



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

**ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON**

Illum il-Hamis 31 ta` Jannar 2019

**Kawza Nru. 1
Rik. Nru. 1153/12 JZM**

Medsea Shipping Agency Limited C-45855

kontra

**i. Mad Ltd (C-44940), li precedentement
kien jisimha Bluewave Line Ltd**

ii. Jean Cali` (K.I. 190852M)

u

**iii. Giovanni Calcaterra
(Passaport Taljan Numru 364600B)**

Il-Qorti :

I. Preliminari

Rat ir-rikors li kien prezentat fl-20 ta' Novembru 2012 fil-Prim`Awla tal-Qorti Civili.

Il-premessi tar-rikors ighidu hekk :-

Il-kumpannija esponenti qeghda fl-ewwel lok tipprezenta dan ir-rikors ai termini tas-subartikoli 214(2)(a)(ii), 214(5)(a) u/jew 214(5)(b) u 218(1)(b) tal-Kap 386 tal-Ligijiet ta` Malta, sabiex il-kumpannija intimata li illum j isimha Mad Ltd tigi xolta u konsegwentement stralcjata b`ordni ta` dina l-Onorabbli Qorti peress illi l-istess kumpannija intimata mhijjex f`qaghda illi thallas id-djun taghha ;

Il-kumpannija esponenti qeghda wkoll tipprezenta dan ir-rikors ai termini tas-subartikoli 214(2)(b)(iii) u 218(1)(c) tal-Kap 386 tal-Ligijiet ta` Malta, sabiex il-kumpannija intimata li illum j isimha Mad Ltd tigi xolta u konsegwentement stralcjata b`ordni ta` dina l-Onorabbli Qorti peress illi jezistu ragunijiet gravi bizzejjed illi jiggustifikaw ix-xoljiment u konsegwenti stralc tal-istess kumpannija;

Il-kumpannija esponenti qeghda wkoll, tipprezenta dan ir-rikors sabiex ai termini tal-artikolu 315 tal-Kap 386, dina l-Onorabbli Qorti tiddikjara u tiddecidi illi l-intimati l-ohrajn Jean Calì u Giovanni Calcaterra, jew min minnhom, illi it-tnejn li huma sa ftit zmien ilu kienu diretturi tas-socjeta` intimata, u kienu xjentement partijiet fit-tmexxija tan-negozju tal-istess kumpannija intimata, mexxew l-istess kumpannija bi hsieb ta` frodi tal-kumpannija esponenti, kreditrici tal-kumpannija intimata, u konsegwentement sabiex dina l-Onorabbli Qorti ssib lill-imsemmija intimati responsabbli personalment, minghajr ebda limitazzjoni ta` responsabilità ghad-dejn illi l-kumpannija intimata ghandha mal-kumpannija esponenti ;

Il-kumpannija esponenti qeghda permezz tal-prezenti rikors titlob bir-rispett ukoll illi dina l-Onorabbli Qorti joghghobha tahtar amministratur

provvizorju ghal waqt il-pendenza tal-proceduri inizjati permezz ta` dan ir-rikors sabiex il-kumpanija intimata Mad Ltd tigi gestita minn tali amministratur matul il-prezenti proceduri.

Fatti

Ir-rikorrenti kienet tikkummercja regolarment mal-intimat. Fl-2009, però, f`daqqa wahda, l-intimata lanqas il-posta ma baqghet tircievi. Il-fatturi u dokumenti ohra mibghuta kollha bdew jigu ritornati bhala "unclaimed". F`daqqa wahda kollox kien beda jigi totalment injorat, u d-djun tal-kumpanija intimata versu l-kumpanija rikorrenti jizdiedu vertiginozament.

Meta gew ipprezentati zewg ittri ufficjali kontra l-kumpanija intimata, datati it-tnejn it-22 ta` April, 2009, li ghandhom numri 1600/09 u 1601/09 u li kopji taghhom huma annessi u markati rispettivament dokument "IU1A" u dokument "IU1B", l-intimata wiegbet permezz ta` zewg ittri ufficjali responsivi t-tnejn datati d-19 ta` Gunju, 2009, u li kopji taghhom huma annessi u markati rispettivament dokument "IU2A" u "IU2B", fejn qalet illi l-pretensjonijiet tar-rikorrenti kienu nfondati fil-fatt u fid-dritt.

Dana meta xahar qabel, fil-11 ta` Marzu, 2009, fil-gazzetta "Business Today" gie ppubblikat artikolu b`intervista mal-intimat Cali fejn jaghti ad intendere illi n-negozju tant kien sejjer tant tajjeb illi "We are interested in creating new lines" biex jitkabbar in-negozju. Kopja tal-artikolu imnizzla mill-internet hija annessa bhala dokument "DD".

Imbaghad is-socjeta` intimata, minkejja dak li qalet fl-ittra ufficjali responsiva, lanqas biss dehret fil-kawzi li gew ipprezentati fil-Qorti u kif dettaljat hawn isfel u sussegwentement, meta regghet giet interpellata ghal diversi drabi, baqghet ma wiegbet bl-ebda mod.

Permezz ta` kawza mibdija b`Rikors Mahluf numru 444/2009 JZM, ir-rikorrenti kienet talbet illi is-socjeta` intimata tigi ikkundannata sabiex thallas is-somma ta` erbgha u erbghin elf, tliet mija u disgha u tletin

ewro u tnejn u disghin centezmu (€44,339.92), bl-ispejjez taz-zewg mandati numri 715/09 u 716/09 u bl-imghax kummercjali sad-data tal-pagament effettiv, u t-talbiet tal-esponenti kienu intlaqghu ghal kollox permezz ta` sentenza ta` dina l-Onorabbli Qorti tal-11 ta` Jannar, 2010. Kopja tas-sentenza hija annessa bhala dokument "JZM".

F`dik il-kawza is-sorti mitluba kienet tirrigwarda pilotage fees, mooring fees, Valletta grain terminal charges, kif ukoll spejjez ohra konnessi u ancillari, kif ukoll agency fees u bunkering fees in konnessjoni ma` zewg bastimenti jisimhom "MV Antonia" u "MV Fehim Bey"

Permezz ta` kawza mibdija b` Rikors Mahluf numru 102/2010 AL, ir-rikorrenti imbaghad kienet talbet illi is-socjeta` intimata tigi ikkundannata sabiex thallas is-somma ta` sebgha u tletin elf, erba` mija u sitta u tletin ewro u wiehed u sittin centezmu (€37,436.61), bl-ispejjez u bl-imghax kummercjali mid-data meta l-ammonti saru dovuti sad-data tal-pagament effettiv, u t-talbiet tal-esponenti kienu ntlagghu ghal kollox permezz ta` sentenza ta` dina l-Onorabbli Qorti tas-27 ta` Ottubru, 2010. Kopja tas-sentenza hija annessa bhala dokument "AL".

F`dik it-tieni kawza is-sorti mitluba kienet tirrigwarda bunkering fees in konnessjoni maz-zewg bastimenti jisimhom "MV Antonia" u "MV Fehim Bey".

Dawn il-hlasijiet intalbu wkoll diversi drabi permezz ta` interpellazzjonijiet bil-fomm kif ukoll bil-miktub, kemm qabel u kif ukoll wara li gew konkluzi z-zewg kawzi fuq dettaljati, fosthom permezz ta` ittra legali datata l-20 ta` April, 2011, hawn annessa in kopja u markata dokument "AT".

Eventwalment wara illi z-zewg sentenzi ghaddew in gudikat u l-hlas, minkejja l-interpellazzjonijiet, baqa` ma sarx, ir-rikorrenti pprezentat mandat ta` sekwestru ezekuttiv numru 734/11 fis-27 ta` Mejju, 2011, ghall-ammont komplessiv ta` sorte dovuta skond iz-zewg sentenzi fuq dettaljati, ghalhekk total ta` wiehed u tmenin elf, seba` mija u sitta u sebghin ewro u tlieta u hamsin centezmu (81,776.53). Kopja tal-atti tal-

mandat ta' sekwestru hija annessa ma' dan ir-rikors u immarkata dokument "S".

Minkejja l-fatt illi il-mandat gie debitament notifikat lis-sitt (6) banek sekwestratarji, hadd minnhom ma iddepozita ebda ammont fir-registru ta' din il-Qorti.

Ai termini tas-subartikolu 214(5)(a) tal-Kap 386, kumpannija titqies li ma tkunx tista' thallas id-djun taghha jekk id-dejn dovut mill-kumpannija ma thallasx ghal kollox jew in parti wara 24 gimgha mill-ezekuzzjoni ta' titolu ezekuttiv kontra l-kumpannija b'xi wiehed mill-atti ezekuttivi msemmijin fl-artikolu 273 tal-Kap XII.

Ghal din ir-raguni biss, digà, jirrizulta illi skond il-ligi il-kumpannija intimata ma ghandhiex minn fejn thallas id-djun taghha u ghalhekk jezistu l-elementi rikjesti mil-ligi ghall-istralc tal-kumpannija intimata minn dina l-Onorabbli Qorti.

Mir-ricerki li saru fir-Registru Pubbliku jirrizulta li s-socjeta' intimata ma hija proprjetarja ta' ebda proprjeta' immobbli, u effettivament jirrizulta illi qatt ma kienet sid ta' proprjeta' immobbli. Kopja tar-rizultat tar-ricerki hija annessa bhala dokument "R".

Lanqas ma jidher illi l-kumpannija intimata qatt kellha xi beni f' isimha jew attiv bizzejjed biex taghmel tajjeb ghad-djun kummercjali taghha.

Ghalhekk jirrizulta b'mod car illi l-intimati Cali u Calcaterra kostantement u flagrantement abuzaw mill-corporate veil tal-kumpannija intimata meta fil-fatt kienu jafu l-hin kollu li ma kien hemm xejn illi jaghmel tajjeb ghad-djun li kienu qeghdin jikkontrattaw ma' terzi, u fosthom, u principalment, il-kumpannija rikorrenti li tinsab issa, minhabba tali agir, esposta f' ammont tant ingenti.

Mir-ricerka li l-esponenti ghamlet mar-Registru tal-Kumpanniji, jirrizulta illi ghalkemm il-kumpannija intimata giet inkorporata nhar il-21 ta` Awwissu, 2008, minn dik il-gurnata `l quddiem,, naqset b`mod assolut illi tipprezenta xi forma ta` accounts u ipprezentat biss Annual Return wahda fit-28 ta` Marzu, 2012. Dana kif jidher mid-dokument imnizzel mis-sit tar-Registru tal-Kumpanniji, anness u markat bhala dokument "RC".

Mir-ricerka fir-registru ta` dina l-Onorabbli Qorti il-kumpannija esponenti saret taf ukoll illi il-kumpannija intimata nqatghet kontriha kawza ohra fl-ismijiet "San Lucian Oil Company Limited vs Bluewave Line Limited" deciza fl-24 ta` Frar, 2011, Rikors Mahluf Numru 1105/2010AL, u li permezz taghha l-kumpannija intimata hemmhekk giet ikkundannata thallas is-somma ta` erbatax-il elf, seba` mija u tmienja u tletin ewro u hamsin centezmu (€14,738.50) flimkien mal-imghax bir-rata ta` wiehed fil-mija (1%) fix-xahar sad-data tal-pagament effettiv. Kopja ta` din is-sentenza hija annessa u mmarkata dokument "SL". Fl-4 ta` Mejju, 2009, kien anki gie akkordat mandat ta` sekwestru kontra l-kumpannija intimata, u dana f`isem il-kreditrici Keuek Shipping Limited, mandat numru 727/09. Kopja tal-mandat hija annessa u mmarkata dokument "K".

Jirrizulta kjarament illi il-kumpannija intimata mhijiex f`posizzjoni li thallas id-djun taghha, ghaliex minn dak li inghad hawn fuq u minn dak illi ser jirrizulta mis-smigh tar-rikors, senjatament mill-fatt illi il-kumpannija intimata Mad Ltd ma ghandhiex u ma kellhiex flus kontanti depozitati fil-banek lokali, ma jirrizultax li ghandha proprjeta` immobbli imma djun biss, , kif ser jigi ippruvat lil dina l-Onorabbli Qorti, u ghalhekk il-kumpannija intimata ma tistax thallas id-djun taghha meta jitqies il-passiv kontingenti u prospettiv tal-kumpannija intimata u dana skond kif jiddisponu is-subartikoli 214(2)(a)(ii), 214(5)(b) u 218(1)(b) tal-Kap 386.

Illi wiehed jistaqsi x`qieghed isir bhalissa mill-introjtu li qieghed jidhol bhalissa, mill-kummerc tal-kumpannija intimata, jekk din ghadha effettivament tikkumercja.

Barra minn hekk, il-kumpannija intimata ghandha tigi xolta u

konsegwentement stralcjata minn dina l-Onorabbli Qorti ghaliex jezistu ragunijiet gravi ghaldaqshekk.

L-esponenti issostni illi ix-xoljiment u konsegwenti stralc tal-kumpannija intimata ghandu jigi ordnat minn dina l-Onorabbli Qorti ghaliex fic-cirkostanzi jirrizulta bl-aktar mod lampanti illi l-kumpannija intimata giet operata b`abbuz a skapitu tal-kredituri tal-istess kumpannija, fosthom u primarjament l-esponenti, u ghalhekk jezistu ragunijiet gravi bizzejjed sabiex dina l-Onorabbli Qorti tordna ukoll ix-xoljiment u konsegwenti stralc tal-kumpannija intimata ai termini tal-artikoli 214(2)(b)(iii) u 218(1)(c) tal-Kap 386.

It-talba tal-kumpannija esponenti taht l-artikolu 315 tal-Kap 386

L-esponenti barra minn hekk qeghda, fit-tieni lok, tipprezenta dan ir-rikors sabiex ai termini tal-artikolu 315 tal-Kap 386 dina l-Onorabbli Qorti tiddikjara u tiddecidi illi l-intimati l-ohra Jean Cali u Giovanni Calcaterra, jew min minnhom, li it-tnejn kienu diretturi tal-kumpannija intimata u illi xjentement kienu partijiet fit-tmexxija tan-negozju tal-istess kumpannija, mexxew l-istess kumpannija bi hsieb ta` frodi tal-kumpannija esponenti, kreditrici tal-kumpannija intimata, u konsegwentement sabiex dina l-Onorabbli Qorti issib lill-imsemmija intimati responsabbli personalment, minghajr ebda limitazzjoni ta` responsabilita` ghad-dejn illi il-kumpannija intimata ghandha mal-kumpannija esponenti.

Amministratur provvizorju

Illi f`dawn ic-cirkostanzi huwa mehtieg b`urgenza illi l-kumpannija intimata Mad Ltd tibda tigi gestita minn terza persuna indipendenti sabiex ma jkunx hemm iktar abbuzi u ghalhekk qeghda issir talba ghall-hatra ta` amministratur provvizorju sabiex jiehu f`idejh it-tmexxija tan-negozju tal-kumpannija intimata.

Ghandu jinghad ukoll illi :

L-insolvenza tal-intimata li ser tirrizulta, ma kenitx ir-rizultat ta` negozju sfortunat li mar hazin minkejja tmexxija ghaqlija u korretta. Dana ma kienx il-kaz u ser jirrizulta fil-fatt illi :

Il-kapital tal-kumpannija kien mizeru u li kien ovvju li ma jistax ikopri d-djun li l-kumpannija kienet diehla ghalihom u d-dejn kiber b`ritmu mgħaggel u bla kontroll ;

Ma jidhirx illi nzammu kotba tal-kumpannija u hemm nuqqasijiet serji fil-kontrolli nterni tal-istess kumpannija ;

Jean Cali minkejja kollox baqa` jpingi s-sitwazzjoni tal-kumpannija bhala wahda pozittiva u ta` success ;

Jidher li l-intimata ilha fi stat effettiv ta` insolvenza, liema stat kien, jew missu kien maghruf lid-diretturi li misshom ilhom li bdew proceduri ghal xoljiment tal-kumpannija intimata;

Dan l-istat ta` insolvenza però inzamm mohbi mill-kredituri, fosthom ir-rikorrenti, liema habi sar xjentement jew b`nuqqas ta` osservanza tal-obbligi naxxenti mil-ligi ;

Hekk kif id-djun komplew jikbru, tkompla l-operat tal-kumpannija bi pregudizzju kbir tal-interessi tal-kredituri u minghajr assolutament ebda qies ta` kif il-kumpannija intimata kienet ser tonora l-obbligazzjoniet minnha assunti ;

Il-kumpannija intimata qatt ma kellha assi sostanzjalment realizzabbli u kellha prospetti minn dejjem zghar hafna illi tevita ix-xoljiment minhabba insolvenza ;

L-intimati, ex-diretturi tal-kumpannija intimata, ma ghamlux

rapprezentazzjonijiet veritieri dwar l-istat tal-kumpannija, jew zgwidaw, jew bl-agir u/jew is-skiet taghhom, u/jew bi pretensjonijiet foloz u/jew b`mezzi ohra ta` frodi, taw impressjoni hazina lill-kredituri b`mod illi dawn baqghu jikkummercjaw mal-kumpannija intimata, u dana meta l-istess kumpannija intimata kienet digà fi stat ta` insolvenza jew ma kellhiex prospetti xierqa illi tevita xoljiment minhabba l-insolvenza taghha.

Interpellati ghall-ahhar darba biex jersqu ghall-hlas permezz ta` tliet ittri legali ilkoll datati is-6 ta` Novembru, 2012, (u li kopji taghhom huma annessi u mmarkati dokumenti "L1", "L2" u "L3", l-intimati baqghu inadempjenti.

Ghaldaqstant u ghar-ragunijiet premissi, wara li jsiru d-dikjarazzjonijiet necessarji u illi jinghataw il-provvedimenti opportuni, jghidu l-intimati ghaliex ma ghandhiex dina l-Onorabbli Qorti tilqa` t-talbiet tal-kumpannija esponenti illi qeghda hawn titlob illi dina l-Onorabbli Qorti joghgobha :

It-talbiet tar-rikorrenti kienu dawn :

1. *Fl-istadju preliminari ta` dan ir-rikors u b`urgenza tahtar minnufih amministratur provvizorju sabiex jamministra u jiggestixxi n-negozju tal-kumpannija intimata Mad Ltd u sabiex jaqdi dawk il-funzjonijiet u setghat dwar l-amministrazzjoni tal-imsemmi negozju u dana taht u skond id-direzzjoni ta` dina l-Onorabbli Qorti.*

2. *Tiddikjara u tiddecidi illi il-kumpannija intimata Mad Ltd ma tistax thallas id-djun taghha ghaliex id-dejn dovut mill-kumpannija intimata baqa` ma thallasx ghal kollox wara li ghaddew iktar minn erbgha u ghoxrin (24) gimgha mill-ezekuzzjoni ta` titolu ezeuttiv kontra l-kumpannija b`xi wiehed mill-atti ezeuttivi msemmijin fl-artikolu 273 tal-Kodici ta` Organizzazzjoni u Procedura Civili u wkoll meta jitqies il-passiv kontingenti u prospettiv tal-kumpannija intimata, u dan ai termini tas-subartikoli 214(2)(a)(ii), 214(5)(a) u/jew 214(5)(b) u 218(1)(b) tal-Kap 386.*

3. *Tiddikjara u tiddeciedi illi f`kull kaz, hemm ragunijiet gravi bizzejjed li jiggustifikaw ix-xoljiment u konsegwenti stralc tal-kumpannija intimata Mad Ltd u dan ai termini tas-subartikolu 214(2)(b)(iii) u 218(1)(c) tal-Kap 386.*

4. *Tordna x-xoljiment u konsegwenti stralc tal-kumpannija intimata b`effett mill-jum imsemmi fl-artikolu 223 tal-Kap 386.*

5. *Taghti ai termini tal-artikolu 219 tal-Kap 386, dawk l-ordnijiet u provvedimenti kollha li jidhrulha xierqa u opportuni waqt l-andament tal-proceduri.*

6. *Tahtar stralcjarju bis-setghat u d-dmirijiet kollha skond l-artikoli 228 et sequitur tal-Kap 386 u taghti kull provvediment illi dina l-Onorabli Qorti jidhrilha xieraq u opportun fic-cirkostanzi nkluz ukoll illi jinvestiga l-agir negligenti u abuziv ta` Jean Cali u ta` Giovanni Calcaterra u dan in vista wkoll ta` dak illi jipprovdi l-artikolu 316 tal-Kap 386.*

7. *Fi stadju ulterjuri tas-smigh ta` dan ir-rikors, tiddikjara u tiddeciedi illi l-intimati Jean Cali u ta` Giovanni Calcaterra, jew min minnhom, diretturi fil-passat tal-kumpannija intimata u li xjentement kienu partijiet fit-tmexxija tan-negozju bil-mod hawn fuq deskritt, mexxew lill-kumpannija intimata bil-hsieb ta` frodi lejn il-kumpannija esponenti u ghalhekk tiddikjara lill-imsemmija intimati Jean Cali u/jew Giovanni Calcaterra responsabbli personalment, minghajr ebda limitazzjoni ta` responsabilita` ghal kull jew ghal xi dejn jew responsabilitajiet ohra tal-kumpannija intimata fil-konfront tal-kumpannija esponenti u tikkundanna lill-imsemmija Jean Cali u Giovanni Calcaterra, jew min minnhom, ihallsu l-istess.*

Bl-ispejjez, inkluzi dawk tal-ittra legali tal-20 ta` April, 2011, u dawk tal-ittri legali tas-6 ta` Novembru, 2012, u tal-mandati ta` sekwestru, ta` qbid u ta` inibizzjoni pprezentati kontestwalment ma` dan ir-rikors, kontra l-intimati li huma ngunti in subizzjoni, personalment u fil-

kaz ta` Mad Ltd, tramite r-rapprezentanti legali taghha.

Traduzzjoni ta` dan ir-rikors ghal-lingwa Ingliza huwa wkoll anness u mmarkat dokument "E".

Rat id-dokumenti esebiti mar-rikors.

Rat illi ghalkemm il-kumpannija ntimata kienet notifikata bir-rikors u bl-avviz tas-smigh tal-kawza, ma pprezentatx risposta.

Rat ir-risposta li pprezentaw l-intimati Jean Calì u ta` Giovanni Calcaterra fit-28 ta` Jannar 2013 li taqra hekk :-

1. *Illi, fl-ewwel lok, l-esponenti jirrilevaw illi ma humiex il-legittimi kontraditturi ghar-rigward tal-ewwel sitt (6) talbiet tas-socjeta` rikorrenti, u dan stante illi, illum-il gurnata, huma m`ghandhom l-ebda relazzjoni guridika mas-socjeta` intimata Mad Limited (C44940), u dan kif jirrizulta mid-dokumenti ufficjali registrati fir-Registru tal-Kumpanniji, kopja ta` liema huma hawn annessi u mmarkati bhala 'Dok. JC1' - 'Dok. JC3', kif ukoll mill-iskrittura private bl-intestatura 'Share Transfer Agreement' datata tnejn (2) ta` Frar tas-sena elfejn u tnax (2012), kopja ta` liema hija hawn annessa u mmarkata bhala 'Dok. JC4' ;*

2. *Illi b`zieda mas-suespost, qieghed jigi rilevat illi a tenur tal-klawsola bin-numru hamsa (5) 'f' tal-iskrittura surreferita, kien gie pattwit illi l-azzjonisti godda tas-socjeta` intimata Mad Limited (C44940) "... are hereon accepting liability for all present and future liabilities that may arise in connection with the Company`s activities, business or affairs up to the date of entering into of this agreement", u dan wara dikjarazzjoni cara u espresso tad-djun assunti mis-socjeta` ezercitanti l-kummerc that l-isem Bluewave Line Limited. Ghaldaqstant, l-ispejjez relatati mal-proceduri mitlubin fl-ewwel sitt (6) talbiet, kemm-il darba kellhom jintlaqghu minn din l-Onorabbli Qorti, m`ghandhomx jitbataw mill-esponenti ;*

3. Illi, minghajr pregudizzju ghas-suespost, l-esponenti jirrilevaw illi s-seba` (7) talba tas-socjeta` rikorrenti hija totalment infondata fil-fatt u fid-dritt, u ghalhekk, ghandha tigi michuda bl-ispejjez kontra s-socjeta` rikorrenti, u dan kif ser jirrizulta mill-provi prodotti fil-mori ta` dawn il-proceduri, senjatament, izda, bl-ebda mod limitatament, in vista tar-ragunijiet segwenti :

i. Id-deskrizzjoni tal-fatti kontenuta fir-rikors tas-socjeta` rikorrenti hija wahda selettiva u li ma tirrispekkjax in-natura reali u fattwali tar-relazzjoni kummercjali bejn is-socjetajiet parti fil-kawza. Di fatti, id-deskrizzjoni moghtija, konvenjentement, tinjora l-fatt illi s-socjeta` rikorrenti kienet tagixxi de facto bhala l-broker u bhala l-agent esklussiv tas-socjeta` intimata, illi dak iz-zmien kienet topera taht l-isem 'Bluewave Line Limited' :- Kienet hi illi, mill-bidu nett tal-inkorporazzjoni tas-socjeta` Bluewave Line Limited, iprovdiet il-kuntatti ghan-nolegg tal-bastiment MV Antonia ; Kienet hi illi zammet kuntatt kontinwu ma` sid il-bastiment imsemmi, u dan ghan-nom u f` isem is-socjeta` Bluewave Line Limited ; Kienet hi illi hadet hsieb illi thallas kull fattura, kif ukoll illi tipprocessa u tircievi kull pagament dovut ghas-servizzi rezi minn Blue Wave Line Limited ; u kienet hi, imbaghad, illi kienet tipprovdi illi thallas lis-socjeta` Bluewave Line Limited sehemha minn dawn il-profitti, u dan sa Marzu tas-sena elfejn u disgha (2009), cioe` madwar xahar qabel ma l-pretensjonijiet tas-socjeta` rikorrenti ma gew vantati gudizzjarjament permezz tal-ittri ufficjali bin-numri 1600/2009 u 1601/2009, entrambi datati u ntavolati nhar it-tnejn u ghoxrin (22) ta` April 2009;

ii. Ghalhekk, ghandu jkun car illi hadd ma seta` jkun jaf il-qaghda finanzjarja tas-socjeta` Blue Wave Line Limited ahjar mis-socjeta` rikorrenti, u dan kif ser jirrizulta waqt it-trattazzjoni tal-kawza ;

iii. Ghall-finijiet ta` kjarezza, ghandu jinghad ukoll illi l-interpellazzjonijiet surreferiti jirreferu ghal ammonti illi huma differenti minn dawk eventwalment kanonizzati fiz-zewg sentenzi fl-ismijiet Medsea Shipping Agency Limited (C45855) vs Bluewave Line Limited (C44940), decizi fil-hdax (11) ta` Jannar tas-sena elfejn u ghaxra (2010) (Rikors Mahluf Nru. 444/09 JZM) u fis-sebgha u ghoxrin (27) ta` Ottubru 2010 (Rikors Mahluf Nru. 102/2010/AL) ;

4. *Illi b`zieda mat-tielet (3) eccezzjoni hawn fuq riportata, l-esponenti jichdu kategorikament illi qatt kien hemm xi forma ta` agir frawdolenti da parti taghhom fil-gestjoni tas-socjeta` Bluewave Line Limited. Di piu`, id-dejn illi, talvolta, sar dovut lis-socjeta` rikorrenti kien konsegwenza ta` sensiela ta` cirkostanzi inaspettati, imprevedibbli u finanzjarjament devastanti ghas-socjeta` Bluewave Line Limited, illi mmaterjalizzaw ruhhom f`Marzu tas-sena 2009, cioe` madwar xahar qabel ma gew interpellati gudizzjarjament mis-socjeta` rikorrenti illi, da parti taghha, hadet sehem attiv fit-trattattivi u fin-negozjati kondotti ghan-nom u f`isem is-socjeta` Bluewave Line Limited, u dan, bil-ghan illi jigi evitat jew minimizzat dan it-telf finanzjarju. B`zieda ma` dan jinghad ukoll illi wara dawn l-avvenimenti, illi ser jigu spjegati fid-dettall waqt it-trattazzjoni tal-kawza, kif ukoll wara l-intavolar ta` proceduri gudizzjarji fil-konfront tas-socjeta` Bluewave Line Limited, l-esponenti bl-ebda mod ma fittxew agent jew broker iehor sabiex jikkumercjaw tramite s-socjeta` Blue Wave Line Limited u, bl-ebda mod, ma komplew jghabbuha b`xi djun jew pizijiet ohra.*

5. *Salvi eccezzjonijiet ulterjuri.*

Rat id-dokumenti esebiti mar-risposta.

Rat il-provvediment li tat il-Prim`Awla tal-Qorti Civili fil-15 ta` Lulju 2014 dwar l-ewwel sitt talbiet tar-rikorrenti.

Rat illi minn hemm `il quddiem beda l-istralc tas-socjeta` ntimata bil-hatra tar-Ricevitur Ufficjali bhala stralcjarju, ladarba s-socjeta` ntimata kienet dikjarata xjolta bl-istess provvediment tal-15 ta` Lulju 2014.

Rat illi l-procediment fir-rigward tas-seba` talba thalla *sine die* riappuntabbli b`effett mid-data tal-gheluq ta` l-istralc.

Rat il-provvediment li tat il-Prim`Awla tal-Qorti Civili fl-14 ta`

Jannar 2016 fejn *inter alia* wara li sabet li l-affarijiet tal-kumpannija kienu stralcjati ordnat it-thassir tal-isem tal-kumpannija de qua mir-Registru tal-Kumpanniji.

Rat illi kien riappuntat il-procediment dwar is-seba` talba.

Rat id-direzzjoni li tat il-Prim`Awla tal-Qorti Civili fl-udjenza tat-8 ta` Marzu 2016 fis-sens illi seba` talba tar-rikorrenti kienet tirrigwarda lill-intimati Jean Cali` u Giovanni Calcaterra.

Rat illi fl-udjenza tas-27 ta` Frar 2017 is-seba` talba kienet ceduta mis-socjeta` rikorrenti limitatament fil-konfront tal-intimat Jean Cali`. Ghalhekk is-smigh kompla fil-konfront ta` l-intimat Giovanni Calcaterra.

Rat id-digriet moghti fis-26 ta` April 2018 li bih is-smigh kien ser jitkompla minn din il-Qorti kif presjeduta, mhux aktar mill-Prim`Awla tal-Qorti Civili, wara li dahal fis-sehh l-Att I tal-2018.

Rat id-digriet li moghti fis-26 ta` April 2018 fejn kienet ordnata l-allegazzjoni ta` l-atti tal-kawza fl-ismijiet *Medsea Shipping Agency Limited vs Blue Wave Line Limited (Rik. Gur. Nru. 444/09 JZM)*, u l-atti tal-kawza *Medsea Shipping Agency Limited vs Blue Wave Line Limited (Rik. Gur. Nru. 102/2010 AL)*.

Rat l-atti tal-kawzi li kienu allegati u l-provi l-ohra,

Rat illi l-kawza thalliet ghad-decizjoni ghal-lum dwar is-seba` talba bil-fakolta` li l-partijiet jipprezentaw noti ta` osservazzjonijiet.

Rat illi ma gewx prezentati noti ta` osservazzjonijiet.

Rat l-atti l-oħra.

II. Analizi

Is-seba` talba li qeghda tkun deciza llum taqra hekk :-

... tiddikjara u tiddecidi illi l-intimati Jean Cali u Giovanni Calcaterra, jew min minnhom, diretturi fil-passat tal-kumpannija intimata u li xjentement kienu partijiet fit-tmexxija tan-negozju bil-mod hawn fuq deskritt, mexxew lill-kumpannija intimata bil-hsieb ta` frodi lejn il-kumpannija esponenti u ghalhekk tiddikjara lill-imsemmija intimati Jean Cali u/jew Giovanni Calcaterra responsabbli personalment, minghajr ebda limitazzjoni ta` responsabilita` ghal kull jew ghal xi dejn jew responsabilitajiet oħra tal-kumpannija intimata fil-konfront tal-kumpannija esponenti u tikkundanna lill-imsemmija Jean Cali u Giovanni Calcaterra, jew min minnhom, ihallsu l-istess.

Billi fil-mori tal-kawza, din is-seba` talba kienet ceduta mir-rikorrenti fil-konfront ta` Jean Cali`, il-Qorti trid tara jekk saritx il-prova ta` dak prospettat bis-seba` talba kontra l-intimat Giovanni Calcaterra.

1. Dwar is-socjeta` Mad Ltd gia` Blue Wave Line Ltd

Mir-rapport tal-istralcjarju Av. Kevan Azzopardi (li huwa wkoll ir-Ricevitur Ufficjali) a fol 403 et seq., jirrizulta li s-socjeta` Bluewave Line Ltd ("**Blue Wave**") kienet iffurmata fil-21 ta` Awwissu 2008. Twaqqfet bil-ghan illi tiggstixxi u tirregistra bcejec tal-bahar.

Jirrizulta mill-Memorandum u l-Articles of Association taghha ("**M&A**") a fol 124 et seq illi l-azzjonisti kienu Jean Cali`, Philip Cassar, Gorg Grech u Rank Professional Services Ltd, din tal-ahhar bhala fiducjarja ta` terz.

Jirrizulta wkoll mill-M&A illi kellha tlett diretturi : Philip Cassar, Giovanni Calcaterra u Jean Cali`. Philip Cassar irrozenja minn direttur

b'effett mill-1 ta` Mejju 2009.

Mill-Form T a fol. 122 jirrizulta illi l-ishma li kellu Gorg Grech kienu trasferiti favur Jean Cali` b'effett mid-29 ta` Frar 2012.

Fit-2 ta` Marzu 2012, l-ishma kollha kienu trasferiti lil Diana Anardino u lil Gaetana Franceschino, cittadini Taljani residenti l-Italja.

Fl-att tat-trasferiment tal-ishma a fol 70 et seq, kien dikjarat hekk mill-azzjonisti vendituri :-

a) The Vendors declare that the Company has the following known assets and liabilities :

Trade Debtors : €193,171

Trade Creditors : €259,927

b) The Vendors hereby declare that :

The Company has not yet finalized the audited financial statements for the years 2008, 2009, 2010 and 2011 ;

The Company`s audited financial statements for the years 2008, 2009, 2010 and 2011 still need to be submitted to the Company Registry ; and

The Company`s tax returns for the years 2008, 2009, 2010 and 2011 still need to be submitted to the Commissioner of Inland Revenue Department.

c) The Company has provisional trade losses amounting to €247,670.

d) The Company is currently subject to judicial proceedings being taken against it by third parties and is also subject to a number of precautionary and executive warrants.

Jirrizulta li b`effett mit-22 ta` Marzu 2012, Jean Cali` u Giovanni Calcaterra rriżenjaw minn diretturi u minflokhom inhatru Diana Anardino u Gaetana Franceschino. Fl-istess data, l-isem tal-kumpannija ma baqax Bluewave izda sar Mad Ltd ("**Mad**"). In-numru ta` registrazzjoni baqa` l-istess.

Kemm ir-Registratur tal-Kumpanniji kif ukoll l-istralcjarju kkonfermaw illi Blue Wave qabel u Mad wara wara qatt ma pprezentat *financial statement* skont il-ligi. Kien prezentata *annual return* wahda biss.

Jirrizulta willi Mad kellha kont bankarju wiehed ma` Bank of Valletta plc. Il-kont kien *overdraft* fl-ammont ta` €80,000 u infetah fil-11 ta` Settembru 2008. Billi l-*overdraft* ma kienx qed jithallas lura, l-*overdraft* twaqqaf mill-bank stess u kien konvertit ghal *business loan* fis-27 ta` Awwissu 2009. Il-*loan account* spicca fit-13 ta` Ottubru 2016 wara li thallas kull ma kien dovut lill-bank ghas-saldu. Il-*loan* thallas minn Jean Cali`. Thallsu wkoll xi ammonti minn Giovanni Calcaterra permezz ta` kont fl-isem ta` Pepe Imports Company Limited.

2. Dwar pceduri gudizzjarji

a) Rik. Gur. Nru. 444/2009 JZM

Fit-12 ta` Mejju 2009, is-socjeta` rikorrenti pprezentat rikors guramentat kontra Blue Wave ghall-hlas ta` kreditu ta` €44,339.92. B`sentenza tal-11 ta` Jannar 2010, Blue Wave kienet ikkundannata thallas lill-kumpannija rikorrenti s-somma ta` €44,339.92, bl-ispejjez u bl-imghax kif mitlub. Is-sentenza ghaddiet in gudikat.

b) Rik. Gur. Nru. 102/2010 AL

Fil-5 ta` Frar 2010, is-socjeta` attrici pprezentat rikors guramentat iehor kontra Blue Wave ghall-hlas ta` kreditu ta` €37,436.61. B`sentenza

tas-27 ta` Ottubru 2010, Blue Wave kienet ikkundannata thallas lill-kumpannija rikorrenti s-somma ta` €37,436.61 bl-ispejjez u bl-imghax kif mitlub. Is-sentenza ghaddiet in gudikat.

c) Mandat ta` Sekwestru Ezekuttiv Nru. 734/2011

Fit-30 ta` Mejju 2011 kien milqugh rikors li pprezentat is-socjeta` rikorrenti fis-27 ta` Mejju 2011 ghall-hrug ta` Mandat ta` Sekwestru Ezekuttiv kontra Blue Wave ghall-ammont ta` €81,776.53 li tieghu kienet kanonizzata bhala kreditrici skont iz-zewg sentenzi appena citati. Ghalkemm il-kumpannija debitrici ma kenitx notifikata bil-Mandat, is-sekwestratarji kienu kollha notifikati fil-31 ta` Mejju 2011. Jirrizulta illi l-ammonti dovuti ma thallsux.

d) Rik. Gur. Nru. 1105/2010 AL

Fit-28 ta` Ottubru 2010, is-socjeta` San Lucian Oil Company Limited ipprezentat rikors guramentat kontra Blue Wave ghall-hlas ta` kreditu fl-ammont ta` €14,738.50. B`sentenza tal-24 ta` Frar 2011, Blue Wave kienet ikkundannata thallas lil San Lucian Oil Company Limited is-somma ta` €14,738.50 bl-ispejjez u bl-imghax kif mitlub. Il-Qorti hija sprovvista minn provi ohra dwar dan il-kreditu.

e) Mandat ta` Sekwestru Kawtelatorju Nru. 727/2009

Fl-4 ta` Mejju 2009 is-socjeta` Kucuk Shipping Limited pprezentat rikors ghall-hrug ta` Mandat ta` Sekwestru Kawtelatorju kontra Blue Wave ghall-ammont ta` €125,635. Il-Qorti hija sprovvista minn provi ohra dwar din il-kwistjoni.

f) It-talbiet fil-kawza odjerna

Bi provvedimenti li tat il-Prim`Awla tal-Qorti Civili fil-15 ta` Lulju 2014, kienu decizi l-ewwel sitt talbiet tas-socjeta` Medsea Limited.

Il-Qorti ghamlet dawn il-konsiderazzjonijiet :-

“Fl-isfond tal-premess, il-Qorti hija tal-fehma illi ghalkemm il-Mandat Ezekuttiv hareg, u kien ezegwit, kontra l-kumpannija debitrice meta kien jsimha Bluewave Line Limited (C44940), l-effetti ta` l-ezekuzzjoni ta` dak il-Mandat ghall-fini tal-Art 214(5)(a) huma l-istess anke jekk wara l-ezekuzzjoni tal-Mandat il-kumpannija debitrice bidlet isimha ghal MAD Ltd bin-numru ta` registrazzjoni taghha jibqa` l-istess. Huwa rrilevanti ghall-accertamenti li trid taghmel il-Qorti fl-ambitu tal-Art 214(5)(a) li l-objects, l-azzjonisti u d-diretturi nbidlu wkoll mal-bdil tal-isem. Jibqa` l-fatt li l-kumpannija baqghet l-istess wahda b` isem iehor. Ghalhekk it-terminu tal-24 gimgha wara l-ezekuzzjoni tal-Mandat Ezekuttiv ighodd ghal MAD Ltd., kif kien ighodd meta l-kumpannija kien jsimha Bluewave Line Limited. U billi l-kumpannija ntimata baqghet ma hallset xejn mill-import tal-Mandat Ezekuttiv wara l-ezekuzzjoni tieghu, dak li jrid l-Art 214(5)(a) jirrizulta ppruvat.

Accertat illi l-kumpannija intimata mhijiex f`qaghda li thallas id-djun taghha fis-sens tal-Art.214(5)(a), il-Qorti issa sejra tara jekk ghandhiex tipprocedi ghax-xoljiment u ghall-istralc tal-intimata fis-sens tal-Art.214(2)(a)(ii).

Din il-Qorti ma ghandhiex prova tal-kontabilita` tal-kumpannija ntimata mill-2008 sal-lum. Li taf fic-cert il-Qorti huwa li meta l-azzjonisti l-godda hadu f`idejhom il-kumpannija ntimata, u qabel bidlu isimha, kienu edotti mill-qaghda finanzjarja xejn felici tal-kumpannija ghaliex din ingiebet

ghall-konjizzjoni taghhom mill-azzjonisti ta` qabel kif jirrizulta mill-kontenut tas-share transfer agreement – inkluz fejn si tratta ta` Mandati.

Ghal din il-Qorti ma jaghmel l-ebda sens illi kumpannija li qeghda titmexxa tajjeb jew li hija finanzjarjament affidabbli tigi notifikata bi procediment hekk serju b`konsegwenzi daqstant gravi, u mbaghad imqar taghmel l-icken sforz biex tiddefendi ruhha. Hekk gara fil-kaz tal-lum ghaliex minkejja debita notifika l-kumpannija ntimata la pprezentat risposta u wisq anqas baghtet lil rapprezentant taghha biex isegwi dan il-procediment.

Fil-kumpless taghhom, il-provi juru li l-qaghda finanzjarja tal-kumpannija ntimata ma hija tajba xejn. Il-fatt wahdu li kemm ilha kostitwita qatt ma baghtet il-financial statements taghha lir-Registratur tal-Kumpanniji, u ghalhekk kisret il-ligi, m`ghandux imur ghall-beneficcju taghha fil-qies tal-fatti u cirkostanzi tal-kaz meta din il-Qorti tigi biex tara jekk hemmx lok ghax-xoljiment u l-istralc taghha skond l-Art.214(2)(a)(ii) ladarba rrizulta li ma tistax thallas id-djun taghha skond l-Art.214(5)(a). L-intimata, tramite d-diretturi taghha, ma ghamlet propju xejn biex tagevola l-kompitu iebes ta` din il-Qorti.

Il-kumpannija ntimata kellha l-opportunita` kollha li tigi quddiem il-Qorti fejn filwaqt li taccetta li baqghet inadempjenti versu r-rikorrenti skond l-Art.214(5)(a) tipprova tissoddisfa lill-Qorti illi ma timmeritax li tigi xjolta u stralcjata. Il-Qorti m`ghandhiex prova ta` x`assi ghandha l-kumpannija intimata llum u jekk ghandha, hemmx minnhom disponibbli biex jinbieghu halli thallas lill-kumpannija rikorrenti fi

zmien ragonevoli. Lanqas m`ghandha prova tad-dhul tal-intimata ; jew prova ta` l-ghaliex ma hallsitx lill-kumpannija rikorrenti. B`kuntrast mal-inerzja u nuqqas ta` interess tal-kumpannija intimata u tad-diretturi taghha, il-Qorti ghandha l-prova nkonfutabbli li l-kumpannija intimata baqghet ma hallsitx id-debitu taghha versu r-rikorrenti skond l-Art.214(5)(a). Ghalhekk mill-kumpless tal-provi akkwiziti, il-kwadru li johrog huwa li l-kumpannija intimata tinsab fi stat illi mhijiex f`qaghda li thallas id-djun taghha, u li tkun gustifikata u ragonevoli l-Qorti jekk tiddikjara x-xoljiment u ghall-istralc taghha.

...

Ikkunsidrat :

III. L-ewwel u t-tieni eccezzjonijiet tal-intimati Cali` u Calcaterra

Hija l-fehma konsiderata tal-Qorti illi dawn l-eccezzjonijiet huma fondati u sejrjn jigu akkolti. Diga` rajna li l-ewwel sitt talbiet kienu ntizi mill-kumpannija rikorrenti biex tottjeni x-xoljiment u l-istralc tal-kumpannija intimata. Irrizulta ppruvat illi fid-data tal-presentata tar-rikors promotorju, l-intimati Cali` u Calcaterra kienu diga` temmew kull relazzjoni kwalsiasi mal-kumpannija ntimata; dan huwa evidenti mid-dokumenti esebiti l-aktar dawk soċjetarji. La kien mistenni minnhom u lanqas kellhom xi jedd jirrispondu ghal dawk l-ewwel sitt talbiet vis-à-vis l-kumpannija rikorrenti. Ghalhekk m`ghandhomx lanqas ibatu spejjez fir-rigward.

Il-Qorti ordnat ix-xoljiment ta` Mad Ltd b`effett mill-20 ta` Novembru 2012 u ordnat ukoll l-istralc taghha. Wara provvediment iehor

tal-14 ta` Jannar 2016, kien ordnat it-thassir tal-isem mir-Registru tal-Kumpanniji.

III. Xiehda

Jirrizulta illi Jean Cali` u Giovanni Calcaterra ddecidew li jidhlu fin-negozju tal-garr ta` merkanzija bil-bahar. Hadu b` nolegg bastiment, imbaghad inkarikaw lill-kumpannija rikorrenti biex tkun il-*broker*. In-negozju ra l-bidu tieghu fl-2008. Anthony Vassallo, direttur manigerjali tas-socjeta` rikorrenti, xehed illi abbazi tal-esperjenza ta` snin twal fis-settur, huwa gharaf mill-ewwel illi l-progett ta` Cali` u Calcaterra kien iebes ghaliex fis-settur hemm kompetizzjoni feroci. Minkejja li wriehom id-diffikultajiet li kienu ser jiltaqghu magghom, dawk kienu konvinti li jmexxu bil-pjanijiet tagghom.

Stqarr :-

“Meta kienu gew is-Sur Cali` u s-Sur Calcatella u gejna flimkien u dan jiena kont ghidtilhom wara esperjenza ta` tletin sena f’dan ix-xoghol illi l-via li kienu se jaqbdu ma kienitx wahda hafifa, kien hem suq feroci u jridu joqghodu attenti kif se jagixxu. Is-Sur Cali` quddiem dak iil-hin qalli jiena ghandi dan it-telefon qalli kissruwuli n-nies biex jghabbu mieghi, qalli inti ma tifhimx, qalli jiena kelli r-Wrangler u ghamilt success minnha, qalli jiena kelli affarijiet ohra u ghamilt success minnhom u wara tletin sena qalli li jien ma nifhimx fix-shipping. Ghidtlu orrajt mela komplu bil-proposta taghkom u naraw fejn naslu.” (fol. 81)

Mistoqsi ghaliex accetta n-negozju tagghom ladarba kien daqstant diffidenti, Vassallo wiegeb illi ladarba kienu konvinti li setghu jmexxu bil-progett, accetta nkella kienu jmorru ghand *broker* iehor. Ghalhekk irraguna *tanto vale* jzomm in-negozju hu u jaqla` minnu huwa wkoll. Ir-rwol tas-socjeta` rikorrenti kien illi tirreklama s-servizz tas-socjeta` ntimata, tiehu hsieb il-bastiment meta jidhol Malta, u taghmel xoghol ta` kordinament meta l-bastiment jasal Pozzallo.

Elton Borg, kontrollur finanzjarju tas-socjeta` rikorrenti, xehed kif in-negozju kien jinvolvi hafna xoghol ghalihom. Hu kien jiehu hsieb jigbor il-hlasijiet dovuti lis-socjeta` intimata pero` kien ukoll jiehu hsieb ihallas is-servizzi mikrija b`relazzjoni mal-gestjoni tal-vapur. Ghax-xoghol taghha s-socjeta` rikorrenti kienet tithallas *commission fees*. Sa mill-bidu nett huwa jinsisti ma` Jean Cali` sabiex ihallas pero` kien dejjem jitlob aktar zmien biex ihallas ; gieli kien jaghmel xi pagament akkont.

Anthony Vassallo u Elton Borg fessru illi Jean Cali` ma kellux min jaghmillu l-*accounts*. Cali` kellema lill-*accountant* tas-socjeta` rikorrenti li rifjuta l-inkarigu minhabba konflitt ta` interess. It-tnejn sahu ma` Cali` biex isib *accountant* illi jkun jista` jzommlu l-kontijiet.

Anthony Vassallo spjega illi qabel beda n-negozju maghha, is-socjeta` rikorrenti ma ndagatx is-solidita` finanzjarja tas-socjeta` intimata. Huma qaghd u fuq il-kelma ta` Jean Cali` li dejjem kien isemmi s-success li ghmel fil-fabbrika Wrangler. Zied jghid li Jean Cali` kien isemmi illi ghandu proprjeta` x`taghmel tajjeb. Ma sar ebda ftehim dwar kif kellhom isiru l-pagamenti ghaliex "*we took him at his word li kien jaf x`inhu jaghmel*" (fol. 87). Cali` kien *hands on* fil-kumpanija u kien anki jinzel jiltaqa` mal-klijenti x-xatt. Ftit xhur wara beda l-inkwiet ghaliex il-kontijiet ma bdewx jithallsu. Ghalihom kien fatt stramb kif Cali` kien jithallas mis-socjeta` rikorrenti bi flus kontanti pero` hu qatt ma jhallas il-kontijiet tieghu. Sahansitra Cali` kie imur jitkarrab ghandhom biex ma jzommulux *freight charges* halli jkun jista` jahdem.

Jidher li n-negozju dam ghaddej biss ftit xhur bejn l-2008 u l-2009, ghaliex apparti kumulu ta` dejn mas-socjeta` rikorrenti, is-socjeta` intimata kellha wkoll dejn ma` s-sidien tal-bastiment noleggjat, apparti dejn ghal *bunkering*. L-apice tal-krizi tas-socjeta` intimata gie meta wara li l-bastiment wasal Malta ma thallix jerga` johrog minhabba d-dejn akkumulat. Ghalhekk kellha tieqaf min-negozju. Minn dan l-incident` il quddiem ma kienx hemm kuntatt ma` Jean Cali` minkejja diversi kienu t-tentattivi tas-socjeta` rikorrenti.

Kemm Anthony Vassallo u kif ukoll Elton Borg xehdu illi kienu jafu lil Jean Cali` bhala ragel onest. Xehdu wkoll illi huma kienu jirkellmu mieghu. Ma` Giovanni Calcaterra ftit li xejn kien hemm kuntatt. Fil-fatt, Elton Borg spejga illi kien hemm zmien fejn kien jircievi xi *invoices* mill-Italja, x'aktarx minghand il-mara ta` Giovanni Calcaterra. Cali` dejjem kien jassigurahom li kellu biex jaghmel tajjeb ghad-dejn u ma` Anthony Vassallo sahsitra wahhal it-tort f` Calcaterra. Xehdu wkoll illi Cali` diversi drabi sahaq illi kien se jwaqqaf in-negozju.

Jean Cali` xehed li Giovanni Calcaterra kien avukat Taljan. Blue Wave kienet ghaddejja mill-problemi pero` Calcaterra rnexxielu jsib klijenti li accettaw li jixtru l-kumpannija bid-dejn b'kollox. Huwa halla kollox fl-idejn ta` Calcaterra ghal dak li kien jirrigwardja l-bejgh. Dwar in-negozju, iddeskrivieh bhala *a big challenge*. Kien hemm spejjez relatati ma` hsarat fil-vapur ; dawn l-ispejjez ma kienux ippjanati. Ghamel l-almu biex in-negozju jirnexxi. Kien jafda jafda hafna lill-agenti tieghu izda ma kienux jikkontrolla kollox ghaliex dan ma kienux possibbli.

Ikkonferma li n-negozju dam sejjer biss ftit xhur. Kemm dam ghaddej, fil-parti l-kbira, hadmu bil-vapur bl-isem *Antonia*. Gara pero` li dan il-bastiment beda jdahhalhom fil-problemi u fl-ispejjez. Beda gej ix-xoghol ghaliex kien lahqu ftehim ma` Lidl Italia biex igorru l-merkanzija lejn Malta. Nehhew l-*Antonia* u minflok gabu iehor bl-isem *Faren Bey*. Thallsu Lm20,000 sabiex ingieb minn Tunez.

Xehed illi fl-ahhar gurnata ta` servizz bl-*Antonia*, hekk kif il-vapur gie biex jidhol il-port, il-kaptan irrifjuta li jidhol il-port ghaliex ried jithallas US\$ 50,000. Ghalih dak kien rikatt ghaliex il-merkanzija abbord, konsistenti minn *hatching eggs*, kienet tiswa US\$ 1.4 miljun. Il-polza ta` kariku kienet saret mis-socjeta` rikorrenti. Kienu kostretti jhallsu l-prezz tar-rikatt, oltre pagamenti ohra relatati mal-*Antonia*. Ghall-ahhar tlett gimghat tal-operat tal-*Antonia*, is-socjeta` intimata kellha tithallas is-somma ta` hamsa u ghoxrin elf (?!!) kull vjagg. Il-hlas baqa` ma sarx.

Ma tirrizultax il-munita tal-hlas.

Lanqas ma saru provi oħra dwar dawn id-diffikultajiet, pagamenti, vjaggi jew merkanzija.

Cali` jaccetta dak iz-zmien is-socjeta` intimata kienet qegħda tiffaccja problema ta` likwidita` u n-negozju ma setax ikompli.

Skont Cali`, in-negozju waqaf meta l-vapur kien mizmum milli jkompli jopera. Il-konsegwenza kienet li l-kumpannija spiccat fl-istat li ma setghetx tkompli thallas dak li kellha tagħti.

Ikkonferma illi l-ammonti dovuti lis-socjeta` rikorrenti ma thallsux.

Xehed illi huwa ragel ta` unur u sa fejn seta` għamel minn kollox biex jonora kull obbligu.

Fisser illi d-dizavventuri wasslu l-kumpannija fix-xifer u l-accounts ma sarux għaliex ma setghux ilahhqu ma` dak kollu illi kien għaddej.

IV. L-Art 315 tal-Kap 386

Għalkemm għal xi raguni – **li taf hija biss** – ma kenitx indikata mis-socjeta` rikorrenti d-disposizzjoni li abbazi tagħha ntavolat is-seba` talba, huwa bil-wisq evidenti li din it-talba hija nkwadrata fil-kuntest tal-**Art 315 tal-Kap 386** li jaqra hekk :-

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

xjentement kienu partijiet fit-tmexxija tan-negozju bil-mod qabel imsemmi tkun responsabbli personalment, minghajr ebda limitazzjoni ta' responsabbiltà ghal kull jew ghal xi dejn jew responsabbiltajiet ohra tal-kumpannija kif il-qorti tista' tordna.

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

Minn qari ta' z-zewg subartikoli li jaghmlu d-disposizzjoni huwa bil-wisq evidenti li l-ewwel subartikolu jirregola l-aspetti civili tal-materja filwaqt li t-tieni subartikolu jittratta dawk kriminali.

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

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

Il-mudell ta' l-Art 315 jinsab fil-ligi Ingliza.

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

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

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

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

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

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

time make such further order as may be necessary for the purpose of enforcing any charge imposed under this subsection.

For the purpose of this subsection, the expression "assignee" includes any person to whom or in whose favor, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration (not including consideration by way of marriage) given in good faith and without notice of any of the matters on the ground of which the declaration is made.

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

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

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

Fil-ligi Ingliza, id-disposizzjonijiet li jittrattaw ir-

responsabbilita` personali, u cioe` dak li nsibu fl-Art 315(1) tal-Kap 386, kienu nkorporati fl-Art 213 ta` l-Insolvency Act 1986.

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

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

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

Dan premiss, jidher illi l-legislatur Malti ried illi l-kummerc bi frodi fix-xenarju tad-dritt Malti jwassal ghal konsegwenzi civili u penali bis-sahha ta` disposizzjoni wahda u cioe` l-Art. 315 tal-Kap 386.

Jidher illi ma riedx illi l-azzjoni civili u dik penali jkunu regolati b` ligijiet diversi kif gara fil-kaz tal-Ingilterra.

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

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

i. Min ghandu dritt ta' azzjoni :

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

ii. Sejbien ta' responsabbilta` :

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

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

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

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

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

The provision imposes liability on the wrongdoer for "all or any of the debts or other liabilities of the company as the court may direct". Clearly, therefore, the wrongdoer may be held liable not only for contractual obligations undertaken by the company, but also for any other form of obligation,

including liability in tort and statutory claims against the company, whether liquidated or otherwise (...)

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

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

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

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

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

V. Dottrina/Gurisprudenza Ingliza

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

Section 213(1) sets out the conduct that

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

...

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

...

the Court of Appeal in R v. Grantham [1984 – 2 WLR 815 ; 1984 – BCLC – 270] adopted a robust

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

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

...

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

himself or herself from liability if the subjective view was not reasonable.

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

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

...

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

...

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

...

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

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

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

...

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

...

However there is no rule that behaviour of a particular kind inevitably leads to a finding of intent of defraud. For example, there is no rule that continuing to trade while insolvent is fraudulent.

...

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

...

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

...

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

...

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

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

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

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

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

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

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

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

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

"To deceive is to apprehend, to induce a man to believe that a thing is true when it is false and which the person practicing the deceit knows to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by

falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."

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

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

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

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

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

VI. Dottrina/gurisprudenza tal-qradi taghna

Dwar l-intenzjoni fil-kaz ta' *dolo*, issir riferenza ghas-sentenza li tat il-Qorti ta' l-Appell fil-31 ta' Marzu 1967 fil-kawza "**Rev. Sac. Don**

Francesco Zammit et vs Av. Dott. Anthony Farrugia et” fejn inghad hekk :-

Illi ghal dik li hi definizzjoni ta` dolo ghadha tista` tigi utilment ripetuta anki illum dik ta` Labcone (fr. 1 :D.4.3) "dolum malum esse omnes camditatem fallaciam marbinationem ad circumverendum fallendum decipiendum alterum adhibitam". Fi kliem iehor, id-dolo jikkonsisti fir-rieda hazina ta` wiehed mill-kontraenti li topera permezz ta` qerq (raggiri) biex tiddevja r-rieda tal-iehor billi tipprovaha zball (errore).

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

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

Id-dottrina u l-gurisprudenza kontemporanei jidhru orjentati lejn apprezzament tad-dolo "in concreto" jigifieri b`referenza ghall"istato d`animo" tal-vittima specifika. Minn naha wahda l-gudikant irid

jikkunsidera l-intenzjoni tal-vittma in relazzjoni ghar-ragjunijiet li ddeterminaw il-kunsens u minn naha l-oħra l-grad ta` inesperjenza jew inavvedutezza ta` l-istess vittma. (Marty et Renaut. Droit Civil, 1952, Tome II, 1er. Volume, p. 128).

Tajjeb jinghad illi fil-kaz tal-**Art 315(1) tal-Kap 386** ir-rekwizit illi "any business of the company has been carried on with intent to defraud creditors" fil-gurisprudenza Ingliza jista` jkun sodisfatt "by a single transaction designed to defraud a single creditor". [ara **In Re Gerald Cooper Chemicals Ltd** (1978) Ch 262, (1978) 2 All E.R. 49]

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

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

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

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

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

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

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

Professur Andrew Muscat ikompli :

"The test will however be satisfied where directors allow a company to incur credit when they have no reason to think that the creditors will ever be paid. It can also be satisfied where the directors obtain credit at a time when they have no good reason to believe that funds will become available to pay the creditors when their debts become due or shortly thereafter"

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

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

Minn din id-decizjoni kien hemm appell.

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

Trattat il-meritu, din il-Qorti tirrileva illi l-kuncett ta` kummerc bi frodi jinsab deskritt fl-Artikolu 315

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

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

Qabel l-introduzzjoni ta` dawn il-provedimenti, diretturi setghu dejjem jinstabu responsabbli ta` agir bi frodi, ghax il-principju ta` fraus omnia corrumpit ma kienx jippermetti li xi hadd jiehu vantagg mill-agir frawdolenti tieghu. L-awtur L.S. Sealy fil-ktieb "Cases and Materials in Company Law" (Butterworths, 7th Edit. 2004), jghid, f`pagna 616, li l-kuncett ta` `fraudulent trading` kif kien jigi enuncjat mill-Qrati Inglizi jista` jigi adottat għall-fini ta` interpretazzjoni tal-legislazzjoni l-gdida, "but the introduction of the

concept of 'wrongful trading', which can lead to the same consequences with a much lighter burden of proof, will surely mean that s 213 will be very rarely invoked in the future".

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

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

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

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

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

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

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

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

"Whether, and if so when, Courts can infer intent to defraud with respect to a respondent is not

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

...

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

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

not what everyone guesses might occur."

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

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

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

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

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

F`kaz sussegwenti (Re Patrick & Lyon, Limited (1933) gie deciz li l-intenzjoni to defraud u fraudulent purpose jikkompreni "actual dishonesty involving, according to the current

notions of fair trading among commercial men, real moral blame”.

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

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

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

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

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

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

At those times the business might either have succeeded or failed."

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

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

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

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

VII. Locus standi

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

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

Fil-kaz tal-lum, is-socjeta` rikorrenti ghandha *locus standi* billi rrizulta li kienet kanonizzata kreditrici ta` Blue Wave.

Irrizulta li Blue Wave bidlet l-isem ghal Mad.

In-numru ta` registrazzjoni baqa` l-istess.

Jirrizulta ppruvat ukoll illi kemm fid-data tal-presentata ta` l-kawza, kif ukoll wara sal-lum, ir-rikorrenti baqghet ma thallset xejn mill-kreditu taghha.

VIII. Il-legittimi kontraditturi

Is-seba` talba kienet intiza sabiex tolqot zewg persuni partikolari, li kienu diretturi, u azzjonisti tas-socjeta` de qua, u cioe` Cali` u Calcaterra.

Dawk il-persuni huma legittimi kontraditturi.

Wara li s-seba` talba kienet ceduta fil-konfront ta` Jean Cali` fil-mori tal-kawza, il-Qorti trid tara jekk is-seba` talba tissussistix kontra Giovanni Calcaterra.

IX. Ir-rekwiziti tal-azzjoni

Sabiex tirnexxi talba bhal dik taht esami, hemm bżonn li jkunu sodisfatti zewg rekwiziti :-

a) illi tinsorgi kwistjoni waqt stralc ta` kumpanija ;

b) illi n-negozju tal-kumpanija jkun tmexxa bil-hsieb ta` frodi tal-kredituri.

a) Stat ta` stralc

L-applikazzjoni tal-Art 315(1) tiskatta meta kumpanija tkun waqt stralc.

L-istat ta` dritt kien riaffermat fis-sentenza ta` din il-Qorti diversament presjeduta tat-12 ta` Ottubru 2007 fil-kawza "**Valle Del Miele Limited vs Wallace Fino et**" (op. cit.).

Hemm inghad :-

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

Għalkemm l-agir lamentat jista` jwassal għal dikjarazzjoni ta` responsabilita` personali tad-diretturi, tali responsabilita` personali tista` tigi dikjarata biss waqt li l-kumpanija tkun fi process ta` stralc, u danaa tenur tal-artikolu 315 u 316 tal-imsemmi Kap. 386. Il-ligi tal-kumpaniji, li hi ligi specjali li tirregola l-kumpaniji u l-ufficcjali

taghha, ma tipprovdix rimedji oħra kontra allegat abbuz tad-diretturi, u meta istitut hu regolat b`ligi speċjali, mhux leċitu li ssir riferenza għal xi principju generali tad-dritt. Hu minnu li, b`mod generali, minn jabbuza bid-drittijiet mogħtija lilu jista` jkun passibbli għal danni, izda meta istitut hu regolat b`ligi speċjali, hi biss dik il-ligi li għandha tigi kkunsidrata għal-fini ta` responsabilita` tal-partijiet u tar-rimedji mogħtija – “specialia generalibus derogant” (ara, fil-kaz tal-istitut tal-bejgh, l-applikazzjoni ta` dan l-istess principju fil-kawza “**Scifo Diamantino vs Meridian Enterprises Co. Ltd**”, deciza minn din il-Qorti fit-13 ta` Frar, 2003). F`dan il-kaz, il-ligi speċjali rregolat kif u meta diretturi jistghu jinstabu responsabbli personalment għad-djun tal-kumpanija tagħhom, u hi biss fil-limiti ta` dak provdut f`dik il-ligi speċjali li r-rimedji jridu jinstabu.

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

“Fil-fatt l-artikolu 316 jiddisponi illi l-Qorti tista` tagħmel dikjarazzjoni ta` responsabilita` personali, mingħajr ebda limitazzjoni, “meta kumpanija tkun giet xolta u tkun insolventi u jkun jidher li persuna li kienet direttur tal-kumpanija kienet taf, jew kellha tkun taf qabel ix-xoljiment tal-kumpanija, li ma kienx hemm prospett xieraq li l-kumpanija setgħet tevita x-xoljiment minhabba l-insolvenza tagħha”. Hekk

ukoll hija l-posizzjoni fl- Inghilterra minn fejn ahna adattajna l-ligi l-gdida dwar il-kumpaniji.

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

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

...

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

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

Aktar `l quddiem, l-istess awtrici tindika l-kondizzjonijiet li jridu javveraw ruhhom qabel ma direttur ta` kumpanija jista` jinstab responsabbli ta` "wrongful trading". L-istess bhal ma jinghad fil-ktieb "Farrar`s Company Law" aktar qabel kwotat, hi wkoll tinnota li l-ewwel kondizzjoni hi li "the company has gone

into insolvent liquidation” (pagna 844). Dan hu hekk ghax qabel ma jigi dikjarat li kumpanija hija insolventi, mhux lecitu li wiehed imur wara l-corporate veil u jitlob sodisfazzjon ghall-kreditu tieghu direttament minghand id-diretturi personalment.”

Fid-decizjoni li tat fl-14 ta` Mejju 2010 fil-kawza “**Dottor Andrew Borg Cardona noe vs Victor Zammit et**” (op. cit.) il-Qorti tal-Appell irrilevat illi :-6

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

Fil-11 ta` Dicembru 2014, il-Prim`Awla tal-Qorti Civili tat decizjoni fil-kawza fl-ismijiet “**Charles Grech & Company Limited vs Firm Camilleri Bros. (Marketing) Company Limited**” fejn affermat li meta jsiru talbiet skont l-Art 315 u l-Art 316 tal-Kap 386 waqt kawza fejn kumpanija ma tkunx ghadha giet xjolta, dawk it-talbiet ikunu ntempestivi.

Bil-preciz inghad hekk :-

“Din il-Qorti tghid illi t-test tal-ligi huwa car u inekwivoku. It-tieni talba hija fil-fatt intempestiva ghaliex ma tistax tingieb quddiem il-qorti biex tippronunzja ruhha dwarha fi procediment bhal ma huwa dak tal-lum. Infatti huwa biss fil-provvediment li sejra taghti illum illi

I-Qorti sejra tiddikjara jekk il- kumpannija ghandhiex tigi xjolta u stralcjata inkella le. Mela certament fid-data tal-presentata tar-rikors promotur, ma kienx ghad hemm pronunzjament dwar xoljiment u stralc. Il-Qorti qeghda ghalhekk tilqa` t-tieni u t-tielet eccezzjonijiet."

Fil-kaz tal-lum, jirrizulta ppruvat illi l-kawza kienet prezentata fl-20 ta` Novembru 2012. Mad Ltd kienet xjolta fil-15 ta` Lulju 2014. Minn dakinhar beda l-istralc taghha. Fl-14 ta` Jannar 2016, kien ordnat it-thassir tal-isem tal-kumpannija mir-Registru tal-Kumpanniji.

b) Negozju tal-kumpannija li jkun tmexxa bil-hsieb ta` frodi tal-kredituri tal-kumpannija jew ta` kredituri ta` xi persuna ohra jew bil-ghan ta` frodi

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

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

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

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

Il-frazi "*business of the company*" ma tinkludix biss in-negozju ta` kuljum li ghalih tkun giet kostitwita l-kumpannija jew dak li ghalih tkun maghrufa, izda wkoll dak in-negozju ancillari jew relatat li jwassalha biex

tilhaq il-milja tal-operat taghha.

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

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

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

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

Tkompli ssir referenza ghal **Arlidge & Parry On Fraud** (op. cit.) fejn inghad :-

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

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

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

...

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

...

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

...

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

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

...

and there appears to me to be two types of such object-persons. There are those who choose to make the company their debtor, as ordinary trade suppliers, and those in whose favour liability from

the company arises by the choice of the company, not their own, e.g. the Inland Revenue as to PAYE and national insurance contributions and the Customs and Excise as to the value added tax. As to trade creditors,

...

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

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

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

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

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

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

First, there must be dishonesty involved. Dishonesty is an essential ingredient of the offence (R v Cox (1982) 75 Cr App R 291). So making bad, even disastrous, business decisions will not be enough, of itself, to constitute fraudulent trading. Absent fraudulent intent or recklessness, directors who, in good faith, try but fail to trade out of a difficult financial position, will not be guilty of fraudulent trading. However, the carrying on of a company`s business and incurring debts at a time when the directors know that there is no reasonable prospect of the creditors being paid when the debt becomes due or shortly thereafter has been held to be fraudulent (R v Grantham [1984] 3 All ER 1669). Carrying on the business does not necessarily mean continuing to trade. The collection of assets for the purpose of paying existing creditors falls within the definition. However, paying some creditors in preference to others is not, of itself, fraudulent (Re Sarflax Ltd [1979] Ch 592). Nor is keeping an existing creditor at bay with promises of future payment, even if those promises are misleading and cannot be honoured (Morphitis v Bernasconi [2003] Ch 552).

However, accepting payment or deposits for goods in circumstances where the directors know the goods cannot be supplied and the payments cannot be returned because the company is

insolvent will constitute fraudulent trading, even if this involves only one customer (in re Gerald Cooper Chemicals [1978] Ch 262).

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

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

IX. Risultanzi

In-negozju ta` kumpannija jkun tmexxa bi hsieb ta` frodi, jekk issir il-prova ta` **actual dishonesty** ossija l-prova ta` l-intenzjoni li jkun pregudikat kreditur. L-intenzjoni tirrizulta mill-imgieba, anke b`inferenza, wara li jitqiesu c-cirkostanzi kollha tal-kaz.

B`referenza ghall-kaz tal-lum, jirrizulta mill-*statements* bankarji li Blue Wave, minkejja *i buoni propositi*, bdiet hazin mill-bidu tant li

ghalkemm kellha *overdraft* dan fi zmien qasir kellu jigi konvertit mill-bank stess ghal *business loan* billi ma kienx qed isir hlas lura ta` l-*overdraft*. Is-sitwazzjoni kienet rimedjata biss *in extremis* meta l-*loan* thallset mill-kont personali ta` Jean Cali`.

Tajjeb jinghad illi n-negozju li riedet tintraprendi Blue Wave kien destinat li jiffaccja kompetizzjoni, li kienet deskritta mill-kreditur li ta bidu ghall-azzjoni tal-lum, bhala *feroci*. Apparti li kellha thabbat wiccha ma` kompetituri li kienu diga` stabbiliti fis-suq, kien jidher bhala fatt illi ghaliex kienet novella fis-settur, il-kalkoli li ghamlet tal-hidma taghha kienu bil-wisq approssimattivi jew affrettati fis-sens illi qajla kienet taqleb favur taghha n-negozju tal-garr tal-merkanzija bejn Malta u Sqallija.

Jidher illi Jean Cali` strieh fuq l-esperjenza li kellu f` negozju ghal kollox divers, li pero` seta` kaxkar mieghu kuntatti, li xi drabi jistghu jkunu ta` utilita`. Jidher illi ghamel l-almu tieghu jara n-negozju jirnexxi. Pero` jidher ukoll illi Cali` nhakem mill-impenji li jirrikjedi xoghol ta` din ix-xorta, u kif, jaccetta huwa stess, tilef il-kontroll. Beda jiddependi dejjem aktar fuq il-hidma tas-socjeta` rikorrenti. U tilef kontroll fuq l-ispejjez tan-negozju. Ma zammx il-kontabilita`; lanqas inkarika *accountant* biex ighinu jsib tarf. Fil-fatt irrizulta mill-prova tal-fatti illi l-operat ta` Blue Wave ma kienx sostenibbli. L-ispejjez tan-negozju kienu kbar, u xi drabi mprevedibbli wkoll. In-nuqqas ta` likwidita` gab lid-diretturi fuq rkobbtejhom bil-konsegwenza li kellhom jitolbu aktar zmien sabiex ihallsu l-pendenzi taghhom. Minkejja d-diffikultajiet kollha, Cali` baqa` fiducjuz fuq *turnaround* tan-negozju. Ghad in-nuqqas ta` likwidita`, sahansitra gab vapur gdid biex jopera u kompla jinkorri aktar spejjez.

Effettivament in-negozju waqaf hesrem ghaliex terzi zammew il-vapur milli jerga` jsalpa wara li dahal Malta. Minflok irrinfaccja l-problemi, Cali` warrab. Intant is-socjeta` rikorrenti waqfet milli taghti aktar koncessjonijiet ghall-hlas u bdiet izzomm il-merkanzija bi tpacija. Il-provi juru illi d-diretturi ta` Blue Wave sstottovalutaw ir-riskji meta dahlu ghal dak in-negozju, li kien jirrikjedi *feasibility study* tajjeb u likwidita` sabiex taghmel tajjeb ghall-ispejjez. L-intervista rilaxxjata minn Jean Cali` ftit xhir biss wara li beda dan in-negozju hija prova ta` ingenwita` da parti tieghu. Fl-intervista Cali` kien qieghed jipprospetta

tkabbir li kien difficli li jinkiseb in vista tad-djun u tan-nuqqas ta` likwidita` .

Il-kollass tan-negozju gie minhabba *business model* zbaljat fejn il-qligh seta` jigi generat biss b'koncessjoni ta` aktar zmien ghall-hlas tad-djun. Il-kumpannija kienet qeghda topera minghajr kontroll effettiv. Jidher bic-car illi n-negozju tmexxa b'sogru zejzed u minghajr pjan tant illi lanqas il-*financial statements* u l-*audits* tal-kumpannija ma saru. Lanqas ma jirrizulta illi saret xi *cash injection* mill-azzjonisti fin-negozju tal-kumpannija sabiex din tkun sostenibbli fl-operat taghha. Cali` jaccetta illi kien konxju mill-qaghda kritika tal-kumpannija.

Ghalkemm kien gestit tramite kumpannija, fil-fatt in-negozju kien ta` Cali` u Calcaterra. Kien ghalhekk fl-interess taghhom illi, apparti li bhala diretturi joqghodu ma` dak illi jghid l-Art 167(1) tal-Kap 386, jassikuraw ruhhom li jinzammu l-*accounts*, li jsiru l-*audits*, kif ukoll l-*financial statements* u li dawn jigu prezentati lir-Registratur tal-Kumpanniji.

Il-Qorti ma ssib l-ebda gustifikazzjoni ghala Cali` pprova jiskarika n-nuqqas tieghu fuq is-socjeta` rikorrenti. Anki jekk is-socjeta` rikorrenti baqghet taghmel xoghol ghal Blue Wave skont il-ftehim ta` bejniethom, jibqa` l-fatt illi Cali` mexxa in-negozju hazin mill-bidu nett.

Fattur rilevanti sabiex ikun determinat kummerc bi frodi huwa meta ma jittiehdux dawk il-prekawzjonijiet sabiex jigi minimizzat id-dannu a skapitu tal-kredituri.

Mill-assjem ta` l-provi ma jirrizultax li ttiehdu prekawzjonijiet ta` din ix-xorta. Matul it-tmexxija tieghu, Cali` m'ghamel ebda pjan fattibbli sabiex il-kredituri, inkluz is-socjeta` rikorrenti, ma jibqghux skoperti fir-radd lura tal-krediti. M`ghamel l-ebda *business plan* serju. Minflok kien jimxi *alla giornata*. Is-socjeta` rikorrenti qaghdet ghal kollox fuq il-kelma ta` Cali. Skont hi, Cali` kien jassiguraha li kellu mnejn ihallas. Billi kien trattat bhala persuna onesta, baqa` jinghata koncessjonijiet.

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

Ighid :-

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

By contrast, when an order is made under the fraudulent trading provision in English law, the wrongdoer will be ordered "to make contributions (if any) to the company`s assets as the court thinks proper. In its practical application, the provision in Maltese law would probably favour the creditors who have been the victims of the wrongdoing rather than the other creditors of the company – as a court is more likely to direct the wrongdoers to be personally liable vis a vis the victims

...

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

Skont il-ligi taghna (ghad-differenza tal-ligi Ingliza) kreditur ordinarju li jaghmel il-prova li kien defrawdatt ghandu rimedju **dirett** u jista` jigi rizarcit **direttament** minn min jirrizulta li jkun ghamel kummerc bi frodi ghad-dannu tieghu.

Andrew Muscat fil-**Principles of Maltese Company Law** (op. cit.) b` riferenza ghall-Art 315(1) tal-Kap 386 jirrileva illi :-

"The provision imposes liability on the wrongdoer for "all or any of

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

...

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

...

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

Fil-kaz tal-lum, jirrizulta ppruvat illi t-tmexxija effettiva tas-socjeta` intimata kienet f'idejn Jean Cali. Qajla hemm referenza fl-atti ghall-intimat l-iehor Giovanni Calcaterra. Anke s-socjeta` attrici tikkonferma li rari kien hemm kuntatt ma` Calcaterra. Kien Cali` li kien attiv fl-affarijiet ta` kuljum tan-negozju ; kien sahsitra jmur personalment ix-xatt jittratta meta kien jitlaq jew jasal il-bastiment. Ma` Cali` kienet tittratta s-socjeta` rikorrenti kemm dwar in-negozju kif ukoll dwar id-diffikultajiet tal-hlasijiet. Cali` ma jaghmel ebda accenn ghall-involviment ta` Calcaterra fin-negozju. Anzi mid-deposizzjoni tieghu huwa evidenti li n-negozju kien qiegħed jitmexxu proprju minn Cali` wahdu. Accertat dan kollu, ghalkemm il-Qorti hija tal-fehma li kien ippruvat li l-*modus operandi* ta` Cali` fil-vicenda in kwistjoni kien jesponih għal sanzjoni skont l-Art 315(1), jibqa` l-fatt illi s-seba` talba kontra Cali` kienet ceduta fil-mori tal-kawza. Għalhekk sejra tieqaf hawn fejn jirrigwarda Cali`.

Ghar-rigward ta` Giovanni Calcaterra, kien ippruvat illi dan kien direttur ta` Blue Wave fiz-zmien tal-kwistjoni. Fl-istess waqt ma rrizultax ippruvat illi Calcaterra kien involut fil-gestjoni tan-negozju tal-kumpanija. Tenut kont tat-tifsira ta` *direttur* li tirrizulta fl-Art 2 tal-Kap 386, il-Qorti tghid illi Calcaterra kellu obbligi li johorgu mill-figura tieghu ta` direttur. Fl-istess waqt il-Qorti hija tal-fehma wkoll illi tenut kont ta` r-rekwiziti li jaghmlu s-sostrat tal-Art 315(1), ma tirrizultax ippruvata *x-xjenza* ta` Calcaterra fil-kummerc bi frodi. Ghalhekk qeghda teskludi li Giovanni Calcaterra ghandu jgorr responsabilita` kif previst fl-Art 315(1).

Decide

Ghar-ragunijiet kollha premessi, il-Qorti qeghda tipprovdi dwar is-seba (7) talba tal-kumpanija rikorrenti, u dwar it-tielet (3) u r-raba` (4) eccezzjonijiet, billi qeghda taqta` u tiddeciedi hekk :--

Tastjeni milli tiehu konjizzjoni ulterjuri tas-seba` (7) talba fil-konfront tal-intimat Jean Cali` stante li t-talba kienet ceduta mill-kumpanija rikorrenti fil-konfront tal-istess intimat fil-mori tal-kawza.

Tichad l-istess talba kif dedotta fl-intier taghha fil-konfront tal-intimat l-iehor Giovanni Calcaterra.

Tordna li l-ispejjez ghandhom jithallsu mill-kumpanija rikorrenti.

Onor. Joseph Zammit McKeon
Imhallelf

Amanda Cassar
Deputat Registratur