



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

**ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON**

Illum it-Tnejn 13 ta` Lulju 2020

**Kawza Nru. 5
Rikors Nru. 18/2019 JZM**

**Av. Antoine Naudi [ID. 448570 (M)]
bhala mandatarju specjali ta`
Andreas Strime Christensen,
detentur tal-Passaport Norvegiz bin-
numru 30349816 fil-kwalita` tieghu
ta` "trustee", mahtur mill-Asker and
Baerum District Court fin-Norvegja,
tal-proprjeta` ossia "estate" tad-
defunt Thor Stian Kennedy Normann**

vs

Boreas Holding Ltd [C-86166]

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentat fl-4 ta` Lulju 2019 li jaqra hekk :-

Illi l-kumpanija intimata Boreas Holding Ltd giet registrata f` Malta fis-sebgha (7) ta` Mejju 2018 bin-numru ta` registrazzjoni C-86166, bhala kumpanija b` membru wiehed; [ara DOK X anness ma` dan ir-rikors]

Illi l-isem tal-azzjonist uniku tal-kumpanija intimata registrat mar-Registatur tal-Kumpaniji huwa dak ta` Thor Stian Kennedy Normann, detentur tal-passport Norvegiz bin-numru 27409564, illi ghadu jidher sal-lum bhala d-detentur ta` elf u mitejn (1,200) ishma Ordinarji tal-klassi "A" ta` Euro [€1) kull wiehed. Thor Stian Kennedy Normann huwa wkoll registrat bhala s-segretarju tal-kumpanija intimata; [ara DOK X anness ma` dan ir-rikors]

Illi Frode Christoffer Prado-Kristiansen, detentur tal-passaport Norvegiz bin-numru 30895399 huwa registrat mar-Registatur tal-Kumpaniji bhala l-uniku direttur u rapprezentant legali u guridiku tal-kumpanija intimata; [ara DOK X anness ma` dan ir-rikors]

Illi Thor Stian Kennedy Normann miet fit-tlieta u ghoxrin (23) ta` Awwissu 2018, u fil-25 ta` Jannar 2019 Andreas Strime Christensen, detentur tal-passport Norvegiz bin-numru 30349816 gie mahtur mill-"Asker and Baerum District Court" fin-Norvegja bhala "the sole trustee in charge of the estate" tad-defunt fl-interess tal-beneficjarji, l-eredi u l-kredituri tal-"estate" tad-defunt Thor Stian Kennedy Normann. [ara DOK AC1 anness mal-affidavit ta` Andreas Strime Christensen (DOK ASC) ukoll anness ma` dan ir-rikors]

Illi kif hemm spjegat f` dettal kbir fl-affidavit ta` Andreas Strime Christensen anness ma` dan ir-rikors, id-defunt Normann u xi uhud mill-kumpaniji tieghu fin-Norvegja kienu spickaw taht il-lenti tal-"Financial Supervisory Authority" tan-Norvegja minhabba bosta lmenti mressqa minn konsumaturi u investituri illi waslu sabiex infethu diversi proceduri gudizzjarji fin-Norvegja kontra Normann u xi uhud mill-kumpaniji tieghu apparti investigazzjonijiet kriminali tal-Pulizija illi dawn tal-ahhar ghadhom ghaddejjin sal-lum kemm fuq l-agir ta` Normann meta kien haj kif ukoll fuq l-involviment tad-direttur uniku tal-kumpanija intimata Frode Christoffer Prado-Kristiansen;

Illi sabiex din l-Onorabbli Qorti jkollha ideja tal-gravita` tal-problema illi halla warajh Normann, mix-xoghol siewi u investigattiv illi qed jaghmel ir-rikorrent Andreas Strime Christensen fil-kors tal-mandat moghti lil mill-Qorti Norvegiza, jinghad illi sat-22 ta` Mejju 2019, il-proprjeta` tad-defunt ossia "estate" hija milquta minn lmenti ta` kredituri illi jeccedu s-sittax-il miljun Euro [€16,000,000) u r-rikorrent wisq jibza` illi din il-figura tista` tkompli tikber drastikament;

Illi nhass il-bzonn illi jigi anness affidavit ta` Andreas Strime Christensen ma` dan ir-rikors sabiex din l-Onorabbli Qorti tinghata sfond generali, ta` dak illi gara s`issa u illi ghadu ghaddej f`din is-"saga" li wassal lir-rikorrent sabiex jitlob l-ghajnuna ta` din l-Onorabbli Qorti f` Malta;

Illi ai fini tat-talbiet illi serjin isiru iktar `l isfel f`dan ir-rikors, ir-rikorrent, bil-poter moghti lil mill-Qorti Norvegiza, ghandu interess u obbligu illi jhares l-interessi tal-membru mejjet Thor Stian Kennedy Normann speċjalment meta qed jirrizultalu illi l-kumpanija intimata kienet infethet sabiex tipprova tledi d-drittijiet ta` persuni illi kienu nvestew f`kumpaniji n-Norvegja illi llum il-gurnata qeghdin jew kien bi hsiebhom isiru sussidjarji tal-kumpanija intimata;

Illi kien ghalhekk li ftit wara l-hatra tieghu, ir-rikorrent ghamel kuntatt mad-direttur uniku tal-kumpanija intimata Frode Christoffer Prado-Kristiansen sabiex, "inter alia", jiffirma dokumentazzjoni ntiza sabiex ir-rikorrent jigi registrat bhala azzjonist fl-interess tal-membru mejjet flok id-defunt biex b`hekk jigu protetti mmedjatament l-assi tal-imsemmija kumpanija u tal-membru mejjet;

Illi Frode Christoffer Prado-Kristiansen qua direttur in rappresentanza tal-kumpanija intimata, irrifjuta u ghadu jirrifjuta illi jaghmel dan ghall-skopijiet illi r-rikorrent jemmen huma kollha in mala fede;

Illi f`dan l-istadju u wara sitt xhur ta` investigazzjonijiet min-naha tar-rikorrent fejn qed jigu misjuba affarijiet godda dwar il-kumpanija intimata prattikament kuljum - fosthom anke trasferimenti ta` flejjes lejn kontijiet tal-kumpanija intimata f` Malta, huwa ferm evidenti u essenzjali ghalih illi jigi registrat bhala azzjonist flok il-membru mejjet fl-interess tal-eredita` tal-istess membru mejjet, tal-

beneficjarji, l-eredi u l-kredituri tal-"estate" ossia proprjeta` kollha tal-mejjet;

Illi inoltre, minhabba n-nuqqas ta` kooperazzjoni illi qed isib minghand l-uniku direttur tal-kumpanija intimata, huwa mportanti wkoll illi r-rikorrent, fil-kwalita` personali tieghu, jigi mahtur direttur u rapprezentant legali u guridiku tal-kumpanija intimata flok Frode Christoffer Prado-Kristiansen u segretarju tal-kumpanija intimata flok il-membru mejjet;

Illi r-rikorrent Andreas Strime Christensen fil-kapacita` tieghu premessa, jikkwalifika bhala "membru" ai termini tal-Artikolu 402(6) tal-Kap. 386 tal-Ligijiet ta` Malta stante illi jirrapprezenta, "inter alia", l-interessi tal-membru mejjet;

Ghaldaqstant premess is-suespost, ai termini tal-Artiklu 402 tal-Kap. 386 tal-Ligijiet ta` Malta l-esponenti umilment jitlob li din l-Onorabbli Qorti joghgobha, jekk jidhrilha li dan jkun gust u ekwu, taghmel ordni taht dawk il-kondizzjonijiet li jidhrilha xierqa sabiex :

1. Tiddikjara illi ghar-ragunijiet fuq imsemmija l-ommissjoni tal-kumpanija intimata illi tirregistra lir-rikorrent bhala l-azzjonist uniku taghha mal-Registratur tal-Kumpaniji f`Malta abbazi tal-hatra tieghu datata 25 ta` Jannar 2019 mill-"Asker and Baerum District Court" fin-Norvegja qed jirreka u x`aktarx ser jkompli jirreka lill-esponenti pregudizzju b`mod ingust (unfairly prejudicial) ai termini tal-Artikolu 402 tal-Kap. 386 tal-Ligijiet ta` Malta.

2. Tordna li fil-kumpanija intimata, tigi approvata r-registrazzjoni tal-esponenti Andreas Strime Christensen, detentur tal-passport Norvegiz bin-numru 30349816 mahtur mill-"Asker and Baerum District Court" fin-Norvegja fil-25 ta` Jannar 2019 bhala l-azzjonist flok id-defunt Thor Stian Kennedy Normann, detentur tal-passport Norvegiz bin-numru 27409564.

3. Tordna illi Andreas Strime Christensen, detentur tal-passport Norvegiz bin-numru 30349816, fil-kapacita` personali tieghu, jigi mahtur bhala direttur u rapprezentant legali u guridiku tal-kumpanija intimata flok Frode Christoffer Prado-Kristiansen.

4. *Tordna illi Andreas Strime Christensen, detentur tal-passport Norvegiz bin-numru 30349816, fil-kapacita` personali tieghu, jigi mahtur bhala segretarju tal-kumpanija intimata flok Thor Stian Kennedy Normann, detentur tal-passport Norvegiz bin-numru 27409564 illi miet fit-23 ta` Awwissu 2018.*

5. *Tordna illi jsiru dawk l-atti kollha ancillari ghal tali registrazzjoni jew altrimenti mehtiega fic-cirkostanzi, inkluz, jekk necessarju emendi fil-Memorandum u Artikli tal-Assocjazzjoni tal-kumpanija intimata u/jew rizzoluzzjonijiet idoneji.*

6. *Tawtorizza lil Andreas Strime Christensen, detentur tal-passport Norvegiz bin-numru 30349816, fil-kapacita` personali tieghu, sabiex jiffirma kwalsiasi dokument mitlub mir-Registratur tal-Kumpaniji f` Malta, b` mod partikolari dawk imsejha "Form K" u "Form T" sabiex jinghata effett ghat-talbiet suesposti.*

Bl-ispejjez.

Rat id-dokumenti li kienu prezentati mar-rikors promotur.

Rat illi ghalkemm il-kumpanija ntimata kienet notifikata skont il-ligi, ma pprezentatx risposta.

Rat illi kienet milqugha t-talba tar-rikorrent noe sabiex il-provi kollha li tressqu fil-kawza bin-numru 17/2019 JZM ikunu jghoddu bhala prova fil-kawza tal-lum ghall-finijiet u effetti kollha tal-ligi.

Rat illi l-kawza thalliet ghal provvediment ghas-26 ta` Marzu 2020 bil-fakolta` li l-kumpanija ntimata tippresenta nota ta` osservazzjonijiet sat-28 ta` Frar 2020.

Rat illi l-kumpanija ntimata baqghet ma pprezentatx nota ta` osservazzjonijiet.

Rat illi l-kawza thalliet ghal provvediment ghal-lum billi l-provvediment ma setax jinghata fis-26 ta` Marzu 2020 in vista tad-disposizzjonijiet tal-Avvizi Legali 61 u 65 tal-2020.

Rat l-atti l-oħra tal-kawza.

II. Xieħda

Ix-xieħda ewlenija hija kostitwita mid-deposizzjoni tal-mandant tar-rikorrent, u cioe` Andreas Strime Christensen ("**Christensen**") li xehed kemm b` affidavit kif ukoll viva voce quddiem din il-Qorti. Huwa pprezenta dokumenti kemm mal-affidavit kif ukoll max-xieħda tieghu viva voce sabiex isostni d-deposizzjonijiet tieghu.

Din hija **sintesi** ta` dak li xehed :-

Xehed illi l-professjoni tieghu hija dik ta` avukat u jispeċjalizza fil-qasam tal-falliment ; għalhekk huwa dak li huwa magħruf bħala *insolvency practitioner*. Stqarr illi fil-kors ta` proceduri ta` falliment ta` Thor Stian Kennedy Normann (`**Normann**') li kienu istitwiti fin-Norvegja, huwa kien maħtur mill-qorti bħala trustee tal-wirt ta` Normann li miet fit-23 ta` Awwissu 2018.

Stqarr illi dak li wassal għall-proċediment fin-Norvegja kien inkwiet u thassib tal-opinjoni pubblika dwar il-mod kif Normann mexxa n-negozju tieghu qabel il-mewt tieghu. It-thassib kien illi Normann kien holoq u fassal skema ta` investiment finanzjarju li biha qarraq bil-pubbliku. L-iskema kienet attirat madwar NOK 400 miljun (ekwivalenti għal EUR 40 miljun) l-aktar minghand persuni anzjani. Tant holoq inkwiet dak l-investiment illi fl-2017 l-awtoritajiet finanzjarji fin-Norvegja hadu decizjoni li jagħlqu dak in-negozju. Il-konsegwenza kienet illi bosta investituri bdew jagħmlu pressjoni fuq Normann sabiex jirkupraw flushom.

Kompla jixhed li minkejja l-preokkupazzjoni tal-pubbliku li kien investa flusu mieghu, fl-2018 Normann beda jwaqqaf kumpanniji barra min-Norvegja. Dan il-fatt huwa korraborat mid-dokumenti. Fil-fatt waqqaf u rregistra zewg kumpanniji fir-registru ta` Malta : dik intimata ; u oħra bl-isem Aiolos Invest Holding Ltd (C86167). Għamel

dan sabiex ikun jista` jittrasferixxi assi min-Norvegja lejn Malta u b`hekk jipprova jiskansa pressjoni li kienet qeghda ssir fuqu fin-Norvegja mill-investituri u mill-pulizija.

Stqarr illi Normann miet hesrem fit-23 ta` Awwissu 2018.

Kompla jixhed illi fil-25 ta` Jannar 2019 huwa kien appuntat mid-District Court ta` Asker and Baerum bhala "sole trustee" tal-wirt ta` Normann.

Fisser li wara li nghata l-inkariku, beda jinvestiga sabiex jirrintraccja l-assi. Ghamel hekk ghaliex l-patrimonju ta` Normann huwa fi stat ta` falliment ghaliex hemm *claims* li jlahhqu l-ammont ta` NOK 100 miljun (ekwivalenti ghal €16 miljun) meta l-valur tal-assi fin-Norvegja huwa ta` *just a couple of millions* (kliem ix-xhud). Jidher li hafna flus ma baqghux in-Norvegja u huwa qed ifittex sabiex isib dawn l-assi barra min-Norvegja f`diversi gurisdizzjonijiet fosthom Malta. Qal illi go Malta kienu skoperti l-kumpannija ntimata u l-kumpannija l-ohra Aiolos Invest Holding Ltd.

Kompla spjega illi assi qeghdin jigu ricerkati fi Spanja wkoll ghar-raguni li l-habiba ta` Normann hija Spanjola residenti Ibiza. Infatti saret kawza go Spanja kontra taghha ghal flus li kienet irceviet minghand Normann.

Dwar assi taz-zewg kumpanniji registrati Malta, xehed illi ghandu bizzejjed evidenza (derivata minn emails u minn telefonds cellulari ta` Normann) li turi t-tnejn ghandhom kontijiet bankarji kemm Malta kif ukoll barra minn Malta. Kemm hemm flus fil-kontijiet mhuwiex maghruf ghaliex sal-lum huwa prekluz milli jikseb informazzjoni ta` din ix-xorta. Il-bank li jopera Malta koncernat huwa Ferratum Bank.

Kompla jghid illi hemm ukoll bank fil-Bulgarija jismu iCard Bank. Jista` jkun li hemm ukoll depoziti fid-Deutsche Bank pero` dwar dan ma kienx cert.

Referibbilment ghall-kawza tal-lum ix-xhud kien mistoqsi ghaliex talab lill-Qorti sabiex tahtar lilu bhala direttur u segretarju tal-kumpannija ntimata minflok id-direttur attwali u cioe` Frode

Christoffer Prado-Kristiansen ("**Prado-Kristiansen**"). Stqarr li Prado-Kristiansen huwa accountant. Huwa pprova jikkopera mieghu. Fil-bidu qallu li kien ser jikkopera izda in segwitu bidel fehmtu u waqqaf kull koperazzjoni. Għadu jidher bħala direttur tas-socjeta` ntimata u huwa residenti Oslo fin-Norvegja. Saru proceduri fin-Norvegja sabiex Prado-Kristiansen ma jkunx jista` jkompli jagixxi għaz-zewg kumpanniji registrati Malta. It-talba tieghu kienet milqugħa mill-Qorti ta` Oslo. Ipprezenta l-provvediment tal-qorti li kien markat Dok AC1. Billi d-dokument kien bin-Norvegiz kienet prezentata kopja tieghu bl-Ingiliz.

Kompla jixhed illi huwa kien mahtur bħala *trustee* fl-interess tal-eredi, tal-kredituri u tal-pubbliku.

Sahaq illi fin-Norvegja l-kwistjoni kienet qegħda tigi trattata bħala materja ta` interess pubbliku u kienet mertu ta` investigazzjoni kriminali.

Ix-xhud kien mistoqsi hekk :

And what is the risk if I may ask if Mr Frode remains as a director today and what is the risk if the shareholder at present remains Mr Normann the deceased because he is still showing as the shareholder of the company. Can you explain this ?

It-twegiba tieghu kienet din :

For us it's a complete dead end until we have the appointment to represent the company. We are not able to ask for any information from the bank so anybody else before we are properly identified as the trustee and to be able to act on behalf of the companies; and then we can't investigate and then we have to wait for this ruling before we can start.

Kompla stqarr hekk :

It's important for us to say that this is a particular case and that Mr Normann died very suddenly. He died at Ibiza in Spain very suddenly. So we don't know what was his plan and we don't know how far he and his people had come with their plan of transferring assets from different parts of Norway or from abroad when he died.

Xehed ukoll **Eivand Thue** li huwa awditur Norvegiz li kien mahtur mill-qorti fin-Norvegja sabiex jinvestiga n-negozju ta` Normann. Irrizulta li dan kellu struttura socjetarja kbira u komplissa. Huwa kien jixtri l-propjeta` mmobbli bl-akkwist ikun kwazi ghal kollox finanzjat mill-banek. Wara l-akkwist holoq prodott ta` investment infassal ghal persuni anzjani fin-Norvegja tramite diversi socjetajiet kostitwiti u registrati fin-Norvegja.

Fisser illi l-istrategija ta` Normann kienet illi sabiex jakkwista l-propjeta` jiehu self mill-banek ta` madwar EUR 20 miljun imbaghad ihajjar lill-persuni anzjani sabiex jinvestu fil-propjeta` minn EUR 20 sa 30 miljun. B`hekk ikun akkumula b`kollox EUR 50 miljun. Huma ppruvaw jistharrgu fejn marru l-fondi li kienu akkumulati fin-Norvegja. Sabu li ma kienux fis-socjetajiet registrati n-Norvegja. Irrizulta li ftit zmien qabel miet, Normann kien waqqaf u rregistra Malta z-zewg kumpanniji li semma`. Ghandhom interess li jikkonservaw l-assi ta` dawn il-kumpanniji fl-interess tal-kredituri u tal-eredi, kemm assi prezenti Malta kif ukoll assi li dawn il-kumpanniji jista` jkollhom barra minn Malta.

Dwar il-komportament ta` Prado-Kristiansen, xehed illi huwa ltaqa` mieghu f`okkazjoni wahda u tkellem mieghu xi drabi bit-telefon. Ghall-bidu wera li kien se jikkopera izda mbaghad meta beda jintalab informazzjoni mhux biss ma ghaddiex din l-informazzjoni li kienet rikjesta minnu anzi ghadda informazzjoni zbaljata. Safejn jaf hu, ghalkemm Prado-Kristiansen huwa residenti Oslo fin-Norvegja, ghadu direttur taz-zewg kumpanniji registrati Malta.

Av. Dr. Antoine Naudi xehed li huwa sar jaf biz-zewg kumpanniji in kwistjoni minghand Dr Andreas Christensen. Kienu gew registrati Malta minn Maria Alexon li hija *service provider* b`ufficcju li jinsab Birkirkara. Hija persuna Maltija mizzewga ma` cittadin mhux Malti. Meta kellimha kien car hafna maghha u cioe` li klijent taghha (u cioe` Normann) kien fetah dawk iz-zewg kumpanniji Malta meta kien qed jigi investigat bl-ihrah fin-Norvegja dwar il-mod kif mexxa n-negozju tieghu. L-ewwel reazzjoni taghha kienet fis-sens illi hi ma kellha x`taqsam xejn. Meta fakkarha li l-indirizz registrat taz-zewg kumpanniji kien l-indirizz taghha, u kien jehtieg informazzjoni dwar iz-zewg kumpanniji, qaltlu li kienet sejra tghaddi informazzjoni pero` baqa` ma wasal xejn. Meta semmielha lil Prado-Kristiansen, kien evidenti mir-reazzjoni taghha li kellha problemi ma` dan Prado-Kristiansen kien hem mil-problemi bejniethom. Jidher li lanqas kuntatt ma kien qed ikun hemm bejn Prado-Kristiansen u din Maria Alexon. Il-

konsegwenza ta` din is-sitwazzjoni hija li ma hemm hadd li qed jiehu hsieb dawn iz-zewg kumpanniji.

Dr Naudi kompli jiddeponi hekk :-

... meta jien staqsejt - isma', kontijiet tal-bank, ghax jien dak li kien jinteressa ... hemm ? Ir-reazzjoni kienet le. Kull ma kien hemm kienu t-transfer tal-bank account tax-share capital inizjali u l-fees taghna meta ftahna l-kumpanija ... account, pero` bank account ma hemmx.

Ghaddew xi gimghat jekk mhux xhur u ergajt kellimtha, ghaliex giet ghall-informazzjoni tieghi illi kien hemm kontijiet hawn Malta, u kumbinazzjoni ftakru illi kienu fethu xi bank accounts il-Ferratum Bank. Gheditilha mela mhux ezattament ftahtu il-kumpanniji biss bahla service provider bl-indirizz registrat ghandkom imma ghamiltu xi xoghol iehor. Biss biss il-kont tal-bank. Iva, jista` jkun iva. Waqfet hemm, ma smajt xejn iktar. Gheditilha isma' jekk mhux ser tikkoperaw ser ikollna ahna mmexxu mod iehor ; u fil-fatt spiccajna biex ftahna dawn il-kawzi.

Ghaliex l-importanza ta' dawn il-kawzi ghal klijent tieghi hu proprju dak li xehed. Jigifieri hu qieghed f' pozizzjoni fejn minhabba li ghandu interess mhux tieghu personali, li jaqdi dmiru personalment skont l-ordni tal-Qorti, dak dejjem, imma l-interess tieghu bhala trustee ghal beneficju tal-eredi, tal-kredituri, tan-nies kollha li gew zgiwdati, frodati etc., jaghmel l-investigazzjonijiet kollha opportuni li jista' u allura qed jifrex fejn jista'.

In-Norvegja wasal fejn wasal, sabu xi sittin miljun ewro semma minn l-ammont ikbar li hemm. Fethu kawza Spanja u fethu dawn iz-zewg kawzi biex ikomplu jinvestigaw dak li jista' ikun, jista' ikun li m'hemmx, jista' ikun pero` illi hu audit trail tal-flus. Ghax minn hemm, minn l-audit trail tal-flus jaslu.

Problema li ghandna hi li meta ktibt personalment, u hemm esebiti wkoll, l-ittri tieghi lil Frode u bghattlu emails ukoll etc, u dawn jinsabu esebiti mal-affidavit, gie lura b' risposti mhux kredibbli ; mhux lest li jikkopera assolutament u allura qeghdin f' pozizzjoni fejn ladarba ghandna direttur li mhux lest jikkopera, allura mal-bank hu l-persuna li jiffirma d-dokumenti, li jista' jitlob l-informazzjoni.

Ghandna sitwazzjoni fejn ix-shareholder ghadu d-defunt, mentri fl-interess tal-estate huwa importanti li jigi l-persuna effettivament li l-qorti ordnat (tan-Norvegja ordnat) li jikun hu flok dak id-defunt. U

huwa importanti ghalija allura li jidhol Andreas Christensen f' dawn il-vesti biex ikomplu l-vjagg ta' din l-investigazzjoni. Dak huwa l-iskop kollu.

III. L-Art. 402 tal-Kap. 386

L-azzjoni odjerna hija fondata 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 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 general, 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 tal-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 tal-azzjonijiet ta` xi membri tal-kumpannija minn membri oħra tal-kumpannija jew mill-kumpannija nnifisha u, f`kaz ta` xiri mill-kumpannija, għat-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 għan-nom tal-kumpannija ; jew

(f) jipprovdi 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 jipprovdi għall-istralc konsegwenzjali tagħha.

(4) Meta jsir ordni ghax-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.

(6) F`dan l-artikolu il-kelma "membru" tinkludi persuna li legalment tista` tirrappreżenta l-interessi ta` membru mejjet, persuna li għandha jkunu għaddew legittimament azzjonijiet fil-kumpannija b` wirt testamentarju jew mhux testamentarju, u trustee kif imfisser fl-artikolu 127 li jkollu azzjonijiet fil-kumpannija

Ghalkemm id-dicitura tal-Art. 402(1) ittiehdet testwalment minn disposizzjoni simili li tirrizulta fil-Companies Act ta` New Zealand, tajjeb jinghad illi l-ligi ta` New Zealand segwiet l-izvilupp legislattiv fl-Ingilterra. Fl-Ingilterra, 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-pagna 485 tal-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) tal-Art. 402, hija tassattiva l-prova tal-att li jkun mertu tal-ilment.

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 ma tkunx sodisfacjenti ghaliex ma jkunx irrizulta dak previst fis-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 jipprovi s-subartikolu (1) huwa pregudizzjali ghall-prosegwiment tal-azzjoni.

IV. Locus standi

Art. 402(1) jaghti lil *kull membri ta` kumpannija* l-jedd li jintavola azzjoni ta` din ix-xorta.

Il-mandant tar-rikorrent mexxa bl-azzjoni odjerna bis-sahha tad-dokument a fol 33 u 34 tal-process.

Id-dokument huwa provvediment moghti mill-Asker and Baerum District Court fil-25 ta` Jannar 2019.

It-titolu tad-dokument huwa : *Appointment of Executor.*

Fil-provvediment jinghad li dik id-District Court ghandha s-setgha bis-sahha tal-ligi Norvegiza *to appoint executors of estates.*

In esekuzzjoni tas-setghat taghha, il-Qorti appuntat lil Andreas Strime Christensen li huwa Attorney-at-law bhala **sole trustee in charge of the estate after Thor Stian Kennedy Normann, born 18th of April 1979, deceased 23rd of August 2018, in the interest of all beneficiaries, heirs and creditors** (enfasi u sottolinear ta` din il-qorti) [ara fol 33]

Ghalkemm il-kumpannija ntimata ma pprezentatx risposta, il-Qorti sejra xorta wahda tistharreg jekk Andreas Strime Christensen, mandant tar-rikorrent Av. Antoine Naudi, kellux *locus standi* sabiex jistitwixxi l-azzjoni odjerna.

Sejra tirreferi ghat-test bl-Ingliz tal-Kap. 386 sabiex tiffacilita ezami komparattiv mal-ligi Ingliza.

Member huwa definit fl-ewwel subinciz tal-Art. 2 tal-Kap. 386.

Hemm jinghad illi : **“except where otherwise specifically defined, means a shareholder of a company ...”**

Fl-istess subinciz, **“shareholder”** huwa definit bhala : **“a person entered in the register of members of a company ...”**

Ghall-iskop tal-Art. 402, il-legislatur ried iwessa` t-tifsira ta` “*member*” tant li fis-subinciz (6) zied illi **“member”** includes :

"a person entitled at law to represent the interests of a deceased member, a person to whom shares in the company have lawfully devolved by way of testate or intestate succession, and a trustee, as defined in article 127, who holds shares in the company.

Fl-**Art. 127** tal-Kap. 386, **trustee** huwa definit bhalta **a person who may act as a trustee in accordance with the Trusts and Trustees Act and includes any fiduciary holding shares on behalf of another person**

Fil-**Kap. 331** tal-Ligijiet ta` Malta, u cioe` it-Trusts and Trustees Act, **"trustee"** ghandu din it-tifsira : ***"in relation to property, means the person or persons holding the property or in whom the property is vested on terms of trust in accordance with the provisions of this Act or, a person that is otherwise deemed to be a trustee under this Act"***

Hija l-fehma ta` din il-Qorti illi ghall-ahjar interpretazzjoni tal-ligi taghna ghandha ssir riferenza ghas-sources taghha. Aktar kmieni saret referenza ghal dak li kienet Sec 459 tal-Companies Act Ingliza 1985 li wara li saret il-Companies Act 2006 kienet sostitwita b`Sec 994(1) ghalkemm it-test baqa` l-istess.

Sec 994 tal-Companies Act 2006 Ingliza tghid :-

1) *A member of a company may apply to the court by petition for an order under this Part on the ground—*

(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

(2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been

transferred or transmitted by operation of law as they apply to a member of a company.

(3) In this section, and so far as applicable for the purposes of this section in the other provisions of this Part, "company" means—

(a) a company within the meaning of this Act, or

(b) a company that is not such a company but is a statutory water company within the meaning of the Statutory Water Companies Act 1991.

Ghall-fini ta` kompletezza ta` analizi, trid issir riferenza ukoll ghal **Sec 112** tal-Companies Act 2006 Ingliza li jaghti tifsira ta` "member" billi tghid illi –

(1) The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members.

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company.

Mayson, French & Ryan fil-ktieb tagghom "**Company Law**" (26th Edition – OUP) Pg 565 ighidu hekk –

Under CA 2006, s. 994(1) a petition for relief of unfairly prejudicial conduct of a company's affairs may be presented by a member of the company ...

A person to whom shares in a company have been transferred or have been transmitted by operation of law but who is not a member of the company (because of not being on the register of members) is treated as a member for the purposes of CA 2006 s.994(1) and reference to a members or members must be construed accordingly [s 994(2)].

The word "transferred" in s 994(2) requires at least that a proper instrument of transfer should have been executed and delivered to the transferee or the company in respect of shares in question. It is not sufficient that there is an agreement for transfer (Re Company (No

003160 of 1986) [1986] BCLC391 ; Re Quickdome Ltd (1988) BCLC 370).

The phrase "transmitted by operation of law" in s 994(2) refers to a legal process by which the legal title passes and does not cover the creation of an equitable interest for example under a trust (Re a Company (No 007828 of 1985) (1985) 2 BCC 98,951).

A nominee shareholder, holding shares as a bare trustee, may petition under s 994 because the interests of such a shareholder include the economic and contractual interests of the beneficial owners of the shares (Atlasview Ltd vs Brightview Ltd (2004) EWHC 1056 (Ch) (2004) 2 BCLC 191.

Tal-istess fehma huma **Gower and Davies** fil-"**Principles of Modern Company Law**" (Eight Edition – Sweet & Maxwell) Pg 682 ; u **Sealy** fil-"**Cases and Materials in Company Law**" (Ninth Edition – OUP) Pg. 651-652.

Bis-sahha tal-provvediment tal-25 ta` Jannar 2019, l-Asker and Baerum District Court appuntat lil Andreas Strime Christensen mhux biss bhala *executor* tal-wirt ta` Normann izda wkoll bhala *sole trustee in charge of the estate*. Wara li qieset l-Art. 402(6) tal-Kap. 386, kif ukoll id-dottrina Ingliza f` dan il-qasam, din il-Qorti tghid minghajr l-icken esitazzjoni li l-mandant tar-rikorrent jikkwalifika bhala *member* ghall-finijiet u effetti kollha tal-Art. 402 sabiex jippromwovi l-azzjoni odjerna.

V. Mertu

1. 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 ressuq 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-pagna 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."

2. 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-pagna 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-Pagna 218 tal-Kap. 6 tal-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, ir-rikorrent noe istitwixxa l-azzjoni korrettement kontra l-kumpanija ntimata wahedha, ghaliex tirrifletti l-finalita` taghha kif tirrizulta mit-talbiet, dejjem jekk ir-rikorrent noe jaghmel il-prova sal-graf rikjkest mil-ligi ta` dak li jrid is-subartikolu (1) tal-Art. 402.

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

a) 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-kumpanija jew fuq att jew omissjoni tal-kumpanija.

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 tal-Att dwar il-kumpaniji jaghti diskrezzjoni pjuttost wiesa` lill-Qrati u dan ghalix 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 ommissjoni tal-kumpanija. Il-pregudizzju jista` jirreferi ghall-azzjonist li qed jippromwovi l-proceduri, ghal xi azzjonist iehor jew ghall-interess in generali tal-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 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 tal-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-
aspettativi legittimi jitwiendu 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 tal-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])

b) Dottrina

Fil-pagna 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-pagna 464 tat-Third Edition ta' **Ferrari'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-pagna 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-pagna 506 ta` **Company Law** (op. cit.) **Brenda Hannigan**
tirimarka 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-pagna 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-pagni 691-692 tal-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-paġni 569-570 tal-ktieb **Company Law** (26th Edition - 2009/2010 - OUP) l-awturi **Mayson, French & Ryan** iġiddu 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 Ingliz -

"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."

c) Risultanzi

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

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

Il-kumpannija ntimata kienet registrata mar-Registatur tal-Kumpanniji fis-7 ta` Mejju 2018. Mill-Memorandum u l-Articles of Association ("**M&A**") taghha (fol 7 et seq) jirrizulta li kienet kostitwita principalment sabiex tmexxi *the activities of investment, consulting, purchase and sales of real estate, shares and stocks and related activities*. Kemm l-*authorised* kif ukoll l-*issued share capital* kienu ta` €1,200 diviz f` 1200 sehem b` valur nominali ta` €1, li minnu 20% biss kien *paid up*. L-ishma **kollha** kienu registrati f` isem Thor Stian Kennedy Normann, cittadin tan-Norvegja, residenti n-Norvegja. B`hekk Normann kien l-uniku azzjonista, li kien ukoll *company secretary*. Il-kumpannija kellha mill-bidu nett direttur wiehed jismu Frode Christoffer Prado-Kristiansen, ukoll cittadin tan-Norvegja, residenti n-Norvegja, li ghandu r-rappresentanza legali u gudizzjarja tal-kumpannija. Ghalkemm jirrizulta ppruvat illi Normann miet fit-23 ta` Awwissu 2018, mill-atti tar-Registru tal-Kumpanniji, jirrizulta wkoll li l-ishma ghadhom registrati f` isem l-azzjonista mejjet, u Prado-Kristiansen ghadu jidher bhala direttur. Jirrizulta wkoll li s-*service provider* lokali li kienet tat servizz lil Normann fir-registrazzjoni tal-

kumpanija, u li fuq l-indirizz tagħha jidher l-indirizz registrat tal-kumpanija, ma kellhiex istruzzjonijiet minghand id-direttur, anke wara l-mewt tal-uniku azzjonista tal-kumpanija.

Kif diga` rrilevat aktar kmieni, il-mandant tar-rikorrent kien mahtur mill-qorti fin-Norvegja bhala esekutor u *trustee* tal-wirt ta` Normann. Mhuwiex kontradett meta jghid li ghalkemm ghamel kuntatt ma` Prado-Kristiansen, dan ghalkemm fil-bidu wera disponibilita` li jikkopera mal-esekutor fl-accertament tal-assi tal-mejjet, inkluz l-kumpanija ntimata, fil-verita` ma pprovda xejn.

L-**Art. 136A(1) tal-Kap. 386** iqiegħed fuq l-ispallejn kull direttur l-obbligu "*li jaġixxi b'onestà u bona fide fl-aħjar interessi tal-kumpanija*".

L-**Art. 136A(2) tal-Kap. 386** jistipola illi d-diretturi għandhom "*jippromwovu il-benessere tal-kumpanija u jkunu responsabbli għal :* (a) *it-tmexxija ġenerali tal-kumpanija 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)] ingħad :-

"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-Pagni 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.

Ladarba Christensen ittratta ma` Prado-Kristiansen bis-sahha ta` provvedimenti tal-qorti li kien jaghti titolu legali u sahha legali lil Christensen fl-operat tieghu bhala ezekuttur u trustee tal-wirt tal-uniku azzjonista tal-kumpannija, Prado-Kristiansen kellu obbligu legali lejn il-kumpannija ta` *utmost good faith* billi jassikura mhux biss koperazzjoni izda trasparenza fl-operat tieghu li ma jnissel ebda suspett ta` *wrongdoing*.

Fil-kaz tal-lum l-interess tal-kumpannija kien l-istess bhal dak ta` Normann ghaliex dan kien is-sid tal-ishma kollha.

Il-*vacuum* insidjuż u perikoluz, thares mnejn thares, li gabet magħha l-mewt ta` Normann ma jistax jigi kopert minn Prado-Kristiansen minhabba l-komportament kjarament ambigwu u xejn trasparenti tieghu.

Il-gurisprudenza taghmilha cara illi d-dritt tal-membru li jaghmel azzjoni skont l-Art. 402 tal-Kap. 386 (u f` dan il-kaz il-Qorti sabet li Christensen jikkwalifika bhala *membru* ghall-finijiet u effetti kollha tal-ligi) mhuwiex 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-kumpannija.

Fis-sentenza Ingliza "**Loch v Blackwood**" ([1924] A.C. 783) il-Qorti kienet sabet illi mhux rikjest "*a grave degree of misconduct*" biex taghti rimedju ghal dak li fil-ligi taghna huwa l-Art. 402. Is-sentenza tghid : "*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 taghha. Il-Qorti tghid illi bl-imgieba tieghu fit-tmexxija tal-affarijiet tal-kumpannija ntimata, Prado-Kristiansen bhala direttur gab ruhu b` mod u manjiera li ma jridx l-Art. 402(1) li l-fondament taghha hija l-gustizzja u l-ekwita`. Proprju ghalhekk, meqjusa l-fatti u c-cirkostanzi partikolari li jsawru dan il-kaz, il-Qorti hija tal-fehma li huma sodisfatti l-elementi li jsawru l-Art. 402(1) tal-Kap. 386.

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

Ir-rikorrenti noe talab serje ta` rimedji.

Il-Qorti tirrileva illi ghandha diskrezzjoni wiesgħa 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` Awwissu 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-Pagna 285 ta` "**Company Law – Theory, Structure and Operation**" (OUP – 1998) **Brian Cheffins** jghid 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, u wara li hadet in konsiderazzjoni r-ragunijiet kollha li wassluha sabiex tiddikjara li kien hemm vjolazzjoni tal-Art. 402(1), il-Qorti sejra tipprovdi favorevolment dwar it-talbiet kollha tar-rikorrent noe, ghaliex hija tal-fehma li jikkostitwixxu rimedji effettivi.

Provvediment

Ghar-ragunijiet kollha premissi, il-Qorti qeghda tipprovdi dwar it-talbiet tar-rikorrent noe billi :-

Tiddikjara illi jirrizulta kull ma huwa rikjest li jkun ippruvat skont l-Art. 402(1) tal-Kap. 386 tal-Ligijiet ta` Malta.

Tordna li fil-kumpanija intimata tigi approvata r-registrazzjoni ta` Andreas Strime Christensen, detentur tal-passport Norvegiz bin-numru 30349816, bis-sahha tal-hatra li nghata mill-Asker and Baerum District Court tan-Norvegja fil-25 ta` Jannar 2019, kif fuq inghad, bhala l-azzjonista tal-istess kumpanija ntimata, minflok Thor Stian Kennedy Normann, detentur tal-passport Norvegiz bin-numru 27409564 li miet fit-23 ta` Awwissu 2018.

Tordna illi Andreas Strime Christensen, detentur tal-passport Norvegiz bin-numru 30349816, jinhatar bhala direttur u rapprezentant legali u gudizzjarju tal-kumpanija intimata minflok Frode Christoffer Prado-Kristiansen.

Tordna illi Andreas Strime Christensen, detentur tal-passport Norvegiz bin-numru 30349816, jinhatar bhala segretarju tal-kumpanija intimata minflok Thor Stian Kennedy Normann, detentur tal-passport Norvegiz bin-numru 27409564 li miet fit-23 ta` Awwissu 2018.

Tordna illi jsiru dawk l-atti kollha ancillari ghal tali registrazzjoni jew altrimenti mehtiega fic-cirkostanzi, inkluz, jekk ikunu mehtiega, emendi fil-Memorandum u Artikli tal-Assocjazzjoni tal-kumpanija intimata u/jew rizzoluzzjonijiet idoneji.

Tawtorizza lil Andreas Strime Christensen, detentur tal-passport Norvegiz bin-numru 30349816, sabiex jiffirma kwalsiasi dokument mitlub mir-Registratur tal-Kumpaniji f` Malta, b` mod partikolari dawk imsejha "Form K" u "Form T" sabiex jinghata effett ghall-ordnijiet suesposti.

Tordna lill-kumpanija ntimata sabiex thallas l-ispejjez kollha ta` din il-kawza.

Tordna lir-Registratur tal-Qorti sabiex minnufih jibghat kopja legali ta` dan il-provvediment lir-Registratur tal-Kumpanniji sabiex dan jirregola ruhu.

**Onor. Joseph Zammit McKeon
Imhallef**

**Amanda Cassar
Deputat Registratur**