



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

**ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON**

Illum it-Tlieta 30 ta` Ottubru 2018

**Kawza Nru. 2
Rikors Nru. 304/2016 JZM**

**Av. Jonathan Abela Fiorentino,
avukat (detentur tal-Karta tal-
Identita` bin-numru 555482M)
bħala mandatarju speċjali ta` Marsoft
International A/S, socjeta` registrata
fin-Norvegja bin-numru 937 657 927 u
b`indirizz registrat ta` Inkognitogata
33A, 0256 Oslo, fin-Norvegja**

kontra

**1. Vroon Containers B.V., socjeta`
registrata fl-Olanda bin-numru
22055081 u b`indirizz registrat ta`
Haven Westzijde 21, 4511 AR
Breskens, fl-Olanda, u**

**2 Balticmax Holding Company
Limited (C-0765)**

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentat fl-14 ta` April 2016 li jaqra hekk :-

*Illi s-socjeta` rikorrenti Marsoft International A/S (“**Marsoft**”) hija membru fis-socjeta` Balticmax Holding Company Limited (C-70765) (“BHC”) u ghandha hamsin fil-mija (50%) tal-ishma fl-istess socjeta` waqt li l-membru l-iehor fis-socjeta` BHC hija s-socjeta` intimata Vroon Containers B.V. (Vroon`), li ghandha l-hamsin fil-mija (50%) l-ohra tal-ishma fl-istess socjeta` u dan kif jirrizulta mill-memorandum u l-istatut tas-socjeta` BHC (kopja hawn annessa “**Dok. A**”);*

*Illi z-zewg membri tas-socjeta` BHC, ossija s-socjeta` rikorrenti Marsoft u s-socjeta` intimata Vroon, flimkien mas-socjeta` BHC stess, iffirmaw ftehim datat 6 ta` Ottubru 2015 u msejjah “BHC Co-operation Agreement” (kopja hawn annessa “**Dok. B**”) intiz sabiex fost l-ohrajn jirregola r-relazzjoni tal-partijiet fi hdan is-socjeta` BHC u kif ukoll it-tmexxija tal-istess socjeta` ;*

Illi fost l-ohrajn, skond l-imsemmi ftehim, is-socjeta` BHC ghandu jkollha tlett (3) diretturi, tnejn nominati minn kull wiehed mill-membri tas-socjeta` rispettivament u wiehed nominat miz-zewg membri unanimament. Klawzola 5.1 tal-imsemmi ftehim ttipprovi s-segwenti:

The Board of Directors of the Company shall at all times consist of up to 3 board members or such other number to be determined with the unanimous consent of the Parties. Vroon and Marsoft are each entitled to nominate and have elected one member to the board. The third member of the Board will be nominated by both Parties unanimously. ...;

Illi fil-prezent is-socjeta` BHC ghandha zewg diretturi, li huma s-Sur Arlie Sterling nominat mis-socjeta` rikorrenti Marsoft u s-Sur Herman Marks nominat mis-socjeta` intimata Vroon, filwaqt li l-post tat-tielet direttur indipendenti huwa vakant;

Illi Vroon, apparti li hija membru fis-socjeta` BHC, avvanzat self favur l-istess socjeta` BHC u qed tippretendi li BHC ma ottemperatx ruha mal-kondizzjonijiet tal-kuntratti ta` self u li s-somma kollha hija dovuta. Minn

naha l-ohra s-socjeta rikorrenti Marsoft u d-direttur nominat minnha, is-Sur Arlie Sterling, jikkontendu li dan m`huwiex minnha u li Vroon u d-direttur nominat minnha, s-Sur Herman Marks qed jagixxu b` mod abuziv sabiex Vroon tiehu l-kontroll assolut tal-grupp ta` kumpanniji li tieghu s-socjeta BHC hija l-parent.

Illi infatti Vroon diga intavolat zewg rikorsi ghall-hrug ta` mandati ta` inibizzjoni, wiehed fil-konfront ta` Marsoft u l-iehor fil-konfront ta` BHC. Permezz tal-ewwel mandat ta` inibizzjoni (numru 263/2016 AF) li jinsab differit ghas-7 ta` April 2016 ghall-iskop tan-notifika tal-kuraturi deputati, Vroon qed titlob li Marsoft tigi inibita inter alia milli tbiegh u titrasferixxi l-ishma taghha fis-socjeta` BHC u milli tezercita d-drittijiet kollha taghha naxxenti mill-istess ishma. Permezz tat-tieni mandat ta` inibizzjoni (numru 375/2016 LSO) li jinsab differit ghal provvedimenti in camera, Vroon qed talbet li BHC tigi inibita milli tbiegh u titrasferixxi l-ishma taghha f`socjeta` ohra Balticmax Acquisition Corporation One Limited (C-70766) ("AC1") u milli tezercita d-drittijiet kollha taghha naxxenti mill-istess ishma (ghalkemm fil-kors tal-proceduri irtirat din it-tieni talba). Is-socjeta` AC1 min-naha taghha hija azzjonista f`numru ta` kumpanniji ohrajn li huma proprjetarji ta` numru ta` bastimenti ta` merkanzija;

Illi huwa evidenti li l-affarijiet tas-socjeta` BHC qed jitmexxew da parti ta` Vroon b`mod li huwa oppressiv, b`mod mhux gust diskriminatorju kontra, jew b`mod mhux gust ta` pregudizzju, ghall-membru l-iehor Marsoft, jew b`mod li huwa kontra l-interessi tal-membri in generali u dan ghar-ragunijiet segwenti –

(i) id-direttur nominat mis-socjeta` intimata Vroon jinsab f`posizzjoni cara u manifesta ta` kunflitt ta` interess stante li filwaqt min-naha wahda qieghed ihares l-interessi tas-socjeta` intimata Vroon li jappartjeni lilha, min-naha l-ohra ghandu wkoll ihares l-interessi tas-socjeta` BHC li taghha huwa direttur!;

(ii) dan il-kunflitt ta` interess car u manifest jirrizulta mill-fatt li, kif gja espost hawn aktar qabel, Vroon qieghdha b`mod abbużiv u oppressiv ghall-ahhar taghmel minn kollox sabiex tiehu kontroll assolut tas-socjetajiet imsemmija billi tipprova twaqqaf lis-socjetajiet Marsoft u BHC milli jezercitaw id-drittijiet taghhom;

(iii) minkejja li s-socjeta` BHC ingaggat is-servizzi professjonali ta` avukat f`Malta sabiex tiddefendi ruhha, qed jigu riskontrati diffikultajiet minhabba li d-direttur nominat minn Vroon qieghed jostakola u jfixkel it-

tmexxija tas-socjeta` BHC u dan konsegwenza tal-fatt li dan id-direttur qiegħed jilbes diversi kpiepel li jgibu magħhom interessi opposti u kunfliggenti għal xulxin;

(iv) inoltri tezisti wkoll is-sitwazzjoni kemmxejn serja u pjuttost stramba (jekk mhux ridikola) li d-direttur nominat minn Vroon inevitabbilment għandu access għall-pariri u informazzjoni dwar il-linja difensiva ta` BHC mogħtija mill-avukat ingaggat sabiex jiddefendiha, meta min-naha l-oħra huwa qed iħares l-interessi ta` Vroon li hija stess għandha pretensjonijiet fil-konfront ta` BHC – fi kliem semplici dan huwa kaz fejn l-istess persuna trid tiddefendi ruhha minn pretensjonijiet li qed tagħmel hi stess!;

Illi r-rikors odjern qiegħed isir in vista tal-pretensjonijiet vantati fil-konfront tas-socjeta BHC, senjatament stante li huwa meħtieġ li din is-socjeta` titqiegħed f`posizzjoni li tkun tista` tiddefendi ruhha b`mod adegwat kontra l-pretensjonijiet li Vroon qed tressaq fil-konfront tagħha u anke jekk hemm bzonn tiehu azzjoni kontra Vroon. Fl-umli opinjoni tal-esponenti dan ikun jista` jsir biss jekk f`din is-socjeta` jkun hemm persuna indipendenti (kif wara kollox gja` huwa mahsub għalih fil-Co-operation Agreement imsemmi) li tkun tista` thares l-interessi tal-istess socjeta` b`mod oggettiv;

Illi fl-umli opinjoni tal-esponenti, din l-Onorabbli Qorti għandha tkun sodisfatta li dan l-ilment huwa bazat sewwa u għalhekk ikun gust u ekwu li din il-Qorti tagħmel ordni ai termini tal-artikolu 402 tal-Kap 386 tal-Ligijiet ta` Malta, taht dawk il-kondizzjonijiet li jidhrilha xierqa, sabiex jirregola t-tmexxija tal-affarijiet tal-kumpannija inkluz illi tahtar persuna indipendenti sabiex tiddefendi u thares adegwatament l-interessi tas-socjeta` BHC u tmexxi l-affarijiet tal-istess socjeta`, partikolarment fil-kuntest tal-pretensjonijiet vantati kontriha mill-membri tagħha stess Vroon. Wara kollox, kif gja sottomess, sitwazzjoni simili kienet gja mahsuba fil-Co-operation Agreement imsemmi.

Għaldaqstant, għar-ragunijiet fuq mogħtija, is-socjeta` rikorrenti Marsoft International AS titlob umilment u bir-rispett li, prevja kwalunkwé dikjarazzjoni oħra xierqa, necessarja u opportuna, din l-Onorabbli Qorti joghgobha tagħmel ordni li jirregola t-tmexxija tal-affarijiet tal-kumpannija inkluz (mingħajr pregudizzju għal generalita ta` din it-talba) illi tahtar persuna indipendenti sabiex tiddefendi u thares adegwatament l-interessi tas-socjeta` Balticmax Holding Company Limited (C-70765) u tmexxi l-affarijiet tal-istess socjeta` u dan ai termini tal-artikolu 402 tal-Kap 386 tal-Ligijiet ta` Malta u taht dawk il-kondizzjonijiet li jidhrilha xierqa.

Rat ir-risposta ta' Vroon Containers B.V. ("**Vroon**") (rappresentata mill-mandatarju taghha Av. Jean-Pie Gauci Maistre) prezentata fit-12 ta' Mejju 2016 li taqra hekk :-

Illi preliminarjament r-rikorrenti nomine ghandu jipprova illi huwa debitament awtorizzat jagixxi fil-proceduri odjerni ghan-nom tas-socjeta' rikorrenti Marsoft International A/S;

Illi s-socjeta' esponenti assolutament ma taqbilx illi l-affarijiet tas-socjeta' Balticmax Holding Company Limited qed jitmexxew da parti taghha b`mod li huwa oppressiv, b`mod mhux gust u diskriminatorju kontra, jew b`mod mhux gust ta' pregudizzju ghas-socjeta' rikorrenti, u tirrispingi l-istess allegazzjonijiet bhala infondati fil-fatt u fid-dritt;

Illi a kuntrarju ta' dak li tallega s-socjeta' rikorrenti huwa l-agir jew ahjar in-nuqqas ta'agir ta' l-istess socjeta' rikorrenti illi fil-fatt pogga s-socjeta' Balticmax Holding Company Limited fi stat illi l-affarijiet tal-kumpannija qed jitmexxew b`mod oppressiv b`mod mhux gust u diskriminatorju kontra, jew b`mod mhux gust ta' pregudizzju ghas-socjeta' esponenti u dan ghar-ragunijiet segwenti:

1. *Illi fis-26 ta' Mejju 2015 giet istitwita s-socjeta' Balticmax Holding Company Limited liema socjeta' kellha lis-Sur Paul Leo Eckbo bhala l-uniku azzjonista u direttur tas-socjeta' u lis-Sur Stanley Portelli bhala segretarju tal-kumpannija (Dok VC1).*

2. *Illi fis-17 ta' Awwissu 2015 f`laqgha straordinarja ta' l-azzjonisti tas-socjeta' Balticmax Holding Company Limited, il-laqgha giet infurmata, fost affarijiet ohra (Dok VC2):*

a. *Illi Marsoft International A/S, socjeta' assocjata ma' l-uniku membru ta' Balticmax Holding Company Limited u cioe is-Sur Paul Leo Eckbo, kienet qieghda tahdem estensivament u esklussivament ma' Bremer Landesbank sabiex jizvillupaw programm ghar-ristrutturar tal-portfolio marittimu tal-bank. Il-programm, imsejjeh il-`Marsoft Debt Program` jinvolvi l-akkwist ta' mhux aktar minn 32 container ships. Dawn il-vapuri kienu se jinxtraw, indirettament, f`isem diversi sussidjarji ta' Balticmax Holding Company Limited. Il-vapuri kienu se jigu finanzjati b` USD444 miljun Master Facility Agreement, tat-23 ta' Gunju 2015, bejn Balticmax Acquisition Corporation One Ltd (C 70766), sussidjarja ta' Balticmax Holding Company Limited, u Bremer Landesbank.*

b. *Illi l-ishma f'isem Paul Leo Eckbo kienu se jigu trasferiti lil Vroon Containers B.V. u Marsoft International A/S f'percentagg ugwali.*

c. *Illi Balticmax Acquisition Corporation One Ltd kienet diga ghamlet l-ewwel drawdown taht il- Master Facility Agreement.*

d. *Illi l-finanzjament ghall-akkwist tal-vapuri kien se jkun provdut minghand Vroon Containers B.V. taht senior loan ta` USD 10.5 miljun u bridge financing sa USD 10.5 miljun.*

e. *Illi USD 1.05 miljun taht is-senior loan minghand Vroon Containers B.V. kienu diga` gew utilizzati.*

f. *Illi gie deciz illi jinhargu 398,000 ishma godda, f'isem Vroon Containers B.V. u Marsoft International A/S f'percentagg ugwali.*

g. *Illi l-azzjonisti kienu ser jidhlu f`shareholders agreement.*

h. *Illi s-Sur Stanley Portelli gie appuntat direttur tas-socjeta` Balticmax Holding Company Limited.*

i. *Illi kien ser jinbidel il-memorandum u artikoli tas-socjeta` biex jirrifletti l-bidliet imsemmija (Dok VC3).*

3. *Illi s- Senior Loan Note (Dok VC4) u s-Senior Bridge Loan Note (Dok VC5), gew iffirmiti fis-6 t` Ottubru tas-sena 2015, minkejja li l-ewwel drawdown taht il-loan notes kien diga` sar f`Awwissu tas-sena 2015, u dan kif gie rrekordjat fil-minuti tal-laqgha straordinarja ta` l-azzjonisti tas-socjeta` Balticmax Holding Company Limited, tas-17 ta` Awwissu 2015 surreferit.*

4. *Illi permezz tal-BHC Co-Operation Agreement (Dok VC6), li gie ffirmit fis-6 t` Ottubru tas-sena 2015, il-partijiet qablu li, Paul Leo Eckbo jirtira u li l-Bord tad-Diretturi ghandu jkun maghmul minn tlett diretturi. Iz-zewg azzjonisti huma ntitolati li jinnominaw u jappuntaw direttur kull wiehed u t-tielet direttur ikun maghzul bi qbil bejn iz-zewg partijiet b`mod unanimu. Skond l-istess ftehim, Vroon Containers B.V. appuntaw lil Herman*

FM Marks u Marsoft International A/S appuntaw lil Arlie Sterling, li huwa ko-fundatur u direttur ta` Marsoft Inc. Is-Sur Stanley Portelli li originarjament kien appuntat Direttur min Paul Leo Eckbo zamm ir-rwol tieghu, u dan bil-kunsens unanimu taz-zewg azzjonisti.

5. *Illi ghar-rugunijiet unikament imputabbli lil Arlie Sterling u Marsoft International A/S, inkluz allegazzjonijiet infondati u theddid, s-Sur Stanley Portelli rrizenja mir-rwoli tieghu bhala direttur u segretarju ta` Balticmax Holding Company Limited u minn kull rwol li kellu f`kull socjeta` fl-istruttura ta` Balticmax Holding Company Limited.*

6. *Illi inoltre, PwC f`Malta, tterminaw is-servizzi kollha li kienu qed joffru lill-istruttura ta` Balticmax Holding Company Limited u dan ukoll minhabba ragunijiet unikament imputabbli lil Arlie Sterling u Marsoft International A/S,*

7. *Illi huwa kemmxejn ironiku li l-istess Arlie Sterling u Paul Leo Eckbo, it-tnejn involuti fil-grupp ta` Marsoft, ikkawzaw li Stanley Portelli u PwC f`Malta jirrezenjaw meta filfatt kemm is-Sur Stanley Portelli u Price Waterhouse Coopers gew appuntati minn Paul Leo Eckbo u kienu involuti f`Balticmax Holding Company Limited ferm qabel Vroon Containers B.V. saru azzjonisti f` Balticmax Holding Company Limited.*

8. *Illi r-rizenja ta` Stanley Portelli u t-terminazzjoni tas-servizzi offruti minghand PwC f`Malta affettwaw b`mod negattiv, sahsitra b`konsegwenzi rrimedjabbli, l-istruttura ta` Balticmax Holding Company Limited.*

9. *Illi Herman Marks, bhala direttur ta` Balticmax Holding Company Limited ghamel diversi attentati, flimkien ma` PwC f`Malta u Bremer Landesbank, biex jirrizolvi l-problemi, izda dawn qatt ma sabu l-kooperazzjoni ta` Arlie Sterling u Marsoft International A/S.*

10. *Illi Vroon Containers B.V. m`ghandhom l-ebda skop jaraw l-istruttura ta` Balticmax Holding Company Limited tfalli. Sa `llum, skond il-Loan Notes, Vroon Containers B.V. huma dovuti minghand Balticmax Holding Company Limited, ta` l-inqas, hmistax-il miljun seba` mija, sebgha u tletin elf u hames mitt Dollaru Amerikan (USD15,737,500) u dan oltre l-imghax ta` ghaxra fil-mija (10%) fis-sena.*

11. *Illi inoltre, Vroon Containers B.V., , huma dovuti wkoll zewg miljuni u mitt elf Dollaru Amerikan (USD2,100,000) u dan oltre l-imghax mis-socjeta` rikorrenti u dan skond il- BHC Cooperation Agreement*

12. *Illi Balticmax Holding Company Limited u Marsoft International A/S naqqsu mill-obbligazzjonijiet taghhom skond is-Senior Loan Note, is-Senior Bridge Loan Note u l-BHC Co-operation Agreement, u l-ammonti surreferiti dovuti lil Vroon Containers B.V. ghadhom dovuti, u kien propju ghalhekk illi nhargu l-mandati inikati fir-rikors promotur, u cioe sabiex is-socjeta` esponenti tikkawtela d-driitijiet taghhha.*

Illi inoltre, r-ragunijiet “evidenti” moghtija mis-socjeta` rikorrenti fir-rikors taghha biex tiggustifika illi l-affarjiet tas-socjeta Balticmax Holding Company Limited qed jitmexxew da parti ta` Vroon b`mod li huwa oppressiv, b`mod mhux gust diskriminatorju kontra, jew b`mod mhux gust ta` pregudizju, ghall-membru l-iehor Marsoft, huma ironici ghall-ahhar u dana ghaliex kienet l-istess socjeta rikorrenti illi qablet man nomina ta` l-istess Diretturi illi fil-fatt gew elenkati u approvati fil-BHC Co-operation Agreement. Inoltre, is-socjeta` rikorrenti ghogobha thalli barra il-fatt illi d-direttur nominat minnha u cioe s-Sur Sterling huwa ko-fundatur u President ta` Marsoft Inc. Ghalhekk huwa car illi s-socjeta` esponenti tinsab ezatt fl-istess sitwazzjoni tas-socjeta` rikorrenti.

Illi din il-kawza hija msejsa fuq l-Art. 402 tal-Kap. 386 u huwa principju ben assodat illi l-intervent tal-Qorti ghandu jitlaq mill-prova (li tinkombi lis-socjeta` rikorrenti) li s-socjeta` esponenti bhala azzjonista tal-Baltimax Holding Company Limited, ghamlet atti oppressivi, ngusti u diskriminatorji bi pregudizju u ghad-detriment tal-kumpanija rikorrenti. Illi kif ser jigi ppruvat ahajar waqt it-trattazzjoni tar-rikors dan l-element krucjali ma jezistix u dan stante illi r-rizenja tat-tielet direttur kien unikament minhabba l-agir abbuziv tas-socjeta` rikorrenti fil-konfront tieghu, u nonostatnente diversi tentattivi sabiex jinhattar direttur gdid, is-socjeta` rikorrenti baqghet inadempjenti.

Salv eccezzjonijiet ulterjuri.

Bl-ispejjez kontra s-socjeta` rikorrenti li hija min issa ngunta in subizzjoni u b`riserva ta` kull azzjoni ulterjuri spettanti lis-socjeta` esponenti fil-ligi.

Rat ir-risposta ta` Balticmax Holding Company Limited ("**BHC**")
prezentata fis-17 ta` Gunju 2016 li taqra hekk :-

1. *L-affarijiet ta` BHC qed jitmexxew mill-bord tad-diretturi taghha, u ghalhekk mhux il-kaz, kif inhu allegat, li l-affarijiet taghha qed jitmexxew "da parti ta` Vroon". Fl-interess taghha stess, BHC mhix sejra tesprimi ruhha dwar l-allegazzjonijiet li Marsoft International A/S qieghda tivvanta kontra Vroon Containers B.V.*

2. *Dato ma non concesso li japplikaw l-estremi tal-art. 402 (1) tal-Kap. 386 u kemm -il darba d-diretturi ta` BHC jibqghu ma jahtrux it-tielet direttur skont klawzola 5.1 tal-Cooperation Agreement (Dok B), BHC ma topponix il-hatra ta` dan id-direttur minn dina l-Onor Qorti.*

3. *BHC m`ghandhiex tbat i spejjez.*

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

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

Rat in-noti ta` osservazzjonijiet.

Rat l-atti l-ohra tal-kawza.

II. Provi

Arlie Sterling xehed li huwa l-President ta` Marsoft Inc. Din hija entita` kummercjali bazata fl-Istati Uniti li hija s-sid ta` Marsoft li hija registrata fin-Norvegja. Huwa azzjonista ta` Marsoft. Huwa direttur ta` BHC u ta` Balticmax Acquisition Corporation One Limited ("**AC1**"). BHC hija *holding company* li hija l-proprjetarja ta` AC1. Din tal-ahhar ghandha ishma go kumpanija li hija sid ta` bastimenti u cioe` Balticmax Container Ships. Nofs l-ishma ta` BHC huma ta` Marsoft. In-nofs l-iehor huwa ta` Vroon.

Xehed illi fil-bord ta` BHC hemm zewg diretturi : direttur minnhom huwa appuntat minn Marsoft u cioe` hu ; id-direttur l-iehor huwa mahtur

minn Vroon u dan huwa Herman Marks. Skont il-memorandum u l-articles of association ta` BHC (“**M&A**”) jistghu jigu appuntati sa hames diretturi. Il-bord ta` AC1 huwa kompost minnu u minn Herman Marks.

Fisser li Bremer Landesbank (“**Bremer**”) huwa bank Germaniz li ghandu *portfolio* sostanzjali ta` kumpanniji tas-*shipping* u li kien talab l-assistenza ta` Marsoft. Fl-2012, Marsoft kienet mitluba sabiex tghin dawn il-kumpanniji fil-mod kif seta` jitmexxa l-*portfolio*. Marsoft toffri servizzi relatati mas-*shipping market*. Vroon u Bremer kienu klijenti antiki ta` Marsoft.

Stqarr illi wara ftehim ma` Bremer, huwa avvicina investituri godda fl-Istatu Uniti u l-Iskandinavja. Tkellem ukoll ma` Vroon. Id-diskussjonijiet ma` Vroon bdew f` Ottubru 2014. Is-*share purchase agreement* sar fl-14 ta` Awissu 2015. Fl-istess zmien kien finalizzat ukoll *loan agreement* bejn Bremer u AC1 fejn Bremer iprovdiet US\$ 50 miljun bhala *working capital*, liema kapital kellu jintuza sabiex il-bastimenti jkunu jistghu joperaw wara li jkunu riparati u *upgraded*.

Kompla jixhed illi fid-Dok AS 31 hemm indikati r-ricevuti ta` depoziti li ghamlu Marsoft u Vroon meta akkwistaw u hallsu ghall-ishma ta` BHC.

Qal li hemm sensiela ta` emails u atti ohra li juru t-tentattiv ta` Herman Marks (“**Marks**”) biex jiehu kontroll ta` BHC.

Dok AS1 hija mozzjoni li pprezenta Marks sabiex dan ikun appuntat u awtorizzat biex jirraprezenta lil BHC, kif ukoll li jiffirma ftehim u jaghmel transazzjonijiet, b`mod u manjiera li jaqbez il-bord.

Spjega li huwa rrifjuta li jiffirma Dok AS1 u anke Dok AS2.

Kompla jghid li huwa nforma lill-bank li r-rizoluzzjonijiet dwar *electronic banking authority* ma kienux validi peress li huwa ma kienx iffirma. Minkejja dan il-process mexa xorta. Il-konsegwenza kienet illi l-access ghall-kontijiet bankarji ta` BHC u AC1 gew fl-idejn ta` persuni li kienu jwiegbu lil Marks. Fil-fatt anke llum l-access ghadu fl-idejn ta` persuni li huma mpegati ta` Vroon.

Kompla stqarr illi manuvra ohra ta` Marks kienet li jappunta lilu nnifsu bhala direttur ta` AC1. Huwa ma kienx approva l-kontenut ta` Dok AS7. Dan kien iffirmit minn Marks wahdu.

Qal illi bid-Dok AS8 kienet intimidata Annika Hedstrom, impjegata ta` Marsoft. Huwa kien wiegeb ghal dik l-ittra. Ghall-ittra tieghu ma kienx hemm risposta.

Fisser illi Dok AS9 u AS10 huma dokumenti li kienu skambjati fiz-zmien tal-vaganzi. Dak il-perijodu kien diffiqli ghalih li jaqra dik il-korrispondenza. Minkejja li fl-agenda tal-laqgħa li kienet saret Dicembru 2016, huwa talab li jigu diskussi kwistjonijiet ohra, Marks irrifjuta t-talba tieghu, u kienet trattata biss il-kwistjoni li tingħata twegiba għall-ittra tal-bank sabiex jigu estizi l-kundizzjonijiet u l-ftehim finanzjarju ma` AC1.

Kompla fissier illi bid-Dok AS10, Marks informa lill-bank li kienet ser tigi rifjutata l-offerta għall-estensjoni bil-konsegwenza li waqqaf ic-cans li jigu akkwistati tmien (8) bastimenti ohra. Huwa ma kienx ta l-kunsens tieghu biex tigi terminata l-facilita`, anzi min-naha tieghu ried l-facilita` titkompla.

Xehed illi l-pjan originali kien li jigu akkwistati 32 bastiment. Dawn kienu diga` identifikati ; il-bank kellu l-ghazla li jmur għal bastimenti differenti jekk isib diffikulta` biex jakkwista bastiment partikolari. AC1 spiccat akkwistat 24 bastiment biss.

Spjega illi b`Dok AS11, impjegat ta` Vroon innotifika lill-bord dwar is-suspensjoni tal-ftehim dwar l-akkwist ta` bastimenti fil-31 ta` Dicembru 2015. Skont il-minuti tal-21 ta` Lulju 2016 (Dok AS12), kien hemm mozzjoni sabiex Vroon thallas US\$ 512,500, li kellhom jintuzaw għall-bastimenti. Billi ma kompliex l-akkwist tal-bastimenti skont il-pjan, dik is-somma kellha tithallas lura lil Vroon bl-interessi ta` 10% fis-sena.

Qamet ukoll kwistjoni dwar US\$ 2 miljun li Vroon kienet qed titlob li tithallas minn BHC. Huwa oppona li jsir dak mil-hlas billi l-bord ma kienx adegwatament infurmat. Dak iz-zmien id-diretturi kienu għadhom hu u Marks. Cio` nonostante Marks xorta wahda ddikjara li kien ser jizbanka dawk il-US\$ 2 miljun unilaterament. Dan seta` jagħmlu għaliex impjegati ta` Vroon kellhom kontroll shih tal-facilitajiet bankarji elettronici. Fid-Dok AS13, Marks iapprova jsib raguni għalfejn gibed dawk il-flus. Ikkonferma li d-

direttur li kien mahtur mill-Qorti Dr Richard Galea Debono kien baghat email fit-12 ta` Ottubru 2016 fejn qies li l-izbank li kien sar bhala att illegali.

Kompla jghid illi huwa talab li jinhatar *manager* indipendenti. It-talba tieghu kienet respinta minn Mark. Ghalhekk it-tmexxija baqghet tigi kondotta minn nies ta` Vroon.

Qal illi Bremer kellu problema minhabba t-tmien bastimenti li kellhom jigu akkwistati u li baqghu ma gewx akkwistati. In segwitu dawn il-bastimenti kienu akkwistati minn Vroon wahedha b` kundizzjonijiet ahjar milli dak li ppjanat. Fil-fatt Vroon ikkostitwiet entitajiet fl-Olanda biex tkun tista` takkwista dawn il-bastimenti.

Spjega li skont il-*pool agreements*, Vroon kellha thallas lil AC1 darbtejn f` xahar. Fil-fatt l-ebda pagamenti ma saru lil AC1. Min-naha tieghu huwa oggezzjona ghal dan. Ipprova jiehu azzjoni biex jiddefendi l-interessi ta` BHC. Min-naha taghha Vroon bdiet proceduri ta` arbitragg kontra BHC fin-Norvegja minhabba n-nuqqas ta` hlas ta` imghax skont il-*loan notes*. Huwa deher ghal BHC. Sakemm Dr Galea Debono rrizenja minn direttur, kien jidher mieghu wkoll.

Sostna li sabiex BHC tkun tista` tkompli topera, kien hemm bzonni direzzjoni fis-sens illi direttur ikun jista` jiehu azzjoni kontra Vroon kif ukoll illi Marks jibqa` barra minn azzjonijiet li BHC tiehu kontra Vroon.

Insista li li kienet mehtiega riforma ta` l-istruttura tal-kumpannij.

Bl-azzjonijiet li saru minn Vroon, il-kumpannija tilfet 25% tal-bastimenti.

Av. Dr. Stanley Portelli xehed li huwa kien direttur ta` BHC li hija *holding company* b`diversi kumpanniji sussidjarji nkluz ta` AC1. Huwa kien direttur ukoll tas-sussidjarji. Kull sussidjarja kienet *shipping company*. Il-hsieb kien li jsir l-akkwist ta` numru ta` vapuri.

Xehed illi huwa rrizenja minn direttur billi kien hemm nuqqas ta` qbil bejn iz-zewg diretturi l-ohra, li kellu wiehed minnhom kien appuntat minn kull wiehed miz-zewg azzjonisti. Huwa pprova jaghmel opra ta` medjazzjoni izda t-tentattiv tieghu ma rnexxiex. Ghalhekk kellu jaghti r-rizenja tieghu.

Stqarr illi kien hemm qbil li Paul Eskbo ("**Eskbo**") gbo jirrienza u minfloku jinhatar Arlie Sterling. Ghalhekk kienet prezentata Form K.

Gara izda li Eskbo kkontesta din il-Form K ghaliex qal li ma kinitx l-intenzjoni tieghu li jirrienza. Fil-fatt il-korrispondenza skambjata kienet turi li Egbo kien ser jirrienza.

Fil-**kontroezami**, ikkonferma li r-risoluzzjoni tas-16 ta` Novembru 2015 esebita bhala Dok LP6 hija ffirmata minn Herman Marks wahdu.

Ikkonferma li fis-6 ta` Ottubru 2015 saret ittra ta` rizenja ta` Eskbo minn direttur ta` BHC. Din l-ittra hija riflessa fil-Form K esebit bhala Dok LP3.

Ikkonferma li fil-minuti ta` laqgħa generali straordinarja ta` BHC, kien hemm *acknowledgement* tar-rizenja ta` Eskbo u l-hatra ta` Herman Marks u Arlie Sterling bhala diretturi ta` BHC.

Ikkonferma li l-abbozz ta` risoluzzjoni esebita a fol 203 sa 205 kienet iffirmata minn Herman Marks.

Ikkonferma li fit-13 ta` Ottubru 2015 kien skambjat email fejn huwa kien ippropona li fil-futur ghandu jkun hemm qbil bejn iz-zewg diretturi qabel ma huwa jingħata struzzjonijiet.

Sostna li huwa ma kellux ittra ta` rizenja ta` Eskbo minn AC1.

Spjega li r-risoluzzjoni tas-16 ta` Novembru 2015 ghaddiet għandu b` email li kien bagħat Carmel Myers ta` Vroon.

Sostna li Egbo kien oggezzjona meta saret il-Form K fir-rigward tal-kariga tieghu fl-AC1. Kien konsapevoli ta` dokumenti li juru r-rizenja ta` Eskbo minn direttur ta` BHC. Il-Form K in kwistjoni baqghet ma gietx irtirata.

Av. Dr. Mark Lautier xehed li d-ditta ta` awdituri PwC Malta kienet ingaggata minn PwC Norway biex tghin fit-tnedija ta` struttura ta`

kumpanniji. Kienet inkarigata wkoll biex taghti pariri dwar Income Tax u VAT compliance. Kellha wkoll l-inkarigu li tipprepara diversi dokumenti socjetarji ohra u li tipprezentahom.

Stqarr illi l-Form K esebita bhala Dok LP5 kienet preparata minn PwC u kienet cirkolata lir-rappresentanti ta` Marsoft u ta` Vroon. Kienet iffirmata mill-*company secretary* u d-direttur Dr. Stanley Portelli. Wara li l-Form K kienet prezentata, waslet ghandhom email minghand Arlie Sterling fejn kienu nfurmati illi Paul Eskbo qatt ma rrizenja minn direttur.

Spjega li rcevev korrisondenza ntiza sabiex tkun rettifikata s-sitwazzjoni.

Qal illi in segwitu PwC ma baqghetx taghti s-servizzi taghha.

Ippreciza li l-Form K baqghet ma nbidlitx ghax huma baqghu ma nghatawx struzzjonijiet miz-zewg nahat.

Kien evidenti li Marsoft kienet qeghda turi li ma kellhiex aktar fiducja fil-PwC.

Fil-**kontroezami**, stqarr illi bejn Marsoft u PwC dejjem kien hemm fiducja shiha. Qamet il-kwistjoni ta` nuqqas ta` fiducja meta nqalghet ir-rizenja ta` Egbo. Sostna li fil-*cooperation agreement* bejn Vroon, Marsoft u BHC, kien jinghad car li Eskbo kellu jirrizenja. PwC ma ratx ittra ta` rizenja ffirmata minn Eskbo.

Herman Marks xehed illi huwa impjegat ta` Vroon Group u membru tal-bord tad-diretturi tal-group. Vroon Containers hija kumpannija sussidjarja.

Xehed illi l-hsieb wara l-holqien ta` BHC gie min-naha ta` Marsoft. Din kienet qed tagixxi b`inkarigu ta` Bremer Landesbank.

Qal illi l-proposta ta` negozju kienet prezentata lilhom u lil numru ta` investituri ohra bil-ghan li jsir ristrutturar ta` bastimenti li jgorru l-*containers*.

Huwa kien appuntat fuq il-bord ta` BHC biex jirraprezenta lil Vroon.

L-ishma ta` BHC huma maqsuma ndaqs bejn Marsoft u Vroon.

Stqarr illi Vroon dahlet ghall-progett minhabba l-*expertise* taghha fil-qasam marittimu.

Qal illi Vroon investiet flus fil-progett sabiex ikun jista` jaqbad.

Fisser illi Bremer kien hataf numru ta` *container ships* li kienu insolventi. Kien miftiehem illi Vroon tiehu 50% tal-ishma u tinvesti fi proporzjon ta` nofs il-*loan notes*. Billi Marsoft ma kenitx sabet investiture. Vroon accettat li tipprovdi ghan-nofs l-iehor.

Stqarr illi fix-xahar ta` Awissu 2015 kien mahtur Dr. Stanley Portelli minn Marsoft bhala direttur. Il-problemi nholqu meta f` Novembru 2015 induna li Marsoft kienet qed tittrasferixxi flus mill-kontijiet ta` BHC favur taghha stess bhala *management fees*.

Qabel ma sar il-*co-operation agreement* saru jafu li BHC kienet ikkontrattat il-funzjonijiet manigerjali kollha lil Marsoft. Vroon bdiet topera l-kontijiet bankarji ta` BHC fuq talba ta` Marsoft. Kull operazzjoni bankarja kienet kontrollata u verifikata mill-bank. Sal-15 ta` Novembru 2015, Marsoft kienet *sole manager* ta` dak kollu li kien qed jigri fil-grupp. Vroon qatt ma thallset tax-xoghol li ghamlet ghal BHC. Arlie Sterling dejjem agixxa fl-interess ta` Marsoft.

Fisser illi kien iffirmit *master finance agreement* li kien intiz sabiex jipprovdi facilitajiet finanzjarji ghal 32 bastiment. Il-facilita` tas-self kienet ta` madwar US\$ 440 miljun. Il-valur fis-suq tal-bastimenti kien ta` US\$ 210 miljun. Kien miftiehem li t-32 bastiment jigu akkwistati sa l-ahhar ta` Dicembru 2015. Il-pattijiet ma gewx osservati u rnexxielhom jakkwistaw 24 vapur sal-31 ta` Dicembru 2015. Dr Portelli rrizenja minn direttur ghaliex kien tqieghed taht pressjoni minn Marsoft biex jerga` jahtar lil Eskbo bhala direttur ta` AC1.

Kompla jghid illi PwC ma baqghetx taghti servizz wara li Marsoft allegat illi PwC ma kenitx imparzjali. Wara r-rizenja ta` Dr Portelli u PwC,

kienet diskussa ittra tal-bank sabiex ikun hemm estensjoni ta' *l-availability period*. Huwa talab li jinhatru diretturi ta' l-SPVs izda ghal xi raguni Arlie oggezzjona. Billi ma sarux id-diretturi, ma setghux jigu akkwistati iktar bastimenti.

Xehed illi fix-xahar ta' Jannar 2016 sar mandat Oslo u sar appell minn Marsoft. L-appell kien michud. Imbaghad sar arbitragg. Skont il-lodo arbitrali, Marsoft kellha thallas US\$ 2.1 miljun lil Vroon bhala sorte, apparti l-ispejjez u l-imghaxijiet. Inltre Marsoft kienet ordnata li tittrasferixxi 9,600-il sehem ta' BHC lil Vroon. Minn dan kollu Marsoft baqghet ma ghamlet xejn.

Stqarr illi qamet kwistjoni ohra dwar talba ta' Vroon biex tithallas lura *l-loan notes* li kellhom jintuzaw ghall-akkwist ta' bastiment li baqa' ma giex akkwistat. Marsoft oggezzjonat. Meta dawn il-*loan notes* ma thallsux, sar arbitragg li kien deciz favur Vroon. BHC kienet ordnata thallas US\$ 3 miljun lil Vroon.

Cahad li l-fatt li kienu akkwistati 24 bastiment biss, kellu riperkussjonijiet negattivi fuq il-*business model* ta' Marsoft. Kien hemm zgur thassib da parti ta' Vroon illi kien qed jidher li l-istruttura kienet qed tahli hafna flus b' rata aktar mghaggla minn dik prospettata. Ippruvaw jiltaqghu ma' Bremer li ried li l-azzjonisti jhallsu US\$ 2 miljun izda Marsoft irrifjutat.

Kompla jixhed illi BHC ghandha dejn ta' US\$ 13-il miljun ma' Vroon. L-unici assi li ghandha BHC huwa l-ishma fl-AC1. Illum BHC mhijiex fil-qaghda li thallas id-djun taghha.

Qal illi AC1 kienet tinsab fl-istess sitwazzjoni. Huwa waqqaf il-*management agreements* li kien hemm bejn AC1 u BHC.

Sahaq illi Vroon tilfet US\$ 13.5 miljun mentri Marsoft hadt US\$ 125,000 f' mizati li ma kinitx intitolata ghalihom. Gabret US\$ 1 miljun mill-bank bhala *commission* ghal kull *loan note*.

Fil-**kontroezami**, xehed illi huwa ma abbozzax id-dokument a fol 198. Ikkonferma l-kontenut tad-dokument kif ukoll illi d-dokument kien iffirmit minnu biss.

Stqarr illi r-raguni ghad-dokument kienet illi kien hemm in-necessita` ta` aktar speditezza fil-process ta` l-akkwist ta` bastimenti billi l-process kien jitlob hafna ffirmar.

Ir-risoluzzjoni ma kinitx ghaddiet ghalkemm kienet diskussa.

Ikkonferma li d-dokument a fol 208 kien jaghti setgha lill-impjegati ta` Vroon biex jacedu ghall-facilitajiet bankarji.

Sostna li r-risoluzzjoni li jitnehha Eskbo kienet abbozzata minn PwC u ffirmaha hu biss.

Egbo kien accetta li jirrienza minn direttur tal-kumpannija bhala parti mill-*co-operation agreement* li kien esplicitament miftiehem bejn Marsoft u Vroon. Ir-rizenja kienet diskussa quddiem diversi nies, u tirrizulta wkoll minn korrisondenza skambjata.

Ikkonferma li klawsola 5.6 tal-*co-operation agreement* tirrigward BHC u mhux AC1.

Stqarr illi BHC ittrasferiet US\$ 2 miljun li kienu dovuti lil Vroon. Huwa awtorizza dak it-trasferiment. It-trasferiment sar fl-interess ta` BHC ghall-iskop illi jonqsu l-interessi li kellha thallas BHC abbazi tal-*loan note*.

Fisser illi l-istrutturi soċjetarji ta` BHC u ta` AC1 ma baqghux operattivi wara li Marsoft instigat ir-rizenja ta` Dr Stanley Portelli u ta` PwC.

Cahad li Vroon akkwistat ir-rimanti tmien (8) vapuri li kellhom jigu akkwistati minn BHC.

Ikkonferma illi huwa ttrasferixxa l-ishma li BHC kellha fl-AC1 lil Vroon. BHC irceviet US\$ 2,000 fil-kont taghha ghal dak it-trasferiment ta` ishma. Biex sar it-trasferiment ma hax awtorizzazzjoni. Effett tat-trasferiment, il-kontroll tal-voti ghadda ghand Vroon u ghalhekk Marsoft giet maqtugha barra.

Qal illi l-procedura ghax-xoljiment u stralc ta` AC1 ma tirrifletti dak li huwa stipulat fil-*co-operation agreement*.

Av. Dr. Richard Galea Debono xehed li huwa kien mahtur mill-Qorti lejn l-ahhar tas-sajf 2016 bhala direttur addizzjonali ta` BHC. Il-hatra saret peress li fil-bord ta` BHC kien hemm zewg diretturi biss u dawn ma setghux jiftehmu dwar hafna affarijiet. Ghalhekk kien hemm bzonn tat-tielet direttur sabiex jarbitra bejniethom. Saru diversi laqghat tal-bord.

Xehed illi l-azzjonista Vroon tiehu hsieb *ship management* waqt li l-azzjonista Marsoft hija kumpannija l-aktar ta` ricerka li tipprova tizviluppa *economic models* ta` kif kumpanniji jistghu joperaw. Marsoft kienet zviluppat mudell ekonomiku fejn minflok li l-bank Bremer Landesbank ibiegh b`subbasta vapuri li kienu qeghdin jaghmlu tajjeb ghall-krediti li kellu bir-riskju li jigbor ftit mill-krediti li kellu, il-vapuri kellhom imorru go flotta li titmexxa minn BHC tramite l-kumpannija sussidjarja taghha AC1. L-idea kienet li l-vapuri jibqghu jahdmu b` tali mod li jkollhom dhul bizzzejjed sabiex ma jigux *scrapped* u sabiex il-bank ikun jista` jsostni l-interessi li kellu fuq self, bit-tama li meta s-suq tal-vapuri joghla jkun jista` jbiegh xi vapuri minnhom bi prezz tajjeb. Marsoft harget bl-idea li ssir din il-*joint venture*.

Spjega li l-vapuri gew trasferiti lil 24 kumpannija separata. kollha sussidjarji ta` AC1. Kien hemm ftrehim li kienet sussidjarja ta` BHC. Kien hemm *agreement* dettaljat bejn iz-zewg *shareholding entities*. Wahda mill-kondizzjonijiet kienet li l-flotta kellha tkun ta` mhux inqas minn 28 bastiment izda dan l-ghan ma ntlahaqx minhabba li wara 24 bastiment, ix-xiri waqaf. Dan sehh minhabba li Vroon bdiet tghid li ma hemmx ghalfejn jinxtraw iktar. Marsoft deherilha li kellhom jibqghu jinxtraw sa 28 bastimenti ghaliex il-*business model* kien hekk gie pjanat.

Kompla jghid li kien hemm problema fuq il-*business manager* li idealment kellu jkun indipendenti minn Marsoft u minn Vroon. Sakemm huwa dam hu direttur, ma kienx appuntat *business manager*.

Qal illi l-*business model* ta` Marsoft ma kienx qed jirnexxi ghal xi raguni. Meta beda jigri dan, Vroon haditha kontra Marsoft, u din tal-ahhar bdiet twahhal fi Vroon ghaliex ma nextrawx it-28 vapur. Marsoft akkuzat lil Vroon illi din ma kenitx qeghda taghmel *management* tajjeb ta` l-bastimenti.

Kompla jghid illi kien wasal punt fejn Herman Marks deherlu li jrid jigbor flus minghand BHC , u ghalhekk qabad u gibed US\$ 2 miljun mill-kont

ta` BHC. Huwa kien wissa lil Marks lid an ma kellux jaghmlu izda Marks wiegbu li dawk il-flus kienu dovuti lil Vroon.

Xehed illi fid-29 ta` Novembru 2016 saret laqgha billi l-accounts ta` BHC kienu waqghu lura. Waqt il-laqgha, Marks qal illi kien sehh *default tal-loan notes* li Vroon kellha kontra BHC. Huwa tkellem mal-konsulent legali li kien ser jiddefendi lil BHC fl-arbitragg. Minn qari tal-*loan notes*, kienet tirrizulta *default*.

Kompla jixhed illi huwa tkellem ma` Arlie Sterling u insista mieghu li ma kienx hemm difiza x`tinghata kontra l-pretensjoni ta` Vroon. Huwa ippropona lil Vroon sabiex jekk ikun hemm ammissjoni tat-talba taghha kif dedotta fl-arbitragg, ikun hemm ftehim ta` dilazzjoni tal-pagamenti sabiex BHC tinghata l-opportunita` li thallas dak dovut, bla ma tispicca nsolventi, anke ghall-fini ta` kontabilita`.

Stqarr illi Vroon accettat din il-proposta.

Min-naha ta` Marsoft l-insistenza kienet illi dak pretiz minn Vroon ma kienx dovut.

In vista ta` dan, huwa rrizenja minn direttur ghaliex ma riedx ikun direttur ta` kumpannija nsolventi.

Qal ukoll illi safejn jaf hu, l-arbitragg fin-Norvegja kien deciz favur Vroon.

III. Fatti

Fil-qosor il-fatti saljenti b`ordni kronologiku huma dawn :-

BHC kienet registrata Malta fis-26 ta` Mejju 2015 bin-numru C70765.

Kienet kostitwita bhala *sole member limited liability company*.

Il-membru kien Paul Eckbo (fol 47 sa 49).

Fis-17 ta` Awissu 2015, kienu registrati zewg trasferimenti ta` ishma meta Eckbo ttrasferixxa 50% tal-ishma lil Vroon u l-50% l-ohra lil Marsoft (ara fol 6 sa 27 tal-process).

Fit-18 ta` Awissu 2015, Dr Stanley Portelli kien appuntat bhala direttur ta` BHC.

Kien ukoll appuntat direttur ta` kumpanniji sussidjarji ta` BHC, fosthom AC1 (ara fol. 491 u 492).

Min-naha taghha, AC1 ghandha diversi kumpanniji sussidjarji li ghandhom numru ta` bastimenti.

Il-beneficjarji ta` AC1 huma Marsoft u Vroon fi kwoti ndaqs.

Fis-6 ta` Ottubru 2015 kien iffirmit ftehim ta` koperazzjoni bejn BHC, Marsoft u Vroon (ara fol 28 sa 35) bil-hsieb li tkun regolata r-relazzjoni ta` bejniethom. Fost il-pattijiet kien miftiehem illi *l-overall strategic direction of the business of BHC* kellu jigi determinat mill-partjiet kollha b`mod unanimu waqt laqgħa generali ta` l-azzjonisti. Kien miftiehem li l-bord tad-diretturi tal-kumpannija kellu jkun kompost minn tliet membri jew numru iehor hekk kif determinat bil-kunsens unanimu tal-partijiet. Vroon u Marsoft inghataw id-dritt li jinnominaw u jahtru membru wiehed fil-bord, mentri t-tielet membru kellu jkun mahtur bi ftehim bejn Vroon u Marsoft.

Fil-ftehim insibu li :-

Marsoft and Vroon will use their best efforts to ensure that the Vroon Bridge Financing is repaid fully by the end of 2015 by 1) maximising cash flow in the Company in Q 4 2015 available for loan repayments and 2) raising funding for BHC in the form of senior loan notes with profit participation

....

In the event that Marsoft and/or Vroon cannot raise sufficient funding to reduce Vroon`s exposure under the Bridge Financing to USD 0 by 31 December 2015 then

1. *Marsoft and/or nominee will subscribe any pay on 31 December 2015 to up to USD 2,100,000 of the Profit participation Loan Notes. These funds to be used solely to reduce Vroons` outstanding under the Vroon Bridge Financing.*

2. *Marsoft will transfer no later than 6 January 2016 shares in BHC to Vroon in compensation, if there is a shortfall relative to the USD 0 target then Marsoft and Vroon will split the difference of the shortfall and Marsoft will transfer a percentage of shares in BHC equal to its portion of the shortfall, divided by USD 10,500,000 and multiplied by 10% of the shares.*

Fis-6 ta` Ottubru 2015 ukoll, BHC ghamlet zewg kuntratti ta` self ma` Vroon fejn din silfet flejjes lil BHC ghall-investment (ara fol 73 sa 76).

Fis-6 ta` Ottubru 2015 ukoll, Eckbo rrizenja minn direttur ta` BHC (fol 493). Fl-istess gurnata kienu appuntati bhala diretturi Arlie Sterling minn Marsoft, u Herman Marks minn Vroon.

Fit-12 ta` Novembru 2015, Eckbo rrizenja minn direttur ta` AC1 u fl-istess gurnata kienu appuntati bhala diretturi ta` AC1 Arlie Sterling u Herman Marks bl-istess mod kif kienu nhatru bhala diretturi ta` BHC.

Fit-28 ta` Dicembru 2015, Dr Stanley Portelli rrizenja minn direttur ta` BHC, minn direttur ta` AC1, u minn direttur fis-socjetajiet sussidjarji kollha ta` AC1 (fol 504 sa 506).

Skont il-ftehim ta` koperazzjoni, sal-31 ta` Dicembru 2015, Marsoft kellha tittrasferixxi US\$ 2.1 miljun lil Vroon, kif ukoll li tittrasferixxi 2.49% ta` l-ishma li Marsoft kellha fil-BHC. La l-flus u lanqas l-ishma ma kienu trasferiti.

Fl-14 ta` April 2016, Marsoft ipprezentat il-kawza odjerna.

Fit-2 ta` Settembru 2016, din il-Qorti tat *interim order* fejn hatret lil Dr Richard Galea Debono bhala direttur iehor ta` BHC.

Fis-16 ta` Dicembru 2016, Dr Galea Debono informa l-Qorti li ma kellux alternattiva ohra hlief li jirrizenja minn direttur.

Fil-21 ta` Frar 2017, inghata lodo minn arbitru f` Oslo fis-sens illi Marsoft kienet ordnata thallas lil Vroon is-somma ta` US\$ 2.1 miljun bl-ispejjez u bl-imghax, kif ukoll illi kienet ordnata tittrasferixxi lil Vroon 2.49% tal-ishma li ghandha fil-BHC kellhom ikunu trasferiti lil Vroon (ara minn fol 567 sa 637).

Fil-15 ta` Mejju 2017, inghata lodo iehor minn arbitru f` Oslo fis-sens illi Marsoft kienet ordnata thallas lil Vroon l-ammont ta` US\$ 12,225,00 apparti hlasijiet ohra (ara minn fol 638 sa 682).

IV. L-eccezzjoni preliminari

Vroon tat eccezzjoni preliminari fis-sens illi r-rikorrent Dr Jonathan Abela Fiorentino kellu jaghmel il-prova li huwa kien debitament awtorizzat minn Marsoft sabiex jistitwixxi dan il-procediment.

Waqf il-gbir tal-provi ma saret ebda referenza ghal din l-eccezzjoni. Lanqas saret referenza ghalha fin-noti ta` osservazzjonijiet.

Dan premess, jirrizulta li fix-xieghda tieghu Arlie Sterling wiegeb in esami ghal domandi li saru minn Dr. Richard Camilleri, li bhal Dr Abela Fiorentino, kien qed jidher ghal Marsoft. Imkien ma rrizulta mid-deposizzjoni tieghu anke in kontroezami li Dr Abela Fiorentino ma kienx il-mandatarju ta` Marsoft fil-kawza tal-lum.

Skont l-**Art 1857(2) tal-Kap 16**, mandat jista` jsir mhux biss b`att pubbliku jew bil-kitba izda anke bil-fomm kif ukoll tacitament. Dan kien ikkonfermat b`ghadd ta` sentenzi tal-qrati taghna fosthom **Frendo vs Azzopardi et** (PA : 28 ta` Jannar 2004) ; **Elkhaite et vs Attard et** (PA : 28 ta` Frar 2002) ; u **Tabone pro et noe vs Debono et** (PA : 21 ta` Novembru 2007).

Fil-kaz tal-lum, l-assjem ta` fatti u cirkostanzi li hargu fil-kors ta` din il-kawza juri li Dr Abela Fiorentino kellu l-mandat li jipprezenta l-azzjoni ghal Marsoft.

Ghalhekk l-eccezzjoni qeghda tkun respinta.

V. L-Art 402 tal-Kap 386

Marsoft ressqet it-talbiet taghha abbazi tal-Art 402 tal-Kap 386.

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

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

...

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

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

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

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

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

(e) jordna lill-kumpannija li tibda, tiddefendi, tkompli jew ma tkomplx procedimenti tal-qorti, jew jawtorizza lil membru jew membri tal-kumpannija li jibdeu, jiddefendu, ikomplu jew ma jkomplux procedimenti tal-qorti fisem u ghan-nom tal-kumpannija ; jew

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

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

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

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

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

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

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

“Where the court is satisfied that a petition under s. 994 is well founded, it may make such order as it thinks fit for giving relief in respect of matters complained of [s 996(2)]”

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

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

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

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

VI. Il-prova

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

Ighid –

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

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

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

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

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

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

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

sufficient if the conduct satisfies only one of these tests.”

VII. Il-legittimu kontradittur

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

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

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

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

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

person or persons who were allegedly responsible for the wrongdoing and that the court's order need not in all cases be issued against the company itself. The Court remarked that as the applicant's allegations of wrongdoing were directed towards the defendant, it was clear that the defendant was a proper party to the proceedings. It also stated that the fact that the action was not also filed against the company did not nullify the proceedings.

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

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

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

complained of may be made a respondent, at least if he would be affected by the relief sought.

Tenut kont tal-ilmenti ta` Marsoft, il-Qorti tqis illi l-intimati hekk kif imharrka huma legittimi kontradditturi taghha ghall-finijiet u effetti kollha tal-ligi. Tajjeb jinghad illi fl-eventwalita` li ssir il-prova tar-rekwiziti ta` l-Art 402(1), u allura l-Qorti tkun trid tipprovdi skont l-Art 402(3), il-provvediment taghha jolqot ukoll lis-socjeta` ntimata.

VIII. Gurisprudenza

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

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

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

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

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

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

... l-Artikolu 402 ta` l-Att dwar il-kumpaniji jaghti diskrezzjoni pjuttost wiesa` lill-Qrati u dan ghalix dawn il-provvedimenti ghandhom l-ghan li jissalvagwardjaw u jiprotegu lill-azzjonisti ta` socjeta` kummercjali, partikolarment lil dawk li huma minoritarji u li ghalhekk qeghdin fl-impossibilita` li jirregolaw il-mod li bih tkun qed titmexxa s-socjeta` li fiha huma jkollhom interess ...

... din id-disposizzjoni, li hija bbazata fuq l-Art.459 tal-Companies Act (1985) Ingliza, hija ispirata fuq principji ta` ekwita` aktar milli minn drittijiet strettament legalistici biex ikun jista` jigi moghti rimedju. Dak li hu necessarju hu li l-azzjonista jipprova li minhabba l-gestjoni tas-socjeta` partikolari hu qed isofri, jew ukoll jista` jsofri, pregudizzju ta` natura oppressiva, ingusta jew diskriminatorja. Tali gestjoni tista` tirreferi sempliciment ghal xi att specifiku jew xi ommisjoni tal-kumpanija. Il-pregudizzju jista` jirreferi ghall-azzjonist li qed jipromwovi l-proceduri, ghal xi azzjonist iehor jew ghall-interest in generali ta` l-azzjonisti. Ma hemmx ghalfejn li huwa jipprova li huwa zgur ser isofri xi pregudizzju fil-futur. Tali prova tista` ssir fuq bazi ragjonevoli ta` possibilita` ("**Vincent Monreal et v. Lino Delia noe**" deciza mill- Prim`Awla tal-Qorti Civili fit-13 ta` Mejju,1999). Infatti gie deciz mill-Qrati Inglizi fil-kawza in **re Bovey Hotel Ventures Ltd** [(1983) B.C.L.C. 290] li "the Court will not give a list of situations when this remedy may be resorted to however one principle remains clear. A shareholder may make use of this article when his shareholding in the company has been seriously diminished at least seriously jeopardized by reason of a course of conduct or the part of those who have the de facto control of the company, which has been unfair to the member concerned".

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

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

The test for unfairness must, I think, be an objective, not a subjective, one. In other words it is

not necessary for the petitioner to show that the persons who have de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith ; the test, I think is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner`s interests.

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

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

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

... *Fil-ligi Ingliza (ara Art 459 tal-Companies Act, 1985) jinstab rimedju simili li hu maghruf bhala "The Unfair Prejudice Remedy". Il-Qorti ta` l-Appell Ingliza stabbiliet fil-kaz "**in Re Saul D. Harrison & Sons plc** ([1995] 1BCLC 14)" il-linji ta` gwida dwar kif kellu jkun l-operat biex ikun jista` jigi kkwalifikat bhala, "unfairly prejudicial" (fit-test tal-Ligi Maltija din il-frazi hi tradotta "b`mod mhux gust ta` pregudizzju"). Wiehed kellu, fl-ewwel lok, jara jekk dak l-operat kienx jew le skond l-istatut tal-kumpanija. Izda fl-applikazzjoni tal-imsemmija dispozizzjoni – ispirata fuq principji ta` ekwita` aktar milli minn drittijiet strettament legali – il-Qorti tiehu in konsiderazzjoni l-aspettattivi legittimi ("legitimate expectations") li r-rikorrent jista` jkollu u li sikwiet ikunu ferm aktar wiesgha mid-drittijiet strettament legali li johorgu mill-istatut ta-ssocjeta`. Dawn l-aspettattivi legittimi jitwiellu minn xi relazzjonijiet personali partikolari bejn l-azzjonisti. Fil-kaz **Ebrahimi vs Westbourne Galleries Ltd.** ([1973] AC 360) Lord Wilberforce elenka numru ta` sitwazzjonijiet fejn dan ir-rimedju jista` jinghata, sitwazzjonijiet dawn li x`aktarx jinstabu f` kumpaniji zgħar privati li ta` sikwiet jissejhu "quasi partnerships", fosthom is-segwenti :-*

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

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

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

Fid-decizzjoni ta` din il-Qorti diversament presjeduta tas-7 ta` Ottubru 2016 fil-kawza **Av. Dr. Pio M. Valletta noe vs Jeno Torocsik et** inghad illi sabiex ikun hemm *unfair prejudice*, (a) *it-test irid ikun wiehed oggettiv ;* (b) *M`hemmx htiega li l-attur jipprova l-mala fede ;* (c) *M`hemmx htiega li l-*

attur jipprova li kien hemm intenzjoni li tikkawza pregudizzju ; (d) Mhux gust ma jfissirx bilfors li l-agir irid ikun illegali ; u (e) L-agir irid ikollu effett negattiv fuq l-attur bhala azzjonist.

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

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

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

IX. Dottrina

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

... The position will vary greatly from the small private companies, commonly called quasi-partnerships, to public companies of considerable size. As a quasi-partnership, the company will

usually have been formed or continued on the basis of a personal relationship involving mutual confidence. There may be an agreement or understanding that all or some of the shareholders are to participate in the conduct of the business. Restrictions on the transfer of shares will be the rule rather than the exception. The individuals involved may also have made relatively substantial capital contributions to the company. Shareholders in such companies will be a small close-knit group, actively involved in many instances in the daytoday operations and financially and personally committed to the company. Here the scope for legitimate expectations beyond their strict legal rights is obviously greatest.

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

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

“That is not to say that s.459 does not apply to larger private companies and public companies for

the section is clearly not limited to quasipartnerships. The point is that it may be harder to establish conduct which is unfairly prejudicial to the interests of the members in such companies.

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

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

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

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

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

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

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

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

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

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

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

“The words ‘unfairly prejudicial’ are general words and they should be applied flexibly to meet the circumstances of the particular case ... The conduct [being complained of] must be both prejudicial [in the sense of causing prejudice or harm to the relevant interest) and also unfairly so ; conduct may be unfair without being prejudicial or prejudicial without being unfair, and it is not sufficient if the conducts satisfies only one of these tests.”

Ikomplu billi jaghmlu riferenza ghal **“O’Neill vs Phillips”** (op. cit.) in partikolari dwar l-għazla li għamel il-Parlament Ingliż –

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

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

X. L-ilmenti tar-rikorrenti

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

Tajjeb li jkun ribadit illi sabiex ikun sodisfatt il-vot tal-ligi huwa bizzegjed jekk tirrizulta mqar wahda mic-cirkostanzi ndikati fl-Art 402(1). Infatti l-legislatur għazel il-konguntiv *jew* mhux l-

konguntiv u fid-disposizzjoni. Ghalhekk ir-reqwiziti huma alternattivi mhux kumulattivi.

Fis-sostanza, l-ilmenti tar-rikorrenti fil-kuntest tal-Art 402(1) kienu dawn :-

1. Illi Herman Marks unilateralment ta struzzjonijiet ghar-registrazzjoni tar-rizenja ta` Paul Eckbo mill-bord tad-diretturi ta` AC1.

2. Illi Marks iffirma wahdu rizzoluzzjonijiet ta` BHC u AC1 fejn ta lill-impjegati ta` Vroon l-awtorita` ghal *electronic banking* fil-kontijiet ta` BHC u AC1 mal-Bremer Landesbank ("**BLB**").

3. Illi Vroon ippruvat tinnegozja kuntratt li BHC u AC1 kellhom ma` kuntrattur principali taghha OSM, liema negozju gdid kien ser jiswa lil BHC u AC1 aktar minn US\$ 3 miljun fl-2016 wahedha.

4. Illi Marks irrifjuta unilateralment offerta minn BLB biex jigu estizi t-termini tal-Master Financial Agreement bejn AC1 u BLB sabiex jigi kompletat l-akkwist tal-vapuri.

5. Illi Marks ibblokka l-hatra ta` *company manager* indipendenti ghal BHC bi ksur tal-ftehim ta` koperazzjoni.

6. Illi Marks ippreleva l-ammont ta` US\$ 2 miljun mill-kontijiet ta` BHC favur Vroon minghajr l-awtorizzazzjoni tal-bord ta` BHC.

7. Illi kienet approvata minn impjegat ta` Vroon spiza ta` US\$0.9 miljun ghal *technical management expenses* minghajr l-awtorizzazzjoni tal-bord ta` BHC.

8. Illi Marks ha aktar minn US\$200,000 mill-fondi ta` BHC biex jithallsu drittijiet u spejjez legali minghajr l-awtorizzazzjoni tal-Bord.

9. Illi Marks approva jitermina l-*management agreement* bejn BHC u AC1 fit-22 ta` Mejju 2017.

10. Illi Marks kien qieghed imexxi u jawtorizza affarijiet importanti tal-kumpannija bil-pretiza li ma kellux ta` risoluzzjoni mill-bord.

11. Illi Vroon ghamlet hlasijiet fl-ammont ta` US\$500,000 mill-kontijiet ta` AC1 lil OSM minghajr awtorizzazzjoni.

12. Illi Marks unilateralment iffirma ftehim bejn BHC u AC1 li bih tnaqqsu l-*management fees* li jithallsu lil BHC ghall-amministrazzjoni tal-bastimenti.

13. Illi Marks unilateralment appunta lil Andersch mhallsin minn AC1 biex jaghmlu *independent business review* u konxjament tahom informazzjoni zbaljata.

14. Illi Vroon ittrasferiet favuriha l-ishma li BHC kellha fl-AC1 u harget ishma godda fl-istess AC 1 favuriha.

Il-Qorti sejra tittratta dawn l-ilmenti.

1. Ir-rizenja ta` Paul Eckbo

Ir-rikorrenti tilmenta illi Herman Marks unilateralment ta struzzjonijiet ghar-registrazzjoni tar-rizenja ta` Paul Eckbo mill-bord tad-diretturi ta` AC1 (fol 94).

Il-pretensjoni tar-rikorrenti kienet kontestata mill-intimata.

Il-Qorti ezaminat il-provi, inkluz id-dokumenti.

Id-dikjarazzjoni ta` rizenja ta` Paul Eckbo ffirmata minnu jidher li saret b` referenza ghall-kariga tieghu ta` direttur fil-BHC (fol 545 sa 549). Mill-banda l-ohra, ma tressqux provi dokumentarji dwar rizenja ta` Paul Eckbo mill-kariga tieghu ta` direttur ta` AC1.

Waqf il-gbir tal-provi nghad illi din ir-rizenja kienet miftehna bejn Marsoft u Vroon. Dr Stanley Portelli xehed li Arlie Sterling ma kienx oggezzjona ghar-rizenja ta` Eckbo u li Eckbo stess kien ukoll ikkonferma li l-ftehim kien li huwa jirrizenja u jigi appuntat direttur iehor minfloku.

Din il-Qorti tqis li dan l-ilment jirrigwarda kwistjoni relatata ma` AC1 mhux ma` BHC.

Din il-kawza ma saritx minn BHC kontra AC1 izda minn Marsoft kontra BHC u Vroon.

Jekk saru atti fl-ambitu ta` AC1 u li dwarhom qed isir ilment a tenur tal-Art 402(1) dawn huma barra mill-parametri ta` din il-kawza.

2. Marks iffirma wahdu

Inghad illi Marks iffirma wahdu rizoluzzjonjiet ta` BHC u AC1 fejn impjegati ta` Vroon inghataw l-awtorita` ghal *electronic banking* fil-kontijiet ta` BHC u AC1 ma`Bremer Landesbank. Ir-risoluzzjonijiet ma kienux approvati mid-diretturi kollha (fol 224 sa 230)

Min-naha taghom l-intimati, wara li ghamlu referenza ghal-lodo moghti minn Tribunal ta` Arbitragg ta` Oslo, sostnew illi xejn ma kien jindika li l-passi li ttiehdu ma kinux necessarji jew li ttiehdu *in mala* fede. L-unika konsegwenza li dawk l-atti seta` kellhom kienet li tnaqqas il-kontroll ta` Marsoft fuq il-*cash flow* tal-kumpanniji.

Din il-Qorti tqis dan l-ilment bhala fondat ghaliex il-pass li ttiehed kien unikament intiz sabiex inaqqas il-kontroll ta` Marsoft (azzjonista ndaqs bhal Vroon fil-BHC) fuq il-*cashflow* ta` BHC.

Huwa minnu li kif xehed Av. Richard Galea Debono, ghalkemm kien hemm dik l-awtorita` fuq l-*electronic banking*, huwa kellu jinzamm infurmat dwar kull pagament li kien qed isir, izda mill-mument illi Dr Galea Debono ma baqax direttur mahtur mill-Qorti b`*interim order* is-sitwazzjoni rega` marret ghal li kienet b`Marsoft ma tkun mgharrfa b` dak li qed jigri.

3. Negozjar bi pregudizzju

Inghad illi Vroon ippruvat tinnegozja kuntratt li BHC u AC1 kellhom ma` kuntrattur principali taghha OSM, liema negozju gdid kien ser jiswa lil BHC u AC1 aktar mnn US\$ 3 miljun fl-2016 wahedha..

Jirrizulta li n-negozju baqa` ma wassalx ghal kuntratt. Ghalhekk fir-realta` ma sehxx *unfair prejudice*. Diversa kienet tkun il-konsiderazzjoni li kieku l-kuntratt lahaq kien iffirmit.

4. Rifjut ta` offerta minn BLB

Inghad illi Marks irrifjuta unilateralment offerta minn BLB biex jigu estizi t-termini tal-Master Financial Agreement bejn AC1 u BLB sabiex jigi kompletat l-akkwist tal-vapuri (fol 236).

Skont ir-rikorrenti, b`dak l-agir, BHC ma setghetx tenforza l-obbligi li Vroon kellha fil-konfront ta` BHC fir-rigward ta` *loan agreements* ta` bejniethom billi Vroon spiccat sellfet ammont ta` flus anqas minn dak li kienet intrabtet li ssellef lil BHC.

Skont ir-rikorrenti, gara li f` Dicembru 2015, Marks temm l-investment fil-flotta, u f` Mejju 2016, ghadta tmien vapuri lil Vroon, liema vapuri suppost kienu destinati ghal BHC u li swew lil BHC 25% tal-flotta.

Min-naha taghhom, l-intimati, kontra dan l-ilment, jaghmlu referenza ghall-fatt li b`ittra datata 12 ta` Frar 2016, BLB infurmaw lil Sterling u lil Marks li kien impossibli ghall-bank li jkompli jaghti s-servizz tieghu fir-rigward tat-tmien vapuri li kien ghad fadal ghaliex is-socjetajiet ma kellhomx direttur. Inghata terminu sabiex jigi kkonfermat li kien appuntat direttur ghal kull socjeta`. Marks wiegeb fit-13 ta` Frar 2016 izda Sterling baqa` ma wegibx. Fit-18 ta` Frar 2016, BLB rega` ssollecita lil Sterling sabiex jikkonferma li saret il-hatra ta` direttur. Sterling wiegeb fit-22 ta` Frar 2016 fis-sens illi Marsoft kienet ser izzomm lil BLB responsabbli ghad-danni fil-kaz ta` inadempjenza fl-obbligi taghha. Ghalhekk, skont l-intimati, il-vera raguni ghaliex BHC ma akkwistatx dawk l-ahhar tmien bastimenti kien purament ghaliex Sterling u Marsoft ma rrispettawx u naqsu mill-professjonalita` taghhom lejn dawk li kienu qeghdin jittrattaw maghhom, speċjalment meta kien hemm diskordanza ta` fehmiet.

Din il-Qorti tqis illi kienet Vroon li ffinanzjat il-progett, mentri Marsoft baqghet ma ghamlet ebda investment kif obligat ruhha illi taghmel.

Dan il-fatt kien notat mit-Tribunal ta` Arbitragg ta` Oslo fejn fil-lodo kien rilevat illi Sterling u Marsoft ma kienux onoraw l-obbligi taghhom :-

“It must therefore be established that neither Vroon’s giving notice of the rights it thought it had under the cooperation agreement, its unwillingness to be involved in BLB continuing MFA (beyond the purely temporary extension which was actually given to get in the last three of the 24 vessels) or its therefore being involved in the alternative structure AC2 provides any basis for eliminating or modifying the funding obligations which Marsoft assumed under the cooperation agreement ... the arbitration tribunal believes that the many entities in law which are involved in the structure and the complexity of the agreements on the funding itself mean there are strict requirements on everyone involved to work together in good faith. The arbitration tribunal cannot rid themselves of the impression in this case that Marsoft for its part fell short of meeting this requirement. The arbitration tribunal therefore believe that Marsoft could have achieved considerably more at the end of December 2015 if they had shown a certain humility or more constructive attitude towards their partner Vroon in terms of their own funding obligations under section 2.4 of the cooperation agreement.”

Premess dan kollu, jibqa` l-fatt illi Vroon ma setghetx taqbad u tiehu decizjonijiet tant importanti minghajr ma tikkonsulta mar-rikorrenti, u minghajr ma` din ikollha l-opportunita` li tghid taghha. Ghalkemm l-azzjonisti kienu ftehm u li d-decizjonijiet jittiehdu b`unanimita`, mhux hekk sar anzi ttiehdu decizjonijiet b` mod unilaterali dwar BHC kontra dak li kien previst fl-M&A. Dan agir li mhuwiex accettabbli.

5. Hlasijiet

Inghad li saru hlasijiet ta` US\$ 900,000 ghal *technical management expenses*, US\$ 200,000 ghal drittijiet u spejjez legali, u US\$ 500,000 lil OSM.

Jirrizulta li dawn kienu hlasijiet dovuti lil kredituri terzi.

Madanakollu jirrizulta wkoll li d-decizjonijiet dwar dawk il-hlasijiet ma kienux konkordati kif kellu jkun izda saru wara decizjoni unilaterali tar-rappresentant ta` Vroon minghajr l-adezzjoni tar-rappresentant ta` Marsoft fuq il-bord tad-diretturi.

Anke din hija mgieba li mhijiex avvallata bl-Art 402(1).

6. It-tmiem tal-management agreement

Inghad illi Marks ipprova jitermina l-*management agreement* bejn BHC u AC1 fit-22 ta` Mejju 2017.

Jidher li l-ftehim fil-fatt intemm wara decizjoni li ha Dr. Richard Galea Debono.

Ma tarax li hemm ghalfejn taghti aktar konsiderazzjoni ghal dan l-ilment.

7. L-ingagg ta` Andersch

Inghad illi Marks unilateralment appunta lil Andersch mhallsin minn AC1 biex jaghmlu *independent business review* u konxjament tahom informazzjoni zbaljata.

Il-Qorti tqis li l-ingagg ta` Andersch kien necessarju biex issir analizi tal-qaghda finanzjarja ta` BHC bhala konsegwenza tal-lodi arbitrali li nghataw fin-Norvegija.

Dwar l-allegazzjoni li Marks ghadda informazzjoni zbaljata, il-Qorti ma tarax li dak allegat kien korraborat minn provi sostenibbli.

8. Il-hatra ta` *company manager*

Inghad illi Marks ibblokka l-hatra ta` *company manager* indipendenti ghal BHC bi ksur tal-ftehim ta` koperazzjoni.

Jidher li minkejja li kien hemm l-obbligu li jinhatar *company manager* indipendenti ghal BHC, din il-hatra baqa` ma saritx.

Ir-rikorrenti twahhal fl-agir ta` Herman Marks.

Irrizulta illi permezz ta` *interim order* tat-2 ta` Settembru 2016, il-Qorti hatret lill-Av. Dr. Richard Galea Debono bhala direttur indipendenti ta` BHC sakemm irrizenja fis-17 ta` Dicembru 2016 fuq talba tieghu. Il-Qorti accettat ir-rizenja.

Il-Qorti tqis illi l-fatt li ma kienx mahtur il-*company manager* flimkien mal-fatt tar-rizenja ta` Dr Galea Debono kienu mputabbli ghal nuqqasijiet taz-zewg nahat mhux ta` naha wahda biss. Fil-fatt iz-zewg azzjonisti minflok fittxew l-interess ahhari tal-kumpannija qeghdu fuq quddiem l-interess taghom tramite d-diretturi li ghazlu.

9. It-tehid ta` US\$ 2 miljun

Inghad illi Marks ippreleva l-ammont ta` US\$ 2 miljun mill-kontijiet ta` BHC favur Vroon minghajr l-awtorizzazzjoni tal-bord ta` BHC (fol 238 sa 243).

Irrizulta li fil-fatt kien hemm dan it-tehid li kien unilaterali u minghajr l-approvazzjoni tal-bord.

L-ilment huwa fondat ghaliex anke jekk Vroon kienet kreditrici Marks li kien jirrapprezenta l-interess taghha ma kellu ebda jedd jaqbad flus ta` BHC biex ighaddihom lil Vroon meta ma kienx hemm l-approvazzjoni tal-bord ta` BHC.

10. Ftehim bejn BHC u AC1

Inghad illi Marks unilateralment iffirma ftehim bejn BHC u AC1 li bih tnaqqsu l-*management fees* li jithallsu lil BHC għall-amministrazzjoni tal-bastimenti.

Konsegwenza tal-ftehim, BHC bdiet tippercepixxi inqas dhul. Billi anke dan il-ftehim kien unilaterali għax ma kienx approvat mill-bord ta` BHC, u billi jirrizulta pregudizzju għad-dannu ta` BHC, dak previst mill-Art 402(1) jirrizulta.

11. Trasferiment ta` ishma favur Vroon

Inghad illi Vroon ittrasferiet favuriha l-ishma li BHC kellha fl-AC1 u harget ishma godda fl-istess AC1 favuriha (fol 102 sa 110 u 105 sa 106).

Irrizulta li saret proposta minn Vroon sabiex BHC tbiegh lil Vroon l-ishma ordinarji kollha li kellha fl-AC1 u fl-istess waqt Vroon tislef lil AC1 s-somma ta` US\$ 2 miljun jew AC1 tohrog 50,000 ishma ordinarji godda favur Vroon b` valur nominali ta` US\$ 1 għal kull sehem u barra minn hekk Vroon tislef lil AC1 s-somma ta` US\$ 1.95 miljun.

Din il-proposta ma kenitx approvata.

Cio` nonostante sar trasferiment favur Vroon ta` 2000 sehem li BHC kellha fl-AC1, kif ukoll hargu 50,000-il sehem ordinarju gdid favur Vroon.

Jidher illi Marsoft ma kenitx taf b`dan it-trasferiment.

Jidher ukoll li t-trasferiment ma sarx bl-approvazzjoni tal-bord ta` BHC.

Marks spjega f` email tad-9 ta` Mejju 2017 u esebit bhala Dok AA18 a fol 129 tal-process li għandu n-nru 304/2016/1 illi :-

“Following the last shareholders meeting of AC1, I decided it was (and is) in the interest of AC1 and its

key stakeholders, to adopt various resolutions and actions that have resulted in BHC selling its ordinary shares and AC1 increasing its ordinary issued share capital. Also another director has been appointed to the Board of AC1. These actions have been executed and formalised in Malta.”

XI. Risultanzi

L-essenza ta` socjeta` kummercjali, inkluz kumpannija, hija l-fiducja fil-massimu livell taghha.

Dan ifisser illi kemm bejn il-komponenti taghha u cioe` l-azzjonisti (specjalment meta dawn ikunu persuni differenti) kif ukoll fil-konfront ta` terzi, li jkollhom relazzjonijiet maghha, in partikolari l-kredituri, il-fiducja trid tkun *la pietra miliare*.

Kif tisfaxxja l-fiducja (interna jew esterna – tkun xi tkun), id-destin ta` socjeta` kummercjali jmur lejn in-negattiv, bosta drabi lejn negattiv irreversibbli.

Il-Qorti tishaq illi bord tad-diretturi ta` kumpannija ma jistax jimxi skont il-ligi tal-gungla u cioe` jirbah jew jipprevali min l-aktar huwa b`sahtu, jew jirbah dak li l-aktar jilhaqlu mohhu biex jasal ghall-miri tieghu, li mhux bilfors iwasslu ghall-kisba tal-ghanijiet li ghalihom kumpannija tkun kostitwita.

Kull ma qeghda tghid il-Qorti jkompli jikseb rilevanza `l quddiem.

Dan premiss, u relattivament ghall-kaz tal-lum, il-bicca l-kbira tal-ilmenti tar-rikorrenti huma ppruvati skont il-ligi ghas-sodisfazzjon taghha.

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

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

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

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

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

Id-diskrezzjoni li ghandha l-Qorti hija talment wiesgha illi sahsitra tista` twarrab t-talbiet specifici li jkunu saru mill-membri li jkun garrab *unfair prejudice* skont is-subartikolu (1).

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

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

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

Fir-rikors promotur, ir-rikorrenti talbet il-hatra ta` persuna indipendenti sabiex tiddefendi u thares adegwament l-interessi ta` BHC u tmexxi l-affarijiet taghha.

Fin-nota ta` osservazzjonijiet taghha, ir-rikorrenti tissottometti dak li tixtieq bhala rimedju.

Titlob lill-Qorti sabiex tadotta u tikkonferma b`mod definittiv l-*interim order* taghha tal-21 ta` Gunju 2017.

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

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

Fil-kaz tal-lum, tenut kont tal-provi u tar-risultanzi, il-Qorti tqis illi jkunu gust u ekwu li r-rimedju jkun inkwadrat fl-ambitu tal-paragrafu (a) tas-subartikolu (3) tal-Art 402.

Il-Qorti sejra taghzel din it-triq ghaliex ghandha c-certezza morali illi jekk it-tmexxija tal-affarijiet tal-kumpannija tithalla fl-istat li fih tinsab fil-prezent, karatterizzata kif inhi b`imgieba konflittwali bejn l-azzjonisti u bejn id-diretturi, allura l-futur ta` l-kumpannija ma jawgura xejn tajjeb. Il-provvediment li sejra taghti lllum huwa mirat lejn il-prospettiva ta` futur ahjar ghall-kumpannija ntimata.

Provvediment

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

Tiddikjara illi l-intimata Vroon Containers B.V., bi ksur tal-Art 402(1) tal-Kap 386 tal-Ligijiet ta` Malta, marret kontra l-obbligi taghha fil-konfront tar-rikorrenti u tal-kumpannija ntimata Balticmax Holding Company Limited (C70765).

Bl-applikazzjoni tal-Art 402(3)(a) tal-Kap 386 tal-Ligijiet ta` Malta, tordna li t-tmexxija ta` l-affarijiet kollha tal-kumpannija Balticmax Holding Company Limited (C70765) ghandha tkun kondotta kif gej :-

1) B`effett mil-lum, il-*memorandum* u l-*articles of association* tal-kumpannija ntimata Balticmax Holding Company Limited (C70765) huma soggetti ghal kull ma` qed ikun ordnat li jsir bis-sahha tal-provvediment tal-lum.

2) B`effett mil-lum, b`zieda maz-zewg diretturi li bhalissa jaghmlu l-bord tad-diretturi tal-kumpannija ntimata Balticmax Holding Company Limited (C70765), qeghda tahtar lill-Avukat Dottor Richard Galea Debono bhala Direttur iehor tal-istess kumpannija.

3) Tordna li b`effett mil-lum id-Direttur li qeghda tahtar ikun ukoll ic-Chairman tal-bord tad-diretturi tal-kumpannija ntimata Balticmax Holding Company Limited (C70765).

4) Tordna illi b`effett mil-lum iz-zewg diretturi attwali tal-kumpannija ntimata Balticmax Holding Company Limited (C70765) ikollhom jedd jattendu ghal-laqgħat tal-bord tad-diretturi izda ma jkollhomx dritt tal-vot, liema dritt tal-vot ikun jispetta biss lic-Chairman/Direttur li qeghda tahtar.

5) Tordna illi b`effett mil-lum ic-Chairman/Direttur li qeghda tahtar fil-kumpannija ntimata Balticmax Holding Company Limited (C70765) ikollu access shih u liberu ghal dak kollu li jirrigwarda l-istess kumpannija ntimata - xejn eskluż.

6) Tordna illi b`effett mil-lum ebda att ma jista` jsir fil-kumpannija ntimata Balticmax Holding Company Limited (C70765) jekk ma jkunx approvat mic-Chairman/Direttur li qeghda tahtar. Jekk isir att li ma jkunx hekk approvat, allura dak l-att ikun null u bla effett ghall-finijiet u effetti kollha tal-ligi.

7) Tordna lic-Chairman/Direttur li nhatar illum fil-kumpannija ntimata Balticmax Holding Company Limited (C70765) sabiex jassikura li l-istess kumpannija ntimata titmexxa u tkun konformi mal-ligi.

8) Tordna illi b`effett mil-lum ic-Chairman/Direttur li qeghda tahtar ikollu wahdu r-rappresentanza legali u gudizzjarja tal-kumpannija ntimata Balticmax Holding Company Limited (C70765).

9) Taghti lic-Chairman/Direttur li nhatar illum is-setghat u l-fakoltajiet kollha illi jinkariga persuni sabiex jassistu fit-tmexxija ta` kuljum tal-kumpannija ntimata Balticmax Holding Company Limited (C70765), u dan spejjez tal-istess kumpannija ntimata. Jekk ma jkunx hemm assi tal-istess kumpannija ntimata mnejn jithallsu dawn il-persuni, allura l-hlas tagghom ghandu jsir mill-azzjonisti u cioe` mir-rikorrenti u mill-intimata Vroon Containers B.V. *in solidum* bejniethom.

10) Tordna li c-Chairman/Direttur li nhatar illum fil-kumpannija ntimata Balticmax Holding Company Limited (C70765) sabiex jissottometti ghall-approvazzjoni jew xort`ohra tal-Qorti r-rimunerazzjoni tieghu ghall-prestazzjonijiet tieghu. Din ir-rimunerazzjoni ghandha tithallas darba kull l-ahhar jum ta` kull xahar mill-assi tal-istess kumpannija ntimata. Jekk jirrizulta li ma jkunx hemm mnejn jithallas minn dawk l-assi, allura il-hlas ghandu jsir mill-azzjonisti u cioe` mir-rikorrenti u mill-intimata Vroon Containers B.V. *in solidum* bejniethom.

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

**apposita risoluzzjoni waqt laqgħa generali tal-kumpannija ntimata
Balticmax Holding Company Limited (C70765).**

**Tordna lill-intimata Vroon Containers B.V. sabiex thallas l-
ispejjez kollha ta` din il-kawza.**

**Onor. Joseph Zammit McKeon
Imhallef**

**Amanda Cassar
Deputat Registratur**