-accounts u halli wara jkun hemm audit pero kien infurmat illi Caruana kien siefer.

### III. **L-Art 315 tal-Kap 386**

L-atturi mexxew bl-istanza odjerna abbazi tal-**Art 315 tal-Kap 386** li jaqra hekk :-

*(1) Jekk waqt l-istralc ta` kumpannija sew jekk b`ordni tal-qorti jew volontarjament ikun jidher li xi negozju tal-kumpannija jkun tmexxa bil-hsieb ta` frodi ta` kredituri tal-kumpannija jew ta` kredituri ta` xi persuna ohra jew bil-ghan ta` frodi, il-qorti tista` fuq rikors tar-ricevitur ufficjali, jew tal-istralcjarju jew ta` xi kreditur jew ta` xi kontributorju tal-kumpannija, jekk jidhrilha xieraq li tagħmel hekk, tiddikjara li xi persuni li xjentement kienu partijiet fit-tmexxija tan-*

*negozju bil-mod qabel imsemmi tkun responsabbli personalment, minghajr ebda limitazzjoni ta` responsabbiltà ghal kull jew ghal xi dejn jew responsabbiltajiet ohra tal-kumpannija kif il-qorti tista` tordna.*

*(2) Meta n-negozju ta` kumpannija jitmexxa b`dak il-hsieb jew ghal dawk l-ghanijiet hekk kif imsemmija fis-subartikolu (1), kull persuna li xjentement tkun parti fit-tmexxija tan-negozju kif intqal qabel, tkun hatja ta` reat u tista` tehel meta tinstab hatja multa ta` mhux aktar minn mitejn u tnejn u tletin elf u disa` mija u sebgha u tletin euro u erbgha u tletin centezmu (232,937.34) jew prigunerija ghal perijodu ta` mhux aktar minn hames snin jew dik il-multa u prigunerija flimkien.*

**Minn qari ta` z-zewg subartikoli li jaghmlu d-disposizzjoni huwa bil-wisq evidenti li l-ewwel subartikolu jirregola l-aspetti civili tal-materja filwaqt li t-tieni subartikolu jittratta dawk kriminali.**

**Ghall-fini tal-procediment tal-lum, dak rilevanti huwa dak li jinghad fl-ewwel subartikolu.**

Il-kummerc bi frodi kif jirrizulta fl-Art 315 tal-Att dwar il-Kumpannija tal-1995 ha svolta determinanti fil-gurisprudenza taghna fil-kawzi hekk maghrufa bhala tal-*Price Club*<sup>1</sup>.

Jidher illi l-mudell ta` l-Art 315 jinsab fil-ligi Ingliza.

Tajjeb jinghad illi l-kummerc bi frodi kien introdott ghall-ewwel darba fil-ligi Ingliza fil-Companies Act 1928.

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<sup>1</sup>**Valle del Miele Ltd vs Wallace Fino et**, Prim`Awla tal-Qorti Civili, 12 ta` Novembru, 2007; 27/2003 **Dr Andrew Borg Cardona noe vs Victor Zammit et**, Prim`Awla tal-Qorti Civili, 12 ta` Ottubru, 2007; 26/2003 **Dr Andrew Borg Cardona noe vs Victor Zammit et**, Prim`Awla tal-Qorti Civili, 12 ta` Ottubru, 2007; **Dr Andrew Borg Cardona noevs Victor Zammit et**, Qorti tal-Appell, 14 ta` Mejju, 2010

In segwitu fl-Ingilterra, saret konsolidazzjoni fil-Companies Act 1948.

**L-Art 332 tal-Companies Act 1948** kien jaqra hekk :-

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

*(2) Where the court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration, and in particular may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any company or person on his behalf, or any person claiming as assignee from or through the person liable or any company or person acting on his behalf, and may from time to time make such further order as may be necessary for the purpose of enforcing any charge imposed under this subsection.*

*For the purpose of this subsection, the expression "assignee" includes any person to whom or in whose favor, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration (not including*

*consideration by way of marriage) given in good faith and without notice of any of the matters on the ground of which the declaration is made.*

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

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

Tajjeb li jkompli jinghad illi fl-Ingilterra, id-disposizzjonijiet ta` natura penali kienu nkorporati fl-Art 458 tal-Companies Act 1985. Wara dawn kienu trasposti fl-Art 993 tal-Companies Act 2006.

**Fil-ligi Ingliza, id-disposizzjonijiet li jittrattaw ir-responsabbilita` personali, u cioe` dak li nsibu fl-Art 315(1) tal-Kap 386, kienu nkorporati fl-Art 213 ta` l-Insolvency Act 1986.**

**L-Art 213 tal-Insolvency Act 1986 ighid :-**

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

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

**Dan premiss, jidher illi l-legislatur Malti ried illi l-kummerc bi frodi fix-xenarju tad-dritt Malti jwassal ghal konsegwenzi civili u penali bis-sahha ta` disposizzjoni wahda u cioe` l-Art. 315 tal-Kap 386. Jidher illi ma riedx illi l-azzjoni civili u dik penali jkunu regolati b`ligijiet diversi kif gara fil-kaz tal-Ingilterra.**

**Il-Qorti tosserva wkoll illi waqt illi l-Art 213 tal-Insolvency Act 1986 serva bhala mudell ghall-Art 315 tal-Kap 386, jidher illi l-legislatur Malti ma adattatx id-disposizzjoni Ingliza fl-intier taghha ghal-ligi taghna.**

**Id-differenzi bejn l-Art 213 tal-Insolvency Act 1986 u l-Art 315 tal-Kap 386 huma essenzjalment tnejn:**

**i. Min ghandu dritt ta` azzjoni :**

Waqt illi fil-kaz tal-ligi Ingliza, id-dritt ta` azzjoni jispetta biss lill-istralcjarju, fil-kaz tal-ligi taghna, il-legislatur wessa` l-ghadd tal-persuni li jistghu jittentaw l-azzjoni civili u cioe` r-ricevitur ufficjali jew l-istralcjarju jew xi kreditur jew xi kontributorju tal-kumpannija.

**ii. Sejbien ta` responsabbilta` :**

Fil-kaz ta` sejbien ta` kummerc bi frodi, il-legislatur Malti wessa` l-effetti.

Infatti fil-kaz tal-**Art 213 tal-Insolvency Act 1986**, il-persuni li jirrizultaw responsabbli ta` kummerc bi frodi *are to be liable to make such contributions (if any) to the company`s assets as the court thinks proper.*

Mentri fil-kaz tal-**Art 315(1) tal-Kap 386** il-Qorti *may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid **be personally responsible, without any limitation of liability** for all or any of the debts or other liabilities of the company as the court may direct.* (enfasi u sottolinear ta` din il-Qorti).

Tajjeb jinghad ukoll li fil-ligi taghna l-azzjoni hija diretta kontra dawk “*il-persuni li xjentement kienu partijiet fit-tmexxija tan-negozju*”.

**Andrew Muscat** fil-Pag 256 u 257 ta` **Principles of Maltese Company Law** (MUP – 2007) ighid :-

*The provision imposes liability on the wrongdoer for “all or any of the debts or other liabilities of the company as the court may direct”. Clearly, therefore, the wrongdoer may be held liable not only for contractual obligations undertaken by the company, but also for any other form of obligation, including liability in tort and statutory claims against the company, whether liquidated or otherwise (...)*

*Moreover, it is evident that liability may be imposed on the wrongdoer not only in respect of losses suffered by the victims as a result of the fraud but also in respect of debts or liabilities of the company not connected with the fraud at all.*

Dwar il-persuna tal-konvenut fl-azzjoni skont l-Art 315 tal-Kap 386 **Andrew Muscat** (op. cit.) jikteb hekk fil-Pag 257 :-

*The provision can be invoked against any person involved in the fraud. Liability may therefore be imposed on directors, managers, shareholders and on any other person as long as they are knowingly parties to the fraud.”*



B`hekk skont l-awtur, l-azzjoni tista` tigi istitwita kontra kull persuna li tkun kompartecipi fil-frodi perpetrat.

**Dan premiss, u qabel tghaddi ghall-konsiderazzjoni tal-gurisprudenza tal-Qrati taghna dwar l-Art 315(1) tal-Kap 386, il-Qorti jidhrilha li jkun waqtu jekk tirreferi ghall-mod kif kienu trattati l-effetti civili tal-kummerc bi frodi fid-dottrina u l-gurisprudenza Ingliza safejn dan huwa rilevanti kemm ghall-istat tad-dritt taghna (*supra*) u ghall-kaz in ezami.**

#### **IV. Dottrina/Gurisprudenza Ingliza**

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

*Section 213(1) sets out the conduct that constitutes the action of fraudulent trading i.e. intent to defraud creditors or having a fraudulent purpose. Section 213(2) then states who is liable in civil action and for those who knowingly are parties to the carrying on of a business of a company with intent to defraud creditors. Such persons are liable to make such contributions to the company as the court thinks proper. Commonly the persons who will be the subject of such actions will be the company`s directors. But they are not the only ones who may, theoretically, be sued. In a recent decision Re BCCI Banque Arabe Internationale D`Investissment SA v. Morris [2002 – BCC – 407] Neuberger J. held that section 213(2) was not limited to those who managed or controlled the company that had failed. The learned judge said that a company that was involved in and assisted and benefited from the business of the failed company and did so knowingly could fall within section 213.*

...

*the notion of fraud is at the center of section 213. The interpretation given to the meaning of `fraud` has been of great importance. The meaning of the word has been the main issue that courts have had to address over the years, for fraud is difficult to define at the best of times, as it has different meanings in different contexts. The meaning of `carrying on business with intent to defraud` a phrase found in section 213 has never been defined statutorily and certainly when one considers the case law, one can see that there has not been a consistent approach adopted as far as the test that should be applied.*

...

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

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

*J. stated that dishonesty was a critical element in the action*

...

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

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

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

...

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

...

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

...

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

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

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

...

*Whether there has been intent to defraud is a question of fact to be determined in every case and a person`s intent usually has to be inferred from what the person did. The courts have said that some behaviour will usually give rise to an inference that there has been an intent to defraud. An example is inducing people to give credit to a company knowing that they will not be paid when they expect to be paid ... Similarly it can usually be inferred that there is intent to defraud if liability to “involuntary creditors” such as HM Revenue and Customs is incurred when there is no honest belief that the liability will be discharged when due, or shortly thereafter*

...

*However there is no rule that behaviour of a particular kind inevitably leads to a finding of intent of defraud.*

*For example, there is no rule that continuing to trade while insolvent is fraudulent.*

...

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

...

*The term “parties to the carrying on of the business” includes both the directors and so on who actively carried on the company’s business for a fraudulent purpose and persons such as financiers who encouraged the carrying on of the business for the fraudulent purpose without carrying with the business themselves*

...

*It is essential to show that a person who actively carried on the business did so with fraudulent intent before any other party can be made liable*

...

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

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

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

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

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

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

Wara l-kaz ta` **In Re Patrick and Lyon Limited** (1933) CJ 786 inghad illi rekvizit iehor ghall-azzjoni ta` kummerc bi frodi huwa illi l-attur kellu jipprova *“actual dishonesty involving ... real moral blame”*.

B`hekk inholqot linja ta` demarkazzjoni bejn *“actual dishonesty”* u *“mere blameworthiness”* fejn huwa biss fil-kaz ta` *actual dishonesty* li jkun hemm potenzjal li jkun sodisfatt il-kriterju ta` *“dolo”* li huwa necessarju ghal procediment ta` din ix-xorta.

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

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

Fil-kaz ta' "**R vs Cox & Hidges**" (1982), il-Qorti ta' l-Appell fl-Ingilterra sostniet illi :

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

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

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

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

## V. **Dottrina/gurisprudenza taghna**

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

*Illi ghal dik li hi definizzjoni ta' dolo ghadha tista' tigi utilment ripetuta anki llum dik ta' Labcone (fr. 1 :D.4.3)  
"dolum malum esse omnes camditatem fallaciam marbinationem ad circumverendum fallendum"*

*decipiendum alterum adhibitam*". Fi kliem iehor, id-dolo jikkonsisti fir-rieda hazina ta` wiehed mill-kontraenti li topera permezz ta` qerq (raggiri) biex tiddevja r-rieda tal-iehor billi tipprovaha zball (errore).

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

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

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

Tajjed jinghad illi fil-kaz tal-**Art 315(1) tal-Kap 386** ir-rekwizit illi "*any business of the company has been carried on with intent to defraud creditors*" fil-gurisprudenza Ingliza jista` jkun sodisfatt "*by a single transaction designed to*



*defraud a single creditor*". [ara **In Re Gerald Cooper Chemicals Ltd** (1978) Ch 262, (1978) 2 All E.R. 49]

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

Fis-sentenza tal-4 ta` Marzu 2010 din il-Qorti diversament presjeduta qalet hekk :-

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

*Il-provediment tal-ligi jimponi zewg kundizzjonijiet għall-applikazzjoni tal-istess. L-ewwel minn dawn il-kundizzjonijiet hi li s-socjeta` trid tkun fi stadju ta` stralc; sitwazzjoni li fil-kaz li għandha quddiemha, il-Qorti illum tezisti.*

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

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

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

*Professur Andrew Muscat ikompli :*

*"The test will however be satisfied where directors allow a company to incur credit when they have no reason to think that the creditors will ever be paid. It can also be satisfied where the directors obtain credit at a time when they have no good reason to believe that funds will*

*become available to pay the creditors when their debts become due or shortly thereafter”*

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

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

Minn din id-decizjoni kien hemm appell.

Fis-sentenza li tat fil-25 ta` Ottubru 2013, il-Qorti tal-Appell ghamlet dawn l-osservazzjonijiet :-

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

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

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

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

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

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

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

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

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

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

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

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

...

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

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

*whether the directors acted in creditor interests at a time when the company was in financial difficulty, is fairer in that it eliminates the risks endemic in ex ante action, and it is based upon what actually occurred, not what everyone guesses might occur.”*

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

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

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

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

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

*F`kaz sussegwenti (Re Patrick & Lyon, Limited (1933) gie deciz li l-intenzjoni to defraud u fraudulent purpose*

*jikkompreni “actual dishonesty involving, according to the current notions of fair trading among commercial men, real moral blame”.*

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

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

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

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

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

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

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

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

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

(ara wkoll is-sentenza ta` din il-Qorti kif presjeduta tas-7 ta` April 2011 fil-kawza "**Albert Mizzi nomine vs Noel Agius et**")

## **VI. Locus standi**

Skont l-Art 315(1) tal-Kap 386, l-azzjoni tigi promossa b`rikors :-



- 1 mir-ricevitur ufficjali ; jew
- 2 mill-istralcjarju ; jew
- 3 minn kreditur ; jew
- 4 minn kontributorju tal-kumpannija

Fil-kaz tal-lum, l-atturi ghandhom *locus standi* sabiex jistitwixxu l-azzjoni billi rrizulta li kienu kanonizzati **kredituri** ta` CNJ International Ltd b`sentenza ta` din il-Qorti kif presjeduta fil-kawza fl-ismijiet “**Catherine Buhagiar et vs CNJ International Ltd**” tat-30 ta` April 2015. Minn din is-sentenza ma kienx hemm appell u ghalhekk id-decizjoni ghaddiet in gudikat.

Jirrizulta ppruvat ukoll illi kemm fid-data tal-presentata ta` l-kawza tal-lum, u anke wara sal-lum, l-atturi baqghu ma thallsu xejn mill-kreditu tagghom.

## **VII. Il-legittimi kontraditturi**

L-azzjoni kienet promossa kontra dawk li kienu z-zewg diretturi ta` CNJ International Ltd.

Ghalhekk huma l-legittimi kontraditturi tal-atturi.

Irnexxielhomx l-atturi jaghmlu l-prova kif irid l-Art 315(1) kontra t-tnejn jew kontra xi wiehed jew wahda minnhom jirrizulta aktar `il quddiem.

## **VIII. L-ewwel u t-tieni talbiet**

Ir-rekwiziti tal-azzjoni *de qua* huma tnejn :-

1. li si tratta ta` kumpannija fi stat ta` stralc ;
2. dwar negozju tal-kumpannija li jkun tmexxa bil-hsieb ta` frodi tal-kredituri.

### **1. Stat ta` stralc**

**L-applikazzjoni tal-Art 315(1) tiskatta meta kumpanija tkun waqt stralc, u allura wara li tkun diga` giet xjolta.**

Dan l-istat ta` dritt kien riaffermat fis-sentenza ta` din il-Qorti diversament presjeduta tat-12 ta` Ottubru 2007 fil-kawza **“Valle Del Miele Limited vs Wallace Fino et”** (op. cit.). Hemm inghad :-

*“Il-ligi tal-kumpaniji, pero`, ma tipprovdux ghall-kaz ta` responsabbilita` illimitata tal-azjonisti jekk mhux fil-kaz ta` fraudulent jew wrongful trading. Fil-fatt dak li qed tallega s-socjeta` attrici jista` jinkwadra ruhu taht fraudulent jew wrongful trading, u dana peress li qed tallega li d-diretturi tal-kumpanija ghamlu zmien joperaw meta kellhom kumulu ta` debiti li kienu jafu li ma setghux ihallsu.*

*Ghalkemm l-agir lamentat jista` jwassal ghal dikjarazzjoni ta` responsabilita` personali tad-diretturi, tali responsabilita` personali tista` tigi dikjarata biss waqt li l-kumpanija tkun fi process ta` stralc, u dana a tenur talartikolu 315 u 316 tal-imsemmi Kap. 386. Il-ligi tal-kumpaniji, li hi ligi specjali li tirregola l-kumpaniji u l-ufficjali taghha, ma tipprovdux rimedji ohra kontra allegat abbuż tad-diretturi, u meta istitut hu regolat b`ligi specjali, mhux lecitu li ssir riferenza ghal xi principju generali tad-dritt. Hu minnu li, b`mod generali, minn jabbuza bid-drittijiet moghtija lilu jista` jkun passibbli ghal danni, izda meta istitut hu regolat b`ligi specjali, hi biss dik il-ligi li ghandha tigi kkunsidrata ghal-fini ta` responsabilita` tal-partijiet u tar-rimedji moghtija – “specialia generalibus derogant” (ara, fil-kaz tal-istitut tal-bejgh, l-applikazzjoni ta` dan l-istess principju fil-kawza **“Scifo Diamantino vs Meridian Enterprises Co. Ltd”**, deciza minn din il-Qorti fit-13 ta` Frar, 2003). F`dan il-kaz, il-ligi specjali rregolat kif u meta diretturi jistghu jinstabu responsabbli personalment ghad-djun tal-kumpanija taghhom, u hi biss fil-limiti ta` dak provdut f`dik il-ligi specjali li r-rimedji jridu jinstabu.*

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

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

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

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

...

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

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

*Aktar `l quddiem, l-istess awtrici tindika l-kondizzjonijiet li jridu javveraw ruhhom qabel ma direttur ta’ kumpanija jista’ jinstab responsabbli ta’ “wrongful trading”. L-istess bhal ma jinghad fil-ktieb “Farrar’s Company Law” aktar qabel kwotat, hi wkoll tinnota li l-ewwel kondizzjoni hi li “the company has gone into insolvent liquidation” (pagna 844). Dan hu hekk ghax qabel ma jigi dikjarat li kumpanija hija insolventi, mhux lecitu li wiehed imur wara l-corporate veil u jitlob sodisfazzjon ghall-kreditu tieghu direttament minghand id-diretturi personalment.”*

Fid-decizjoni li tat fl-14 ta’ Mejju 2010 fil-kawza “**Dottor Andrew Borg Cardona noe vs Victor Zammit et**” (op. cit.) il-Qorti tal-Appell irrilevat illi :-

*... ikun hemm kummerc bi frodi jekk waqt l-istralc ta’ kumpanija jkun jidher li xi negozju tal-kumpanija jkun tmexxa bil-hsieb ta’ frodi ta’ kredituri tal-kumpanija jew ta’ kredituri ta’ xi persuna ohra jew bil-ghan ta’ frodi, waqt li jkun hemm kummerc hazin meta kumpanija tkun giet xolta u tkun insolventi u jkun jidher li persuna li kienet direttur tal-kumpanija kienet taf, jew kellha tkun taf qabel ix-xoljiment tal-kumpanija, li ma kienx hemm prospett xieraq li l-kumpanija setghat tevita x-xoljiment minhabba l-insolvenza taghha.” (enfazi mizjud)*

Fil-11 ta’ Dicembru 2014 din il-Qorti kif presjeduta tat decizjoni fil-kawza fl-ismijiet “**Charles Grech & Company Limited vs Firm Camilleri Bros. (Marketing) Company Limited**” fejn affermat li meta jsiru talbiet skont l-Art

315 u l-Art 316 tal-Kap 386 waqt kawza fejn kumpannija ma tkunx ghadha giet xjolta, dawk it-talbiet ikunu ntempestivi. Bil-preciz inghad hekk :-

*“Din il-Qorti tghid illi t-test tal-ligi huwa car u inekwivoku. It-tieni talba hija fil-fatt intempestiva ghaliex ma tistax tingieb quddiem il-qorti biex tippronunzja ruhha dwarha fi procediment bhal ma huwa dak tal-lum. Infatti huwa biss fil-provediment li sejra taghti llum illi l-Qorti sejra tiddikjara jekk il-kumpannija ghandhiex tigi xjolta u stralcjata inkella le. Mela certament fid-data tal-presentata tar-rikors promotur, ma kienx ghad hemm pronunzjament dwar xoljiment u stralc. Il-Qorti qeghda ghalhekk tilqa` t-tieni u t-tielet eccezzjonijiet.”*

Fil-kaz tal-lum, jirrizulta ppruvat illi l-kawza odjerna kienet prezentata fil-11 ta` April 2017 ; illi CNJ International Ltd kienet xjolta fid-29 ta` Frar 2016 u b`sehh minn dakinhar beda l-istralc taghha ; u illi fl-14 ta` Dicembru 2017, wara li ntemm l-istralc, kien ordnat it-thassir tal-isem tal-kumpannija mir-Registru tal-Kumpanniji.

**Ghalhekk l-azzjoni odjerna kienet prezentata f` waqtha.**

**2. Negozju tal-kumpannija li jkun tmexxa bil-hsieb ta` frodi tal-kredituri tal-kumpannija jew ta` kredituri ta` xi persuna ohra jew bil-ghan ta` frodi**

Jekk jissodisfa l-grad tal-prova tax-xjenza tal-frodi, kreditur jista` jagixxi kontra l-amministraturi ta` kumpannija b`mod personali.

L-Art 315 tal-Kap 386 (bhal fil-kaz tal-Art 213 tal-Insolvency Act 1986) ma jitlobx il-prova ta` *a pattern of behaviour*.

Lanqas ma jitlob li l-amministrazzjoni frawdolenta ta` kumpannija tkun giet kondotta b`mod generalizzat jew ripetut matul iz-zmien.

**Jekk il-kreditur jipprova l-hsieb ta` frodi tal-konvenuti jew min minnhom, allura jkun bizzejjed ghalih li jipprova mqar cirkostanza wahda biss fejn in-negozju jkun tmexxa b`dak il-mod, u jinghata rimedju.**

[ara : Pag. 258 : **Andrew Muscat** : Pag. 258 : “**Principles of Maltese Company Law**” (op. cit.) ; u Chadwick L.J. fil-kawza **Morphitis vs Bernasconi** ([2003] EWCA 289)]

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

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

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

L-istess fil-kaz **In Re Sarflax** (1979, Ch 592, (1979) 1 All E R 529) inghad illi anke l-gbir, id-distribuzzjoni u t-trasferiment ta` assi ta` kumpannija jammontaw ghal “*business of the company*”.

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

Terga` taghmel riferenza ghal **Arlidge & Parry On Fraud** (op. cit.) fejn inghad :-

*“Although it is not easy to describe comprehensively all the different types of activity that will constitute the carrying on of business with intent to defraud creditors, three categories emerge from the authorities :*

- *Putting the trader`s existing creditors at risk of not being paid;*

- *Causing people who are not his existing creditors to become his creditors at a time when he is, or is likely to become, insolvent;*
- *Doing things which give rise to causes of action sounding in damages against him in favour of people who are not his existing creditors*

...

*A director is guilty of fraudulent trading if he deliberately trades in such a way as to dissipate the company's assets for inadequate consideration, so that the company's creditors cannot be paid*

...

*it is also clear that a person can be defrauded by being misled into taking a financial risk which he would not otherwise have taken and it is difficult to see how, in practice, inducing a commercial creditor to do x rather than y might not involve risks that which are inherent in x but not y*

...

*This tendency to equate fraudulent trading with insolvent trading has been extended so as to include creditors who have not even been deceived into becoming creditors.*

*The intent to defraud is to be judged by its effect on the person who is the object of the conduct in question*

...

*and there appears to me to be two types of such object-persons. There are those who choose to make the company their debtor, as ordinary trade suppliers, and those in whose favour liability from the company arises by the choice of the company, not their own, e.g. the Inland Revenue as to PAYE and national insurance contributions and the Customs and Excise as to the value added tax. As to trade creditors,*

...

*(t)here is intent to defraud within the meaning of the section if the person responsible was intending to deceive or actually deceiving a supplier that he would be paid at the stipulated time or shortly thereafter when the person so intending or deceiving knew perfectly well that there was no hope of that coming about.*

*As to non-choice, creditors, there is no question of deceit. The intent to defraud in my view lies in continuing to incur the liability for tax or national insurance contributions or value added tax when there is no honest belief that those liabilities will be discharged when they become due or shortly thereafter. ”*

Ezempju ta` agir frawdolenti kien dak trattat fil-kawza **Re Gerald Cooper Chemicals Limited (in Liquidation)** [1978] 1 Ch 262, fejn Templeman J. fisser :-

*"In my judgment, a creditor is party to the carrying on of a business with intent to defraud creditors if he accepts money which he knows full well has in fact been procured by carrying on the business with intent to defraud creditors for the very purpose of making the payment. Mr. Evans-Loam(?) said truly that section 332 creates a criminal offence and should be strictly construed, but a man who warms himself with the fire of fraud cannot complain if he is singed."*

Il-Qorti taghmel ukoll riferenza ghal kitba li kienet dehret fil-**Butterworths Journal of International Banking and Financial Law** ta` Lulju-Awissu 2013 bl-isem : **Fraudulent Trading Update** : fejn l-awtur **Cameron Scott** ighid :-

*However, things become less clear at the other end of the scale, when a company gets into financial difficulties. At what point does trying to keep the company going become fraudulent trading ?*

*First, there must be dishonesty involved. Dishonesty is an essential ingredient of the offence (R v Cox (1982) 75 Cr App R 291). So making bad, even disastrous, business decisions will not be enough, of itself, to constitute fraudulent trading. Absent fraudulent intent or recklessness, directors who, in good faith, try but fail to trade out of a difficult financial position, will not be guilty of fraudulent trading. However, the carrying on*

*of a company's business and incurring debts at a time when the directors know that there is no reasonable prospect of the creditors being paid when the debt becomes due or shortly thereafter has been held to be fraudulent (R v Grantham [1984] 3 All ER 1669).*

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

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

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

*Thirdly, he must also be shown to have played an active part in the carrying on of the business and exercising a controlling or management function. Mere knowledge of and concurrence in what was going on is not, of itself, enough (R v Grantham; Archbold Criminal Pleading Evidence and Practice 2013 edition 30.119). Thus, directors who were not actively involved in the management of that part of the company's business, were not liable for fraudulent trading even though they had concerns about certain transactions which the bank was entering into and expressed these concerns to the manager who was responsible and who gave misleading responses to the directors (Bank of India v Morris). Nor was a company secretary who was aware of the company's financial position but failed to advise the directors to cease trading (Re Maidstone Building Provisions Ltd [1971] 1 WLR 1085).*



### 3. Risultanzi

Sabiex jista` jinghad illi n-negozju ta` kumpannija jkun tmexxa bi hsieb ta` frodi, trid issir il-prova ta` actual dishonesty li tissarrafl fl-intenzjoni li jkun pregudikat kreditur.

L-intenzjoni tirrizulta mill-imgieba, anke b`inferenza, wara li jitqiesu c-cirkostanzi kollha tal-kaz.

Jekk ikun ippruvat illi direttur jitlob avvanz ta` kreditu meta huwa kien jaf jew kien konxju tal-fatt illi kien hemm riskju reali li ma kienx hemm possibilita` li jhallas fiz-zmien miftiehem, allura dak l-agir ikun jikkwalifika bhala kummerc bi frodi.

Dan premiss, u riferibbilment ghall-fattispeci tal-kaz tal-lum, jirrizulta li meta CNJ International Ltd kienet kostitwita din kellha kapital awtorizzat ta` Lm1,000 li fl-2006 zdied ghal Lm10,000. Il-kumpannija qatt ma kellha mmobbli propjeta` taghha.

Kif ikkonferma l-awditur Louis Padovani fix-xieghda tieghu l-kumpannija ma kellhiex profitti sostanzjali.

Effettivament anke milli jirrizulta mill-*istatements* bankarji, kienet dejjem *on the brink* u kien propju ghas-self li rceviet minghand l-atturi li l-kumpannija setghet tixtri l-merkanzija.

Il-*modus operandi* ta` CNJ International Ltd kien fjakk ghaliex ghan-negozju taghha kienet tiddependi kwazi ghal kollox fuq il-kredituri.

Ghalkemm il-qaghda finanzjarja tal-kumpannija kienet fragli, jirrizulta ppruvat illi l-konvenut Claudio Caruana, *qua* direttur, ma kienx qieghed imexxi b`diligenza u ghaqal il-hwejjeg tal-kumpannija daqs li kieku kienu tieghu personali.

Baqà` jitlob flus b`self minghand il-kredituri, fosthom l-atturi, meta kien jaf illi kien ser ikun diffiċli ferm li jhallas lura.

Jirrizulta li fi zmien qasir wara li kien iffirmit il-kuntratt mal-atturi, CNJ International Ltd bdiet taqa` lura fil-pagamenti sakemm eventwalment waqfet thallas ghal kollox.

Tajjeb li jkun rilevat illi diga` fl-2005 Claudio Caruana ried jesplora s-suq azjatiku.

Ghad illi CNJ International Ltd ma kellhiex likwidita`, lanqas biex thallas ghal mawra go Taiwan, Claudio Caruana xorta nsista illi jmur, bl-attrici taghmel tajjeb ghall-ispejjez.

Bhal li kieku dan ma kienx bizzejjed, waqt li kien Taiwan, kompla jordna merkanzija ; ta` dan saret il-prova li hallset l-attrici bl-intendiment illi kellha tithallas lura.

Intant Claudio Caruana fi zmien meta kien ghadu kif spicca negozju tal-gym, ghamel – kif ighid xi hadd lil hinn minn dawn il-Gzejjer – *un passo piu` lungo della gamba* - u dahal negozju bil-ferm akbar fit-Tunezija.

Irrizulta bhala fatt maghruf u pacifiku illi l-Lukanda Jerma Palace, fejn Claudio Caruana kien imexxi l-gym tal-lukanda, u fejn ghamel konoxxenza tal-attrici, ghalqet il-bibien taghha fix-xahar ta` Marzu 2007.

In-negozju li dahal ghalih kien fil-qasam tal-ATVs u tal-jetskis. Huwa bil-wisq evidenti li l-kummerc ta` dawn il-prodotti jinvolvi investiment kapitali notevoli. Kienet iffurmata kumpannija Tunezina li kellha timporta l-prodott ghall-bejgh minghand CNJ International Ltd. Jirrizulta li nfethet showroom go Tunez u kienu mpjegati n-nies. Jidher illi ghal dan in-negozju Claudio Caruana kellu sieheb Tunezin. Ir-rwol preciz ta` dan tal-ahhar mill-provi tieghu jibqa` mcajpar. Lanqas ismu ma rrizulta. Li rrizulta huwa li Caruana kien gej u sejjer Tunez – caqliq bl-ajru li jinvolvi l-ispejjez. Jirrizulta ppruvat illi l-attrici komplet taghmel tajjeb ghax-xiri tal-merkanzija.

Xejn ma jregi l-argument ta` Claudio Caruana meta fin-nota ta` osservazzjonijiet tieghu jissottometti illi bil-ftuh tan-negozju fit-Tunezija huwa ried jiddiversifika n-negozju u ha decizjonijiet meqjusa meta nvesta.

Il-fatti juru xort`ohra.

Il-fatti juru Caruana azzarda bil-pjani ta` negozju tieghu u fil-verita` ra kbir meta kien messu wera aktar kawtela ladarba kien diga` qieghed jesperjenza diffikultajiet finanzjarji. Huwa evidenti pero` li baqa` ghaddej xorta ghaliex jaf li kien hem mil-flus tal-atturi qeghdin jaghmlu tajjeb.

Il-konvenut Caruana jikkontendi li kien imexxi n-negozju b`mod responsabbli u li n-negozju ha svolta negattiva `l isfel ghal ragunijiet barra mill-kontroll tieghu.

Abbazi tal-assjem tal-provi li tressqu, din il-Qorti mhijiex konvinta minn dan.

Il-kollass tan-negozju ta` CNJ International Limited ma kienx imputabbli unikament ghall-gheluq tal-Lukanda Jerma Palace u ghall-konsegwenzi tat-taqlib politiku li kien hemm fit-Tunezija izda ghal *business model* fejn ir-revenue seta` jigi generat kwazi ghal kollox bis-self. Kienet tahdem b`*deficit budget* minghajr kontroll effettiv.

Tajjeb jinghad illi diga` fl-2005, qabel ghalaq il-gym tal-Lukanda Jerma Palace, CNJ International Limited kienet diga` debitrice tal-atturi. *Sul nascere*, in-negozju li beda fin-Tunezija fl-2006 kellu jaghmel tajjeb ghad-dejn li ha Claudio Caruana sabiex beda l-operat ta` CNJ Tunisia. Is-self kien qed jaghmel tajjeb ukoll ghar-*running costs* tan-negozju inkluz l-ispejjez tas-showroom, pagi tal-impjegati u vjaggi. Kieku tabilhaqq mexxa b`ghaqal u b`responsabilita` ma kienx ikompli jiddejjien u addirittura jimbarka fuq negozju gdid go pajjiz barrani minghajr *market study* adegwat liema negozju kien jirrikjedi l-injezzjoni ta` kapital qawwi. Minflok Claudio Caruana sab azzjonista iehor bi *fresh capital* jew ghamel bdil fl-*articles of association* sabiex ikabbar is-*share capital* tal-kumpannija b`mod trasparenti u kontrollabbli minn terzi ghazel minflok li jmur ghal aktar self. Ghalkemm fin-negozju mhux kollox huwa ward u zghar, jekk

min se jibda negozju *from scratch* go pajjiz iehor, jiehu sogru a skapitu tal-kredituri billi jkabbar id-dejn diga` akkumulat tieghu allura dak ma jibqax sogru izda agir abbusiv.

Il-Qorti tosserva wkoll illi tant il-konvenut mexxa b`sogru u b`mod spregudikat illi lanqas il-*financial statements* u l-*audits* tal-kumpanija ma kellu in regola. Milli jirrizulta fl-atti, inkluz ix-xiehda, effettivament il-*financial statements* ghas-snin 1998 u 1999 gew prezentati, pero` dawk ghas-snin ta` wara u cioe` dawk ghas-snin : 2000, 2001, 2002 u 2003 : ghalkemm thejjew baqghu ma gewx prezentati. Imbaghad il-*financial statements* ghas-snin ta` bejn l-2003 u l-2015, is-sena li fiha kienet xjolta l-kumpanija b`ordni tal-qorti, la qatt thejjew u wisq inqas prezentati. Lanqas ma jirrizulta illi qatt saret xi *cash injection* sabiex terga` tiehu l-hajja l-kumpanija illi kienet ilha snin taqta` lura u effettivament ma tkunx f`qaghda li thallas id-djun taghha.

Il-konvenut Caruana jaccetta li kien konxju mill-qaghda mweghra tal-kumpanija.

Ma jaghmel ebda sens l-argument ta` Caruana li l-*accounts* fil-fatt kienu tlestew ghaliex dak li jghodd huwa li jigu prezentati lir-Registratur tal-Kumpaniji sabiex il-pubbliku (inkluz il-kredituri) ikun jista` jaghmel il-verifiki tal-kaz. Huwa propju ghalhekk illi fil-kaz ta` kumpaniji l-Kap 386 irid illi jigu prezentati l-*financial statements*. Ma ninsewx li fil-kaz ta` kumpaniji, hemm *limited liability* li pero` m`ghandhiex tigi abbuzata qisu xejn mhu xejn.

Lanqas ma jista` Caruana jiskarika n-nuqqas tieghu fuq l-awditur. In-negozju kien ta` Caruana (ghalkemm gestit permezz ta` kumpanija). Kien ghalhekk fl-interess tieghu illi, apparti li bhala direttur joqghod ma` li jghid l-Art 167(1) tal-Kap 386, jassikura li jsiru l-*audits* u li l-*financial statements* jigu ntavolati fejn suppost u fiz-zmien stipulat mil-ligi. Dan m`ghamlux anzi baqa` ghaddej bid-dejn.

Lanqas ma huwa sostenibbli l-argument tal-konvenut Caruana illi l-attrici kienet taf bil-profil tar-riskji u ta` l-assi tal-kumpanija, u ghalhekk qatt ma seta` kien hemm malizzja jew malafede da parti tad-diretturi fil-konfront taghha.

Il-Qorti tghid dan ghalix anke jekk *argumenti gratia* dan kien minnu, xorta wahda jibqa` l-fatt illi l-intimat Caruana mexxa n-negozju hazin minn snin qabel ma dahlet fix-xena l-attrici.

Infatti rrizulta li Claudio Caruana u l-attrici saru jaf b`xulxin fl-2004. In-negozju tal-intimat kien ilu ghaddej mill-1986. L-ahhar *financial statements* prezentati kienu daww ghas-sena 1999.

Ma jirrizultax li Caruana qatt wera l-qaghda traballanti tan-negozju tieghu lill-attrici qabel talabha tisilfu l-flus.

**Il-fattur l-iehor mehtiega sabiex ikun hemm kummerc bi frodi huwa meta ma jittiehdux daww il-prekawzjonijiet sabiex jigi minimizzat id-dannu a skapitu tal-kredituri.**

Mill-assjem ta` l-provi jirrizulta li dawn il-prekawzjonijiet ma ttiehdux.

Waqit-tmexxija tieghu, Caruana m`ghamel l-ebda pjan fattibbli sabiex l-atturi bhala *bona fide* kredituri tieghu ma jibqghux skoperti fir-radd lura tas-self taghhom. Ma kellu l-ebda *business plan* serju speċjalment wara li ghalqet il-Lukanda Jerma Palace.

Claudio Caruana jallega illi nvesta s-somma ta` Lm 50,000 minn tieghu fil-kumpannija. Pero` ma gabx prova oggettiva jew korraborativa li ssostni dak li qal. Li kieku hekk il-kaz kien irresponsabbli min-naha tieghu illi jhalli lill-atturi skoperti. Il-Qorti sejra tiskarta bhala mhux sodisfacjentement ippruvata din l-allegazzjoni u tghid illi kieku l-attrici kienet a piena konoxxenza tal-kwadru real ital-qaghda finanzjarja tal-kumpannija ma kenitx sejra tibqa` tiffinanzja n-negozju tal-kumpannija.

Il-Qorti tosserva illi meta l-attrici tixhed illi saret taf bl-ezistenza ta` CNJ International Ltd biss fl-2008 meta kienet iffirmata l-iskrittura ma` Claudio Caruana hija kontradetta mid-dokumenti li pprezentat hija stess fil-kawza fl-ismijiet *Catherine Buhagiar et vs CNJ International Ltd (Rik. Gur. Nru. 1013/15 JZM)*.

Il-Qorti tirreferi ghan-nota li pprezentaw l-atturi f'dik il-kawza (a fol 232 tal-process) ma` liema nota kienu prezentati numru ta` dokumenti. In partikolari fil-punt nru 6 tal-istess nota, hemm referenza ghal Dok CB6 : *Rendikont ta` cekkijiet mahruga mill-esponenti kif mitluba minn Claudio Caruana u hlasijiet li saru da parti ta` CNJ International Limited minn Claudio Caruana*".

Jinsorgi l-kwesit :

Jekk l-attrici tassew kienet taghti l-flus lil Claudio Caruana li – skont l-attrici – ma kien jaghtiha spjegazzjoni ta` xejn, kif allura setghet tkun taf liema pagamenti saru minn CNJ International Ltd u liema le ?

Inoltre mid-dokumenti li pprezentat l-attrici, u min-notamenti taghha stess fuq l-istess, jirrizulta hekk :

- a fol 253 –

cekk fl-ammont ta Lm265.83 datat 29 ta` Marzu 2005 –  
in-notament fuq quddiem tac-cekk jindika `CNJ` waqt li n-  
notament fuq wara jindika `ATVS – Container ;

- a fol 255 –

cekk fl-ammont ta` Lm679.15 datat 6 ta` April 2005 –  
in-notament fuq wara tac-cekk jaqra fost l-ohrajn `CNJ` ;

- a fol 256 –

cekk fl-ammont ta` Lm217 datat 13 ta` April 2005 –  
in-notament fuq wara tac-cekk jaqra fost l-ohrajn `CNJ` ;

- a fol 257 –

cekk fl-ammont ta` Lm318.00 datat 13 ta` April 2005 –  
in-notament fuq wara tac-cekk jaqra fost l-ohrajn `CNJ` ;

- a fol 258 –

cekk fl-ammont ta Lm1471.58 datat 29 ta` Marzu 2005 –  
in-notament fuq quddiem tac-cekk jindika `CNJ` ,

waqt li n-notament fuq wara jindika `Groupage – Buggy` u `Express`

Il-Qorti tqis illi dawn il-provi huma bizzzejjed sabiex juru li l-attrici kienet taf bl-esistenza ta` CNJ International Ltd.

Ghalhekk konsapevoli mill-ezistenza tal-kumpanija CNJ International Ltd, il-Qorti tirrikonoxxi li da parti tal-attrici kien hemm leggerezza, inesperjenza jew *lack of foresight* meta avvanzat il-kreditu minghajr ma qatt ghamlet verifiki dwar il-qagħda finanzjarja tal-kumpanija.

Dan jghodd aktar u aktar meta jittiehed kont tal-fatt illi l-attrici saħansitra hadet self mill-banki biex taqdi lid-debitur u addirittura poggiet bhala garanzija tas-self li hadet hi d-dar matrimonjali tagħha ma` zewgha.

Altru milli messha ghamlet l-accertamenti tagħha.

**Accertati dawn il-fatti u cirkostanzi li jirrigwardaw l-atturi, din il-Qorti fliet mill-gdid l-Art 315 tal-Kap 386.**

Jekk l-azzjoni tirnexxi, l-intimati **jew min minnhom** ikunu responsabbli personalment, minghajr l-ebda limitazzjoni ta` kwalsiasi natura għal kull jew għal xi dejn tal-kumpanija.

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

Ikompli jghid :-

*“the wrongdoer effectively becomes personally and directly bound towards such creditors ...*

*By contrast, when an order is made under the fraudulent trading provision in English law, the wrongdoer will be ordered “to make contributions (if*

*any) to the company`s assets as the court thinks proper. In its practical application, the provision in Maltese law would probably favour the creditors who have been the victims of the wrongdoing rather than the other creditors of the company – as a court is more likely to direct the wrongdoers to be personally liable vis a vis the victims*

...

*In English law, the whole body of creditors, rather than the defrauded creditors alone, stands to gain by an order under the fraudulent trading provision.”*

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

Il-qorti mhijiex marbuta tordna kontribuzzjoni lejn il-gabra ta` l-assi tal-kumpannija sabiex jinqasmu bejn il-kredituri.

Lanqas ma hemm distinzjoni fil-ligi taghna bejn kredituri privileggjati u dawk ordinarji.

Ghalhekk kreditur ordinarju li jaghmel il-prova li kien defrawdatt ghandu rimedju **dirett** u jista` jigi rizarcit **direttament** mill-intimati li jirrizulta li jkunu ghamlu kummerc bi frodi.

Terga` ssir referenza ghal **Principles of Maltese Company Law** (op. cit.) fejn fil-kapitolu li jittratta l-azzjoni skont l-Art 315, **Andrew Muscat** ighid :

*“The provision imposes liability on the wrongdoer for “all or any of the debts or other liabilities of the company as the court may direct”. Clearly therefore, the wrongdoer may be held liable not only for contractual obligations undertaken by the company, but also for any other form of obligation, including liability in tort and statutory claims against the company*

...

*Neither is liability necessarily restricted to debts and liabilities of the company incurred during the period of time when the wrongdoer committed the fraud – the wrongdoer could be saddled with liability even in respect of debts and liabilities incurred before or after the fraud*



...

*Liability under the fraudulent trading provision can be unlimited. In other words, the court is not bound to cap the quantum of liability, by for example limiting it to the amount actually involved in the fraud. The court may however impose whatever limit it deems appropriate in the circumstances."*

**Fil-kaz tal-lum, il-Qorti ssib li l-imgieba ta` Claudio Caruana (mhux tal-konvenuta l-ohra) tirrendih passibbli ghal dak li jipprovdi l-Art 315 tal-Kap 386.**

Ghar-rigward tal-konvenuta Josephine Caruana, mill-provi jirrizulta li Josephine Caruana (li tigi omm il-konvenut Claudio Caruana) tidher bhala direttur ta` CNJ International Ltd.

Fl-istess waqt jirrizulta wkoll li Josephine Caruana qatt ma kienet involuta fil-gestjoni tan-negozju.

Meta tqis it-tifsira ta` *direttur* skont l-Art 2 tal-Kap 386, il-Qorti tghid illi Josephine Caruana kellha obbligi xi twiegeb ghalihom skont il-Kap 386.

**Fl-istess waqt il-Qorti hija tal-fehma illi tenut kont ta` dak li jghid l-Art 315(1) tal-Kap 386 fil-kaz ta` Josephine Caruana, ghad-differenza ta` Claudio Caruana, ma tirrizultax ippruvata *x-xjenza* li hija l-pern ta` l-kummerc bi frodi.**

**Ghalhekk il-Qorti teskludi lil Josephine Caruana minn kull responsabilita` ghall-fini tal-Art 315 tal-Kap 386.**

## **IX. It-tielet talba**

**Il-Qorti sejra tilqa` t-tielet talba kif dedotta kontra l-konvenut Claudio Caruana wahdu bhala konsegwenza tal-fatt illi hija laqghet l-**

ewwel u t-tieni talbiet tal-atturi abbazi tal-Art 315(1) tal-Kap 386 kontra l-istess Claudio Caruana.

### Decide

Ghar-ragunijiet kollha premessi, il-Qorti qeghda tippovdi dwar it-talbiet attrici u dwar l-eccezzjonijiet tal-konvenuti, billi qeghda taqta` u tiddeciedi hekk :-

Tichad l-eccezzjonijiet.

Tilqa` l-ewwel talba kif dedotta fil-konfront tal-konvenut Claudio Caruana.

Tichad l-istess talba kif dedotta fil-konfront tal-konvenuta l-ohra Josephine Caruana.

Riferibbilment ghat-tieni talba, tiddikjara illi l-konvenut Claudio Caruana huwa responsabbli fil-konfront tal-atturi minghajr ebda limitazzjoni ta` responsabilita` ghal kull dejn jew ghal kull responsabilitajiet ohra li kienu assunti mill-kumpannija CNJ International Limited.

Tichad l-istess talba kif dedotta fil-konfront tal-konvenuta l-ohra Josephine Caruana.

Tilqa` t-tielet talba fil-konfront tal-konvenut Claudio Caruana.

Tichad l-istess talba kif dedotta fl-intier taghha fil-konfront tal-konvenuta l-ohra Josephine Caruana.

Tordna li l-ispejjez kollha ta` din il-kawza, inkluz dawk tal-proceduri kollha relatati mal-mandat ta` sekwestru kawtelatorju bin-

**numru 591/2017, ghandhom jithallsu in kwantu ghal tliet kwarti (75%) mill-konvenut Claudio Caruana u in kwantu ghal kwart (25%) mill-atturi.**

**Onor. Joseph Zammit McKeon  
Imhallef**

**Amanda Cassar  
Deputat Registratur**