



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

**ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON**

Illum il-Hamis 30 ta` Mejju 2019

**Kawza Nru. 1
Rik. Nru. 61/15 JZM**

**Ricevitur Ufficjali fil-kapacita`
tieghu ta` stralcjarju tal-
kumpannija Smart Malta ICT
Limited [C-41884] skond digriet
datat 30 ta` Marzu 2010**

kontra

- i. Steve Alamango
(I.D. 201384M)**
- ii. Geoffrey Farrugia
(I.D. 366483M)**

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentat fit-23 ta` Jannar 2015 li jaqra hekk :-

i. Illi l-kumpanija Smart Malta ICT Ltd. (C-41884) kienet giet registrata fis-17 ta` Lulju 2007. L-ewwel azzjonisti kienu l-intimati Steve Alamango [ID 210384M] u Geoffrey Farrugia [ID 366483M] li t-tnejn li huma kienu detenturi ta` mitejn u hamsin (250) ishma Ordinarja ta` €2.329373 kull wiehed. L-istess intimati kienu l-unici diretturi u rapprezentanti legali u guridici tal-kumpanija imsemmija filwaqt illi l-intimat Steve Alamango okkupa l-kariga tas-segretarju tal-kumpanija. Kopja tal-istatut tal-kumpanija Smart Malta ICT Ltd qed jigi ezibit u mmarkat bhala "DOK RU1" ;

ii. Illi l-kumpanija Smart Malta ICT Ltd (C-41884) giet xolta fi stat ta` insolvenza permezz ta` digriet moghti minn din l-Onorabbli Qorti fit-30 ta` Marzu 2010 [kopja legali ezibita bhala "DOK RU2"] b` effett mit-30 ta` Settembru 2009 u dan skont l-Artikolu 223 (1) tal-Kap. 386 tal-Ligijiet ta` Malta wara rikors illi kien sar mill-kumpanija Gutenberg Press Limited (C 8936) ;

iii. Illi din l-Onorabbli Qorti hatret lir-rikorrent bhala stralcjarju tal-kumpanija Smart Malta ICT Ltd. bis-setghat u d-dmirijiet kollha skont l-Artikolu 228 et seq tal-Kap. 386 tal-Ligijiet ta` Malta b`dan illi r-rikorrent inghata wkoll, bla hsara ghall-generalita` ta` dawk is-setghat u dmirijiet :-

a. Wara li jikseb dikjarazzjoni fuq il-qaghda tal-kumpanija intimata kif irid l-Artikolu 226 tal-Kap. 386 tal-Ligijiet ta` Malta jaghmel rapport lill-Qorti kif irid l-Artikolu 227 tal-Kap. 386 tal-Ligijiet ta` Malta ;

b. Jaghmel verifika dwar l-assi u d-djun tal-intimata u dwar il-gradwazzjoni tad-djun ;

c. Jiehu taht il-kustodja jew kontroll tieghu l-assi kollha tal-kumpanija intimata kif jghid u jrid l-Artikolu 237 tal-Kap. 386 tal-Ligijiet ta` Malta ;

d. Jaghmel jew jiddefendi kull azzjoni jew procediment legali iehor fl-isem u fl-interess tal-kumpannija intimata ;

e. Jirrelata dwar il-mizuri mehtiega ghall-harsien tal-assi tal-kumpannija intimata ;

f. Jipprezenta r-rapport tieghu mhux aktar tard minn tliet (3) xhur mid-data tas-sentenza.

iv. Illi in adempjenza tal-inkarigu moghti lilu, ir-Ricevitur Ufficjali hejja rapport bid-data tad-19 ta` Novembru 2012 illi jinsab ezibit fl-atti tar-rikors numru 944/2009 JZM fl-ismijiet "Gutenberg Press Ltd (C-8936) vs. Smart Malta ICT Ltd. (C-41884) [kopja tar-rapport flimkien ma` nota annessi u mmarkati "DOK RU3"].

Minn dan ir-rapport, in sintesi, johorgu "inter alia", is-segwenti punti:

a. Illi inizjalment wara l-hatra tal-istralcjarju, l-ebda wiehed mill-intimati ma ghamel kuntatt mal-istess stralcjarju jew issottometta d-dikjarazzjoni fuq il-qagħda finanzjarja tal-kumpannija hekk kif kontemplat fl-artikolu 226 tal-Lap. 386 tal-Ligijiet ta` Malta ;

b. Illi wara illi b`diffikulta` kbira saret laqgħa wahda mal-intimati, fejn dawn wegħdu illi kienu sejrin jassistu lis-stralcjarju billi jimlew formola bil-qagħda finanzjarja tal-kumpannija, din il-formola qatt ma waslet għand l-istralcjarju sal-gurnata tal-lum ;

c. Illi l-intimati kienu stqarru illi l-kumpannija Smart Malta ICT Ltd ma kellix assi, kellha d-djun u izda qalu illi kellha tigbor flus minn għand terzi. Wegħdu illi jghaddu d-dettalji dwar id-dejn u d-debituri izda din l-informazzjoni qatt ma waslet ;

d. Illi mir-ricerka illi ghamel l-istralcjarju mal-banek ewlenin, mad-Dipartient tat-Taxxa fuq il-Valur Mizjud, mad-Dipartiment tat-Taxxi Interni u mir-Registru tal-Qorti, ma jirrizulta minn imkien illi kien hemm xi debitori.

iv. Illi nonostante diversi tentativi sabiex isiru laqghat u tintbaghat l-informazzjoni mitluba, l-intimati, cioe` d-diretturi tal-kumpannija Smarrt Malta ICT Ltd urew dizinterest totali sal-gurnata tal-lum ;

v. Illi mid-dokumenti registrati ghand ir-Registratur tal-Kumpanniji, jirrizulta illi wara illi giet iffurmata l-kumpannija Smart Malta ICT Ltd, id-diretturi taghha la qatt baghtu "audited financial accounts" u lanqas qatt baghtu "annual returns" biex b`hekk naqsu milli josservaw obbligi impost fuqhom mill-ligi fosthom dawk impost fuqhom mill-Artikoli 167, 176, 178, 181, 183 u 184 tal-Kap. 386 tal-Ligijiet ta` Malta. Qed jigi ezibit estratt mis-sit elettroniku tar-Registratur tas-Socjetajiet illi qed jigi mmarkat "DOK RU4". Isegwi ghalhekk illi kisru obligazzjonijiet imposti fuqhom mill-Kap.372 u Kap. 406 tal-Ligijiet ta` Malta kif sejjer jigi ppruvat fil-kors tat-trattazzjoni tar-rikors ;

vi. Illi, minghajr pregudizzju ghas-suespost, jidher li d-diretturi ma kinux izommu kotba finanzjarji tal-kumpannija, u fil-fatt huma naqsu milli jibghatu l-"audited financial statements" ; dan huwa nuqqas gravi da parti tal-intimati li sahsansitra jista` jrendihom hatja tar-reat kontemplat fl-Artikolu 314 tal-Kap. 386 tal-Ligijiet ta` Malta ;

vii. Illi mill-ftit informazzjoni illi rnexxilu jigbor ir-rikorrent fil-qadi ta` dmirijietu - u dan minhabba nuqqas ta` koperazzjoni min-naha tal-intimati u min-nuqqas ta` dokumentazzjoni illi l-intimati kienu obbligati illi jibghatu lir-Registratur tal-Kumpanniji u lir-Ricevitur Ufficjali- jidher evidenti illi l-intimati ffurmaw il-kumpannija, ghamlu negozju limitat, tellghu dejn ma` xi kredituri f`temp ta` ftit xhur, ma hallsux id-dejn u mghamlu assolutament xejn sabiex jippruvaw isalvaw il-kumpannija jew jimminimizzaw il-pregudizzju lill-istess kredituri meta kienu jafu jew misshom kienu jafu illi ma kienx hemm prospett xieraq li l-kumpannija setghat tevita x-xoljiment minhabba l-insolvenza taghha. Dan kien gja gie prospettat fir-rapport preliminari tal-esponenti datat 19 ta` Novembru 2012 :-

"Mill-istharrig preliminari jirrizulta li d-diretturi tal-kumpannija xolta ma mxewx skond ir-regoli u l-ligijiet kif dettati mill-Kap. 368, tul iz-

zmien minn wara r-registrazzjoni tal-kumpannija sad-data tax-xoljiment ...

Nuqqasijiet bhal dawn ma jwasslu ghal xejn hlief li jqanqlu suspetti f`mohh l-istralcjarju u ferm u ferm aktar f`mohh il-kredituri tal-kumpannija xolta`.

viii. Illi mill-fatti fuq esposti u minn fatti li sejrjn jirrizultaw fil-kors tat-trattazzjoni u l-gbir tal-provi quddiem din l-Onorabbli Qorti, ghandu jirrizulta illi d-diretturi intimati kisru l-obbligi mposti fuqhom mill-ligi fosthom dawk kontemplati fl-Artikoli 314 u 316 tal-Kap.386 tal-Ligijiet ta` Malta ;

Ghaldaqstant ghar-ragunijiet premissi, ir-rikorrent umilment jitlob illi din l-Onorabbli Qorti, sabiex prevja dikjarazzjoni illi :-

a) Il-kumpannija Smart Malta ICT Ltd (C-41884) ma zammitx "records" ta` kontijiet xierqa matul iz-zmien ta` sentejn minnufih qabel ix-xoljiment effettiv taghha u illi fil-mument tax-xoljiment taghha, ma setghetx thallas lill-kredituri taghha ; u

b) L-intimati kienu jafu, jew kellhom ikunu jafu qabel ix-xoljiment insolventi tal-kumpannija Smart Malta ICT Ltd (C-41884) li ma kienx hemm prospett xieraq li l-imsemmija kumpannija Smart Malta ICT Ltd (C-41884) setghat tevita x-xoljiment minhabba l-insolvenza taghha

Joghgobha :-

1. Tiddikjara lill-intimati jew min minnhom responsabbli illi jaghmlu pagament favur l-attiv tal-kumpannija f`somma mhux inferjuri ghal dik ta` hamsin elf tmin mija tlieta u sittin Euro (€50,863), flimkien ma` imghaxijiet ulterjuri sad-data tad-decizjoni ta` dan ir-rikors, jew/u kwalsiasi somma ohra illi jidhrilha xierqa din l-Onorabbli Qorti fic-cirkostanzi, sabiex b`hekk ta` l-inqas jigu kopert d-dejn, spejjez u imghax illi soffrew il-kredituri u jigu mhallsa d-drittijiet u spejjez konnessi

ma` dan ir-rikors u mal-procedura kollha tal-istralc tas-socjeta` Smart Malta ICT Ltd u dan a tenur tal-Artikolu 316(2) tal-Kap. 386 tal-Ligijiet ta` Malta.

Bl-ispejjez kontra l-intimati.

Rat id-dokumenti li kienu pprezentati mar-rikors.

Rat ir-risposta guramentata li pprezenta l-konvenut Geoffrey Farrugia fit-2 ta` Marzu 2015 li taqra hekk :-

1. Illi preliminarjament, l-azzjoni attrici hija preskritta a tenur tal-Artikolu 2153 tal-Kodici Civili kif ukoll a tenur tal-Artikolu 2156(f) tal-Kodici Civili.

2. Illi bla hsara ghall-premess, ma jikkonkorru ir-rekwiziti mehtiega mill-ligi biex l-azzjoni attrici tirnexxi.

3. Illi bla hsara ghall-premess, it-talbiet attrici huma nfondati fil-fatt u fid-dritt, u ghalhekk ghandhom jigu respinti.

Salv eccezzjonijiet ulterjuri.

Bl-ispejjez kontra l-attur nomine, li huwa minn issa ngunt in subizzjoni.

Rat id-dikjarazzjoni tal-fatti u l-lista tax-xhieda ndikati mill-istess konvenut.

Rat ir-risposta guramentata li pprezenta l-konvenut Steve Alamango fid-29 ta` April 2015 li taqra hekk :-

Dikjarazzjoni tal-Fatti

1. Illi l-fatti dikjarati fl-ewwel tliet paragrafi tar-rikors promotur mhumiex kontestati.

2. Illi l-fatti kif esposti fil-paragrafi sussegwenti tar-rikors promotur huma kontestati u jridu jigu pruvati.

3. Illi l-eccipjent jaf bil-fatti suesposti personalment.

Eccezzjonijiet

Ghaldaqstant il-konvenut jeccepixxi bir-rispett :-

1. Preliminarjament illi l-azzjoni attrici hija preskritta a tenur tal-Artikolu 2153 u/jew 2156(f) tal-Kap 16 tal-Ligijiet ta` Malta.

2. Illi minghajr pregudizzju ghas-suespost, ma jikkonkorru l-elementi tal-Artikolu 316 tal-Kap. 386.

3. Illi anke li kieku, dato ma non concesso, kienu jikkonkorru l-elementi tal-Artikolu 316 tal-Lap 386. L-eccipjent mhuwiex responsabbli personalment, u dan kif ser jigi pruvat tul is-smigh tal-kawza.

4. Illi minghajr pregudizzju ghas-suespost, anke li kieku dato ma non concesso, kienu jikkonkorru l-elementi tal-Artikolu 316 tal-Kap 386, il-pagament favur l-attiv tal-kumpannija mill-konvenuti jew min minnhom jista` jigi limitat biss ghad-danni li setghet soffriet il-kumpannija Smart Malta ICT Limited minhabba l-allegat agir in vjolazzjoni tal-Artikolu 316, u mhux ghad-dejn kollu tal-kumpannija kif mitlub mill-attur noe.

5. *Illi minghajr pregudizzju ghas-suespost, anke li kieku dato ma non concesso, kienu jikkonkorru l-elementi tal-Artikolu 316 tal-Kap 386, in konnessjoni mar-raba` eccezzjoni, jispetta lill-attur noe jipprova x`danni effettivament soffriet il-kumpanija minhabba l-allegat agir in vjolazzjoni tal-Artikolu 316 tal-Kap 386.*

6. *Illi minghajr pregudizzju ghas-suespost, anke li kieku dato ma non concesso, kienu jikkonkorru l-elementi tal-Artikolu 316 tal-Kap 386, il-pagament li ghandu jithallas favur l-attiv tal-kumpanija zgur ma jeccedix l-ammont ta` EUR 50,863 u/jew somma verjuri kif mitlub fl-ewwel talba tal-attur noe ghaliex zgur ma kienx hemm dannu simili kkawzat lill-attiv tal-kumpanija u ghalhekk it-talba kif dedotta ma tistax tintlaqa`.*

Rat il-lista tax-xhieda ndikati mill-intimat Steve Alamango.

Rat il-verbal tal-udjenza tal-4 ta` Gunju 2015 fejn il-partijiet inghataw direzzjoni fis-sens illi kellhom jingiebu provi dwar l-ewwel eccezzjoni tal-konvenut Alamango u l-ewwel eccezzjoni tal-konvenut Farrugia sabiex dawn jigu decizi qabel ma jitqies il-mertu.

Rat id-digriet li tat fl-udjenza tal-15 ta` Ottubru 2015 fejn ordnat l-allegazzjoni tal-atti tal-kawza bin-nru 944/09 JZM fl-ismijiet "Gutenberg Press Ltd. vs Smart Malta ICT Ltd".

Rat is-sentenza li tat fit-8 ta` Marzu 2016 fejn cahdet l-ewwel eccezzjoni tal-konvenut Alamango u l-ewwel eccezzjoni tal-konvenut Farrugia, spejjez ghaz-zewg konvenuti.

Rat id-digriet li tat fis-17 ta` Mejju 2016 fejn iz-zewg konvenuti nghataw permess sabiex jinterponu appell mis-sentenza taghha tat-8 ta` Marzu 2016.

Rat is-sentenza li tat il-Qorti tal-Appell fit-18 ta` Lulju 2017 fejn cahdet iz-zewg appelli tal-konvenuti, ikkonfermat is-sentenza ta` din il-Qorti, spejjez ghall-konvenuti, u rrinvjat l-atti ghall-kontinwazzjoni tal-kawza.

Rat illi minn hemm `il quddiem saru provi u kienu trattati t-talbiet tal-attur u l-bqija tal-eccezzjonijiet tal-konvenuti.

Semghet ix-xiehda u rat il-provi l-oħra kollha li tressqu fil-kors tal-kawza.

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

Rat in-noti ta` osservazzjonijiet.

Rat l-atti l-oħra tal-kawza.

II. Fatti

Il-kumpannija Smart Malta ICT Ltd (C-41884) [**Smart Malta**] kienet registrata fis-17 ta' Lulju 2007. L-obbjettiv ewlieni taghha kien li bhala pjattaforma f'Malta¹. L-azzjonisti huma l-konvenuti. L-*issued share capital* kien ta` Lm 500 maqsum f` 500 sehem ordinarju tal-valur ta' Lm 1 kull sehem. Il-konvenuti kienu wkoll diretturi, waqt li l-konvenut Steve Alamango kienu ukoll *company secretary*. Ir-rappreżentanza legali u gudizzjali kienet vestita fihom it-tnejn.

Smart Malta ghamlet ftehim ma` Gutenberg Press Ltd ("**Gutenberg**") fejn din kellha tiehu hsieb l-istampar ta` rivista li kellha tkun i ppubblikata minn Smart Malta. Ma jirrizultax illi kienu miftehema termini dwar pagament. Smart Malta kienet fi hsiebha illi taghmel tajjeb

¹ Ara L-Memorandum and Articles of Association a fol. 29 tal-process.

ghall-ispejjez tal-istampar mid-dhul tar-reklami. Gara li ma dahlux il-hlasijiet li kienu previsti u ghalhekk l-konvenuti, bhala diretturi ta` Smart Malta, hadu decizjoni li jistennew qabel tkun ippubblikata t-tieni edizzjoni. Gutenberg bdiet tigrigi ghall-pagament. Mill-ammont dovut, Smart Malta ghamlet pagament wiehed akkont ta` Lm 858.60, waqt li l-bilanc ta` Lm 6303.40 baqa` ma thallasx.

Smart Malta kienet interpellata thallas izda billi baqghet inadempjenti, Gutenberg ipprezenta kawza kontra taghha bil-procedura sommarja specjali ghall-ammont ta` €14,682.97. Kontestwalment mar-rikors guramentat, Gutenberg ottjeniet il-hrug ta' mandat ta' sekwestru kawtelatorju (785/08). B'sentenza tal-Prim`Awla tal-Qorti Civili tal-14 ta' Jannar 2009 fl-ismijiet *Gutenberg Press Ltd (C8936) vs Smart Malta ICT Ltd (C41884)* (Rik. Nru. 522/08 AF), wara ammissjoni da parti ta` Smart Malta, Gutenberg kienet kanonizzata kreditrici ta' Smart Malta fl-ammont ta' €14,682.97. Sussegwentment Gutenberg ottjeniet il-hrug ta' mandat ta' sekwestru ezekuttiv (383/09) ghall-ammont komplessiv ta` €18,323.27 (sorte + imghax + spejjez).

B'rikors prezentat fit-30 ta' Settembru 2009 fil-Prim`Awla tal-Qorti Civili fl-ismijiet *Gutenberg Press Ltd (C-8936) vs Smart Malta ICT Ltd (C41884)* (Rik. Nru. 944/09 JZM), Gutenberg talbet ix-xoljiment u l-istralc ta' Smart Malta skont l-Art 214(2)(a)(ii) tal-Kap 386. Bi provvediment tat-30 ta' Marzu 2010, il-Prim`Awla tal-Qorti Civili *inter alia* ordnat ix-xoljiment u l-istralc ta` Smart Malta. Ix-xoljiment kien effettiv mit-30 ta' Marzu 2010. Ir-Ricevitur Ufficjali ("ir-Ricevitur") kien mahtur bhala stralcjarju.

Jirrizulta illi r-Ricevitur fit-30 ta' Marzu 2010 kien Joseph Spiteri Staines². Dan baghat zewg ittri u email lill-konvenuti. L-ewwel ittra, dik tad-19 ta' April 2010³, kienet indirizzata lill-konvenut Alamango fejn talab informazzjoni dwar Smart Malta, b`kopja lill-konvenut l-iehor. It-tieni ittra⁴ kienet ukoll indirizzata lill-konvenut Alamango, b`kopja lill-konvenut l-iehor. L-ittra kienet ghall-istess skop ta' dik precedenti. L-

² Ara din il-formola a fol. 11 tal-process esebita bhala parti minn **Dok. RU1**.

³ Ara din l-ittra esebita bhala **Dok. KA1** a fol. 394 tal-process.

⁴ Ara din l-ittra esebita bhala **Dok. KA 2** a fol. 395 tal-process.

email tas-7 ta` Mejju 2010⁵ kienet mibghuta lill-Av. Mark Attard Montalto fejn intalab illi tinzamm laqgħa.

Jirrizulta li Joseph Spiteri Staines ma baqax Ricevitur b`effett mit-30 ta` Gunju 2010⁶.

Kien biss fl-2012 illi nhatar Ricevitur gdid u għalhekk seta` jitkompli l-istralc ta` Smart Malta.

Kien redatt rapport datat 19 ta` Novembru 2012⁷ mnejn jirrizulta illi sad-data tax-xoljiment tagħha :

- i. Smart Malta qatt ma pprezentat il-kontijiet tagħha ;
- ii. Skont ma kien dikjarat mid-diretturi personalment mar-Ricevitur, Smart Malta ma kellhiex assi ;
- iii. Smart Malta ma kellhiex depositi bankarji ;
- iv. Bħala kredituri, Smart Malta kellha lil :

Bank of Valletta plc – €6,097.24 oltre spejjez fl-ammont ta` €177.18 u imghax dekorribbli mis-27 ta` April 2009.

Gutenberg Press Ltd – €14,682.97 oltre spejjez u imghax.

Income Tax – €12,676 rapprezentanti stimi għas-snin 2008 sa 2011 u dan peress illi ma gewx prezentati *returns* u allura ma setax jinhareg l-ammont realment dovut.

VAT – €2,441.34 oltre spejjez u imghax.

⁵ Ara din l-email esebita bħala **Dok. KA 3** a fol. 396 tal-process.

⁶ Ara il-Form L(3) a fol. 10 tal-process esebita bħala parti minn **Dok. RU1**.

⁷ Dan ir-rapport jinsab immarkat bħala **Dok. RU3** a fol. 42 sa 47 tal-process.

- v. Id-diretturi ddikjaraw illi l-kumpanija kellha diversi debitori, izda baqghu ma pprezentawx lista tagghom u tal-ammonti dovuti.

Ir-Ricevitur ikkonkluda illi :

"L-esponenti jhoss li hemm bzonn ta' stharrig ulterjuri u dan peress li d-diretturi tal-kumpanija xolta ghadhom ma pprezentawx ir-rendikont dwar il-qaghda tal-kumpanija.

Mill-istharrig preliminari jirrizulta li d-diretturi tal-kumpanija xolta ma mxewx skond ir-regoli u ligijiet kif dettati mill-Kap 386, tul iz-zmien minn wara r-registrazzjoni tal-kumpanija sad-data tax-xoljiment, stante li ma ssottomettewx il-kontijiet u rapport lir-Registatur tal-Kumpaniji. Barra minn hekk l-istess diretturi naqsu milli jipprezentaw lill-Ufficjali Ricevitur u stralcjarju tal-kumpanija, dik l-informazzjoni necessarja sabiex huwa jkun jista' jizvolgi l-inkariku moghti lilu u jmexxi l-process tal-istralc tal-imsemmija kumpanija l-quddiem.

Nuqqasijiet bhal dawn ma jwasslu ghall xejn hlief li jqanqlu suspetti kemm f'mohh l-istralcjarju, u ferm u ferm aktar f'mohh il-kredituri tal-kumpanija xolta. Ghadaqstant hemm bzonn li d-diretturi jaghtu rendikont dwar il-qaghda tal-kumpanija xolta, u nformazzjoni ohra dwar it-tmexxija taghha."

B'nota tat-13 ta' Frar 2013, ir-Ricevitur informa ill-Qorti illi nonostante l-fatt illi kienu saru diversi tentattivi sabiex isir kuntatt maz-zewg diretturi u li tinkiseb informazzjoni dwar il-kumpanija xjolta, inkluz bil-posta ordinarja u dik registrata, hadd ma kkomunika mieghu.

Ir-Ricevitur ghamel referenza ghal dawn id-dokumenti :-

- ittra registrata tat-2 ta` Marzu 2012 indirizzata lill-konvenut Alamango fl-indirizz tar-residenza tieghu⁸. Jirrizulta mill-*pink card* illi l-Alamango rcieva l-ittra fit-30 ta' Marzu 2012⁹ ;
- ittra registrata ohra wkoll datata 2 ta` Marzu 2012 indirizzata lill-konvenut Farrugia. Intbaghtu zewg kopji wahda fl-indirizz tar-residenza tieghu u l-ohra fl-indirizz moghti ghall-komunikazzjoni dwar affarijiet tal-kumpannija¹⁰. Jirrizulta mill-*pink card* illi Farrugia rcieva ittra fis-6 ta' Marzu 2012 u ittra ohra fis-7 ta' Marzu 2012¹¹.
- avviz ippubblikat fl-14 ta` April 2012 fil-gurnal 'The Times' sabiex kredituri ta' Smart Malta jersqu il-quddiem¹². Ebda kreditur ma ghamel kuntatt.
- ittra bil-posta ordinarja tal-20 ta` Lulju 2012 indirizzata lill-konvenut Alamango¹³.
- ittra bil-posta ordinarja tal-20 ta` Lulju 2012 indirizzata lill-konvenut Farrugia¹⁴.
- ittra bil-posta ordinarja tal-20 ta' Settembru 2012 indirizzata lill-konvenut Alamango¹⁵.
- ittra bil-posta ordinarja tal-20 ta` Settembrtu 2012 indirizzata lill-konvenut Farrugia ¹⁶.
- ittra tat-12 ta` Novembru 2012 indirizzata lill-Av. Mark Attard Montalto fejn ir-Ricevitur baghat javza illi dan kien l-ahhar avviz u li fin-nuqqas kien ser jiehu l-passi necessarji¹⁷.
- ittra tat-3 ta` Dicembru 2012 fejn Av Attard Montalto wiegeb lir-Ricevitur ghaz-zewg konvenuti illi dawn kienu lesti jikkoperaw¹⁸.

⁸ Esebata bhala **Dok. B** a fol. 207 u 208 tal-process.

⁹ Esebata bhala **Dok. C** a fol. 209 tal-process.

¹⁰ Esebati bhala **Dok. D** a fol. 210 u 211 u **Dok. F** a fol. 213 sa 214 tal-process.

¹¹ Esebata bhala **Dok. E** a fol. 212 u **Dok. G** a fol. 215 tal-process.

¹² Ara **Dok. L** a fol. 220 tal-process.

¹³ Esebata bhala **Dok. H** a fol. 216 tal-process.

¹⁴ Esebata bhala **Dok. I** a fol. 217 tal-process.

¹⁵ Esebata bhala **Dok. J** a fol. 218 tal-process.

¹⁶ Esebata bhala **Dok. K** a fol. 219 tal-process.

¹⁷ Esebata bhala **Dok. KA15** a fol. 16 a fol. 408 tal-process.

¹⁸ Esebata bhala **Dok. KA 20** a fol. 412 tal-process.

- email tas-6 ta` Dicembru 2012 li huwa baghat lill-Av. Attard Montaldo (kopja lill-konvenut Alamango) fejn sejjah laqgħa fit-12 ta` Dicembru 2012 fl-Ufficcji tal-MFSA l-Imriehel¹⁹.
- email tal-11 ta` Dicembru 2012 li baghat il-konvenut lir-Ricevitur b`kopja lill-Av. Attard Montalto u lill-konvenut l-iehor fejn kien hemm konferma li kien ser jattendi għal-laqgħa tat-12 ta' Dicembru 2012²⁰.
- email tas-17 ta` Dicembru 2012 li baghat il-konvenut Alamango dwar x`sehh tat-12 ta' Dicembru 2012²¹.
- email tas-17 ta' Dicembru 2012 li baghat il-konvenut Farrugia lir-Ricevitur fejn indika li kien sejjer jibgħat l-informazzjoni kollha sa l-Erbgħa 19 ta' Dicembru 2012²².
- email tas-27 ta` Dicembru 2012 fejn il-konvenut Alamango baghat jistaqsi jekk l-informazzjoni kenitx sottomessa. Il-konvenut Farrugia wiegeb illi kien qieghed ma` huh sabiex jgħalqu d-dokumentazzjoni kollha²³.
- fl-14 ta' Jannar 2013, ir-Ricevitur baghat javza illi kellu bzonn l-informazzjoni sabiex jissottometti r-rapport tiegħu quddiem il-Qorti. Fin-nuqqas ma kienx ser ikollu triq ohra għajr illi jinforma lill-Qorti dwar l-istat reali tal-affarijiet. Il-konvenut Farrugia wiegeb li kien qieghed barra minn Malta u talab ftit jiem ohra biex jipprezenta d-dokumentazzjoni.²⁴

Skont ir-Ricevitur, id-diretturi baqgħu ma bagħtux l-informazzjoni rikjesta minnhom.

¹⁹ Esebita bhala **Dok. KA 19** a fol. 411 tal-process.

²⁰ Esebita bhala **Dok. KA 17** a fol. 409 tal-process.

²¹ Esebita bhala **Dok. KA 24** a fol. 416 tal-process.

²² Esebita bhala **Dok. KA 24** a fol. 416 tal-process.

²³ Esebita bhala **Dok. KA 23** a fol. 415 tal-process.

²⁴ Esebita bhala **Dok. KA 22** a fol. 414 tal-process.

III. Provi

Paul Scicluna²⁵ mid-Dipartiment tat-Taxxi (Taqsuma VAT) xehed illi Smart Malta kienet registrata biex thallas il-VAT b`effett mill-1 ta' Awissu 2007. Tnehhet mir-registrazzjoni fil-31 ta' Mejju 2010. Kemm damet registrata, id-denunzji dejjem dahlu. Fuq il-kumpannija kienet imposta penali fl-ammont ta' €2,441.34.

Fil-**kontroezami** stqarr li ma hemm l-ebda taxxa dovuta. Il-penali kienet imposta ghaliex id-denunzji kienu prezentati tard. Ikkonferma li l-Kummissarju tat-Taxxi kien nieda skema ta` remissjoni sal-perijodu ta` Novembru 2013 fejn penali setghet tigi ridotta sa massimu ta' 80%.

Joseph Debono²⁶ mid-Dipartiment tat-Taxxi (Taqsuma Taxxi Interni) xehed illi mat-taqsuma taghhom Smart Malta kienet registrata b`effett mit-22 ta' Awwissu 2007. Ikkonferma illi Smart Malta ma baghtix il-formoli tat-taxxa ghas-snin ta' stima ta` bejn l-2008 u l-2011 u ta` bejn l-2013 u l-2016. Tal-2012 kienet rifjutata ghalkemm dahlet, mentri tal-2017 dahlet. Wara l-hatra tal-istralcjarju, il-formoli tat-taxxa bdew imorru ghandu. Smart Malta ghandha pendenzi fl-ammont ta' €17,272 (taxxa : €10,588 taxxa ; multi : €196 ; interessi : €6,488).

Fil-**kontroezami** stqarr illi l-ammonti reklamati huma kollha bbazati fuq stima mahduma mill-Kummissarju ghaliex la ma ntbaghtux il-formoli ma setax jigi kkalkolat x`ammont ta' taxxa kien realment dovut. Dawn l-istimi jaqghu biss meta jidhlu *r-returns*. Meta ma jibqghux l-istimi jaqghu ukoll l-interessi ghaliex jekk ma jkunx hemm taxxa dovuta, lanqas ma jkunu dovuti interessi.

Fisser illi ghalkemm il-kumpannija tinsab fi stadju ta' stralc jibqa` l-obbligu li jigu prezentati *t-tax returns*. L-obbligu li tintbaghat *ir-return* jiegaf biss meta jkunu dahlu l-formoli kollha kif mehtieg.

²⁵ Ara din ix-xhieda u d-dokumenti esebiti a fol. 298 sa 304, 432 sa 446 u 503 sa 505 tal-process.

²⁶ Ara din ix-xhieda u d-dokumenti esebiti a fol. 305 sa 328 u 506 sa 511 tal-process.

Dwar il-penali xehed illi dawn ma jaqghux. Pero` l-kumpannija ghandha dritt taghmel *objection*. Dan isir billi l-istralcjarju jimla formola appozita, fejn jindika liema snin qieghed joggezzjoni dwarhom. Ir-riduzzjoni tal-penali hija diskrezzjoni tal-Kummissarju.

Qal illi d-Dipartiment huwa edott mill-fatt illi Smart Malta kienet giet xjolta giet xolta u li tinsab fi stat ta` stralc.

Joanna Bartolo²⁷ mill-Bank of Valletta plc xehdet illi Smart Malta kellha tlett kontijiet mal-bank bejn l-2007 u l-2009. Dawn inghalqu kollha fit-28 ta' April 2009. Wiehed minn dawn il-kontijiet kien *business overdraft*. Billi l-ahhar transazzjoni kienet datata 25 ta' Marzu 2008, fit-8 ta' Ottubru 2009 il-kont kien meqjus mill-bank bhala *non operating* u nqaleb ghal *recovery*. Il-kont jinsab taht il-kontroll tad-*debt management unit* tal-bank.

Kompliet tixhed illi l-bank kien kanonizzat bhala kreditur ta' Smart Malta fl-ammont ta' €6,097.24 ai termini tal-Art 166 tal-Kap 12²⁸. Il-bank ghandu ipoteka generali favur tieghu.

Stqarret illi Smart Malta kellha zewg *current accounts*, wiehed li nghalaq fit-28 ta' April 2009 u l-iehor li nghalaq fit-8 ta' Ottubru 2009. Wiehed miz-zewg kontijiet kien *overdraft* ; minnu hargu seba` cheques. Mill-kont l-iehor hargu tmax-il cheque. Kien hemm numru ta` cheques li kienu *referred to drawer* billi ma kienx hemm bizzejjed fondi depozitati biex ic-cheques ikun jistghu jissarrfu. Ma setax jigi verifikat kemm minn dawn ic-cheques lahqu ssarrfu peress illi l-kontijiet inghalqu.

Kompliet tghid illi fit-8 ta' Ottubru 2009 sar depozitu fil-*business overdraft account* fl-ammont ta' €6,381.33. Dan kien depozitu li sar mill-bank stess sabiex jinghalaq l-*overdraft account* u minflok jinqaleb ghal *loan account*. Din hija procedura nterna tal-bank li tiffacilita l-kontroll tal-pagamenti.

²⁷ Ara din ix-xhieda u d-dokumenti esebiti a fol. 329 sa 352 u 447 sa 469 tal-process.

²⁸ Esebita bhala **Dok. BOV 5** a fol. 349 tal-process.

P.L. Quentin Tanti²⁹ ghar-Registratur tal-Kumpanniji kkonferma illi Smart Malta qatt ma pprezentat *annual returns* u *financial statements*.

Mario Magro³⁰ Kontrollur finanzjarju ta` Gutenberg xehed illi ghall-habta ta` Mejju 2007 il-konvenuti tkellmu ma` Gutenberg dwar xoghol zghir ta` stampar. Dak iz-zmien Smart Malta kienet ghadha mhijiex registrata. Ghal dan ix-xoghol harget fattura fl-ammont ta` Lm 100 u din thallset minnufih. Sar xi xoghol iehor ix-xahar ta` wara izda l-kont fl-ammont ta` €97.83 kien baqa' ma thallasx. Il-konvenuti pprezentaw ruhhom bhala *sales and marketing directors* ta' Smart Malta u pprezentaw anke *business cards* meta l-kumpannija kienet ghadha mhix registrata.

Kompla jixhed illi ftit taz-zmien wara l-konvenuti rega` kellmu lil Gutenberg din id-darba ghal bicca xoghol ferm ikbar ghaliex kellha valur ta' €21,767.99. Gutenberg talbet depozitu ta' €5,182.86 li thallas f`zewg pagamenti f`Settembru 2007. Gutenberg stampat ix-xoghol u harget fattura.

Stqarr illi ntbaghtu kemm prospetti kif ukoll *reminders* izda ma kienx hemm twegiba. Gutenberg baghtet ittra legali li bhala effett taghha sar pagament ta` €2,000. Kien propost *repayment programme* maqsum fuq tlett pagamenti. Pero` billi ma sarx hlas, Gutenberg kellha tibda proceduri fil-qorti sabiex tkun kanonizzata kreditrici ghall-bilanc dovut ta` €14,682.92 oltre l-imghax u spejjez. Il-kawza Rik. Gur. Nru. 522/08 AF kienet deciza favur Gutenberg kontra Smart Malta fl-14 ta` Jannar 2009 mill-Prim`Awla tal-Qorti Civili.

Kompla jixhed illi in segwitu sar mandat ta` sekwestru ezekuttiv. Billi ghaddew erbgha u ghoxrin (24) mill-ezekuzzjoni tal-mandat u Smart Malta baqghet ma hallset xejn, Gutenberg ipprezentat kawza sabiex il-qorti tiddikjara x-xoljiment u l-istalc ta` Smart Malta.

²⁹ Ara din ix-xhieda u d-dokumenti esebiti a fol. 353 sa 376 tal-process.

³⁰ Ara l-affidavit esebiti a fol. 378 sa 385 tal-process.

Magro xehed illi jinsab allarmat dwar il-fatt illi Smart Malta qatt ma pprezentat *annual returns* u *financial statements*.

Stqarr illi l-konvenuti bhala diretturi ta' Smart Malta ghamlu negozju, inkluz ma` Gutenberg, meta la kellhom hjiel ta` l-obbligi bazici taghhom qua diretturi, u lanqas hjiel tal-qagghda finanzjarja ta' Smart Malta. Il-konvenuti messhom kienu jafu illi ma kienx hemm mezz biex Smart Malta thallas id-djun taghha. Lanqas ma hadu prekawzjonijiet jew passi sabiex jevitaw illi jesponu lill-kredituri taghhom ghal riskji. Lanqas ma kkoperaw mal-istralcjarju.

Av. Kevan Azzopardi, bhala Ricevitur Ufficjali³¹, xehed illi huwa beda fil-kariga fil-15 ta' Frar 2012. Qablu kien hemm Joseph Spiteri Staines. Dan kien baghat xi korrisondenza lill-intimati. Meta dahal fl-inkarigu, xehed illi huwa acceda ghall-*file* tal-istralc ta' Smart Malta, u billi ma ra l-ebda twegiba ghall-ittri li baghat ir-Ricevitur ta` qablu, huwa beda jittenta jikkomunika mad-diretturi fejn talab minghandhom informazzjoni dwar Smart Malta. Zamm laqgha maghhom fit-12 ta' Dicembru 2012 fejn indika lill-intimati l-informazzjoni li kien jehtieg minghandhom. L-informazzjoni baqghet ma waslitx.

Kompla jixhed illi huwa zamm wkoll tlett laqghat tal-kredituri. L-ahhar wahda kienet dik ma` Gutenberg. Fil-laqgha kien diskuss jekk setghux jittiehdu proceduri kontra l-intimati ghal kummerc hazin.

Stqarr illi huwa pprova jiffacilita l-process anki mad-Dipartiment tat-Taxxi. Talab illi l-intimati jimtlew ir-*returns* izda ma sar xejn min-naha taghhom.

Kompla jixhed illi :-

"Fost ir-ragunijiet ghalfejn qed nikkontendi li hemm provi dwar dan l-agir hazin tad-Diretturi, ai termini tat-316 tal-Att 386 huwa l-fatt illi d-Diretturi naqsu milli jipprezentaw kontijiet

³¹ Ara din ix-xhieda a fol. 389 sa 425 u 631 sa 634 tal-process.

finanzjarji tal-kumpanija ghas-snin li fiha kienet qiegħda topera. B'dan il-mod huma ppreġudikaw il-kredituri il-ghaliex ma tawhomx ic-cans illi jivverifikaw f'liema stat kienet il-kumpanija u madanakollu baqghu idejnu lil dawn il-kredituri u baqghu imexxu minghajr ma hadu l-ebda azzjoni huma minn jeddhom biex ipoggu l-kumpanija f'xi procedura ta' rkupru jew inkella ta' xoljiment. Minkejja li dawn kienu jafu l-istat tal-kumpanija pero' baqghu għaddejnin minghajr ma jinfirmaw.

...

n-nuqqasijiet f'dan is-sens huma lampanti. Barra dawk in-nuqqasijiet, hemm in-nuqqasijiet illi xehedt dwarhom illi minkejja illi huma ddikajarw illi l-kumpanija kellha xi debituri u kellha tigbor il-flus u jiena bqajt ninsisti li jghadduli l-informazzjoni dwar il-flus li kellhom jgħbruhalli jiena nigbor il-flus u nkun nista' nhallas almenu in parte il-kredituri, dawn baqghu ma taw l-ebda informazzjoni dwar dan, la min huma l-kredituri, la minn fejn hareg id-dejn, la meta gie, la meta jiskatta d-dejn, baqghu ma taw l-ebda informazzjoni ta' xejn."

Zied jgħid ukoll illi lanqas *financial statements* ma gew preparati u allura wasal għall-konkluzjoni illi lanqas kotba tal-kumpanija ma kienu qegħdin jinżammu.

Fil-**kontroezami**, xehed illi meta huwa sar Ricevitur, huwa ha *handover* tal-*files* minghand il-predecessur tiegħu. Kellu laqgħat miegħu u saħansitra għaddielu d-dettalji tal-*email account* tiegħu sabiex huwa bhala Ricevitur għid seta`jaccedi għal korrisondenza antika. Spiteri Staines ma tahx informazzjoni dwar laqgħat li saru mal-intimati izda mill-korrisondenza ddeduca illi għalkemm saru diversi tentattivi ta' laqgħat effettivament ma kienet inżammet l-ebda waħda. Lanqas mill-*file* ma rrizulta li nżammu laqgħat. Il-*file* kien fih biss l-ittri ta' Spiteri Staines u

ghalhekk kien hass il-htiega illi hu stess jibghat ghall-intimati sabiex jikseb l-informazzjoni li kienet nieqsa.

Mistoqsi jekk bhala Ricevitur kienx dejjem jaghmel uzu mill-istess *e-mail account*, spjega illi effettivamente huwa ghandu zewg *accounts* li t-tnejn kienu hemm sa minn mindu ha l-inkarigu u ghadhom hemm sa l-ill. L-emails fl-istess *inbox*. B'referenza ghall-email tal-15 ta' Jannar 2013 mibghuta minn Geoffrey Farrugia, xehed illi din l-email qatt ma waslet ghandu ; dwar dan kien ghamel verifiki sew fl-*inbox* kif ukoll mad-dipartiment tal-IT u rrizulta illi din l-*e-mail* qatt ma waslet. Ikkonferma wkoll illi l-indirizz li fuqu ntbaghtet l-email huwa korrett.

Mistoqsi jekk hax xi passi dwar ir-remissjonijiet fuq it-taxxa, stqarr illi kien ghad hemm lok illi l-intimati jibbenefikaw minn riduzzjoni u biex dan isir trid timtela` formola appozita. Timtela` minnu ghax ghandu r-rapprezentanza tal-kumpannija. Din il-procedura baqghet ma giex inizjata ghaliex qatt ma waslet ghandu minghand l-intimati l-informazzjoni li kellu bzonn. In kwantu ghas-sena meta l-kumpannija kienet qed topera, kellu jithejja rendikont finanzjarju mill-awdituri jew *accountants*. Kwantu ghas-snin l-ohra ma kellux diffikulta` ghaliex ir-*return* tkun *nil* billi l-kumpannija waqfet topera. Kwantu ghall-ammont dovut bhala VAT xehed illi jehtieg riedu jsiru verifiki dwar kemm kien l-ammont realment dovut.

Il-konvenuti Steve Alamango³² u **Geoffrey Farrugia**³³ kienu jahdmu flimkien fis-settur tal-IT u xtaqu jibnu negozju taghhom f'dan is-settur. Minn hawn bdew Smart Malta ghall-habta tal-2006/2007. Il-hsieb kien illi Smart Malta tippubblika rivista u sservi bhala sors ta' informazzjoni tal-IT gewwa Malta.

Alamango xehed illi meta dahlu ghall-pubblikazzjoni dak ghalihom kien settur "*totalment differenti*" minn dak illi kienu jahdmu fih huma. Smart Malta kienet kostitwita ghaliex riedu jipprogettaw l-idea b'mod aktar professjonali, "*iktar stabbli*" u b'tali mod illi tkun "*long term project*".

³² Ara din ix-xhieda a fol. 472 sa 482 tal-process.

³³ Ara din ix-xhieda a fol. 483 sa 497, 513 sa 628 u 635 sa 647 tal-process.

Huwa u Farrugia kienu t-tnejn azzjonisti u diretturi. Huwa kien s-*Sales and Marketing Director* waqt illi Farrugia kien aktar jiehu hsieb il-lat finanzjarju. Is-*share capital* kien ta` Lm 500. Dan kien ammont ckejken kemm jibdew joperaw.

Farrugia xehed illi dak iz-zmien huwa kellu impjieg fuq bazi *full-time*. Peress illi s-*share capital* ma kienx bizzejjed biex il-kumpannija topera, kien juza l-paga u l-flus tieghu li kien faddal sabiex jiffinanzja l-progett. B`dawk il-flus kienu qeghdin jithallsu l-kredituri. Qatt ma ghamel *shareholders loan*. Kien jaf illi l-versamenti li kien qed jaghmel fil-kumpannija ma kienx ser johodhom lura bhala *loan* izda kien ser isarrafhom eventwalment fi profitti. Minghajr dawk il-*cash injections*, il-kumpannija ma kinitx timxi. Il-*cash injections* saru fuq medda ta' sitt xhur u f'ammont ta' madwar Lm 3,000. Dak iz-zmien kien emmen hafna fil-progett u ma rax ir-riskji.

Farrugia u Alamango fissan li r-rivista li kienet stampata ghand Gutenberg harget darba biss. Kienu stampati 30,000 kopja li tqassmu *door-to-door* u mal-gurnali. Il-finanzjament tar-rivista kellu jigi direttament mir-reklami illi kienu ser jidhru fir-rivista. Termini ta' pagament qatt ma gew iffissati u ghalkemm l-*invoice* kienet tghid illi l-hlas ghar-reklam ried isir fi zmien tletin jum rari li thallsu fil-hin.

Farrugia xehed illi l-pjan originali kien illi r-rivista tohrog kull xahrejn, sitt pubblikazzjonijiet f'sena. Il-profitt ghalihom kellu jigu mir-reklamar. Kellhom diversi klijenti u kif jixhdu l-*booking forms* esebiti. Kien hemm ipprenota reklam f'edizzjoni wahda ; u min f'izjed, sahsitra gabu prenotazzjoni ta' reklam ghal sentejn shah. Dan ir-reklamar kien rifliss fl-ewwel edizzjoni tar-rivista. Huma kellhom *long term plan* ghal din ir-rivista. Mir-reklamar kienu ser ihallsu l-ispejjez inkluz dawk ta' Gutenberg. Il-kalkoli taghhom kienu juru illi minn dak illi kienu ser idahhlu tar-riklami fl-ewwel rivista kienu ser jigu *breakeven* u jkopru l-bilanc tal-ispejjez ta' Gutenberg.

Alamango xehed illi l-kumpannija ma kelliex introjtu iehor. Ma kienx hemm hsieb illi jieghdu *loan* jew *overdraft* sabiex ikopru l-pagamenti.

Farrugia fisser illi meta sar in-negozju ma' Gutenberg ma kienx hemm problemi finanzjarji. Dan kien negozju gdid u riedu jaraw kif ser jintlaqa`. Fil-fatt ir-rivista ntlagghet tajjeb u da parti ta' Mario Magro ta' Gutenberg deher illi ried jaghtihom fiducja, u kien hegghom biex imorru ghat-tieni harga.

Skont **Alamango** l-inkwiet finanzjarju inqala` wara l-pubblikazzjoni tar-rivista fl-ewwel edizzjoni taghha. L-istampar tela` ghal madwar Lm 9,000 li minnhom saru hlasijiet.

Mix-xhieda ta' **Farrugia** jirrizulta illi l-intimati hallsu biss Lm 3,000 mill-kont ta' Gutenberg.

Farrugia ighid illi ma kienx iffirmit ftehim dwar il-modalita` tal-hlas ghalkemm ma` Gutenberg kellhom *gentleman's agreement* li l-hlas isir. Gutenberg kienu jafu li huma kienu ghadhom zghar pero riedu jahdmu. Wara l-ewwel harga, bdew izidu fil-*bookings* tar-reklami ghat-tieni publikazzjoni pero' kienu qeghdin jigbru biss depozitu fuq il-prezz tar-reklamar.

Skont **Alamango** meta gew ghall-istampar tat-tieni rivista raw illi kellhom problema ta' likwidita billi ma kinux qeghdin jithallsu tar-reklami. Huma avzaw lil Gutenberg u kellhom iwaqqfu l-istampar tat-tieni harga.

Farrugia stqarr illi kellhom klijenti illi kienu ghamlu prenotazzjoni ta' reklamar ghal numru ta' rivisti. Meta dawn raw illi t-tieni publikazzjoni ma kinitx ser tohrog, huma bdew isibuha aktar diffiqli li jhallsu. Gew f'salib it-toroq, fis-sens illi jekk ikomplu b`aktar hargiet, allura kienu ser jithallsu, jekk jieqfu, jispicaw ma jithallsux.

Skont **Farrugia** l-affarijiet ipprecipitaw meta f'temp ta' ftit xhur kienu rinfaccjati b`mandat ta' sekwestru. L-effett fuqhom ta` dan il-mandat kien negattiv ferm. Kellhom bzonni aktar zmien biex ihallsu ghaliex jekk ma jithallsux tar-reklami ma kellhomx likwidita` biex ihallsu lil Gutenberg. Sahaq illi kellhom klijenti illi riedu jaraw it-tieni edizzjoni

tohrog qabel ihallsu. Meta ma komplewx bit-tieni harga, tilfu l-kredibilita' u allura kient aktar difficli illi jithallsu. Din is-sitwazzjoni gabithom ghar-rkobtejhom. Stqarr illi l-mandat skatta wara li Gutenberg kienet informatha bid-diffikulta illi kellhom biex tohrog it-tieni edizzjoni.

Farrugia zied jghid illi ppruvaw jithallsu minghand id-debituri biex ihallsu l-kredituri u johorgu min-negozju minghajr inkwiet, izda fis-sitwazzjoni li sabu ruhhom fiha, kellhom iwaqqfu l-operat taghhom ghaliex bil-mandat *in vigore* ma setghu jaghmlu xejn. Saru diversi tentattivi sabiex jirkupraw flushom u rcevev anke pagamenti b'cheques, izda dawn ma setghux jissarrfu minhabba s-sekwestru. Ghalkemm grew wara l-klijenti biex jithallsu, qatt ma marru l-qorti maghhom.

Alamango esprima l-fehma illi fiz-zmien relattiv ma kellhomx bizzzejjed esperjenza u sahha biex jigbru flushom.

Farrugia spjega illi ma hasbux illi n-negozju kien ser jiehu din it-triq ghaliex f'mohhhom kellhom illi ser johorgu l-ewwel pubblikazzjoni u jithallsu. Biz-zmien tghallmu illi fin-negozju tendenzjalment in-nies ma jhallsux mill-ewwel. Stqarr illi kienet decizjoni ghaqlija li ma jmorrux ghat-tieni harga biex ma jkomplux ikabbru "*il-gerha ghax ma nifilhux ghaliha*". Qal illi ma riedx li jinftiehem illi l-kumpannija kellha problema ta' likwidita' izda li sabu ruhhom f' sitwazzjoni fejn kien hemm hafna flus x'jingabru. Kieku dawn il-flus ingabru, il-kumpannija kienet issalva.

Sahaq illi l-kumpannija ma kellhiex problemi finanzjarji ghaliex kien hemm numru ta' *commitments* ghal reklamar u allura kienu ser jidhlu l-flus biex tigi *break even* mal-ispejjez. Il-problema kienet tigi li kieku komplew ikabbru n-nefqa ; ghalhekk kien ghaqli li ma tohrogx it-tieni edizzjoni. Li kieku nghataw ftit aktar zmien biex ihallsu ma kinux jaslu ghal dak l-istat ; imbaghad bil-mandat, Smart Malta kellha twaqqaf l-operat taghha.

Stqarr illi fiz-zmien illi l-kumpannija kienet ghada topera, id-dokumenti taghha kienu kollha ghand l-*accountant*. Kien inkarikat

accountant fl-2012 wara li saret il-laqgħa mar-Ricevitur. Huwa kien ipprova jsib *accountant* biss minhabba li l-kumpannija kienet falluta sab diffikulta'. Tkellem ma` certu Franco li kunjomu mhux cert hux Falzon. Ghalkemm ighid illi sar skambju ta' korrisponenza ma` dan Franco, ma gietx prodotta ebda evidenza ta' dan. Meta dan l-*accountant* ma kienx qiegħed jikkopera, talab lil huh li huwa *accountant* sabiex jghinu.

Xehed illi mar-Ricevitur Spiteri Staines kellhom laqgħa wahda. Ghalkemm ir-Ricevitur kien l-istralcjarju, huwa baqa` jagħmlu l-almu tiegħu biex jigbor il-flus dovuti. Dik kienet wahda mir-ragunijiet għaliex damu m'ghaddew l-informazzjoni lir-Ricevitur.

Stqarr illi għall-ewwel esperjenza tagħhom fin-negozju kienu pjuttost organizzati. Cahad illi d-dokumenti ma nġhatawx għaliex ma kienux qegħdin jinzammu kotba. Spjega illi hu bniedem ta' certu "*pride*" u allura ma xtaqx juri kemm kien hemm flus x'jingabru. Xtaq illi jagħmel l-almu tiegħu biex jigbor lura kemm seta` flus qabel ma jipprezenta l-karti lir-Ricevitur. Ghalkemm ir-Ricevitur talabhom l-informazzjoni, id-dewmien kien sforz nuqqas ta' esperjenza, billi ma kienux jafu x'tip ta' informazzjoni u rapporti kellhom jissottomettu.

Alamango xehed illi ma kienx jaf x`kienu l-obbligi tiegħu *una volta* illi l-kumpannija marret fi stralc ; lanqas li waslet għandu xi korrispondenza. Ikkonferma illi l-indirizz li ntuzza għall-korrispondenza huwa dak tar-residenza tiegħu. Xehed illi ma jiftakarx li ffirmat l-*pink card* ; il-firma fuq il-*pink card* kienet differenti minn kif jiffirma s-soltu. Jiftakar illi kienu qegħdin jircievu mingħand ir-Ricevitur u ppruvaw jaraw mal-avukat tagħhom x'seta' jsir.

Xehed illi qatt ma nroraw lir-Ricevitur. Ikkoperaw u ssottomettew kull informazzjoni illi kellhom. Huwa qatt ma kellu karti jew *accounts* għaliex hu personalment qatt ma kellu dokumenti. Meta xehed illi ssottomettew l-informazzjoni kollha, ried ifisser illi l-kumpannija kienet pprovdiet l-informazzjoni mitluba ; biss la kien hu li hejja l-informazzjoni u lanqas ma kien hu li wassal l-informazzjoni għand ir-Ricevitur. Kull ma gie pprezentat sar fl-isem tagħhom it-tnejn. Kien Farrugia illi ha hsieb id-dokumenti u li, skont ma qallu, ipprezentahom.

Farrugia xehed illi Alamango ma kellux l-informazzjoni mehtiega ghaliex dejjem kien hu illi ha hsieb. Hu baghat l-informazzjoni kollha mitluba permezz ta' *e-mail* indirizzata lir-Ricevitur ; l-email kienet ikkopjata lil Alamango u lill-Av. Attard Montalto. Qatt ma rcieva risposta lura dwar din l-*e-mail* ghalkemm qatt ma vverifika jekk l-informazzjoni kenitx waslet ghand ir-Ricevitur.

Dwar il-fatt illi ma gewx prezentati *accounts* u *financial statements* xehed illi dak kien sforz il-fatt illi ma kienx jaf x'kienet titlob minnu l-ligi. Aktar tard wiegeb illi kien jaf li ried izomm il-kotba tal-kumpannija u li dawn zammhom, biss mid-data meta giet kostitwita l-kumpannija sa meta sar is-sekwestru ma lahqitx ghaddiet sena. Spjega wkoll illi xejn ma zammu milli jissottometti l-informazzjoni fil-hin ; dak kien biss kwistjoni ta' nuqqas ta' ko-ordinazzjoni. Lanqas ma kien jaf illi seta' jikseb l-ghajnuna tar-Ricevitur biex jithallas minghand id-debituri ta' Smart Malta.

Stqarr illi minuti tal-laqghat tad-diretturi qatt ma nzammu ghaliex hu u Alamango kienu jiltaqghu kuljum, u kollox sar b'mod informali. Kull komunikazzjoni kienet tasal ghand Alamango ghaliex kienu juzaw l-indirizz tad-dar tieghu. Qabel sari l-mandat ta' sekwestru ma nghata ebda preavviz, u ma kien hemm ebda komunikazzjoni. Kienu jircievu biss *statement* tal-bilanc li kien ghadu dovut. Qabel sar il-mandat, kienu qeghdin jirkellmu ma' Gutenberg dwar it-tieni harga. Huma dejjem riedu jhallsu.

Zied jghid illi waqt illi seta' jaghti lir-Ricevitur lista ta' l-kredituri u tad-debituri, ma setax jaghti l-*management accounts* ghaliex *accountant* ma kellhomx. Huwa fehem illi kellu jghaddi kull informazzjoni, u mhux semplicement lista tal-kredituri u tad-debituri biex ir-Ricevitur jahdem fuqha u jirkupra l-flus.

Xehed illi gabar xi ftit tal-flus anki jekk mhux ammonti kbar. Il-flus li ngabru ntuzaw biex thallsu xi krediti fosthom imal-bank. Il-bqija gew depozitati flejjes il-bank biex jithallas il-kreditu ma' Gutenberg. Ma kienx jaf li l-hlasijiet li rcieva kellu jghaddihom lir-Ricevitur. B'kollox ingabru Lm2,000.

Stqarr li Smart Malta damet topera biss ghal xi sitt xhur.

Xehed illi flimkien ma` huh Christopher Farrugia (li huwa *accountant*) thejjiet lista ta' debituri u kredituri. Fil-fatt kien hemm kreditur wiehed biss li kien Gutenberg. Huwa personalment hallas ghas-saldu lill-kredituri privileggjati u cioe` il-bank u d-Dipartiment tat-Taxxa.

Ipprezenta kopja ta' rapport intitolat "Report on Dissolution and Winding Up of Smart Malta ICT Ltd C41884"³⁴. Ikkonferma li l-informazzjoni dwar Smart Malta ntbaghtet lir-Ricevitur. Ipprezenta wkoll kopja ta' *e-mail* datata 15 ta' Jannar 2013³⁵.

IV. L-Art 316 tal-Kap 386

L-attur qieghed isejjes l-azzjoni tieghu kollha kemm hi fuq L-Art 316 tal-Kap 316 li jaqra hekk :-

(1) Id-disposizzjonijiet ta` dan l-artikolu japplikaw meta kumpannija tkun giet xolta u tkun insolventi u jkun jidher li persuna li kienet direttur tal-kumpannija kienet taf, jew kellha tkun taf qabel ix-xoljiment tal-kumpannija, li ma kienx hemm prospett xieraq li l-kumpannija setghat tevita x-xoljiment minhabba l-insolvenza taghha.

(2) Il-qorti, fuq ir-rikors tal-istralcjarju ta` kumpannija li ghalha japplika dan l-artikolu, tista` tiddikjara li persuna li kienet direttur kif imsemmi fis-subartikolu (1) tkun responsabbli li taghmel pagament favur l-attiv tal-kumpannija kif il-qorti jidhrilha xieraq.

³⁴ Esebit bhala **Dok. GF1** a fol. 494 sa 497 tal-process.

³⁵ Esebta bhala **Dok. GFS** a fol. 621

(3) *Il-qorti ma ghandhiex tilqa` rikors taht dan l-artikolu jekk tkun sodisfatta li l-persuna li kienet direttur **kienet taf** li ma kienx hemm prospett xieraq li l-kumpannija setghet tevita x-xoljiment minhabba l-insolvenza taghha u skont dan tkun hadet kull pass li kellha tiehu sabiex tnaqqas it-telf potenzjali ghall-kredituri tal-kumpannija.*

(4) Ghall-finijiet tas-subartikoli (2) u (3), il-fatti li direttur ta` kumpannija ghandu jkun jaf jew jaccerta ruhu minnhom, il-konkluzjonijiet li ghandu jilhaq, u l-passi li ghandu jiehu huma dawk li jkunu maghrufa jew accertati, jew li jintlahqu jew jittiehdu, minn persuna li b`mod ragonevoli tkun diligenti li jkollha kemm -

(a) *it-taghrif generali, hila u esperjenza li b`mod ragonevoli jkunu mistennija minn persuna li tmexxi l-istess funzjonijiet kif jitmexxew minn jew moghtija lil dak id-direttur fir-rigward il-kumpannija ;*

kif ukoll

(b) *it-taghrif generali, hila u esperjenza li ghandu d-direttur.*

(5) *Ghall-finijiet ta` dan l-artikolu, direttur jinkludi persuna li skont id-direzzjoni jew istruzzjonijiet taghha d-diretturi tal-kumpannija normalment jagixxu.*

(enfasi u sottolinear ta` din il-Qorti)

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

(1) *The provisions of this article shall apply where a company has been dissolved and is insolvent and it appears that a person who was a*

director of the company knew, or ought to have known prior to the dissolution of the company that there was no reasonable prospect that the company would avoid being dissolved due to its insolvency.

(2) The court, on the application of the liquidator of a company to which this article applies, may declare the person who was a director referred to in subarticle (1) liable to make a payment towards the company`s assets as the court thinks fit.

(3) The court shall not grant an application under this article if it is satisfied that the person who was a director knew that there was no reasonable prospect that the company would avoid being dissolved due to its insolvency and accordingly took every step he ought to have taken with a view to minimising the potential loss to the company`s creditors.

(4) For the purposes of subarticles (2) and (3), the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take, are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both -

(a) the knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by or entrusted to that director in relation to the company ; and

(b) the knowledge, skill and experience that the director has.

(5) For the purposes of this article, "director" includes a person in accordance with whose

directions or instructions the directors of the company are accustomed to act.

Jidher illi l-mudell ta` din id-disposizzjoni kien l-**Art 214 tal-Insolvency Act 1986** tar-Renju Unit, ghalkemm il-legislatur Malti ma ttrasportax fil-ligi taghna d-disposizzjoni tal-ligi Ingliza fl-intier taghha.

Ghall-fini tad-decizzjoni tal-lum, tajjeb li jigi osservat illi l-Art 316 jaghmel parti mill-Kapitolu V tal-Kap 386 li jittratta dwar *reati qabel xoljiment jew waqt l-istralc*. Tajjeb jinghad ukoll li fil-kaz tal-Art 316 il-legislatur ma stabilixxa l-ebda piena kriminali jekk jirrizulta ppruvat dak li tghid id-disposizzjoni. Mhux hekk ghamel il-legislatur fil-kaz tal-kummerc bi frodi (Art 315) ghaliex hemm impona piena kriminali. L-istess ghamel fil-kaz ta` disposizzjonijiet ohra fl-istess kapitolu.

V. Locus Standi

Fis-sentenza ta` l-Prim`Awla tal-Qorti Civili tat-12 ta` Novembru 2007 fil-kawza fl-ismijiet **Valle Del Miele Limited vs Wallace Fino et** inghad illi sabiex ikun hemm applikazzjoni tal-Art 315 u 316 tal-Kap 386, kumpanija trid tkun fil-process ta` stralc :-

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

"Fil-fatt l-artikolu 316 jiddisponi illi l-Qorti tista` taghmel dikjarazzjoni ta` responsabilita` personali, minghajr ebda limitazzjoni, "meta kumpanija tkun giet xolta u tkun insolventi u

jkun jidher li persuna li kienet direttur tal-kumpanija kienet taf, jew kellha tkun taf qabel ix-xoljiment tal-kumpanija, li ma kienx hemm prospett xieraq li l-kumpanija setghet tevita x-xoljiment minhabba l-insolvenza taghha". Hekk ukoll hija l-posizzjoni fl-Ingilterra 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 nghatat fil-kawza fl-ismijiet **Brian Theuma vs Chris Cachia pro et noe** deciza fl-14 ta` Ottubru 2004, inghad illi :

Ghalkemm l-agir lamentat jista` jwassal ghal dikjarazzjoni ta` responsabilita` personali ta` direttur, tali responsabilita` personali tista` tigi dikjarata biss waqt li kumpanija tkun fi process ta` stralc, u dana a tenur tal-artikolu 315 u 316 tal-Att tal-1995 Dwar il-Kumpaniji (Kap. 386).

Fl-istess sens kienet id-decizjoni tal-Qorti tal-Appell tal-14 ta` Mejju 2010 fil-kawza fl-ismijiet **Dottor Andrew Borg Cardona noe vs Victor Zammit et.**

Minn qari tal-Art 316, jirrizulta li l-azzjoni trid tkun intavolata mill-istralcjarju.

Fil-Pag 739 ta` **Farrar`s Company Law** (Edit. 1998) jinghad hekk dwar *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."

Fis-sentenza li tat il-Prim`Awla tal-Qorti Civili (kif presjeduta) fil-15 ta` Dicembru 2016 fil-kawza fl-ismijiet **Brian Tonna noe vs Luciano Rotondi et** kien affermat illi :-

Huwa car li d-disposizzjoni tapplika meta kumpanija tkun giet xolta, u tkun insolventi, u jkun jidher li persuna li kienet direttur kienet taf, jew kellha tkun taf, qabel ix-xoljiment tal-kumpanija, li ma kienx hemm prospett xieraq li l-kumpanija setghet tevita x-xoljiment minhabba l-insolvenza taghha.

*Fis-sentenza li tat fil-25 ta` Ottubru 2013 fil-kawza **"Electronic Products Limited vs Emanuel Micallef et"**, il-Qorti tal-Appell qalet :-*

...

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

Insolvency Act, 1986), u l-artikoli ekwivalenti fil-ligi Ingliza huma l-Artikolu 213 (‘fraudulent trading’), u l-Artikolu 214 (‘wrongful trading’).

Iz-zewg kuncetti ta’ kummerc bi frodi u kummerc hazin jixxiebh, bid-differenza tkun li f’kaz ta’ kummerc bi frodi irid jirrizulta li kien hemm il-hsieb li jigu 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 taghhom tkun kompluta u ampia f’kaz li jirrizulta kummerc bi frodi.”

L-azzjoni skont l-Art 316 tista’ ssir biss b’rikors ta’ l-istralcjarju.”

Fil-kaz tal-lum, il-procediment kien inizjat fil-waqt illi Smart Malta kienet tinsab fi stadju ta’ stralc, wara li kienet dikjarata xjolta mill-qorti. Il-kawza kienet promossa mill-istralcjarju kontra dawk li kienu z-zewg diretturi ta’ Smart Malta.

VI. Responsabilita’ tad-diretturi

Skont l-**Art 316(1) tal-Kap 386**, il-prova tar-responsabbilta’ tad-diretturi li kumpanija kienet tinsab fi stat ta’ insolvenza (kif mifhum fil-ligi taghna) tistrieħ fuq zewg elementi :-

i. il-persuna kienet direttur tal-kumpanija;

u

ii. 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.

Fil-kaz tal-lum mhux kontestat illi l-konvenuti kienu l-unici diretturi ta' Smart Malta.

L-**Artikolu 136A tal-Kap 386** jistabilixxi d-dmirijiet **generali** tad-diretturi ta' kumpannija.

L-Art 136(1) jimponi fuq kull direttur l-obbligu "li jagixxi b'onesta u bona fide fl-aħjar interessi tal-kumpannija".

Issir referenza ghas-sentenza fil-kaz ta' **Howard v Herrigel** [1991(2) SA 660 (A)] fejn inghad :

"At common law, once a person accepts appointment as a director, he becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf. That is the general rule and its application to any particular incumbent of the office of director must necessarily depend on the facts and circumstances of each."

Ghar-rigward tat-tieni element, trid issir il-prova dwar jekk :-

- i. kienux jafu illi l-kumpannija kienet tinsab fi stat ta' insolvenza;
- ii. kellhomx ikunu jafu a priori illi ma kienx hemm prospett xieraq illi l-kumpannija tevita x-xoljiment taghha minhabba insolvenza.

Il-legislatur iddelineja l-grad ta' gharfien mistenni.

Minn qari tal-Art 316(4) jidher illi direttur ghandu jagixxi bhala persuna diligenti illi ghandha :

(a) *it-taghrif generali, hila u esperjenza li b`mod ragonevoli jkunu mistennija minn persuna li tmexxi l-istess funzjonijiet kif jitmexxew minn jew moghtija lil dak id-direttur fir-rigward il-kumpannija ;*

kif ukoll

(b) *it-taghrif generali, hila u esperjenza li ghandu d-direttur.*

Dawn il-kwalitajiet huma kumulattivi u mhux alternattivi ghal xulxin.

Tajjeb jinghad illi waqt illi fil-kaz ta' *fraudulent trading* jehtieg issir il-prova illi direttur kellu intenzjoni frawdolenti, fil-kaz ta' *wrongful trading* mhux mehtiega din il-prova.

Ghall-fini tal-prova ta` kummerc hazin, jissussistu t-test soggettiv u dak oggettiv.

Andrew Keay u Peter Walton fil-ktieb '**Insolvency Law Corporate and Personal** (4th Edition, Lexis Nexis, pg. 657) ighidu :-

"The objective test provides that in the course of assessing a claim made against a director courts must consider what a director ought to know or ascertain, the conclusions which ought to be reached and the steps which the director ought to take and evaluate and whether the steps the director took were those which a reasonably diligent person would have taken. The reasonably diligent person who is used here is one who has the general knowledge, skill and experience that may reasonably be expected of a person who carries out the same functions as are carried out

by the director subject to proceedings. The provision then goes on to introduce the subjective element by referring to things that are specific to the respondent director, namely his or her general knowledge, skill and experience. It must not be thought that these two tests, in any way lessen the responsibility of a director who is not very experienced and who does not have the knowledge of the reasonable director. Every director must not only meet the standard relevant to his or her experience, but also the standard of a reasonably diligent director. Where persons are given specific, specialized roles, such as the 'sales director' or 'finance director', then special skills must be expected of that person. ... The upshot is that a director's efforts, or lack thereof, will be assessed in conjunction with the two tests, and the director has to attain the higher of the standards set by the tests. The consequence is that where directors attain the standard of a reasonable person who undertakes their functions in relation to their companies, but they fail to conduct themselves in such ways as would be expected of persons with their knowledge, skill and experience, they could be held liable under section 214. Likewise, if directors act according to the standards of their knowledge, skill and experience, but they fail to have conducted themselves accordingly to how a reasonable person would have conducted himself or herself, they will be liable."

Fil-kaz ta' **Grant & Anor v Ralls & Ors** (**Re Ralls Builders Ltd** [2016] EWHC 234), **Snowden J** osserva illi:

"Whilst the question of whether a director knew that there was no reasonable prospect of the Company avoiding an insolvent liquidation is a question of (subjective) test, the question of whether the director ought to have concluded that this was so is an objective question. In that

respect, section 214 (4) of the 1986 Act provides that the facts which the director ought to know, the conclusions which he ought to reach, and the steps which he ought to take, are those which would be known, reached or taken by a reasonably diligent person having the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as those of the director, and the general knowledge, skill and experience that that director in fact has."

Ghandha tvinci l-presunzjoni illi kull direttur ghandu tal-inqas grad baziku ta' gharfien, hila u esperjenza.

Fil-kaz in re **Produce Marketing Consortium Ltd** ([1989] 5 BCC), **Knox J** osserva illi:

"... the requirement to have regard to the functions to be carried out by the director in question, in relation to the company in question, involves having regard to the particular company and its business. It follows that the general knowledge, skill and experience postulated will be much less extensive in a small company in a modest way of business, with simple accounting procedures and equipment, than it will be in a large company with sophisticated procedures.

Nevertheless, certain minimum standards are to be assumed to be attained. Notably there is an obligation laid on companies to cause accounting records to be kept which are such as to disclose with reasonable accuracy at any time the financial position of the company at that time ([Companies Act 1985](#), s 221(1) and (2)(a)).^[1] In addition directors are required to prepare a profit and loss account for each financial year and a balance sheet as at the end of it ([Companies Act 1985](#), s 227(1)

and (3)).^[2] Directors are also required, in respect of each financial year, to lay before the company in general meeting copies of the accounts of the company for that year and to deliver to the registrar of companies a copy of those accounts ...

The knowledge to be imputed in testing whether or not directors knew or ought to have concluded that there was no reasonable prospect of the company avoiding insolvent liquidation is not limited to the documentary material actually available at the given time. This appears from s. 214(4) which includes a reference to facts which a director of a company ought not only to know but those which he ought to ascertain, a word which does not appear in subs. (2)(b). In my judgment this indicates that there is to be included by way of factual information not only what was actually there but what, given reasonable diligence and an appropriate level of general knowledge, skill and experience, was ascertainable."

Jehtieg illi l-grad ta' gharfien jitqies fid-dawl tal-operat generali tal-kumpannija. Ghalhekk il-Qorti ghandha taghmel l-apprezzament taghha, wara li tkun qieset il-kaz fuq il-merti tieghu.

Fil-**Palmer's Corporate Insolvency Law** (Sweet and Maxwell, Vol. 1, pg. 1256), kien osservat hekk :-

"The court is thus required to arrive at a conclusion as to the appropriate conduct and acumen of a hypothetical person assuming him to have possessed in combination the levels of general knowledge, skill and experience which objectively he ought to have possessed in view of the position held."

VII. Limitazzjoni

Meta tigi nvokata l-applikazzjoni tal-Art 316(1), id-diskrezzjoni tal-Qorti illi tilqa' t-talba u taghmel dikjarazzjoni a tenur tal-Art 316(2), hija limitata bl-Art 316(3). Ghalhekk m'ghandha ssir l-ebda dikjarazzjoni fl-ambitu tal-Art 316(1), jekk il-qorti tkun sodisfatta illi fiz-zmien qabel ix-xoljiment minhabba insolvenza, id-diretturi jkunu hadu kull pass mehtieg sabiex jitnaqqas it-telf potenzjali ghall-kredituri tal-kumpannija.

Sec 214 tal-Insolvency Act 1986 Ingliza titlob mill-istralcjarju illi jiddetermina z-zmien partikolari meta d-diretturi kellhom ikunu jafu illi ma kienx hemm prospett xieraq illi jkun evitat ix-xoljiment tal-kumpannija minhabba inabilita` taghha li thallas id-djun taghha. Mhijiex mehtiega data preciza ; bizzejjed tkun approssimattiva u li tkun tirrifletti zmien meta kien evidenti li l-kumpannija kienet insolventi.

Meta l-legislatur addotta dan it-test fl-Art 316 tal-Kap 386 ghazel illi jaghti interpretazzjoni aktar wiesgha ghar-rekwizit taz-zmien tant li ma ttrasportax il-frazi "*at some time before the commencement of the winding up of the company*" li tirrizulta f`Sec 214 tal-Insolvency Act 1986.

L-istralcjarju mhux obligat illi jindika zmien partikolari minn meta d-direttur kellu jkun edott mill-fatt illi x-xoljiment ikun sar inevitabbli.

VIII. Id-difiza tad-diretturi

Fi procediment promoss abbazi tal-Art 316 id-diretturi jistghu biss iressqu difiza wahda, u cioe` illi juru li mindu saru jafu li l-kumpannija kienet tinsab fi stat ta' insolvenza, hadu kull prekawzjoni possibbli sabiex inaqqsu telf potenzjoni ghall-kredituri. Il-piz ta' din il-provi jinkombi fuq id-diretturi.

Stabbilit il-grad ta' gharfien, il-qorti trid tezamina jekk kienx hemm prospett xieraq illi jigi evitat xoljiment minhabba insolvenza. Dan l-ezami jrid jiehu in konsiderazzjoni numru ta' fatturi bhal : pressjoni mill-kredituri, nuqqas ta' likwidita', nuqqas ta' sostenn finanzjarju, telf ta' xoghol u kuntratti, diffikulta` illi l-kumpannija tithallas minghand id-debituri taghha.

Tajjeb jinghad illi l-Art 316 ma joffrix linji gwida dwar prekawzjonijiet li huma mistennija jittiehdu.

Andrew Keay u Peter Walton, fil-pag 660 ta' **Insolvency Law Corporate and Personal**, *op cit.*, ighidu hekk :-

"The critical issue is what constitutes 'every step?' It is not possible to formulate a list of steps that can be guaranteed to save directors from liability; it will be a matter solely for court discretion. However, seeking and putting into effect the advice of appropriate professionals might constitute a fair approach to take; it will be a matter solely for court discretion. However, seeking and putting into effect the advice of appropriate professionals might constitute a fair approach to take as there are cases that indicate that courts may take into account the fact that the directors have taken professional advice (Re Hawkes Hill Publishing Co Ltd (...); Re Ralls Builders Ltd (..). But it must be emphasized that doing this or taking other actions will not necessarily provide a good defence. It will very much depend on the circumstances and the view that a court takes of what has been done."

Andrew Muscat fil-Pag 284 ta' **Principles of Maltese Company Law** (MUP : 2007) jikteb hekk :-

"An essential feature of the wrongful trading provisions is that liability is attracted not by

mismanagement leading the company to insolvency, but by the failure – “when the writing is on the wall” - to take appropriate steps to minimize the potential loss to creditors. This area of law therefore scrutinises, and penalises, only such conduct as takes place after the time when the director realises or ought to have realised that there was no reasonable prospect of the company avoiding dissolution due to its insolvency.”

Il-Qorti taghmel referenza għall-kaz Ingliz in re **Rubin vs Gunner** ([2004] EWHC 316 (Ch), [2004] BCC 684), *The Rod Gunner Organisation Limited* (“RGO”).

F`dak il-kaz, il-kumpanija in kwistjoni kienet kostitwita u bdiet topera f`Dicembru 1996. Bejn iz-zmien meta giet inkorporata u l-bidu tal-1998, RGO dejjem hadmet b`telf. Lejn it-tmien tal-1997 RGO bdiet diskussjonijiet sabiex tikseb finanzjament. Il-ftehim intlaħaq fl-1998. RGO komplet topera u *man mano* komplet tkabbar id-dejn tagħha.

Fid-decizjoni tiegħu, **Etherton J** qal hekk :

“I accept the Respondents' analysis of the position during this period. In short, I find that, although RGO was insolvent by April 1998, the Respondents had a genuine and reasonable belief, during the period prior to 15 October 1998 (albeit diminishing substantially in reasonableness from the end of September 1998), that Mr Stables would provide sufficient funding for RGO to avoid the company going into insolvent liquidation.”

Lewison J, fil-kaz in re **Hawkes Hill Publishing Co. Ltd.** ([2007] BCC 937) għamel din l-osservazzjoni :

“It is important at the outset to be clear about the relevant question. The question is not whether the

directors knew or ought to have known that the company was insolvent. The question is whether they knew or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation."

Fil-kaz in re **C S Holidays Ltd** [1997] 1 WLR, **Chadwick J** osserva hekk :-

"The companies legislation does not impose on directors a statutory duty to ensure that their company does not trade while insolvent; nor does that legislation impose an obligation to ensure that the company does not trade at a loss. Those propositions need only to be stated to be recognised as self-evident. Directors may properly take the view that it is in the interests of the company and of its creditors that, although insolvent, the company should continue to trade out of its difficulties. They may properly take the view that it is in the interests of the company and its creditor that some loss-making trade should be accepted in anticipation of future profitability. They are not to be criticised if they give effect to such law."

Fil-kaz ta` in re **Ralls Builders Ltd** *op. cit.* inghad :-

"As an initial observation, it is important to note that the fact that a company is insolvent (on a balance sheet or cash-flow basis) and carried on trading does not mean that a director even one with knowledge of that fact – will be liable for wrongful trading if the company fails to survive. Many companies show a balance-sheet deficit from time to time, but nevertheless have every real prospect of trading out of that position or otherwise recovering from the deficiency and thereby avoiding an insolvent liquidation. (See

*also **BNY Corporate Trustee Services Limited vs Eurosail**). Likewise, trading companies often suffer cash flow difficulties and fail to pay their creditors on time, but are able to overcome that cash-flow insolvency by (for example) selling an asset or raising external finance on the security of their assets."*

Jekk id-diretturi jkomplu ghaddejjin bin-negozju sa punt fejn huwa evidenti illi l-kumpanija tkun miexja lejn ix-xoljiment minhabba insolvenza, allura jkun jinkombi fuqhom il-piz tal-prova sabiex juru li n-negozju baqa' ghaddej biex jitnaqqas il-potenzjali riskju ghall-kredituri.

F'azzjoni bhal dik ta' l-illum il-qorti hija msejha sabiex taghmel analizi attenta tac-cirkostanzi kollha tal-kaz.

Fl-istess waqt, il-qorti tkun trid tqis b`kawtela dawk id-decizjonijiet li jkunu ttiehdu in *buona fede* izda fuq skorta ta' informazzjoni li ma tkunx korretta.

Terga `ssir referenza ghall-insenjament ta' **Lewison J** fil-kaz ta' **Hawkes Hill** (*op. cit.*) fejn inghad :-

"Accepting as I do that the directors ought to have known that the company was insolvent, it still leaves open the question: did they know (or ought they to have concluded) that there was no reasonable prospect that the company would avoid an insolvent liquidation? The answer to this question does not depend on a snapshot of the company's financial position at any given time; it depends on rational expectations of what might hold. But directors are not clairvoyant and the fact that they fail to see what eventually comes to pass does not mean that they are guilty of wrongful trading."

...

Of course it is easy with hindsight to conclude that mistakes were made. An insolvent liquidation will almost always result from one or more mistakes. But picking over the bones of a dead company in a courtroom is not always fair to those who struggled to keep going in the reasonable (but ultimately misplaced) hope that things would get better."

Fil-kaz in re **Continental Assurance Company of London plc** ([2001] BPIR 7330), **Parker J** laqa' l-evidenza li gabu d-diretturi fejn urew illi kienu naqqsu l-attivitá kummercjali ghal wahda minima u kawta, u waqqfu n-negozju totalment meta rrizulta illi l-kumpannija kienet insolventi.

Parker J ghamel dawn l-osservazzjonijiet :-

- "106. *In my opinion it would be an extraordinarily harsh result if the directors in this case were liable for wrongful trading. None of the previous cases in which directors have been held to be liable has been remotely like this one. Typically, there have been cases in which the directors closed their eyes to the reality of the company's position, and carried on trading long after it should have been obvious to them that the company was insolvent and that there was no way out for it. In those cases the directors had been irresponsible, and had not made any genuine attempt to grapple with the company's real position.*
107. *In the present case the directors, in my opinion, took a wholly responsible and conscientious attitude, both to Continental's position and to their own responsibilities as*

directors, at all times from and after the first crisis board meeting on 4 June 1991 when major and unexpected losses were reported to them. At the adjourned continuation of that meeting on 14 June 1991 Mr Burrows expressly raised the question of whether Continental could properly continue to trade. The directors did not ignore that question (like the directors in many of the other wrongful trading cases). On the contrary, they considered it directly, closely and frequently.

108. *When it was reported to the directors on 20 December 1991 that newly reported losses meant that Continental had become insolvent they gave instructions that it should not do any more business, and took advice from insolvency practitioners (...). The commencement of a formal liquidation did not happen until 27 March 1992, but that was in order to keep open as long as possible the chance of selling the company. Mr Wacey and Mr Buchler were aware of that at the time and raised no objections. They both confirmed in their evidence that they made no criticisms of the time which passed from December 1991 to March 1992 before the liquidation commenced."*

Tagħmel ukoll referenza għall-kaz in re **Purpoint Ltd** ([1991] BCLC 491) fejn tqanqlet il-kwistjoni dwar jekk nuqqas ta' kapital investit fil-kumpannija għandux ikun indikattiv tal-fatt illi jekk javveraw ruhhom diffikultajiet finanzjarji ma jkunx hemm prospett illi l-kredituri jithallsu.

Vinelott J osserva illi :-

"I have felt some doubt whether a reasonably prudent director would have allowed the company to

commence trading at all. It had no capital base. Its only assets were purchased by bank borrowing or acquired by hire-purchase. And its working capital was contributed by a loan from Mr Froome. The business it inherited from Winnerch Printing Services Ltd had been proved unprofitable and with the winding up of that company the creditors, other than the Royal Bank of Scotland, were left with an empty shell. The new company assumed the additional burden of paying salary to Mr Meredith. However, I do not think it would be right to conclude that Mr Meredith ought to have known that the company was doomed to end in an insolvent winding up from the moment it started to trade. That would, I think, impose too high a test. Mr Meredith believed that his connections in the advertising and publicity field would enable him to introduce new business and that the failure of the old company had been due not to any want of skill or organising ability on Mr Froome's part, but on his inability to attract custom. I cannot say that that was a belief that could not have been entertained by a reasonable and prudent director conscious of his duty to persons to whom the company would incur liabilities in the ordinary course of carrying on its business."

Ghalkemm jesprimi nuqqas ta' qbil mal-konkluzjoni ta' **Vinelott J** fil-kaz appena citat **Andrew Muscat**, fil-Pag. 279-280 ta' **Principles of Company Law** (op. cit.,) ighid :-

"Liability for wrongful trading is not attracted by mismanagement or by undercapitalised incorporation, but by the failure to take appropriate steps to minimise the potential loss to creditors after insolvency becomes inevitable. Because the remedy penalises only conduct taking place after the time when insolvency is inevitable, the wrongful trading provisions are wholly ineffective to impose liability on the majority shareholder or the holding company

merely for having set up an undercapitalised company.” (enfasi mizjuda)

IX. It-talba

Ir-rikorrent qed jitlob illi jekk kemm –il darba l-qorti tiddikjara illi l-konvenuti wettqu kummerc hazin ai termini tal-Art. 316 tal-Kap 386, huma jigu wkoll kundannati jaghmlu hlas kapitali *inter alia* favur l-attiv ta` Smart Malta f` ammont mhux inferjuri ghal €50,863.

F`dan il-kuntest tqum il-kwistjoni tal-ghamla ta` responsabbilta' illi ghandu jkollhom id-diretturi.

Fid-decizjoni li tat fit-12 ta` Ottubru 2007 fil-kawza **Valle Del Miele Limited vs Wallace Fino et** din il-Qorti diversament presjeduta qalet :-

Kif intwera, is-socjeta` attrici qed titlob li d-diretturi tal-kumpanija Price Club Operators Ltd, jigu dikjarati personalment responsabbli ghall-ghemilhom lejn is-socjeta` attrici.

Il-ligi tal-kumpaniji, pero`, ma tipprovdi ghall-kaz ta` responsabbilita` illimitata tal-azjonisti jekk mhux fil-kaz ta` fraudulent jew wrongful trading. Fil-fatt dak li qed tallega s-socjeta` attrici jista` jinkwadra ruhu taht fraudulent jew wrongful trading, u dana peress li qed tallega li d-diretturi tal-kumpanija ghamlu zmien joperaw meta kellhom kumulu ta` debiti li kienu jafu li ma setghux ihallsu. Ghalkemm l-agir lamentat jista` jwassal ghal dikjarazzjoni ta` responsabilita` personali tad-diretturi, tali responsabilita` personali tista` tigi dikjarata biss waqt li l-kumpanija tkun fi process ta` stralc, u dana a tenur 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 tipprovdi rimedji oħra kontra allegat abbuż 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.

Fid-deċizzjoni li tat fil-21 ta` Marzu 2011 fil-kawza **G. Molton Company Limited vs Dr. Raymond Borg et** il-Qorti tal-Magistrati (Malta) qalet hekk :-

"Relazzjonijiet u agir ta` soċjetajiet u relazzjonijiet u agir ta` membri, uffiċjali jew rappreżentanti ta` soċjetà huma regolati bl-Att dwar il-Kumpanniji, Kap.386 tal-Ligijiet ta` Malta. L-unici zewg istanzi fejn din il-Ligi tipprovdi għall-kaz ta` responsabilità illimitata u diretta ta` azzjonisti u rappreżentanti ta` soċjetà huma dawk ta` fraudulent trading u wrongful trading, kontemplati fl-Artikolu 315 u fl-Artikolu 316 ta` l-Att ... Mill-mod kif giet impostata l-azzjoni attrici hu evidenti li ssocjetà attrici qed tagixxi kontra Dr. Raymond Borg LL.D. u martu u Salvu Loreto sive Silvio Borg u martu f`isimhom personali għaliex l-imsemmija Dr. Raymond Borg LL.D. u Salvu Loreto sive Silvio Borg bhala rappreżentanti tas-

socjetà Alufinish Limited allegatament agixxew bi frodi tad-drittijiet tas-socjetà attrici. In effetti fir-Rikors promotur is-socjetà attrici titlob li l-konvenuti f` isimhom personali jigu kkundannati jhallsuha is-somma ta` €7,607.97 in bazi ghall-premessa li l-imsemmija somma giet negozjata f` isem is-socjetà Alufinish Limited (C-25894) izda dan sar bi frodi tad-drittijiet tas-socjetà attrici peress illi l-intimati Dr. Raymond Borg u huh Salvu Loreto sive Silvio Borg bhala rapprezentanti stajtu tkunu tafu li s-socjetà Alufinish Limited ma kienetx f` posizzjoni li tonora l-obbligazzjonijiet taghha.

Fil-fehma tal-Qorti dak allegat mis-socjetà attrici jista` jwassal, kemm-il darba jkun debitament ippruvat, ghal dikjarazzjoni ta` responsabilità personali tar-rapprezentanti tas-socjetà Alufinish Limited, izda kif gustament inghad mill-Prim` Awla tal-Qorti Civili fis-sentenza fl-ismijiet **Valle Del Miele Limited v. Wallace Fino et pro et noe**, Citaz. Nru. 1903/01TM deciza mill-Prim` Awla tal-Qorti Civili fit12 ta` Ottubru 2007, tali responsabilità personali tista` tigi dikjarata biss waqt li il-kumpanija tkun fi process ta` stralc, u dana a tenur ta` l-Artikoli 315 u 316 ta` l-imsemmi Kap.3865. Il-Ligi tal-kumpaniji, li hi ligi specjali li tirregola l-kumpaniji u l-ufficjali taghha, ma tipprovdix rimedji ohra kontra allegat abbuż tad-diretturi, u meta istitut hu regolat b`ligi specjali, mhux lecit u li ssir riferenza ghal xi principju generali tad-dritt. Hu minnu li, b`mod generali, min jabbuza bid-drittijiet moghtija lill jista` jkun passibbli ghal danni, izda meta istitut hu regolat b`ligi specjali, hi biss dik il-ligi li ghandha tigi kkunsidrata ghal-fini ta` responsabilità tal-partijiet u tar-rimedji moghtija – specialia generalibus derogant ... F`dan il-kaz, il-ligi specjali rregolat kif u meta diretturi jistghu jinstabu responsabbli personalment ghad-djun tal-kumpanija taghhom, u hi biss fil-limiti ta` dak

provdut f`dik il-ligi specjali li r-rimedji jridu jinstabu (**Brian Theuma v. Chris Cachia pro et noe**, Citaz. Nru. 537/03TM deciza mill-Prim` Awla tal-Qorti Civili fl-14 ta` Ottubru 2004; *Hi-Timber Company Limited v. Joseph Baldacchino et*, Citaz. Nru. 294/02TM deciza mill-Prim` Awla tal-Qorti Civili fil-15 ta` Dicembru 2005).

L-import ta` l-insenjament enuncjat f`dik is-sentenza huwa car : ghad illi kreditur jista` jottjeni dikjarazzjoni ta` responsabilita` ta` rapprezentanti ta` socjeta` debitrici ghad-dejn ta` dik is-socjeta`, hu jista` jaghmel dan biss fil-limiti ta` dak provdut fil-Kap. 386 tal-Ligijiet ta` Malta, u senjatament fil-kuntest ta` procediment ta` stralc ta` socjeta` u ta` dak provdut fl-Artikoli 315 u/jew 316 ta` l-imsemmi Kapitolu tal-Ligi. Dan il-principju huwa guridikament korrett ghaliex kif osservat mill-awtrici Brenda Hannigan fil-ktieb taghha "Company Law" (Butterworths, Edition 2003, pagna 837; **Brian Theuma v. Chris Cachia pro et noe**, Citaz. Nru. 537/03TM deciza mill-Prim` Awla tal-Qorti Civili fl-14 ta` Ottubru 2004; **Hi-Timber Company Limited v. Joseph Baldacchino et**, Citaz. Nru. 294/02TM deciza mill-Prim` Awla tal-Qorti Civili fil-15 ta` Dicembru 2005; **Valle Del Miele Limited v. Wallace Fino et pro et noe**, Citaz. Nru. 1903/01TM deciza fit-12 ta` Ottubru 2007) dwar il-posizzjoni fil-Ligi Ingliza, li hija il-ligi fuq liema giet addatata l-ligi nostrali dwar il-kumpanniji, 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.

Mill-Kap.386 tal-Ligijiet ta` Malta oltre li jirrizulta li rimedju dirett fil-konfront ta` rapprezentant tas-socjeta` huwa disponibbli biss fil-kuntest ta` procediment ta` stralc ta` socjeta`, jirrizulta wkoll

li kemm il-procedura għall-istralc ta` socjeta` kif ukoll il-konsegwenti azzjoni għal rimedji fil-konfront ta` rapprezentant ta` dik is-socjeta` – bhal ad ezempju r-rimedju fil-kaz ta` fraudulent trading jew wrongful trading – jistghu jigu istitwiti biss quddiem il-Prim` Awla tal-Qorti Civili.”

(ara wkoll is-sentenza ta` din il-Qorti diversament presjeduta tas-27 ta` Gunju 2006 fil-kawza fl-ismijiet **Alf. Mizzi & Sons (Marketing) Limited vs Unifoods Limited et**)

Dwar in-natura tat-talba avanzata mir-rikorrent, fis-sentenza li tat il-Qorti ta` l-Appell fit-18 ta` Lulju 2017 fil-kawza **Ricevitur Ufficjali vs Steve Alamango et** saret distinzjoni bejn azzjoni għal danni u azzjoni skont il-Kap 386.

Il-Qorti tal-Appell qalet hekk :-

L-attur, f` isem is-socjeta` issa fi stralc, mhux qed jitlob hlas ta` danni fis-sens li tiftiehem din il-frazi fl-ordinament guridiku Malti. L-attur qed jitlob li l-konvenuti jikkompensaw lill-istess socjeta` talli, konsegwenza tal-agir taghhom, din spiccat b`passiv li jissupera l-attiv. Azzjoni normali ta` danni tista` tintalab minn kull vittma, anke jekk huwa jkollu assi personali bizzejjed biex ihallas kull dejn li ghandu. F`din l-azzjoni, il-kontribuzzjoni tista` tintalab biss meta l-passiv jissupera l-attiv, u tintalab precizament bi skop li jithallsu d-djun tal-kumpanija. L-iskop u n-natura taz-zewg azzjonijiet huma differenti. Din l-azzjoni ma hijjex wahda għad-danni per se, izda biex id-direttur responsabbli jaghmel pagament favur l-attiv tal-kumpanija, u dan fl-interess tal-kumpanija u biss meta din tkun waqfet topera.

Kif intqal fil-ktieb "Farrars` Company Law" (pagna 739) li ghalih saret anke referenza mill-appellant Farrugia :

"Once liability is established, the extent of any contribution to the company sets is a matter for the court`s discretion and the aim here is primarily compensatory rather than penal to ensure that any depletion of the assets attributable to the period of wrongful trading is made good."

L-iskop ta` din il-kontribuzzjoni hija, biex nghidu, "to balance the books", u mhux bhala kumpens ghad-danni kkagunati. Tnaqqis li issofri socjeta` fil-bilanc taghha, ma hux danni, izda zbilanc li, f`kaz ta` kummerc hazin, u f`kaz biss ta` stralc tas-socjeta`, irid jaghmel tajjeb ghalih id-direttur responsabbli. Diment li s-socjeta` tkun ghadha topera, dan l-izbilanc fil-kotba tal-kumpanija ma jitqiesx "danni" li xi hadd ikun irid jaghmel tajjeb ghalih, izda parti mill-operazzjoni tan-negozju, xi kultant indotta volontarjament ghall-fini ta` beneficcju fiskali. L-izbilanc, ghalhekk mhux "hsara" fis-sens tal-Artikolu 2153 imsemmi, izda nuqqas ta` parita` bejn l-attiv u passiv li thalla jipperdura meta d-direttur kien jaf jew seta` kien jaf li dak l-istat ta` insolvenza ma kienx realistikament possibbli li jitwarrab...t-talba hi fl-interess tal-attiv tal-kumpanija issa fi stadju ta` stralc, u r-relazzjoni guridika hija bejn l-istess kumpanija u d-diretturi - il-kredituri, f`dan l-istadju, ma humiex involuti fl-azzjoni.

Dwar il-kumpens illi ghandu jinghata fl-ambitu ta' kawza bhal dik ta' Illum, fil-kaz **Produce Marketing Consortium Ltd**, op cit., **Knox J** jghid hekk :

"In my judgment the jurisdiction under s. 214 is primarily compensatory rather than penal. Prima

facie the appropriate amount that a director is declared to be liable to contribute is the amount by which the company's assets can be discerned to have been depleted by the director's conduct which caused the discretion under subs. (1) to arise. But Parliament has indeed chosen very wide words of discretion and it would be undesirable to seek to spell out limits on that discretion ..."

Id-dispost ta' l-Art 316 (2) tal-Kap 386 huwa analogu ghal-ligi Ingliza. Ghalhekk ghandhom japplikaw l-istess principji.

Huwa interament fid-diskrezzjoni tal-Qorti x'ammont ghandu jigi likwidat. L-ammont ghandu jigi kalkolat in bazi ghat-telf li garrbet il-kumpanija u mhux skont it-telf subit mill-kredituri.

Tajjeb jinghad ukoll illi l-ammont likwidat ghandu jigi distribwit *pari passu* bejn il-kredituri.

Fi proceduri ta' din ix-xorta l-istralcjarju jkun qiegħed jagixxi fl-interessi generali tal-kredituri kollha u ghalhekk ebda kreditur tal-kumpanija m'ghandu jgawdi minn xi vantagg fuq kreditur iehor. Dan il-principju jghodd ukoll fil-konfront tal-kredituri privileggjati.

Il-Qorti tagħmel tagħha l-gurisprudenza citata.

X. Risultanzi

Ir-rizoluzzjoni tal-vertenza odjerna ssib il-punt krucjali tagħha fl-agir tad-diretturi fil-mument meta rrizulta illi x-xoljiment kien inevitabbli minhabba stat ta' insolvenza. Il-fattur determinati mhuwiex jekk id-diretturi/intimati kienux jafu li x-xoljiment kien inevitabbli. Dan huwa fattur illi mhux necessarjament kien intuwit fil-mument meta l-insolvenza kienet evidenti. Jista' jagħti l-kaz ukoll illi d-diretturi jkunu mxew b'tali

mod u manjiera fejn waqt illi jnaqqsu l-esposizzjoni tal-kredituri ghal aktar sogru, ikomplu ghaddejjin bin-negozju forsi anke sabiex jirkupraw id-debiti u jissaldaw il-pendenzi.

Fil-procediment ta` illum huwa evidenti illi l-hajja ta' din l-attivita' kummercjali tasal biex tghid kienet *stroncata sul nascere*.

Kumpannija b'appena sitt xhur ta' attivita' twaqqfet ghaliex giet insolventi.

Forsi fi kliem **Andrew Muscat**, *the writing was on the wall* sa mill-mument tal-inkorporazzjoni ta' Smart Malta.

Jirrizulta li Smart Malta giet inkorporata b'*share capital* minimu ghall-ahhar kif tirrikjedi l-ligi. Dan kien fatt pubbliku ghaliex johrog mill-istatut pubbliku tal-istess kumpannija.

Ix-xiehda tad-diretturi/intimati tghid hafna dwar il-mod kif giet operata Smart Malta. Turi illi kien il-konvenut Farrugia personalment illi kien qieghed jaghmel tajjeb ghall-ispejjez tal-kumpannija billi jhallas direttament minn butu. Ghalkemm ma tressqu ebda provi oggettivi tal-pagamenti li saru minn Farrugia, ghajr ghal dak illi xehed huwa stess, il-qorti tghid illi dan il-fatt mhuwix determinanti ghall-vertenza odjerna.

Tajjeb li jigi rilevat illi l-intimati mbarkaw fuq progett *di lungo raggio*.

Il-progett tal-intimati (azzjonisti u diretturi) kien intiz u mahsub li jikber u jiggenera l-profitti fuq medda ta' zmien.

Jibqa` forsi l-fatt illi l-intimati ghamlu *un passo piu` lungo della gamba* ghaliex minghajr bazi finanzjarja tajba u sostenibbli taw bidu ghal

progett li dahal fi spejjez qawwija – anke jekk f`sens relattiv – fi zmien qasir.

L-ebda rendikont formali ta' *accounting* ma kien qieghed jinzamm u lanqas kien hemm likwidita` biex taghmel tajjeb ghall-ispejjez.

Jirrizulta wkoll illi ghalkemm Farrugia kien qieghed izomm hu personalment listi ta' spejjez, ordnijiet, krediti u debiti, jibqa` fatt illi ma kienx ingaggat *accountant* sabiex ihejji d-dokumenti b`mod formali.

Effettivament tqabbad *accountant* biss fi stadju tardiv, wara li Smart Maltakienet xjolta mill-qorti.

Lanqas ma kienu prezentanti *financial statements* jew *accounting records*.

Huwa ghal kollox inutili li l-intimat Farrugia jghid illi ma kinitx ghaddiet sena u allura kien ghad m`hemmx l-opportunita` illi jithejjew ir-rapporti. Zgur illi din m`ghandhiex tkun skuza ghal nuqqas.

L-intimati jittentaw igibu skuza bil-fatt illi ma kinux jafu x`kien mistenni minnhom una volta illi l-kumpannija giet xolta. F`dan ir-rigward Farrugia xehed : "... *ma kontx naf ezatt x`inhu dovut minni mill-Ligi x`irrid naghmel bhala rapporti.*" (fol. 489). Alamango wiegeb skejett illi "Le" (fol. 477), ma kienx jafx x`kienu l-obbligi legali tieghu.

Lanqas din ma hi skuzanti.

Hemm imbaghad il-kwistjoni tad-dejn tal-kumpannija.

Farrugia jishaq illi ssalda d-debitu kemm mal-VAT u kif ukoll mal-BOV.

Il-provi juru realta` diversa.

Tqanqlet ukoll il-kwistjoni tat-taxxa li jidher ghadha pendenti.

Din tirrizulta rizolvibbli ladarba jintlew il-formoli appoziti u tigi regolarizzata l-pozizzjoni mad-dipartimenti koncernati.

Il-Qortisejra tqis ukoll il-punt li hareg waqt it-trattazzjoni tal-kawza relattivament ghar-rapport illi Farrugia jishaq illi baghat lir-Ricevitur waqt illi r-rikorrent ighid illi qatt ma rcieva.

Il-provi juru li r-rapport intbaghat.

X` sar mir-rapport jibqa` mhux maghruf.

Dan premiss, din il-Qorti ma tarax ghaliex m'ghandiex taghti affidament ghax-xieha tar-Ricevitur illi huwa qatt ma rcieva dak ir-rapport.

Din il-Qorti tistqarr illi l-agir tal-intimati huwa censurabbli, ghaliex huwa naccettabbli mid-diretturi, aktar u aktar fi procediment ta' stralc fejn mistennija jahdmu id f` id mal-istralcjarju, illi lanqas biss jaghmlu verifiki biex jaccertaw illi r-Ricevitur ikun ircieva kull komunikazzjoni.

Huwa evidenti illi dan il-kaz huwa karatterizzat minn nuqqas ta' informazzjoni, prezunzjonijiet u assunzjonijiet illi xekklu l-komunikazzjoni bejn il-partijiet koncernati. Dan wassal ukoll ghal malintizi u ghal nuqqas ta' koperazzjoni li finalment kompli jesponi lill-kredituri ghal aktar sogru.

Li kieku l-intimati kellhom informazzjoni cara dwar ir-rwol tar-Ricevitur u dwar kif dan seta' jiffacilita' l-proceduri, kieku s-sitwazzjoni certament kienet tiehu zvolta differenti.

Biss, l-impressjoni li hadu l-intimati wara l-laqgħa mar-Ricevitur Spiteri Staines kienet illi kellhom ixammru l-kmiem u jirkupraw id-debiti. Jidher ippruvat li hekk ittentaw jagħmlu. Anke wara x-xoljiment l-intimati baqgħu jigbru l-flus – anki jekk dan il-komplitu kien jispetta lir-Ricevitur bhala stralcjarju tal-kumpannija.

Minn dawn il-konsiderazzjonijiet jirrizulta bic-car illi kien hemm *mismanagement* da parti tad-diretturi intimati.

Madanakollu, dak l-agir tal-intimati m`għandhiex titqies bhala l-fattur determinanti illi għandu jwassal għal dikjarazzjoni kif postulata taht l-Art 316.

Krucjali huwa l-agir tad-diretturi *una volta* illi l-insolvenza kienet evidenti.

Fix-xhieda tiegħu l-konvenut **Alamango** spjega illi *“iltqajna ma problema li qatt ma konnha esperjenzajniha qabel habba li industrija gdida kienet ukoll għalina publications”* u zied jgħid illi għalkemm bdew jigru wara l-flus, f’dan is-settur mhux kulhadd kien jahdem xorta u mhux kulhadd kien ihallas fil-pront. Osserva wkoll illi *“we didn’t have the experience jew il-backbone ta’ kumpannija biex nigru warajhom”*.

Waqt illi juri qbil mal-osservazzjoni ta’ Alamango, Farrugia jzid jgħid *“ma nahsibx li kellna kif poggieha tajjeb Steve, the right muscle, the right backbone. Ahna konna għanda zghar u hassejtni li konnha qed nigu bullied mill-kredituri”*.

Ma hemmx dubju illi fl-ambitu ta’ din l-istruttura kummercjali ma kienx hemm prospett xieraq illi jigi evitat ix-xoljiment. Kien hemm ukoll id-diffikulta tal-gbir tal-hlas għar-reklamar – fattur dan li gie sottovalutat mill-intimati.

Madanakollu, il-Qorti temmen li d-diretturi intimati riedu genwinament li l-progett taghhom isehh.

Huwa ppruvat illi bir-rikavat mir-riklamar l-intimati hasbu li kienu ser ikopru l-ispejjez.

Dak illi kienu qeghdin jaspiraw ghalih id-diretturi kien li almenu jkun hemm *break even* bejn l-introjtu u l-ispejjez. Dan ir-ragunament kien wiehed genwin u ragonevoli.

Il-mandat ta' sekwestru li nhareg fuq talba ta' Gutenberg kien *il colpo di grazia* li serva biex imblokka s-sitwazzjoni. L-intimati ma kellhomx spazju ta' zmien biex jirkupraw flushom.

Il-Qorti tinsab sodisfatta illi anki jekk din kienet l-ewwel esperjenza taghhom fin-negozju, id-diretturi/intimati kellhom dak il-grad ta' gharfien bizzejjed biex jirrealizzaw illi l-kumpannija kienet insolventi.

Nonostante l-fatt illi ma sehhitx il-prova illi fil-hajja qasira ta' Smart Malta nzammu *proper accounting records* kif titlob il-ligi, fi struttura kummercjali zghira fejn ma kienx hemm sistemi operattivi kumplessi, bl-informazzjoni illi kellhom disponibbli, id-diretturi/intimati setghu jaghmlu l-konteggi u jaraw realment x'qaghda finanzjarja kienet tinsab fiha Smart Malta.

Anke jekk l-intimati jammettu illi ma kinux jafu li dak l-istat ta' fatt kien sejjer iwassal ghax-xoljiment ta' Smart Malta, huma hadu l-passi necessarji sabiex inaqqsu t-telf potenzjali ghall-kredituri.

Dan jirrizulta car mill-fatt illi hadu d-decizjoni ghaqlija illi ma jmexxux bit-tieni pubblikazzjoni u b'hekk illimitaw l-esposizzjoni

finanzjarja taghhom, u ma komplewx ikabbru d-dejn taghhom ma` Gutenberg.

Din id-decizjoni tixhed illi d-diretturi kellhom gharfien bizzejjed illi jaqraw tajjeb is-sinjali tant illi hadu decizjoni tempestiva.

Anki jekk din kienet l-ewwel esperjenza taghhom fin-negozju, gharfu jkunu responsabbli.

Jekk kinux korretti fil-mod kif mexxew il-kumpanija hija storja ohra.

Il-gurisprudenza tghallem illi l-pern tal-kwistjoni jdur madwar il-fatt illi ladarba kien evidenti illi l-kumpanija kienet miexja lejn ix-xoljiment minhabba stat ta' insolvenza, id-diretturi hadu kull prekawzjoni favur il-kredituri. Ghalhekk m'ghandhomx jigu penalizzati ghaliex pruvaw isalvaw dan in-negozju.

Provvediment

Ghar-ragunijiet kollha premessi, il-Qorti taqta` u tiddeciedi din il-kawza billi :-

Tilqa` l-eccezzjonijiet tal-konvenuti.

Tillibera lill-konvenuti mill-osservanza tal-gudizzju.

Tichad it-talba tal-attur.

Bl-applikazzjoni tal-Art 223(3) tal-Kap 12, tordna li kull parti thallas l-ispejjez taghha.

**Onor. Joseph Zammit McKeon
Imhallef**

**Amanda Cassar
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