



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

**ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON**

Illum it-Tnejn 16 ta` Dicembru 2019

**Kawza Nru. 2
Rikors Nru. 837/2016 JZM**

Acep Ltd (C 65380)

kontra

Megasol Co. Limited (C61647)

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentat fit-23 ta` Settembru 2016 li jaqra hekk :-

1. Illi l-esponenti hija ishmatarja tal-intimata fi kwoti ndaqs (ossia hamsin fil-mija (50%)) mal-ishmatarja l-oħra tal-intimata, ossia Raeco Ltd (C 66536);

2. Illi meta giet iffurmata l-kumpanija intimata, il-ftehim bejn is-sidien tagħha kien li l-kumpanija tkun immexxija minn zewg (2) diretturi, wiehed magħzul mill-ishmatarja Acep Ltd u iehor magħzul mill-ishmatarja Raeco Ltd;

3. Illi dan il-fatt huwa rifless fl-Artikolu 9 tal-Memorandum tal-kumpanija intimata, kopja ta` liema hija hawn annessa u mmarkata Dok A1, dwar ir-rappreżentanza legali u guridika tal-kumpanija, li jipprovdi li "The legal and judicial representation of the company shall be vested in any two (2) directors acting jointly."

4. Illi fil-fatt, il-kumpanija intimata sa ftit xhur ilu kienet immexxija mid-direttur George Attard (KI 151255(M)) magħzul mill-ishmatarja esponenti u mid-direttur John Ciantar (KI 461968(M)) magħzul mill-ishmatarja Raeco Ltd;

5. Illi gara izda li fit-12 ta` Frar 2016, George Attard irriienja mill-kariga tiegħu ta` direttur tal-kumpanija intimata għal ragunijiet personali, kif jidher mill-kopja tal-Formola K annessa u mmarkata Dok A2;

6. Illi b`rizzultat ta` din ir-rizenja, il-kumpanija intimata kien baqagħlha biss direttur wiehed, ossia John Ciantar li kif għa nghad kien gie magħzul mill-ishmatarja Raeco Ltd, li wkoll jikkupa l-kariga ta` kap eżekuttiv tal-kumpanija intimata;

7. Illi minhabba dan, l-ishmatarja esponenti talbet lill-kap eżekuttiv u l-uniku direttur rimanenti tal-kumpanija intimata kif ukoll ishmatarju ta` Raeco Ltd, John Ciantar, sabiex tinzamm laqgħa generali

ghall-hatra ta` direttur gdid sabiex jirrimpjazza lil dak li kien irrizenja u li kien gie nominat mill-ishmatarja esponenti;

8. Illi minkejja d-diversi talbiet u komunikazzjonijiet maghmula kemm bil-kitba kif ukoll verbalment, id-direttur John Ciantar ghan-nom tal-kumpanija intimata baqa` inadempjenti u fil-fatt, sal-lum ghadha ma ssejhet l-ebda laqgha generali tal-kumpanija intimata u ghadu ghalhekk John Ciantar nominat minn Raeco Ltd luniku direttur tal-istess intimata u konsegwentement, ma hemm hadd li qieghed ihares l-interessi tal-ishmatarja esponenti fit-tmexxija tal-intimata;

9. Illi di più, id-direttur John Ciantar qieghed jiehu detcizjonijiet importanti ghall-andament tal-kumpanija u li ma jsibux sostenn mill-ishmatarja esponenti, li minkejja li tippossjedi nofs l-ishma tal-kumpanija intimata, spiccat sabiex fil-prattika tinstab minghajr vuci u zvantaggata daqs li kieku kienet fil-minoranza;

10. Illi l-istess direttur John Ciantar huwa komdu bis-sitwazzjoni li nholqot, minkejja li ma jistax jirrapprezenta l-kumpanija intimata legalment u guridikament wahdu skont l-istatut tal-kumpanija hawn gja anness;

11. Illi di più, din is-sitwazzjoni holqot oppressjoni, ingustizzja u diskriminazzjoni kontra l-esponenti ishmatarja li ma baqaghlha l-ebda rapprezentanza fit-tmexxija tal-kumpanija intimata u li b`rizultat tad-detizzjonijiet mittiehda unilateralment minn John Ciantar u min-nuqqas tieghu li jsejjah laqgha generali sabiex jinhatar direttur gdid, wasslet ghall-htiega tar-rikors odjern.

Ghaldaqstant ghar-ragunijiet suesposti, l-esponenti umilment titlob lil din l-Onorabbli Qorti joghgobha, a tenur tal-Artikolu 402 tal-Att dwar il-Kumpaniji, Kap. 386 tal-Ligijiet ta` Malta –

1. *Tipprojbixxi lid-direttur tal-intimata John Ciantar milli jiehu ebda decizjoni b`mod unilaterali u/jew ta` natura kritika u/jew li tista` taffettwa l-andament tal-intimata, sakemm mhux bl-approvazzjoni tal-ishmatarji kollha tal-kumpanija.*

2. *Tordna lid-direttur tal-intimata John Ciantar sabiex isejjah laqgħa generali tal-kumpanija fl-immedjat sabiex jinhatar direttur iehor fil-bord tad-diretturi.*

3. *Fin-nuqqas, tahtar persuna tal-fiducja ta` din l-Onorabbli Qorti sabiex tiehu f`idejha l-amministrazzjoni u t-tmexxija tal-kumpanija, issejjah laqgħa generali tal-kumpanija għall-hatra ta` direttur iehor fil-bord tad-diretturi u tiehu kull azzjoni ohra mehtiega fl-interess tal-kumpanija.*

u dan taht kull provvediment iehor li jidhrilha li jkun xieraq fic-cirkostanzi.

Rat ir-risposta pprezentata fit-31 ta` Ottubru 2016 u li taqra hekk :-

Eccezzjonijiet

1. *L-allegazzjonijiet tar-rikorrenti li "d-direttur John Ciantar qiegħed jiehu decizjonijiet importanti għall-andament tal-kumpanija" bi hsara tas-socjeta` rikorrenti in kwantu azzjonista, jew li t-tmexxija tal-kumpanija "holqot oppressjoni, ingustizzja u diskriminazzjoni" kontra l-istess rikorrenti, huma manifestament bla bazi u infondati.*

2. *Hija ukoll legalment infondata l-affermazzjoni tar-rikorrenti li d-direttur prezenti "ma jistax jirrapprezenta l-kumpanija intimata legalment u guridikament wahdu skont l-istatut tal-kumpanija."*

3. Kontra dak li tallega s-socjeta` rikorrenti, l-affarijiet tal-kumpanija intimata dejjem tmexxew u ghadhom qed jitmexxew korrettement fl-interess tal-istess kumpanija u n-negozju taghha u fl-ahjar interess tal-azzjonisti kollha, minghajr distinzjoni jew diskriminazzjoni. Mhux minnu li l-esponenti jew xi membru taghha agixxew b`xi mod ingust jew ta` pregudizzju kontra r-rikorrenti. Ghall-kuntrarju, kienu l-membri tas-socjeta` rikorrenti li naqsu li jfittxu l-ahjar interessi tal-esponenti u agixxew b`interess ta` persuni ohra li huma konnessi maghhom, u ta` negozju iehor li huma nvoluti fih.

Il-Bord tad-Diretturi

4. Klawsola 7 tal-Memorandum of Association jipprovdi li :

"The Company`s affairs shall be entrusted to a Board of Directors which shall consist of not less than one (1) and not more than four (4) Directors, unless and until otherwise determined by the Company in General Meeting."

Huwa veru, kif tghid ir-rikorrenti, li klawsola 9 tal-Memorandum of Association jipprovdi li *"The legal and judicial representation of the Company shall be vested in any two (2) directors acting jointly."* Ir-rikorrenti pero` naqset li tikkwota t-tieni paragrafu tal-istess klawsola 9. Dan ikompli hekk: *"Or without prejudice to the aforesaid the legal and judicial representation of the company may be vested in any person or persons authorized by the Board of Directors from time to time to represent the Company for a specific purpose or in a specific case or cases or classes of cases, provided that no proceedings may be instituted without the Board`s authority."*

5. Klawsola 4 tal-Articles of Association taghmilha cara li d-diretturi nominati fl-istatut mar-registrazzjoni tal-kumpanija kellhom id-dritt jibqghu fil-kariga sal-mewt, sakemm jirtiraw, jew sakemm

jitnehhew skont il-ligi. Inoltre, l-istess klawsola tipprovdi li l-quorum biex jiltaqa` l-Bord tad-Direttur huwa direttur wiehed "as long as the directors shall be one in number."

6. *Ghalhekk l-istatut tal-Kumpanija stess jikkontempla sitwazzjoni fejn il-Bord tad-Diretturi jkun kompost minn direttur wiehed, f` kaz li, bhalma gara f` dan il-kaz, jispicca wiehed mid-diretturi originarjament mahtura ghal ghomorhom. Ma hemm xejn irregolari fit-tmexxija minn Bord b`direttur wiehed. Anke r-rapprezentanza tal-Kumpanija, bl-istatut taghha stess, tista` tigi fdata lil persuna wahda, jew aktar, awtorizzati mill-Bord. Fit-tmexxija tal-kumpanija u tan-negozju taghha, kollox sar u ghadu qed isir skont l-istatut u skont il-ligi.*

7. *Ghal kull buon fini u minghajr pregudizzju, l-esponenti tirrivela wkoll li ai termini tal-artikolu 141(3) tal-Att dwar il-Kumpaniji (Kap. 386), anke kieku r-rapprezentanza ta` kumpanija ma tistax tigi ezercitata skont il-memorandum tal-kumpanija, "kull direttur jista` jirrapprezenta l-kumpanija fi procedimenti gudizzjarji kontra taghha."*

It-Tmexxija tan-Negozju

8. *Matul iz-zmien li l-Bord tad-Diretturi kien kompost minn direttur wiehed ix-xoghol tal-kumpanija kien jikkonsisti principalment fl-ezekuzzjoni teknika tal-progetti ga maqbula u ma ttiehdu ebda decizjonijiet li jikkommettu lill-kumpanija f` xi progetti godda, jew f` xi pizijiet finanzjarji godda. Kienet ir-rikorrenti u l-azzjonisti taghha li ghall-kuntrarju, riedu jfittxu l-nteressi ta` terzi u taghhom stess b` mod li ma kienx necessarjament vantaggju ghall-esponenti. Min-naha tieghu, kif jidher mill-emails esebiti mir-rikorrenti, John Ciantar kien inkwetat dwar hlas ta` €300,000 li l-esponenti giet imgieghla thallas fuq allegazzjoni dwar infrazzjonijiet doganali li fil-verita` ma kellhiex x` taqsam maghhom direttament, izda ddahhlet fihom minghajr ftehim jew decizjoni taghha, mir-rikorrenti u/jew l-assocjati taghha. Dwar dan, John Ciantar ikun jista` jispjega ahjar jekk ikun il-kaz. Jinghad biss li*

John Ciantar irrifjuta li jinvolvi lill-esponenti f` responsabilitajiet li mhumieq taghha.

9. *F` kull kaz, anke matul iz-zmien li ilu direttur wahdu, John Ciantar qaghad attent li ma jaghmel xejn minghajr l-gharfien tar-rapprezentanti tar-rikorrenti u fittex il-kunsens tagghom, anke jekk ma kienx legalment mehtieg.*

F` kull kaz ukoll, kollox sar fl-interess tal-esponenti u l-azzjonisti kollha. Ma ttiehdu ebda decizjonijiet li dahhlu lill-esponenti f` obligazzjonijiet godda, u l-hidma tal-kumpanija kienet koncentrata esklussivament biex jitlestew il-progetti maqbula bejn kulhadd. Kollox sar skont il-ligi u fl-interess tal-esponenti.

Talba ghal hatra ta ` direttur

10. *Huwa veru li l-avukat tar-rikorrenti talab li jigi mahtur direttur fl-interess tar-rikorrenti. Sal-lum pero ` ghadha qatt ma saret talba formali skont il-ligi ghaz-zamma ta ` laqgha generali: f` dan ir-rigward, ir-rikorrenti la mxiet skont l-istatut u lanqas skont il-ligi. L-esponenti u d-direttur John Ciantar mxew ghal kollox fl-interess tal-kumpanija, in-negozju taghha u tal-membri kollha taghha minghajr distinzjoni. Hija bhalissa tinsab koncentrata esklussivament fit-tlestija tal-progetti ga ntraprizi bi qbil, minghajr skopijiet ulterjuri. Din il-Qorti m` ghandhiex tidhol hi fit-tmexxija tal-kumpanija, jew tassekonda lir-rikorrenti fl-iskopijiet taghha u tal-membri taghha.*

Tajjeb li jinghad li r-rikorrenti diga ` wriet ix-xewqa li ma tibqax imsiehba bhala membru tal-esponenti. Anke minhabba f` hekk, l-interessi taghha jmorru ` l hinn min-negozju attwali tal-esponenti.

11. *L-esponenti tirrileva wkoll li l-ewwel zewg talbiet tar-rikorrenti jindirizzaw lid-direttur John Ciantar personalment li mhuwiex*

imsejjah parti f` dawn il-proceduri u ghalhekk in kwantu diretti kontra tieghu dawn it-talbiet huma insostenibbli fil-konfront tal-esponenti.

12. *Ghaldaqstant, ghar-ragunijiet kollha fuq esposti u dawk kollha li jirrizultaw waqt it-trattazzjoni tal-kawza, l-esponenti titlob bir-rispett li din il-Qorti joghghobha tichad it-talbiet kollha tar-rikorrenti.*

Rat id-digriet li nghata fl-udjenza tas-26 ta` Gunju 2018 fejn inghad illi l-kawza kienet saret *ope legis* kompetenza ta` din il-Qorti u mhux aktar tal-Prim` Awla tal-Qorti Civili.

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

Rat illi l-kawza thalliet ghal provvedimenti ghal-lum.

Rat l-atti l-ohra tal-kawza.

II. Il-kawza

Ir-rikorrenti (`**Acep**`) ntavolat l-azzjoni odjerna abbazi tal-**Art 402 tal-Kap 386**.

Acep qeghda titlob il-hatra ta` direttur iehor wara r-rizenja ta` George Attard, ghaliex illum ghalkemm ir-rikorrenti ghandha 50% tal-ishma ta` l-intimata (`**Megasol**`) daqskemm ghandha Raeco Limited (`**Raeco**`) li hija l-azzjonista l-ohra ta` Megasol. Illum il-bord tad-diretturi mhuwiex kompost minn zewg persuni (kif kien qabel ir-rizenja ta` George Attard, b` kull persuna tirrifletti l-ghadd tal-ishma) izda minn John Ciantar **wahdu**, li huwa wkoll direttur ta` Raeco, u li ghandu f` idejh it-tmexxija u l-amministrazzjoni ta` Megasol.

Trid ukoll li tissejjah laqgħa generali ta` Megasol sabiex ikun indirizzat u risolt l-izbilanc ezistenti illum.

Acep tilmenta li bil-fatt li illum hija eskluza għal kollox mit-tmexxija ta` Megasol huwa ta` pregudizzju għaliha.

Acep ma tridx li John Ciantar jibqa` jiehu decizjonijiet wahdu.

Min-naha tagħha, Megasol tikkontendi li l-memorandum u l-articles of association (**M&A**) tagħha jippermetti li l-bord tad-diretturi jkun kompost minn persuna wahda. Il-hatra ta` aktar diretturi minn wiehed hija fid-diskrezzjoni tal-azzjonisti. Tghid li l-azzjoni saret sabiex tolqot lil John Ciantar li pero` ma kienx imharrek bhala parti fil-kawza.

III. L-istruttura ta` Megasol

Trid bilfors issir referenza għall-M&A.

Megasol għandha *authorised share capital* ta` "five hundred thousand Euro (€500,000) divided into five hundred thousand shares (500,000) Ordinary shares of €1 each." L-issued share capital huwa ta` "five hundred thousand Euro (€500,000) divided into five hundred thousand (500,000) Ordinary shares of €1 each allotted and 10% paid up."

L-azzjonisti huma Raeco għandha 50% tal-ishma u cioe` 250,000 -il sehem, Acep li wkoll għandha 50% tal-ishma u cioe` 250,000 -il sehem.

L-**Art 7** tal-memorandum ighid :

"The Company's affairs shall be entrusted to a Board of Directors which shall consist of not less than one (1) and not more than four (4) Directors, unless and until otherwise determined by the Company in General Meetings."

Id-diretturi huma mahtura sabiex jibqghu *"in office indefinitely or until such time as they resign or are removed"*. L-ewwel diretturi kienu John Ciantar u George Attard. Illum l-uniku direttur huwa John Ciantar wara r-rizenja ta' George Attard.

L-**Art 9** tal-memorandum jistabilixxi li r-rapprezentanza legali u gudizzjarji ta' Megasol hija vestita *"in any two (2) directors acting jointly"* pero` jinghad ukoll : *"without prejudice to the aforesaid the legal and judicial representation of the company may be vested in any person or persons authorised by the Board of Directors from time to time to represent the Company for a specific purpose or in a specific case or cases or classes of cases, provided that no proceedings may be instituted without the Board's authority."*

Il-**Clause 4** tal-articles (Board of Directors and Management of the Company) ighid illi ...

"ii. The directors of the company shall serve without retirement until death or until they shall retire or be removed in accordance with section 140 of the Act or the provisions of the Memorandum of Association.

iii. The quorum necessary for the transaction of business at the Board of Directors shall be one director, as long as the directors shall be one in number. ..."

IV. Xiehda

Kenneth Attard u **George Attard** xehdu illi huma diretturi ta` Attard Services Limited ("**ASL**") li fost xoghol iehor ghandha interess fil-qasam tal-enerġija alternattiva u ghalhekk tfittex persuni ohra biex tidhol magghom taghmel negozju f` dak il-qasam.

Charles Cordina xehed illi Comerco Services Ltd ("**Comerco**") u ASL dahlu ghal proġett għall-istallazzjoni ta` pannelli fotovoltajici fuq il-bjut tal-irziezet. Fil-kors ta` diskussjonijiet dwar finanzjament tal-proġett mill-bank, kien suggeritt li dan in-negozju jkun jinvolvi li xi hadd tekniku. Acep li hija fformata minn ASL u Comerco kienet diga` qeghda tiehu hsieb ta` zewg proġetti f`dan il-qasam, fejn kienet qeghda tikkopera fin-negozju ma` Comerco. Huwa ppropona lil Raeco bhala siehba potenzjali fi proġetti ohra. Billi Raeco tappartjeni lil John Ciantar, saru diversi laqgħat mieghu. Min-naha ta` Raeco din diga` kienet qed tiehu hsieb il-proġett tal-Medavia. Sar ftehim. Megasol kienet diga` kostitwita izda ma kenitx topera. Kienet kollha kemm propjeta` ta` Reaco. Kien deciz illi minflok issir kumpannija gdida, Megasol tibda tahdem u tkun isservi sabiex jigu nkorporati fiha l-proġetti kollha. Ghalhekk Acep akkwistat nofs l-ishma f` Megasol minghand Raeco. L-intiza kienet li kull azzjonista jipproponi direttur. Fil-fatt id-diretturi kienu John Ciantar min-naha ta` Reaco u George Attard min-naha ta` Acep.

Kenneth Attard xehed illi r-rwol tieghu kien illi jinnegozja self mal-banek għat-tliet proġetti li kienu ntegrati fr` Megasol u cioe` Santa Rita, Neg Neg u Medavia. Is-self wasal minghand Banif Bank (Malta) plc.

George Attard xehed illi Megasol qeghda tahdem biss fuq dawk it-tliet proġetti. L-investment huwa ta` €2,000,000.

Id-dizgwid kollu jidher illi nqala` bir-rizenja ta` George Attard mill-bord tad-diretturi ta` Megasol.

L-ahwa Attard jghidu illi John Ciantar beda jirrifjuta minghajr raguni li ssir laqgħa generali ta` Megasol sabiex jinhatar direttur iehor. Il-konsegwenza ta` dan kienet illi lllum Megasol qegħda titmexxa minn Ciantar wahdu u Acep m` għandhiex vuci minkejja li għandha 50% tal-ishma.

Charles Cordina xehed illi dak l-istat ta` fatt jippregudika lil Acep.

Kenneth Attard xehed ukoll li dak l-istat ta` fatt kien imur kontra kull aspettattiva legittima ta` Acep.

Kenneth Attard u George Attard xehdu wkoll illi s-sitwazzjoni attwali ma tirispettax il-ftehim li kien intlahaq bejn l-azzjonisti meta bdew in-negozju tagħhom flimkien. Is-sitwazzjoni qegħda tissarraf fi pregudizzju reputazzjonali u finanzjarju serju għal Acep li għalkemm bla direttur għadha qegħda tissoddisfa l-obbligi kollha li għandha f` Megasol.

Kenneth Attard saħaq li l-pozizzjoni li ha Ciantar tagħmel anqas sens meta wiehed iqis illi fuq livell personali l-partijiet baqghu jitmellmu bħal li kieku ma gara xejn.

Fil-kontrozami Kenneth Attard xehed li li għalkemm ma Ciantar ma hemmx glied, lanqas hemm qbil. Bejniethom jitmellmu dwar kollox inkluz xogħol, u generalment jaqblu dwar id-direzzjoni kif għandhom jimxu. Hemm imbagħad diversi kwistjonijiet, fosthom il-kwistjoni tad-direttur li dwarha ma setghux jaslu fi ftehim u li wasslet biex saret din il-kawza.

Xehed illi l-pregudizzju li qed iggarab Acep huwa fir-rigward tat-tmexxija tal-progetti li Acep ma tistax tara fejn waslu u x` qegħdin irendu. Hemm nuqqas ta` *accounts* u ta` *verifiki tal-accounts* mill-

awdituri. Dan holoq incertezza. Bhalissa kollox qieghed f` idejn Ciantar. Acep thalliet minghajr mizura ta` kontroll fuq it-tmexxija ta` Megasol.

Stqarr illi mill-informazzjoni li ghandu jidher illi l-progett tal-Medavia issa huwa *connected* u qieghed jipproduci. Hemm progett iehor li jinsab fi stadju avanzat ta` *connection*. Imbaghad hemm progett iehor li ghadu lura.

Fisser li l-*accountant* ta` Megasol huwa Alex Bonello, li huwa wkoll l-*accountant* ta` ASL. Dan gibed l-attenzjoni illi kien hemm xi entrati fl-*accounts* li ma kienux cari jew li ma kienux korretti.

Kompla jghid illi ghalkemm ma` Ciantar ippruvaw kemm setghu li jikkoperaw, kien hemm hwejjeg li kienu joholqu thassib. Kemm ilu li huh George Attard irrizenja u Ciantar spicca direttur wahdu, l-*accounts* ma gewx approvati. Sett ta` *accounts* gew ippreparati mill-*accountant* u ghaddew ghand l-awditur ghall-verifika. Dwar dan is-sett ta` *accounts* hemm dizgwid ghaliex Acep mhix konvinta li l-figuri li jidhru huma korretti. Meta l-*accounts* marru lura minghand l-awditur, baqghu ma gewx iffirmati minn Ciantar. Lanqas ma kienu prezentati lil-laqgha generali. Minn mindu huh irrizenja minn direttur qatt ma saru laqghat generali.

Ikkonferma illi l-kwistjoni principali fejn ma hemmx qbil fl-*accounts* hija dwar ammont ta` €380,000 fil-kaz ta` pannelli. Dwar din il-kwistjoni hemm kawza separata mad-Dwana. Fil-kuntest ta` dawn il-proceduri saru affidavits inkluz dak ta` John Ciantar. Iltaqghu wkoll ghand l-Av Edward Debono. Prezenti kien hemm hu, George Attard, Caroline Curmi, John Ciantar u Charles Cortis. Dak il-hin kulhadd qal il-bicca tieghu u ttiehdet nota ta` kollox. Wara kull wiehed minnhom ircieva kopja elettronika tal-affidavit tieghu sabiex jikkonferma kienx jaqbel mal-kontenut. Gara illi meta ra l-affidavit tieghu Ciantar ma riedx jiffirma. Fl-affidavit ta` Ciantar kien hemm miktub illi l-pannelli kienu mportati f` isem Megasol ; Ciantar ma kienx accetta li dak kien il-kaz u ghalhekk ma riedx jiffirma l-affidavit.

Zied jghid illi oltre din il-kwistjoni tal-pannelli, kien hemm kwistjonijiet ohra li, ghalkemm zghar, meta kollox jinghadd f`daqqa jnissel thassib.

Fil-kontroezami xehed illi hu rrienza minn direttur ta` Megasol principalment ghal ragunijiet ta` sahha. Ma` Ciantar ma kellux kwistjonijiet ghalkemm kien hemm *ups and downs*.

Dwar il-kwistjoni tal-pannelli stqarr illi dawn akkwistati minn Camerco sabiex jigu installati fl-irziezet. Gara li meta waslu Malta nqalghet kwistjoni ta` dazju. Dak iz-zmien li nqalghet din il-kwistjoni huwa kien ghadu direttur.

Kompla jixhed illi waslu numru ta` *containers* bil-pannelli. Dawn kienu nextraw minn Camerco li kienet imsiehba fin-negozju ma` Acep. Inhattu zewg *containers*. Meta gew biex jinhattu l-bqija, kien deciz min-naha tad-Dwana li ssir spezzjoni. Huwa ha lill-ufficjali tad-Dwana *on site* fl-irziezet fejn kienet se ssir l-installazzjoni. Dak il-hin stess l-ufficjali tad-Dwana taw ordni biex il-pannelli jittiehdu lura d-Dwana. Skont l-ufficjali tad-Dwana il-problema kienet tinsab fil-fatt illi l-isem fuq il-pannelli ma kienx l-istess wiehed ta` fuq l-*invoice*. Kien hemm ukoll kwistjoni dwar *dumping*.

Jinsisti li d-Dwana ma kellhiex ragun ghaliex isem wiehed kien it-*trademark* u l-iehor l-isem tal-fornitur. Dwar din il-kwistjoni hemm proceduri pendent fil-qorti.

Stqarr illi dwar il-pannelli Comerco hadet hsieb il-kuntratti mal-fornitur kif ukoll l-importazzjoni. Saru wkoll dikjarazzjonijiet mad-Dwana min-naha ta` Comerco kif ukoll da parti tal-fornitur fis-sens illi d-*dumping laws* ma kienux japplikaw fil-kaz.

Zied jghid illi meta Comercio marret bid-dokumenti d-Dwana u dawn kienu registrati fis-sistema tad-Dwana, din osservat illi ladarba l-pannelli kienu sejrin ghand Megasol, kellhom jiddahhlu fuq Megasol. Ghalhekk gie li Comercio gabet il-pannelli fuq Megasol. Il-kunsens sabiex dan seta` jsir kien inghata mid-diretturi ta` Megasol.

Spjega illi madwar sena u nofs qabel ma sar il-progett, id-diretturi flimkien kienu ddecidew illi jimpurtaw l-affarijiet necessarji. B` dan l-arrangament Raeco kienet ser timporta affarijiet illi kienu ser jintuzaw minn Acep u vice versa. Acep inkarigat lil Comercio biex tiehu hsieb ix-xiri tal-prodotti. Il-ftehim dwar dan kien car. Id-direzzjoni li nghatat Comercio biex timporta l-materjal fuq Megasol kienet gejjja minn direttur ta` Acep.

Kompla fisser illi min-naha tieghu Ciantar ma kienx accetta li kellu jidhol responsabbli ghad-dazju u multa tal-*anti-dumping* relattiva ghall-importazzjoni tal-pannelli. Huwa assikurat lil Ciantar li dak li gara kien kollu tort tad-Dwana u li Megasol ma kinitx ser tehel multi. Sena wara huwa ffirmat dokument li ghaddielu Ciantar fejn huwa ta garanzija li Megasol ma kinitx ser tehel multi. Kien hemm qbil li l-importazzjoni u l-istallazzjoni tal-pannelli fuq l-irziezet kienet responsabbilita` ta` Comercio. Megasol issemmiet unikament bhala l-kumpanija li kienet qed timporta l-pannelli ; ghalhekk Megasol ma kelliex tkun responsabbli ghall-hlas ta` dazju, spejjez legali u kwalsiasi spiza ohra. L-ispejjez kellhom jibqghu responsabilita` ta` ASL, Comercio u JanJin Science and Technology Company Limited. Da parti taghha Megasol kellha taghmel l-almu taghha biex tikseb soluzzjoni favorevoli.

Qal ukoll li ghalkemm fil-bidu accetta l-arrangament u ffirmat, ffit wara bidel il-hsieb u informa lil Ciantar illi ried jirtira l-kunsens tieghu. Kien pero` tard wisq ghaliex Ciantar kien diga` baghat id-dokumentazzjoni lill-bank.

John Ciantar xehed illi originarjament kien is-sid ta` Megasol. Kien diga` fin-negozju tal-energija alternattiva. Ried ikabbar in-negozju u ghalhekk kellu bzonn l-ghajnuna biex jidhol ghal progetti akbar. Kien avviciat minn George Attard ghan-nom ta` ASL u dahal fin-negozju magghom. Ghalhekk biegh nofs l-ishma illi kellu f` Megasol lil Acep. Illum Megasol hija ffurmata minn Acep u Raeco f` ishma ndaqs bejniethom. Megasol kellha zewg diretturi li kienu hu u George Attard. Dan tal-ahhar in segwitu rrienza.

Kompla jixhed illi Megasol kienet ser tiehu hsieb tlett progetti. Wiehed minnhom kien il-progett tal-Medavia li ghalih dahal responsabbli hu tramite l-kumpannija Recowatt li taghha huwa *s-sole owner*. Megasol dahlet ghal dan il-progett u tat inkariku lil Recowatt sabiex tipprovdi u tistalla l-pannelli, kif ukoll illi tixghel l-impjant. Imbaghad kien hemm zewg progetti ohra – Santa Rita u Neg Neg - li ghalihom kienet ikkommissjonata Comerco sabiex taghmel l-istallazzjoni tal-pannelli. Il-ftehim dwar il-kummissjoni tal-progetti lil Recowatt u lil Comerco sar bil-fomm.

Stqarr illi meta beda n-negozju ta` Megasol, it-tlett progetti kienu diga mexjin separatament. Megasol kellha tagixxi bhala *Energy Performance Company*. Kellha tqabbad kumpanniji ohra sabiex iwettqu l-progett, imbaghad hija kellha tamministra l-progetti biex tiggera u tbiegh l-energija generata.

Kompla stqarr illi meta beda dan in-negozju, hu u George Attard kienu jikkomunikaw hafna flimkien b` *e-mails, telephone* u anke wicc imb wicc. Kienu wkoll jinzammu laqghat formali u jsir *updating* regolari tax-xoghol. Il-bicca l-kbira tad-drabi l-laqghat kienu jkunu nformali bejn iz-zewg diretturi ta` Megasol. Darba biss inzammet laqgha formali tal-bord ; f` dik il-laqgha kienu nzammu l-minuti.

Xehed illi fil-progett tal-Medavia, kienet Recowatt illi mpurtat il-pannelli f` isimha. Dan il-progett huwa ffinalizzat u qieghed jiggenera. Il-progett li kien ikkontrattat lil Comercio waqa` lura fiz-zmien ghaliex kien hemm anomaliji mal-Enemalta u kwistjonijiet ohra indipendenti mill-partijiet. Fl-ambitu ta` dan il-progett kien hemm ukoll kwistjoni dwar l-importazzjoni tal-pannelli u hlas tad-dwana fuqhom fl-ammont ta` €300,000. F` dan il-kaz kienet imposta multa *anti-dumping* li kienet tammonta ghal madwar 53% tal-valur tal-pannelli. Spjega illi dan jigri ghaliex meta l-importazzjoni tkun saret mic-Cina, l-Unjoni Ewropea tintervjeni u timponi taxxa sabiex tassikura kompetizzjoni gusta. Fil-process tal-importazzjoni ntuza l-isem Megasol. Dan kien mifhum li jfisser li l-importatur kienet Megasol. Pero` qatt ma kien hemm qbil bejn id-diretturi li Megasol kellha tidher bhala l-importatur dirett. Megasol kellha semplicement tircievi l-materjal minghajr ma tidhol fi kwistjonijiet ohra. Megasol spiccat esposta ghall-hlas ta` dazju eccessiv. Dwar din il-kwistjoni ghad hemm proceduri gudizzjarji pendententi bejn Megasol u d-Dwana.

Kompla jixhed li huwa ma jaccettax illi d-dazju kellha thallas ghalih Megasol. Lanqas kunsens da parti tieghu ma kien hemm sabiex l-importazzjoni ssir fuq Megasol. George Attard kien serrahlu rasu illi Megasol ma kinitx ser tbat xi konsegwenza mid-Dwana. Fisser illi billi d-diretturi ta` Megasol kienu hu u George Attard huwa ried li ssir skrittura bejniethom fis-sens illi bhala diretturi kienu qeghdin jaqblu li Megasol ma kelliex x` taqsam ma` hlasijiet lid-Dwana. L-iskrittura saret u kienet maqbula waqt laqgħa tal-bord tad-diretturi. In segwitu għal din il-laqgħa, huwa siefer u wara li wasal lura sab li George Attard kien irrizenja minn direttur ta` Megasol. Gara bhala fatt illi Acep harget il-flus biex thallas id-dazju u b` hekk kienu rilaxxjati l-pannelli. Effett ta` dak il-pagament, il-progett seta` jkompli. Megasol ma harget xejn mill-flus li thallsu bhala dazju.

Dwar il-progetti tal-irziezet xehed illi l-pannelli kienu nstallati u kienu qeghdin fil-process li ssir il-konnessjoni. Ghalkemm kien hemm diffikultajiet dwar min kellu jagħmel xi xogħolijiet, il-progetti mxew xorta. Min-naha tieghu għamel li seta` sabiex il-progett jingħalaq tajjeb ukoll.

Kompla jixhed illi wara li George Attard ma baqax direttur ta` Megasol, Acep ressqet talba sabiex jinhatar direttur iehor minflok George Attard. Kien propost l-Av. Dr. Peter Fenech.

Stqarr illi t-talba ta` Acep kienet respinta ghaliex kien tal-fehma li Acep seta` kellha nteressi li jmorru kontra dawk ta` Megasol.

Zied jixhed illi huwa dejjem mexa mal-istatut ta` Megasol u zamm lil Acep informata dwar kollox.

Ried ikun cert illi l-proposta ta` Acep kienet genwina u mhux wahda li tisfratta l-progett.

Qal li meta beda jitlob certa nformazzjoni din bdiet iddum ma tasal inkella r-risposta kienet tkun negattiva.

Ikompli jixhed li minhabba dan beda jkun diffidenti fis-sens illi bdew gejjin certa dubji u ried jimxi b`kawtela specjalment meta l-progett kien wasal fil-fazi finali tieghu.

Bdew jinqalghu ukoll diffikultajiet ta` natura teknika u dwar min kellu jaghmel certu xoghol tekniku.

Acep bdiet tinsisti li bhala kuntrattur ghat-thaffir tat-trinek kellu jitqabba Polidano. Huwa ried li ladarba kien hemm kuntrattur imqabba mill-Enemalta kellu jibqa` miexi hu bix-xoghol sabiex ma jintilifx zmien. Acep kellha tirkupra flus minghand Polidano. Finalment ix-xogholijiet saru mill-kuntrattur tal-Enemalta.

Spjega illi wara li saru numru ta` laqghat informali kien deciz illi jinghalaq il-progett tal-irziezet u n-negozju jieqaf hemm.

Fisser li Megasol kellha zewg ghazliet : i) thalli l-progetti mexjin wahedhom ghaliex dawn ladarba mqabbdin, kienu joperaw wahedhom, jiggeneraw l-energija u l-Enemalta thallas tal-energija generata ; ii) inkella tasal ghal qbil sabiex il-progetti jinbieghu lil terzi. Fil-kaz tal-ewwel possibilita` Megasol kienet sejra tkun qeghda taghti *servicing agreement*. Il-progetti kienu kollha assi ta` Megasol.

Xehed li skont l-M&A Megasol setghet timxi b` direttur wiehed. Wara r-rizenja ta` George Attard, xehed illi ma ha ebda decizjoni ghan-nom ta` Megasol. Kompla biss iwettaq il-progetti u ghalhekk ha biss decizjonijiet dwar l-operat ta` l-kumpannija. Ma hax decizjonijiet dwar tmexxija tant illi la dahal f`negozjati ma` terzi u lanqas ma taha struzzjonijiet lill-bank biex iwettqu xi negozju gdid. Lanqas ma saru *reviews* tas-self li Megasol kienet hadet mill-bank. Peress illi Megasol hija fformata minn zewg kumpanniji, it-transazzjonijiet bankarji jridu jsiru bil-kunsens taz-zewg diretturi u cioe` direttur ghal kull wahda miz-zewg kumpanniji rapprezentati f`Megasol. Kien hemm tranzazzjoni dwar ix-xiri ta` *transformer* li kien diga` hemm qbil dwaru. Megasol kellha tixtri dan l-apparat minghand Raeco. Li gara kien illi Raeco awtorizzat il-pagament u l-bank qabad u awtorizza l-pagament minghajr il-kunsens ta` Acep. Kif Acep issenjalaw dan l-izball, it-transazzjoni giet *reversed*. Sahaq li l-pagament sar unikament minhabba zball tal-bank.

Spjega illi l-ftehim originali kien illi kemm Acep kif ukoll Raeco kellu jkollhom rapprezentanza ta` direttur kull wiehed fuq il-bord ta` Megasol. Wara r-rizenja ta` George Attard la ssejjhu u anqas saru laqghat generali. Laqgha generali kienet ghadha ma ssejhitx ghaliex l-*accounts* ma kienux ghadhom finalizzati. L-*accountant*, inkarigat minn Acep, kien ghadu ghaddej bix-xoghol biex jaghlaq l-*accounts*. Fisser li kien hemm ukoll nuqqas ta` qbil dwar l-*accounts*. Meta jinghalqu l-*accounts*, dawn se jghaddu ghandu bhala direttur ta` Megasol ghall-*approvazzjoni*. Pero` qal mill-ewwel li fl-*accounts* kien ser ikun hemm informazzjoni li ma kenitx korretta, u ghalhekk ma kienx ser japprova l-

accounts. Ikkonferma illi l-intenzjoni tieghu hija li wara li jigu pprezentati l-*accounts* u ssir il-korrezzjoni ta' informazzjoni li se jkun hemm go fihom, allura hemm tissejjah laqgħa generali.

Xehed illi huwa jinsab ukoll inkwetat dwar il-fatt illi l-istallatur u l-fornitur tal-pannelli beda jikkommetti ruhu verbalment mal-bdiewa dwar xogħolijiet illi kienu ser isiru. Dan sar minn wara dahru. Dawn il-*commitments* saru kemm meta Megasol kellha zewg diretturi kif ukoll meta spicca direttur hu wahdu.

Fil-kontroezami xehed illi meta dahlet Acep fin-negozju, huwa diga` kelli *letter of intent* iffimata mid-direttur ta` Medavia u *sanction letter* mill-bank dwar il-finanzjament tal-progett. Ghall-ahhar laqgħat li saru ma` d-direttur ta` Medavia attenda wkoll George Attard. Il-kuntratt ma` Medavia kien iffirmat fil-prezenza ta` George Attard.

Xehed illi fil-kuntratt ma` Medavia, Recowatt kienet ser tbiegh il-materjal bhala pannelli, tbiegh is-servizz u tinstalla l-impjant. Dan l-impjant kollu kien importat minn Recowatt. Meta tlesta l-progett Megasol bdiet tiehu l-profitti billi l-energija generata bdiet tghaddi għand l-Enemalta u din thallas lil Megasol. Hija Megasol illi għandha relazzjoni mal-Enemalta. L-istess sar fir-rigward tal-progetti l-oħra li saru minn Acep bil-profitti jmorru għand Megasol.

Spjega illi ma kenitx il-kwistjoni mad-Dwana li tefgħet il-progett lura.

Stqarr illi huwa qatt ma ried jispicca direttur wahdu fit-tmexxija ta` Megasol. Gara x` gara dejjem ikkonsulta ma` Megasol.

Dwar l-*accounts* ikkonferma illi kien hemm zewg punti li qua direttur ma qabilx magħhom u talab kjarifika. L-ewwel punt kien dwar l-*anti-dumping duty* illi għalkemm kulhadd edott minnha, ma kellhiex

tkun riflessa fl-accounts ta` Megasol. It-tieni punt kien illi hemm stock ta` apparat li jidher fl-accounts ta` Megasol meta dak huwa apparat ta` Acep u Comercio. Ladarba Megasol kienet sejra tieqaf topera, dak l-stock ma kellux ikun rifless fl-accounts taghha. Kienu tlestew *provisional accounts* fil-kuntest ta` possibbli akkwizzjoni tal-kumpanija minn terzi.

Stqarr illi huwa baqa` xxukkjat bir-rizenja ta` George Attard minn direttur. Wara dik ir-rizenja huwa ried iqis il-posizzjoni tieghu sewwa. Ried imexxi l-progetti sal-ahhar. Il-kwistjoni mad-Dwana kienet ta` inkwriet ghaliex Megasol spiccat b`dejn ta` €300,000, anke jekk il-kwistjoni kienet ghadha pendenti fil-qorti. L-ammont kollu tad-dazju thallas minn ASL u ghalhekk kien hemm il-biza` li din titlob rimbors.

Xehed illi l-bank kien edott mill-fatt illi huwa kien l-uniku direttur.

Qal li bejn l-azzjonisti illum hemm relazzjoni strettament professjonali fejn jitkellmu bil-ghan li jmexxu u jiffinalizzaw il-progetti.

Dwar il-ftehim li kien iffirmit bejn id-diretturi ta` Megasol dwar id-dazju, stqarr illi effettivament kienu saru tlett arrangamenti. Dak bejn id-diretturi, iehor bejn ASL u Megasol dwar il-hlas tad-dazju minn ASL sabiex jigu rilaxxjati l-pannelli, u iehor bejn ASL u Comercio sabiex jekk il-qorti tikkonferma illi d-dazju huwa dovut, allura Comercio tkun taqla` l-pannelli, tohodhom lura u tinstalla ohrajn godda.

V. L-Art 402 tal-Kap 386

Ir-rikorrenti tibbaza l-azzjoni odjerna fuq l-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 omissjoni 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-kumpannija ; jew*

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

(g) *ixolji l-kumpannija u jipprovd i għall-istralc konsegwenzjali tagħha.*

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

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

Għalkemm id-dicitura tal-Art 402(1) ittiedet testwalment minn disposizzjoni simili li tirrizulta fil-Companies Act ta` New Zealand, tajjeb jinghad illi l-ligi ta` New Zealand segwiet l-izvilupp legislattiv tar-Renju Unit. Fir-Renju Unit, id-disposizzjoni li kienet tirregola l-*unfair prejudice action* fil-Companies Act 1985 kienet Sec 459. Meta saret il-Companies Act 2006, l-azzjoni bdiet tigi regolata b` Sec 994(1) fis-sens illi Sec 459 thassret għal 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. Fil-kaz tal-lum, ghalkemm ma ndikatx b` mod specifiku, minn qari tal-kawzali u tat-talbiet, jidher illi r-rimedju li r-rikorrenti qeghda tipprospetta jinkwadra ruhu fis-subparagrafu (a) tas-subartikolu (3).

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 jipprovd i s-subartikolu (1) huwa pregudizzjali ghall-prosegwiment tal-azzjoni.

VI. 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 il-Prim`Awla tal-Qorti Civili 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."

VII. Il-legittimu kontradittur

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

Fil-pag. 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.

Fil-kaz odjern, l-azzjoni kienet istitwita kontra Megasol wahedha. L-azzjoni setghet tkun intavolata b`dak il-mod ghaliex tirrifletti l-finalita` tal-istanza, fis-sens illi jekk issir il-prova ta` dak li jrid is-

subartikolu (1), dak li trid tikseb ir-rikorrenti huwa li tkun regolata t-tmexxija ta` Megasol billi l-bord tad-diretturi ma jkunx kompost minn direttur wiehed kif inhi s-sitwazzjoni llum, izda jinhatar it-tieni direttur sabiex it-tmexxija tal-kumpannija tkun kollegjali bil-partecipazzjoni taz-zewg azzjonisti ta` Megasol, kif kienet qabel ir-rizenja ta` George Attard.

VIII. 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 omissjoni 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 omissjoni tal-kumpannija.

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

... l-Artikolu 402 ta` l-Att dwar il-kumpaniji jaghti diskrezzjoni pjuttost wiesa` lill-Qrati u dan ghaliex dawn il-provvedimenti ghandhom l-

ghan li jissalvagwardjaw u jiprotegu lill-azzjonisti ta' socjeta' kummercjali, partikolarment lil dawk li huma minoritarji u li ghalhekk qeghdin fl-impossibilita' li jirregolaw il-mod li bih tkun qed titmexxa s-socjeta' li fiha huma jkollhom interess

...

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

...

Fid-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

I-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-iment tal-azzjonista hu sewwa bbazat u jekk il-Qorti thoss li huwa ekwu u gust li taghmel.

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

... Fil-ligi Ingliza (ara Art 459 tal-Companies Act, 1985) jinstab rimedju simili li hu maghruf bhala "The Unfair Prejudice Remedy". Il-Qorti ta` l-Appell Ingliza stabbiliet fil-kaz "**in Re Saul D. Harrison & Sons plc** ([1995]) 1BCLC 14)" il-linji ta` gwida dwar kif kellu jkun l-operat biex ikun jista` jigi kkwalifikat bhala, "unfairly prejudicial" (fit-test tal-Ligi Maltija din il-frazi hi tradotta "b` mod mhux gust ta` pregudizzju"). Wiehed kellu, fl-ewwel lok, jara jekk dak l-operat kienx jew le skond l-istatut tal-kumpanija. Izda fl-applikazzjoni tal-imsemmija dispozizzjoni - ispirata fuq principji ta` ekwita` aktar milli minn drittijiet strettament legali - il-Qorti tiehu in konsiderazzjoni l-aspettattivi legittimi ("legitimate expectations") li r-rikorrent jista` jkollu u li sikwiet ikunu ferm aktar wiesgha mid-drittijiet strettament legali li johorgu mill-istatut ta-ssocjeta`. Dawn l-aspettattivi legittimi 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 partnerhsips", 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' l-Prim`Awla tal-Qorti Civili moghtija fis-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 provvedimenti oħra mogħtija mill-Prim`Awla tal-Qorti Civili fosthom : **Paul Buhagiar Company Limited vs Paul & Rocco (Gzira) Limited** [28 ta` Settembru 2017] ; **Haake Torsten pro et noe vs SOS It Business GmbH et** [28 ta` Settembru 2017] ; **B.C Investments Limited vs Bag Investments Co Ltd et** [30 ta` Marzu 2017] ; u **Joseph Busuttil et vs Suzanne Busuttil et** [30 ta` Marzu 2017])

2. Dottrina

Fil-pag. 449 ta` **Farrar`s Company Law** (Fourth Edition) jingħad 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. 464 tat-Third Edition ta` **Ferrar`s Company Law** jinghad
illi :-

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

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

" ... the courts recognised that sec 994 protects expectations and not just rights. Borrowing from public law, it is sometimes said that the section protects the "legitimate expectations" of the petitioner, though more recently the courts have preferred the private law phrase "equitable considerations" [Qorti tal-Appell Ingliza fil-

kawza "**Saul D Harrison & Sons plc**" – 1995 – għall-uzu tal-frazi "legitimate expectations" ; House of Lords – "**O`Neill vs Phillips**" – 1999 – għall-uzu tal-frazi "equitable considerations")
Whatever the language used, the difficult issue is to distinguish those expectations of the petitioner which are to be classified as "legitimate" or which considerations are to fall within the category of "equitable considerations" and so as deserving of legal recognition and protection from those expectations which the petitioner may harbour as a matter of fact but which the courts will not protect."

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

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

Ikomplu billi jagħmlu riferenza għal "**O`Neill vs Phillips**" (op. cit.) in partikolari dwar l-għazla li għamel il-Parlament Ingliż –

"Parliament 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).

Tajjeb 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.

Fis-sostanza, l-ilmenti tar-rikorrenti kienu dawn :-

a) It-tehid ta` decizjonijiet b` mod unilaterali

Mhuwix kontestat li l-*memorandum* ta` Megasol jippermetti li l-bord tad-diretturi jkun kompost anke minn direttur wiehed biss.

L-ilment ta` Acep huwa li wara li John Ciantar baqa` wahdu direttur ta` Megasol huwa ha decizjonijiet unilaterali fit-tmexxija tal-affarijiet tal-kumpannija li huma ta` pregudizzju ghaliha bhala azzjonista skont l-Art 402(1) tal-Kap 386.

L-Art 136A(1) tal-Kap 386 iqieghed fuq l-ispallejn kull direttur l-obbligu "*li jagixxi b`onestà u bona fide fl-aħjar interessi tal-kumpannija*".

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

Fil-kaz ta' **Howard v Herrigel** [1991(2) SA 660(A)] 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."

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 conflict 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.

Dan premiss, tajjeb jinghad illi Ciantar jilqa` ghall-ilment ta` Acep billi jghid illi ghalkemm huwa l-uniku direttur ta` Megasol il-kompitu tieghu qed ikun li jmexxi l-progetti diga` operattivi, u li jiffinalizza dawk li ghadhom mhux kompletati. Ighid ukoll li ghalkemm huwa *sole director* dejjem izomm lil Acep infurmata bil-hidma tieghu, u anke jikkonsultaha.

Ciantar iggustifika l-kondotta tieghu li jkompli ghaddej wahdu bhala direttur minhabba li skont hu certi atti li saru minn Comercio qua membru ta` Acep qanqlu thassib. Deherlu illi Acep setghet kienet qeghda timxi b`mod illi jmur kontra l-interessi ta` Megasol. Ghalhekk iddecieda li jkun ahjar fic-cirkostanzi li jmexxi wahdu sakemm iwassal il-progetti kollha li jkunu operattivi.

Il-Qorti qieset b`reqqa l-provi akkwiziti.

Ma jirrizultax illi b`Ciantar wahdu bhala direttur Megasol hadet decizjonijiet dwar progetti godda jew ta` tmexxija. Jidher li komplet bl-ezekuzzjoni ta` l-impenn illi hadet ghat-twettiq tal-progetti. Dwar pagamenti jew operazzjonijiet bankarji, ma jidher li nbidel xejn ghaliex ghalkemm kien hemm direttur wiehed l-awtorizzazzjoni tar-rikorrenti baqghet mehtiega.

Ir-rikorrenti twessa` l-ilment taghha billi tinkludi l-kwistjoni ta` l-accounts ta` Megasol.

Jirrizulta li l-accounts ghadhom mhux maghluqa minhabba dizgwid dwar entrati, b`mod partikolari l-kwistjoni tal-*anti-dumping duty* li biha kienet akkollata Megasol mid-Dipartiment tad-Dwana, liema kwistjoni hija mertu ta` proceduri gudizzjarji.

Il-Qorti ma ssibx li fil-kumpless l-ilment huwa misthoqq ghaliex ir-rikorrenti ma rressqitx provi sodisfacjenti li juru li t-tmexxija ta` Megasol hadet decizjonijiet unilaterali li ppregudikaw id-drittijiet tar-rikorrenti bil-mod u manjiera li ma jridx l-Art 402(1) tal-Kap 386.

b) In-nuqqas li tissejjah laqgħa generali għall-hatra ta` direttur iehor wara r-rizenja ta` George Attard

Wara li l-kumpless tal-provi jitqieghed fil-kuntest tieghu, m`ghandux ikun hemm dubju li l-kwistjoni kollha li wasslet biex saret din il-kawza kien il-fatt li wara r-rizenja ta` George Attard ma kienx mahtur direttur iehor li jiehu postu.

L-ilment tar-rikorrenti huwa li sa minn meta kienet kostitwita, Megasol dejjem kellha zewg diretturi : John Ciantar propost mill-azzjonista Raeco u accettat mill-azzjonista l-oħra Acep ; u George Attard propost mill-azzjonista Acep u accettat mill-azzjonista l-oħra Raeco. Iz-zewg azzjonisti għandhom l-istess għadd ta` ishma f`Megasol. Bir-rizenja ta` George Attard minn direttur għal ragunijiet ta` sahha (fatt mhux kontestat) baqgħet ma saritx il-hatra ta` direttur iehor ghaliex baqgħet ma ssejhitx laqgħa generali tal-azzjonisti. Mill-mod kif kif huma mfassla l-*articles of association* biex tissejjah il-laqgħa generali hija mehtiega l-adezzjoni ta` Raeco li hija kontrollata minn Ciantar.

Saret il-prova illi Acep rressqet it-talba tagħha sabiex issir il-laqgħa generali għall-hatra tat-tieni direttur diversi drabi. Ciantar ikkonferma illi kienet decizjoni tieghu li ma tkunx akkolta t-talba tar-rikorrenti għar-ragunijiet li kienbu accennati aktar kmieni. Isostni wkoll li l-laqgħa generali baqgħet ma saritx ghaliex kellu rizervi dwar l-*accounts* ta` Megasol li jekk ma kienux sejrin korretti kienu sejrin isibu l-opposizzjoni tieghu fis-sens li ma kienx ser jiffirmahom bhala direttur biex imorru quddiem il-laqgħa generali.

Minn ezami tal-atti jidher illi r-rikorrenti qeghda tressaq l-ilment taghha f` mument meta l-pozizzjoni taghha qua azzjonista ta` Megasol tista` tkun serjament pregudikata.

L-ilment tar-rikorrenti huwa marbut mal-proceduri pendenti quddiem il-qradi fejn qed ikun kontestat minn Megasol hlas ta` dazju li jaqbez it-€300,000. Ghalkemm ma saret ebda prova dokumentarja, mhijjex kontestata la r-raguni u lanqas il-mertu ta` dawk il-proceduri.

Tajjeb jinghad li l-kwistjoni mad-Dipartiment tad-Dwana skattat bl-importazzjoni ta` l-pannelli fotovoltajici. Din l-importazzjoni kienet ikkommissjonata minn Acep lil Comerco, li hija membru ta` Acep. Mill-evidenza jirrizulta li Megasol kienet indikata bhala l-importatur u ghalhekk meta gie biex isir ir-rilaxx tal-pannelli id-Dwana applikat *anti-dumping duty* kontra Megasol. Mhux il-kompitu ta` din il-Qorti li tghid min ghandu ragun f` dik il-vertenza billi l-kwistjoni jirrizulta li hija *sub-judice*. Dak rilevanti ghal-iskop ta` dan il-procediment huwa l-isfond ta` kif zviluppaw l-affarijiet internament f` Megasol wara li spuntat il-kwistjoni mad-Dipartiment tad-Dwana. Mhuwiex kontestat illi d-diretturi ta` Megasol kienu qablu li fil-kwistjoni mad-Dwana Megasol ma kellha tbatu xejn. Mix-xiehda ta` Ciantar jirrizulta li ancillari ghall-kitba li saret bejn Ciantar u Attard kienu saru zewg skritturi ohra ; riferenza ghat-tliet skritturi saret aktar kmieni. Ebda wahda minn dawn l-iskritturi ma kienet ezebita. Madanakollu il-mertu tal-iskritturi mhuwiex ikkontestat. Jemergi biss il-fatt illi meta forsi kien tard wisq, George Attard bidel il-fehma tieghu u rtira l-kunsens tieghu fuq il-kitba fejn Megasol kienet ser tkun ezoreata mill-hlas tad-dazju. Bhala fatt immedjatament wara George Attard irrizenja minn direttur, kif diga` nghad, ghal ragunijiet ta` sahha.

Premess dan kollu, il-posizzjoni llum hija Megasol ghaddejja bil-progetti li kienu fis-sehh meta George Attard kien ghadu direttur. Ma rrizultax li saru progetti godda b` John Ciantar direttur wahdu. Ghad hemm pendenti l-procediment dwar il-hlas tad-dazju. Ciantar esprima

t-thassib tieghu illi Megasol ghadha esposta ghall-pagament illi ghamlet ASL sabiex jigu rilaxxjati l-pannelli. Mill-banda l-oħra r-rikorrenti esprimiet thassib dwar il-fatt illi f`dawk il-proceduri d-Dwana oggezzjonat ghall-prezenza fl-awla tas-smigh tal-kawza ghal persuni li ma kienux diretturi. Dan isib konferma fix-xieħda ta` John Cortis, ghalkemm ma kienx prezentat dokument mill-atti ta` dak il-procediment.

Fil-kuntest tal-procediment dwar il-hlas tad-dazju, il-Qorti tqis illi t-thassib tar-rikorrenti huwa gustifikat aktar u aktar meta dan l-ilment isir fid-dawl ta` skritturi privati li saru bejn id-diretturi ta` Megasol u dawk bejn il-membri ta` Acep. In-nuqqas ta` rappreżentanza ta` Acep f`dawk il-proceduri, propju ghax ma hemmx direttur propost minnha fil-bord ta` Megasol, oggettivament tista` tirrizulta fi pregudizzju finanzjarju serju ghal Acep.

Jirrizulta wkoll illi Megasol m`ghandhiex futur attiv.

Ghalhekk ix-xenarju huwa tali li jew Megasol tibqa` toffri *servicing* ghall-impjanti u tippercepixxi dhul ; inkella tbiegh l-assi tagħha u tieqaf topera.

Il-pozizzjoni tal-partijiet hija cara fis-sens illi fis-sitwazzjoni li tinsab mhuwiex vijabbli ghal Megasol illi tintraprendi progetti godda.

Anke ghalhekk il-Qorti tifhem li Acep ghandha tinghata l-opportunita` li tipproponi direttur b`zieda ma` John Ciantar.

Tkun xi tkun kwalsiasi decizjoni dwar il-futur ta` Megasol huwa vitali li fit-tmexxija ta` Megasol ikun hemm ukoll direttur iehor propost minn Acep li jara l-assjem tal-interessi ta` Megasol b`mod aktar wiesgha. Jara wkoll kif dan l-interess ikun

tassew komuni mhux ihares l-interess ta` azzjonista wiehed biss.

Ir-*raison d`etre* tal-Art 402 tal-Kap 386 hija l-ekwita` u l-bilanc fil-harsien tad-drittijiet u tal-interessi tal-azzjonisti.

Ir-rikorrenti tishaq illi l-ftehim bejn il-partijiet kien illi Megasol titmexxa minn zewg diretturi u tirreferi ghall-klawsola 9 tal-*memorandum* li jghid illi r-rapprezentanza legali u guridika hija fdata "*in any two (2) directors acting jointly*".

John Ciantar jichad illi kiser l-istatut ta` Megasol.

Jishaq illi l-M&A jippermetti li Megasol titmexxa minn bord kostitwit minn direttur wiehed, dment li l-laqgha generali ma tipprovdux diversament (Klawsola 7).

Jirreferi ukoll ghat-tieni paragrafu tal-klawsola 9 li tghid illi :-

"without prejudice to the aforesaid the legal and judicial representation of the company may be vested in any person or persons authorised by the Board of Directors from time to time to represent the Company for a specific purpose or in a specific case or cases or classes of cases, provided that no proceedings may be instituted without the Board`s authority."

Il-klawsola 7 tistabilixxi l-kostituzzjoni tal-bord tad-diretturi.

Legalment Ciantar ghandu d-dritt warajh u cioe` d-dritt li jerfa` wahdu t-tmexxija ta` Megasol, bl-obbligi li kull dritt igorr mieghu.

Cio` nonostante ma jfissirx li ghax Ciantar ghandu dritt, mexa wkoll bl-ekwita` li hija fundamentali fl-azzjoni skont l-Arft 402 tal-Kap 386.

Il-gurisprudenza, li ghaliha diga` saret referenza aktar kmieni, taghmlha cara illi d-dritt ta` l-membru li jaghmel azzjoni skont l-Art 402 tal-Kap 386 mhuwix ristrett ghad-drittijiet li jinsorgu mill-M&A izda jestendu ghal dawk l-aspettativi legittimi li ghandu kull membru dwar it-tmexxija tal-affarijiet tal-kumpanija.

Riferibbilment ghall-kaz ta` Ilum, l-aspettattiva` legittima tar-rikorrenti ssib il-fonti taghha fil-ftehim accertat u ppruvat tal-mod kif kellha titmexxa Megasol.

Dan ifisser illi anke jekk ma tkunx tirrizulta llegalita` fl-agir ta` min ikun direttur, il-gestjoni minn direttur wiehed, li jista` jkollu interess ta` azzjonista wiehed biss (kif kien il-kaz odjern), jista` jkun ta` pregudizzju mhux biss ghall-azzjonista l-iehor izda wkoll ghall-kumpanija, anke fuq bazi ta` ekwita`.

Il-pregudizzju tar-rikorrenti fl-istat li tinsab Megasol Ilum huwa kostitwit billi i) id-dejn illi ghandha, u allura l-espozizzjoni illi ghandha ghal azzjoni mil-bank f`kaz ta` morozita fil-pagamenti; ii) x`ser isir minnha fil-futur ; iii) l-ezitu tal-procediment dwar il-hlas tad-dazju.

Meqjusa l-fatti u c-cirkostanzi partikolari li jsawwru dan il-kaz, il-Qorti hija tal-fehma li fir-rigward ta` dan l-ilment huma sodisfatti l-elementi li jsawwru l-Art 402(1) tal-Kap 386.

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

Accertat il-ksur tal-Art 402(1) tal-Kap 386, il-Qorti sejra tqis ir-rimedju l-aktar opportun, wara li tkun tat konsiderazzjoni anke tat-tliet talbiet tar-rikorrenti.

Fil-kaz tal-ewwel talba, din sejra tkun respinta kemm fuq bazi ta` dritt kif ukoll fuq bazi ta` ekwita`.

Riferibbilment ghaz-zewg talbiet l-ohra, sejra tqis il-bzonn ta` Megasol.

Il-Qorti tirrileva illi ghandha diskrezzjoni wiesgha sabiex taghti dik l-ordni li tkun xierqa tenut kont tal-fatti u cirkostanzi tal-kaz (ara d-decizjoni tal-Qorti tal-Appell tal-31 ta` Jannar 2003 fil-kawza "**Philomena Ellul vs Charles Ellul pro et noe et**").

Id-diskrezzjoni li ghandha hija talment wiesgha illi sahsitra tista` twarrab talbiet specifici li jkunu saru minn rikorrent fi procediment ta` din ix-xorta.

Fil-provvediment li tat il-Prim` Awla tal-Qorti Civili fl-1 ta` Awissu 2017 fil-kaz : **Calamatta Cuschieri Investment Services Limited et vs 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.*

Dan premiss, il-kaz ta' illum jipprezenta xenarju fejn Megasol hija prattikament inattiva, fis-sens illi ghalkemm ghadha ghaddejja fit-twettieq ta' progetti diga' mibdija tinsab wieqfa ghal kollox fi progetti godda.

Il-Qorti sejra tkun prattika fl-indirizz tal-ilment tar-rikorrenti billi, tenut kont tal-assjem, fuq bazi ta' ekwita', tappunta hija direttur b' zieda mad-direttur li hemm illum.

Accertat li ghandha tintervjeni abbazi tal-Art 402(3)(a) tal-Kap 386, il-Qorti jidhrilha li jkun opportun fl-ahjar interess ta' Megasol li tahtar direttur iehor, b' zieda mad-direttur li hemm illum sabiex tassikura ruhha, anke b' ekwita' l-hsieb li serva bhala sostrat ghall-formazzjoni ta' Megasol. Ghal dan il-ghan jidhrilha gust u opportun li l-ghazla ta' dan id-direttur agguntiv ghandha taqa' fuq l-Av. Dr. Peter Fenech.

Provvediment

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

1. Tiddikjara illi jirrizulta ppruvat dak rikjest mill-Art 402(1) tal-Kap 386 tal-Ligijiet ta' Malta.

2. Tiddikjara li jkun gust u ekwu li taghti ordni skont l-Art 402(3)(a) tal-Kap 386 tal-Ligijiet ta' Malta. Ghalhekk qeghda tordna li l-affarijiet kollha tal-kumpannija intimata Megasol Co. Limited (C 61647) ghandhom jitmexxew billi b'effett mil-lum, b' zieda ma' d-direttur li ghad hemm sal-lum fil-kumpannija intimata, tahtar lill-Avukat Dottor Peter Fenech

bhala direttur iehor tal-kumpannija ntimata, billi tqis ruhha sodisfatta li l-Av. Dr. Fenech ghandu l-hila mehtiega sabiex iwettaq dik il-hatra.

3. Tordna illi b`effett mil-lum l-Avukat Dottor Peter Fenech bhala direttur mahtur illum ikollu access shih u liberu ghal dak kollu li jirrigwarda l-kumpannija intimata - xejn eskluż.

4. Tordna illi b`effett mil-lum ebda att ma jista` jsir fil-kumpannija intimata jekk ma jkunx approvat miz-zewg diretturi tal-kumpannija intimata. Fin-nuqqas dak l-att ikun null u bla effett ghall-finijiet u effetti kollha tal-ligi.

5. Tordna lid-diretturi tal-kumpannija intimata sabiex jassikuraw ruhhom li l-kumpannija intimata titmexxa kif trid il-ligi.

6. B`effett mil-lum, il-memorandum u l-articles of association tal-kumpannija intimata huma soggetti ghal dak kollu li qed ikun ordnat li jsir bis-sahha tal-provvediment tal-lum.

Bl-applikazzjoni tal-Art 223(3) tal-Kap 12 tal-Ligijiet ta` Malta, tordna li kull parti tbatl l-ispejjeż taghha fil-kawza tal-lum.

**Onor. Joseph Zammit McKeon
Imhalled**

**Amanda Cassar
Deputat Registratur**