



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

**ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON**

Illum il-Hamis 28 ta` Novembru 2019

**Kawza Nru. 2
Rik. Nru. 765/2017 JZM**

K Consult Limited (C-63411)

kontra

**International Machinery Limited
(C-63411);**

u

**b` digriet moghti fil-15 ta` Frar
2018 gie mahtur Dr Joseph Ellis
bhala kuratur ad litem tas-socjeta`
International Machinery Limited;**

u

**b` digriet tal-5 ta` Marzu 2019 in-
numru ta` registrazzjoni C-63411
gie mhassar u mibdul ghal C-56965**

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentat fit-22 ta` Awwissu 2017 li jaqra hekk :-

Illi s-socjeta` esponenti hija azzjonista fis-socjeta` International Machinery Limited [Registrazzjonji C 56965] billi tiddetjeni tliet mija u sitt (306) "A" ordinarju ta` Euro-il wiehed, ghoxrin fil-mija (20%) imhallsa, minn elf u mitejn (1,200) sehem "A" u "B" ordinarju ghoxrin fil-mija (20%) imhallsa, li jiformaw parti mill-kapital versat u sottoskritt tal-imsemmija socjeta` .

Illi s-socjeta` esponenti kienet hatret ukoll direttur fuq il-Bord tad-Diretturi tal-imsemmija socjeta` fil-persuna ta` Kurt Camilleri, izda fl-1 ta` Dicembru 2015 Kurt Camilleri rrizenja mill-kariga tieghu ta` direttur.

Illi l-esponenti bhala azzjonista tal-imsemmija socjeta thoss li s-socjeta International Machinery Limited qieghda titmexxa b`mod oppressiv, mhux gust u diskriminatorju fil-konfront taghha u kontra l-interessi taghha bhala socja tal-istess socjeta u dan kif sejjer jigi ppruvat f`dettal waqt is-smigh ta` dan ir-rikors.

Illi s-socjeta` International Machinery Limited qatt ma ssottmetti dikjarazzjonijiet finanzjarji sa minn meta giet inkorporata u registrata fis-sena 2014 u f` dan iz-zmien qatt ma ssejhu laqghat annwali generali jew inghatat informazzjoni lill-esponenti dwar l-andament tas-socjeta` .

Ghaldaqstant ir-rikorrenti esponenti bhala azzjonista tas-socjeta` International Machinery Limited ghar-ragunijiet fuq esposti u dawk ir-ragunijiet li sejrjn jigu spjegati f`dettal waqt is-smigh tal-kawza, qieghda, ghat-tenur u in virtu ta` dak dispost fis-sub-artikolu (1) tal-Artikolu 402 tal-Att dwar il-Kumpaniji [Kap. 386 tal-Ligijiet ta` Malta], umilment titlob lil dina l-Onorabbli Qorti sabiex joghgobha tordna x-xoljiment u l-konsegwenti stralc tas-socjeta` International Machinery Limited. [Registrazzjoni C 63411].

Bl-ispejjez.

Rat ir-risposta li pprezentat Kristina Polidano fit-12 ta` Dicembru 2017 li taqra hekk :-

1) *Illi l-esponenti hija azzjonista principali tas-socjeta` intimata u ghalhekk qieghda tippresenta din ir-risposta ghal kull interess li ghandha fis-smigh ta` din il-kawza, pero` jigi rilevat li m`ghandhiex ir-rapprezentanza guridika ta` l-istess socjeta` intimata minkejja li hija azzjonsita tal-istess;*

2) *Illi minn ricerka li ghamlet l-esponenti f`dawn l-ahhar jiem, irrizulta li s-socjeta` intimata bhalissa tinsab bla diretturi ghaliex l-ahhar direttur, li kien gie appuntat kien fit-tmienja (8) ta` Jannar 2016, u cioe` s-sur Jonathan Camilleri li kien qabad u rrozenja minghajr ma nforma lill-azzjonisti bir-rizenja u bir-ragunijiet ghar-rizenja tieghu qabel m`ghamel dan;*

3) *Illi skont il-memorandum and articles of association, l-unici persuni li huma vestiti bid-dritt ta` rapprezentanza legali tas-socjeta` intimata, huma d-diretturi, u peress li llum il-gurnata m`hemm l-ebda direttur, din ir-risposta giet prezentata mill-esponenti qua azzjonista;*

4) *Illi jinghad li bl-istess mod identiku, li d-direttur tas-socjeta` attrici li huwa, s-sur Kurt Camilleri, b`kumbinazzjoni kien wkoll direttur tas-socjeta` intimata u rrozenja minn din il-kariga bl-istess mod ta` Jonathan Camilleri u cioe` minghajr ma nforma lill-ebda wiehed mill-azzjonisti;*

5) *Illi jigi rilevat li Jonathan Camilleri kien responsabbli li jgib l-accounts tas-socjeta` intimata fl-ordni spettat mil-ligi kif fil-fatt kien qed jaghmel, wara li dawn thallew fi stat dizastruz u mhux komplut mid-direttur precedenti taghha u cioe` mis-Sur Kurt Camilleri;*

6) *Illi, it-talbiet tas-socjeta` rikorrenti ghandhom jigu michuda, bl-ispejjez, stante li huma nfondati fil-fatt u fid-dritt u dan ghaliex ma*

jezistux il-premessi u l-elementi necessarji biex dina l-Onorabbli Qorti tkun tista` tordna xi rimedju disponibbli ai termini tal-Artikolu 402 tal-Kap 386 tal-ligijiet ta` Malta;

7) Illi minn-ezami tal-Artiklu 402(1) tal-Kap 386, ma jirrizultax li ssitwazzjoni attwali bejn il-kontendenti hija dik imsemmija f` dan l-istess artiklu;

8) Illi din l-azzjoni tas-socjeta` attrici hija wahda malizzjuza u rat biss biex taghmel il-hajja tal-esponenti difficili tant li s-socjeta` rikorrenti harget in-notifika lill-esponenti azzjonista mhux fuq l-indirizz li qieghda tghix fih, izda minflok fl-indirizz tal-genituri taghha u dan meta kienu jafu ben tajjeb li missier l-esponenti qieghed marid b`marda terminali u ghalhekk riedu jinkwetaw lill-anzjani genituri tal-esponenti u xejn aktar.

9) Illi t-talba attrici ghandha tigi michuda ghar raguni imsemmija f` paragrafu numru 5 u 6 ta din l-istess risposta.

Salv eccezzjonijiet ulterjuri permessi mil-ligi.

Rat id-digriet li tat fl-udjenza tal-15 ta` Frar 2018 fejn kien mahtur l-Av. Dr. Joseph Ellis bhala kuratur *ad litem* tas-socjeta` intimata International Machinery Limited.

Rat id-digriet li nghata fl-udjenza tal-21 ta` Mejju 2018 fejn inghata provvediment fis-sens illi l-kawza kienet sejra tkompli tinstema` mill-Qorti Civili (Sezzjoni tal-Kummerc) kif presjeduta u mhux aktar mill-Prim` Awla tal-Qorti Civili.

Rat ir-risposta li pprezenta l-kuratur *ad litem* tas-socjeta` intimata fil-5 ta` Marzu 2019 u li taqra hekk :-

Illi fl-ewwel lok, ghandu jigi pprecizat illi n-numru ta` registrazzjoni tas-socjeta` rikorrenti hu C 56965 u ghandha ssir id-debita korrezzjoni fl-att promotur.

Illi bla pregudizzju ghas-suespost, l-esponenti fil-kwalita` tieghu premessa mhuwiex prezentement edott mill-fatti li taw lok ghal dina l-kawza u ghaldaqstant, jirrizerva illi jdahhal eccezzjonijiet ulterjuri, aktar `il quddiem.

Salv eccezzjonijiet ulterjuri.

Rat id-digriet li tat fl-udjenza tal-5 ta` Marzu 2019 fejn kienet awtorizzata l-korrezzjoni tan-numru ta` registrazzjoni tas-socjeta` rikorrenti fis-sens illi dan in-numru gie jaqra `C 56965` minflok `C 63411`.

Rat illi minkejja l-ordni li tat fl-udjenza tal-5 ta` Marzu 2019, ir-rikorrenti baqghu ma pprezentawx kopja tal-Memorandum & Articles of Association ta` International Machinery Limited.

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

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

Rat illi ma gewx prezentati noti ta` osservazzjonijiet.

Rat l-atti l-ohra tal-kawza.

II. Fatti

International Machinery Limited ("**IML**") kienet kostitwita fit-8 ta` Jannar 2014. L-azzjonisti taghha huma : K Consult Ltd (detentrici ta` 306 *A Class Ordinary Shares*) ; Kevin Spiteri (detentur ta` 180 *A Class Ordinary Shares*) ; u Kristina Polidano (detentrici ta` 713 *A Class Ordinary Shares* u ta` sehem wiehed tal-klassi *B Ordinary Share*. Billi IML m`ghandhiex diretturi, inhatar kuratur *ad litem* ghall-fini tal-kawza tal-lum sabiex ihares l-interessi ta` IML.

Kien esebiti dawn id-dokumenti :

- Form K datata 1 ta` Dicembru 2015 :
mnejn jirrizulta li Kurt Camilleri rrienza minn direttur ta` IML b`effett mill-1 ta` Dicembru 2015.
- Form K datata 5 ta` Mejju 2015 :
mnejn jirrizulta li Kevin Spiteri rrienza minn direttur ta` IML b`effett mill-5 ta` Mejju 2015.
- Form K datata 1 ta` Gunju 2015 :
mnejn jirrizulta li Alex Polidano rrienza minn direttur ta` IML b`effett mit-2 ta` Gunju 2015.
- Form K datata 8 ta` Jannar 2016 :
mnejn jirrizulta li Jonathan Camilleri kien appuntat direttur ta` IML b`effett mit-8 ta` Jannar 2016.
- Form K datata 12 ta` Jannar 2016 :
mnejn jirrizulta li Keith Camilleri kien mahtur bhala Company Secretary ta` IML b`effett mill-11 ta` Jannar 2016.
- Form K datata 5 ta` Mejju 2016 :
mnejn jirrizulta li Kevin Spiteri rrienza minn Company Secretary ta` IML b`effett mill-5 ta` Mejju 2016.
- Form K datata 18 ta` Awwissu 2017 :
mnejn jirrizulta li Jonathan Camilleri rrienza minn direttur ta` IML b`effett mis-27 ta` Gunju 2017.

- Form K datata 2 ta` April 2018 :
mnejn jirrizulta li Keith Camilleri rrizenja minn company secretary ta` IML b`effett mid-29 ta` Marzu 2018.

Jirrizulta illi l-ahhar *annual return* ta` IML li kienet prezentata kienet dik li tghodd ghall-2017.

Ma jirrizultax illi qatt kienet prezentati *financial statements* lir-Registratur tal-Kumpanniji.

III. Xiehda

Kurt Camilleri xehed illi wara sitt snin ta` hidma, il-kumpannija Ocean & Sky Logistics Limited (`**Ocean & Sky`**) stabbiliet ruhha fil-qasam tal-*freight forwarding* u fil-qasam marittimu.

Qal illi wara insistenza tieghu kien deciz li ssir kumpannija ohra sabiex jigu diversifikati l-investment u s-servizzi li kienet taghti Ocean & Sky fis-settur tal-vapuri u *superyachts*.

Fil-fatt kienet kostitwita Ocean Marine Services Ltd (`**Ocean Marine`**) li kienet registrata fis-16 ta` Dicembru 2010 bin-nru. C51432. Il-kumpannija saret sabiex toffri servizzi ta` *brokerage, chartering* u *management* ta` vapuri kif ukoll servizzi teknici u ta` agenzija lill-vapuri u *yachts*.

Stqarr illi huwa kellu ishma fil-minoranza ta` Ocean Marine, billi l-bicca l-kbira tal-ishma kienu taht il-kontroll ta` Alex Polidano li kellu f`idejh kull decizjoni eżekuttiva u finanzjarja.

Kompla jixhed illi Ocean Marine bdiet l-operat taghha meta Kevin Spiteri dahal jahdem maghha. Spiteri huwa accountant kwalifikat li hadem ghal zmien twil fis-settur tal-vapuri.

Qal illi Ocean Marine kienet topera mill-istess ufficcju ta` Ocean & Sky. Hu u Spiteri kienu jiltaqghu l-ufficcju kwazi kuljum u kienu jaggornaw lil xulxin regolarment b`dak illi kien ghaddej. Ocean & Sky kienet toffri lil Ocean Marine servizzi ta` agenzija peress illi la Polidano u lanqas Spiteri ma kienu jafu kif jahdem ix-xoghol fil-qasam tal-vapuri u *yachts*. Meta Spiteri dahal jahdem ma` Ocean Marine, din dejjem ghamlet xi telf biss irkuprat u bdiet anke taghmel il-profitt. Sahansitra kienet involuta fil-bejgh u xiri ta` vapuri u dan kien ihalli qligh tajjeb.

Kompla jghid illi fit-8 ta` Jannar 2014 saret kumpannija ohra li taghha Ocean & Sky kienet propjetarja. Il-kumpannija l-gdida kellha tixtri ishma fis-socjeta` IML li kellha diversi kuntratti u rapprezentanza ta` ditti kbar bhal Cummins, Ingersoll Rand u Valvoline.

Fisser illi Spiteri ikkoncentra x-xoghol tieghu f`IML u beda jahdem minn ufficcju Hal-Qormi fejn IML kellha l-mahzen taghha. Spiteri kompla l ghaddej bix-xoghol ta` Ocean Marine fis-settur marittimu.

Stqarr illi kien Mejju 2014 meta beda l-inkwiet fil-More Supermarkets Hamrun Ltd., fejn Ocean & Sky kienet investiet hafna flus.

Kompla jixhed illi mill-kontanti ta` Ocean & Sky hargu wkoll il-flus biex tkun tista` topera Ocean Marine, kif ukoll il-flus ghall-investment fl-IML.

Ocean & Sky ghalhekk tilfet madwar €2,000,000 bhala konsegwenza tad-decizjonijiet u l-investimenti li ghamlet.

Skont ix-xhud kienu nvestimenti hzienu u saru tort tal-intimat Polidano billi Polidano wahdu kien responsabbli totalment ghall-investment li kien sar fil-More.

Kompla stqarr illi peress li Polidano kien tilef kull kontroll, u Ocean & Sky kienet qabdet it-triq tan-nizla, sar ftehim ma` Polidano sabiex dan iwarrab minghajr ma jithallas xejn peress illi t-telf kollu mgarrab minn Ocean & Sky kien responsabbli ghalih l-istess Polidano. Kien miftiehem ma` Polidano illi huwa kellu jiehu Ocean & Sky taht it-tmexxija tieghu u kif ukoll li jhallas it-taxxi kollha dovuti fuq is-*share transfer*, inkluz is-sehem ta` Polidano mill-istess taxxi.

Fisser illi f` Awwissu 2014 kien iffirmit *share transfer agreement* fejn l-ishma ta` IML ghaddew minghand Ocean Marine ghal ghand Kristina Polidano, li tigi l-mara ta` Alex Polidano.

Kompla jixhed illi Alex Polidano kien qieghed jabbuza mill-finanzi ta` Ocean Marine u beda jinqala hafna nkwiet.

Stqarr illi Polidano sahasitra nqabad fil-fatt jiffalsifika *invoice* fuq progett ta` vapur sabiex jiffroda `l fuq minn \$80,000 dollaru.

Sahaq illi Spiteri kien prezenti meta nqala` dan l-incident.

Konsegwenza tal-abbuz mill-finanzi illi kien qieghed jaghmel Polidano u kif ukoll ghaliex kien qieghed jinqala dizgwid bejn Spiteri u Polidano, Spiteri ma kienx komdu jkompli jahdem ma` Polidano tant li rrozenja fil-5 ta` Mejju 2015 u fetah negozju ghal rasu.

Meta Spiteri hareg mix-xena, huwa stenna illi Polidano kien ser jiehu f` idejh ir-riedni tas-sitwazzjoni ghaliex Polidano kien direttur ta` IML u kien qieghed jircievi `l fuq minn tlett elef ewro fix-xahar f` paga. F` Gunju 2015 Polidano wkoll ta r-rizenja tieghu minn direttur.

Ighid illi huwa ha r-riedni f` idejh biss l-affarijiet xejn ma kienu sejrin tajjeb.

Xehed illi kull meta kien jistaqsi lil Polidano kif sejrin l-affarijiet tal-kumpannija dan dejjem wiegeb illi l-affarijiet kienu mexjin sewwa. Gara pero` li meta huwa ha t-tmexxija ta` IML f` idejh sab illi kien hemm diversi hlasijiet b`lura x` jsiru apparti hlas ta` taxxa u anke sigurta` socjali. Spicca li kellu jiehu hsieb tal-hlasijiet kollha li kienu pendent, ha hsieb ix-xiri ta` *stocks* u *sales*, apparti t-tmexxija ta` IML.

Kompla jixhed illi darba minnhom waslet telefonata mill-Head Office tal-Bank of Valletta. Din it-telefonata dahlet fuq numru li kien ta` Ocean & Sky izda kien jintuza minn Polidano meta dan kien ghadu *business partner*. Ighid illi huwa ha t-telefonata li kienet gejjja mill-Compliance Section tal-Bank. Il-persuna li kienet qed iccempel staqsiet ghal Polidano u malli huwa qalilha li hu ma kienx Polidano it-telefonata ntemmet hesrem. Thasseb dwar dan. Fil-frattemp fuq l-istess numru kienu qeghdin jidhlu diversi messaggi mill-HSBC fejn Polidano kien qieghed jintalab jaghmel kuntatt b`urgenza mal-Bank. Gara wkoll illi l-*accounts* ma bdewx jigu registrati mal-MFSA u Polidano ma beda jaghti informazzjoni ta` xejn.

Xehed illi preokkupat b`dan kollu ha l-azzjoni odjerna fil-vesti tieghu ta` rapprezentant tal-azzjonista ta` minoranza..

Av. Dr. Pio Valletta pprezenta numru ta` dokumenti illi jirrizultaw mill-*website* tar-registru tas-socjetajiet.

Fil-**kontroezami**, stqarr illi s-socjeta` attrici ghandha l-fakulta` illi tappunta direttur fuq il-Board tad-Diretturi ta` IML. Id-direttur in rapprezentanza ta` K Consult kien Kurt Camilleri li rrizenzja b`effett mill-1 ta` Dicembru 2015. Id-dizgwid bejn l-azzjonisti, principalment bejn Kurt Camilleri u Alex Polidano, fixkel l-operat tal-kumpannija u wassal ghall-kroll totali taghha tant illi illum waqfet topera u hadd ma jaf x` sar mill-operat taghha. Ghalkemm kellha diversi ditti mportanti hafna, m`ghandiex assi u *accounts* qatt ma saru.

IV. L-Art 402 tal-Kap 386

Ir-rikorrenti ressqet it-talba taghha abbazi tal-Art 402 tal-Kap 386.

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

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

...

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

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

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

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

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

(e) *jordna lill-kumpannija li tibda, tiddefendi, tkompli jew ma tkomplix procedimenti tal-qorti, jew jawtorizza lil membru jew membri tal-kumpannija li jibdew, jiddefendu, ikomplu jew ma*

jkomplux procedimenti tal-qorti f` isem u ghan-nom tal-kumpanija ; jew

(f) jipprovdi ghall-hlas ta` kumpens minn dik il-persuna li tista` tkun instabet responsabbli mill-qorti ghal telf jew danni li jkunu ggarrbu minhabba att jew nuqqas li dwaru jkun sar ilment lill-persuna li tkun garrbet dak it-telf jew danni ; jew

(g) ixolji l-kumpanija u jipprovdi ghall-istralc konsegwenzjali taghha.

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

(5) Ordni maghmul taht dan l-artikolu jista` jehtieg lil kumpanija biex ma taghmilx xi emenda, jew li taghmel emenda mehtiega, fil-memorandum jew fl-istatut taghha.

Ghalkemm id-dicitura tal-Art 402(1) ittiehdet testwalment minn disposizzjoni simili li tirrizulta fil-Companies Act ta` New Zealand, tajjed jinghad illi l-ligi ta` New Zealand segwiet l-izvilupp legislattiv tar-Renju Unit. Fir-Renju Unit, id-disposizzjoni li kienet tirregola l-*unfair prejudice action* fil-Companies Act 1985 kienet Sec 459. Meta saret il-Companies Act 2006, l-azzjoni bdiet tigi regolata b` Sec 994(1) fis-sens illi Sec 459 thassret ghal kollox mill-Companies Act 1985 u dahlet ezatt kif inhi f` Sec 994(1) tal-Companies Act 2006.

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

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

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

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

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

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

V. Il-prova

Fil-Pag 1317 ta` **Principles of Maltese Company Law** (Volume Three : Second Edition : MUP : 2019) **Andrew Muscat** ighid illi fuq ir-rikorrent jistrieħ il-piz tal-prova li l-att jew omissjoni lamentata jaqa` fl-ambitu tas-subartikolu (1).

Ighid –

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

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

Illi l-prova biex tirnexxi dina l-azzjoni tispetta lir-rikorrenti li ressuqo dina l-azzjoni. Huma jridu

jippruvaw li (a) l-affarijiet tal-kumpanija jkunu tmexxew jew qed jitmexxew jew aktarx jitmexxew b`mod li... (b) jew li xi att jew ommissjoni tal-kumpanija kienu jew huma jew x`aktarx se jkunu, oppressivi b`mod mhux gust diskriminatorji kontra, jew b`mod mhux gust ta` pregudizzju, ghal membru jew membri jew b`mod li jkunu kontra l-interessi tal-membri in generali.

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

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

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

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

VI. Il-legittimu kontradittur

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

Fil-pag. 1352 tal-ktieb ighid hekk :-

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

...

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

...

*the forms of relief that may be granted by the court are considerably wide-ranging ; a court order could be issued against a number of persons, typically the company itself and one or more shareholders. In **Joseph Calleja vs Vincent Calleja**, an article 402 was filed only against one of the shareholders. The company itself was not a party. The defendant pleaded that the company itself were wrongly instituted, as the action had to be filed against the company and not against himself as a member. The Court, in a judgement in parte, considered article*

402 to provide a flexible and equitable remedy and agreed with the applicant's submissions that an article 402 action had to be instituted against the person or persons who were allegedly responsible for the wrongdoing and that the court's order need not in all cases be issued against the company itself. The Court remarked that as the applicant's allegations of wrongdoing were directed towards the defendant, it was clear that the defendant was a proper party to the proceedings. It also stated that the fact that the action was not also filed against the company did not nullify the proceedings.

...

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

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

The petitioner will be the member seeking relief, and the company of which he is a member and in relation to whose affairs he alleges unfairly prejudicial conduct will be made a respondent. Additionally, every member of the company (other than the petitioner) whose interests might be effected by the relief sought should be joined as a respondent, whether or not allegations of unfairly prejudicial conduct are made against him: in the case of a small private company, this will usually mean that every member ought to be joined as a respondent to the petition. The category of potential respondents (other than the company) is

*not, however, limited to members of the company. In an appropriate case, relief may be sought against a non- or former member. The width of the category of potential respondents is indicated by *Lowe vs Fahey* ((1996) 1 BCLC 262), where it was held that if the unfairly prejudicial conduct alleged was a diversion of corporate funds, a petitioner could seek relief not only against members and former members, but also against directors involved or third parties who knowingly received or improperly assisted in the diversion. Even a person who is not actively involved in the conduct of the affairs of the company complained of may be made a respondent, at least if he would be affected by the relief sought.*

VII. L-Art 402(1) tal-Kap 386

1. Gurisprudenza

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

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

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

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

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

Fis-sentenza tagħha tad-9 ta' Marzu 2007 fil-kawza "**Vella et vs Vella Brothers Ltd et**", il-Qorti tal-Appell qalet hekk :-

... l-Artikolu 402 ta' l-Att dwar il-kumpaniji jagħti diskrezzjoni pjuttost wiesa' lill-Qrati u dan għaliex dawn il-provvedimenti għandhom l-għan li jissalvagwardjaw u jipprotegu lill-azzjonisti ta' socjeta' kummercjali, partikolarment lil dawk li huma minoritarji u li għalhekk qeghdin fl-impossibilita' li jirregolaw il-mod li bih tkun qed titmexxa s-socjeta' li fiha huma jkollhom interess

...

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

...

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

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

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

Fis-sentenza "**Monreal et vs Delia noe**" (op. cit.) inghad :-

Dawn il-provedimenti huma ta` salvagwardja u ta` protezzjoni ghall-azzjonisti ta` socjeta` kummercjali, b`mod partikolari ghal dawk li huma minoritarji. Ir-rimedji li johorgu minn dawn il-provedimenti huma moghtija lil kull azzjonist ta` socjeta` kummercjali. Kull azzjonist, anke jekk hu minoritarju, ta` socjeta` kummercjali, anke jekk hi pubblika, jista` jitlob li jinghataw l-ordnijiet kollha necessarji u opportuni, f`kaz li jirnexxielu jipprova illi minhabba l-gestjoni tal-istess socjeta` huwa qed isofri jew ukoll jista` jsofri xi pregudizzju ta` natura oppressiva, ingusta jew diskriminatorja. Tali gestjoni tista` tirreferi semplicement ghal xi att specifiku jew xi ommissjoni tal-kumpanija. Il-pregudizzju jista` jirreferi ghall-azzjonist li qed

jippromuovi l-proceduri, ghal xi azzjonist iehor jew ghall-interessi in generali tal-azzjonisti. In vista ta` dan kollu jista` jinghad li hu bizzejjed li l-azzjonista jipprova li huwa qed isofri jew eventwalment jista` jsofri xi pregudizzju minhabba xi agir tas-socjeta` li taghha huwa jippossjedi xi ishma. Ma hemmx ghalfejn li huwa jipprova li huwa zgur li ser isofri xi pregudizzju fil-futur. Tali prova tista` ssir fuq bazi ragjonevoli ta` probabbilita`. Inoltre, skond dak li hemm provdut fis-subartikolu (3) tal-istess artikolu 402, il-Qorti tista` tipprocedi biex taghmel kull ordni necessarja u opportuna skond dawn il-provedimenti, jekk jirrizulta li l-ilment tal-azzjonista hu sewwa bbazat u jekk il-Qorti thoss li huwa ekwu u gust li taghmel.

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

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

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

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

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

Fid-decizjoni ta` din il-Qorti diversament presjeduta tas-7 ta` Ottubru 2016 fil-kawza **Av. Dr. Pio M. Valletta noe vs Jeno Torocsik et** inghad illi sabiex ikun hemm *unfair prejudice*, (a) *it-test irid ikun wiehed oggettiv ;* (b) *M`hemmx htiega li l-attur jipprova l-mala fede ;* (c) *M`hemmx htiega li l-attur jipprova li kien hemm intenzjoni li tikkawza pregudizzju ;* (d) *Mhux gust ma jfissirx bilfors li l-agir irid ikun illegali ;* u (e) *L-agir irid ikollu effett negattiv fuq l-attur bhala azzjonist.*

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

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

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

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

2. **Dottrina**

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

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

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

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

"That is not to say that s.459 does not apply to larger private companies and public companies for the section is clearly not limited to quasipartnerships. The point is that it may be harder to establish conduct which is unfairly prejudicial to the interests of the members in such companies.

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

In the early days of S.459, it was thought that the petitioner must have unfairly suffered prejudice to an interest as a member only (and not eg. as a director). This requirement has never been relaxed in that the Court is prepared to recognise that

*members may have different interests having regard to their rights, expectations and obligations (**Re a company** (No 00477 of 1986 [1986 BCLC 376; **O`Neill v Phillips**. [1999] 1 WLR 1092). This is particularly so in quasi-partnership cases where a minority is excluded from management. But where the articles make detailed provision for any departing members to sell their shares at a fair price, the position may be different ...Section 459 has proved to be a powerful weapon for minority shareholders, particularly in the case of quasi-partnerships. In such companies, minorities who are excluded from management participation or who unfairly suffer loss as a result of wrongdoing by directors or majority shareholders may get relief under the section.*

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

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

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

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

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

"The term "unfair prejudice" whether analysed as a `standard` or a `concept` is a relatively more

objective one which is concerned with running the company in a way that is clearly unfair in its consequences to the complaining shareholder, even if the respondents can claim to have acted in the best of good faith."

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

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

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

"The words `unfairly prejudicial` are general words and they should be applied flexibly to meet the circumstances of the particular case ... The conduct [being complained of] must be both prejudicial [in the sense of causing prejudice or harm to the relevant interest) and also unfairly so ; conduct may be unfair without being prejudicial or prejudicial without being unfair, and it is not

sufficient if the conducts satisfies only one of these tests."

Ikomplu billi jaghmlu riferenza ghal "**O`Neill vs Phillips**" (op. cit.) in partikolari dwar l-ghazla li ghamel il-Parlament Ingiliz –

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

3. Risultanzi

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

Tajjed li jkun ribadit illi sabiex ikun sodisfatt il-vot tal-ligi huwa bizzejjed jekk tirrizulta mqar wahda mic-cirkostanzi ndikati fid-dispozizzjoni. Tant hu hekk illi l-legislatur ghazel il-konguntiv jew mhux l-konguntiv u fid-disposizzjoni. Ghalhekk ir-rekwiziti huma alternattivi mhux kumulattivi.

L-ilmenti tar-rikorrenti kienu illi : a) sa minn meta IML kienet kostitwita u registrata fl-2014 baqghu qatt ma gew prezentati *financial statements* ; b) qatt ma ssejjhu laqghat generali annwali ; u c) qatt ma nghatat informazzjoni dwar l-andament ta` IML. Ir-rikorrenti tilmenta li bil-mod kif tmexxiet IML kien jikser dak li jipprovdi l-Art 402(1) tal-Kap 386.

Fil-Pag. 145-146 ta' **Critical Company Law** (Second Edition – Routledge – 2016) **Lorraine Talbot** tghid hekk :-

"A corporate body can only act through agents, and it is of course the duty of those agents so to act as best to promote the interest of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements, in which he has, or can have, a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered".

Directors were fiduciaries who owed a duty of complete loyalty to the company, the principal. That duty would only be fulfilled if the director avoided all situations where he or she had a personal interest that might possibly conflict with that of the company. Failure to do so would be a breach of duty, which would allow the company to avoid the contract or make the director accountable to the company for any personal gains. The fairness or otherwise of the contract entered into was an irrelevant consideration and might not be raised.

L-**Art 136A(1) tal-Kap. 386** jixhet fuq spallejn kull direttur ta' kumpannija l-obbligu "li jagixxi b'onestà u bona fide fl-ahjar interessi tal-kumpannija".

Fid-decizjoni in re **Howard v Herrigel** [1991(2) SA 660(A)] inghad illi :

"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 if each."

L-Art 136A(2) tal-Kap 386 jistipola illi d-diretturi ghandhom *"jippromwovu il-benessere tal-kumpannija u jkunu responsabbli ghal : (a) it-tmexxija generali tal-kumpannija u l-amministrazzjoni u l-immaniggjar taghha ; u (b) s-sorveljanza generali tal-affarijiet taghha."*

Ghalkemm bhala azzjonista bil-maggoranza tal-ishma f` isimha, Kristina Polidano pprezentat risposta hija baqghet ma ressqitx provi. Fir-risposta kemm teccepixxi li ma jezistux il-premessi u l-elementi sabiex din jinghata rimedju skont l-Art 402 tal-Kap 386 ghaliex ma jirrizultax illi s-sitwazzjoni attwali bejn il-kontendenti hija dik kif deskritta mir-rikorrenti.

Il-Qorti trid timxi fuq il-provi. Wara li semghet ix-xhieda u qieset il-provi l-ohra, il-Qorti tqis illi bil-mod kif tmexxiet IML kien jinkwadra ruhu f` dak li l-ligi ma tridx li jsir bl-Art 402(1) tal-Kap 386.

Jirrizulta ppruvat li bhala azzjonista r-rikorrenti baqghet ma ngihatx informazzjoni li kellha jedd tikseb. Kurt Camilleri xehed illi ghalkemm min-naha ta` Polidano Agius kien jinghad li l-kumpannija sejra tajjeb qatt ma ntwera xejn bhala konferma jew sostenn ta` dan.

Jidher evidenti mill-provi li kemm ilha kostitwita IML baqghet ma pprezentatx dikjarazzjonijiet finanzjarji, obbligu legali ewlieni dan tad-diretturi, u mgieba rregolari li tirreka pregudizzju serju lill-azzjonisti kollha, speċjalment izda lill-azzjonisti b` minoranza tal-ishma bhal ma hija r-rikorrenti.

Il-qagħda prekarja ta` IML hija konfermata mill-fatt li tinsab sprovvista minn diretturi li rriżenjaw kollha, bl-ahhar wiehed jitlaq fl-2016. Ghall-iskop tal-kawza tal-lum, il-Qorti deherilha li kien xieraq u opportun li tahtar kuratur *ad litem* sabiex jittutela l-interess ta` IML.

Ma jirrizultax li IML ghadha assi. Billi qatt ma kienu *financial statements* lir-Registratur tal-Kumpanniji mhijiex maghrufa l-qagħda finanzjarja tagħha.

Fis-sentenza Ingliza "**Loch v Blackwood**" ([1924] A.C. 783) il-Qorti sabet illi mhux rikjest "*a grave degree of misconduct*" biex tagħti rimedju taħt dak li fil-ligi tagħna huwa l-Art.402. Is-sentenza tghid li "*the loss of confidence by the shareholders in the management of the company would be enough to constitute breach of duty by the company directors*".

L-essenza ta` socjeta` kummercjali, inkluz kumpannija, hija l-fiducja fil-massimu livell tagħha. Kif tisfaxxa l-fiducja, id-destin ta` socjeta` kummercjali jmur lejn in-negattiv, bosta drabi lejn negattiv irreversibbli. Il-Qorti tishaq illi bord tad-diretturi ta` kumpannija ma jistax jimxi skont il-ligi tal-gungla. Fil-kaz tal-lum, abbazi tal-assjem tal-provi, il-Qorti ssib li da parti tal-intimata, kien hemm ksur tal-Art. 402(1) tal-Kap 386 għad-dannu tar-rikorrenti.

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

Ladarba sabet vjolazzjoni tal-Art 402(1), il-Qorti sejra tghaddi għall-konsiderazzjoni tar-rimedji skont kif jipprovdi s-subartikolu (3) tal-Art 402.

Fil-kaz tal-lum, bhala rimedju, ir-rikorrenti qegħda titlob l-applikazzjoni tal-paragrafu (g) tas-subartikolu (3) tal-Art 402, u cioe` ix-xoljiment u l-istralc ta` IML.

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

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

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

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

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

Ir-raguni ghaliex intalab specifkament ir-rimedju tax-xoljiment u tal-istralc ta` IML hija ghaliex ir-rikorrenti tilfet totalment il-fiducja illi kellha fit-tmexxija ta` Alex Polidano li kien direttur, apparti l-kwistjonijiet l-ohra li kienu trattati aktar kmieni.

Fil-Pag. 585 ta` **Mayson, French & Ryan on Company Law** (26th Edition – 2009/2010 – OUP) jinghad hekk :-

In several cases in which winding up has been ordered on the just and equitable ground, the courts have commented that one individual in de facto control of the company has treated it as his or her own, typically failing to give proper information to other members and withdrawing excessive remuneration or other benefits (Baird v Lees 1924 SC 83 ; Thomson v Drysdale 1925 SC 311 ; Loch v John Blackwood Ltd [1924] AC 783 at p 794). In Thomson v Drysdale, Lord President Clyde said at page 315 :

... in any case in which the shareholders hold a preponderating interest in a company make it manifest that they intend to set at naught the security provided by company procedure, and to treat the company and its affairs as if they were their own property, it is impossible that the minority should retain any confidence in the impartiality or probity of the company`s administration and – according to the circumstances of each particular case – it becomes a question whether the minority are not entitled, as a matter

of `justice and equity` within the meaning of [the Insolvency Act 1986 s 122(1)(g)] to have the company wound up.

Anke din il-Qorti tishaq illi r-*raison d`etre* tal-*unfair prejudice action* hija l-ekwita`. Bl-applikazzjoni ta` dan il-principju għall-fattispeci tal-kaz tal-lum, il-Qorti mhijiex tara sbokk iehor għall-kumpanija ntimata, li tinsab bla riedni u bla direzzjoni, ghajr ghax-xoljiment u l-istralc tagħha. Imkien ma kien ippruvat għas-sodisfazzjoni tagħha li hemm xi futur realistiku u fattibbli ta` xi xorta għal IML.

Provvediment

Għar-ragunijiet kollha premissi, din il-Qorti qegħda tipprovdi dwar it-talba u dwar l-eccezzjonijiet billi qegħda :-

Tiddikjara li huma fondati sewwa l-ilmenti tar-rikorrenti skont l-Art. 402(1) tal-Kap. 386 tal-Ligijiet ta` Malta.

Tiddikjara illi huwa gust u ekwu li tapplika l-Art. 402(3)(g) tal-Kap. 386 tal-Ligijiet ta` Malta.

Bl-applikazzjoni tal-Art. 402(4) tal-Kap. 386 tal-Ligijiet ta` Malta, tordna x-xoljiment tal-kumpanija International Machinery Limited (C63411) b`effett mil-lum u tordna wkoll l-istralc tagħha.

Tahtar lir-Ricevitur Ufficjali bhala stralcjarju tal-kumpanija International Machinery Limited (C63411) u tagħtih is-setgħat u dmirijiet kollha previsti mid-disposizzjonijiet tal-Kap 386 tal-Ligijiet ta` Malta.

Tordna lill-istralcjarju sabiex jipprezenta rapport tal-hidma tiegħu sa zmien xahrejn mil-lum.

Tordna lill-kumpanija International Machinery Limited (C63411) u lill-azzjonisti tagħha u cioe` r-rikorrenti, Kevin Spiteri, Kristina Polidano sabiex *in solidum* bejniethom ihallsu l-ispejjez

kollha ta` din il-kawza, komprizi l-ispejjez tal-kuratur *ad litem*. Tordna li ghandhom ihallsu wkoll *in solidum* bejniethom l-ispejjez kollha tal-istralc, inkluzi l-ispejjez u d-drittijiet tal-istralcjarju.

Thalli l-istralc ghall-udjenja ta` nhar it-Tlieta 11 ta` Frar 2020 fid-9.00 a.m.

**Onor. Joseph Zammit McKeon
Imhallef**

**Amanda Cassar
Deputat Registratur**