



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

**ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON**

Illum il-Hamis 31 ta` Ottubru 2019

**Kawza Nru. 1
Rikors Nru. 1144/2014 JZM**

**Tamamu Company Limited
(C-36981)**

kontra

**Pizza Factory Company Limited
(C-51901)**

Il-Qorti :

I. Preliminari

Rat ir-rikors li kien prezentat fit-18 ta` Dicembru 2014 quddiem il-Prim` Awla tal-Qorti Civili li jaqra hekk :-

1. Illi s-socjeta` Pizza Factory Company Limited hija debitrice tas-socjeta` esponenti f`arretrati ta` kera dovuti ghall-kiri ta` fond kummercjali li minnu s-socjeta` ntimata giet zgumbrata gudizzjarjament (Dokument TC1) u oltre tali debitu l-istess socjeta` ntimata hija debitrice wkoll tas-socjeta` esponenti f`ammonti ohrajn kif jidher skont id-dokument l-iehor hawn anness (Dokument TC2) liema debiti sal-lum qatt ma gew ikkontestati mis-socjeta` ntimata (Dokument TC3 u TC4).

2. Illi ghalkemm meta nterpellata biex thallas is-socjeta` ntimata f`diversi okkazjonijiet talbet li tinghata z-zmien biex tkun tista` tipproponi pjan ta` hlas, qiegħed jidher car illi l-intimata mhijiex f`posizzjoni li thallas id-debiti tagħha.

3. Illi din l-insolvenza ilha tipprevali sa minn qabel is-socjeta` esponenti pprocediet gudizzjarjament għall-izgumbrament tas-socjeta` ntimata mill-fond kummercjali gja` mikri kif inghad lil din is-socjeta`. Id-diretturi ta` l-intimata kienu perfettament konsapevoli, u dwar dan l-esponenti qed tiriserva d-drittijiet tagħha skont il-ligi fil-konfront tad-diretturi personalment in bazi għal "fraudulent trading".

L-esponenti għalhekk titlob bir-rispett illi din l-Onorabbli Qorti joggobha, ai termini ta` l-artikolu 214(2)(a)(ii) tal-Kap 386, tordna x-xoljiment tas-socjeta` ntimata Pizza Factory Company Limited.

Rat id-dokumenti li kienu prezentati mar-rikors.

Rat ir-risposta li kienet prezentata fid-19 ta` Jannar 2015 li taqra hekk :-

Illi ma jirrikorrux ic-cirkostanzi previsti mill-artikolu 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta u dan kif se jigi ppruvat fil-kors tqat-trattazzjoni ta` dan ir-rikors.

Salv risposta ulterjuri.

Rat il-verbal tal-udjenza tal-Prim` Awla tal-Qorti Civili tat-2 ta` Frar 2015 fejn ir-rikorrenti ddikjarat, ghall-fini tal-Art 214(2)(a)(ii) tal-Kap 386 tal-Ligijiet ta` Malta, illi kienet qeghda tibbaza ruhha fuq il-paragrafu (b) tal-Art 214(5) tal-Kap 386.

Rat id-digriet li nghata fl-udjenza tas-7 ta` Mejju 2018 fejn din il-Qorti pprovdiet illi, in vista tal-Att I tal-2018, il-kawza kienet sejra tkompli tinstema` minnha kif presjeduta, minflok mill-Prim` Awla tal-Qorti Civili.

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

Rat in-nota li pprezentat l-intimata fl-udjenza tal-20 ta` Novembru 2018 fejn, b` referenza ghar-risposta li kienet prezentata fid-19 ta` Jannar 2015, kienet imfissra b` aktar dettall il-kontestazzjoni li qeghda taghmel l-intimata ghall-istanza tar-rikorrenti.

Rat id-digriet li nghata fl-istess udjenza tal-11 ta` Lulju 2019 fejn il-kawza thalliet ghal provvediment ghal-lum.

Rat l-atti l-ohra tal-kawza.

II. Provi

L-intimata kriet minghand ir-rikorrenti il-hanut 2, Pretty Bay, B` Bugia, bis-sahha ta` kuntratt tas-17 ta` Awissu 2011. Billi baqghet moruza fil-hlas tal-kera, ir-rikorrenti pprezentat rikors fil-quddiem il-Bord li Jirregola l-Kera sabiex tirriprendi l-pussess tal-fond, u sabiex l-intimata tkun zgumbrata mill-fond. B` sentenza moghtija fit-3 ta` Gunju 2013 (Dok TC1) il-Bord li Jirregola l-Kera ddikjara xjolta l-lokazzjoni u awtorizza lir-rikorrenti sabiex tiehu l-fond lura fi zmien tletin jum b` effett mit-3 ta` Gunju 2013. Fil-fatt ir-rikorrenti hadet lura l-fond izda l-intimata kellha pendenzi mar-rikorrenti li huma ben dokumentati (Dok TC2 a fol 5 et seq) u mhux kontestati (Dok TC3 u TC4). Il-hsarat li sabet ir-rikorrenti meta

hadet lura l-fond (u l-quantum relattiv) kienu konfermati bil-gurament mill-Perit Carmel ellul fl-udjenza tat-30 ta` April 2019 (fol 121).

L-intimata kienet registrata fit-3 ta` Frar 2011. L-azzjonisti huma l-ahwa Mark u Simon Grima li ghandhom l-ishma kollha *fully paid up* fi kwoti ndaqs, u cioe` 600 Ordinary Shares kull wiehed. L-istess ahwa Grima huma wkoll id-diretturi tal-kumpannija.

L-M & A tal-kumpannija (Dok MFSA1) kien prezentat fl-udjenza tat-2 ta` Marzu 2015 mir-rapprezentant tar-Registatur tal-Kumpanniji. Fih kien hemm ir-*registered documents*. Fost dawn id-dokumenti pero` ma kienx hemm l-*abridged financial statements* peress li sa dakinhar ma kienux ipprezentati.

B` nota li pprezentat fis-6 ta` April 2018 (fol 82 u 83) l-intimata ndikat illi l-assi taghha kienu jammontaw ghal €8,120 waqt li d-djun kienu jlahhqu l-figura ta` €319,940. Il-kontenut tan-nota kien ikkonfermat minn Simon Grima fid-deposizzjoni tieghu waqt l-udjenza tas-17 ta` Jannar 2019. L-istess Grima kkonferma l-kontenut tal-ittri esebiti mir-rikorrenti a fol 11 u 12.

Simon Grima xehed fl-udjenza tas-17 ta` Jannar 2019. Stqarr illi ghalkemm kienu qeghdin jaqtghu mill-ammonti li kellhom jaghtu lil xi kredituri, huma baqghu ma hallsu xejn minn dak dovut lir-rikorrenti. L-assi, konsistenti f` apparat tal-kcina, baqghu li kienu pero` l-valur taghhom qieghed igarrab deprezzament. Dan l-apparat kien jinsab go hanut iehor taghhom li qieghed San Giljan. Fisser li l-kumpannija ghandha *a registered trademark* u cioe` Pizza Factory. Huma kienu ppruvaw ibieghu dak it-*trademark* pero` ma kienux ikkonkludew. Stqarr illi n-negozju tal-kumpannija huwa sospiz anke mill-hanut ta` San Giljan. Fil-fatt m`ghadx ghandhom hwienet mnejn jiggstixxu n-negozju. Ikkonferma li r-rikorrenti m`ghamlet ebda kawza kontra l-intimata sabiex din tkun ikkundannata thallas l-ammonti pretizi mir-rikorrenti. Safejn jaf hu, ir-rikorrenti m`ghandhiex tiehu l-ammonti kollha li semmiet. Il-hanut ta` B` Bugia opera biss ghal madwar sena, ghalkemm hallsu rigal biex hadu l-hanut. In-negozju ma vinciex ghaliex sabu ma` wicchom xeba` kawzi li saru mill-kredituri tan-negozju li hallewhom bla nifs. Ikkonferma li sabiex ir-

rikorrenti hadet lura l-hanut, apparti l-kawza fil-Bord li Jirregola l-Kera, ipprezentat ukoll mandat ta` zgumbrament.

Ir-rikorrenti pprezentat dokumenti b`nota tal-5 ta` Marzu 2019. Apparti kopja tal-mandat ta` zgumbrament tal-intimata mill-fond de quo, u relattiva ezekezjoni, kienu prezentati wkoll :

kopja ta` ittra ufficjali tat-28 ta` Gunju 2012 (fol 102 u 103) fejn *inter alia* l-intimata kienet interpellata *wkoll* sabiex thallas l-ammont kompressiv ta` €8,414.82 bhala bilanc tal-hlas ta` *key money* u arretrati ta' kera relattivi ghall-hanut de quo. L-ittra ufficjali kienet notifikata lil Simon Grima ;

u

kopja ta` ittra ufficjali tal-4 ta` Ottubru 2012 skont l-Art 166A tal-Kap 12 fejn *inter alia* l-intimata kienet interpellata sabiex thallas l-ammont ta` €16,014 bhala arretrati ta` kera u bilanc ta` *key money* relattivi ghall-hanut de quo. L-att kien debitament notifikat lill-intimata. Billi ma tirrizulta prezentat l-ebda oggezzjoni ghall-att, l-ittra ufficjali saret ezezutiva ghall-finijiet u effetti kollha tal-ligi.

Simon Grima kompla jixhed fl-udjenza tal-5 ta` Marzu 2019. Fost hwejjeg ohra, xehed illi meta hanut l-fond huma l-hanut kien jismu *Karamba Snack Bar*. Huma bidlu l-isem u sar *Pizza Factory*. Billi x-xiehda ta` Simon Grima dwar it-tlestija tal-*financial statements* tal-kumpannija kienet inkonklussiva, ir-rikorrenti harrket bhala xhud lill-Awditur Charles Scerri, li ddepona fl-udjenza tat-30 ta` Mejju 2019.

L-Awditur Scerri pprezenta l-*full audit* tal-intimata ghas-sena li ghalqet 31 ta` Dicembru 2011 (Dok CS1). Xehed illi dak kien l-ewwel u l-uniku *audit* ghaliex ma sarux ohrajn. Stqarr illi fl-2011, il-kumpannija kienet diga` falluta. Sakemm ma bidlitx ir-rota fis-snin ta` wara, il-kumpannija sa mill-2011 ma kellhiex futur. Fl-2011, is-sena li fiha kienet kostitwita, tilfet xeba` flus. Kellha *turnover* ta` €273,000 u tilfet €152,000. Stqarr illi l-hwienet li kellha l-intimata illum ghalqu kollha. Falliet ghaliex id-dhul li kellha ma seta` qatt ikopri l-infiq speccjalment is-salarji, deskritti

mix-xhud, bhala *fenomenali*. Ikkonferma li l-lum l-intimata hija *out of business* ghaliex mhijiex qeghda taghmel negozju.

Fl-udjenza tal-11 ta' Lulju 2019, id-difensur tal-intimata ghamel verbal fejn iddikjara illi : *minn tfittxija illi huwa ghamel fl-arkivju tal-qorti, irrizulta illi ghall-ittra ufficjali esebita a fol 106 tal-process, ma kienet saret ebda nota responsiva min-naha tas-socjeta` ntimata.*

III. Dritt / Dottrina / Gurisprudenza

Qabel tghaddi sabiex tqis il-mertu, il-Qorti jidhrilha li jkun opportun jekk taghmel analizi ta' d-disposizzjonijiet li huma attwali u rilevanti ghall-vertenza tal-lum.

a) L-Art 218(1) tal-Kap 386

Persuna li titlob ix-xoljiment u l-istralc ta' kumpannija, trid toqghod ghal dak li jipprovdi l-Art 218(1) tal-Kap 386 li jaqra hekk -

Talba lill-qorti (aktar `il quddiem imsejha "rikors ghal stralc") ghal -

(a) stralc ta' kumpannija mill-qorti skont l-artikolu 214(1)(a) ;

(b) xoljiment u stralc ta' kumpannija mill-qorti skont l-artikolu 214(2)(a) ; jew

(c) xoljiment u stralc ta' kumpannija skont l-artikolu 214(2)(b),

ghandha ssir b` rikors li jista` jsir jew mill-kumpannija wara decizjoni tal-laqgha generali jew mill-bord tad-diretturi taghha jew minn xi detentur ta` obligazzjoni, kreditur jew kredituri, jew minn xi kontributorju jew kontributorji :

Izda rikors skont il-paragrafi (b) jew (c) jista` wkoll isir minn xi azzjonist jew direttur tal-kumpannija.

Fil-kaz tal-lum, ir-rikorrenti mexxiet bl-istanza tax-xoljiment (u stralc konsegwenti) tal-intimata ghaliex hija kreditur taghha, kif jirrizulta li huwa l-kaz, abbazi tal-provi li tressqu fil-kors ta` din il-

kawza. Ghalhekk ghandha *locus standi* sabiex tippromwovi l-azzjoni.

Dan premiss, ir-rikorrenti qeghda titlob ix-xoljiment (u stralc konsegwenti) tal-intimata abbazi tal-Art 214(2)(a)(ii) u tal-Art 214(5)(b) tal-Kap 386.

b) L-Art 214(2)(a)(ii) tal-Kap 386

Meta tfassal il-mudell ghal-ligi taghna l-gdida dwar il-kumpanniji, dik li illum hija Kap 386, u li kellha tiehu post l-Ordinanza dwar Socjetajiet Kummercjali – Kap 168, il-qafas maghzul kien dak tal-Companies Act Ingliza 1985.

Fil-ligi Ingliza, ix-xoljiment u l-istralc ta` kumpanniji kien trattat b` legislazzjoni *ad hoc* u cioe` l-Insolvency Act 1986. Meta sar l-Att XXV tal-1995 dwar il-Kumpanniji, id-disposizzjonijiet li jirregolaw ix-xoljiment u l-istralc kienu integrati fil-ligi l-gdida, mhux kif sar fl-Ingilterra.

Dan premiss, tajjeb jinghad illi l-Art 214(2)(a)(ii) jaghti lill-qorti diskrezzjoni li xxolji u tistralcja kumpannija *jekk il-kumpannija ma tkunx tista` thallas id-djun taghha.*

Id-disposizzjoni trid tinqara flimkien ma` l-**Art 214(5)** fejn hemm stabbiliti s-sitwazzjonijiet fejn il-ligi taghna tqis illi kumpannija ma tkunx tista` thallas id-djun taghha.

Tnejn huma c-cirkostanzi definiti fil-ligi :-

(a) *jekk id-dejn dovut mill-kumpannija jkun baqa' ma thallasx ghal kollox jew f`parti wara erbgha u ghoxrin gimgha mill-ezekuzzjoni ta' titolu ezeuttiv kontra l-kumpannija b`xi wiehed mill-atti ezeuttivi msemmijin fl-artikolu 273 tal-Kodici ta' Organizzazzjoni u Procedura Civili.*

jew

(b) *jekk ikun ippruvat ghas-sodisfazzjon tal-qorti li l-kumpannija ma tkunx tista' thallas id-djun taghha, meta din tqis ukoll il-passiv kontingenti u prospettiv tal-kumpannija.*

Ir-rikorrenti qeghda tistrieħ fuq l-Art 214(5)(b).

c) L-Art 214(5)(b) tal-Kap 386

Fil-ligi tagħna li *kumpannija ma tkunx tista` thallas id-djun tagħha għandu sinjifikat preciz u definit.*

Fil-ligi Ingliza, il-posizzjoni hija aktar wiesgha.

Fil-Pag 859 ta` **Boyle & Birds` Company Law** (Eighth Edition – Jordans – 2012) jingħad illi :-

There are two principal, although not exclusive or exhaustive, tests of insolvency : a company is insolvent if it unable to pay its debts as they fall due ("cash flow insolvency") ; it is also insolvent if its liabilities exceed its assets ("balance sheet insolvency") ...

B` mod aktar ristrett, fil-ligi tagħna dak previst mill-Art 214(5)(a) jixbah dak magħruf bħala *cash flow insolvency* fil-ligi Ingliza, mentri dak rikjest fl-Art 214(5)(b) jixbah il-*balance sheet insolvency*.

Fit-test bl-Ingliz **l-Art 214(5)(b) tal-Kap 386** jaqra :-

For the purposes of subarticle (2)(a)(ii), a company shall be deemed to be unable to pay its debts ...

if it is proved to the satisfaction of the court that the company is unable to pay its debts, account being taken also of contingent and prospective liabilities of the company.

Fl-Insolvency Act 1986 Ingliza, insibu disposizzjoni li **tixbah** dik tal-ligi tagħna, **ghalkemm mhijiex l-istess.**

Il-Qorti qeghda tirreferi għall-**Art 123(2)** tal-Insolvency Act 1986 li jaqra hekk –

A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.

Huwa evidenti li ghad li hemm xebh, iz-zewg disposizzjonijiet mhumiex identici.

Id-divergenza tinsab fil-fatt illi waqt illi fil-ligi taghna, il-mizura hija semplici : *the company is unable to pay its debts account being taken also of contingent and prospective liabilities of the company, fil-ligi Ingliza, il-kriterju huwa divers ghaliex il-qorti tkun trid tqis illi *the value of the company`s assets is less than the amount of its liabilities ... billi tiehu kont ta` ... contingent and prospective liabilities.**

Din il-Qorti tqis li d-differenza bejn iz-zewg ligijiet mhijiex ta` *drafting* izda ta` sostanza. Premessa d-distinzjoni bejn iz-zewg ligijiet, il-Qorti sejra tirreferi ghad-dottrina Ingliza dwar kif din ittrattat il-koncett ta` *contingent* u dak ta` *prospective liabilities*.

Il-Qorti sejra tirreferi ghal dak li d-dottrina Ingliza tirreferi ghalih bhala **balance sheet insolvency** fl-ambitu tal-**Art 123(2)** tal-Insolvency Act 1986.

Fil-Pag 19 tal-ktieb **Insolvency Law – Corporate and Personal** (op. cit.) jinghad hekk dwar *balance sheet insolvency* :-

In determining whether the assets are outweighed by the liabilities a court is able to take into account contingent and prospective liabilities, but not contingent and prospective assets [Byblos Bank SAL v. Al-Khudhairy (1986) 2 BCC99, 549 (CA)] It has been said that "liabilities" is a broadened term compared with "debts" [Re A debtor (No 17 of 1966) (1967) Ch 590 ; (1967) 1 All ER 668]. "Liabilities" is defined for the purposes of winding up in rule 13.12 (4) to mean "a liability to pay money or money`s worth, including any liability under an enactment, any liability for breach of trust, any liability in contract, tort or bailment and any liability arising out of an obligation to make restitution". Then rule 13.12 (3) states that it is immaterial whether the liability is present or future, whether it is certain or contingent, or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion.

Clearly with this test it is only possible to take into account the assets owned by the company including the uncalled capital of the company [Re National Livestock Insurance Co (1858) 26 Beav 153 ; 53 ER 855 ...

Fil-Pag 114 tar-Raba` Edizzjoni (2011) ta` **Principles of Corporate Insolvency Law** (Sweet & Maxwell) **Roy Goode** ighid hekk –

The idea underlying this test ... is that it is not sufficient for the company to be able to meet its current obligations if its total liabilities can ultimately be met only by the realisation of its assets and these are insufficient for the purpose ...

Fil-Pag 130 ikompli hekk –

The mere excess of liabilities over assets is not in itself determinative. What has to be shown is that by reason of the deficiency of its assets the company has reached the point of no return.

Fil-Pag 134 sa 136, l-awtur jittratta n-nozzjoni ta` **contingent liability** u jghid hekk –

To give the phrase "contingent liability" any meaning we must restrict it to a liability or other loss which arises out of an existing legal obligation or state of affairs but which is dependent on the happening of an event which may or may not occur. Many of the cases have stressed the need for the liability to arise out of an existing obligation.

... in considering whether there is a contingent liability the court has regard to the existing commercial situation, not merely an existing legal obligation. In this regard, assistance can be derived from Financial Reporting Standard 12 which defines a contingent liability in the following terms :

(a) *"A possible obligation that arises from past events and whose existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the entity`s control*

(b) *a present obligation that arises from past events but is not recognised because :*

(i) *it is not probable that a transfer of economic benefits will be required to settle the obligation ;*

or

(ii) *the amount of the obligation cannot be measured with sufficient reliability.*"

... the term "contingent liabilities" is ultimately not a term of art and its precise meaning will depend on its context. The court is thus entitled to have regard to commercial realities ...

Fil-Pag 136 u 137, l-awtur jittratta n-nozzjoni ta' **prospective liability** u jghid hekk –

... The phrase "prospective liability" is neither a legal nor an accounting term of art. It has been judicially defined as : " ... a debt which will certainly become due in the future, either on some date which has already been determined or some date determinable by reference to future events."

... it has been described ... as unmatured liability which will inevitably ripen into a debt with the passage of time. Such a definition encompasses all forms of debitum in praesenti, solvendum in futuro including an indisputable claim for unliquidated damages which remains only to be quantified and will result in a debt far more than a nominal amount. "Prospective liability" thus embraces both future debts, the sense of liquidated sums due, and unliquidated claims.

d) Gurisprudenza

Il-Qorti sejra tirreferi **wkoll** ghal giurisprudenza tal-qradi Ingliزي kif tghodd kemm ghall-*cash flow test* kif ukoll ghall-*balance sheet test*.

Tibda billi tirreferi ghad-decizjoni li tat il-Court of Appeal fil-kaz ta' **Byblos Bank SAL v. Al-Khudhairy** [1987] fejn *inter alia* nghad illi :

"If a debt presently payable is not paid because of lack of means, that will normally be sufficient to prove that the company is unable to pay its debts. That will be so even if, on an assessment of all the assets and liabilities of the company, there is a surplus of assets over liabilities. That is trite law."

Fuq nota simili inghad minn Lord Justice Hoffmann fil-kaz **In Re a Company 12209 of 1991** [1992] BCLC 865, 868 :-

"A company`s non-compliance with a statutory demand, or non-satisfaction of execution of a judgment debt, is a matter that can be proved quite simply, usually by a single short witness statement. If proved, it establishes the court`s jurisdiction to make a winding up order, even if the company is in fact well able to pay its debts. If however a debt which has been made the subject of a statutory demand is disputed on reasonable grounds, the petitioner is adopting what has been called a high-risk strategy, and the petition may be dismissed with indemnity costs."

Tnejn mill-kawzi fl-Ingilterra fejn kien imfisser b`reqqa dak illi ghandu jigi mistharreg meta ssir talba ghal xoljiment u stralcta` kumpannija ghar-raguni ta` nsolvenza huma : **Cheyne Finance Plc (No.2)** deciz fis-17 ta` Ottubru 2007 : u **BNY Corporate Trustee Services Ltd vs Eurosail-UK 2007-3BL Plc** deciz fit-30 ta` Lulju 2010. It-tnejn kienu decizi mill-High Court (Chancery Division) – England and Wales.

Il-punti saljenti illi hargu miz-zewg decizjonijiet citati kienu migbura fil-kawza li kienet deciza mill-Court of Appeal fit-3 ta` April 2014 fil-kaz ta` **Bucci vs Carman (Liquidator of Casa Estates (UK) Ltd)**, EWCA Civ 383, fejn inghad hekk :-

"In my judgment the following points emerge from the decision of the Supreme Court in Eurosail (and in particular the judgment of Lord Walker) :

- i) *The tests of insolvency in s 123(1)(e) and 123(2) were not intended to make a significant change in the law as it existed before the Insolvency Act 1986 : para 37.*

- ii) *The cash-flow test looks to the future as well as to the present : para 25. The future in question is the reasonably near future ; and what is the reasonably near future will depend on all the circumstances, especially the nature of the company`s business: para 37. The test is flexible and fact-sensitive : para 34.*
- iii) *The cash-flow test and the balance sheet test stand side by side: para 35. The balance sheet test, especially when applied to contingent and prospective liabilities is not a mechanical test: para 30. The express reference to assets and liabilities is a practical recognition that once the court has to move beyond the reasonably near future any attempt to apply a cash-flow test will become completely speculative and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test : para 37.*
- iv) *But it is very far from an exact test: para 37. Whether the balance sheet test is satisfied depends on the available evidence as to the circumstances of the particular case: para 38. It requires the court to make a judgment whether it has been established that, looking at the company`s assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to meet those liabilities. If so, it will be deemed insolvent even though it is currently able to pay its debts as they fall due: para 42.*

*In the course of his judgment in Eurosail Lord Walker approved what he described as the "perceptive judgment" of Briggs J in **Re Cheyne Finance plc**(No 2) [2007] EWHC 2402 (Ch), [2008] 2 All ER 987, [2008] Bus*

LR 1562. Two of the points that Briggs J made bear on our case :

- i) *Cash-flow solvency or insolvency is not to be ascertained by a blinkered focus on debts due at the relevant date. Such an approach will in some cases fail to see that a momentary inability to pay is only the result of temporary illiquidity. In other cases, it will fail to see that an endemic shortage of working capital means that a company is on any commercial view insolvent, even though it may continue to pay its debts for the next few days, weeks, or even months: para 51.*
- ii) *Even if a company is not cash-flow insolvent, the alternative balance-sheet test will afford a petitioner for winding up a convenient alternative means of proof of a deemed insolvency: para 57."*

Fil-kawza **BNY Corporate Trustee Services Ltd & Ors v Neuberger** li kienet deciza fid-9 ta` Mejju 2013 mis-Supreme Court Ingliza, saret analizi fid-dettall tal-izviluppi illi sehhew fil-ligi Ingliza fir-rigward tal-Art. 123 tal-Insolvency Act.

Ghal dak li ghandu x` jaqsam mal-*cash flow test* kien imfisser :-

*"The changes in form served, in my view, to underline that the "cash flow" test is concerned, not simply with the petitioner`s own presently-due debt, nor only with other presently-due debts owed by the company, but also with debts falling due from time to time in the reasonably near future. What is the reasonably near future, for this purpose, will depend on all the circumstances, but especially on the nature of the company`s business. That is consistent with **Bond Jewellers, Byblos Bank and Cheyne Finance**. The express reference to assets*

and liabilities in my view a practical recognition that once the court has to move beyond the reasonably near future (the length of which depends, again, on all the circumstances) any attempt to apply a cash-flow test will become completely speculative, and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test. But it is still very far from an exact test, the burden of proof must be on the party which asserts balance-sheet insolvency."

(ara wkoll: **Ross & Anor vs Gaffney & Anor**, High Court Chancery Division, 2 ta` Gunju 2016 ; **BHS Group Ltd vs Retail Acquisitions Ltd**, High Court Chancery Division, 5 ta` Mejju 2017)

IV. Risultanzi

Il-Qorti taghmel referenza ghall-kontijiet awditjati ta` l-intimata ghas-sena li ghalqet fil-31 ta` Dicembru 2011. Dawk kienu l-unici *financial statements* li tlestew. U kienu ffirmati mid-diretturi dakinhar tal-ahhar udjenza tal-kawza. Inoltre sa dik l-udjenza. l-*abridged financial statements* ma kienux ghadhom intbaghtu lir-Registatur tal-Kumpanniji.

Dan premiss, anke mad-daqqa t` ghajn, mill-audit tal-2011, jirrizulta illi fl-ewwel sena ta` negozju taghha, il-kumpannija sabet ruhha fl-inkwiet fis-sens illi id-dhul taghha difficilment seta` jaghmel tajjeb ghad-dejn. Jidher li d-dejn beda jingema` sa mill-bidu nett ta` l-operat tal-kumpannija. Ma jirrizultax x` gara mill-finanzi u mill-operat tal-intimata fis-snin ta` wara l-2011. Jidher pero` li x-xejra kienet negattiva ghaliex certament fl-ahhar sena u aktar, in-negozju taghha waqaf tant li mill-hanut li kellha B` Bugia, l-intimata giet zgumbrata wara sentenza moghtija mill-Bord li Jirregola l-Kera, wara talba li saret mir-rikorrenti, waqt li mill-hanut ta` San Giljan, ma nnegozjatx aktar. Ma jirrizultax illi l-intimata bdiet taghmel negozju minn band` ohra.

Fil-kaz tal-lum tirrizulta ppruvata qaghda **serja** ta` nuqqas ta` likwidita`. Dan il-fatt johrog mill-aktar car u kristallin mid-deposizzjoni ta` Simon Grima. Il-konsegwenza negattiva ta` din il-qaghda hija li kredituri (bhar-rikorrenti) baqghu ma thallsux minn dak dovut lilhom. Riferibbilment ghan-nota tal-intimata a fol 89 u 90, senjatament l-ahhar paragrafu taghha, din il-Qorti tghid illi l-kreditu tar-rikorrenti mhuwiex kaz ta` *a bona fide disputed debt*. Tant huwa hekk li l-kreditu tar-rikorrenti huwa kanonizzat, wara li ittra ufficjali li r-rikorrenti pprezentat skont l-Art 166A tal-Kap 12 ma kenitx opposta u kontestata mill-intimata. Dan il-fatt kien accettat mill-intimata stess tramite d-difensur taghha fl-udjenza tal-11 ta` Lulju 2019. Dan tal-lum mhuwiex kaz fejn l-intimata waqfet temporanjament milli thallas id-dejn taghha fil-konfront tar-rikorrenti, izda huwa kaz fejn mhux biss waqfet ghal kollox milli thallas, izda m`ghandhiex mnejn thallas lir-rikorrenti.

Il-Qorti fliet b` reqqa l-atti li jsawwru l-procediment odjern, u wara li ghamlet l-apprezzament taghha tal-fatti li jemergu mill-provi fl-assjem taghhom, il-Qorti hija tal-fehma li abbazi tal-Art 214(5)(b) tal-Kap 386, l-intimata mhijiex fil-qaghda li thallas id-djun taghha.

V. Id-diskrezzjoni tal-qorti

Accertat illi l-intimata mhijiex f`qaghda li thallas id-djun taghha skont l-Art 214(5)(b) tal-Kap 386, il-Qorti trid tara jekk ghandhiex tesercita d-diskrezzjoni taghha kif irid l-Art 214(2)(a)(ii) tal-Kap 386.

Il-Qorti taghmel referenza ghall-pag. 913-914 ta` **Boyle & Birds` Company Law** (op. cit.) fejn inghad illi :-

Unpaid creditors of a company may consider commencing winding-up proceedings against the company as an alternative to suing for payment. As a debt collection mechanism, winding up proceedings may be swifter and, for the individual creditor, less expensive than a claim that may come

to trial for sometime ; on the other hand, winding up is a collective procedure for the benefit of creditors generally and it does not benefit specific creditors individually (**F. Oditah "Winding Up Recalcitrant Debtors" 1995 LMCLQ 107**) ...

Fil-kaz tal-lum, ma rrizultax li r-rikorrenti marret mill-ewwel għall-procedura tax-xoljiment tal-intimata bla ma rrikorriet għal toroq ohra mnejn tithallas dak dovut lilha. Lanqas ma jirrizulta li r-rikorrenti ppruvat tgharraq b`mod indebitu lill-intimata.

Brenda Hannigan tghid hekk fil-ktieb **Company Law** (Lexis Nexis - Butterworths - 2003) :-

"winding up or liquidation ... is the process by which the assets of the company are collected in and realised, its liabilities discharged and the net surplus, if there is one, distributed to the persons entitled to it. Only when this has been done is the company`s existence finally terminated by a process known as dissolution ... Insolvent winding up occurs essentially when companies are unable to pay their debts in full. When a company cannot pay its debts in full, difficult problems arise as to how the assets that are available should be distributed. In theory ... the law tries to maintain an equality between creditors so that assets are pooled and distributed pari passu ie rateably according to the size of each creditor`s claim."

L-awtrici tirreferi għall-Cork Committee Report dwar *good modern insolvency law*.

Kien specifikat li l-ghanijiet huma :-

"... to recognise that the world in which we live and the creation of wealth depend upon a system founded on credit and that such a system requires, as a correlative, an insolvency procedure to cope with its casualties; ... to relieve and protect where necessary the insolvent, and in particular the individual insolvent, from any harassment and undue demands by his creditors ... at the same time, to have regard to the rights of creditors whose own position may be at risk because of the insolvency; ... to realise the assets of the insolvent which should properly be taken to satisfy his debts, with the minimum of delay and expense; to distribute the proceeds of the realisations among the creditors in a fair and equitable manner, returning any surplus to the debtor; to ensure that the processes

of realisation and distribution are administered in an honest and competent manner, To recognise that the effects of insolvency are not limited to the private interests of the insolvent and his creditors, but that other interests of society or other groups in society are vitally affected by the insolvency and its outcome and to ensure that these public interests are recognised and safeguarded, ... to provide the means for the preservation of viable commercial enterprises capable of making a useful contribution to the economic life of the country."

Fil-pagna 216 tal-ktieb **Insolvency Law – Corporate and Personal**
(op. cit.) jinghad hekk :-

While a creditor is able to establish the fact that a company is unable to pay its debts ... it does not mean that a winding-up order will be automatically made ; the court has an unfettered discretion ... The company might be able to establish that it is solvent thereby rebutting the presumption of insolvency relied on by the creditor. Nevertheless a court may still make a winding up order if the company does not dispute the fact that it owes money to the creditor who has requested payment because non payment gives rise to a legitimate suspicion of inability to pay ...

Bhala fatt irrizulta ghal din il-Qorti illi r-rikorrenti *qua* kreditrici tal-intimata ma ghamlet l-ebda tentattiv ta' *arm twisting* fil-konfront ta' l-intimata. Hija l-fehma konsiderata ta' din il-Qorti illi l-intimata ilha s-snin takkumula dejn versu diverrsi kredituri, fosthom ir-rikorrenti, u ftit ghamlet sabiex issib tarf tas-sitwazzjoni. Illum jirrizulta li waqfet min-negozju taghha. Tista' tghid hija sprovvista kwazi ghal kollox minn assi li jaghmlu d-differenza. Anke jekk limitata ghall-2011, unikament minhabba nuqqas da parti tal-intimata, l-istampa li tohrog mill-*financial statements* taghha hija negattiva. Tul is-snin ma jidhirx li l-azzjonisti ghamlu *an injection of fresh capital* fil-kumpannija sabiex terga' tiehu r-ruh, anke jekk jidher li hallsu xi djun minn buthom. B`daqshekk ma jfissirx li taw nifs lin-negozju tal-intimata. Jidher li l-azzjonisti hadu decizjoni safejn jirrigwarda l-intimata *to call it a day*. Kumpannija li ma taghmilx negozju hija entita' bla ruh. Ma tkunx qeghda taqdi l-ghanijiet taghha. Kumpannija li ma tiggenerax attivita' ekonomika ma jistax ikollha dhul. Sprovvista minn dhul, ma tista' qatt thallas id-dejn taghha. Jirrizulta li l-azzjonisti ghandhom dejn derivanti minn negozju iehor tramite kumpanniji ohra fejn sahsitra kienu kostretti jbieghu d-djar tar-residenza taghhom. Ghalhekk

huwa evidenti li m`ghandhom l-ebda hajra jew intenzjoni li jinvestu fl-intimata. Rinfaccjata b`dan l-istat ta` fatt, ix-xoljiment u l-istralc tal-intimata huwa inevitabbli.

Tenut kont tal-assjem ta` fatti u dritt, il-Qorti sejra tghaddi ghax-xoljiment u ghall-istralc ta` l-intimata.

Provvediment

Ghar-ragunijiet kollha premissi, il-Qorti qeghda tipprovdi hekk :-

Tiddikjara illi l-kumpannija intimata Pizza Factory Company Limited (C-51901) mhijiex f`qaghda li thallas id-djun taghha abbazi tal-Art. 214(2)(a)(ii) u tal-Art. 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta.

Tordna x-xoljiment tal-kumpannija intimata Pizza Factory Company Limited (C-51901) b`effett mit-18 ta` Dicembru 2014 skont l-Art. 214(2)(a)(ii) u l-Art. 223(1) tal-Kap 386 tal-Ligijiet ta` Malta.

Tordna wkoll l-istralc taghha.

Tahtar lir-Ricevitur Ufficjali bhala stralcjarju tal-kumpannija intimata Pizza Factory Company Limited (C-51901) bis-setghat u bid-dmirijiet li huma previsti u stabbiliti fil-Kap 386 tal-Ligijiet ta` Malta, b`dan illi l-istralcjarju ghandu jipprezenta rapport tal-hidma tieghu sal-31 ta` Jannar 2020.

Tordna lill-kumpannija intimata Pizza Factory Company Limited (C-51901) sabiex tbatl l-ispejjez taghha u dawk tar-rikorrenti.

Bl-applikazzjoni tal-Art. 236(2) tal-Kap. 386 tal-Ligijiet ta` Malta, tordna lir-rikorrenti u lill-intimata Pizza Factory Company Limited (C-51901) sabiex *in solidum* bejniethom ihallsu l-ispejjez kollha ta` l-istralc, inkluzi d-drittijiet u l-ispejjez tal-istralcjarju.

Ghall-finijiet u effetti kollha tal-ligi, senjatament l-Art. 3(i) tar-Regolament tal-Unjoni Ewropea 2015/848, tiddikjara li dan tal-lum huwa procediment li jikkwalifika bhala `primary proceeding`.

Thalli l-istralc ghall-udjenza ta` nhar il-Hamis 23 ta` Jannar 2020 fid-9.00 a.m.

**Onor. Joseph Zammit McKeon
Imhallef**

**Amanda Cassar
Deputat Registratur**