



QORTI CIVILI PRIM` AWLA

**ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON**

Illum it-Tnejn 30 ta` Novembru 2020

**Kawza Nru. 4
Rik. Gur. Nru. 627/2013 JZM**

GBCom Limited (C 51508)

kontra

Dr Nicolai Vella Falzon li, wara n-nota tieghu tal-25 ta` Lulju 2013, kien konfermat, b`digriet tal-20 ta` Awwissu 2013, bhala Kuratur Deputat sabiex jirrapresenta lis-socjeta` MSA Holdings Limited, socjeta` registrata d-Dubai, United Arab Emirates, b`numru ta` registrazzjoni JC/2522/10 ;

Prokuratur Legali Madeleine Firman li, wara n-nota taghha tat-18 ta` Lulju 2013, kienet konfermata, b`digriet tal-20 ta` Awwissu 2013, bhala Kuratur Deputat sabiex tirrapresenta lill-assenti Mohammedreza Aghaei ;

**Afegra Management Limited
(C 49208) ;**

Afegra Holding Limited (C49209) ;

Afegra Finance Limited (C49210)

Il-Qorti :

I. Preliminari

1. Ir-rikors guramentat

Rat ir-rikors guramentat prezentat fis-27 ta` Gunju 2013 li jaqra hekk

1. *Illi s-socjeta` attrici GBCom Limited, socjeta` Maltija bin-numru ta` registrazzjoni C 51508 kienet azzjonista fis-socjeta` Afegra Management Limited, socjeta` ohra Maltija bin-numru ta` registrazzjoni C49208. Kif jirrizulta mill-anness estratt tal-Malta Financial Services Authority (`l quddiem **MFSA**) datat 3 ta` Gunju 2013 din is-socjeta` kellha tletin fil-mija (30%) tal-ishma (vide Dok. A).*

2. *Illi l-azzjonisti l-ohra fi hdan l-istess socjeta` kienu Mohammedreza Aghaei li effettivament kellu disgha u sittin fil-mija (69%) tal-ishma u s-socjeta` MSA Holdings Limited (li l-beneficial owner taghha huwa Hassan Asadi) li kellha wiehed fil-mija tal-ishma (1%).*

3. *Illi s-socjeta` Afegra Management Limited kellha socjeta` sussidjarja – socjeta` ohra Maltija, bl-isem ta` Afegra Holdings Limited, numru ta` registrazzjoni C 49209. Fil-fatt is-socjeta` Afegra Management Limited kellha disgha u erbghin fil-mija (49%) tal-ishma f`din is-socjeta`, filwaqt li s-socjeta` MSA Holdings Limited kellha wiehed u hamsin fil-mija (51%) tal-ishma. Dan jirrizulta mill-estratt tal-MFSA, hawn anness bhala Dok. B.*

4. *Illi s-socjeta` Afegra Holding Limited kellha socjeta` sussidjarja taghha – Afegra Finance Limited, socjeta` ohra registrata Malta bin-numru ta` registrazzjoni C 49210. Dan jirrizulta minn estratt tal-MFSA anness bhala Dok. C.*

5. *Illi is-socjeta` Afegra Finance Limited kellha imbaghad numru ta` socjetajiet sussidjarji taghha, fosthom socjeta` bl-isem Afegra Trading SA, registrata L-Isvizzera.*

6. *Illi kartella tal-Group Structure tal-Afegra Group hija annessa bhala Dok. D.*

7. Illi l-iskop li ghalih twaqqfu dawn is-socjetajiet kollha kien li jsir kummerc fl-Iran. Illi l-kummerc kien isir tramite s-socjeta` Afegra Trading SA, is-socjetajiet l-oħra hawn fuq imsemmija kienu hemm għal skopijiet finanzjarji u bħala parti minn skema ta` effiċjenza fiskali, li tuzufriwixxi mil-legislazzjoni Maltija f` dan ir-rigward.

8. Illi b`hekk effettivament is-socjeta` attrici GBCom Limited kellha erbatax punt sebgha fil-mija (14.7%) fl-Afegra Group, Mohammed Aghaei kellu tlieta u tletin punt wiehed tmienja fil-mija (33.81%) tal-Afegra Group u s-socjeta` MSA Holdings Limited kellha wiehed u hamsin punt disgha erbgha fil-mija (51.49%) tal-Afegra Group.

9. Illi x-xogħol kien maqsum kif gej : Mohammed Aghaei kien jjeħu hsieb il-bejgh – principlment fl-Iran, u dan kien jagħmlu bl-involviment ta` socjeta` li kienet tappartjeni interament lilu bl-isem Afegra Middle East. Il-bejgh attwalment kien isir mis-socjeta` Afegra Trading. Is-socjeta` GBCom Limited, tramite il-beneficial owner tagħha Gert Bosscher, kienet inkarigata mix-xiri u mill-operations f` Geneva l-Isvizzera.

10. Illi din l-istruttura hadmet tajjeb minn meta giet inkorporata sa` Novembru 2011. Sa` dak iz-zmien kellha turnover sostanzjali u kienet qed tagħmel qliegh tajjeb sew. B`hekk fl-ewwel sitt xhur tas-sena 2011 is-socjeta` Afegra Trading SA kellha turnover ta` aktar minn US\$ 800,000,000. Fil-fatt l-isem Afegra sar sinonimu mad-dinja kollha fil-qasam tal-bejgh tal-qmuh.

11. Illi f`daqqa wahda f` Novembru 2011 għal ragunijiet li ser jigu spjegati iktar `l quddiem, l-affarijiet waqfu habta u sabta u s-socjeta` attrici giet infurmata li l-Iranjani ma kienux qed ihallsu. L-azzjonisti l-oħra ma riedux imorru wara l-Iranjani għall-hlas u gie deciz li l-grupp jirralenta sew, kwazi għal kollox, il-bejgh, sabiex jikkonsolida l-posizzjoni tieghu u ma jitlifx flus. L-azzjonisti l-oħra insistew illi huma kienu ser jinnegozjaw mal-Iranjani għall-hlas.

12. Illi saru diversi diskussjonijiet bejn l-azzjonisti biex jaraw x`kienet l-aħjar triq `l quddiem, u fil-hmistax ta` Mejju 2013, sar ftehim li permezz tieghu, is-socjeta` MSA Holdings kellha tixtri l-ishma tas-socjeta` attrici fis-socjeta` Afegra Management Limited bil-prezz ta` US\$ 3,000,000. Dan il-ftehim u hawn anness bħala Dok. E. F`dal-ftehim il-partijiet ftehemu wkoll li l-ftehim kien regolat bil-ligi Maltija.

13. Illi l-prezz ta` US\$ 3,000,000 kien ikkalkulat fuq il-kotba finanzjarji tas-socjetajiet fi hdan l-istess Afegra Group.

14. *Illi appena gie ffirmat il-ftehim, is-socjeta` attrici skopriet illi waqt li huma kienu azzjonisti fis-socjeta` bejn Novembru 2011 u t-tletin ta` Mejju 2013, l-azzjonisti l-ohra kienu bdew jahdmu l-istess xoghol ta` Afegra Group minn wara dahar is-socjeta` attrici, tramite socjetajiet ohrajn.*

15. *Illi rrizulta wkoll illi pagamenti li suppost waslu ghand l-Afegra Group baqghu ma waslux u marru ghand socjetajiet ohrajn kontrollati mill-konvenuti MSA Holdings Limited u Mohammedreza Aghaei.*

16. *Illi rrizulta wkoll li gew falsifikati dokumenti u li sar qerq car a dannu tas-socjeta` attrici, kif ser jigi ppruvat fil-kors tal-kawza.*

17. *Illi kieku s-socjeta` attrici kienet taf b`dan kollu zgur li ma kenitx ser tbiegh l-ishma taghha bil-prezz irrizorju ta` US\$ 3,000,000 imma kienet tippretendi li tithallas ukoll l-erbatax punt sebgha fil-mija (14.7%) ekwita` fil-qliegħ kollu li sar minn wara daharha bejn Novembru 2011 sad-data tal-bejgh tal-ishma, u dan peress illi s-socjeta` attrici kellha sehem ta` erbatax punt sebgha fil-mija (14.7%) f`dak kollu li jsehh, jew suppost sehh, fi hdan l-Afegra Group.*

18. *Illi rejalment in-negozju kollu li sar minn wara dahar is-socjeta` attrici, suppost li sar tramite l-istruttura ta` Afegra Group, u kwindi l-introjtu kollu li sar minn dan in-negozju, suppost li dahal fi hdan l-Afegra Group u s-socjeta` attrici kellha erbatax punt sebgha fil-mija (14.7%) tal-profitt kollu li gie rejalizzat.*

19. *Illi l-agir ta` Mohammedreza Aghaei bhala direttur tas-socjeta` Afegra Management Limited imur ukoll kontra l-artikolu 136A u 143 tal-Kap. 386 tal-Ligijiet ta` Malta.*

20. *Illi is-socjeta` MSA Holdings Limited, u s-sid beneficjarju taghha Hassan Asadi, kienu komplici mal-istess Mohammedreza Aghaei u t-tnejn li huma agixxew in mala fede sabiex tigi ppregudikata s-socjeta` attrici. Fil-fatt anke d-diretturi li s-socjeta` MSA Holdings Limited poggiet fuq is-socjetajiet Afegra Holdings Limited u Afegra Finance Limited agixxew kontra l-interessi tal-istess socjetajiet sabex jagevolaw lil MSA Holdings Limited.*

21. *Illi l-agir tal-konvenuti MSA Holdings Limited u Mohammedreza Aghaei jmur ukoll kontra l-ftehim li kien hemm bejnhom u s-socjeta` attrici*

li n-negozju tal-qmugh ghall-Iran u ghall-pajjizi ohra tal-Vant kellu jsir tramite l-istruttura tal-Afegra Group.

22. Illi in vista tal-mala fede u anke qerq li gie kommess, kif ukoll in vista tal-integrazzjoni ekonomika bejn is-socjetajiet diversi fi hdan l-Afegra Group, ghandu jkun hemm "Lifting of the Corporate Veil" li jezisti bejn id-diversi socjetajiet fi hdan l-Afegra Group.

23. Illi s-socjetajiet sussidjarji Afegra Holdings Limited u Afegra Finance Limited, bhala socjetajiet sussidjarji ta` Afegra Management Limited, li kienu wkoll kontrollati mill-konvenuti azzjonisti fi hdan Afegra Management Limited, huma wkoll responsabbli solidalment versu s-socjeta attrici ghad-danni minnha sofferti.

Jghidu ghalhekk il-konvenuti ghaliex ghar-ragunijiet premissi, m`ghandhiex din l-Onorabbli Qorti :

1. Tiddikjara li l-konvenuti, jew min minnhom, agixxew b`mala fede fil-konfront tas-socjeta` attrici u naqsu mill-obbligi taghhom versu l-istess socjeta` attrici.

2. Tiddikjara li l-konvenuti, jew min minnhom, agixxew b`qerq fil-konfront tas-socjeta` attrici.

3. Tiddikjara li s-socjeta` attrici sofriet danni bhala rizultat ta` din il-mala fede, nuqqas ta` harsien ta` obbligi legali, kif ukoll qerq li gie kommess.

4. Tillikwida d-danni sofferti mis-socjeta` attrici.

5. Tikkundanna lill-konvenuti, jew min minnhom, ihallsu lis-socjeta` attrici, d-danni hekk likwidati.

Bl-ispejjez, inkluzi dawk tal-mandat ta` sekwestru li qed jigi intavolat kontestwalment, u bl-imghaxijiet legali permessi mill-ligi, kontra l-konvenuti li huma minn issa ngunti ghas-subizzjoni.

Rat il-lista tax-xhieda, kif ukoll l-elenku tad-dokumenti li kienu prezentati mar-rikors guramentat.

2. Ir-risposti guramentati

a) Il-konvenut Mohammedreza Aghaei

Rat ir-risposta guramentata li pprezentat il-Kuratur Deputat P.L. Madeleine Firman fil-25 ta` Settembru 2013 li taqra hekk :-

1. Preliminarjament, illi din l-Onorabbli Qorti m`ghandhiex gurdizzjoni sabiex tisma` u tiddeciedi l-vertenza odjerna ai termini tad-dispozizzjonijiet tal-Artikolu 742 tal-Kap 12 tal-Ligijiet ta` Malta in kwantu l-kawza kif impustata fil-konfront tal-eccipjent ma taqa` taht l-ebda kap gurdizzjonali mill-kapi msemmija fl-Artikolu 742 li fuqu din il-Qorti tista` teradika l-gurdizzjoni taghha.

2. Preliminarjament ukoll u minghajr pregudizzju ghas-sueccepit, in-nullità tar-rikors guramentat ai termini tal-Artikolu 789(1)(c) tal-Kap.12 tal-Ligijiet ta` Malta in kwantu kif gie redatt ir-rikors guramentat, dan ir-rikors ipoggi lill-konvenut fl-impossibilità li jressaq difiza adegwata in kwantu ma huwa car proprju xejn x`inhuma u liema huma l-allegazzjonijiet fl-att promotur li qed jitressqu fil-konfront tieghu personalment, x`obbligi allegatament kiser il-konvenut u fuq kollox jekk il-kawza tressqitx sabiex tattakka l-validità tal-ftehim dwar it-trasferiment tal-ishma, jew sabiex tikkonstata ksur ta` obbligi fiducjarji jew semplicement sabiex tipprova xi ghemil delittwali iehor li ghalih allegatament huwa responsabbli l-konvenut. Fic-cirkostanzi ma huwiex possibbli li l-konvenut jiddetermina l-bazi tal-azzjoni (u allura l-eccezzjoni u sussegwentement il-prova li trid titressaq) bir-rizultat illi huwa mpossibbli li jissalvagwardja d-drittijiet tieghu b`mod effikaci u huwa ghalhekk li l-konfuzjoni fir-rikors guramentat tikkomporta n-nullità tieghu.

3. Illi preliminarjament ukoll u minghajr pregudizzju ghas-sueccepit, in-nuqqas ta` interess guridiku tas-socjeta` GBCom Limited f`dak li jirrigwarda l-allegazzjonijiet dwar l-allegat telf soffert mill-entitajiet tal-Afegra Group (inkluz is-socjetajiet konvenuti u Afegra Trading SA) kif ukoll l-allegazzjonijiet ta` ksur ta` obligazzjonijiet fiducjarji in kwantu se mai f`dawk ic-cirkostanzi jkun l-istess Afegra Trading SA u l-konvenuti l-ohrajn li jista` jkollhom l-interess guridiku rikjest sabiex iressqu tali proceduri u mhux GBCom una volta ex admissis din mhijiex kawza ta` natura derivattiva (u ma tistax tkun stante li GBCom ma ghadhiex azzjonista ta` Afegra Management Limited) izda biss kawza sic et simpliciter ghad-danni, liema danni, jekk qatt sehew, ma gewx sofferti mill-attrici imma mis-socjeta` Afegra Trading SA u/jew Afegra Management Limited.

4. Minghajr pregudizzju ghas-sueccepit u fuq il-mertu, in kwantu ghall-uniku allegazzjoni fil-konfront tal-konvenut Mohammedreza Aghaei,

ossija dik ta` ksur ta` obbligi fiducjarji ai termini tal-Artikolu 136A u 143 tal-Kap. 386, il-konvenut jeccepixxi illi ma huwiex il-legittimu kuntradittur ta` dawn it-talbiet in kwantu huwa ma kellu proprju l-ebda obligazzjoni fiducjarja tal-ebda tip fil-konfront tal-attrici GBCOM. L-obbligi fiducjarji tad-diretturi msemmija fil-ligi nostrana fl-ewwel lok huma obbligi fil-konfront tal-kumpanija u mhux tal-azzjonisti u d-diretturi ma jafu proprju l-ebda tali obbligu fil-konfront tal-azzjonisti u fit-tieni lok, fi kwalunkwe kaz il-konvenut kien biss direttur fil-konvenuta Afegra Management Limited, u mhux fis-socjetajiet l-ohra. L-allegazzjonijiet, kollha respinti, li qed isiru fir-rikors promotur **kollha** jirrigwardaw l-operat tal-kumpanija li kienet effettivament taghmel in-negozju ossija Afegra Trading SA (registrata f` Ginevra, l-Isvizzera) u **l-ebda allegazzjoni** ma tirrigwarda l-operat tal-uniku kumpanija li taghha huwa direttur l-konvenut.

5. Illi fi kwalunkwe kaz, u minghajr pregudizzju, anke jekk din il-Qorti tqis illi l-konvenut huwa l-legittimu kontradittur ta` dawn it-talbiet, dawn l-istess talbiet huma michuda in kwantu infondati fil-fatt u fid-dritt.

6. Illi fir-rigward tat-talbiet sabiex jigi dikjarat li l-konvenut, flimkien mal-konvenuti l-ohtajn jew individwalment, agixxa b` xi forma ta` mala fede jew qerq fil-konfront tal-attrici dawn l-allegazzjonijiet huma respinti bl-akbar qawwa bhala infondati fil-fatt u fid-dritt u fl-ebda mument l-konvenut Aghaei ma kien responsabbli ghal xi danni allegatament sofferti mis-socjeta` attrici kif jista` jigi facilment u ampjament ippruvat fit-trattazzjoni ta` din il-kawza jekk ikun hemm il-htiega.

7. Salv eccezzjonijiet ulterjuri skont il-ligi.

8. Bl-ispejjez ta` din l-istanza kif ukoll l-ispejjez tal-mandat kawtelatorju mahrug mis-socjeta` attrici kontra l-istess attrici minn issa ngunta in subizzjoni.

Illi kienu esposti u konfermati bil-gurament dawn il-fatti :-

1. Illi l-istruttura socjetarja tal-Grupp Afegra, qabel it-trasferiment tal-ishma, kienet bazikament dik murija fl-organigramm immarkat bhala Dok D mar-rikors promotur u l-konvenut esponenti jiddikjara li hlief ghal zball ta` tipografija fil-punt numru 3 (49% fil-mija u mhux 46% fil-mija) tar-rikors guramentat, il-punti numru 1 sa 6 tal-istess rikors guramentat jirriflettu sew l-istruttura socjetarja tal-grupp u ma hemm l-ebda oggezzjoni ghall-fatti kif riportati.

2. Illi fir-rigward tal-punt numru 7 mhuwiex korrett illi jintqal li "l-iskop li ghalih twaqqfu dawn is-socjetajiet kien li jsir kummerc fl-Iran".

Filwaqt li l-grupp kellu klijentela sostanzjali fl-Iran, il-grupp ma ghex imwaqqaf ghal dan l-iskop u grupp kellu attivitajiet f`diversi pajjizi oħrajn.

3. *Illi assolutament mhux korrett dak redatt fil-punt numru 8 tar-rikors promotur meta b`mod artifizjali, minghajr l-ebda bazi legali u fattwalment zbaljat is-socjeta` attrici tghid li "effettivament" kellha "14.7% fil-Grupp Afegra". Dan ma hu minnu xejn. L-attrici GBCom hija azzjonista fl-import ta` 30% tal-azzjonijiet tal-konvenuta Afegra Management Limited u xejn izjed kif del resto jidher mill-organigramm anness mill-istess socjeta` attrici.*

4. *Illi bl-istess mod mhux minnu dak li jintqal fil-punt 9 tar-rikors promotur u kemm il-fatti kif riportati kif ukoll dak li taghti x`jifhem izda ma tghidux espressament is-socjeta` rikorrenti huwa fattwalment skorrett. Kif sejjer jigi ampjament ippruvat f`din il-kawza, l-organizzazzjoni tal-operat kienet kompletament differenti minn kif riportat mill-attrici. Fl-ewwel lok GBCom ma kienet inkarigata propju minn xejn. Hija kienet semplicement azzjonista ta` Afegra Management Limited u xejn izjed, effettivament il-kumpanija li kienet tikkontjeni l-interess ta` Gert Bosscher fil-grupp Afegra. Id-direttur tagħha Gert Bosscher kien direttur ukoll ta` Afegra Trading SA f`Ginevra u kien fil-vesti tieghu ta` direttur tal-istess Afegra Trading SA, bid-doveri kollha li kien jikkomporta dak ir-rwol fil-konfront ta` dik il-kumpanija stess, li Bosscher kien involut għan-nom tagħha fi transazzjonijiet ma` terzi. In oltre il-konvenut Mohammedreza Aghaei (li kuntrarju għall-Gert Bosscher la kien direttur u lanqas impjegat ta` Afegra Trading SA) kien semplicement igib in-negozju u jirrendi servizzi lill-Afegra Trading SA u l-metodologija ta` Aghaei u l-implementazzjoni tagħha saret fid-dawl tax-xemx u kienet mhux biss avvallata izda magħrufa u approvata mill-istrutturi kollha relevanti tal-grupp Afegra inkluz Bosscher li illum qed iressaq dawn l-allegazzjonijiet u jinheba wara GBCom.*

5. *Illi l-punt numru 10 u 11 jikkostitwixxu tghawwig ta` fatti. Fl-ewwel lok jintqal illi kuntrarju għall-impresjoni li qed tipprova tinghata billi jigu citati figuri enormi, il-marginu ta` profitt fuq transazzjonijiet fis-swieq tal-qmuh huwa zghir u zghir hafna. Fit-tieni lok, u aktar importanti minn hekk izda s-sitwazzjoni ta` profitabilità tal-grupp laqqtet daqqa ta` harta kbira mhux minhabba l-hlasijiet tal-klijenti Iranjani izda, kif sejjer jigi ippruvat, minhabba decizjonijiet totalment zbaljati ta` Gert Bosscher (direttur u azzjonista tal-attrici GBCom u direttur u impjegat ta` Afegra Trading SA) li arreka dannu kbir bit-traskuragni tieghu li arrekaw dizastru finanzjarju lill-Afegra Trading SA u lill-Afegra Group in generali. Fit-tielet lok ukoll huwa inkredibbli li l-attrici tistqarr illi "l-azzjonisti l-oħra ma riedux imorru wara [d-debituri] Iranjani" meta apparti li dan mhux minnu, kienu l-istess Gert Bosscher u martu Camelia Simion li kienu l-unici diretturi ta` Afegra Trading SA u kienu huma li kellhom imorru wara l-kredituri. It-tnejn li huma ma kienux kapaci jigbru dawn ir-receivables minn għand il-klijenti Iranjani. Kif sejjer jigi wkoll ippruvat allura, il-verzjoni tal-attrici mhix*

minna u dan minghajr l-ebda riserva ghad-drittijiet tal-azzjonista ta' Afegra Trading SA ossija Afegra Finance Limited illi tressaq proceduri kontra Gert Bosscher u Camelia Simion ghat-telf soffert kemm b`rizultat tat-transazzjonijiet dizastruzi ezegwiti fis-suq kif ukoll ghan-nuqqas ta` gbir ta` flejjes dovuti.

6. *Illi l-punti 11 sa 13 huma wkoll misrapprezentazzjoni kemm tal-avvenimenti nfushom kif ukoll tat-tempistika ta` meta sehew tali avvenimenti. Apparti li hemm qabziet kbar fis-sekwenza, l-isfond fattwali li fih sar it-trasferiment tal-ishma ma kienx marbut mas-sitwazzjoni relattiva ghall-krediti mal-klijenti Iranjani. Dik kienet kwistjoni antika mentri l-isfond reali kien dak tat-telf kbir soffert minn Afegra Trading SA kagun tad-decizjonijiet xellerati mehuda minn Gert Bosscher u x-xewqa tieghu li ma jibqax bhala investitur (tramite GBCom) fil-holding company Afegra Management Limited.*

7. *Illi kif digà ntqal, fuq il-punti 14 sa 15, appartu li azzjonist ma ghandu l-ebda obbligu fiducjarju tat-tip imsemmi la lejn is-socjeta` attrici u lanqas lejn l-azzjonisti l-ohrajn, il-fatti riportati f`dawk il-punti mhumiex minnhom kif sejjer jigi ppruvat.*

8. *Illi bl-akbar qawwa, u b`riserva ta` proceduri ulterjuri kemm penali kif ukoll civili, l-konvenut qatt u fl-ebda mument ma kkommetta xi falsifikazzjoni ta` xi tip kif allegat fil-punt numru 16 tar-rikors promotur.*

9. *Illi bl-istess mod l-allegazzjonijiet fil-punti 17 u 18 huma fabbrikazzjonijiet minghajr l-ebda l-icken prova jew dettall intizi biss sabiex ipingu lill-esponent Mohammedreza Aghaei f`dawl ikrah. Ma sar l-ebda negozju barra mill-kuntest tal-Afegra grupp bi ksur ta` xi obbligu li kellu l-konvenut Aghaei, ma sar l-ebda negozju li f`dak is-sens ma kienx maghruf mill-partijiet kollha involuti u fuq kollox il-konvenut Aghaei kif sejjer jigi ppruvat ma ghamel l-ebda negozju minn "wara dahar" il-grupp Afegra. Mhux talli dan mhux il-kaz izda talli kien l-istess konvenut Aghaei li gab hafna min-negozju lil Afegra Trading SA. U dan appartu l-fatt li (i) kif intqal qabel u kif sejjer jigi ppruvat sal-icken dettall, il-prezz maqbul fuq il-kuntratt kien prezz pattwit kuntrattwalment u (ii) ghandu wkoll jerga` jigi sottolinjat illi fi kwalunkwe kaz l-attrici GBCom ma kienetx proprjetarja ta` 14.7% tal-Afegra Group u lanqas kwindi tal-profitti tal-grupp izda kienet azzjonista fl-import ta` 30% f`Afegra Management biss.*

10. *Illi f`dak li jirrelata ghall-punt numru 19 u 20 tar-rikors filwaqt li jichad kategorikament l-allegazzjoni kontenuti fihom, il-konvenut Aghaei jissottometti li lanqas fattwalment ma jista` jkun li gara hekk ghaliex is-socjeta` li taghha huwa direttur - Afegra Management Limited - ma taghmilx transazzjonijiet ghajr l-approvazzjoni tal-kontijiet awditjati u l-kompilazzjoni ta` xi formoli statutorji u allura ma jistax jifhem kif fl-*

eżercizzju ta' dawn id-doveri seta' qatt kiser l-obbligi fiducjarji li ghandu lejn Afegra Management Limited. Fir-rigward tar-rwol ta' Assadi u l-prezunt agir tieghu u tal-konvenut Aghaei kontra l-interessi tal-Afegra Group din hija ghal kollox asserzjoni gratuwita li ma tistax tkun aktar 'l boghod mill-verità.

11. Illi l-konvenut Aghaei ma jaf xejn dwar dan il-prezunt ftehim imsemmi fil-punt numru 21 tar-rikors guramentat u ghalhekk, u ghal ragunijiet ohrajn li sejrjn jittressqu fit-trattazzjoni ta' din il-kawza, din l-allegazzjoni wkoll qed tigi saldament ribattuta.

12. Illi ma tezisti l-ebda l-icken istanza fejn il-konvenut Aghaei, wahdu jew flimkien ma' Assadi u/jew terzi, b'xi mod agixxa b' mod qarrieq, frawdolenti u/jew dannuz ghall-interessi tal-kumpanija li fiha kien direttur kif ukoll tal-kumpaniji l-ohrajn tal-Afegra Group. Illi mhux talli bl-agir tieghu l-Afegra Group ma soffra l-ebda dannu qatt izda talli l-parti l-kbira tas-success tal-istess grupp gej proprju mill-attività tal-istess Aghaei u Assadi.

Rat il-lista tax-xhieda ndikati mill-istess Kuratur Deputat.

b) Il-konvenuta MSA Holdings Limited

Rat ir-risposta guramentata li pprezenta Av. Nicolai Vella Falzon noe fit-30 ta' Settembru 2013 u li taqra hekk :-

Illi l-esponent huwa debitament awtorizzat jaghmel din ir-risposta u jikkonfermaha bil-gurament ghan-nom tal-kumpanija intimata MSA Holdings Limited permezz ta' risoluzzjoni tal-istess kumpanija iffirmata mid-direttur ossia sole director taghha fil-31 ta' Lulju, 2013 u d-dikjarazzjonijiet minnu maghmula u kkonfermati f'din ir-risposta huma ibbazati fuq fatti u cirkostanzi hekk kif dedotti lilu mill-mandanti tieghu ;

Eccezzjonijiet

Illi fl-isfond tal-fatti hawn taht dikjarati u dawk li ser jirrizultaw mit-trattazzjoni tal-kawza, l-eccezzjonijiet illi qed taghti l-kumpanija esponenti tramite l-esponent nomine permezz ta' din ir-risposta mahlufa huma s-segwenti :

1. Preliminarjament, in-nullita' tar-rikors promotur ai termini tal-artikolu 789 subinciz (c) u (d) tal-Kapitolu 12 tal-Ligijiet ta' Malta stante illi l-istess rikors hekk kif impostat mill-kumpanija rikorrenti huwa konfuz

ghall-ahhar u d-domandi huma redatti b`mod lakoniku b`tali mod u manjera illi ma huwiex possibbli ghall-intimati li jiddeterminaw il-bazi tal-azzjoni rikorrenti ghaliex la huwa car jekk huwiex qed jigi allegat xi ksur tal-kuntratt ta` bejgh jew li kien hemm xi vizzju fil-kunsens dwar l-istess; la huwa car jekk l-allegazzjonijiet kollha maghmula humiex fil-konfront tal-intimati kollha jew min minnhom ; la huwa car ghaliex gew interpellati wkoll l-kumpanniji intimati fi hdan l-Afegra Group meta ma hemm ebda allegazzjoni fil-konfront taghhom u lanqas talbiet rilevanti ghalihom; la huwa car x`inhuma l-`obbligi legali` li qed tirreferi ghalihom il-kumpannija rikorrenti fit-talbiet taghha fil-konfront tal-intimati fil-vesti diversi taghhom; u la huwa car x`tip ta` danni allegatament soffriet il-kumpannija rikorrenti. Dawn in-nuqqasijiet ta` formalita` fir-rikors promotur jolqtu s-sustanza stess tal-azzjoni ezercitata mir-rikorrenti b`tali mod li huwa ta` pregudizzju ghall-intimati li, kif ghandhom dritt jistennew, ma tqeghdux f`posizzjoni li jistghu jiddefendu ruhhom adegwatament kontra l-azzjoni rikorrenti u ghalhekk ir-rikors promotur huwa null.

2. Preliminarjament ukoll u minghajr pregudizzju, n-nuqqas ta` interess guridiku tal-kumpannija rikorrenti GBCom Limited fir-rigward tal-allegazzjonijiet u talbiet kollha maghmula minnha dwar xi ksur ta` obbligi legali jew fiducjarji dovuti lilha stante illi hadd mill-intimati, inkluz il-kumpannija esponenti, ma kellhom jew seta` jkollhom xi obbligi legali jew fiducjarji fil-konfront ta` GBCom Limited li ma kienet xejn hlief azzjonista ta` Afegra Management Limited. Allegazzjonijiet u talbiet ta` din in-natura huma rilevanti fil-konfront tad-diretturi tal-kumpanniji rilevanti u mhux kontra l-azzjonisti jew persuni ohra li ma ghandhom l-istes obbligi legali jew fiducjarji.

3. Illi minghajr pregudizzju u fil-mertu l-allegazzjonijiet kollha maghmula fil-konfront tal-kumpannija esponenti huma nfondati fil-fatt u fid-dritt u kif ser jirrizulta mit-trattazzjoni tal-kawza l-kumpannija esponenti bl-ebda mod ma agixxiet in mala fede jew b`qerq u ma kkagunat ebda danni fil-konfront tal-kumpannija rikorrenti u se mai hija l-kumpannija esponenti li soffriet danni b`konsegwenzza tal-agir illegali tal-kumpannija rikorrenti u r-rapprezentant taghha kif ser jigi spjegat f`aktar dettall fil-kontro-talba intavolata kontestwalment ma din ir-risposta.

4. Salv eccezzjonijiet ulterjuri.

5. Bl-ispejjez kontra l-kumpannija rikorrenti u bl-ingunzjoni taghha u tar-rapprezentanti taghha ghas-subizzjoni.

Risposta dwar Fatti Dikjarati

Illu fir-rigward tal-fatti hekk kif dikjarati mill-kumpannija rikorrenti fir-

rikors mahluf taghha l-esponent nomine qed jaghmel is-segwent i dikjarazzjonijiet mahlufa ai termini tal-artikolu 158(3)(c) tal-Kapitolu 12 tal-Ligijiet ta` Malta :

1. Illi l-fatti dikjarati mill-kumpannija rikorrenti fil-paragrafi 1 sa 6 tar-rikors tieghu ma humiex kontestati pero` ghandu jinghad illi fl-istess jum illi l-kumpannija esponenti xtrat l-ishma tal-kumpannija rikorrenti fi Afegra Management Limited fuq talba tal-istess kumpannija rikorrenti, hija ntalbet ukoll sabiex tixtri (u fil-fatt xtrat) l-ishma kollha tal-intimat l-iehor Mohammedreza Aghaei fl-istess kumpannija u ghalhekk bi ftehim illi sar dakinhar stess il-kumpannija esponenti akkwistat ukoll dawn l-ishma biex illum effettivament hija l-unika azzjonista fi Afegra Management Limited. Ghalhekk ukoll id-dokument anness mar-rikors promotur bhala **Dok D** li juri l-istruttura tal-Afegra Group ma jirriflettix is-sitwazzjoni kurrenti tal-istruttura tal-grupp ;

2. Illi dwar id-dikjarazzjoni fil-paragrafu 7 tar-rikors promotur il-kuntest huwa generalment korrett biss pero` ma huwiex minnu illi dawn is-socjetajiet twaqqfu sabiex isir kummerc fl-Iran biss ghaliex kien hemm intenzjoni u fil-fatt kien beda jsir ukoll kummerc fi pajjizi ohra ;

3. Illi dwar id-dikjarazzjoni fi paragrafu 8 tar-rikors promotur din hija konkluzjoni simplistika ghall-ahhar u hija legalment insostenibbli ghaliex l-kumpannija rikorrenti ma kienet xejn hlief azzjonista bi tletin fil-mija (30%) tal-ishma ta` Afegra Management Limited ;

4. Illi diversi fatti dikjarati fil-paragrafu 9 tar-rikors promotur huma kontestati. Huwa minnu illi l-attivita` kummercjali tal-grupp kien isir tramite l-kumpannija Svizzera Afegra Trading S.A. izda ma huwiex minnu illi GBCom Limited kellha xi involviment fl-attivita` kummercjali taghha. GBCom kienet biss azzjonista fil-holding company Afegra Management Limited u xejn aktar. Kienu Gert Bosscher u martu Camelia Simion, in kwantu diretturi ta` Afegra Trading S.A. li kienu principalment involuti fl-operat tal-attivita` kummercjali ta` Afegra Trading S.A. u Bosscher kien wkoll responsabbli ghax-xiri tal-qamh u fil-fatt kien hu (flimkien ma Camelia Simion), illi bid-decizjonijiet hzienu kompli jaggrava l-problemi finanzjarji tal-kumpannija Afegra Trading S.A. u tal-grupp kif spjegat aktar` l-quddiem u fil-kontro-talba li ser tigi prezentata kontestwalment ma` din ir-risposta mahlufa ;

5. Illi l-fatti dikjarati fil-paragrafu 10 tar-rikors promotur huma generalment korretti izda l-kumpannija rikorrenti konvenjentement halliet barra fatt importanti fl-isfond tal-kawza minnha proposta u cioe` illi l-margini ta` qliegh li kienet qed taghmel il-kumpannija Afegra Trading S.A. minkejja l-bejgh sostanzjali li kellha kien zghir hafna b` rizultat illi, kif taf

il-kumpannija rikorrenti stess (ghaliex il-proprjetarji taghha huma Gert Bosscher u martu Camelia Simion stess) din il-kumpannija kienet qed topera b`riskji finanzjarji elevati ;

6. *Illi l-fatti dikjarati fil-paragrafu 11 tar-rikors promotur huma kontestati ghaliex huma infondati u, fir-rigward tal-kumpannija esponenti in partikolari, allegazzjonijiet ta` dan it-tip appartu li huma inveritieri huma wkoll inspjegabbli ghaliex MSA Holdings Limited ma kienet xejn hlief u hija biss azzjonista fil-grupp u bl-ebda mod ma kienet involuta fil-gestjoni tan-negozju ta` Afegra Trading S.A. Se mai kien ir-rapprezentant tal-kumpannija rikorrenti innifisha (Gert Bosscher wahdu jew ma martu Camelia Simion peress illi kienu d-diretturi tat-trading company) illi kien responsabbli ghal dak illi issa qed tilmenta dwaru l-istess kumpannija rikorrenti. Barra minn hekk il-problemi finanzjarji li laqtu l-grupp fiz-zmien imsemmi kienu rizultat ta` cirkostanzi politici internazzjonali illi bdew jolqtu l-Iran fiz-zmien in kwistjoni u ta` decizjonijiet zbaljati u hziena illi ha l-imsemmi Gert Bosscher (wahdu jew ma` martu Camelia Simion) fiz-zmien in kwistjoni ad insaputa tal-azzjonisti l-ohra u illi wasslu ghal telf u problemi finanzjarji serji hafna ;*

7. *Illi l-fatti dikjarati fil-paragrafu 12 u 13 tar-rikors promotur huma generalment korretti izda konvenjentement il-kumpannija rikorrenti ma taghtix stampa kompluta tal-fatti ghaliex ma tghidx illi kienet hi stess (tramite r-rapprezentant taghha Gert Bosscher wahdu jew ma martu Camelia Simion) illi talbet lill-kumpannija esponenti sabiex tixtri l-ishma taghha fi Afegra Management Limited u illi pproponiet il-kundizzjonijiet tal-istess trasferiment. Wara d-decizjonijiet dizastruzi illi ha Gert Bosscher (wahdu jew ma` martu Camelia Simion) minghajr l-approvazzjoni tal-azzjonisti l-ohra l-kumpannija rikorrenti GBCom intebhet illi jaqbillha tohrog mill-grupp u tirkupra l-investment li kienet ghamlet sabiex tahrab mis-sitwazzjoni finanzjarja prekarja li l-grupp kien jinsab fih. Ghalhekk, dwar il-paragrafu 13 tad-dikjarazzjoni tal-kumpannija rikorrenti ghandu jinghad illi l-prezz ta` tlett miljun euro (€3,000,000) kien propost mill-kumpannija rikorrenti stess tramite Gert Bosscher li assigura lill-kumpannija esponenti illi l-valur tal-ishma kienu ghadu minn tal-inqas ekwivalenti ghall-valur nominali taghhom, haga li qed jirrizulta li ma kienitx minnha ;*

8. *Illi d-dikjarazzjonijiet maghmula fil-paragrafi 14 sa 18 tar-rikors promotur huma kompletament infondati fil-fatt u fid-dritt u fir-rigward taghha l-kumpannija esponenti tikkontesta kategorikament l-allegazzjonijiet kollha hemm maghmula mill-kumpannija rikorrenti bhala inveritieri u defamuzi. Bhala sfond bizzejjed jinghad illi l-kumpannija esponenti (u l-proprjetarji taghha) ma kienu xejn hlief investituri fl-Afegra Group minghajr ebda tip ta` involviment fin-negozju tax-xiri u bejgh ta` qamh. Il-kumpannija esponenti tiffirma parti minn grupp ta` kumpanniji illi jimmanifatturaw u jbieghu potato chips u qatt ma kellhom involviment dirett fix-xiri jew bejgh tal-qamgh u ghalhekk, kif ser jirrizulta mill-provi u*

kif taf sew l-kumpannija rikorrenti, l-kumpannija esponenti qatt ma kellha involviment hlief in kwantu investitur u financier tal-grupp ;

9. *Illi peress illi d-dikjarazzjoni fi paragrafu 19 tar-rikors promotur hija diretta kontra l-intimat l-iehor Mohammedreza Aghaei, l-esponenti ma ghandiex x`tirrispondi, biss pero` ghandu jigi rilevat ghall-fini ta` korrettezza illi Aghaei ma kienx direttur ta` Afegra Trading S.A. (li kienet responsabbli ghall-attivita` kummercjali tal-grupp) u ghalhekk ma jistghux jissussistu l-allegazzjonijiet maghmula kontra tieghu f` dan il-paragrafu. Fi kwalunkwe kaz ukoll il-kumpannija esponenti qed tirrizerva d-drittijiet kollha spettanti lilha skond il-ligi fir-rigward ta` kull persuna ohra involuta fil-grupp f`kaz illi jirrizulta illi kien hemm xi ksur ta` obbligi jew responsabbilitajiet legali jew azzjonijiet dannuzi jew doluzi ohra ;*

10. *Illi l-allegazzjonijiet maghmula fil-paragrafi 19 sa 23 tad-dikjarazzjoni guramentata tal-kumpannija attrici huma kontestati bl-aktar mod kategoriku u huma kompletament infondati kemm fil-fatt kif ukoll fid-dritt ghaliex huma allegazzjonijiet ghal kollox gratuwiti, arbitrarji u inveritieri u l-kumpannija esponenti qed tirrizerva d-drittijiet kollha spettanti lilha skond il-ligi kontra l-kumpannija rikorrenti dwar l-istess.*

Rat il-lista tax-xhieda.

c) Il-konvenuti Afegra Management Limited, Afegra Holding Limited u Afegra Finance Limited

Illi l-esponent huwa debitament awtorizzat jaghmel din ir-risposta u jikkonfermaha bil-gurament ghan-nom tas-socjetajiet intimati Afegra Management Limited (C49208) ; Afegra Holding Limited (C49209) ; u Afegra Finance Limited (C49210) permezz ta` risoluzzjonijiet tal-azzjonisti tas-socjetajiet rispettivi u prokuri mill-istess socjetajiet datati 3 ta` Ottubru 2013, u d-dikjarazzjonijiet minnu maghmula u kkonfermati f` din ir-risposta guramentata huma bbazati fuq fatti u cirkostanzi hekk kif dedotti lilu mill-mandanti tieghu.

Eccezzjonijiet :

1. *Preliminarjament, in-nullita` tar-rikors promotur ai termini tal-artikolu 789(c) u (d) tal-Kapitolu 12 tal-Ligijiet ta` Malta, stante illi l-istrutturar tar-rikors guramentat ma jippermettix lis-socjetajiet esponenti jistabilixxu bi precizjoni l-bazi tal-azzjoni rikorrenti, u dan ghaliex is-socjeta` rikorrenti tifrex l-azzjoni taghha b`mod ambigwu bit-tama li tinkwadra taht xi provizjoni jew ohra tal-ligijiet ta` Malta. Din l-ambigwita` ccahhad lis-socjetajiet konvenuti milli jressqu difiza adegwata u*

konsegwentement tikkomporta n-nullita` tar-rikors promotur ;

2. Preliminarjament ukoll u minghajr pregudizzju ghall-ewwel eccezzjoni, is-socjetajiet eccipjenti mhumiex il-legittimi kuntraditturi ghat-talbiet tas-socjeta` rikorrenti u ghandhom jigu liberati mill-osservanza tal-gudizzju stante illi ma tezisti l-ebda relazzjoni guridika bejn l-istess socjeta` rikorrenti u s-socjetajiet intimati eccipjenti li tista` tiggustifika din l-azzjoni fil-konfront tal-istess socjetajiet eccipjenti kif spjegat aktar l-isfel u kif jigi ppruvat waqt it-trattazzjoni tal-kawza ;

3. Preliminarjament ukoll u minghajr pregudizzju ghas-sueccepit, is-socjeta` rikorrenti ghandha tiddikjara xi prova bi hsiebha ggib b`kull wiehed jew wahda mix-xiehda taghha skont l-artikoli 156(4) u 158(6) tal-Kap. 12 tal-Ligijiet ta` Malta ;

4. Fil-mertu, illi t-talbiet tas-socjeta` attrici fil-konfront tas-socjetajiet esponenti huma nfondati fil-fatt u fid-dritt kif jigi ampjament ippruvat waqt it-trattazzjoni tal-kawza ;

5. Salv eccezzjonijiet ulterjuri skont il-ligi ;

6. Bl-ispejjez, inkluz tal-mandat kawtelatorju numru 627/13 mahrug mill-attrici, li hija minn issa ngunta ghas-subizzjoni.

Dikjarazzjoni ta` Fatti :

1. Illi t-talbiet tas-socjeta` rikorrenti f`din il-kawza huma bbazati principalment fuq kuntratt datat 15 ta` Mejju 2013 permezz ta` liema s-socjeta` konvenuta MSA Holdings Limited xtrat l-ishma kollha tas-socjeta` attrici GBCom Limited fis-socjeta` esponenti Afegra Management Limited ;

2. Illi r-relazzjoni bejn il-partijiet f`din il-kawza, sal-15 ta` Mejju 2013 kienet kif elenkata fil-kartella pprezentata mar-rikors guramentat bhala "DOK D" ;

3. Illi s-socjeta` rikorrenti qed tallega illi l-prezz lilha mhallas fuq il-kuntratt ghal tali ishma, ossia tlett miljun Ewro (€3,000,000) huwa rrizorju bhala konsegwenza ta` mala fede u qerq da parti tal-konvenuti kollha, jew min minnhom, f`din il-kawza ;

4. Illi l-bazi tal-mala fede u qerq allegat huwa illi allegatament l-azzjonisti, diretti jew indiretti, fis-socjetajiet konvenuti hadmu xoghol simili

ghal dak illi jaghmlu l-istess socjetajiet konvenuti, direttament jew tramite sussidjarji tagghom, u dan minn wara dahar is-socjeta` attrici ;

5. Illi s-socjetajiet esponenti ma kellhom ebda relazzjoni kontrattwali, delittwali jew xorta ohra mas-socjeta` rikorrenti billi huma qua socjetajiet ma ttrasferew ebda azzjonijiet. Kienu l-azzjonisti li ghamlu kwalunkwe transazzjoni de quo agimus. Fil-fatt il-partijiet fuq il-kuntratt tal-15 ta` Mejju 2013 kienu s-socjeta` rikorrenti GBCom Limited bhala xerrejja u s-socjeta` konvenuta MSA Holding Limited bhala bejjiegħa tal-ishma fis-socjeta` esponenti Afegra Management Limited ;

6. Għalhekk la Afegra Management Limited, u wisq anqas Afegra Holding Limited u Afegra Finance Limited ma huma l-legittimi kontraditturi għat-talbiet tas-socjeta` attrici peress illi ma tezistix relazzjoni guridika bejn l-istess għajr għal fatt illi s-socjeta` GBCom Limited kienet azzjonista (30%) fis-socjeta` Afegra Management Limited sal-15 ta` Mejju 2013 ;

7. Illi s-socjeta` attrici ma tispjegax il-logika wara l-involviment tas-socjetajiet esponenti f`din il-kawza ; di fatti mkien fir-rikors mahluf ma hemm xi spjegazzjoni ta` liema natura ta` relazzjoni hemm bejn is-socjeta` rikorrenti u l-esponenti ;

8. Illi l-Att Dwar il-Kumpaniji, kif ukoll il-principji generali tad-dritt kummercjali ma jimponu ebda drittijiet jew obbligi bejn azzjonist u kumpanija li jistghu jiggustifikaw dawn il-proceduri fil-konfront tas-socjetajiet esponenti ; għal kuntrarju l-ligi tipprospetta illi l-azzjonist hu kompletament distint mis-socjeta`, u dan hu l-fondament tan-natura indipendenti u awtonoma ta` socjeta` kummercjali.

9. Illi allura huwa llogiku kif is-socjetajiet esponenti, bhala mera suggett, diretti jew indiretti tal-kuntratt tal-15 ta` Mejju 2013 ġia` msemmi (stante illi jitratta t-trasferiment ta` ishma fil-parent company Afegra Management Limited) ġew inkluzi f`din il-kawza ;

10. Illi anke li kieku l-fatti allegati mis-socjeta` attrici kienu fil-fatt ippruvati, is-socjetajiet esponenti kellhom ikunu atturi u qatt konvenuti fil-kawza dwar il-mertu ;

11. Illi s-socjetajiet eccipjenti jirrespingu b`mod kategoriku l-allegazzjoni magħmula f`paragrafu 23 tar-rikors guramentat bhala nfondati kemm fil-fatt kif ukoll fid-dritt għar-ragunijiet ġia` espressi ;

Rat il-lista tax-xhieda.

3. Il-kontrotalba ta` MSA Holdings Limited

Dr. Nicolai Vella Falzon noe pprezenta kontrotalba li taqra hekk :-

1. *Illi l-esponent huwa debitament awtorizzat jaghmel din il-kontrotalba u jikkonfermaha bil-gurament ghan-nom tal-kumpannija intimata MSA Holdings Limited permezz ta` risoluzzjoni tal-istess kumpannija iffirmata mid-direttur ossia sole director taghha fil-31 ta` Lulju, 2013 u d-dikjarazzjonijiet minnu maghmula u kkonfermati f` din ir-risposta huma ibbazati fuq fatti u cirkostanzi hekk kif dedotti lilu mill-mandanti tieghu ;*

2. *Illi l-esponent nomine jixtieq jipprevalixxi ruhu mir-rikors guramentat tal-kumpannija GBCom Limited kontra tieghu (fost intimati ohra) sabiex jipprezenta l-kontrotalba odjerna ghaliex ghandu pretensjonijiet x` ivanta kontra l-kumpannija GBCom Limited ;*

3. *Illi a skans ta` ripetizzjoni l-esponent nomine jaghmel riferenza ghad-dikjarazzjonijiet maghmula fir-rikors mahluf ta` GBCom Limited kif ulterjorment kjarifikati bid-dikjarazzjonijiet responsivi tal-esponent nomine fir-risposta guramentata tieghu pprezentata kontestwalment ma din il-kontro-talba ;*

4. *Illi kif intqal fir-risposta guramentata tal-esponent nomine, Gert Bosscher flimkien ma` martu Camelia Simion huma l-proprjetarji assoluti ta` GBCom Limited u kienu wkoll id-diretturi u amministraturi ta` Afegra Trading S.A. responsabbli ghall-kummerc kollu tal-grupp. Afegra Trading S.A. kienet il-kumpannija fi hdan l-Afegra Group li permezz taghha kien isir in-negozju kollu tal-grupp ;*

5. *Illi l-kumpannija Afegra Management S.A. kienet bdiet taffacca xi problemi finanzjarji f`xi zmien fis-sena 2012 tant illi l-kumpannija esponenti MSA Holdings Limited, li kienet silfet madwar mitt miljun Euro (€100,000,000) lill-istess kumpannija sabiex jigi finanzjat in-negozju taghha, kienet accettat proposta ta` Gert Bosscher illi jigu mahfura madwar ghoxrin miljun Euro (€20,000,000) dovuti lill-kumpannija esponenti sabiex jigi evitat il-falliment tal-Afegra Group. Bl-intervent tal-kumpannija esponenti Afegra Trading S.A. setghet tkompli timxi bin-negozju taghha taht id-direzzjoni ta` Gert Bosscher u Camelia Simion ;*

6. *Illi xi xhur wara u senjatament ghall-habta ta` April 2013 Gert Bosscher hareg profit warning u baghat javza lill-azzjonisti l-ohra inkluz il-*

kumpannija esponenti illi Afegra Trading S.A. regghet kienet fi sitwazzjoni finanzjarja prekarja ;

7. Illi minn diskussjonijiet illi saru bejn il-partijiet malli harget din il-profit warning, irrizulta illi minkejja d-diffikultajiet politici u ekonomici li kienu gja qed jolqtu n-negozju ta` Afegra Trading S.A. fix-xhur precedenti, fl-ewwel xhur tas-sena 2013 Gert Bosscher u Camelia Simion kienu ghamlu investimenti ta` bejn seba` u ghaxar miljun Euro (€7,000,000 - €10,000,000) fi hekk imsejha "futures" liema investimenti kienu fallelw drastikament ;

8. Illi dawn l-investimenti kienu saru minghajr l-approvazzjoni tal-azzjonisti u kienu investimenti li saru bl-ghagla, b`mod traskurat u irresponsabbli ghaliex Bosscher u Simion kienu jafu illi dawn kienu investimenti b`riskju elevat, riskju li l-grupp ma kienx f`posizzjoni illi jiehu ;

9. Illi f`dan l-istadju Gert Bosscher ghan-nom tal-kumpannija hawn intimata GBCom Limited talab lill-kumpannija esponenti sabiex taccetta illi tixtri l-ishma tieghu fil-holding company Afegra Management Limited ghaliex huwa ma riedx jibqa` involut fil-grupp. Kien evidenti illi Bosscher li kien l-iktar persuna illi kien jaf is-sitwazzjoni finanzjarja tal-Grupp, kien qed jibza` mill-problemi illi kien ukoll gab b`idejh u illi l-prijorita` tieghu kienet illi ma jitlef xejn mill-investment originali li kien ghamel fil-grupp ta` tlett miljun Euro (€3,000,000) ;

10. Illi effettivament dak li ried Bosscher (u martu Simion) kien illi jahrab mis-sitwazzjoni prekarja tal-grupp (li del resto huwa kien responsabbli ghaliha) basta jikseb rimbors tal-investment kapitali li kien ghamel u fil-fatt fl-isfond ta` dawn it-talbiet li ghamel ghall-bejgh tal-ishma tieghu huwa intrabat ukoll illi jirrezenja immedjatament mill-bord tad-diretturi ta` Afegra Trading S.A. ;

11. Illi fl-isfond ta` dawn it-talbiet tieghu Gert Bosscher in kwantu direttur ta` Afegra Trading S.A. u amministratur tal-kummerc kollu tal-grupp u in kwantu rapprezentant tal-kumpannija hawn intimata GBCom ta` x`jifhem lill-kumpannija esponenti illi l-valur tal-ishma ma kienx inqas mill-valur nominali taghhom ta` tlett miljun Euro (€3,000,000). F`dan iz-zmien il-kumpannija esponenti ma kellhiex raguni ghal xiex tiddubita l-kelma ta` Bosscher peress illi hadd iktar minnu ma kien jaf x`inhi l-posizzjoni finanzjarja tal-grupp ;

12. Illi peress illi l-kumpannija esponenti kellha investimenti kapitali u finanzjarji kbar hafna fil-grupp hija kellha interess illi tipprotegi dawn l-interessi taghha u peress illi kien evidenti illi Gert Bosscher u

Camelia Simion ma riedux ikomplu jmexxu n-negozju tal-grupp hija ma kelliex alternattiva hlief li taccetta li tixtri l-ishma ta` GBCom u tiehu kontroll tal-grupp sabiex tkun tista` tevita l-falliment tieghu ;

13. Illi barra minn hekk, fl-istess zmien, l-azzjonist l-iehor Mohammedreza Aghaei talab ukoll illi johrog mill-grupp taht l-istess kundizzjonijiet proposti minn GBCom ;

14. Illi ghall-istess motivi hawn fuq imsemmija l-kumpannija esponenti accettat li tixtri wkoll l-ishma ta` Aghaei ghall-prezz nominali taghhom u fil-fatt fl-istess gurnata u cioe` 15 ta` Mejju, 2013 gew iffirmati z-zewg kuntratti ta` trasferiment ta` ishma fi Afegra Management Limited biex b`hekk l-ishma kollha nxtraw mill-kumpannija esponenti ;

15. Illi llum qed jirrizulta illi l-kumpannija GBCom Limited, tramite r-rapprezentanti u proprjetarji taghha Gert Bosscher u Camelia Simion, ghamlet rapprezentazzjonijiet foloz dwar il-qagħda finanzjarja tal-attivita` kummercjali tal-grupp sabiex din tikseb il-bejgh tal-ishma taghha fi Afegra Management Limited ghal prezz illi jeccedi l-valur rejali taghhom ;

16. Illi barra minn hekk, wara li gie iffirmat il-ftehim ta` trasferiment tal-ishma fil-15 ta` Mejju, 2013 l-istess kumpannija tramite r-rapprezentanti taghha fuq msemmija b`qerq u/jew malizzja u/jew mala fede ghamlet u ghadha qed taghmel azzjonijiet li gja kkawzaw u ghadhom qed jikkawzaw hsara ngenti lill-attivita` kummercjali tal-grupp biex b`hekk rega gie ridott (u ghadu qed jigi ridott) sostanzjalment il-valur tal-ishma mibjugha minn GBCom Limited lill-kumpannija mittenti ;

17. Illi sad-data ta` llum il-kumpannija esponenti gja hallset miljun u hames mitt elf Euro (€1,500,000) ghall-ishma trasferiti lilha minn GBCom Limited ;

18. Illi l-agir illegali tal-kumpannija intimata GBCom Limited jikkostitwixxi ksur tal-ftehim fuq imsemmi tal-15 ta` Mejju, 2013 u jikkostitwixxi wkoll qerq, mala fede u agir doluz tal-kumpannija intimata li ghaldaqstant ghandha tirispondi ghad-danni li kkagunat u li ghadha qed tikkaguna lill-kumpannija mittenti.

Ghaldaqstant l-esponent nomine jitlob bir-rispett illi dina l-Onorabbli Qorti joghogobha ghar-ragunijiet hawn fuq premissi :-

(i) Tiddeciedi u tiddikjara illi l-kumpannija rikonvenzjonata kisret l-kundizzjonijiet jew obbligi taghha fil-kuntratt ta` trasferiment ta` ishma datat 15 ta` Mejju, 2013 u/jew agixxiet b`qerq u/jew mala fede u/jew

b` mod doluz fil-konfront tal-kumpannija esponenti fil-kuntest tal-bejgh tal-ishma taghha fi Afegra Management S.A. ;

(ii) Tiddeciedi u tiddikjara illi l-kumpannija rikonvenzjonata GBCom Limited hija ghalhekk responsabbli ghad-danni sofferti mill-kumpannija esponenti b` rizultat tal-agir illegali taghha kif hawn fuq imsemmi ;

(iii) Tillikwida d-danni hekk sofferti mill-kumpannija esponenti okkorrendo bil-hatra ta` esperti nominandi ;

(iv) Tikkundanna lill-kumpannija rikonvenzjonata thallas lill-kumpannija esponenti d-danni hekk likwidati flimkien ma` l-imghaxijiet legali skond il-ligi.

Bl-ispejjez inkluz tal-ittra ufficjali datata 6 ta` Settembru 2013, tar-risposta guramentata kontestwali u ta` din il-kontrotalba u bl-ingunzjoni tal-kumpannija rikonvenzjonata u r-rapprezentanti taghha ghas-subizzjoni.

Rat il-lista tax-xhieda.

5. Ir-risposta guramentata tal-attrici ghall-kontrotalba

Taqra hekk :

1. Illi s-socjeta` attrici tichad kategorikament illi hija ghamlet xi rapprezentazzjonijiet foloz lis-socjeta` konvenuta MSA Holdings Limited. Anzi fl-istess ftehim ta` bejgh (esebit bhala Dok.E mar-rikors guramentat) gie espressament pattwit :

*"The Purchaser (i.e. MSA Holdings Limited) represents and warrants to Seller that the Purchaser has had access to such information regarding the Company, including without limitation, the Company`s organization, corporate records, financial statements, tax liabilities, title to properties, contracts and pending or threatened claims, as Purchaser deems relevant for the purposes of entering into this Agreement. **The Purchaser acknowledges that Seller makes no representations or warranties with respect to the Company except for title to the Shares.**"*

2. Illi s-socjeta` attrici tichad kategorikament ukoll illi hija b`xi mod kisret il-ftehim tal-15 ta` Mejju 2013. Illi jekk hemm xi hadd li kiser dan il-ftehim, kienet proprju is-socjeta` MSA Holdings Limited li ma effetwatx il-pagamenti minnha dovuti ai termini tal-artikolu 2.2 (ii) meta fil-31 ta` Awissu 2013 naqset li thallas US\$ 1,000,000, kif pattwit, u issa qiegħda tipprova tabbuza minn dawn il-proceduri sabiex tipprova tittardja

il-pagament minnha dovut. Irid jinghad li s-socjeta` attrici qed tfittex lis-socjeta` MSA Holdings Limited ghal dan il-bilanc, permezz ta` proceduri separati fl-ismijiet : "GBCom Limited vs Av Dottor Nicolai Vella Falzon li gie nominat bhala Kuratur sabiex jirraprezentaw lis-socjeta` MSA Holdings Limited" - Rik. Nru 1001/2013.

3. *Illi in sussidju u minghajr pregudizzju ghas-suespost is-socjeta` attrici tichad illi hija, jew id-diretturi taghha, kienu b`xi mod responsabbli ghal xi telf ta` flus da parti tal-Afegra Group. Dan il-grupp, tramite it-trading arm tieghu, Afegra Trading SA, kien jinnegozja fil-qmuh u c-cerejali, u li gara huwa li fit-28 ta` Marzu 2013, il-United States Department of Agriculture ippublika l-istatistika mensili tal-World Corn and Wheat Production. Dawn il-figuri xxukjaw is-suq b`kollass immedjat tal-prezz tal-qamh u l-qamharrun (wheat and corn) mad-dinja kollha. Dan jirrizulta mill-anness Dok. F mahrug mic-Chicago Board of Trade – il-benchmark internazzjonali fis-suq relevanti. Dan affettwa lis-socjeta` Afegra Trading negativament stante li kellha circa 143,000 tonnelli ta` qmuh – li jissarfu f` telf ta` circa US\$ 8.9 miljuni. Immedjatament fl-1 ta` April (l-ewwel gurnata ta` xoghol wara l-publikazzjoni tal-istatistika peress li kien hemm il-Gimgha l-Kbira u l-Ghid fin-nofs) Gert Bosscher baghat profit warning lill-azzjonisti l-ohra b`kopja lil Bob Marzbani (ir-rappresentant ta` MSA Holdings Limited), b`update sussegwenti fit-3 ta` April 2013. Vide Dok. G anness. Irid jinghad ukoll illi business confirmations kollha kif ukoll kull transazzjoni f` future, jew futures positions dejjem kienu jintbaghatu fuq l-emails tal-Grupp, u b`hekk id-diretturi l-ohra kienu ben konxji ta` kull transazzjoni li tkun qed isseh.*

4. *Illi ma hu minnu xejn li s-socjeta` attrici jew id-diretturi taghha b`xi mod mxew b`xi malafede, jew b`qerq, kienu biss il-konvenuti fil-kawza li mxew b`dan il-mod mas-socjeta` attrici kif huwa ben espost fir-rikors guramentat u l-atti sussegwenti ppresentati mis-socjeta` attrici.*

5. *Illi in sussidju ma hu minnu xejn li s-socjeta` rikonvenzjonanti b`xi mod sofriet xi dannu.*

6. *Illi in vista tas-suepost is-socjeta` attrici ma kisret ebda kuntratt u ma hija responsabbli ghall-ebda allegat dannu reklamat mis-socjeta` rikonvenzjonanti u tali rikonvenzjoni ghandha tigi michuda bl-ispejjez.*

Salv eccezzjonijiet ulterjuri.

Rat il-lista tax-xhieda, u l-elenku ta` dokumenti li kienu prezentati ghall-iskop tal-kontrotalba.

Rat il-verbal tal-udjenza tal-4 ta` Frar 2014 fejn il-partijiet qablu li x-xiehda li tat Camelia Simion fl-atti tar-rikors fl-ismijiet *GB Com Limited vs Dr Nicolai Vella Felzan* (Rik. Nru. 1539/13 JZM) tkun taghmel prova ghall-fini tal-kawza tal-lum.

Rat id-digriet taghha tat-22 ta` April 2014 fejn ordnat li l-kawza fl-ismijiet : *GBCom Limited (C51508) vs Avukat Dr Nicolai Vella Falzon* noe *sabiex jirrapprezenta lis-socjeta` registrata Dubai, United Arab Emirates, b`numru ta` registrazzjoni JC/2522/10* (Rik. Nru. 1001/2013 AE) tinstema` flimkien mal-kawza odjerna.

Rat is-sentenza taghha tal-15 ta` Jannar 2015 fejn laqghet l-ewwel (1) eccezzjoni tal-Kuratur Deputat P.L. Madeleine Firman, u helsitha mill-osservanza tal-gudizzju, spejjez ghall-kumpannija attrici.

Rat is-sentenza li nghatat mill-Qorti tal-Appell fit-30 ta` Ottubru 2015 fejn is-sentenza taghha tal-15 ta` Jannar 2015 kienet revokata, spejjez taz-zewg istanzi ghall-Kuratur Deputat P.L. Madeleine Firman. L-atti kienu rimessi ghall-prosegwiment tal-kawza.

Rat is-sentenza li tat il-Qorti tal-Appell fid-29 ta` Marzu 2019 cahdet it-talba tal-Kuratur Deputat P.L. Madeleine Firman, spejjez ghaliha, ghas-smigh mill-gdid tal-appell li kien deciz fit-30 ta` Ottubru 2015.

Semghet ix-xhieda u rat il-provi l-ohra.

Rat id-digriet taghha li nghata fl-udjenza tas-27 ta` Jannar 2020 fejn kienet milqugha talba tal-partijiet sabiex kull prova li saret fil-kawza odjerna tkun tikkostitwixxi prova wkoll fil-kawza bin-numru 1001/13 JZM.

Rat in-noti ta` osservazzjonijiet.

Semghet is-sottomissjonijiet finali.

Rat illi l-kawza thalliet ghas-sentenza ghal-lum.

Rat l-atti l-ohra.

II. Provi

1. Il-twaqqif tal-Grupp Afegra

Gert Bosscher ("**Bosscher**") u Mohammedreza Aghaei ("**Aghaei**") kienu Itaqghu fl-ambitu tal-Australian Wheat Board ("**AWB**") gewwa Ginevra.

Bosscher kien impjegat tal-AWB b`esperjenza twila ta` snin fis-suq tal-qamh.

Aghaei mill-Iran ghandu snin esperjenza fin-negozju principalment tal-qamh, zokkor u zejt. L-attivita` kummercjali tieghu hija l-aktar fis-suq tal-Iran fejn huwa rikonoxxjut li mhux biss jaf is-suq tajjeb izda ghandu kuntatti sodi ma` negozji internazzjonali fosthom Bunge, Intergrain, Wilmar, Inerco u Glencore, li juzaw is-servizzi tieghu bhala sensar fis-suq tal-Iran. Ghandu numru ta` kumpanniji fosthom : Agro World Boarder Middle East, Agro Hope, Quantz International u Quantz Oleo Gida Insaat, kollha nvoluti fin-negozju tal-qamh.

Meta AWB kienet fil-process illi tinbiegh lil terzi, Bosscher u Aghaei ghamlu l-hsieb illi jwaqqfu s-socjeta` biex topera fis-settur tal-qamh. Aghaei laqqa` lil Bosscher ma` Hassan Asadi ("**Asadi**") li ried jinvesti fis-suq tal-qamh. Asadi huwa s-sid beneficjarju ta` grupp kbir ta` kumpanniji bin-negozju principali fis-settur tal-*potato chips*. Ma kellu ebda involviment fin-negozju tal-qamh.

Bosscher ha hsieb jikkordina t-twaqqif tal-kumpanniji. Id-ditta legali Loyens and Loeff ta` Ginevra hejjiet pjan ta` struttura. Il-Grupp Afegra ("**il-Grupp**") kien kostitwit minn Bosscher, Aghaei u Asadi sabiex isir negozju principalment fil-provvista ta` qamh, zrieragh u zejt tal-hxejjex lill-Iran. In segwitu kellhom jigu esplorati wkoll swieq ohra. It-tlieta dahlu fil-Grupp Afegra : fil-kaz ta` Bosscher permezz tal-kumpannija attrici ("**GBCom**") ; fil-kaz ta` Asadi permezz tal-kumpannija konvenuta MSA Holdings Limited ("**MSA**") ; u fil-kaz ta` Aghaei de proprio. Meta kien kostitwit il-Grupp Afegra, kemm Aghaei kif ukoll Asadi kienu nvoluti fin-negozju tagghom.

Il-Grupp kien kompost minn seba` kumpanniji:

Afegra Holding Ltd ("**Afegra Holding**"),
Afegra Finance Ltd ("**Afegra Finance**"),
Afegra East Commodities (Volgograd),
Afegra Trading and Shipping,

Afegra Trading SA ("**Afegra Trading**"),
Afegra Eastern Europe (Kiev) u
Afegra Eastern Europe (Moska).

Il-kumpanniji kienu registrati f` Malta, Ginevra, Vienna, Dubai, Kiev u Volgograd.

Afegra Holding kienet registrata Malta u hija l-*holding company* tal-Grupp, b` 51.49% tal-ishma ta` MSA u 49.51% ta` Afegra Management Ltd ("**Afegra Management**"). Din tal-ahhar hija kumpannija registrata u kienet inkorporata fit-30 ta` Marzu 2010. L-azzjonisti kienu GBCom bi 30% tal-ishma, MSA b` sehem wiehed u Aghaei b` 69% tal-ishma.

Aghaei kien direttur ta` Afegra Holding bejn it-30 ta` Marzu 2010 u t-28 ta` Mejju 2011.

Aghaei u Bosscher kienu diretturi ta` Afegra Management. Aghaei kien direttur bejn is-17 ta` Mejju 2010 u s-27 ta` Mejju 2011 u mill-25 ta` Ottubru 2012 sas-6 ta` Ottubru 2015. Bosscher sar direttur fis-27 ta` Mejju 2011.

Afegra Finance kienet registrata Malta. L-uniku azzjonista taghha hija Afegra Holding. Afegra Finance hija l-azzjonista ta` Afegra East Commodities (Volgograd), Afegra Trading and Shipping, Afegra Trading SA.

Afegra Holding, Afegra Finance u Afegra Management ma kienu jaghmlu ebda negozju ma` terzi.

Afegra Trading kienet registrata Ginevra u tmexxi n-negozju kollu tal-Grupp. Kienet registrata Ginevra ghal zewg ragunijiet : access ahjar ghall-iffinanzjar tan-negozju ; u l-possibilita` ta` negozju mal-Iran minkejja s-sanzjonijiet li kienu mposti kontra l-Iran mill-Istati Uniti, mill-UE u mill-Gnus Maghquda ("**is-sanzjonijiet**"). Kienet kostitwita b` kapital azzjonarju ta` US\$20 miljun. Asadi hareg US\$10.3 miljun, Aghaei hareg US\$6.9 miljun u Bosscher hareg US\$3 miljun. Id-diretturi ta` Afegra Trading kienu Bosscher u martu Camelia Simion ("**Simion**"). Minn Ginevra kienu jiehdu hsieb l-amministrazzjoni, l-ezekuzzjoni tal-kuntratti, il-kontabilita`, il-fatturar tax-xoghol u l-impjegati. Simion saret direttur u *operations manager* ta` Afegra Trading fid-9 ta` Gunju 2010. Bejn il-15 ta` Lulju 2010 u t-3 ta` Frar 2011 kienet direttur manigerjali. Bejn it-3 ta` Frar 2011 u l-31 ta` Marzu 2014 kienet direttur. Kienet tiehu hsieb l-ezekuzzjoni tal-kuntratti ta` bejgh u xiri.

L-unika kumpannija li thalliet barra mill-asseti tal-Grupp kienet

Afegra Middle East FZE ("**Afegra Middle East**") li kienet registrata fl-UAE fil-15 ta' Lulju 2010 b'ufficcju Dubai u bl-impjegati taghha. Afegra Finance kienet harget ittra ta' garanzija finanzjarja ghar-rigward tal-kapital azzjonarju ta' Afegra Middle East. Skont **Aghaei** dan sar ghaliex il-Grupp kienet jehtieg li Afegra Middle East tkun kostitwita fl-iqsar zmien possibbli sabiex tkun taghti servizz lill-Grupp. Jirrizulta li s-sid beneficjarju ta' Afegra Middle East huwa Aghaei li hareg il-kapital azzjonarju kollu u huwa l-uniku membru taghha.

Av. Dr Ramona Piscopo xehdet illi bhala l-uniku azzjonista ta' Afegra Middle East, Aghaei kellu jiehu hsieb jinkorpora l-kumpannija. Minn korrisondenza cirkolata minn Jean-Philippe Vito Deplanque, irrizulta li Afregra Middle East kienet giet inkorporata izda kienet ghadha mhux trasferita lil Afegra Finance. Il-hsieb kien li Afegra Finance kellha tixtri u takkwista l-ishma ta' Afregra Middle East minghand Aghaei¹. Dan baqa' ma sehxx minhabba s-sanzjonijiet.

Asadi² xehed illi Bosscher u Aghaei ma kienux qalulu bit-twaqqif ta' Afegra Middle East. Lanqas ma kien jaf bil-garanzija finanzjarja li kienet harget Afegra Finance meta saret Afegra Middle East. Lanqas ma kien jaf li l-kontabilita' ta' Afegra Middle East kienet qeghda tigi revizjonata mill-*accountants* ta' Afegra Trading. Meta sar jaf, huwa oggezzjona ghaliex ghalkemm Afegra Middle East ma kinitx parti mill-Grupp, kienet qeghda ggorr l-istess isem u markju. Madanakollu mbaghad accetta wara li kien konvint minn Bosscher u Aghaei li l-kumpannija kien hemm bzonnha sabiex ikun facilitat il-gbir tal-flus.

Aghaei³ cahad illi Afegra Middle East kienet registrata f'ismu unikament minhabba s-sanzjonijiet. Cahad ukoll li kien izomm l-ishma f' Afegra Middle East ghan-nom tal-Grupp.

Xehed illi Afegra Middle East intuzat ghall-beneficcju tal-Grupp fis-sens illi ffacilitat pagamenti u transazzjonijiet tal-Grupp. Fil-fatt Afegra Middle East kienet isservi bhala *main partner* u intermedjarja tan-negozju tal-Grupp fil-Lvant Nofsani. Kienet ukoll strumentali biex ikun facilitat ir-rekuperu ta' krediti li l-Grupp kellu ma' klijent fl-Iran. Ghal dawn il-prestrazzjonijiet, Afegra Middle East kellha tircievi korrissettiv.

Spjega illi ghalkemm Afegra Middle East kienet distinta mill-Grupp xorta wahda ntghazel l-isem Afegra ghaliex bl-uzu ta' dak l-istess isem, il-banek kienu ser jiffacilitaw it-transazzjonijiet. Dan kien fattur importanti partikolarment f'xenarju fejn kien qieghed isir hafna negozju mal-Iran u

¹ Dok. RF 6 sa RF 8 a fol. 1593 sa 1603, Vol. V tal-process.

² Affidavit a fol. 1780 sa 1789, Vol. VI tal-process.

³ Affidavit a fol. 971 sa 1014 u sett ta' dokumenti immarkati "Exhibit MA 01" sa "Exhibit MA 68" a fol. 1015 sa 1157, Vol. IV tal-process Rik. Gur. 627/13 JZM.

kienu diversi s-sanzjonijiet. Afegra Middle East kienet tintuza biss sabiex tiffacilita-pagamenti u t-transazzjonijiet relattivi ghan-negozju. Ghalhekk mill-kontijiet ta` Afegra Middle East kienu jghaddu ukoll flejjes li finalment kienu ta` Afegra Trading.

Fl-2011 sforz tal-operat ta` Afegra Middle East, Afegra Trading kellha dhul ta` US\$1.2 biljuni. Fl-2012 id-dhul naqas drastikament konsegwenza tal-problemi fl-Iran. Dawn wasslu sabiex stagna n-negozju.

Bhala parti mill-Grupp kienet ukoll kostitwita Afegra Dubai, li pero` baqghet qatt ma giet registrata.

Fit-3 ta` Awwissu 2012 kienet kostitwita kumpannija ta` investiment bl-isem Afegra Holding Canada Limited ("**Afegra Canada**").

Babak Marzbani ("**Marzbani**") xehed illi kien hu li waqqaf Afegra Canada minghajr struzzjonijiet ta` hadd. Qal li ma kienx hemm raguni partikolari ghaliex saret din il-kumpannija kif lanqas ma kien hemm raguni ghaliex intghazel l-isem Afegra. Il-kumpannija twaqqfet unikament ghal dak illi seta jinqala f`kuntest ta` investimenti futuri. Il-kumpannija ma kellha l-ebda konnessjoni ma` l-Grupp. Ma kienx cert jekk Asadi kienx jaf li saret Afegra Canada.

F`Jannar 2013 sar trasferiment ta` aktar minn US\$4 miljun minn Afegra Dubai destinati ghal Afegra Canada. Il-flus marru direttament go *client account* tal-Avukat Kanadiz Rod McCloy billi Afegra Canada ma kellhiex kontijiet bankarji taghha. Dawk il-flus kellhom jigu trasferiti lil MSA bhala hlas lura ta` dejn. Meta sar dak it-trasferiment, Asadi kien jaf bit-twaqqif ta` Afegra Canada.

Marzbani spjega illi l-hsieb tieghu kien li jigbor lura l-investiment li kien ghamel Asadi billi jigbor il-pagamenti fuq is-self. Il-flus ried li jiddepozitahom. Ghalhekk kien hemm id-diskussjonijiet sabiex jitwaqqfu kumpanniji Hong Kong u l-Kanada sabiex jigu deponzitati l-flus fihom imbgħad isir investiment għdid.

Dwar Afegra Canada, **Asadi** xehed illi dik kienet kumpannija tal-familja tieghu. Il-kumpannija kienet xjolta fit-23 ta` Awwissu 2013.

Minn skambju ta` korrisonanza bejn Mazbani u Aghaei jirrizulta illi kienu għaddejnin diskussjonijiet dwar it-twaqqif ta` Afegra Finance Canada u Afegra Finance Hong Kong, liema kumpanniji qatt ma saru.

Xehed illi l-beneficjarji tal-Grupp kienu :

MSA (Asadi) : 51.49% ;
Aghaei : 33.81% ;
GBCom (Bosscher) : 14.7%.

Kull wiehed kellu jiehu hsieb is-settur ta` kompetenza tieghu :

- Aghaei kellu jkun responsabbli mis-suq fl-Iran, u mill-gestjoni tal-impjegati f` Dubai u Tehran ;
- Bosscher kellu jkun responsabbli mix-xiri tal-prodott sabiex jigi esportat lejn l-Iran, mill-pagamenti lill-fornituri, u mill-impjegati fl-Ewropa
- Asadi kellu jkun responsabbli mill-finanzjament tal-attivitajiet kummercjali tal-Grupp.

Asadi xehed illi ghalkemm MSA kellha l-maggoranza tal-ishma, huwa qatt ma ried iservi bhala direttur fil-Grupp, fl-ewwel lok ghaliex ma kellux gharfien tan-negozju partikolari tal-Grupp, u fit-tieni lok ghaliex huwa kellu grupp ta` 24 kumpanija ohra fl-Iran li kienu jimpenjaw hafna mill-hin tieghu u ma kienux jippermettu li jkun fit-tmexxija ta` negozju gdid. Huwa qies l-Grupp Afegra biss bhala opportunita` ta` investment.

Qal illi huwa jafda lil Bosscher u lil Aghaei u ghalhekk halla t-tmexxija f` idejhom. Ghamel referenza ghal email tieghu tal-25 ta` Settembru 2012 fejn inghad : *"my interference in trade is not good for Afegra group and also we had agreed that I never meddle in trade"*.

Dwar id-*dividends*, stqarr li l-azzjonisti kellhom jiehd *dividends* abbazi tal-profitti generati mill-Grupp. Anke d-dirigenti u l-impjegati setghu jibbenefikaw minn *bonus* ta` 17% fuq il-qligh nett.

Kompla jixhed illi bhala impjegat, Bosscher kien jircievi salarju ta` CHF 350,000 fis-sena, apparti *bonuses* li fis-sena kienu jvarjaw minn CHF 250,000 sa CHF 650,000. Simion kellha salarju ta` CHF 150,000 fis-sena, apparti *bonuses*.

Aghaei qatt ma thallas ghas-senserija.

Bhala finanzjatur tal-Grupp, Asadi xehed illi hareg diversi *shareholders` loans*. Bejn Mejju 2010 u Novembru 2011, MSA silfet lil

Afegra Holding is-somma globali ta` US\$110 million. Fil-25 ta` Mejju 2010 sar self ta` US\$20 miljun ; fil-11 ta` Marzu 2011 sar self ta` US\$20 miljun, fil-15 ta` Marzu 2011 sar self ta` US\$10 miljun ; fit-22 ta` Gunju 2011 sar self ta` US\$10 miljun ; fid-19 ta` Awwissu 2011 sar self ta` US\$10 miljuni; fl-4 ta` Novembru 2011 sar self ta` US\$20 miljun. Parti minn dawn is-self thallsu lura. Mil-*loan agreements* esebiti jirrizulta illi fuq uhud mis-self Asadi kellu jithallas lura imghax f` ammont li jvarja bejn 4% u 8% fis-sena.

Dr Ramona Piscopo kkonfermat illi MSA kienet tislef flus lil Afegra Holding. Din imbaghad kienet tqieghed il-flus ghand Afegra Finance jew tuza l-flus sabiex taghti aktar self. Finalment, wara li jithallsu l-kredituri kollha, il-profitti kienu jinqasmu bejn MSA u Afegra Management, u jekk jifdal bejn l-azzjonisti.

Waqt laqgħa tal-azzjonisti li saret Tehran fis-26 ta` Settembru 2011 Asadi ppropona li : *"the rights of my investment as the main owner of Afegra be supported by Mr Bosscher and he takes responsibility for them. Gert Bosscher agreed on Mr Asadi`s suggestion as the responsible person for his rights of investment."*⁴

Il-flus tan-negozju kienu fil-kontijiet ta` Afegra Trading u Bosscher kien vestit bir-responsabbilita` illi jhallas lil MSA tax-*shareholders` loan*. Il-pagamenti ma kinux tempestivi.

Bosscher xehed illi l-fatt li tqieghed responsabbli għad-dejn kienet biss nasba kontra tiegħu. Ma kienx hemm flus fil-kontijiet ta` Afegra Trading għaliex Asadi u Aghaei ma kinux qegħdin jghaddu l-flus li kienu deħlin min-negozju fl-Iran.

In-negozju tal-Grupp kellu budget limitat għal US\$25 miljun li ma setax jinqabez jekk mhux bil-kunsens tal-azzjonisti kollha. B` dak il-limitu fin-nefqa, Asadi u Aghaei raw illi jipprotegu l-investment tagħhom.

Ma kienx sar *shareholders` agreement*.

Dwar dan il-fatt, **Asadi** stqarr li l-intiza bejn l-azzjonisti kienet cara. Ghalkemm kien suggerit lilhom li jsir *shareholders` agreement*, l-azzjonisti deħrilhom illi ma kienx meħtieġ.

L-azzjonisti qatt ma tkellmu dwar il-possibilita` li huma jkomplu u/jew jidhlu f` negozju iehor waqt li kienu wkoll diretturi u azzjonisti tal-Grupp.

⁴ Exhibit 22 a fol. 391, Vol. II tal-process Rik. Gur. 627/13 JZM.

Kien hemm qbil li ma tittiehed ebda rizzoluzzjoni f` dan ir-rigward.

Lanqas ma kien ftehim bejn l-azzjonisti li ma jidhlu f` ebda negozju li jkun jikkompeti ma` dak tal-Grupp, anke jekk kien evidenti mill-bidu nett li Asadi u Aghaei kellhom interessi f` negozju iehor.

2. L-inkwiet

In-negozju beda jmur tajjeb.

Fl-ewwel sena Afegra Trading irregistrat turnover li kien jaqbez il-US\$1.2 biljun. Maz-zmien beda jilhaq medja ta` bejn US\$100 miljun u US\$150 miljun fix-xahar, bi profitt nett ta` bejn US\$2 jew US\$3 miljun kull xahar ; 90% tan-negozju kien jigi mill-Iran.

F` Novembru 2011 beda jberraq.

Kienu mposti sanzjonijiet kontra l-Iran li komplew jizdiedu fl-2012. Il-banek tal-Iran bdew jaghlqu l-kontijiet tal-klijenti taghhom. Dan gab nuqqas ta` likwidita` bil-konsegwenza li n-negozju waqaf.

Fl-2011 thallsu l-pagi pero` ma thallsux *dividends*.

Afegra Trading kellha diversi krediti x` tigbor mill-Iran izda d-debituri taghha bdew jagghu lura fil-hlasijiet. L-ikbar dejn kien dak ta` Afra General Trading LLC ("**Afra**") u ta` Tejarat Aria Gostar Iranina Navid, it-tnejn kumpanniji kontrollati min-negozjant mill-Iran Afrashtehpour. Id-dejn taghhom kien jammonta ghal US\$65 miljun.

Bosscher kien ghamel konoxxenza ta` Afrashtehpour meta kien jahdem ma` AWB.

Meta Bosscher dahal ghal negozju mieghu ghan-nom ta` Afegra Trading ma rax il-htiega ta` *due diligence exercise* dettaljat. Qaghad fuq il-gudizzju ta` Asadi u Aghaei ghaliex kien jafdahom. Barra minn hekk, Afrashtehpour kien negozjant ghani u ghalhekk ma kienx hemm dubju dwar il-qaghdha finanzjarji b` sahhitha tieghu.

Bhala fatt id-diffikultajiet li sabet ruhha rinfaccjata bihom Afegra

Trading sabiex tirkupra l-kreditu taghha kellu mpatt finanzjarju negattiv.

F`Ottubru 2012 Bosscher ippropona li tieqaf l-attivita` kummercjali ta` Afegra Trading, illi l-Grupp jigi xjolt u l-azzjonisti jiehdu lura l-valur tal-azzjonat taghhom. Ghalkemm waqaf is-suq tal-Iran, il-proposta ta` Bosscher kienet respinta mill-azzjonisti l-ohra, u ghalhekk Afegra Trading bdiet tesplora swieq godda fosthom l-Italja, t-Turkija, l-Egittu u l-Olanda.

Asadi xehed illi minkejja s-sitwazzjoni difficili li sabet ruhha fiha l-kumpanija, Bosscher beda jressaq proposti ta` negozju gdid. Ighid illi Bosscher talbu sabiex jinvesti aktar flus, imma huwa rrifjuta. Anzi nsista li Aghaei u Bosscher kellhom jikkoncentraw fuq il-gbir lura tal-flus li kienu dovuti.

Fl-14 ta` Mejju 2012 Asadi hatar lil Marzbani mid-ditta Synergy Accounting Services Ltd tal-Kanada sabiex jiehu hsieb il-kontroll finanzjarju tal-Grupp. Din il-hatra saret bla ma kienu kkonsultati l-azzjonisti l-ohra.

Marzbani kellu *inter alia* jaghmel : "*review and approval of the financial statements and the auditors` report for each of the groups` companies*" kif ukoll sabiex jiehu hsieb il-*protection of shareholders` rights fil-holding company*.

Asadi xehed illi kien ilu jaf lil Marzbani sa mill-1997 u kien l-*accountant* tal-fiducja tieghu.

Ried jifhem x` kien sejjer hazin. Ghalhekk qabbaq lil Marzbani biex izomm taht kontroll u jara li Asadi jithallas lura s-*shareholders`s loan*. Marzbani kellu jghaddi l-informazzjoni lil Asadi.

Marzbani ffirmat *letter of understanding* fejn obbliga ruhu li jipprovdi lill-azzjonisti b` rapporti nterni.

L-involvement ta` Marzbani kien limitat ghal Afegra Finance u Afegra Holding u ma kienx estiz ghall-kumpaniji l-ohra.

Marzbani talab li jara dokumenti fosthom il-*loan agreement*.

Il-process ha fit-tul u ma tressaq l-ebda rapport formali dwar dak li rrizulta lil Marzbani.

Skont il-*letter of understanding* Marzbani kien responsabbli wkoll sabiex ihejji *internal audit* ta` Afegra Holding u ta` Afegra Finance. Kellu ukoll jirrevedi l-*audit report* li jippreperaw Deloitte, jikseb *tax law review*, jipprepara *statements* ghal Afegra Holding u Afegra Finance, ihejji *investment accounting*, ihares il-kapital azzjonarju u jqassam id-*dividends* u l-profitti.

Fid-19 ta` Mejju 2012 Deplanque ghadda lil Marzbani d-dokumentazzjoni finanzjarja kollha relattiva ghall-Grupp⁵.

Waqf laqgħa li saret bejn it-28 u d-29 ta` Mejju 2012 Marzbani nghata USB drive b`informazzjoni finanzjarja.

Marzbani stqarr illi l-informazzjoni kienet tikkonsisti f`ghadd kbir

ta` transazzjonijiet komplessi mmens tant li talab l-assistenza ta` Deloitte sabiex jifhem sewwa l-qagħda finanzjarja. Dan l-esercizzju baqa` ma sarx kawza tal-fatt illi fl-2012 kien hemm telf sostanzjali u waqaf l-operat.

B`email tal-5 ta` Awwissu 2012 Bosscher talab garanzija li ma kien ser jitlef xejn mill-investment tieghu.

Bosscher jallega illi Aghaei kellu interess fis-socjeta` Tejarat Aria Gostar Iranian Navid bhala azzjonist u direttur.

In **kontroezami** xehed li l-affermazzjoni tieghu kienet fondata fuq zewg rapporti fil-media. Qal ukoll li ma kienet saret l-ebda verifika mal-awtoritajiet.

Skont l-M&A u d-dokumenti li nkisbu mir-Registru tal-Kumpanniji tal-Iran, ma jirrizultax illi Aghaei qatt kien involut fil-kumpannija Tejarat Aria Gostar Iranian Navid⁶.

Jirrizulta li bis-sahha ta` ftehim privat datat 22 ta` Settembru 2012, Bosscher kiseb garanzija minghand Afrashtepour li dan kien ser ihallas l-ammont ta` US\$22 miljun sat-28 ta` Frar 2013.

Jirrizulta li b`zewg ftehim privati ohra datati 19 ta` Settembru 2012

⁵ Exhibit 6 a fol. 363, Vol. II tal-process, Rik. Gur. 627/13 JZM.

⁶ Dok. MF 13 a fol. 627 sa 701, Vol. III tal-process Rik. Gur. 627/13 JZM

u 24 ta` Settembru 2012, il-familja Afrashtepour tat b`garanzija bil-beni kollha li kellha f`Dubai.

Bosscher jikkoncedi li mhux dejjem fittex illi jiehu parir legali dwar passi li kien ser jiehu. F`dan il-kaz ikkonsulta ma` avukat go Tehran li hejja wkoll l-abbozz tal-ftehim li kellu jigi ezegwit go Dubai. Ma saret ebda verifika ta` jekk il-ftehim kienx ezegwibbli f`Dubai.

Fis-27 ta` Settembru 2013, ossia ftit jiem wara li kien iffirmit il-ftehim, Bosscher ha parir legali f`Dubai.

Tajjeb jinghad illi l-ftehim sar bejn Afrashtepour u Bosscher de proprio.

Bosscher qatt ma fittex li jenforza l-ftehim. Isostni li kien Asadi li waqqfu u minflok ta struzzjonijiet lil Aghaei sabiex jiehu hsieb jithallas minghand Afrashtepour.

Gara li l-familja Afrashtepour ma hallsitx ghax il-propjeta` taghha spiccat milquta b`ipoteka. Afegra Trading spiccat sprovvista minn garanzija ghall-kreditu li kellha.

Bhala azzjonisti maggoritarji Asadi u Aghaei kellhom hafna x`jitilfu jekk in-negozju jmur hazin. Kien ghalhekk illi Asadi talab lil Aghaei sabiex jiehu hsieb din il-kwistjoni.

Bejn l-2011 u l-2012, Bosscher ma kienx irnexxielu jirkupra xejn mill-kreditu li Afegra Trading kellha kontra Afra. Min-naha tieghu f`temp ta` sitt xhur Aghaei rnexxielu jigbor l-ammont ta` US\$48,400,000 mid-dejn li kellha Afra. Sa Novembru 2012 dan id-dejn partikolari kien nizel ghal US\$16.6 miljun, bl-imghax ikun US\$8.3 miljun.

Bosscher xehed illi l-gbir tad-dejn ta` Afra li kellu jsir minn Aghaei kien ir-rizultat ta` ftehim li sar minn wara dahru bejn Aghaei u Asadi.

F`email tas-6 ta` Gunju 2013 Asadi rrefera ghall-pagament li Afegra Trading kienet ser tircievi minghand Afra ta` US\$25 miljun inkluz l-imghax.

Bosscher ighid illi qabel ma kien iffirmit is-*Share Purchase Agreement* ma kienx jaf li kien ser isir dak il-pagament u ghalhekk meta biegh l-ishma tieghu kien ipprivat mis-sehem tieghu mid-dhul.

F`email tal-4 ta` Novembru 2012, Marzbani intalab ihejji l-*balance sheets* tal-kumpanniji fl-Ewropa u tal-UAE. Marzbani jghid li dan qatt ma sar ghaliex skont hu kienet bicca xoghol impossibbli.

B`effett mis-6 ta` Novembru 2012 Simion u Marzbani kienu appuntati "B Directors" ta` Afegra Holding.

Fl-istess jum, Mikel Nicholas Sieben u Anna-Marie Roxas Garcia (it-tnejn qaba ta` Marzbani) kienu appuntati "B Directors" ta` Afegra Finance.

L-"A Directors" ta` Afegra Holding u ta` Afegra Finance kienu Credence Corporate & Advisory Services Limited ("**Credence**") u l-Av. Dr James Muscat Azzopardi. L-"A Directors" setghu jagixxu biss bl-approvazzjoni ta` Asadi.

Simion xehdet illi bil-mossa tieghu li jappunta lil Marzbani, Sieben u Roxas Garcia bhala "B Directors" Asadi kiseb il-kontroll assolut tal-Grupp.

Dr Ramona Piscopo xehdet illi l-hatra tad-diretturi fil-bordijiet ma kenitx il-prerogattiva ta` Asadi, ghax il-hatriet kienu jsiru mill-azzjonisti. Fil-fatt kienu l-azzjonisti li hatru lil Credence bhala direttur. Gara li waqt laqgħa li saret Malta fl-4 ta` Novembru 2011 Asadi ried li Credence ma jkunx jistghu jieħdu decizjonijiet qabel ma jkunu kkonsultaw u kisbu l-approvazzjoni tieghu⁷. U hekk sar. Dan l-intendiment kien riaffermat f`korrispondenza tal-4 ta` Gunju 2012 li kienet cirkolata bejn l-azzjonisti u persuni ohra.⁸

Av. Dr. James Muscat Azzopardi xehed illi Credence hija *corporate service provider* u kienet tagħti servizz lill-Grupp. Fl-2010, kienet inkarikata minn Loyance & Loeff sabiex toħloq l-qafas legali tal-Grupp f`Malta. Fil-fatt saru l-kumpanniji li kienu registrati Malta. Credence pprovdiet ukoll servizzi ta` kontabilita`. Saret laqgħa Ginevra li ghaliha kienu prezenti Bosscher u Asadi. Dan tal-ahhar tramite l-kumpannija tieghu MSA kellu jkun il-finanzjatur u l-investitur principali. Credence setghu jagixxu biss fuq struzzjonijiet ta` Asadi jew tar-rapprezentanti tieghu.

Waqt inkontru li sar fid-29 ta` Novembru 2012 kien hemm qbil illi

⁷ Dok. RF 3 a fol. 1586 Vol. V tal-process.

⁸ Dok. RF 4 a fol. 1587 u 1588, Vol. V tal-process.

"internal reviews of the group would be done by Mr Bob Marzbani on a 10-10-10 basis."⁹ Skont letter of understanding li kienet iffirmata waqt dik il-laqgħa, Marzbani kellu jkun responsabbli minn : "a. Internal audit of Holding and Finance; b. Review audited report Deloitte annually; c. Any tax lawyer review or opinion to be involved with; d. Preparation of the statements of Holding and Finance; e. The investment accounting; f. All investors will have capital/account monitored by Bob Marzbani; g. All dividends and distributions of profit will be paid by Bob Marzbani. Approval by director and paid by Bob Marzbani."

Bosscher u **Simion** jishqu illi Marzbani qatt ma wettaq l-inkariku tieghu.

Bosscher stqarr illi n-negozju fis-suq tal-qamh huwa riskjuz. Attenzjoni akkurata kellha tkun prestata għall-investimenti li jsiru, partikolarment għall-iskop tal-akkwist ta` materja prima.

Minkejja li n-negozju tal-Iran kien waqaf, u billi n-negozju fl-Ewropa kien iħalli margini ta` profitt zghir hafna, Bosscher investa fl-akkwist ta` kwantita` kbira ta` materja prima, meta Afegra Trading diga` kellha stock b`valur ta` US\$20 miljun.

Fl-1 ta` April 2013 Bosscher bagħat email lil Asadi u Aghaei (b`kopja lil Simion u Marzbani) fejn avzahom b`li kien qed jigri. Is-suggett tal-email kien : "IMPORTANT – profit warning"¹⁰. Fl-email Bosscher spjega lill-azzjonisti kollha x`kien ser ikun l-impatt tal-prezzijiet tal-prodotti kif stabbiliti mid-Dipartiment tal-Agrikultura tal-Istati Uniti. Bi provvista akbar tal-prodott, il-prezz nizer drastikament. Il-provvista kbira tal-prodott ma kenitx prevista. B`email tat-3 ta` April 2013 Bosscher informa lill-azzjonisti li l-Grupp kien ser igarrab telf ta` madwar US\$8.9 miljun.¹¹. In segwitu rrizulta li t-telf imgarrab kien ta` madwar US\$5 miljun.

Bosscher u **Simion** jishqu illi t-telf ma kienx *investment loss* izda *trading loss* għaliex is-suq tal-qamh huwa volatili u riskjuz. Sabiex tikber, il-kumpanija kellha bzonn tixtri l-prodott. L-investment fi *stocks* futuri huwa riskju li min qieghed f`dak in-negozju jkollu jiehu. Ghalkemm kien riskju magħruf, fl-istess waqt hadd ma seta` jipprevedi telf daqstant sostanzjali.

Bosscher iqis dan it-telf bhala "a relatively small loss". **Fil-kontroezami** fisser illi meta wiehed iqabbel it-telf mal-qligh, it-telf ma kienx wiehed kbir.

⁹ Exhibit 33 a fol. 419 Vol. II tal-process Rik. Gur. 627/13 JZM.

¹⁰ Exhibit 34 a fol. 420 *tergo* Vol. II tal-process Rik. Gur. 627/13 JZM.

¹¹ Exhibit 3 a fol. 334 Vol. II tal-process Rik. Gur. 627/13 JZM.

Simion stqarret illi : *"Afegra Trading SA, Geneva has been set up as the trading arm of Afegra Group of Companies (...). Not any restrictions were established by the shareholders."*¹² Lanqas ma kien hemm ftehim illi negozjar kellu jsir bl-approvazzjoni tal-azzjonisti.

Fil-25 ta` April 2013 Stefano Genito, *financial manager* ta` Afegra Trading, baghat lil Marzbani ir-rapport ghall-ewwel kwart tas-sena. B`email tat-30 ta` April 2013, Genito ghadha lil Marzbani l-informazzjoni kollha li kien talab inkluz: *il-bank balances* tal-Grupp mill-31 ta` Marzu 2013, *il-bank balance* ta` Afegra Trading, *payment collection update*, rendikont tal-interessi u bilanci tas-*shareholders` loan*. Fit-2 ta` Mejju 2013 Genito mbaghad ghadha kull informazzjoni ulterjuri li talab Marzbani.

Fis-7 ta` Mejju 2013 Bosscher baghat email lil Asadi b`kopja lil Aghaei u Simion. Is-suggett tal-email kien : *"Serious decisions to be taken on Afegra`s future"*. Fl-email ighid illi fl-2013 in-negozju kien beda hazin. Jaccetta li kien tort tieghu ghaliex ha decizjoni hazina fl- investment fis-suq tal-qamh. Ighid illi d-decizjoni tieghu giet ghaliex fis-sena ta` qabel il-provvista tal-qamh kienet baxxa waqt li d-domanda kienet kbira. Billi fl-2013 kien hemm provvista kbira ta` qamh, il-prezz tbaxxa konsiderevolment. Fl-email elenka l-hlasijiet li kienu dovuti lil Afegra Trading minn bejgh fl-Iran u talab li ssir laqgħa tal-azzjonisti. Fl-istess email, Bosscher jagħmel il-pozizzjoni tieghu cara. Fil-paragrafu indikat bl-ittra "I" intitolat *"Position G. Bosscher"*, ighid hekk :

*"I do have an interest to continue the operations in Afegra and like to bring it to a next level. I am proud of what we have built up. However, I have a major problem with the loan I took for USD 2 mln in order to buy the shares in Afegra. I have no problem remaining in the company with USD 1 mln and obviously reduce my shares accordingly and continue my operations as employee of the group and fulfill all my duties, which I have always done. An investment in a Swiss company is legally safe and should offer you very good opportunities for your money. Just having money in the bank does not render any return."*¹³

Bosscher ippropona wkoll ix-xoljiment tal-grupp.

Fil-kontroezami, xehed illi Afegra ma kinitx f`pozizzjoni illi tikkompeti ma` kumpanniji kbar li kienu ilhom stabbiliti sewwa u għal snin twal fis-settur. Waqt li fis-suq internazzjonali, varjazzjoni fil-prezz tal-qamh kienet wahda zghira, għal Afegra kien ifisser hafna.

¹² A fol 78, Vol I tal-process Rik. Gur. 1001/13 JZM.

¹³ Exhibit 35 a fol. 422 Vol. II tal-process Rik. Gur. 627/13 JZM.

Asadi wiegeb ghal dan b`email tas-7 ta` Mejju 2013 fejn qal hekk :

*"You already have mentioned to me in Malta that you owe 2 mln. I told you under any circumstances you should not be worried. If you think by selling your shares to me and getting your money, you will feel safe and secure, that is fine to me. You still can work as a responsible manager within the group, Mohamad and I will be happy to have you by our side, as always. I firmly recommend you any decision made in the group you should reduce your overhead and staff expenses, this will give a sense of security to the group and helps to have a new start up. I do not intend to close down the group and I will stand to the end. The high-risk trades must be prevented."*¹⁴

Marzbani kkonferma illi ma sar l-ebda esercizzju sabiex jaraw x`wassel ghat-telf ta` Afegra Trading.

3. Share Purchase Agreement

Dr. Ramona Piscopo xehdet illi b`email tas-7 ta` Mejju 2013 Bosscher taha struzzjonijiet sabiex thejji *Share Purchase Agreement*¹⁵ billi ried ibiegh *"the equivalent of USD 2 mln shares held by GBCom in Afegra Holding to MSA Holding. We will do this at nominal value"*. Hejjiet il-ftehim u abbozz ghaddietu lil Bosscher, Simion u Marzbani b`email tal-15 ta` Mejju 2013¹⁶. Fiha jinghad illi *"Second SPA for Aghaei`s shares will follow shortly."*

Waqt laqgħa li kellu ma` Marzbani fit-13 ta` Mejju 2013, Bosscher ressaq erba` proposti għall-konsiderazzjoni tal-azzjonisti. Fosthom ippropona l-bejgħ tal-ishma li kellu, kif ukoll ir-rizenja tiegħu kemm minn impjegat u kif ukoll minn direttur.

Asadi u Aghaei laqgħu din il-proposta u minnufih marru Ginevra sabiex jigi finalizzat il-bejgħ tal-ishma.

Imhasseb dwar il-qgħada finanzjarja ta` Afegra, Aghaei ukoll iddecieda li jbiegħ is-sehem tiegħu.

Aghaei xehed illi kien hemm tliet ragunijiet għaliex ried ibiegh l-ishma tiegħu : i) kien tilef il-fiducja f` Bosscher u Simion ; ii) Afegra Trading kienet qegħda kontinwament tirrifjuta li tipprocessa negozju li hu kien

¹⁴ Exhibit 36 a fol. 422 *tergo* Vol. II tal-process Rik. Gur. 627/13 JZM.

¹⁵ `Dok. RF 1` a fol. 1583, Vol. V tal-process.

¹⁶ `Dok. RF 9` u `Dok. RF 10` a fol. 1938 sa 1951, Vol. VI tal-process.

qiegħed igib u b`hekk kien qiegħed jissogra li jxellef relazzjonijiet kummerċjali li kellu mal-klijenti tiegħu u li kienu jmorru lura snin twal ; iii) Afegra Trading naqset milli tohrog garanzija bankarja favur Afegra Middle East ma` zewg banek Iranjani u b`hekk esponiet lil Afegra Middle East għal penali ta` US\$99,765,970.

Bejn it-12 u l-14 ta` Mejju 2013 Marzbani u Genito daru d-dokumenti finanzjarji kollha ta` Afegra Trading.

Marzbani xehed illi kien iffirmit ix-*Share Purchase Agreement* huwa ltaqa` ma` Genito sabiex jiddiskutu s-sitwazzjoni. Ma kienx hemm zmien bizzegħed sabiex issir analizi tal-qagħda finanzjarja. Ried pero` jkun cert li jingħata access għad-dokumentazzjoni kollha. B`li jingħad access kien ser ifisser li ma kienx ikun hemm diffikulta` li x-*Share Purchase Agreement* jigi ffirmit. Id-diskussjoni ma` Genito kienet superficjali bla dettall. Lanqas ma kien trattat l-abbozz tal-ftehim. Huwa kien biss konsulent fil-process li wassal għall-konkluzjoni tal-ftehim.

Fl-14 ta` Mejju 2013 Genito bbagħat email Marzbani b`verzjoni riveduta tal-qagħda finanzjarja sa Marzu 2013.

Asadi kellu stampa cara quddiemu tas-sitwazzjoni finanzjarja tal-Grupp mnejn irrizulta li kien hemm telf sostanzjali. Din l-informazzjoni waslet għandu qabel kien iffirmit il-ftehim.

Il-ftehim kien konkluz fil-15 ta` Mejju 2013. Bil-ftehim GBCom bieghet l-ishma tagħha skont il-valur nominali tagħhom.

La saret stima tal-valur tal-kumpannija u lanqas saret valutazzjoni tal-ishma.

Asadi kkonferma illi ma ha ebda parir legali qabel ma kien iffirmit il-ftehim. Huwa accetta l-pattijiet u l-kondizzjonijiet tal-ftehim.

Skont klawnsola nru. 2.2 kienet miftehema skeda ta` pagamenti għall-hlas tal-prezz. Infatti l-ewwel pagament ta` US\$1.5 miljun kellu jsir "*on or before 31 May 2013*". Dan il-pagament sar fil-11 ta` Gunju 2013.

Asadi kkonferma illi s-somma ta` US\$1.5 miljun ittiehdet minn Bosscher bl-approvazzjoni tiegħu bhala pagament akkont tal-prezz tal-ishma ta` GBCom. Il-bilanc baqa` ma thallsx u GBCom għamlet kawza dwar dak il-bilanc.

B` kuntratt iehor tal-15 ta` Mejju 2013 Asadi akkwista l-ishma li kellu Aghaei skont il-valur nominali tagghom.

Boscher jghid illi kien biss minhabba s-sitwazzjoni finanzjarja prekarja ta` Afegra Trading illi biegh l-ishma ta` GBCom ghall-valur nominali tagghom.

Catherine Tornare-Cottet¹⁷, fuq inkarigu ta` Lalive, u bhala *accountant* mad-ditta Baker Tilly Spiess SA ("**BTS**") kienet mitluba taghmel valutazzjoni ta` Afegra Trading SA ghall-perjodu ta` bejn il-31 ta` Mejju 2013 u l-31 ta` Dicembru 2013. Fir-rapport ta` BTS li kien ippubblikat fl-24 ta` April 2015, issemma l-valur tal-ishma ta` Afegra Trading fil-31 ta` Mejju 2013. Sal-31 ta` Dicembru 2013 l-ishma ta` Afegra Trading kienu tilfu l-valur tagghom.

Fir-rapport, BTS irrimarkaw illi :-

- i) Illi huma qaghd fuq l-*unaudited accounts*.
- ii) Illi "*we did not have access to the Company`s accounting and trading IT application and no representative of Afegra was available to answer questions and to provide relevant documentation*"¹⁸
- iii) Illi "*the sufficiency of these procedures is soleley the responsibility of the Board and the beneficial owner. Consequently, we make no representation regarding the sufficiency of the procedures described above neither for the purpose for which this report has been requested nor for any other purposes.*

...

While our work has involved a highlevel analysis of financial information and accounting records, our engagement does not include an audit in accordance with generally accepted auditing standards. Accordingly, we assume no responsibility and make no representation with respect to the accuracy or completeness of any information provided to us for the purposes of the Agreed-Upon Procedures."

¹⁷ A fol. 2001, Vol. VI tal-process.

¹⁸ A fol. 2004, Vol. VI tal-process.

4. Is-segwitu

Skont il-pattijiet tax-*Share Purchase Agreement*, Bosscher irrizenja minn direttur b`effett mit-22 ta` Mejju 2013, ghalkemm baqa` mpjegat, sakemm irrizenja mill-impjeg fil-31 ta` Awissu 2013.

Bosscher jixhed illi huwa skanta kif Afegra Trading ghamlet success fl-ewwel tmintax-il xahar tal-operat taghha, imbaghad in-negozju waqaf.

Waqt laqgħa li saret fis-16 ta` Mejju 2013 Asadi stqarr li kien ser ikompli bin-negozju tieghu flimkien ma` Aghaei. Asadi kkomunika wkoll id-decizjoni tieghu illi kien ser itemm l-impjeg ta` dawk kollha involuti f` Afegra Trading fl-ufficju ta` Ginevra. L-unici li kienu ser jibqgħu fl-impieg kien Simion u Genito. Asadi kellu jressaq proposta ta` negozju f` temp ta` 72 siegħa izda dan baqa` ma sarx.

Simion tiddekrivi bhala "*astonishing*" il-fatt li wara li kien iffirmit ix-*Share Purchase Agreement* ma` Aghaei, Asadi ddikjara li kien ser ikompli b`negozju bi shab ma` Aghaei. Stqarret li ma setghetx tifhem kif Aghaei u Asadi baqgħu jghidu li s-suq tal-Iran ma kienx vijabbli, imbaghad huma komplew bin-negozju fl-istess suq.

Asadi xehed li skont il-ftehim, wara r-rizenja minn direttur, Bosscher kellu jibqa` impjegat sa Awwissu. Simion kellha ssir *managing director* minflok Bosscher. Aghaei kellu jibqa` sensar sabiex ikunu rkuprati l-krediti li kellu l-Grupp. Asadi stenna li se jiehu lura "*a clean and operational company*"¹⁹.

Markov Andrej Michajlovitsj²⁰ xehed illi waqt li kien qiegħed jattendi konferenza, fornitur mill-Ukrajna rrimarka li kien kuntent dwar il-fatt li l-Grupp kien rega` beda jinnegozja. Ighid li baqa` mistaghgeb ghaliex ma kien jaf b`ebda negozju. Stqarr illi fit-22 ta` Mejju 2013 Afegra Trading saret taf li kien hemm kumpannija ohra fl-Ukrajna, bl-isem Adonis, li kienet qegħda tippresenta ruhha bhala affiljata ta` Afegra Middle East ta` Dubai. Adonis kienet socjeta` ta` Aghaei u kellha struttura kummercjali bhal tal-Grupp. Din l-istruttura kummercjali gdida kienet ser topera mingħajr Bosscher u l-impjegati tieghu. Aghaei kien ser juza l-gharfien kollu u l-informazzjoni li giet mingħand Bosscher sabiex ikompli bin-negozju tal-qamh fis-suq tal-Iran.

Insospettiti b`dan kollu, Bosscher u Simion bhala amministraturi tal-

¹⁹ A fol. 1784, Vol. VI tal-process.

²⁰ Affidavit esebit bhala `Dok. MAM` a fol. 545, Vol. II tal-process Rik. Gur. 627/13 JZM.

email accounts ta` Afegra, *accessaw emails* li kienu ghaddejjin bejn Aghaei u l-impjegati tieghu. Minnhom saru jafu li Aghaei kien qieghed jaghmel negozju f` isem diversi tieghu, liema negozju kien qieghed isir b` informazzjoni konfidenzjali li kellha Afegra Trading.

Da parti tieghu Asadi baqa` ghaddej bil-finanzjament tan-negozju.

Skont Bosscher, l-iskop ta` Asadi u Aghaei kien li jwarrbu lilu sabiex ikompli n-negozju ghalihom. Kien ghalhekk illi Afegra tilfet in-negozju taghha.

Fil-lejl ta` bejn il-5 u s-6 ta` Gunju 2013²¹ waqt telekonferenza ma` Asadi u Marzbani, Bosscher stqarr ma` Asadi li Aghaei kien "seraq" in-negozju ta` Afegra. Asadi kkonvinca lil Bosscher sabiex ma jiehux passi legali. Fl-istess waqt wissa lil Bosscher li kien ser izommu responsabbli u talbu jinvestiga l-allegazzjonijiet u jaghtih aktar informazzjoni. Bosscher pero` ma ressaq ebda informazzjoni u minflok ghadha sabiex intavola diversi proceduri legali.

Minnufih Asadi u Marzbani bdew jibghatu diversi emails bi struzzjonijiet dwar dak illi kellu jsir.

Asadi talab ukoll illi d-domain ta` Afegra.com jigi registrat direttament fuq isem il-kumpannija u ma jibqax aktar registrat f` isem Simion personalment.

Fis-6 ta` Gunju 2013 Asadi hatar lil Simion bhala direttrici manigerjali ta` Afegra Trading. Fil-verita` dan qatt ma sehh ghaliex qatt ma giet registrata f` dik il-kariga mar-Registatur tal-Kumpanniji. Madanakollu, minkejja dak li kienet skopriet u minkejja li l-kumpannija kienet ser tfalli, Simion xorta wahda kienet ser taccetta l-irwol li offrieha Asadi ghaliex hasset li kellha obligazzjonijiet fiducjarji xi tkopri. Fil-fatt Simion tghid illi ghalkemm irrizultalha li seta` kien hemm frodi, hija ghazlet li ma titlaqx mill-kariga taghha ghaliex kellha obligazzjonijiet fiducjarji kemm lejn l-azzjonisti kif ukoll lejn l-awtoritajiet u l-kredituri tal-kumpannija.

Simion tghid li l-hatra taghha kienet intiza sabiex Asadi jzommha kemm jista` jkun vicin tieghu. Fl-istess jum Marzbani ta struzzjonijiet sabiex jinghalqu l-ufficcji fl-Ukrajna u fir-Russja kif ukoll sabiex jitkeccew l-impjegati fl-ufficcju ta` Ginevra.

Ikkonfermat li ghalkemm Bosscher irrizenja minn direttur fit-22 ta`

²¹ E-mail a fol. 356 sa 358, Vol II tal-process Rik. Nru 1001/13 JZM.

Mejju 2013 hija ghazlet li tistenna sal-5 ta` Lulju 2013 sabiex tirregistra d-dokumenti relattivi, billi kienet qeghda tistenna li jinhatar direttur iehor flok Bosscher.

Cio` nonostante jirrizulta li sa dak iz-zmien Simion kienet diga` accettat li tkun direttur manigerjali. Barra minn hekk, b`email tas-6 ta` Gunju 2013²² Asadi taha struzzjonijiet sabiex tirregistra lil ibnu Sami Asadi u lil Stefano Genito bhala diretturi ta` Afegra Trading. Konsapevoli mill-allegazzjonijiet ta` Simion u Bosscher, Genito ghazel li jirrizenja mill-kariga²³.

F`email tat-12 ta` Gunju 2013 li Asadi baghat lil Simion (b`kopja lil Aghaei) Asadi qal illi, skont il-ftehim li kellu ma` Aghaei, il-margini tal-profitt kellu jkun ta` mhux anqas minn 3.4% u kellu jsir pagament *in parte* ta` mhux anqas minn 10%.

Aghaei spjega illi Asadi kien talbu sabiex jibqa` jaghmilha ta` sensar u jgib lejn Afegra Trading negozju b`margini ta` profitt ta` 3.4%.

Ighid illi ma kien hemm xejn sigriet dwar dan tant li Simion kienet ikkopjata bil-korrispondenza kollha dwar dan il-ftehim bejn Asadi u Aghaei.

B`email tas-27 ta` Gunju 2013 Bosscher jaghmel referenza ghall-informazzjoni dwar *deprived business*.

Waqt laqgħa li saret Ginevra fit-3 ta` Lulju 2013, Bosscher ikkomunika d-decizjoni tieghu illi abbazi ta` evidenza li kellu li kien vittma ta` frodi, huwa kien sejjer jistitwixxi proceduri gudizzjarji.

Intant bejn id-data tar-rizenja ta` Bosscher u d-data tar-registrazzjoni tar-rizenja tieghu, Bosscher ma kellu ebda awtorita` li jkompli jagixxi bhala direttur.

Cio` nonostante ta struzzjonijiet għal Afegra Trading sabiex jittiehdu diversi proceduri gudizzjarji. Simion approvat l-istruzzjonijiet kollha ta` Bosscher kif ukoll is-safar tieghu lejn Dubai biex jibdwew proceduri f`Dubai. Bosscher gie ukoll Malta fejn għan-nom ta` GBCom beda proceduri gudizzjarji. L-ispejjez tas-safar ta` Bosscher kif ukoll l-ispejjez sabiex bdew il-proceduri legali f`Ginevra u f`Dubai thallsu kollha minn Afegra Trading.

²² A fol. 360 tal-process, Rik. Nru. 1001/13 JZM.

²³ E-mail tat-28 ta` Gunju 2013 a fol. 361 tal-process, Rik. Nru. 1001/13 JZM.

Simion ikkonfermat li l-azzjonisti ma kellhomx konozzenza ta` dan.

5. **Deprived business**

Min-naha tal-kumpannija attrici, jinghad illi qabel kien iffirmit ix-*Share Purchase Agreement* tal-15 ta` Mejju 2013, la Bosscher u lanqas Simion ma kellhom ebda suspett li Asadi jew Aghaei setghu kienu qeghdin jiehdu ghalihom negozju tal-Grupp.

Bosscher u **Simion** jinsistu li kien biss wara li kien iffirmit ix-*Share Purchase Agreement* illi ntebhu li Asadi u Aghaei kienu qeghdin jaghmlu negozju minn wara daharhom. Ighidu ghalhekk illi dan wassal ghal *deprived business* ghal Afegra Trading, u konsegwentement ghal telf ta` qligh ghal GBCom bhala azzjonista.

Bosscher jallega illi kien hemm diversi kumpanniji li ntuzaw sabiex isir negozju ad insaputa ta` GBCom. Qal illi ma sarx jaf qabel b` dan ghaliex ghalkemm kellu kontroll ta` Afegra Trading, il-flus kienu barra l-kumpannija u kienu taht il-kontroll ta` Asadi u Aghaei.

Jirrizulta li Bosscher kiseb informazzjoni dwar l-allegat ` *deprived business* ` wara li accessa l-*email accounts* ta` Aghaei, Hamed Asadirad, Nastran Davollou u Muhammed Abbas Chawala.

Kiseb ukoll access ghall-emails ta` Quantz International Trading FZE ("**Quantz**") li kienu skambjati bejn s-7 ta` Gunju 2013 u t-2 ta` Lulju 2013.

Bosscher seta` jaccessa dawn l-*email accounts* ghaliex fit-18 ta` Marzu 2010 hu u Simion gew registrati bhala amministaturi tad-*domain* ta` Afegra.com li huwa proprjeta` ta` Afegra Trading. Mill-*emails* Bosscher iddeduca li kemm qabel u kif ukoll wara l-15 ta` Mejju 2013 Aghaei ghamel negozju tramite East Coral General Trading, Adonis, Quantz u Afegra Middle East FZE. Ghalkemm dan in-negozju kien jikkompeti ma` tal-Grupp, Aghaei qatt ma nforma lill-azzjonisti l-ohra li kellu xi nteress f` dawk il-kumpanniji.

Minn informazzjoni li giet mis-CRI Group fuq talba ta` Bosscher, jirrizulta illi :

East Coral General Trading Co LLC ("**East Coral**") kienet registrata fis-27 ta` Settembru 2013. Asadi u Aghaei ma jiffigurawx.

Adonis Trading FZE ("**Adonis**") tirrizulta hija proprjeta` ta` Hassan Ali. Ebda dettalji ohra ma kienu disponibbli dwar din il-kumpannija. Mill-*general ledger* ta` Adonis jirrizulta illi Aghaei hallas is-somma ta` AED 185,000 bhala *capital*²⁴.

Skont ma rrizulta mill-emails, **Bosscher** ikkonkluda li Hassan Ali kien qiegħed jagixxi bhala *prestanome* għal Aghaei fin-negozju li fih kienet involuta Adonis.

Bosscher jishaq illi Aghaei ma kellu ebda permess sabiex jagħmel negozju barra mill-Grupp.

Fil-**kontroezami** Bosscher xehed :

*"I was not aware that Mr Aghaei was working with loads of companies he was a partner in the business and I expect partners to respect what they sign and when, where the whole purpose of setting up Afegra was about managing this business in to Iran."*²⁵

Mill-korrispondenza li pprezentaw, kemm Bosscher kif ukoll minn Aghaei, jirrizulta li l-Grupp ingħata servizz minn Afegra Middle East, Adonis, Quantz u East Coral sabiex ikun facilitat in-negozju tagħha.

Jidher illi Quantz kienet inkarikata mill-Grupp fil-garr tal-merkanzija. East Coral kienet tikri l-vapuri u tiffacilita l-pagamenti. L-istess kienet tagħmel Adonis fis-sens illi kienet tghin fil-hlasijiet għal Afegra.

Minhabba d-diffikultajiet fil-kummerc mal-Iran, u bil-hsieb illi n-negozju ma jieqafx, Afegra Trading kellha diversi *partners* li kienu joffru s-servizzi tagħhom bi hlas.

Aghaei xehed illi Bosscher kien jaf b`dan kollu partikolarment għaliex kien hu stess illi kien jikkordina n-negozju bejn id-diversi *partners* ta` Afegra. Dan jirrizulta mill-korrispondenza. Għalih ma kienx rilevanti liema email address kien isir uzu minnu. Għalih l-importanti kien li n-negozju jimxi. Fl-emails jingħad li xi negozju kellu jsir tramite kumpanniji

²⁴ Exhibit 57 a fol. 441, Vol. II tal-process Rik. Gur. 627/13 JZM.

²⁵ A fol. 606, V II tal-process Rik. Gur. 627/13 JZM.

ohra bhal Quantz li kienu ta` Aghaei stess.

In kontroezami, Bosscher xehed illi kien jaf bi Quantz qabel kien kostitwit il-Grupp. Kien jaf ukoll illi Aghaei kien akkwista l-ishma tieghu fi Quantz fl-2011. Kien jaf ukoll li n-negozju ta` Quantz kien fis-settur tal-qamh. Ghalih ma kienx hemm konflitt.

Skont ma xehed **Asadi**, mill-minuti ta` laqgħa tal-bord li saret f` Settembru 2011, u mill-kontro-ezami ta` Bosscher, jirrizulta li Bosscher deliberatament għazel li ma jkunx involut fis-socjeta` Quantz għaliex kienet qegħda tintuza għal negozju li jmur kontra s-sanzjonijiet imposti kontra l-Iran.

Bosscher xehed illi kien jaf bi transazzjonijiet li saru għal Afegra Trading tramite Quantz tant illi sad-29 ta` Mejju 2012 Afegra Trading kienet debitrici ta` Quantz fl-ammont ta` US\$10.2 miljun. Spjega illi l-hlas għan-negozju ta` Afegra Trading fl-Iran kien qieghed jigi tramite Afegra Middle East. Meta ma kienx possibli illi jgħaddu l-pagamenti, Aghaei kien juza l-flus ta` Afegra Middle East sabiex iħallas lil Quantz. Dan kien mezz biex jigu facilitati l-pagamenti. Bosscher jallega illi fil-verita` dawn il-flus kellhom jgħaddu lil Afegra Trading izda Aghaei kien qieghed jiddevja l-flus band` ohra bil-konsegwenza li Afegra Trading ma kienet qed tircievi xejn. Ighid ukoll li kien jaf bl-eżistenza ta` East Coral u li Afegra Trading għamlet negozju tramite East Coral.

Bosscher jikkoncedi li certa allegazzjonijiet li ressaq huma bbazati fuq assunzjonijiet u deduzzjonijiet li hu stess għamel meta sab isem kumpanniji terzi innizzel f` korrispondenza li kienet tinvolti wkoll lil Afegra.

Fl-affidavit tieghu **Bosscher** jagħti rendikont dettaljat tan-negozju li allegatament kien konkluz ad insaputa ta` GBCom qabel il-15 ta` Mejju 2013.

Skont il-kalkoli tieghu il-valur minimu totali tad-*deprived business* kien jammonta għal US\$80,660,991,90 li minnu s-somma ta` US\$2,490,252,54 huma profitti. Jghid illi s-sehem ta` GBCom minn din is-somma huwa ta` 14.7% lu cioe` : **US\$366,067,12.**

In kwantu jirrigwarda n-negozju li kien konkluz wara l-15 ta` Mejju 2013, **Bosscher** ighid illi d-dhul globali kien ta` US\$227,731,736 li minnhom **US\$10,323,830** kienu profitti.

Fil-kawza odjerna, is-socjeta` attrici qeghda titlob il-hlas ta` kumpens fl-ammont ta` **US\$ 21,793,141** in kwantu ghal US \$14,540,761 bhala is-sehem taghha ta` 14.7% li kellha fil-Grupp u in kwantu ghal US\$7,252,380 bhala s-sehem taghha minn *deprived profit*.

Aghaei xehed illi huwa dejjem hadem b` mod indipendenti.

Stqarr illi qatt ma ntrabat sabiex jahdem esklussivament ghal kumpannija wahda jew ghal grupp partikolari ta` kumpanniji ghaliex jemmen kull klijent ghandu l-bzonnijiet partikolari tieghu. B`daqshekk ma kien hemm ebda konflitt ta` nteress.

Ighid illi mill-bidu nett l-involviment tieghu fit-tmexxija kellu jkun limitat. Il-kompitu tieghu kien li jgib in-negozju. Kien jintervjeni fit-tmexxija biss meta kien ihoss li l-intervent tieghu kien necessarju.

Fil-minuti tal-laqgħa tal-bord tas-6 ta` Settembru 2011, tnizzel illi t-tmexxija u l-amministrazzjoni tal-Grupp kellha tkun fdata lil Bosscher u Aghaei. Il-minuti kienu ffirmati minn Aghaei wkoll.

Aghaei jghid illi huwa dejjem zamm ruhu distanti mit-tmexxija izda bhala investitur ta` ammont konsiderevoli ta` kapital kellu nteress isegwi kif kien sejjer il-Grupp. Dak kien il-ftehim mill-bidu nett. Huwa kellu n-negozju tieghu fl-istess settur u kien ilu jmexxi dak in-negozju b` success ghal snin twal. Ma kellu ebda hsieb illi jaghlaq jew iwaqqaf in-negozju tieghu meta kien kostitwit il-Grupp. Huwa kien investitur, fatt li kien maghruf mill-azzjonisti l-oħra.

Stqarr illi ghalkemm kompli jmexxi n-negozju toegħu, xota wahda ressaq hafna negozju lejn il-Grupp. Spjega illi Afegra Trading kienet tixtri l-prodott minghand kumpanniji li uhud minnhom kienu stabbilit fl-Iran imbagħad tbiegħ il-prodotti lill-klijenti tagħha. Huwa zamm rwol ta` sensar u kien jiehu hsieb ibiegħ il-prodott ta` Afegra Trading lill-klijenti. L-intiza qatt ma kienet illi huwa kellu jkun l-agent esklussiv ta` Afegra Trading.

Cahad illi qatt hataf jew seraq negozju ta` Afegra. Huwa nvesta fil-Grupp u għalhekk kellu nteress li jara li n-negozju ta` Afegra Group imur tajjeb.

Sahaq illi Bosscher qatt ma seta` jippretendi li hu jghaddi kull bicca negozju tramite l-Grupp għal għadd ta` ragunijiet fosthom : i) storja twila

ta` negozju fis-settur, tant illi kien igawdi l-fiducja ta` bosta, u ma kien isib ebda diffikulta` biex isib il-fornituri u biex ibiegh il-prodott ; ii) l-intendiment ta` bejn l-azzjonisti tal-Grupp ; iii) is-sanzjonijiet kontra l-Iran, inkluz id-diffikultajiet li jsiru hlasijiet mill-Iran ; u iv) l-inabilita` tal-Grupp li jipprocessa transazzjonijiet u negozju ta` volum konsiderevoli. Barra minn hekk, ghalkemm Afegra Trading kellha l-flus sabiex taghmel certu negozju, fl-istess waqt ma riditx tiehu s-sogru. Bl-impozizzjoni ta` diversi kundizzjonijiet, Afegra Trading kienet taghmilha ferm difficli sabiex in-negozju jimxi.

Qal illi huwa qatt ma heba xejn u kull negozju li ghamel dejjem sar fil-miftuh.

Aghaei fisser illi Bosscher qatt ma seta` jikkompara ruhu ma` Asadi u mieghu, la in kwantu tal-investment li kien sar fil-kumpanniji u lanqas in kwantu ta` esperjenza ta` bejgh u gharfien tas-settur.

Spjega illi l-fatt li kien hemm negozju li ma sarx minn Afegra m`ghandux jigi addebitat ghal *deprived business* izda kien dovut unikament ghall-fatt illi l-Grupp ma setax jiggestixxi dak in-negozju specifiku.

Qal illi fl-assenza tal-Grupp, in-negozju kien jittiehed minn Afegra Middle East u Quantz li t-tnejn kienu kumpanniji tieghu. In-negozju gieli haduh ukoll kumpanniji ohra bhal East Coral u Adonis, li ebda wahda minnhom ma kienet tieghu jew ta` Asadi.

Fisser illi fil-bidu Afegra kellha kapital ta` US\$10 miljuni, li maz-zmien zdied ghal US\$70 miljun.

Ma kienx hemm kompetizzjoni ghaliex il-kwalita` u kwantita` ta` negozju li setghet taghmel Afegra Middle East ma kienx jikkompara ma` dak illi qatt setghet taghmel Afegra Trading.

Spjega li l-kumpanniji kienu joperaw mill-istess ufficcju gewwa Dubai u kienu juzaw ukoll l-istess numri tat-telefon.

Qal illi s-suq tal-qamh huwa wiehed kompetittiv immens u l-profitti huma zghar. Spjega illi kull negozju li jsir mal-Iran huwa riskjuz. Ghalhekk l-ispejjez ikunu oghla sabiex jaghmlu tajjeb ghar-riskji kollha. Ir-riskju kompla jikber minhabba s-sanzjonijiet kontra l-Iran.

Aghaei cahad l-allegazzjonijiet li bejn l-2012 u 2013 ma kienx qiegħed jghaddi negozu lil Afegra Trading. Fil-fatt ghadda hafna negozju izda hafna mill-profitti ntilfu għaliex Bosscher għamel investimenti zbaljati.

Dwar il-figuri u t-transazzjonijiet li jsemmi fl-affidavit tieghu, Aghaei jghid illi l-informazzjoni waslet għandu mingħand terzi. Hu personalment ma kellux dettalji ta` kull transazzjoni. Għalhekk il-figuri citati huma r-risultat ta` kalkoli li saru minn haddiehor.

Asadi xehed illi kien fatt magħruf li Aghaei kien sensar indipendenti u kien ser jibqa` jmexxi n-negozju għal kumpanniji ohra apparti dak ta` Afegra. Fil-fatt il-volum ta` negozju li Aghaei gab kien ferm akbar minn dak illi setgħet tidhol għalih Afegra.

Qal illi n-negozju bi shab ma` Bosscher u Aghaei swielu t-telf ta` ammont kbir ta` flus, telf ta` hin u telf ta` reputazzjoni. Shabu fin-negozju kienu jdur fuqu biex jinvesti dejjem aktar u hu kien johrog il-flus. Bid-decizzjonijiet u bl-investimenti zbaljati li ha Bosscher, Afegra tilfet il-profitti kollha li kienet irregistrat fi zmien qasir mit-twaqqif tagħha. Il-valur u r-reputazzjoni tal-kumpannija gew fix-xejn.

Spjega illi nqalghu kwistjonijiet bejn Bosscher u Aghaei meta bdew jagħmlu allegazzjonijiet kontra xulxin. Meta talab lil Bosscher sabiex isostni dak li kien qed jallega, dan ma ressaq ebda dokument in sostenn ta` dak li qed jallega. Għall-kuntrarju Bosscher u Simion hassru 43,000 emails u caħdulu l-access għall-ufficcju ta` Afegra Trading u għad-dokumentazzjoni relattiva għall-kumpannija. Huwa deherlu li jekk Bosscher u Aghaei ma jibqgħux azzjonisti, is-sitwazzjoni kienet ser tijieb. Pero` ma rax li l-inkwiet kien għadu gejj. Bil-prezentata ta` diversi proceduri gudizzjarji, u bl-attitudni ta` Simion li ma riditx twarrab, u baqgħet tiehu passi sabiex twaqqaf it-tkeccija tagħha, intilef hafna zmien. In-negozju waqaf għal kollox.

6. Proceduri gudizzjarji

Meta GBCom istitwiet il-proceduri kontra l-konvenuti, Simion baqgħet direttur kemm tas-socjeta` attrici kif ukoll ta` Afegra Trading. Ma rriżenjatx minn direttur ta` Afegra Trading. Lanqas ma jidher li għarrfet lil Asadi bil-proceduri li kienu ntavolati minn GBCom..

Bernd Ehle ("Ehle") mid-ditta legali Lalive SA ("**Lalive**") xehed illi f` Lulju 2013 Lalive kienet inkarikata sabiex tirrapprezenta lil Afegra Finance u lil Afegra Trading fi proceduri gudizzjarji fil-Qorti ta` Ginevra.

In vista tal-allegazzjonijiet li ghamel Bosscher, u l-fatt illi Simion kienet azzjonista ta` GBCom, Marzbani u Asadi dehrilhom li ma kienx aktar tenibbli li ghal Simion tibqa` *sole director* ta` Afegra Trading minhabba konflitt ta` interess.

Simion ikkonfermat illi in vista tal-allegazzjonijiet li kienu qeghdin isiru kontra Asadi u Aghaei, hija hadet passi sabiex twaqqaf lir-Registratur tal-Kummerc fl-Isvizzera milli jirregistra bidliet fit-tmexxija ta` Afegra Trading. Riedet izzomm il-kontroll ta` Afegra Trading sabiex tkun tista` tiehu passi kontra l-azzjonisti f` isem Afegra Trading. Fil-fatt intavolat proceduri fil-qradi ta` Ginevra u ta` Dubai kontra Asadi, Aghaei, MSA Holding u Adonis. Kisbet il-hrug ta` mandat ta` sekwestru f` Malta fejn kienu kolpiti ta` Afegra, li kien segwit bi proceduri gudizzjarji f` Malta.

Skont Simion, ma kellhiex konflitt ta` interess fid-decizjonijiet li hadet.

Bosscher kellu jirrizenja minn direttur b` effett mill-31 ta` Mejju 2013. Bhala fatt din ir-rizenja damet sa Lulju 2013 sabiex tkun registrata formalment. Bhala fatt ukoll f` dak il-perijodu Bosscher ipprezenta l-kawzi f` Ginevra u f` Dubai, spejjez ta` Afegra Trading.

Ehle xehed illi rrizulta li Bosscher kien ilu mill-31 ta` Mejju 2013 f` kuntatti ma` avukati sabiex jintavola proceduri legali f` Ginevra, Malta u Dubai.

Fis-26 ta` Lulju 2013 l-azzjonisti approvaw rizzoluzzjoni ghat-tnehhija ta` Simion mill-kariga ta` direttur. Kienet sostitwita b` Laurent Berney ("**Berney**").

Simion tikkontendi li l-laqgha tal-azzjonisti ma kenitx valida.

Tghid illi baqghet direttur sal-24 ta` Marzu 2014 meta b` decizjoni tal-Qorti ta` Ginevra tnehhiet mill-kariga.

Berney ma setax jigi registrat bhala direttur ta` Afegra Trading. Kien biss f` Settembru 2013 illi Simion tat access lil Berney ghall-ufficini tal-kumpannija bil-konsenja tac-cavetta.

Berney ipproceda minnufih sabiex il-bidliet fil-karigi jigu registrati mar-Registatur tal-Kumpanniji ta` Ginevra.

It-talba ta` Berney kienet michuda peress illi b` ittra tal-11 ta` Lulju 2013 Avv. Feniello kien irregistra, in via kawtelatorja, l-oggezzjoni tieghu ghal kwalsiasi bdil fid-direzzjoni ta` Afegra Trading.

Barra minn hekk, fil-kors tal-proceduri kontra Aghaei, Afegra Middle East, Asadi u MSA, b` rikors tat-22 ta` Lulju 2013 prezentat fil-Qorti ta` Ginevra, ghal Afegra Trading, intalab provvedimenti *interim* sabiex ir-Registatur tal-Kumpanniji ma jirregistrax it-tnehhija ta` Simion minn *sole director*.

Fit-30 ta` Lulju 2013, Avv. Urs Saal ("**Saal**") ghal Simion de proprio ressaq it-tieni ittra ta` oggezzjoni ghal bdil fid-direzzjoni ta` Afegra Trading.

Minkejja li Simion u Bosscher kienu diga` marru ghall-proceduri gudizzjarji, Simion ma semmiet xejn dwar dan fil-laqgha li saret fis-26 ta` Lulju 2013.

B` ittra tat-30 ta` Lulju 2013, Lalive ghal Afegra Trading temmet l-inkariku tar-rapprezentanza legali li Avv. Feniello kellu ta` Afegra Trading u talbet minnu kopja tad-dokumentazzjoni relattiva ghall-proceduri li kienu saru ghal Afegra Trading. B` ittra tas-6 ta` Awissu 2013 Avv. Feniello rifjuta.

Jirrizulta li Lalive ghamlet talba lill-qorti sabiex tigbor kopji tal-atti, kif ukoll sabiex taghmel sottomissjonijiet. Simion opponiet. Il-qorti cahdet it-talba ta` Lalive. Fil-21 ta` Awissu 2013 Lalive irtirat l-applikazzjoni li kienet tressqet ghal Afegra Trading sabiex ma jsirx bdil fir-Registru tal-Kumpanniji. Fl-istess waqt Lalive ghamlet sottomissjonijiet lill-qorti. Fis-26 ta` Awissu 2013 it-talba ta` Lalive kienet milqugha u kien dikjarat li Berney kien ir-rapprezentant legittimu ta` Afegra Trading. Berney xorta ma nghatax access ghall-hwejjeg ta` Afegra Trading.

Fit-22 ta` Lulju 2013 Simion intavolat gudizzjarji gewwa Dubai. Il-procediment kien deciz kontra taghha fit-23 ta` Lulju 2013.

Fid-9 ta` Awissu 2013 Simion de proprio intavolat proceduri godda f` Ginevra kontra Afegra Trading u Afegra Middle East.

L-ilmenti kienu allegat frodi minn Asadi u Aghaei.

B` ittra tad-29 ta` Awissu 2013 Saal wiegeb li Simion ma kinitx sejra tottempra ruhha mat-talbiet ta` Berney u ghalhekk ma kinitx ser tipprovdu access ghall-hwejjeg ta` Afegra Trading.

Simion stiednet lil Berney sabiex fit-2 ta` Settembru 2013 jattendi ghal laqgħa fl-ufficju ta` Afegra Trading, Ginevra. Fuq l-agenda kien hemm 17-il punt għad-diskussjoni. Għall-laqgħa kienu prezenti Bosscher u r-rappreżentanti legali ta` Berney u ta` Simion. Fil-laqgħa Simion ippreżentat dokument fejn indikat li l-proceduri ta` Dubai kienu dwar telf ta` dhul min-negozju fl-Iran. Simion qalet illi dawk il-proceduri qatt ma kienu ntavolati minhabba l-ispejjeż involuti. Aktar tard irrizulta li fil-fatt il-proceduri kienu saru u t-talbiet li kienu tressqu għal Afegra Trading kienu gew michuda fit-23 ta` Awissu 2013. Fil-laqgħa ma ssemmewx il-proceduri li Simion kienet ippreżentat Ginevra. B`email tat-2 ta` Settembru 2013 Berney u Lalive ikkonfermaw li kienu kopja ta` li kien hemm fis-servers ta` Afegra²⁶.

Fil-kors tal-laqgħa, Simion ippreżentat abbozz tal-*financial statements* ta` Afegra Trading sal-31 ta` Dicembru 2012. L-abbozz kien thejja minn Deloitte bhala awdituri ta` Afegra Trading. Skont dan id-dokument, fit-taqsimha ntitolata "*Events after closing*" saret nota li kienet tirreferi speċifikament għal allegat telf ta` negozju. L-istess tnizzel ukoll fl-abbozz tal-*management representation letter* li kellha tigi ffirmata mid-direttur ta` Afegra Trading sabiex l-awdituri jkunu jistghu jirrilaxxjaw ir-rapport tagħhom. Berney u Lalive iddikjaraw li ma kinux ser jaccettaw din in-nota li kienet inserita kemm fil-*financial statements* u kif fil-*management representation letter*. Simion irribattiet li mingħajr l-inkluzjoni ta` dawk in-noti hija ma kinitx ser tiffirma l-*financial statements* għas-sena 2012. Afegra Trading zammet ferma l-pozizzjoni tagħha għal zewg ragunijiet : i) għaliex ma kien hemm ebda proceduri istitwiti kontra Afegra Trading ; u ii) għaliex il-pretensjoni vantata minn GBCom fil-kawza odjerna tirreferi għac-cirkostanzi li wasslu lil GBCom sabiex tbiegħ l-ishma tagħha. Il-*financial statements* in kwistjoni kienu ppubblikati f`April 2014 wara li Deloitte accettaw li jnehhu kull referenza għal allegazzjoni ta` frodi.

Ehle xehed illi b` ittra tas-17 ta` Ottubru 2013 Instra Corporation PTY Ltd ("**Instra**") intalbet minn Lalive sabiex tohrog *passwords* godda għad-*domain* "afegra.com". Dan sar. Saru wkoll *email forwarding settings* sabiex il-posta elettronika ma tibqax tasal għand Simion. Kompla jgħid illi kif Simion saret taf b` dan ikkomunikat ma` Instra u talbet li tingħata lura l-access. Minhabba l-konflitt, Instra għalqet. Din is-sitwazzjoni baqgħet tippersisti sal-24 ta` Gunju 2014 meta Instra finalment ipprovdiet lil Berney b` access għad-*domain* ta` Afegra.

²⁶ A fol. 365 tal-process Rik. Gur. 1001/12 JZM.

Ehle jaghmel referenza ghal diversi episodji fejn – skont hu - Simion tawwlet il-proceduri ta` Ginevra filwaqt illi baqghet izzomm ghal kemm setghet kull kontroll fuq Afegra Trading.

Jirrizulta li fis-7 ta` Ottubru 2013 Afegra Trading mexxiet kontra Simion u talbet provvediment *interim* sabiex titnehha mill-kontroll, u taghti access lil Berney ghall-affarijet u ghall-proprjeta` ta` Afegra Trading. It-talba kienet akkolta fit-8 ta` Ottubru 2013 mill-qorti ta` Ginevra. Billi fil-provediment jidher li ma nghadx illi Berney kien il-legittimu rapprezentant ta` Afegra Trading, Simion irrifjutat li taghti l-informazzjoni li kien jehtieg sabiex imexxi l-kumpanija.

B`sentenza moghtija fl-20 ta` Jannar 2014, il-Qorti ta` Ginevra ddikjarat illi Simion ma kellha ebda dritt illi tibqa` direttur, ladarba fis-26 ta` Lulju 2013 Berney kien appuntat *sole director* ghal Afegra Trading.

Berney inghata access shih ghall-affarijet tal-kumpanija fit-3 ta` Frar 2014.

Fiz-zmien li ghadda bejn is-26 ta` Lulju 2013 u t-3 ta` Frar 2014, Simion m`ghamlet xejn sabiex tkompli tmexxi l-kumpanija. B`hekk in-negozju waqaf ghal kollox.

Fil-5 ta` Frar 2014 Afegra Trading inkarikat lil Kroll Ontrack ("**Kroll**") sabiex taccessa u taghmel kopja tal-*electronic files* kollha tal-kumpanija.

Ehle kompla jghid illi mir-rapport li kien redatt minn Kroll, irrizulta illi bejn 6:14 pm u 7:17 pm tat-23 ta` Awissu 2013 kien intuza *software* "*Ccleaner*" sabiex issir *secure wipeout* tad-*data* kollha li kien jaghmilha mpossibbli li jkun hemm *recovery* tad-*data* mhassra. Dakinhar Simion, Bosscher u Genito kellhom access ghall-affarijet kollha tal-kumpanija. It-telf tad-*data* mhassra kien ta` detriment ghal Afegra Trading partikolarment ghaliex ma setghetx taccess informazzjoni utli ghad-difiza taghha fi proceduri ta` arbitragg naxxenti minn ftehim mal-kumpanija Crius liema ftehim dahal ghalih Bosscher ghan-nom ta` Afegra Trading. Il-lodo arbitrali kien kontra Afegra Trading li kienet ordnata thallas madwar US\$2.3 miljun oltre l-imghax.

Fl-24 ta` Ottubru 2014 Afegra Trading mexxiet kontra Bosscher u Simion, fejn talbet risarciment ta` danni fl-ammont ta` CHF 98,466.00 rapprezentanti telf, inkluzi spejjez fosthom legali.

Fil-kontroezami xehed illi bil-proceduri li kienu istitwiti minn Bosscher u Simion, ghan-nom ta` Afegra Trading, gewwa Dubai, il-qorti kienet mitluba sabiex tordna s-sekwestru ta` assi li kienu sitwati f` Dubai. It-talba kienet michuda ghal ragunijiet procedurali.

Ehle kompla jixhed illi fil-bidu tal-2013 Asadi kien qieghed jikkonsidra li jaghlaq in-negozju ta` Afegra u jghaddi ghal-likwidazzjoni. Aktar tard pero` beda jqis li seta` jkompli n-negozju bl-involviment ta` ibnu Sami Asadi. Il-hatra ta` Berney kienet intiza unikament sabiex ikun hemm direttur *interim*. Jaf illi Asadi talab lil Berney sabiex ifittex negozjatur tajjeb.

Stqarr illi, mill-informazzjoni li kellha Lalive, irrizulta li fiz-zmien meta thassret id-*data* l-unici persuni li kellhom access biex jaghmlu dan kienu Bosscher u Simion, u possibilment anke Genito. Safejn jaf hu, l-impjegati kollha kienu tkeccew, u ghalhekk ma kienx hemm aktar persuni li kellhom access. Zied jghid illi ma jiftakarx li kien hemm *back up* tad-*data* kollha tal-kumpanija. Irrizulta biss illi kienu gew cancellati madwar 43,000 *e-mail* li l-kontenut taghhom baqa` mhux maghruf. Minn *e-mails* ohra li kienu ghadhom disponibbli, irrizultat li Bosscher kien ilu f` kuntatt mal-avukati tieghu. Bhala fatt, Afegra Trading ghazlet li ma tiehu ebda passi dwar it-thassir tal-*e-mails*.

Dwar il-proceduri ta` arbitragg fil-kaz tal-ftehim ma` Crius, **Ehle** xehed illi Simion u Bosscher kienu tawh l-informazzjoni li kellhom inkluz ukoll il-verzjoni dwar kif zvolgew il-fatti.

Kompla jghid illi wara l-laqgha tas-26 ta` Lulju 2013 kien hemm disputa tahraq dwar il-validita` tat-tnehhija ta` Simion minn direttur ; waqt li l-kwistjoni kienet pendenti fil-qorti ta` Ginevra, kien hemm zmien fejn Berney ma kellux access lanqas ghall-ufficini tal-kumpanija. Madankollu kien hemm ukoll perjodu fejn Berney kien imur l-ufficcju b` Simion tkun prezenti.

Wara l-laqgha tat-2 ta` Settembru 2013 sar *back up* tad-*data* li kien hemm fil-kompjuters tal-kumpanija ; din il-*backup* inghatat lil Lalive. Imbaghad Lalive intavolat proceduri kontra Simion sabiex twaqqafha milli tghaddi informazzjoni. Simion interpretat dan bhala li ma setghetx tghaddi l-informazzjoni lil Berney.

GBCom talbet u ottjeniet il-hrug ta` mandat ta` sekwestru fejn kienu kolpiti US\$4 miljun li Afegra kellha depozitati f` bank Malti. Kienu kolpiti wkoll ishma li MSA kellha f` Afegra.

Simion xehdet illi wara l-laqgħa tal-bord tas-26 ta` Lulju 2013 hija ma komplietx tagħmel negozju gdid. Baqgħet tiehu hsieb hlasijiet li kienu pendenti u l-ezekuzzjoni ta` xi kuntratti. Dak iz-zmien il-hsieb ta` Asadi kien li l-Grupp ikun likwidat.

Għaz-zmien kollu ta` bejn Lulju 2013, meta kienet registrata r-rizenja ta` Bosscher, u t-tnehhija tagħha minn direttur f` Jannar 2014, Simion kienet l-unika direttur ta` Afegra Trading.

Simion baqgħet tithallas is-salarju tagħha sa Lulju 2013, għaliex wara l-laqgħa tas-26 ta` Lulju 2013 hija ma rcevietx aktar hlasijiet tant li hadet passi fil-qorti ta` Ginevra. Is-salarju tagħha kien ta` CHF 150,000 fis-sena.

Asadi stqarr illi bl-agir tagħha Simion qatlet in-negozju ta` Afegra għaliex qieset l-interessi ta` GBCom u m`ghamlet xejn sabiex tkompli n-negozju ta` Afegra.

Marzbani xehed illi l-agir ta` Bosscher u Simion kien ta` dannu kbir għall-Grupp, l-aktar għaliex filwaqt illi baqgħet direttur ta` Afegra Trading, wara li sar il-bejgħ tal-ishma, Simion m`ghamlet xejn biex thares l-interessi ta` Afegra Trading. L-agir ta` Simion kien immirat esklussivament sabiex tghin lil Bosscher fil-proceduri legali li kien intavola. Minhabba t-telf li garrbet Afegra Trading kellha tkun likwidata wara li kienet dikjarata insolventi b`sentenza tal-qorti ta` Ginevra tat-22 ta` April 2015.

Asadi jgħid illi baqa` ma thallasx lura l-ammonti li kien silef lill-Grupp u tilef ukoll l-investment kapitali li kien għamel. It-telf tiegħu kien ilahhaq it-US\$30 miljun.

III. It-talbiet

1. Dritt

a) L-Art 136A tal-Kap 386

Din id-disposizzjoni saret parti mill-Kap 386 bis-sahha tal-Att IV tal-2003. Sal-lum għadha dik li kienet fl-2003.

Hemm elenkati d-**dmirijiet generali** tad-diretturi.

Id-disposizzjoni taghmel parti mill-Kapitolu VIII tal-Att dwar il-Kumpanniji li jittratta dwar it-Tmexxija u l-Amministrazzjoni ta` Kumpannija.

Taqra hekk :-

(1) *Direttur ta` kumpannija jkun marbut li jagixxi b` onestà u bona fide fl-ahjar interessi tal-kumpannija.*

(2) *Id-diretturi ta` kumpannija ghandhom jippromwovu il-benessere tal-kumpannija u jkunu responsabbli ghal :*

(a) *it-tmexxija generali tal-kumpannija u l-amministrazzjoni u l-immaniggjar taghha ; u*

(b) *s-sorveljanza generali tal-affarijiet taghha.*

(3) *B` mod partikolari, izda bla hsara ghal kull dmir iehor moghti lid-diretturi ta` kumpannija, jew lil xi wiehed minnhom, bil-memorandum u l-istatut ta` assocjazzjoni jew b` dan l-Att jew b` xi ligi ohra, id-diretturi ta` kumpannija :*

(a) *ikunu obbligati li jezercitaw kura, diligenza u hila li jkunu ezercitati minn persuna ragonevolment diligenti li jkollha -*

(i) *kemm it-taghrif, il-hila u l-esperjenza li jkunu ragonevolment mistennija minn persuna li tkun qed taqdi l-istess funzjonijiet li jkunu moqdija jew fdati lil dak id-direttur dwar il-kumpannija ;*

(ii) *kif ukoll it-taghrif, il-hila u l-esperjenza li jkollu d-direttur ;*

(b) *ma ghandhomx jaghmlu profitti sigrieti jew personali mill-pozizzjoni taghhom minghajr il-kunsens tal-kumpannija, lanqas ma jaghmlu gwadan personali minn informazzjoni konfidenzjali tal-kumpannija ;*

(c) *ghandhom jassiguraw li l-interessi personali taghhom ma jkunux f` konflitt mal-interessi tal-kumpannija ;*

(d) *ma ghandhomx juzaw xi proprjetà, informazzjoni jew opportunità tal-kumpannija ghall-beneficcu taghhom stess jew ta` xi hadd iehor, jew jiehdur xi beneficcu b` xi mod iehor b` konnessjoni mal-ezercizzju tas-setghat taghhom, hlief bil-kunsens tal-kumpannija f` laqgħa generali jew hlief kif permess mill-memorandum u l-istatut ta`*

assocjazzjoni tal-kumpannija ;

(e) ghandhom jezercitaw is-setghat li ghandhom ghall-finijiet li jkunu nghataw is-setghat u m`ghandhomx juzaw hazin dawk is-setghat.

b) L-Art 1124A tal-Kap 16

Bl-Att XIII tal-2004, dahal fil-Kap 16 l-**Art 1124A** li kien gie fis-sehh fl-1 ta` Jannar 2005.

Id-disposizzjoni taqra hekk :-

(1) Obbligazzjonijiet fiducjarji jinqalghu bis-sahha tal-ligi, kuntratt, kwazi kuntratt, trust, assunzjoni ta` kariga jew imgieba fejn persuna (il-"fiducjarju") -

(a) ikollha d-dmir li thares l-interessi ta` persuna ohra, jew

(b) izzomm, tezercita kontroll jew jkollha setghat ta` disponiment fuq proprjeta` ghall-beneficcju ta` persuna ohra, inkluz meta din tkun vestita bhala sid ta` dik il-proprjeta` ghal dan l-ghan, jew

(c) tircievi taghrif minghand persuna ohra marbuta bid-dmir tal-konfidenzjalita` u dik il-persuna tkun taf, jew fic-cirkostanzi kollha b`mod ragonevoli ghandha tkun taf, li l-uzu ta` dak it-taghrif huwa intiz li jkun ristrett.

(2) Persuna li tkun delegata xi funzjoni minn fiducjarju u tkun taf, jew mic-cirkostanzi ghandha tkun taf bl-obbligazzjonijiet fiducjarji wkoll titqies li hija soggetta ghall-obbligazzjonijiet fiducjarji.

(3) Obbligazzjonijiet fiducjarji jinqalghu minn imgieba meta persuna -

(a) minghajr ma jkollha dritt, tiehu u taghmel uzu minn proprjeta` jew taghrif li jkunu ta` haddiehor, sew ghall-beneficcju taghha jew xort`ohra ; jew

(b) meta tkun terza persuna, tagixxi meta tkun taf, jew meta tkun ragonevolment mistennija li tkun taf, mic-cirkostanzi, bil-ksur ta` obbligazzjonijiet fiducjarji mill-fiducjarju, u tircievi jew xort`ohra takkwista proprjeta` jew taghmel qligh iehor mill-ghemil jew permezz tal-ghemil tal-

fiducjarju.

(4) Minghajr pregudizzju ghad-dmir ta` fiducjarju li jwettaq l-obbligazzjonijiet tieghu bl-ikbar bona fide u li jagixxi b`mod onest fil-kazijiet kollha, fiducjarju jkun marbut, bla hsara ghad-disposizzjoni espressa ta` ligi jew kondizzjonijiet espressi ta` xi kuntratt bil-miktub li jeskludi jew jimmodifika dak id-dmir, skont il-kaz -

(a) li jezercita d-diligenza ta` bonus pater familias fit-twettiq tal-obbligazzjonijiet tieghu ;

(b) li jevita kull konflitt ta` interess ;

(c) li ma jirceviz xi profitt mhux dikjarat jew mhux awtorizzat mill-kariga jew funzjonijiet tieghu ;

(d) li jagixxi b`mod imparzjali meta d-dmirijiet ta` fiducjarju jkunu lejn iktar minn persuna wahda ;

(e) li jzomm kull proprjeta` li tista` tkun akkwistata jew mizmuma bhala beneficjarju, segregata mill-proprjeta` personali tieghu u minn dik ta` persuna ohra li favur taghhom jista` jkollu obbligazzjonijiet simili ;

(f) li jzomm records xierqa bil-miktub tal-interess tal-persuna li favur taghha jkunu obligati l-obbligazzjonijiet fiducjarji ;

(g) li jaghti kont dwar il-proprjeta` soggetta ghal dawk l-obbligazzjonijiet fiducjarji ;

(h) li jirritorna fuq talba li ssirlu kull proprjeta` mizmuma taht obbligazzjonijiet fiducjarji lill-persuna li legittimament ikollha jedd ghalha jew kif ordnat minnha jew kif xort`ohra mehtiega mil-ligi applikabbli.

(5) B`zieda ma` kull rimedju iehor skont il-ligi, persuna soggetta ghall-obbligazzjonijiet fiducjarji li tikser dawk l-obbligazzjonijiet tkun marbuta li trodd lura kull proprjeta` flimkien mal-beneficcji l-ohra kollha miksuba minnha, sew direttament sew indirettament, lil min ikun dovut id-dmir.

(6) L-obbligu li tinghata lura proprjeta` miksuba minn ksur ta` dmir fiducjarju ghandu japplika wkoll ghall-proprjeta` kollha li fiha il-proprjeta` originali kienet konvertita jew li biha kienet sostitwita.

2. Dottrina /Gurisprudenza [nostrana u estera]

"Directors can also be regarded as fiduciaries. The notion of fiduciaries was introduced into Maltese civil law by amendments to the Civil Code in 2004. A fiduciary is defined as a person who (a) owes a duty to protect the interests of another person, or (b) holds, exercises control or powers of disposition over property for the benefit of other persons, including when he is vested with ownership of such property for such purpose; or (c) receives information from another person subject to a duty of confidentiality and such person is aware or ought, in the circumstances, reasonably to have been aware, that the use of such information is intended to be restricted.

As has also been discussed, a director falls at least under the first limb of the said definition and may also qualify as a fiduciary under the second and third limbs.

...

A fiduciary has a fundamental duty to carry out his obligations with utmost good faith and to act honestly in all cases. This duty of good faith and honesty cannot be excluded by contrary agreement. Apart from this general duty, fiduciaries are also subject to a number of specific duties which can be modified or excluded either by express provision of the law or by the express terms of an instrument in writing. These specific duties can be divided into three categories: duties of loyalty, duties of care and administrative duties. The duties of loyalty comprise (a) the duty to avoid any conflict of interest (b) the duty not to receive undisclosed or unauthorized profit from his position or functions; (c) the duty to act impartially when the fiduciary duties are owed to more than one person; and (d) the duty to return on demand any property held under fiduciary obligations to the person lawfully entitled thereto or as instructed by him or as otherwise required by applicable law. The fiduciary's duty of care is expressed as the duty "to exercise the diligence of a bonus paterfamilias in the performance of his obligations." On the administrative side, the fiduciary is obliged (a) to keep any property as may be acquired or held as a fiduciary segregated from his personal property and that of other persons towards whom he may have similar obligations; (b) to maintain suitable records in writing of the interest of the person to whom such fiduciary obligations are owed and (c) to render account in relation to the property subject to such fiduciary obligations.

A fiduciary who acts in breach of his fiduciary obligations, is in addition to any other remedy that may be available at law, bound to return any property together with all other benefits derived by him, whether directly or indirectly, to the person to whom the duty is owed. The obligation to return property derived from a breach of a fiduciary duty shall apply also to all property into which the original property has been converted or for which it has been substituted."

Issir referenza ghad-dottrina u ghall-gurisprudenza li kienet citata minn din il-qorti kif presjeduta fis-sentenza li taghha tad-29 ta` Settembru 2016 fil-kawza "**Desmond Mizzi et vs KPMG et**" (mhux appellata) :²⁷

*Fis-sentenza ta` din il-qorti kif presjeduta tat-2 ta` Dicembru 2013 fil-kawza "**Carmen Xuereb v. L-Avukat Anton Micallef**" inghad :-:*

" ... Fiducjarju ghandu l-obbligu li jzomm u jittratta taghrif li jircievi b`mod kunfidenzjali. Ghandu d-dmir ta` lealta` fl-amministrazzjoni. Ghandu d-dover li jhares l-interessi tal-persuna li tkun tatu l-inkariku. Ghandu jiehu hsieb b`onesta` u b`kontabilital-affarijiet ta` min ikun tah l-inkariku. Ghandu jezercita d-diligenza ta` bonus pater familias fit-twettieg tal-obbligazzjonijiet tieghu. M`ghandux ikollu konflitti ta` interess, ghandu dejjem jagixxi fl-interess ta` min tah l-inkariku u m`ghandux jircievi profitt mhux awtorizzat."

*Fis-sentenza li tat din il-Qorti diversament presjeduta fit-13 ta` Novembru 2014 fil-kawza "**Vascas Enterprises Limited vs Adrian Ellul**" inghad hekk :-*

"Kif taraha din il-Qorti, il-kwisjtioni legali li trid tigi indirizzata tirrigwarda d-doveri fiducjarji u d-doveri ta` fedelta relattivi ghal kuntratt ta` impjeg bejn il-konvenut u s-socjeta attrici.

Jibda biex jinghad illi l-ligi Ingliza taghmel distinzjoni bejn iz-zewg doveri. Il-Qorti tirreferi ghal zewg appelli moghtija wahda mill-Qorti tal-Appell Ingliz fl-ismijiet Jeremy Michael Ranson vs Customer Systems plc deciza fis-27 ta` Gunju 2012 u ohra moghtija mill-Qorti tal-Appell ta` Singapore fl-ismijiet Smile Incorporated Dental Surgeons Pte Ltd vs Lui Andrew Stewart deciza fil-31 ta` Lulju 2012. Il-kawzi huma b`fatti simili ghal kawza sub iudice u fihom saret espozizzjoni erudita u kwazi identika tal-principju regolatur in materia. Fl-appell Ranson il-Qorti tal-Appell Ingliz trattat il-kwistjoni ta` impjegat f`pozizzjoni manigerjali li rrezenza biex jiftah ghal rasu fl-istess sfera tal-impjeg tieghu u fil-perjodu tal-impjeg fetah il-kumpanija tieghu, tkellem ma` kuntatti tad-ditta li kienet timpjegah, ma qal xejn dwar dan lil principal tieghu u fil-fatt wara li ttermina

²⁷ Ara wkoll is-sentenza fl-ismijiet **M.A.I.M Services Limited vs Albert Galea pro et noe**, moghtija minn din il-Qorti kif presjeduta fit-18 ta` Settembru 2017 (appellata)

I-impjeg accetta xoghol minghand I-imsemmija kuntatti.

Il-Qorti tal-Appell qalet hekk :

A "fiduciary" duty should not be confused with a duty of "fidelity". The duty of fidelity may be expressly set out in the contract but if not, it will be implied. All employment contracts contain an implied term that an employee will serve their employer in good faith and with fidelity (duty of fidelity) meaning that during employment, the employee should act in their employer`s interests and not use the time for which he is paid by the employer in furthering their own interests. However, it also means that whilst the employee must have regard to their employer`s interests, it does not in general amount to a "promise to give his employer the benefit of every opportunity within the scope of its business"

A fiduciary duty exists where there is fiduciary relationship, such as between a director and the company of which the director is an officer. Directors are under a fiduciary duty (partially set out in the Companies Act 2006) which requires the director to owe a "single-minded duty of loyalty to the company and act in the company`s best interests`

Il-Qorti tal-Appell qalet in oltre li I-impjegat hu f` pozizzjoni differenti u ma jassumiex, semplicement qua impjegat, obbligi fiducjarji lejn il-principal. Anki jekk jitqies bhala fiducjarju, mhux kull fiducjarju jassumi l-istess doveri f` kull cirkostanza. Il-fonti ghandu jkun il-kuntratt ta` impjeg. Obbligi fiducjarji jinsorgu fejn obligazzjonijiet specifici kuntrattwali jpoggu lill-impjegat f` sitwazzjoni fejn il-ligi ghalhekk tramite dawn l-obbligi timponi fuqu doveri addizzjonali aktar rigoruzi.

Ma` dan jizdied illi impjegati ta` certa livell jistghu jkunu suggetti ghal doveri fiducjarji imposti mill-kuntratt ta` impjeg pero ma jistghux jitpoggew fil-keffa ta` diretturi u d-doveri fiducjarju impost fuqhom. Dover fiducjarju ta` direttur inghad fil-kawza Fishel imsemmija fid-decizjoni kkwotata illi : "the hallmark of a fiduciary is a single-minded duty of loyalty. The duty of loyalty in that context has a precise meaning: "namely the duty to act in the interests of another". As mentioned, this is not a feature of an employment relationship. In the employment context the duty of loyalty, although given the same label, "is one where each party must have regard to the interests of the other, but not that either must subjugate his interests to those of the other."

... Illum bl-introduzzjoni tal-artikolu 1124(A) tal-Kap. 16 dwar obbligi fiducjarji, giet kristallizzata dak li I-Qrati taghna kienu jsostnu cioe illi certi kuntratti minn natura taghhom jimponu obbligi addizzjonali ghal dawk kuntrattwali fosthom il-kuntratt ta` impjeg. L-artikolu 1124(A)(a) fil-fatt jasserixxi li hemm obbligi fiducjarji meta dawn jirrizultaw mill-istess ligi, minn kuntratt u fost affarijiet ohra msemmija, minn assunzjoni ta` kariga fejn fost elementi ohra persuna jkollha d-dmir li thares l-interessi ta` persuni ohra.

Kwindi, hu car illi fil-ligi Maltija, rapport kontrattwali jew/u anki f'assunzjoni ta` kariga (kif certament il-kaz odjern jiccentra) hemm obbligu fiducjarju fejn hemm id-doveri li wiehed ihares l-interess ta` haddiehor. Hi l-fehma ta` din il-Qorti li dan l-artikolu ma hu xejn ghajr l-applikazzjoni generali tal-ligi illi fil-qadi tad-doveri tieghu, impjegat irid iqis l-interess tal-principal tieghu u jagixxi bid-diligenza kollha fil-qadi ta` dmiru u aktar ma hi gholja l-pozizzjoni jew il-kariga, aktar jassumi piz l-obbligu ta` fedelta, lealta, onesta u buona fede fil-konfront tal-principal u aktar hu ta` importanza li dak li ghandu kariga jagixxi bid-diligenza ta` bonus pater familias. Tradott f`termini semplici l-impjegat speċjalment fil-karigi esekuttivi ma jridx jaghmel hsara, jew jagixxi b`detriment jew pregudizzju jew b`dannu ghal-interess tal-principal tieghu. Dawn id-doveri ghandhom jitqiesu b`zieda ma` kull kondizzjoni ohra kontrattwali fir-rapport ta` impjieg bejn il-principal u l-impjegat.

Huma in-natura tal-kariga, ir-responsabilitajiet u poteri afdati oltre kundizzjonijiet specifici tal-kuntratt ta` impjieg li jiddeterminaw u jiddelineaw il-qies tal-fiducja riposta u mistennija u ghalhekk huma dawn il-fatturi li jriedu jittiehdu in konsiderazzjoni meta jigi kunsidrat allegazzjoni ta` nuqqas ta` dover kemm esplicitu jew implicitu liema nuqqas igib mieghu il-konsegwenza ta` responsabilita ghal hsara li tkun allegatament giet kommissa a dannu tal-principal."

*Ghal din il-Qorti huwa rilevanti wkoll dak li kiteb l-Av. Max Ganado bl-isem "Fiduciary Obligations under Maltese Law" fil-ktieb "**Trusts e Attivita` Fiduciarie 2013**" :*

"Two fiduciary obligations, that of acting with utmost good faith and acting honestly, are absolute and cannot be waived or otherwise tampered with.

... All fiduciaries must act with utmost good faith as they have no interest to act otherwise as they are acting for the benefit of someone else. This is an obligation that cannot be waived or reduced either... Article 1124A (4) states :

Without prejudice to the duty of a fiduciary to carry out his obligations with utmost good faith and to act honestly in all cases, a fiduciary is bound, subject to express provision of law or express terms of any instrument in writing excluding or modifying such duty, as the case may be -

"and then lists the obligations one by one in subparagraphs ...

These feature singly or even in groups, in other parts of the Code and in other laws and are not a statement of new law but a summary of existing law which is spread out all over the legal system and court judgements. Some of these obligations apply only in some contexts and not others. It should also be noted that this list is not exhaustive and there could be other fiduciary obligations which emerge from the context.

...

The list is as follows :

- (a) to exercise the diligence of a bonus pater familias in the performance of his obligations ;
- (b) to avoid any conflict of interest ;
- (c) not to receive undisclosed or unauthorised profit from his position or functions ;
- (d) to act impartially when the fiduciary duties are owed to more than one person ;
- (e) to keep any property as may be acquired or held as a fiduciary segregated from his personal property and that of other persons towards whom he may have similar obligations ;
- (f) to maintain suitable records in writing of the interest of the person to whom such fiduciary obligations are owed ;
- (g) to render account in relation to the property subject to such fiduciary obligations ; and
- (h) to return on demand any property held under fiduciary obligations to the person lawfully entitled thereto or as instructed by him or as otherwise required by applicable law."

Fis-sentenza li tat fit-30 ta` Mejju 2014 fil-kawza : **Office Essentials Limited vs James Veneziane et** : il-Qorti tal-Magistrati (Malta) qalet :-

"Fil-kawza **Anthony Caruana & Sons Limited vs Christopher Caruana** deciza mill-Qorti tal-Appell fit 28 ta` Frar 2014, intqal is-segwent i dwar l-obbligi naxxenti mill-Artikolu 1124A u lill min japplikaw:

Din il-Qorti tara` li filwaqt li hu veru li l-Artikolu 1124A tal-Kodici Civili dahal fis-sehh wara li sehhe w il-fatti meritu ta` din il-kawza, dak l-artikolu ma hu xejn hlief riproduzzjoni ta` principju ta` dritt applikabbli gia` fid-dritt Ruman fejn kien meqjus bhala "a parasitic institution" (ara Lee, "The Elements of Roman Law", pagna 340), mhux bhala kuntratt imma bhala li jimponi obbligi addizzjonali ghal daw k kuntrattwali fil-kaz ta` certi kuntratti. Il-kuncett ta` obbligazzjonijiet fiducjarja lanqas ma hu marbut necessarjament mal-kuncett ta` trusts li dahal fis-sistema maltija b` mod komplut fl-1 ta` Jannar 2005 u hu ta` applikazzjoni generali f`kull kaz li dak li jkun ikun qed jagixxi f` interess ta` haddiehor meta allura hu mistenni li jagixxi bid-debita attenzjoni u kura. Kif qalet il-Qorti tal-Magistrati (Ghawdex), Gurisdizzjoni Superjuri, fil-kaz Cordina v. Cordina, deciza fis-26 ta` Settembru 2007, bl- introduzzjoni tal-Artikolu 1124A fil-Kodici Civili, is- sitwazzjoni "giet hafna aktar iccarata", pero` ma giex mahluq kuncett gidid. Kif qalet il-Prim`Awla tal-Qorti Civili fil-kaz Messina v. Galea deciza fil-5 ta` Jannar 1881, il-ligi Rumana kienet u ghada il-"ius comune" ta` Malta u, "nei casi non provoduti dalle nostre leggi, dobbiamo ricorrere alle leggi Romane". Il-kuncett ta` fiducja bejn il-principal u r-rapprezentant tieghu ilu jezisti fl-istorja legali taghna, u meta tqis li l-konvenut kien

jokkupa kariga ta` General Manager, huwa car li l-ekwita` kienet timponi fuqu doveri u obligazzjonijiet li jmorru lill-hinn mill-obbligazzjonijiet kuntratwali tieghu.

Manager jinghad li ghandu doveri ta` ghaqal u lealta` lejn il-principal tieghu. Kif jghid il-mibki Professur Joseph A. Micallef fin-noti tieghu dwar il-Kodici ta` Kummerc (pagna 121-123):

"The office of manager from the legal point of view embraces both the concept of agency and the contract of trust which arises between the manager and his principal and he must, personally perform the duties which go with this office. The manager is an agent of the principal. He acts on his behalf and in his name. But he also administers the affairs of the principal and is in charge of the business or a branch of business of the principal in one or more fixed places. He is therefore the mandatory of the principal and the main function of his office is to increase the prosperity of the principal. He is therefore also the lessor of work and industry. These characteristics have been referred to by the Commercial Court, Judge Profs. Parnis presiding, in the case Zammit vs Galea et decided on the 5th March 1907. The manager is therefore in relation to his principal an administrator, namely a mandatory and a lessor of work while in relation to third parties he is the representative that binds the principal and therefore is his agent."

*Il-manager allura avolja m`ghandux responsabbilta` ta` policy making, huwa fiducjarju tal-principal tieghu u jrid jagixxi dejjem in bona fede u b`lealta`. Kif jghidu l-awturi Hayton et filktieb "The Law of Trusts" (pagna 760) fiducjarju ghandu dejjem "a duty of confidence which is coupled with the duty of loyalty", u fost dawn iddoveri hemm dak ta` kunfidenzjalita`, fis-sens, kif jispjegah tajjeb Lord Millet fil-kaz Ingliz *Balkiah v. KPMG* (1999 1 All ER 517):*

"the duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not to misuse it, that is to say, without the consent of the former client to make any use of it or to cause any use to be made of it by others otherwise than for his benefit."

In kwantu jirrigwarda specifikament guriprudenza estera, issir referenza ghas-sentenza li nghatat fil-kawza **Chan v Zacharia** [(1984) 154 C.L.R. 178 at 199] fejn inghad :

"Directors, as with other categories of fiduciaries, are subject to a range of equitable obligations aimed at preventing abuse of position through secretly enriching themselves. In this respect, the no-conflict rule comes to the fore whereby directors are precluded from placing themselves in a position where their personal interest conflict with their duties to the company.....the fiduciary in breach of the no-conflict duty ...must account...for any benefit or gain...obtained or received in circumstances

where a conflict or significant possibility of conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain."

Fis-sentenza fil-kawza **Bray v Ford** [(1986) A.C. 44 at 51-52] inghad :

"It is an inflexible rule of a court of equity that a person in a fiduciary position ... is not, unless otherwise expressly provided, ... allowed to put himself in a position where his interest and duty conflict ... human nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect."

Fuq nota simili kienet is-sentenza fil-kawza **Bristol and West Building Society v Mothew** [(1996) EWCA Civ 533].

"The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his beneficiary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict ..."

Fil-kaz tal-lum, is-socjeta` attrici ssostni li t-trasferiment tal-ishma min-naha taghha kien vizzjat b` malafede u frodi ghaliex, ghad-detriment tas-socjeta` fejn kienu l-ishma, twettaq *diverted business*, b` diretturi jaghmlu uzu minn informazzjoni u kuntatti ta` gewwa sabiex jaghmlu negozju u gwadann ghall-interess personali taghhom jew ta` kumpanniji fejn huma *beneficial owners*.

L-intimati kkontestaw il-fondatezza ta` din il-pretensjoni. L-intimat Aghaei sostna li huwa kien ilu fl-istess linja ta` negozju ga minn qabel twaqqaf il-Grupp, u kien hu illi ressaq il-kuntatti u l-informazzjoni sabiex Afegra Trading setghet taghmel in-negozju taghha.

Fil-Pag 608 et seq ta` **Principles of Maltese Company Law** (op. cit.) **Andrew Muscat** ighid :-

*"In **Industrial Development Consultants Ltd vs Cooley** [(1972) 1 WR 443] the defendant, an architect, was managing director of the plaintiff company which was in the business of building and development consultancy. As the company`s representative, he took part in negotiations with representatives of the Eastern Gas Board, aimed at securing for the*

company contracts to build a number of large depots. The negotiations proved unsuccessful because the Board would not engage a firm of consultants (as distinct from a private architect). Soon afterwards, however, the assignment was offered to the defendant in his private capacity. He then obtained release from his employment with the company (by falsely representing that he was in ill health) and was later awarded the assignment by the Board.

The Court held that he was accountable to the company for the whole of his benefits under the contract. Liability was misuse of information, since the defendant had obtained, while he was managing director, information that the project was to be revived and consciously held this information back from the company and took steps to turn it to his advantage. It was considered irrelevant that he had been approached as an individual consultant. Information which he received while he was managing director and which was relevant and of concern to the plaintiff company was information which he was obliged to pass on to the company. It may, at first sight, appear curious that the company should receive a benefit which it would probably not have received had the defendant complied with his duty to inform it. The Court however pertinently remarked that if the defendant is not required to account he will have made a large profit as a result of having deliberately put himself into a position in which his duty to the company and his personal interests conflicted.

...

English courts have sometimes focused on the capacity of the profiteers: the corporate opportunity must have been acquired by reason of the profiteers' position as directors and the nature of the opportunity itself is not really examined (**Industrial Development Consultants Ltd vs Cooley** decided in 1972 (1972) 1 WLR 443. Cf, **Regal (Hastings) Ltd vs Gulliver** (1967) 2 AC 134). In **Canadian Aero Service Ltd vs O`Malley** (1974) 40 DLR (3d) 371), however, the Canadian Supreme Court recognized the limitations of the capacity approach. In that case, the president and executive vice-president of the plaintiff company had been engaged on behalf of the company in negotiating for a large surveying and mapping assignment. Instead of securing the contract for the company, they resigned their posts and incorporated their own company to which they successfully diverted the assignment.

The Court held that the fiduciary duty had survived their resignation and that such duty was enforceable both against them personally and against the company they had formed. Laskin J observed that the capacity approach stultified the development of the doctrine. He accordingly preferred to consider a number of different factors in order to establish whether or not the defendant was in breach of his fiduciary duties. **Factors that should be taken into account included the position or office held by the director, the director's relation to the opportunity, the amount of knowledge possessed, the particular circumstances in**

which it was obtained and whether it was "special , or indeed, even private" , and the nature, "specificness" and "ripeness" of the opportunity. (enfasi mizjuda)

The different approaches to the corporate opportunities doctrine were later considered in **Island Export Finance Ltd vs Umunna** [(1986) BCLC 460], a case involving a managing director who had resigned and subsequently obtained valuable orders from a client of the company. After considering English and Canadian authorities in this area of the law, the Court cited with approval Laskin J`s key dictum in **Canadian Aero Service Ltd vs O` Malley**, and adopted a more flexible doctrine than the previous English judgements did. The Court took into account the lack of maturity of the opportunity as well as the motive for the defendant`s resignation from the company and the fact that the company was not actively pursuing further business with the particular client. It was further noted that the defendant had not made improper use of any confidential information. The Court held that **if what the director learnt before his resignation did not qualify as a corporate opportunity, it was no breach of this aspect of directors` duties to exploit the information personally thereafter.** The defendant was accordingly allowed to keep the profit that he had obtained for himself." (enfasi mizjuda)

L-awturi **Mills & Reeve** ghamlu kitba fit-30 ta` April 2008 li dehret f` The Litigator (9th Edition) u li riferenza ghalha saret fis-sit elettroniku [lexology.com](http://www.lexology.com) bl-isem "**Directors – competing in breach of fiduciary duty**".

Mills & Reeve jghidu hekk :-

"Because of the unique relationship between a company and its directors, a director is precluded from obtaining for himself, either secretly or without the informed approval of the company, any business advantage either belonging to the company or for which he has been negotiating. This is known as a fiduciary duty and is analogous to the duty between the trustee of a private trust and a beneficiary. Like a trustee, if the director does obtain such an advantage he may be forced to account to his former employer for all the profits made from that advantage.

A director is free to resign as director and the fiduciary relationship ceases at the time of the resignation. In principle, once he has resigned his directorship, the director is free to set up in competition with his former employer and is not precluded (subject to any provisions in a service agreement or contract) from using, in the new business, the general fund of skill and knowledge he acquired as a director in the old one. However, a director may still be in breach of his fiduciary duty where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself any "maturing business opportunity" sought by his former

employer and where it was his position as director that led to the opportunity being acquired.

What conduct amounts to a breach of fiduciary duty ?

In considering whether an act of a director amounts to the acquisition of a "maturing business opportunity" the court will take into account the position or office held, the nature of the opportunity, its ripeness, its specifics and the director's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained, the timing between resignation and acquiring the opportunity and the circumstances of the resignation.

In Foster Bryant Surveying Ltd v Bryant, the Court of Appeal reviewed all the authorities and identified three different situations. At either end of the spectrum, where the former director's conduct was either obviously without fault (as was the case with Mr Bryant who had been frozen out of the company, forced to resign and had not solicited the subsequent approach from a client) or obviously in bad faith (where the director had plotted from the outset to divert the opportunity, resigned without notice and immediately set up in competition with staff and clients poached from his previous employer) it is easy to make a decision. However, the vast majority of cases fall into the middle ground.

In Bryant the Court of Appeal approved pragmatic solutions based on a common sense and meritsbased approach. This may be a classic case, however, of something that it is easy for a court to say but far more difficult to actually do.

From the authorities, there is a whole range of activity that may or may not amount to a breach of fiduciary duty depending on the facts of each case. In particular, the court will focus on the activity while still a director, what preparatory steps were taken, when they were taken and whether there is a link between the resignation and departure of the director and the acquisition of the business opportunity."

Kitba ohra li dehret fl-istess sit elettroniku kienet dik ta' **W L G Gowling** bl-isem : "**Former directors who set up in competition : the first post-Companies Act 2006 case comes to light**" : tal-10 ta' Marzu 2010 : fejn irrefera ghad-decizjoni : **Thermascan Limited v Norman Norman** [2009] EWHC 3694 (Ch).

L-awtur ighid hekk :-

It's the first reported case in England and Wales relating to those provisions of the Companies Act 2006 that govern conflicts of interest and the appropriation by directors of their company's business opportunities.

...

Mr Norman, a thermal engineer by trade, had been an executive director of Thermascan Limited (Thermascan) since 1997. Thermascan conducted specialised surveys of commercial property, typically for insurance purposes. It used infrared technology to scan factories and warehouses for problem signs such as a hot spot indicating an electrical fault and possible fire risk. A fresh survey would be required at the same time each year prior to renewal of the customer`s insurance policy.

On 10 September 2008 Mr Norman gave one month`s notice to Thermascan to terminate his contract of employment. On expiry of the notice - as it happens, nine days after the conflict of interest provisions of the Companies Act 2006 (CA 2006) came into force - he resigned as a director. Within a month he commenced employment with Sykes & Co, a building and property maintenance company. His job was to head up a new preventative maintenance division providing thermal engineering survey services. Four months after that Mr Norman was made redundant. He set about launching his own business through a company called HotspotThermography Limited.

The issue

It is axiomatic that an executive director who, having left his company, joins or sets up a competing business is, legally speaking, in a dangerous place. There is a real prospect of personal liability for breach of contract and/or fiduciary duty. The former director may even be ordered to account to the company for all the profits of the new venture.

It is best to consider Mr Norman`s two distinct roles in turn, first as employee and then as company director.

As employee

Mr Norman was bound by the terms of his employment contract :

Not, at any time, to use or to divulge any confidential information concerning Thermascan`s business which had come to his knowledge in the course of his employment and which was not in the public domain.

Not, for six months after termination, to canvass or solicit business from any person with whom he had dealt to a material extent and who at any time in the twelve months preceding termination had been a Thermascan customer.

Clearly therefore, while at Sykes & Co, Mr Norman could neither exploit confidential information nor canvass or solicit Thermascan`s customers. However, by the time he was made redundant, he was virtually free of the second of these obligations. He continued to be bound by the restriction as regards the use of confidential information.

As director

Perhaps counter-intuitively Mr Norman`s fiduciary duties as a director did not entirely come to an end when he resigned. As regards the exploitation of any property, information or opportunity of which he became aware when he was in office, he remained subject to a statutory duty to avoid a conflict between his duties to Thermascan and his selfinterest (CA 2006, s 175(1) and s 170(2)(a)).

Thermascan sought a court order restraining Mr Norman from canvassing or soliciting its customers, even if no confidential information was involved. It invoked CA 2006, and specifically sections 170 and 175.

The case helps us answer the following questions :

Does CA 2006 change the way in which we advise company directors who, having left their companies, propose to join or set up competing businesses? Specifically, does it produce a different answer than the common law it replaced ?

No.

The parties in Thermascan agreed, and the trial judge recorded, that the relevant provisions of CA 2006 did not alter the pre-existing law ...

How do the courts balance the interests of the company in such a case with the public interest in permitting former directors to continue to earn a living using their pre-existing fund of skill and knowledge ?

As explained above, Mr Norman, even after resigning as a director, was precluded - without the informed approval of Thermascan - from exploiting property, information or opportunities of which he became aware when he was a director. This would extend to the exploitation of any business advantage either belonging to Thermascan or for which it had been negotiating. On the other hand, the courts recognise that, no less than employees, directors acquire a general fund of knowledge, skill and experience in the course of their work. It is plainly in the public interest that they should be free to exploit this fund of knowledge in a new position.

The effect of the court's judgment in Thermascan was that the "stock in trade" of knowledge which Mr Norman had acquired as a director of Thermascan, even including such things as business contacts and personal connections made as a result of his directorship, was his to exploit in the future.

However :

- It would have been different if Mr Norman had been subject to ongoing contractual restrictions. Here however the six-month non-solicitation covenant to which he had been subject lapsed shortly after he was made redundant from Sykes & Co.*

- While the restriction on using confidential information had not expired, there appeared to be inadequate evidence in Mr Norman's case to support a conclusion that, by contacting Thermascan's customers after the six-month period, he was in breach of it.*

- The analysis would have been different if "trade secrets" had been at issue - the classic examples are chemical formulae and algorithms, but commercial information can fall into this category too.*

- It would also have been different if Mr Norman's resignation had been prompted or influenced by a wish to acquire "maturing business opportunities" sought by Thermascan and where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.*

For a business opportunity to be said to be "maturing" it appears that there must generally have been some discussion, if not significant discussion, of the potential opportunity. That would not typically have been the case at Thermascan where the lion's share of the trade was repeat business and there was minimal contact between Thermascan and individual customers until shortly before the next occurring survey date. The judge dismissed an argument to the effect that the annually recurring surveys were in the nature of periodically maturing business opportunities. He came to the conclusion that, while Mr Norman remained subject to (limited) fiduciary duties even after resignation as a director, they did not amount to a blanket prohibition on canvassing or soliciting business from Thermascan customers.

Each case turns on its own facts and the nature of Thermascan's business was particularly influential here. It would have been a relevant factor if there had been a greater level of formality in the arrangements between Thermascan and its customers under which Thermascan could definitely look forward to recurring business.

It is perhaps worth pointing out that Thermascan is to be distinguished from a long line of other cases which turn on what a director should or should not do while still in office. There was no suggestion in this

case that the former director actually sought to compete with the company prior to termination. Still less was there that other classic feature of these sorts of case: a conspiracy to damage or even destroy the old business before moving on to the new.

Kitba ohra kienet dik ta` **John Lowry** tat-30 ta` April 2012 fl-**International Review of Law** bl-isem : "**Codifying the corporate opportunity doctrine : The (UK) Companies Act 2006**"

L-awtur jittratta *post-resignation liability* :-

According to section 170(2), liability under section 175 will apply to former directors as well as those who are currently holding office. The existence and extent of the former directors` liability is not self-evident. A lay director may readily assume that with resignation liability is at an end. But, of course, section 170(2) signals that activity that predates resignation may continue to be the source of fiduciary liability. In this it draws upon the case law. Yet, taking the two sections together, they fail to do justice to the multifarious conditions that attend imposition of liability in equity, conditions that depend upon the specific facts in dispute. Once more, the putative director will find that the devil is in the detail. There is a range of permutations that lie buried beneath the surface of the statutory language, involving both fact and law.

Directors are free to resign at any time. Absent specific terms in the contract of employment, their fiduciary relationship does not continue beyond resignation (Att. Gen. v. Blake [1998] Ch 439, at 453, varied on other grounds [2000] 3 WLR 625 (HL)). Should they subsequently use their expertise in the pursuit of an opportunity that might have been of interest to their former company, this will not automatically engage liability within the terms of section 175. To that extent they are free to use their fund of general knowledge and skill. How far this knowledge includes specific information acquired in furtherance of the previous company`s enterprise, may vary with each case. Sometimes the information will not be open for exploitation but take the form of a trade secret or property belonging to the ex-directors` former company. This fact alone indicates a problem for the lay director who may find little guidance on a significant demarcation simply by studying the language in the statute.

Juxtaposed with the sparse language of section 175, it confirms that what directors need to know about their potential liability may not readily be encapsulated in a blanket restatement. This is hardly surprising. The recent case law has had to confront multifarious issues deriving from modern competitive enterprise. This issue typically arises where the allegation is that an ex-director has exploited specialist knowledge and skill acquired while in his or her former employment. In Dranez Anstalt v. Zamir Hayek [2001] 1 BCLC 693. Appealed on other grounds: [2003] 1 BCLC 278. Evans-Lombe J held that a company cannot claim protection in respect of

know-how and general knowledge memorised by a director as part of his or her job, notwithstanding that such fund of knowledge will equip the director as a competitor. The exception concerns information that qualifies as 'trade secrets'. Noting that this is an area where detailed and accurate pleadings are required, the judge drew upon Mummery LJ's observations in FSS Travel and Leisure Systems Ltd v. Johnson (1998 IRLR 382.), a case involving computer software:

This distinction necessitates examination of all the evidence relating to the nature of employment, the character of the information, the restrictions imposed on its dissemination, the extent of use in the public domain and the damage likely to be caused by its use and disclosure in competition with the employer.

Typical examples of trade secrets include company databases, customer lists, suppliers' agreements, and business and sales strategy (See, for example, Item Software (UK) Ltd v. Fassihi, above n 42; and Quarter Master UK Ltd v. Pyke [2005] 1 BCLC 245).

A director who anticipates leaving one company to go it alone, may find little guidance in the code on how far it is permissible to set about establishing a new enterprise while still engaged by the old. Of course this is a challenging area in terms of equitable principles of liability. One of the favoured rationalisations for fiduciary obligations is to ensure that everything the director does is exclusively in furtherance of the principal company's economic advantage. Taken at face value, this seems to rule out the possibility of a director being allowed to begin his own venture until he has ceased to hold office. However, as is clear from the case law, the courts are prepared to engage in a fact intensive exercise when determining whether the activities of a director undertaken in anticipation of resignation have crossed the line.

For example, in Balston Ltd v. Headline Filters Ltd ([1990] FSR 385. See also, Framlington Group plc v. Anderson [1995] 1 BCLC 475. See J. Lowry and R. Edmunds 'The Corporate Opportunity Doctrine: The Shifting Boundaries of the Duty and its Remedies' (1998) 61 MLR 515) the defendant (Head) had been an employee and director of Balston for some seventeen years. Immediately before resigning from the company he agreed to take a lease of commercial premises in order to start-up his own business. At that stage, he had not decided upon the nature of the business he would enter.

Shortly after his resignation, one of Balston's customers contacted Head after being told that the company would be discontinuing its supply to him of a certain type of filter tube. Head therefore began manufacturing the filters and supplied them to the customer. Balston Ltd sought to hold him to account. Falconer J held that it was not a breach of fiduciary duty for a director to start-up a business in competition with his former company after his directorship had ceased, even where the intention to commence business was formed prior to the resignation. On the evidence, Head had

not attempted to divert to himself a maturing business opportunity, an opportunity which was in the contemplation of Balston Ltd. The issue continues to be litigated.

A more recent illustration is Coleman Taymar Ltd v. Oakes. The claimant, Coleman Taymar Ltd, had decided to close both the manufacturing process and its research and development facility in the UK. Mr Oakes, while still technically a director of, but after the termination of his employment with Coleman Taymar Ltd, launched GoGas (UK) plc as a competitor. In so doing, several of his preparatory steps in establishing GoGas were breaches of his general fiduciary duty as a director. Thus Oakes was liable by: making use of confidential company reports in negotiating leases of premises vacated by the claimant; indirectly buying equipment at full value from the claimant, and using Taymar`s employees to assist him in establishing GoGas. In terms of liability, the claimant`s victory seems somewhat pyrrhic, insofar as the judge found that Oakes`s preparatory activities were honest and reasonable breaches for which it was fair to relieve him of liability under section 727 of the Companies Act 1985.

Not surprisingly, pre-resignation activities, which are flagrantly designed to denude the company of an opportunity by diverting it to the defendant director, will attract the full rigour of equity`s proscription. For example, in CMS Dolphin Ltd v. Simonet [2001] 2 BCLC 704.), CMS Dolphin (CMSD), an advertising company, successfully claimed that Simonet, its former managing director, was in breach of fiduciary duty by diverting a maturing business opportunity to a new company established by him, following his resignation from CMSD (As is typical in such litigation, CMSD bolstered its claim by arguing that there was also a breach of the duty of fidelity by virtue of his employment contract. the business or reputation of the company, and he was not precluded from using his general fund of skill and knowledge to compete with his former company. However, not surprisingly, it was held that appropriating a maturing business opportunity belonging to CMSD was a misuse of its property for which Simonet was liable). It was argued that Simonet had resigned in order to acquire for himself the opportunity sought by CMSD, and that he had diverted parts of CMSD`s business and taken its staff with him to his new company. Lawrence Collins J held that a director`s power to resign from office is not a fiduciary power and a director is entitled to resign even if it might have a disastrous effect on the business reputation of the company, and he was not precluded from using his general fund of skill and knowledge to compete with his former company. However, not surprisingly, it was held that appropriating a maturing business belonging to CMSD was a misuse of its property for which Simonet was liable.

Rix LJ`s judgment in Foster Bryant Surveying Ltd v. Bryant, holds important lessons for future courts. Having subjected In Plus Group to close scrutiny, he stressed that there must be `some relevant connection or link between the resignation and the obtaining of the business.` He emphasised the need to demonstrate both lack of good faith with which the future

exploitation was planned whilst still a director, and the need to show that the resignation was an integral part of the dishonest plan. Thus, in cases where liability for postresignation breach of duty had been found, there was, he noted, a causal connection between the resignation and the subsequent diversion of the opportunity to the director's new enterprise. However, Rix LJ recognised the difficulties of accurately summarising the circumstances in which retiring directors, may or may not be held to have breached their fiduciary duties because the issue is necessarily 'fact sensitive.'

*These cases serve to illustrate the types of conduct undertaken in anticipation of resignation that fall either side of the line. And, on their facts, no one can dispute the reasoning adopted by the judges. Yet, notwithstanding the underlying objectives of the CLR in codifying the duties, the statute offers little guidance beyond the somewhat abstract language of section 175(4)(a) which provides that **the duty will not be broken if the 'situation cannot reasonably be regarded as likely to give rise to a conflict of interest'** (Although, as Lord Goldsmith explained when the Bill was going through Parliament: 'Once you know that you are now in a situation of conflict, you will have to do something about it, but you are not in breach simply because it happened when, as is set out in subsection (4)(a), it could not, 'reasonably be regarded as likely to give rise to' the conflict.' See the Official Report, 6/2/2006; coll. GC289). Whether this is sufficient to convey the distinction drawn in the case law between the permissible exploitation of know-how and general knowledge on the one hand, and steps that might be taken which represent the diversion of a corporate opportunity on the other, is open to doubt. No doubt, legal advisors will have little difficulty in appreciating the distinction. But that belies the CLR's goal of simplifying the law and, thereby, making it accessible to the lay director."*

Fl-**Art 2 tal-Kap 386** insibu li "direttur"

"tinkludi kull persuna li jkollha l-kariga ta' direttur ta' kumpanija, ikun x' ikun l-isem taghha, li sostanzjalment taqdi l-istess funzjonijiet dwar it-tmexxija tal-kumpanija, bhal direttur".

Tifsira simili tinsab f' **Sec 250 tal-Companies Act 2006** tal-Ingilterra li tghid : "director includes any person occupying the position of director by whatever name called."

Persuna tista' titqies li hija "direttur" ghall-finijiet u effetti kollha tal-ligi, jekk tkun **tmexxi** kumpannija, anke jekk tkun tissejjah *manager*.

Ghalhekk fis-sustanza, li jghodd mhuwiex it-titolu jew l-isem tal-kariga li jkollha persuna, izda l-funzjoni dirigenzjali fis-sens tat-tmexxija li l-persuna jkollha fil-kumpannija.

Fil-kuntest Malti, direttur jassumi l-funzjoni *de jure* meta jkun formalment u validament mahtur skont il-ligi u registrat mar-Registratur tal-Kumpanniji.

Fl-Ingilterra kienet trattata fid-dottruna u fil-gurisprudenza l-figura ta' diretturi : *de facto* u *shadow directors* (dawn tal-ahhar b' referenza specifika ghalhom f' Sec 250 tal-Companies Act 2006).

Fil-kaz **In Re Hydrodam (Corby) Ltd** [1994]²⁸ **Millett J** jiddeskrivi d-diretturi *de facto* hekk :

"a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director, although never actually or validly appointed as such. To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could probably be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can probably be performed by a manager below board level. A de facto director, I repeat, is one who claims to act and purports to act as a director, although not validly appointed as such."

Fil-ktieb **Company Law** (4th Ed. – OUP - Pg. 159-161) **Brenda Hannigan** taghmel is-segwenti osservazzjonijiet :

"Essentially, a de facto director is someone who is part of the corporate governing structure of the company and who has assumed the status and functions of a company director so as to make himself liable as if he were a de jure director. It is possible, for example, for a shareholder or a consultant to the company to act in a way which makes him a de facto director. But he must have assumed the office of director and it is necessary to distinguish between a person acting in another capacity, for example as a mere agent, employee or adviser of the company or solely as a shareholder protecting his investment. If it is unclear whether the acts of the person in question are referable to an assumed directorship or to some other capacity, the person in question is entitled to the benefit of the doubt."

The question whether someone is a de facto director is likely to arise where a penalty or liability may be imposed on a 'director', such as

²⁸ 2 BCLC 180

disqualification or liability for wrongful trading or misfeasance and the individual attempts to evade the penalty or liability by relying on the fact that he is not a de jure director, i.e. not a formally and properly appointed director.

The Supreme Court confirmed in Re Paycheck Services 3 Ltd, Revenue and Customs Commissioners v Holland that there is no single decisive test for determining whether someone is a de facto director, and indeed it is not necessary that the term `de facto director` be given the same meaning in all of the different contexts in which a director may be liable.

...

In Re Idessa Ltd, Burke v Morrison an individual who exercised real influence over the company`s affairs and acted on an equal footing with the de jure director and who had the same salary and access to the company`s bank account, financial records and payroll functions as the de jure director, and who was held out as a director in the company`s business plan, could fairly be regarded as part of the company`s corporate governance, however much he downplayed his role when giving evidence, and he was liable as a de facto director. In Re Mumtaz Properties Ltd, Wetton v Ahmed a person who, within an informally run family business, dealt with suppliers and local authorities, who had a director`s loan account on which he could make drawings for his personal benefit, and who the court found to be one of the nerve centres from which the company`s activities radiated, was a de facto director. He was part of the corporate governance structure of the company and was jointly and severally liable with the other directors for the misapplication of the company`s funds."

Fil-kaz **Smithton Ltd v Naggar** [2015] 1 WLR 189, **Lady Arden of Heswell**, b` referenza ghad-decizjoni fil-kaz **Re Pycheck Services 3 Ltd, Revenue and Customs Commissioners v Holland** [2011] 1 BCLC 141, tissenjala dawk li ssejjah : "*Practical points: what makes a person a de facto director ?*".

Tghid hekk :

"33. *Lord Collins sensibly held that there was no one definitive test for a de facto director. The question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director. However, a number of points arise out of Holland and the previous cases which are of general practical importance in determining who is a de facto director. I note these points in the following paragraphs.*

34. *The concepts of shadow director and de facto are different but there is some overlap.*

35. *A person may be de facto director even if there was no invalid appointment. The question is whether he has assumed responsibility to act as a director.*

36. *To answer that question, the court may have to determine in what capacity the director was acting (as in Holland).*

37. *The court will in general also have to determine the corporate governance structure of the company so as to decide in relation to the company's business whether the defendant's acts were directorial in nature.*

38. *The court is required to look at what the director actually did and not any job title actually given to him.*

39. *A defendant does not avoid liability if he shows that he in good faith thought he was not acting as a director. The question whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief.*

40. *The court must look at the cumulative effect of the activities relied on. The court should look at all the circumstances "in the round" (per Jonathan Parker J in Secretary of State v Jones).*

41. *It is also important to look at the acts in their context. A single act might lead to liability in an exceptional case.*

42. *Relevant factors include :*

i) *whether the company considered him to be a director and held him out as such;*

ii) *whether third parties considered that he was a director;*

43. *The fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision.*

44. *Acts outside the period when he is said to have been a de facto director may throw light on whether he was a de facto director in the relevant period.*

45. *In my judgment, the question whether a director is a de facto or shadow director is a question of fact and degree. The principles of appellate review are well-established. I need only summarise those applicable here. Where the decision depends upon the judge's assessment of weight to be attached to various facts, the test to be satisfied on appeal is that in most cases the judge was plainly wrong. Where the appellant contends that the judge misdirected herself as to the law, the court must determine what the law is and whether the judge applied it."*

Filwaqt illi direttur *de facto* huwa parti mill-istruttura ta' governanza ta' kumpannija u ghandu r-rwol u funzjoni ta' direttur, *shadow director* huwa persuna li ghandha influwenza fuq it-tmexxija ta' kumpannija, minghajr ma formalment ikollhom xi rwol fil-bord tad-diretturi.

Dwar il-figura ta' *shadow director*, **Millett J** fil-kaz citat aktar kmieni **In Re Hydrodam (Corby) Ltd** [1994]²⁹ jghid :

"A shadow director by contrast, does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims are the only directors of the company to the exclusion of himself. He is not held out as a director by the company. To establish that a defendant is a shadow director of a company it is necessary to allege and prove: (1) who are the directors of the company, whether de facto or de jure; (2) that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed so to act. What is needed is, first, a board of directors claiming and purporting to act as such; and, secondly, a pattern of behaviour in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others."

Fil-Pag 165 et seq tal-ktieb **Company Law** (op.cit.) **Brenda Hannigan** tosserva illi :

"Despite the nomenclature, though the shadow director may indeed be 'lurking in the shadows', it is not an essential ingredient of the definition. In Secretary of State for Trade and Industry v Deverell, Morritt LJ gives the example of the person resident abroad who owns all the shares, but operates the company through a local board of directors. If such person gives directions to the local board as to what to do, then though the person takes no steps to hide his part in the affairs of the company, he may be a shadow director. In Re Paycheck Services 3 Ltd, Revenue and Customs Commissioners v Holland, Lord Walker gives the example of the CEO of a holding company who openly gives instructions to the board of a subsidiary."

Fil-kaz **Secretary of State for Trade and Industry v Deverell** (2001) Ch 340 (CA) il-qorti harget b'lista ta' sitwazzjonijiet li juru konkretament x' ikun u x' jaghmel *shadow director* :

²⁹ 2 BCLC 180

“(1) The definition of a shadow director is to be construed in the normal way to give effect to the parliamentary intention ascertainable from the mischief to be dealt with and the words used ...

(2) The purpose of the legislation is to identify those, other than professional advisers, with real influence in the corporate affairs of the company. But it is not necessary that such influence should be exercised over the whole field of its corporate activities ...

(3) Whether any particular communication from the alleged shadow director, whether by words or conduct, is to be classified as a direction or instruction must be objectively ascertained by the court in the light of all the evidence. In that connection I do not accept that it is necessary to prove the understanding or expectation of either giver or receiver. In many, if not most, cases it will suffice to prove the communication and its consequence ... Certainly the label attached by either or both parties then or thereafter cannot be more than a factor in considering whether the communication came within the statutory description of direction or instruction.

(4) Non-professional advice may come within that statutory description. The proviso excepting advice given in a professional capacity appears to assume that advice generally is or may be included. Moreover the concepts of “direction” and “instruction” do not exclude the concept of “advice” for all three share the common feature of “guidance”.

(5) It will, no doubt, be sufficient to show that in the face of “directions or instructions” from the alleged shadow director the properly appointed directors or some of them cast themselves in a subservient role or surrendered their respective discretions. But I do not consider that it is necessary to do so in all cases. Such requirement would be to put a gloss on the statutory requirement that the board are “accustomed to act in accordance with” such directions or instructions.”

Dwar dawn is-sitwazzjonijiet, **Brenda Hannigan** [**Company Law** – Pg. 167 - op. cit.] tirrimarka :

“These criteria show the court moving away from a strict interpretation of the statutory definition to a more flexible one: the influence exerted need not be over all of the company’s affairs; the ‘directions and instructions’ may blend into advice and guidance; and the de jure directors need not have surrendered their roles as long as they are accustomed to act etc.

...

In Re Mea Corporation, Secretary of State for Trade and Industry v Aviss the evidence was that the two individuals in question (one of whom was the owner of the businesses) decided matters with regard to the

recruitment of employees and the payments of creditors, they handled funding negotiations with the banks and tax matters with the Inland Revenue. The key allegation, as far as the court was concerned, was that they decided on the application within a group of companies of a group treasury policy which resulted in all companies remitting funds to the parent company which then determined how those funds were used and which creditors got paid. In particular, funds were paid to companies outside of the group in which one of the directors had a personal interest. Despite the protestations of the board of companies in the group, this policy persisted which, the court said, showed the level of control exercised by these individuals. The court had no hesitation in finding that this ability to dictate policy in an area of corporate affairs as critical as the application of trading income and the payment of trade creditors made them shadow directors. In Vivendi SA v Richards the individual in question prepared the company's business plan, devised strategy, engaged with key advisers, looked for investments for the company (so looked somewhat like a de facto director) but primarily he was the person to whom the sole de jure director turned to, deferred to, and in accordance with those directions and instructions the de jure director was accustomed to act, hence he was a shadow director.

Clearly a controlling shareholder is potentially at risk of being classified as a shadow director, if they act vis-à-vis the de jure directors (by directions or instructions) in a way which brings them with the criteria outlined earlier, including that the board or a majority of the board must be accustomed to act on those directions or instructions."

Fil-ktieb **Sealy & Worthington's Text, Cases and Materials in Company Law** (11th Ed. Pg. 330) **Sarah Worthington** tosserva illi :

"In appropriate cases, a holding (and possibly also its directors), a consultant called in to assist in a corporate rescue and a company's bank could be held to be 'shadow directors', ... But for this to be the case, the whole board has to act in accordance with the shadow director's instructions or directions."

Il-principju ghandu japplika wkoll fil-kaz ta' dawk il-membri ta' kumpannija li minhabba l-attivitajiet u l-kondotta taghhom fl-ambitu tal-kumpannija jassumu r-rwol ta' *shadow director/s*.

Il-punt krucjali kardinali jibqa' li l-qorti trid tistabilixxi min b' mod fattwali, tangibbli u verifikabbli ezercita influenza fit-tmexxija tal-kumpannija. Jista' jkun hemm sitwazzjonijiet fejn persuna tikkwalifika kemm kemm bhala *de facto* u kif ukoll bhala *shadow director*. Kaz tipiku jkun dak fejn persuna tassumi rwol ta' direttur *de facto* f' qasam partikolari tan-negozju u tezercita dak ir-rwol b' setghat li generalment ikunu

jispettaw lil direttur, u fl-istess waqt ikun qieghed jezercita l-influenza tieghu billi jaghti direzzjonijiet lill-bord tad-diretturi dwar aspetti ohra fit-tmexxija tan-negozju.

Trattati dawn l-aspetti, il-qorti tishaq li d-diretturi ghandhom obbligi lejn il-kumpannija.

Issir referenza ghall-kaz **Howard v Herrigel** [(1991)(2) SA 660 (A)] fejn fid-decizjoni nghad:

"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."

Fi-decizjoni li nghatat fil-kaz "**Brazilian Rubber Plantations and Estates Ltd**"(1911.Ch.425) **Neville J** qal hekk :-

"A director`s duty has been laid down as requiring him to act as reasonably to be expected from him, having regard to his knowledge and experience. He is, I think, not bound to bring any special qualifications to his office. He may undertake the management of a rubber company in complete ignorance of everything connected with rubber, without incurring responsibility for the mistakes which may result from such ignorance. Such reasonable care must, I think, be measured by the care an ordinary man might be expected to take in the same circumstances on his own behalf. He is clearly I think, not responsible for damages occasioned by errors of judgement."

Fil-ktieb **Pennington`s Company Law** (pg. 778) jinghad :-

"Director`s powers are given to them to be used for the benefit of the company, that is for the benefit of the shareholders of the company as a whole and not for the benefit of the directors themselves, nor for the benefit exclusively of a section of the shareholders or employees of the company ... or of outsiders."
(enfasi ta` din il-qorti).

Il-qorti tirribadixxi dak li nghad mill-Prim`Awla tal-Qorti Civili fis-sentenza taghha tal-15 ta` Settembru 2015 fil-kawza fl-ismijiet **Alexandra Balzan Ruggier vs Amadeo Balzan** meta qalet illi r-*raison d`etre* tal-Artikolu 136A tal-Kap 386 huwa l-interess tal-kumpannija, u l-interess

personali tad-diretturi u tal-azzjonisti huwa rrilevanti.

Pero` hemm eccezzjonijiet ghal dan il-principju li ghandu valenza generali. Tista` tittiehed, anke minn azzjonisti, azzjoni direttament kontra diretturi ghal agir imputabbli lilhom de proprio.

Fil-kaz **Coleman v Myers** [1977] 2 NZLR 255 **Woodhouse J**
b` riferenza ghal **Percival v Wright** [1902] 2 Ch. 421 ighid :

"In my opinion it is not the law that anybody holding the office of director of a limited liability company is for that reason alone to be released from what otherwise would be regarded as a fiduciary responsibility owed to those in the position of shareholders of the same company. Certainly their status as directors did not protect the defendants in a Canadian case which finally made its way to the Privy Council: se Allen v Hyatt. The decision in that case turned upon the point that the directors of the company had put themselves in a fiduciary relationship with some of their shareholders because they had undertaken to sell shares of the shareholders in an agency capacity. But there is nothing in the decision to suggest that in the case of a director the fiduciary relationship can arise only in an agency situation. On the other hand, the mere status of company director should not produce that sort of responsibility to a shareholder and in my opinion it does not do so. The existence of such a relationship must depend, in my opinion, upon all the facts of the particular case ...

As I have indicated it is my opinion that the standard of conduct required from a director in relation to dealings with a shareholder will differ depending upon all the surrounding circumstances and the nature of the responsibility which in a real and practical sense the director has assumed towards the shareholders. In the one case there may be a need to provide an explicit warning and a great deal of information concerning the proposed transaction. In another there may be no need to speak at all. There will be intermediate situations. It is, however, an area of the law where the courts can and should find some practical means of giving effect to sensible and fair principles of commercial morality in the cases that come before them; and while it may not be possible to lay down any general test as to when the fiduciary duty will arise for a company director or to prescribe the exact conduct which will always discharge it when it does, there are nevertheless some factors that will usually have an influence upon a decision one way or the other. They include, I think, dependence upon information and advice, the existence of a relationship of confidence, the significance of some particular transaction for the parties and, of course the extent of any positive action taken by or on behalf of the director or directors to promote it. In the present case each one of those matters had more than ordinary significance and when they are taken together they leave me in no doubt that each of the two directors did owe a fiduciary duty to the individual shareholders."

Dan il-principju kien riaffermat fil-kaz **Peskin v Anderson** [2000] EWCA Civ 326, fejn **Mummery LJ** ghamel dawn l-osservazzjonijiet :-

"29. According to the headnote in **Percival v. Wright** [1902] 2 Ch 421 that case decided that:

"The directors of a company are not trustees for individual shareholders, and may purchase their shares without disclosing pending negotiations for the sale of the company`s undertaking."

30. *The apparently unqualified width of the ruling has, over the course of the last century, been subjected to increasing judicial, academic and professional critical comment; but few would doubt that , as a general rule, it is important for the well being of a company (and of the wider commercial community) that directors are not over-exposed to the risk of multiple legal actions by dissenting minority shareholders. As in the affairs of society, so in the affairs of companies, rule by litigation is not to be equated with the rule of law.*

31. *For his part, Lord Gribner QC accepted that the fiduciary duties owed by the directors to the company do not necessarily preclude, in special circumstances, the co-existence of additional duties owed by the directors to the shareholders. In such cases individual shareholders may bring a direct action, as distinct from a derivative action, against the directors for breach of fiduciary duty.*

32. *A duality of duties may exist. In **Stein v. Blake** [1998] 1 All ER 724 at 727d and 729g Millett LJ recognised that there may be special circumstances in which a fiduciary duty is owed by a director to a shareholder personally and in which breach of such a duty has caused loss to him directly (e.g. by being induced by a director to part with his shares in the company at an undervalue), as distinct from loss sustained by him by a diminution in the value of his shares (e.g. by reason of the misappropriation by a director of the company`s assets), for which he (as distinct from the company) would not have a cause of action against the director personally.*

33. *The fiduciary duties owed to the company arise from the legal relationship between the directors and the company directed and controlled by them. The fiduciary duties owed to the shareholders do not arise from that legal relationship. They are dependent on establishing a special factual relationship between the directors and the shareholders in the particular case. Events may take place which bring the directors of the company into direct and close contact with the shareholders in a manner capable of generating fiduciary obligations, such as a duty of disclosure of material facts to the shareholders, or an obligation to use confidential information and valuable commercial and financial opportunities , which have been acquired by the directors in that office, for the benefit of the shareholders,*

and not to prefer and promote their own interests at the expense of the shareholders.

34. These duties may arise in special circumstances which replicate the salient features of well established categories of fiduciary relationships. Fiduciary relationships, such as agency, involve duties of trust, confidence and loyalty. Those duties are, in general, attracted by and attached to a person who undertakes, or who, depending on all the circumstances, is treated as having assumed, responsibility to act on behalf of, or for the benefit of, another person. That other person may have entrusted or, depending on all the circumstances, may be treated as having entrusted, the care of his property, affairs, transactions or interests to him. There are, for example, instances of the directors of a company making direct approaches to, and dealing with, the shareholders in relation to a specific transaction and holding themselves out as agents for them in connection with the acquisition or disposal of shares; or making material representations to them; or failing to make material disclosure to them of insider information in the context of negotiations for a take-over of the company's business; or supplying to them specific information and advice on which they have relied. These events are capable of constituting special circumstances and of generating fiduciary obligations, especially in those cases in which the directors, for their own benefit, seek to use their position and special inside knowledge acquired by them to take improper or unfair advantage of the shareholders.

35. The court has been referred to the valuable and detailed surveys of the authorities, expounding the special circumstances which justify the imposition of fiduciary duties on directors to individual shareholders, in the judgments of Court of Appeal in New Zealand in **Coleman v. Myers** [1977] 2 NZLR 225 (especially pp.323-325,328-330) and of the Court of Appeal of New South Wales in **Bunninghausen v. Glavanics** [1999] 46 NSWLR 538 (especially pp. 547-560). In both of those cases fiduciary duties of directors to shareholders were established in the specially strong context of the familial relationships of the directors and shareholders and their relative personal positions of influence in the company concerned.

36. The cases of **Allen v. Hyatt** (1914) 30 TLR 444 at p. 445 (directors making representations to secure options to purchase shares of shareholders and undertaking to sell shares of shareholders in agency capacity); **Howard Smith Limited v. Ampol Petroleum Limited** [1974] AC 821 at pp.834, 837-838 (directors` use of fiduciary power of allotment of shares for a different purpose than that for which it was granted, and so as to dilute the voting power of the majority shareholding of issued shares); **Re a Company** [1987] 1BCLC 82 at pp.84-85; and **Re Chez Nico** [1992] BCLC 192 at p.208 were also cited. See also the discussion in Spencer Bower on Actionable Non-Disclosure (2nd Ed) 1990 pp.417-435.

37. The claims for breach of fiduciary duty owed by the directors to the members of the Club are put in several different, though interrelated

and overlapping, ways. They have been argued on the appeal by Mr Vos QC (who did not appear below) with a somewhat different emphasis than before the judge as indicated in a draft Re-amended Statement of Claim. This judgment will refer to certain passages in the draft Amended Statement of Claim (which have since been deleted), since they were the pleaded claims before the judge."

3. L-eccezzjonijiet preliminari

a) In-nullita` tar-rikors guramentat (it-tieni eccezzjoni ta` Mohammedreza Aghaei u l-ewwel eccezzjoni tal-konvenuti l-ohra)

In-nullita` qeghda tkun eccepita abbazi tal-Art 789(1)(c) u (d) tal-Kap 12.

Fis-sentenza li tat din il-qorti diversament presjeduta fil-25 ta` Frar 2016 fil-kawza "**Theresa Chetcuti et vs Maria Carmela sive Lina Warrington et**" inghad hekk :-

Illi fejn ikun hemm eccezzjonijiet ta` nullita` bhal dawk li gew sollevati fil-kawza odjerna, wiehed ghandu jezamina jekk verament dawn l-eccezzjonijiet fis-sustanza taghom iwasslux ghan-nullita` o meno. Fil-fatt, l-emendi li saru fil-Kodici ta` Organizzazzjoni u Procedura Civili bl-Att XXIV tas-sena 1995 kienu intizi, inter alia, proprju sabiex jigu evitati dawn it-tip ta` eccezzjonijiet. Tali eccezzjoni ta` nullita` ta` att gudizzjarju hija proponibbli biss jekk jikkonkorru r-rekwiziti stabbiliti fl-artikolu 789 tal-Kap 12 u l-Qorti tifhem li r-rikorrenti qed jinvoka l-Artikolu 789(1)(c).

Fil-fatt l-artikolu 789(1) tal-Kap 12 jitkellem car dwar meta att gudizzjarju jista` jigi dikjarat null.

(1) *L-eccezzjoni ta` nullita` tal-atti gudizzjarji tista` tinghata jekk :*

(a) *jekk in-nullita` hija dikjarata mil-ligi espressament ;*

(b) *jekk l-att jinhareg minn qorti mhux kompetenti ;*

(c) *jekk fl-att ikun hemm vjolazzjoni tal-forma mehtiega mil-ligi, ukoll jekk mhux taht piena ta` nullita`, kemm-il darba dik il-vjolazzjoni tkun giebet, lill-parti li titolb in-nullita`, pregudizzju illi ma jistax jissewwa xort` ohra hlief billi l-att jigi annullat ;*

(d) jekk l-att ikun nieqes minn xi partikolarita` essenzjali espressament mehtiega mil-ligi.

Izda dik l-eccezzjoni ta` nullita` kif mahsuba fil-paragrafi (a), (c) u (d) ta` dan is-subartikolu ma tkunx tista` tinghata jekk dak in-nuqqas jew vjolazzjoni jkun jistghu jissewew taht kull dispozizzjoni ohra tal-ligi.

Tifsira tajba ta` din id-disposizzjoni, flimkien ma` l-isfond li fih il-legislatur wera li ried iqeghda, hija moghtija f` sentenza tal-Qorti tal-Appell fil-kawza fl-ismijiet "**Salvino Busuttil et vs Agostino Baldacchino**;" (28.1.1998 – Kollez. Vol:LXXXII.ii.30)

L-eccezzjoni ta` nullita` ta` att, taht il-paragrafu (c) tas-subartikolu (1) ta` dan l-artikolu, ma tistax tinghata, meta l-parti li taghtiha tkun baqghet taghmel jew, ghad li tkun taf biha, tkun halliet li jibqghu jsiru atti ohra wara, minghajr ma teccepixxi dik in-nullita`.

Illi l-erba` (4) cirkostanzi msemija f` dak l-artikolu huma tassattivi, fis-sens li biex dik l-eccezzjoni ta` nullita` ta` att gudizzjarju tirnexxi, trid bilfors taqa` taht il-parametri ta` xi wahda minnhom.

Ir-rikorrenti ssottomettew li qed jibbazaw l-eccezzjoni taghhom fil-parametri tas-subinciz (d) citat hawn fuq u ghalhekk japplika l-proviso ghall-artikolu 789(1).

Illi bil-proviso citat il-legislatur jaghmel referenza ghall-artikolu 175 tal-Kap 12.

L-artikolu 175 (1) tal-Kap 12 jaqra hekk:

"Il-Qorti tista`, f` kull waqt tal-kawza, qabel is-sentenza, wara talba ta` wahda mill-partijiet, wara li tisma` meta jehtieg il-partijiet, tordna s-sostituzzjoni ta` xi att jew tippermetti tibdil fl-iskritturi, sew billi fihom jizdied jew jitneha l-isem ta` wahda mill-partijiet u jitqiegged iehor floku, jew billi jissewewa zball fl-isem tal-partijiet jew fil-kwalita` li fiha jidhru, jew billi jissewewa kull zball iehor jew billi jiddahhlu hwejjeg ohra ta` fatt jew ta` dritt ukoll permezz ta` nota separata, sakemm sostituzzjoni jew tibdil bhal dan ma jbiddilx fis-sustanza l-azzjoni jew l-eccezzjoni fuq il-mertu tal-kawza."

Hu pacifiku li din id-disposizzjoni tal-ligi (anke kif kienet qabel l-emendi tal-1995 u tal-2005) inghatat fil-gurisprudenza interpretazzjoni wiesgha fis-sens li ma gietx adottata l-istrettezza li donnhom ifissru l-kliem tal-ligi. Hekk fis-sentenza "**Moore noe vs Falzon et**" P.A. 15 ta` Dicembru 1995) kien deciz li -` ghalhekk gie ritenut illi l-ligi ma tirrikjedix kliem partikolari ghal kif ghandha ssir ic-citazzjoni, bizzejjed jiftiehem xi jkun qiegged jitlob l-attur, b` mod li l-kawzali tista` tkun espressa lakonikament, u sahsitra tista` tkun anki dedotta mid-domanda (Kollez. XXIV.II.502,

XXIX.I.431 u XXXII.I.228)”. Ara wkoll **Mario Mizzi noe et vs Mario Grech noe et** PA – 3 ta` Ottubru 2003) fejn din il-gurisprudenza tinsab ukoll iccitata.

Hekk ukoll inghad fis-sentenza tal-Qorti tal-Appell fil-kawza "**Bonnici vs Zammit noe**" deciza fl-20 ta` Jannar 1986 fejn it-tifsira tal-Artikolu 156(1) kienet spjegata hekk-

"Illi l-Artikolu 156(1) jipprovdi li l-oggett u r-raguni tat-talba gudizzjarja ghandhom ikunu mfissra car u sewwa fic-citazzjoni. Dan ma jfissirx pero` li kwalunkwe nuqqas da parti tal-attur ghandu mill-ewwel jigi mehud fis-sens li qed imur kontra d-dispost tal-Artikolu 155(1) (illum 156(1) tal-Kap 12) u ghalhekk igib mieghu n-nullita` tac-citazzjoni. Infatti, biex citazzjoni tigi mwaqqfa irid ikun hemm raguni gravi, u fost kollox, ghandu jigi ezaminat jekk ic-citazzjoni tkunx defungenti jew zbaljata b` mod li l-konvenut ikun jista` jigi ppregudikat fid-difiza tieghu. Dan apparti li c-citazzjoni ghandha tigi ezaminata fit-totalita` taghha u mhux spezzettata."

Il-principji li kienu enuncjati fil-gurisprudenza taghna fil-kaz tac-citazzjoni jghoddu bl-istess mod ghar-rikors guramentat.

Huwa principju inderogabbli li l-azzjoni hija migbura fil-premessi li ghandhom iwasslu ghat-talbiet. Ghalhekk ghandu jirrizulta ness guridiku bejn il-premessi u t-talbiet sabiex jigi sodisfatt ir-rekwizit tal-Art 156 tal-Kap 12. Mhux biss, izda huwa mehtieg li mill-mod kif huwa mfassal ir-rikors guramentat li l-azzjoni tkun kjarment identifikabbli fil-ligi.

L-Art 156 tal-Kap 12 jimponi fuq l-attur li jidentifika l-oggett tal-kawza, jaghti r-raguni ghala qed jitlob dak l-oggett, u jfisser car u sewwa kemm l-oggett kif ukoll ir-raguni ("**Galea vs Galea**" – Qorti tal-Appell – 30 ta` Marzu 1998 ; u "**Camilleri et vs Galea**" – Prim` Awla tal-Qorti Civili – 6 ta` Gunju 1991).

Dan huwa mehtieg ghaliex *il citato deve conoscere quanto da lui si richiede dai termini delle domande e non dai documenti che vanno uniti alla citazione da altro mezzo di prova che in sostegno delle domande potrebbero essere predati e non a lui notificati* ("**Zammit vs Cassar noe**" – Prim` Awla tal-Qorti Civili – 6 ta` Novembru 1930 u "**Mizzi vs Chapman et**" – Prim` Awla tal-Qorti Civili – 26 ta` April 1951).

Pero` ghandu jinghad li l-Art 156 tal-Kap 12 inghata fil-gurisprudenza taghna interpretazzjoni wiesgha sabiex b`hekk ma kienx adottat ir-rigur li donnhom iridu jfissru l-kliem tad-disposizzjoni (**Vol. XXIX.I.431 ; XXXII.I.228 ; u XXXIV.II.502**).

Fis-sentenza "**Scicluna vs Xuereb et**" deciza fit-22 ta` Mejju 1967, il-Qorti tal-Appell osservat li ghalkemm fic-citazzjoni l-kawzali tista` tkun dedotta b` mod lakoniku, ic-citazzjoni ma tkunx nulla jekk il-kawzali tkun imfissra tajjeb, u sakemm ma tkunx talment difettuza li minhabba f` hekk il-konvenut jigi pregudikat ghaliex ma jkunx jista` jiddefendi ruhu.

Il-linja adottata mill-qrati taghna, anke minhabba l-emendi ghall-Kap 12 li saru bl-Att XXIV tal-1995, hija li l-formalizmu esagerat ghandu kemm jista` jkun jigi ridott u arginat ("**Fino vs Fabri noe**" – Qorti tal-Appell – 28 ta` Frar 1997) bil-konsegwenza li l-atti ghandhom jigu salvati anziche` annullati jew dikjarati nulli ("**Ellul vs Coleiro**" – Qorti tal-Appell – 24 ta` Jannar 1964 ; "**Urso vs Cini**" – Prim`Awla tal-Qorti Civili – 19 ta` Jannar 1999).

Din il-qorti ghalhekk tirriaferma l-principju li n-nullita` ta` att gudizzjarju hija sanzjoni estrema li ghandha tkun imposta biss meta n-nuqqas fl-att – sostanzjali jew formali – ma jkunx jista` jigi tollerat minghajr hsara ghal xi principju ta` gustizzja procedurali.

Ghalhekk l-att ghandu jigi annullat biss ghal ragunijiet gravi ("**Vella et vs Camilleri**" – Prim`Awla tal-Qorti Civili – Vol.LXXXI.III.31)

Fil-kaz tal-lum, il-konvenuti jilmentaw li garrbu pregudizzju ghad-difiza taghhom ghaliex jghidu illi ma setghux jifhmu r-raguni u allura abbazi ta` liema kawzali s-socjeta` attrici qeghda tressaq it-talbiet taghha fil-konfront ta` kull wiehed minnhom.

Issib li dan l-ilment huwa nfondat.

Jirrizulta mir-risposta guramentata, mill-provi li tressqu, min-noti ta` osservazzjonijiet, u kif ukoll mis-sottomissjonijiet finali li ghamlu l-konvenuti kollha li fehmu sewwa x` kienet n-natura tal-azzjoni u kif kellhom jilqghu ghalha.

Ghalhekk l-eccezzjonijiet preliminari dwar in-nullita` tal-azzjoni qeghdin ikunu respinti.

b) Il-kumpanniji

Qabel tqis is-siwi tal-eccezzjonijiet dwar l-interess guridiku u tal-

legittimita` tal-persuna, tajjeb li tkun determinata l-istruttura tal-kumpanniji li jiffurmaw il-Grupp, inkluz fit-tmexxija.

Ghalkemm il-kumpanniji huma sebgha, ma gewx prezentati r-*registered documents* taghhom. Fl-atti jirrizultaw biss *print outs* stampati f`Gunju 2013 mis-socjeta` attrici. Kull fatt dwar il-kostituzzjoni, l-azzjonisti u t-tmexxija tal-kumpanniji johrog mix-xiehda.

Afegra Holding hija l-*holding company* fejn MSA Holdings ghandha 51.49% tal-ishma u Afegra Management ghandha l-bqija.

Aghaei kien direttur ta` Afegra Holding bejn it-30 ta` Marzu 2010 u t-28 ta` Mejju 2011.

Fis-6 ta` Dicembru 2012 Simion u Marzbani nhatru bhala "B" directors ta` Afegra Holding.

Mid-dokument stampat u anness mar-rikors guramentat, jirrizulta li fit-3 ta` Gunju 2013, il-bord kien kompost mill-istess persuni li kienu fis-6 ta` Dicembru 2012.

Afegra Management kienet kostitwita bejn GBCom (30%) MSA (1%) u Aghaei (69%). Aghaei kien direttur bejn is-17 ta` Mejju 2010 u s-27 ta` Mejju 2010, u bejn il-25 ta` Ottubru 2012 u s-6 ta` Ottubru 2015. Bosscher sar direttur b`effett mis-27 ta` Mejju 2011.

Mid-dokument stampat u anness mar-rikors guramentat, jirrizulta illi fit-3 ta` Gunju 2013 id-diretturi kienu Credence Corporate & Advisory Services Limited, Av. Dr. James Muscat Azzopardi, Aghaei u Bosscher.

Afegra Finance hija sussidjarja ta` Afegra Holding.

Waqf laqgha tal-bord li saret fl-4 ta` Novembru 2011 kienet prezentata lista tad-diretturi ta` kull kumpannija. Jirrizulta li l-"A" directors ta` Afegra Managament, Afegra Holding u Afegra Finance kienu Credence Corporate & Advisory Services Limited u Av. Dr. James Muscat Azzopardi.

Afegra Trading SA hija sussidjarja ta` Afegra Finance. Id-diretturi taghha mill-bidu nett kienu Bosscher u Simion.

Dak illi jrid ikun determinat huwa r-rwol ta` MSA Holdings.

Asadi huwa l-finanzjatur tramite MSA Holdings. Din kienet tislef il-flus lil Afegra Holding li mbaghad kienet tittrasferixxi l-flus ghal Afegra Finance biex tiffinanzja n-negozju ta` Afegra Trading.

Asadi ma kellux involvement dirett fin-negozju u fit-tmexxija ghax ighid li kien impjenat fin-negozju tieghu personali, u anke ghaliex ma kienx midhla tan-negozju tal-qamh.

Ghalkemm formalment ma kienx direttur, xorta wahda rrizulta li Asadi kellu kontroll, mod iehor. Dan hareg minn sensiela ta` dokumenti. L-estratti l-aktar saljenti huma :-

- i. Fil-laqgħa tal-bord tas-6 ta` Settembru 2011, inghad :

*"I would be the main investor and the rest **manage and participate**.*

...

*I agreed with Mr. Aghaei, that I will never interfere in their trades. I have trust on Mr. Aghaei and Bosscher to run the company and managing it in the future. **But apart from the trade issues I have the authority to middle and decide in fields such as investments, organization, appointing managing directors, members of the board and expenses of all companies.**³⁰ (enfasi mizjuda)*

- ii. E-mail tas-7 ta` Novembru 2011 mibghutha minn Dr Ramona Piscopo lil Asadi :

*"As agreed during the meeting, **Credence will only sign documents for Afegra Holding Limited and Afegra Finance Limited after they have received your approval.**"³¹ (enfasi mizjuda)*

- iii. Letter of Understanding datata 29 ta` Novembru 2012 fejn kien maqbul illi l-*"operation of holding account must all be"* approvat minn Asadi.³²

Anke l-hatra ta` Marzbani fil-bord saret minn Asadi personalment.

³⁰ Fol. 319, Vol. II tal-process Rik. Gur. 627/13 JZM.

³¹ Fol. 331, Vol. II tal-process Rik. Gur. 627/13 JZM.

³² Fol. 419, Vol. II tal-process Rik. Gur. 627/13 JZM.

Asadi xehed :

"Asadi : *I was a silent investor. I never intervened in anything, in any matter. ... I didn't enter in the company's operation but I just wanted to have control on the holding. This the thing that I explained was the reason that I brought Mr Marzbani, to have the control of the holding."*³³

u aktar :

"Traduttur : *This is a general responsibility of a person that is going in the holding as the top company. The person that goes on the top has to control all of the company's, before on the top it wasn't controlled by me, and I didn't have any control of the company's, so I brought Mr Marzbani to come on the top and control and review all of the company's. All the information that I have now is from Mr Marzbani's entrance in the company, because before we didn't have any information. Before Mr Marzbani, Mr Gert and Mr Aghaei were telling me of the activities of the company, how they wanted, and after Mr Marzbani I got a bit control of what is happening in the company."*³⁴

Din ix-xiehda hija korraborata minn dik ta' Marzbani li kkonferma li nhatar sabiex ihares l-interessi ta' Asadi.

Jirrizulta li Credence Corporate & Advisory Services Limited u Av. James Muscat Azzopardi kienu jagixxu fuq struzzjonijiet ta' Asadi.

Ghalkemm ma kienx direttur, Asadi kien jattendi ghal-laqghat tal-bord (ara l-minuti tal-laqghat tas-6 ta' Settembru 2011, 26 ta' Settembru 2011, 29 ta' Mejju 2012 u 29 ta' Novembru 2012).

Ghalkemm Asadi *de jure* ma kienx direttur, u jghid illi qatt ma kien *de proprio* fit-tmexxija tal-Grupp, fil-fatt irrizulta li kellu rwol centrali. Mhux biss kien influwenti fit-tmexxija izda kien ukoll jiehu decizjonijiet importanti ta' natura direttorjali. Inoltre d-diretturi *de jure*, Credence Corporate and Advisory Services Ltd u Dr James Muscat Azzopardi, ma setghux jagixxu hlief fuq struzzjonijiet u/jew b' approvazzjoni ta' Asadi.

Fl-isfond tal-provi kif ukoll tal-gurisprudenza citata aktar kmieni, m'ghandux ikun hemm dubju li Asadi kien *de facto director* billi permezz ta' MSA Holdings zamm il-kontroll fil-Grupp.

³³ Fol. 1870, Vol. VI tal-process Rik. Gur. 627/13 JZM.

³⁴ Fol. 1872, Vol. VI tal-process Rik. Gur. 627/13 JZM.

Anke MSA Holdings tista` titqies bhala *de facto director*.

Mill-banda l-ohra, jista` jinghad illi Afegra Holding, u aktar minn hekk Afgera Finance bhala *wholly owned subsidiary* ta` Afegra Holding, assumiet rwol ta` *shadow director* li kien jopera fuq struzzjonijiet tad-*de facto director* u cioe ta` Asadi.

Anke Aghaei kellu rwol importanti.

Ghal xi zmien kien anke direttur *de jure* ta` Afegra Holding u ta` Afegra Management. Jishaq li ma riedx jinvolvi ruhu fit-tmexxija ta` Afegra Trading ghaliex kellu negozju iehor tieghu x` jiehu hsieb. Fl-istess waqt tajjed jinghad illi kien principalment bis-sahha ta` Aghaei li Afegra Trading setghet taghmel in-negozju ewlieni taghha. Infatti 90% tan-negozju ta` Afegra Trading kien gej mill-Iran. Mhux kontestat illi Aghaei gab il-kuntatti u kien imexxi n-negozju ta` Afegra Trading fl-Iran. Kien jiehu hsieb ukoll jircievi l-hlasijiet tan-negozju ta` Afegra Trading, apparti li kien ukoll il-kuntatt mal-awtoritajiet u l-banek fl-Iran.

Ir-rwol ta` Aghaei kien centrali.

Kif xehed huwa stess, kien hu li kien jaghzel liema negozju jghaddi lil Afegra Trading u liema le. Fuq kollox kien jiehu hsieb jara kif jiffacilita l-pagamenti ghal Afegra Trading. Aghaei kellu kontroll sostanzjali fuq in-negozju ta` Afegra Trading. Fit-twettiq tad-decizjonijiet, kien ikopri rwol direttorjali, anke fiz-zmien meta ma kienx direttur.

Il-qorti tqis illi anke Aghaei kellu rwol ta` *de facto director*.

**c) L-interest quridiku
(it-tielet eccezzjoni ta` Mohammedreza Aghaei u
t-tieni eccezzjoni ta` MSA Holdings Limited)**

Iz-zewg konvenuti jeccepixxu li l-agir lamentat mis-socjeta` attrici huwa dwar ksur ta` obbligi fiducjarji. Ghalhekk bhala azzjonista GBCom ma kellhiex tippromwovi azzjoni ta` din ix-xorta ghaliex l-obbligi fiducjarji huma rilevanti biss fil-konfront tal-kumpannija.

Min-naha taghha, GBCom tikkontendi li, anke jekk fid-data tal-prezentata tar-rikors guramentat kienet diga` bieghet l-ishma taghha,

qabel bieghet l-ishma, sehk *deprived business* li kellu influwenza fuq id-decizjoni taghha li tbiegh ; ghalhekk kellha l-interess rikjest mil-ligi sabiex tipprocedi bl-azzjoni.

Fis-sentenza li tat fit-23 ta` April 2013 fil-kawza "**Amedeo Barletta noe et v. L-Awtorita` tas-Servizzi Finanzjarji ta` Malta**" din il-qorti diversament presjeduta qalet hekk :-

"Illi l-Qorti tqis li meta wiehed ihares lejn is-siwi ta` eccezzjoni li tqanqal dubju dwar jekk hemmx tassew l-interess guridiku tal-parti attrici li ssostni l-kawza, wiehed irid izomm ma` dak li jipprovdi l-artikolu 780 tal-Kapitolu 12 tal-Ligijiet ta` Malta u mal-principji li sa minn zmien twil ilu ssawru biex ifissru x` inhu mehtieg biex tali interess isejjes il-jedd tal-azzjoni. Biex tali interess ikun tutelat minn karattru guridiku, irid ikun iwassal ghal rizultat ta` utilita` u vantagg ghal min irid jezercita l-jedd (Ara App. Civ. 13.2.1953 fil-kawza fl-ismijiet Manche` vs Montebello (Kollez. Vol: XXXVII.i.56), b` mod li jekk l-azzjoni ma tistax twassal biex tipproduci tali rizultat ghal min jibdiha, dik l-azzjoni ma tistax tregi (P.A. 7.1.1953 fil-kawza fl-ismijiet Camilleri vs Sammut (Kollez. Vol: XXXVII.ii.605). Kien minhabba dan il-principju li ghadd ta` sentenzi cahdu l-jedd tal-azzjoni lil min ried jikseb` sentenza biss dikjarazzjoni minghajr oggett materjali (Ara App. Civ. 8.6.1942 fil-kawza fl-ismijiet Cortis vs Bonello (Kollez. Vol: XXXI.i.218) ;

Illi, minbarra dan, u dejjem ghal dak li jirrigwarda l-aspett tal-attwalita` tal-interess f`attur, irid jintwera li dak l-interess jibqa` jsehh matul il-hajja kollha tal-azzjoni, u mhux biss fil-bidu taghha, ghaliex jekk dan l-interess jintemm fix-xejn, il-konsegwenza immedjata tkun li l-imharrek jinheles milli jibqa` fil-kawza (App. Civ. 17.2.1993 fil-kawza fl-ismijiet Sammut et noe vs Attard (Kollez. Vol: LXXVII.ii.246).

Hu stabbilit ukoll mill-Qrati li dak li jfisser l-interess tal-attur ghandu jkun jidher mill-att innifisu li bih tinbeda kawza (Ara App. Civ. 3.12.1984 fil-kawza fl-ismijiet Borg vs Caruana (Kollez. Vol: LXVIII.ii.232) u l-ghadd ta` sentenzi hemm imsemmija, u ghalkemm il-mottiv tal-interess mhux mehtieg li jkun imsemmi fir-Rikors Mahluf, ghandu jirrizulta mill-provi jekk kemm-il darba jigi kuntrastat (Ara App. Civ. 12.12.1983 fil-kawza fl-ismijiet Ignazio Gatt vs Michael Debono et). Illi l-interess mhux tabilfors ikun wiehed li jigi kwantifikat f`somma determinata ta` flus jew gid, u jista` jezisti wkoll fejn jimmira li jhares jew jaghti gharfien ghal jedd morali jew suggettiv (P.A. 13.10.1952 fil-kawza fl-ismijiet Axiaq vs Mizzi noe et (Kollez. Vol: XXXVI.ii.532), imbasta l-jedd invokat ma jkunx wiehed ipotetiku (App. Civ. 15.12.1932 fil-kawza fl-ismijiet Scolaro vs Bailey (Kollez. Vol: XXVII.ii.195);"

[ara wkoll: is-sentenzi ta` din il-qorti diversament presjeduta fil-kawzi : **MrBookmaker.com Ltd. v. Stichting De Nationale Sporttotalisator** (17/05/2011) u **Nicholas de Giorgio v. Vincent Paul Savona et**

(26/04/2012)].

Diga` gie stabbilit illi MSA Holdings u allura Asadi kienet qeghda tagixxi bhala direttur *de facto*. L-istess ighodd ghal Aghaei. It-tnejn kellhom obbligi fiducjarji.

Il-principju generali huwa illi d-diretturi ghandhom obbligi fiducjarji lejn il-kumpannija. Huwa biss in via eccezzjonali li dawk l-obbligi fiducjarji japplikaw ukoll fil-konfront tal-azzjonisti.

Meqjusa c-cirkostanzi partikolari ta` dan il-kaz, il-qorti hija tal-fehma meqjusa illi d-decizjonijiet kollha illi ttiehdu kellhom impatt fuq il-qagħda finanzjarja u n-negozju li kien qiegħed isir minn Afegra Trading li mbagħhad kellu effett fuq il-Grupp, kif ukoll fuq il-valur tal-ishma.

Ir-rekwizit tal-interess jissussisti u għalhekk l-eccezzjonijiet fuq riferiti qegħdin ikunu respinti.

d) Legittimita` tal-persuna

Permezz tar-raba` eccezzjoni, Aghaei eccepixxa illi mhuwiex il-legittimu kontradittur tas-socjeta` attrici, billi m`ghandu ebda obbligu fiducjarju fil-konfront tagħha. Ighid inoltre illi huwa qatt ma kien direttur ta` Afegra Trading.

Jirrizulta li Aghaei ma kienx direttur ta` Afegra Trading.

Jirrizulta li għal xi zmien kien direttur *de jure* kemm ta` Afegra Holding u kif ukoll ta` Afegra Management.

Mill-provi pero` jirrizulta wkoll illi bl-agir direttorjali tieghu, Aghaei kien qiegħed igib ruhu bhala direttur *de facto*.

Għalhekk kellu obbligi fiducjarji fil-konfront ta` GBCom li jagħmluh legittimu kontradittur tagħha fl-azzjoni odjerna.

Ir-raba` eccezzjoni ta` Mohammedreza Aghaei qegħda tkun respinta.

Min-naha tagghom, bit-tieni eccezzjoni, Afegra Management, Afegra Holding u Afegra Finance eccepew li mhumiex legittimi kuntraditturi ghax isostnu li m`ghandhom ebda relazzjoni guridika ma` GBCom.

Jirrizulta li GBCom kienet azzjonista ta` Afegra Management bi kwota ta` 30%.

Jirrizulta li Afegra Management hija azzjonista ta` Afegra Holding bi kwota ta` 49%.

Jirrizulta li Afegra Holding hija l-uniku azzjonista ta` Afegra Finance b`din tal-ahhar tkun il-vejikolu finanzjajru ghan-negozju ta` Afegra Trading li fiha GBCom kienet investiet US\$3 miljun.

Ir-relazzjoni guridika tirrizulta.

It-tieni eccezzjoni ta` Afegra Management Limited, Afegra Holding Limited u Afegra Finance Limited qeghda tkun michuda.

4. Mertu

It-talbiet attrici kienu hamsa :

Sabiex jintlaqghu t-tielet, ir-raba` u l-hames talbiet, jehtieg li jkunu akkolti l-ewwel u/jew t-tieni talbiet billi l-ahhar tliet talbiet huma dipendenti u konsegwenzjali ghall-ewwel tnejn.

Sejra tqis l-ewwel zewg talbiet flimkien :

Bihom il-qorti qeghda tkun mitluba tiddikjara li l-konvenuti (jew min minnhom) gabu ruhhom fil-konfront ta` GBCom :

- b`malafede (l-ewwel talba)
- bi ksur tal-obbligi legali tagghom (l-ewwel talba)
- b`qerq (it-tieni talba)

Fil-kaz li ssib favur l-attrici bl-ewwel u/jew bit-tieni talba, il-qorti mhijiex tintalab tirrexxindi l-kuntratt tat-trasferiment tal-ishma, izda qeghda tintalab li wara li tiddikjara li l-attrici ghandha jedd tithallas danni, tillikwida d-danni u tordna lill-konvenuti jew min minnhom sabiex ihallsu d-

danni likwidati.

Dwar il-malafede :

Skont l-**Art 993 tal-Kap 16**, il-kuntratti ghandhom jigu esegwiti bil-bona fidi u jobbligaw mhux biss ghal dak li jinghad fihom izda wkoll ghall-konsegwenzi kollha li ggib maghha l-obbligazzjoni skont ix-xorta taghha bl-ekwita` bl-użu jew bil-ligi.

Skont l-awtur **Ricci** (Diritto Civile – Vol VII – Para. 47 – Pag 65) :

"E cio` vuol dire che i contraenti non hanno bisogno d`indicare, allorché` contraggono, le conseguenze derivanti dal contratto, presumendosi, al riguardo che essi le abbiano implicitamente volute, se il contrario non risulti dalla stipulata conversione."

(ara wkoll : **Joseph Falzon v. Calcedonio Cuschieri noe** – Qorti tal-Appell Civili – 23 ta` Ottubru 1936 – Kollez. Vol. XXIX.I.1408)

Il-prova li l-konvenuti (jew min minnhom) gabu ruhhom b` malafede Tispetta lill-attributi.

Dwar l-inadempiment tal-obbligi legali :

L-aspetti legali kienu trattati aktar kmieni.

Dwar il-qerq :

Fis-sentenza li tat fit-3 ta` Dicembru 1919 fil-kawza **Galea vs Zammit** (Kollez. Vol. XXIV.I.203) il-Qorti tal-Appell qalet hekk –

"I seguenti sono principi cardinali consacrati dalla giurisprudenza intorno al dolo in materia civile :

(1) Il mantenimento dei contratti e` di interesse generale, perche` e` principio d`ordine pubblico e di pubblica economia che i titoli di proprieta` sian fermi e stabili : siffata considerazione impone che nella causa d`impugnazione di contratto per vizio di consenso si proceda colla massima circospezione perche` non si abbia ad annullare un atto che

dovrebbe rimanere in vigore.

(2) *I principi che regolano il dolo si devono applicare con maggior rigore quando trattasi di un atto a titolo gratuito che quando trattasi di un contratto a titolo oneroso (Laurent XI,127).*

(3) *A provare il dolo bastano gli indizi e le congetture, purché siano gravi e concordanti, si da generare la convinzione che la liberalità o il contratto impugnato è stato l'effetto dei raggiri usati dall'altra parte o da terzi"*

Fis-sentenza ta` din il-qorti diversament presjeduta moghtija fil-31 ta` Jannar 2003 fil-kawza **Camilleri vs Cachia et** saret riferenza ghall-gurisprudenza –

"(a) *A costituire i raggiri non basterebbe il fatto di un predominio acquistato ed esercitato da una persona sull'altra per indurla al contratto, ma occorre un elemento specifico costituito dalle false rappresentazioni, dagli artifici fraudolenti, dallo inganno, usati quale mezzo per raggirare la scarsa intelligenza dell'altro contraente" – "**Giovanni Farrugia Gay -vs- Emanuele Farrugia Gay**", Prim` Awla, Qorti Civili, 3 ta` Mejju 1921 (Vol. XXIV P II p 578) ;*

(b) *I raggiri usati da uno dei contraente sono stati tali che senza di essi l'altra parte non avrebbe contratto" - "**Terese Galea -vs- Salvatore Bonnici**" a Vol. X pagna 592. Fi kliem iehor l-ingann irid ikun il-kawza determinanti li ta lok ghal ftehim li ghaqqad in-negozju ("**Alice Cassar Torreggiani -vs- Albert R. Manche`**", Appell Civili, 17 ta` Marzu 1958 (Vol. XLII P I p 126) ;*

(c) *Kif stabbilit fis-subinciz (2) ghall-Artikolu 981, id-dolo jew frodi ma huwa qatt prezunt izda jrid jigi pruvat minn min jallegah. Trid allura ssir il-prova li parti wahda uzat "scienter" raggiri frawdolenti u artifizji li kienu gravi ("**Joseph Mifsud nomine -vs- Paul Tanti**" u "**Josephine mart Francis Galea -vs- Perit Walter Caruana Montaldo**", iz-zewg kawzi decizi rispettivament fl-4 ta` Frar 1965 u s-16 ta` Dicembru 1970)".*

Fis-sentenza tal-Qorti tal-Appell tal-31 ta` Marzu 1967 fil-kawza **Zammit et vs Farrugia et** kien precizat illi –

Biex azzjoni simili tirnexxi jrid qabel xejn jigi ppruvat li kien hemm dolo da parti ta` wiehed mill-kontendenti. Il-prova tad-dolo, il-ligi tghid espressament, trid issir minn min jallegah, u l-intenzjoni li tqarraq hi essenzjali ghax id-dritt modern ma jammettix dolo oggettiv` in re ipsa` hi espressa fil-kliem tal-artikolu 1024 tal-Kodici Civili, `inganni maghmulin minn wahda mill-partijiet.` Illi fit-test Taljan tal-artikolu u 687 tal-

Ordinanza Nru. VII tal-1868 kienu "raggiri usati da uno dei contraenti."

Fis-sentenzi moghtija minn din il-qorti diversament presjeduta fl-20 ta` Marzu 2003 fil-kawza **Aquilina et vs Ellul** u tat-28 ta` Lulju 2004 fil-kawza **Portelli et vs Felice** kienu elenkati l-erba` elementi mehtiega sabiex il-qerq jivvizzja l-kunsens –

- a) illi jithaddmu mezzi jew atti qarrieqa, u allura l-intenzjoni li parti tqarra bil-parti l-ohra ;
- b) illi l-atti jkunu fihom infushom gravi ;
- c) illi jkunu determinanti biex isir il-kuntratt ;
- d) illi l-qerq ikun sehh bil-partecipazzjoni, attiva jew passiva, tal-parti l-ohra.

Meta tqis il-mod kif l-attrici impostat il-provi taghha, jidher li l-pretensjonijiet taghha kienu rivolti lejn Asadi tramite MSA Holdings, kif ukoll lejn Aghaei.

Id-diretturi ta` GBCom - Bosscher u Simion - jallegaw li Asadi u Aghaei kienu kolluzi flimkien sabiex negozju li – skont GBCom – kellu jigi kondott u ezegwit minn Afegra Trading, kien sottratt jew devjat lejn kumpanniji li fihom Asadi u/jew Aghaei ghandhom interess jew involviment jew li addirittura huma l-*beneficial owners* taghhom.

Il-Grupp kien kostitwit minn Asadi, Aghaei u Bosscher.

Jirrizulta li l-Grupp kien kostitwit sabiex jaghmel negozju "*in the trading, organization, handling and shipping of grains, oilseeds and vegetable oils*". Fil-bidu n-negozju principali kellu jkun ikkoncentrat fis-suq tal-Iran, sakemm in segwitu bdew jigu esplorati swieq godda.

Asadi huwa imprenditur li jmexxi u huwa l-*beneficial owner* ta` ghatt gmielu ta` socjetajiet. Is-settur tan-negozju tieghu huma l-*potato chips*. Jaccetta li qatt qabel ma kien ghamel ebda tip ta` negozju fis-settur tal-qamh. Biss kellu interess li jinvesti fis-settur.

Asadi kellu qaghdha finanzjarja b` sahhitha.

Aghaei pprezenta ruhu bhala negozjant li kien ilu snin jopera fis-settur tal-qamh. Kellu diversi kumpanniji tieghu joperaw fis-settur,

partikolarment fis-suq tal-Iran. Kien f`qagħda finanzjarja tajba tant li hallas US\$6.9 miljun sabiex xtara l-ishma fil-Grupp u ma jirrizultax li ha self sabiex jiffinanzja dik in-nefqa.

Bosscher ma kellux bizzejjed finanzi minn tieghu meta ddecieda li jidhol fin-negozju ma` Asadi u Aghaei. Fil-fatt sabiex GBCom setgħet takkwista l-ishma, Bosscher u/jew GBCom kellhom jissellfu US\$2 miljun.

Mill-korrispondenza skambjata, jirrizulta li kien hemm diffikultajiet sabiex is-self jithallas lura. Il-konsegwenza kienet illi hekk kif Afegra Trading sabet ruhha fil-problemi kien deciz li GBCom tbiegh l-ishma tagħha. Jirrizulta li fil-5 ta` Awissu 2012 meta bdew jinqalghu diffikultajiet serji sabiex Afegra Trading tigbor il-krediti tagħha, tenut kont li kienet nefqet hafna flus biex takkwista l-materja prima, Bosscher talab li jingħata garanzija li l-investment tieghu ma kienx f`riskju. Imbagħad f`email tieghu tas-7 ta` Mejju 2013, meta l-kumpanija garrbet telf qawwi, għamilha cara li kellu somma sostanzjali xi jhallas lura, u ma setax jitlef mill-investment tieghu.

Mal-kostituzzjoni tal-Grupp, ma sar ebda *shareholder`s agreement*.

Madanakollu meta twaqqaf il-Grupp kien fatt magħruf illi kemm Asadi kif ukoll Aghaei kellhom in-negozju rispettiv tagħhom ; terga` u tghid, Aghaei kellu negozju tieghu fl-istess settur u fl-istess suq li fih kienet ser topera Afegra. Fil-fatt kien jagixxi bhala sensar.

Bosscher jikkonferma li kien jaf li Aghaei kellu negozju tieghu ga minn qabel kien kostitwit il-Grupp. Fin-nota ta` sottomissjonijiet tieghu saħansitra jikkoncedi li "*Aghaei huwa persona b`kuntatti kummercjali b`sahħithom fl-Iran*".

Bosscher jgħid illi qagħad fuq il-ligi Maltija u li "*because I take that for granted. I base myself on the laws in place.*"³⁵ Jiddikjara wkoll illi "*No, it was not a concern, because that was something I was not expecting in the first place, ..., I do not expect my partners to compete with one and the same company.*"³⁶ u aktar illi "*No, it was not a concern*" għaliex "*For me I took it for granted, yes, absolutely.*"³⁷

Fix-xieħda tieghu Asadi jgħid illi Aghaei "*would not charge his brokerage fee for this business because he was a shareholder.* **However**

³⁵ A fol. 767, Vol. III tal-process Rik. Gur. 627/13 JZM.

³⁶ A fol. 795, Vol. III tal-process Rik. Gur. 627/13 JZM.

³⁷ A fol. 766, Vol. III tal-process Rik. Gur. 627/13 JZM.

Mr Aghaei would not receive a wage or bonuses or other remuneration from Afegra Group because he was not going to be working exclusively for Afegra Group. Mr Aghaei was not employed with anyone. He was an independant broker and would continue to act as such. Both I and Mr Bosscher knew that Aghaei acted as broker for other companies and would continue to do so. We did not even have a discussion about this. It was not considered necessary.³⁸

Min-naha tieghu Aghaei xehed :

*"Why would I drop all the business I had built over the years only to limit myself to just one Channel, that is, the Afegra Group ? ... I introduced a lot of business to the Afgera group originating leads for Gert Bosscher and being the person who introduced most of the business of the group, I created the value behind the Afegra group by doing so (...) and at the same time carried on with my life as a commodities trader."*³⁹

Fil-kontroezami, stqarr :

Dr Kris Borg : *You just said you were taking the brokerage. So were the transactions of Afegra Trading and the role of Afegra Middle East was merely that of taking a brokerage or was Afegra Middle East actually yours as you`re suggesting and you can trade as much as you want and do whatever you want with it ?*

Xhud : *Both Sir, I could do whatever I wanted, but also I was shareholder of Afegra Management, I invested in the company 7,000,000 Dollars. When I invest 7,000,000 Dollars I want to have some return. I was doing also the most transactions of Afegra Geneva.*

Aktar `il quddiem kien mistoqsi mill-qorti.

Qorti : *So what you`re saying, Mr Aghaei, is this, Afegra Middle East could compete with Afegra Trading, but in real terms it did not do this because there was no comparison between the business that Afegra Middle East had with the business that Afegra Trading had ? This is what you`re saying?*

Xhud : *I should correct that, sorry. The capability of Afegra Group was only 70,000,000 Dollars, something like this.*

³⁸ A fol. 1782, Vol. VI tal-process Rik. Gur. 627/13 JZM.

³⁹ Para. 18, fol. 975, Vol IV tal-process Rik. Gur. 627/13 JZM.

Qorti : *Whereas*

Xhud : *I had lots of clients for Iran, which they asked me for example for two Panamax of beans, one Panamax of beans it could 40,000,000 Dollars.*

Qorti : *So the business that Afegra Middle East had when compared to that of Afegra Trading was no comparison, was very large?*

Xhud : *For sure.*"⁴⁰

Ighid ukoll illi :

"That`s it, this is the only thing which is happening and threaten us with Courts, always calling us, if you don`t compensate we go to the Courts, then why should we compensate, it`s none of your business what we are doing, you were just an employee. We from very beginning were principals, we had enough funds, we don`t need to, for Dollars 200,000 or Dollars 1,000,000, we do deprived business. Why we should do that ? We have enough funds. We have our names. This was the only thing which happened to us. And now we are coming and going, coming and going, just for this."

Mhuwiex komprensibbli ghal din il-qorti kif materja daqstant sensitiva ma kenitx trattata f` waqtha b` reqqa u b` dettall meta tqis li tnejn mit-tlett azzjonisti diga kellhom in-negozju separat tagghom.

Terga` u tghid wiehed mill-azzjonisti kien ilu snin jinnegozja proprju fl-istess settur.

Fic-cirkostanzi Bosscher kellu hafna x` jitlef ghaliex hu kien l-uniku li ma kellux negozju iehor.

Possibbli allura li ma gharafx ihares sewwa l-interessi tieghu ?

Il-kwistjoni tal-allegat *deprived business* qamet biss wara li kien konkluz ix-*Share Purchase Agreement*. Bosscher u Simion jishqu li ma kienu jafu xejn qabel il-15 ta` Mejju 2013 u li kien proprju dakinhar illi Bosscher issuspetta.

⁴⁰ Fol 1438-1439, Vol V tal-process Rik. Gur. 627/13 JZM.

Il-qorti fliet kemm jista` jkun b` reqqa l-atti kollha.

Tressqu bhala prova volumi ta` dokumenti in sostenn tat-tesi ta` naha u ta` ohra.

Gharblet in-natura, il-kwalita` u l-entita` tan-negozju li GBCom tallega li sar minn wara daharha.

Abbazi tal-provi, jirrizulta li :

- Bosscher u Simion kienu l-unici diretturi ta` Afegra Trading.
- Afegra Trading kienet kostitwita sabiex tkun *the sole trading arm* tal-Grupp.
- Bosscher u Simion kienu wkoll *administrators* tad-domain tal-Grupp sabiex b`hekk sa mit-18 ta` Marzu 2011 kellhom access ghall-*emails* kollha li jghaddu mis-server ta` Afegra.

Il-qorti hija perplessa dwar kif kien proprju u biss fil-15 ta` Mejju 2013 illi GBCom intebhet b`dak illi ddeskriviet bhala *deprived business*.

Tajjeb jinghad illi l-kaz kollu beda meta fil-15 ta` Mejju 2013.

Din kienet id-data meta, kif ighid Bosscher, il-linka bil-firma fuq ix-*Share Purchase Agreement* ma kenitx ghadha biss nixfet, li b`kumbinazzjoni rcieva telefonata fejn intalbet stima. Skont Bosscher, kien il-*body language* ta` Aghaei dakinhar tal-15 ta` Mejju 2013 li qanqal suspett f` mohhu li wasslu biex jinvestiga s-sitwazzjoni aktar fil-fond.

Bosscher stqarr li ma setax jifhem kif kien possibbli li fl-ewwel sena u nofs taghha Afegra Trading, bin-negozju li ghamlet, kien hemm mhux biss *turnover* qawwi izda anke profitt tajjeb, imbaghad kollox waqaf hesrem. Bosscher jattribwixxi dan il-kapovoljiment tan-negozju ghal *deprived business*.

Ghal din il-qorti jibqa` fatt difficilment komprensibbli kif dan is-suspett ghadda minn mohh Bosscher proprju ftit tal-hin wara l-bejgh tal-ishma.

Ma tirrizulta ebda spjegazzjoni ragjonevoli ghaliex Bosscher ma ghamel ebda ndagni qabel GBCom bieghet l-ishma taghha, meta tqis li n-negozju kien ilu sejjer lura sa minn nofs l-2012.

Dan qed jigi rimarkat ghaliex Bosscher kellu access totali ghad-dokumenti kollha tal-kumpannija nkluz tan-negozju taghha. Kellu wkoll access ghall-*emails* li kienu fuq is-*server*. Barra minn hekk, il-qorti tishaq li Bosscher u Simion kienu l-unici diretturi ta` Afegra Trading. Ghalhekk kellhom responsabbilita` li jsegwu mill-qrib il-qagħda kummercjali u finanzjarja ta` Afegra Trading. Fuq kollox, kellhom jaraw sewwa sew ghaliex stagna n-negozju u jipproponu soluzzjonijiet fattibbli u li setghu jitwettqu fl-interess kemm ta` Afegra Trading kif ukoll tal-Grupp. Mhux bizzejjed li Bosscher ighid li huwa kien jafda lil shabu fin-negozju. Apparti l-fiducja, in-negozju jimxi fuq il-kompetenza, is-sahha finanzjarja, il-previzjoni tal-futur tas-suq ibbazata fuq il-mera tal-passat, it-tempestivita` ta` azzjoni l-aktar meta jkun hemm fatturi jew cirkostanzmzi avversi jew negattivi, kif ukoll investimenti bil-ghaqal.

Mix-xiehda ta` Bosscher, korroborata mill-emails li bagħat huwa stess, jidher illi dan safa` mahkum minn ansjeta` mpellenti, meta ra forsi qabel haddiehor (ghaliex hu u martu - mhux haddiehor - kienu diretturi *de jure* ta` Afegra Trading) illi n-negozju u d-dhul kienu naqsu drastikament. Il-hsieb ewlieni tieghu kien illi jsalva l-investiment tieghu.

Sakemm inbieghu l-ishma, ma jirrizultax illi Bosscher jew Simion kellhomx suspett dwar *deprived business*.

Terga` u tghid : waqt li fl-ezami Bosscher isostni li sar negozju, avvers għal Afegra Trading, tramite kumpannija li jghid li ma kienx jaf bihom, fil-kontroezami xehed illi mhux biss kien jaf b`dawk il-kumpannija talli saħansitra dawn kienu joffru s-servizzi tagħhom qua intermedjarji jew agenti sabiex jiffacilitaw negozju u pagamenti ta` Afegra Trading.

Evidenti huma l-inkonsistenzi fix-xiehda ta` Bosscher dwar materji krucjali (mhux marginali) għall-fini tal-istanza odjerna.

F`dan il-kuntest, il-qorti taccenna għal fejn fix-xiehda ta` Bosscher jingħad illi s-sanzjonijiet kontra l-Iran kellhom impatt qawwi fuq in-negozju, imbagħad għal xi raguni jerga` lura fuq li xehed u jistqarr li dawk is-sanzjonijiet ma kellhomx impatt negattiv.

GBCom ghamlet allegazzjonijiet, li kienu jitolqu minn supposizzjonijiet li ghamlu Bosscher u Simion, abbazi ta` nformazzjoni li giet minn emails li accessaw ghalihom, wara li GBCom bieghet l-ishma taghha.

Il-qorti teskludi li dawn l-allegazzjonijiet ghandhom il-kwalita` ta` prova.

Fl-ewwel lok, li kieku verament riedu jaghmlu negozju kontra l-interess tal-Grupp, u indirettament b`detriment ghal GBCom, ma kienu jaghmel sens li Asadi u Aghaei jikkomunikaw permezz ta` *email accounts* li ghalihom kellhom Bosscher u Simion access liberu.

Fit-tieni lok, tqis illi Asadi u Aghaei kellhom wisq x`jitolfu bil-kollass tal-Grupp, tenut kont tal-investment li kienu ghamlu. Kellhom kull interess li jirnexxi n-negozju tal-Grupp.

Tqis ukoll illi wara li GBCom bieghet l-ishma, Simion mhux biss thalliet fl-impjeg, izda baqghet direttur, b`access ghad-dokumenti kollha ta` Afegra Trading. Li kieku kien tassew li Asadi ried iwarrab lil Bosscher kien jiehu spunt sabiex mal-firma tax-*Share Purchase Agreement* fil-15 ta` Mejju 2013 itemm ukoll kull involviment ta` Simion, inkluz l-impjeg taghha.

Fuq kollox, il-qorti tqis bhala inverosimili li kellu jkun proprju ftit tas-sighat biss wara li kien iffirmit il-ftehim tat-trasferiment tal-ishma li l-allegat *deprived business* kellu jitla` f` wicc l-ilma.

L-assjem ta` fatti u cirkostanzi huma ndikattivi li Bosscher u Simion riedu jassiguraw li ma jitolfu xejn mill-investment taghhom, minkejja li jafu ben tajjeb il-qaghda finanzjarja negativa tal-Grupp. GBCom ressqet il-pretensjonijiet li qeghda taghmel fil-kawza odjerna wara li bil-bejgh tal-ishma hadet lura l-valur shih tal-investment taghha.

Ferm il-premess, il-qorti sejra tqis l-allegat ksur ta` obbligi fiducjarji.

Jirrizulta li qabel kien kostitwit il-Grupp, u bl-gharfien tal-azzjonisti l-ohra, Aghaei kien diga` nvolut f` negozju fl-istess linja ta` dak li kien sejjer jikkonduci l-Grupp. Mhux kontestat li kien jaf tajjeb is-suq tal-Iran, u kellu kuntatti tajbin ma`negozjanti kbar u ditti rinomati fis-settur. Aghaei ghadda lil Afegra Trading il-kuntatti li kellu u xpruna n-negozju taghha lejn l-Iran. Fl-istess waqt ghalkemmm kien involut *in prima persona* fin-negozju u fit-tmexxija tal-Grupp, Aghaei baqa` jmexxi wkoll in-negozju tieghu.

Sabiex tiddetermina jekk Aghaei marx kontra l-obbligi fiducjarji tieghu, il-qorti trid thares lejn diversi fatturi fosthom :

- il-posizzjoni li kien jokkupa ;
- in-ness tieghu man-negozju ;
- ic-cirkostanzi li wasslu ghan-negozju ;
- it-tip tan-negozju ;
- kienx dak in-negozju specjali ghall-kumpannija ;
- kienx matur in-negozju.

Jekk in-negozju in kwistjoni ma jikkwalifikax bhala *corporate opportunity*, allura ma hemmx ksur ta` obbligi fiducjarji.

Il-qorti tikkondividi l-linja ta` hsieb kif traccjata fil-gurisprudenza citata aktar kmieni li l-obbligi fiducjarji ghandhom japplikaw biss fir-rigward ta` informazzjoni u gharfien akkwiziti waqt li direttur ikun qieghed jokkupa l-kariga tieghu.

Fil-kaz odjern, irrizulta li Aghaei kiseb is-sengha, il-hila, l-esperjenza u l-kuntatti qabel ma kien kostitwit il-Grupp. Imbaghad ikkontribwixxa l-gharfien li kellu sabiex ikun avvjat in-negozju tal-Grupp.

Jirrizulta li Aghaei zamm kontroll fuq in-negozju li kien ighaddi jew ma jghaddix lill-Grupp. Jiggustifika dan billi jghid li l-Grupp ma kellux is-sahha finanzjarja li jidhol ghal certa negozju. Jafferma li Afegra Trading ma riditx tidhol ghal riskji fejn kien involut negozju mal-Iran.

F`cirkostanzi normali, kondotta tan-negozju b`dan il-mod kienet issib ingroppi ma` xiex tehel maghhom. Fil-kaz in kwistjoni, ma setax ikun dan il-kejl tal-imgieba. Meta kien kostitwit il-Grupp kull azzjonista kien jaf x`kienu l-interessi tal-azzjonisti l-ohra. Tant kull azzjonista kien jaf fejn hu li hadd minnhom ma deherlu li kellu jinsisti fuq it-tfassil u l-konkluzjoni ta` *shareholders agreement* sabiex jimxi pari passu mal-M&As. Barra minn hekk, lanqas meta n-negozju ta` Afegra Trading beda jiehu n-nizla, u qabel sar l-bejgh u t-trasferiment tal-ishma minn GBCom, xi hadd ma deherlu li kellu ghalfejn jindaga jew addirittura jattakka l-operat ta` Aghaei.

Meta jitqies l-assjem tal-fatti u cirkostanzi, fl-isfond tal-konsiderazzjonijiet ta` dritt u ta` kazistika li ghalihom saret referenza aktar kmieni, il-qorti mhijiex sodisfatta li fuq bilanc ta` probabilitajiet saret il-prova mill-attrici tal-ewwel tliet talbiet. Dak li kien deskritt bhala *deprived business* fil-fatt negozju li qatt ma kien ta` Afegra Trading jew li Afegra ma setghetx tidhol ghalih. Fi kwalunkwe kaz, irrizulta li n-negozju kien jaf il-bidu tieghu ghal kuntatti u esperjenza fis-suq li Aghaei kellu min diversi snin qabel. In kwantu jirrigwarda Asadi, jirrizulta lid an ma kienx involut direttament fin-negozju tant li ma kienx il-persuna li kien igib negozju lejn il-Grupp, apparti li n-negozju personali ta` Asadi u tal-kumpanniji li taghhom kien il-*beneficial owner* ma kienx jikkompeti mal-Grupp.

Billi l-ewwel, it-tieni u t-tielet talbiet qeghdin jigu michuda, ma hemmx lok illi tqis ir-raba` u l-hames talbiet billi dawn huma konsegwenzjali ghall-ewwel tlieta.

IV. Il-kontrotalba

Il-konvenuta MSA Holdings Limited kienet l-unika mill-konvenuti li pprezentat li pprezentat kontrotalba.

It-talbiet rikonvenzjonali kienu erbgha. It-talba ewlenija kienet l-ewwel wahda bit-tlieta l-ohra konsegwenzjali ghall-ewwel wahda.

Bl-ewwel domanda rikonvenzjonali, il-qorti kienet mitluba tiddikjara u tiddeciedi li GBCom kisret l-kundizzjonijiet jew obbligi taghha fil-kuntratt ta` trasferiment ta` ishma in kwistjoni tal-15 ta` Mejju 2013 u/jew agixxiet b` qerq u/jew mala fede u/jew b` mod doluz fil-konfront ta` MSA Holdings Limited.

Nigu ghall-kuntratt.

Skont klawsola 1.2 :

*The ownership of the Shares in the Company shall be transferred by the Seller to the Purchase, with effect from the 31st May 2013 (hereinafter referred to as the "**Effective Date**").*

Hekk jirrizulta li gara.

Skont klawnsola 3(i) :

Gert Bosscher, a Dutch national, holder of passport number BLH2R85J2 resigns as director of Afegra Trading SA prior to the Effective Date.

Kemm Bosscher (korraborat minn Simion) ikkonfermaw illi Bosscher irrizenja fit-22 ta` Mejju 2013. Ikkonfermaw ukoll illi Simion damet sal-5 ta` Lulju 2013 sabiex taghmel id-debita registrazzjoni mar-Registru ta` Ginevra. Ghalkemm ir-registrazzjoni damet sitt gimghat biex tkun registrata, u allura ghall-interess tal-**pubbliku in generali**, ghall-finijiet soċjetarji **nterni** jibqa` l-fatt li d-data tar-rizenja tieghu minn direttur kienet it-22 ta` Mejju 2013.

Issir referenza ghall-klawsola 4 li tghid :-

4.1 The Seller represents and warrants to the purchaser that as of the Effective Date :

4.1.1 The Shares are fully paid up.

4.1.2 The Seller is the owner of the Shares and has full legal right, power and authority to enter into this Agreement and to transfer valid title to the Shares of the Purchaser.

Anke l-pattijiet tal-klawsola 4 jirrizultaw sodisfatti.

Ma jistax jinghad illi l-attrici baqghet inadempjenti.

MSA tallega li GBCom ghamlet rapprezentazzjonijiet foloz ghar-rigward il-valur tal-ishma.

Il-konsiderazzjonijiet ta` din il-qorti huma dawn :

Afegra Trading kienet ilha ggarrab telf sa minn nofs l-2012.

Asadi silef US\$110 miljun sabiex ighin in-negozju bil-ghan li jkun

skansat ix-xoljiment u l-istralc tal-Grupp.

It-*trading arm* tal-Grupp kienet Afegra Trading. Kienet diretta minn Bosscher u Simion. Jirrizulta wkoll li t-tmexxija u l-amministrazzjoni kienet tinkludi lil Aghaei wkoll. Ma hemmx dubju illi l-akbar daqqa `l isfel ghan-negozju ta` Afegra Trading, u li kellu l-effett *domino* fuq il-bqija tal-Grupp, kienu is-sanzjonijiet kontra l-Iran li gabu magghom diffikultajiet kbar sabiex setghu jigu rkuprati krediti li kellha Afegra Trading, anke minn negozjanti kbar, bil-banek fl-Iran jissikkaw il-hrug tal-flus mill-pajjiz. Minkejja l-flus li harget MSA Holdings (Asadi), il-Grupp ma setax jirkupra. Ghalkemm saru tentattivi minn Bosscher u Simion sabiex isalvaw il-*salvabile*, it-tentattivi tagghom ma kellhomx l-esitu mixtieq. Il-*colpo di grazia* ghall-hajja kummercjali tal-Grupp kien investiment illi mar hazin. Bosscher jirrikonoxxi li s-suq tal-qamh huwa wiehed riskjuz. Ghalhekk haseb biex jinvesti fil-hazna tal-materja prima. Minkejja li n-negozju mill-Iran kien waqaf, dak alternattiv mill-Ewropa kien ihalli profitt bil-wisq inferjuri. Bosscher ha d-decizjoni li jinvesti fl-akkwist ta` kwantita` kbira ta` *stock* fi zmien meta Afegra Trading diga` kellha *stock* valutat fl-ammont ta` US \$20 miljun. Gara li, minhabba l-volatilita` tas-suq tal-qamh, meta d-Dipartiment tal-Agricoltura tal-Istati Uniti ffixxa l-prezzijiet, dawn nizlu sewwa. Effett ta` dan, tilfu madwar US\$8 miljun.

F` email tieghu tas-7 ta` Mejju 2013 Bosscher stqarr illi :

*"This is all caused by a wrong opinion from my side. ... The end effect is that we have lost all our profits which we earned since the startup of Afegra. Moreover, our Iranian business is reduced to zero, which initially was the backbone of our business."*⁴¹

Fil-kontroezami, Bosscher fisser illi fis-suq tal-qamh ikun hemm it-telf, ghalkemm dak imgarrab mill-Grupp ma kienx previst. Iddeskriva t-telf registrat bhala : "*a relatively small loss*".

Mhux tal-istess fehma kien Aghaei li jiddeskrivi lil Bosscher bhala :

*"rash and sometimes irrational, he took risky decisions and he always thought he was right and others were wrong. ...he was completely inconsiderate towards his other two partners and the rest of the employees at the Afegra group – he exposed the group to substantial risk with no safeguards (...) or prior consultation with us his partners."*⁴²

Asadi u Aghaei isemmu wkoll episodju fejn, minghajr ma kkonsulta magghom, Bosscher kien involva fin-negozju lil Thomas Karner u silfu US\$2

⁴¹ Exhibit 35 a fol. 421 *tergo* Vol. II tal-process Rik. Gur. 627/13 JZM.

⁴² Fol. 1001, Vol. IV tal-process Rik. Gur. 627/13 JZM.

miljun minn fondi ta` Afegra Trading. Karner harab bil-flus ghad-detriment ta` Afegra Trading.

Jekk il-qorti taccetta li Bosscher ha decizjonijiet u ghamel investimenti riskjuzi li spicca kellhom impatt serju fuq il-qagħda finanzjarja tal-Grupp, tghid illi t-telf kien jikkwalifika bhala *investment loss*. Anke jekk kull investment ghandu margini ta` riskju, ma setax ikun ragjonevolement previst li t-telf kien ser ikun wiehed daqstant sostanzjali. Dan jingħad għaliex fis-snin ta` qabel, sehhet skarsezza fil-provvista tal-qamh. U kienet sorpriza li fl-2013 il-provvista kienet ser tkun qawwija li kienet se ggib tnaqqis sostanzjali fil-prezzijiet.

Il-qorti tqis ukoll illi l-*modus operandi* tal-Grupp kien tali li ttiehdu decizjonijiet mingħajr wisq konsultazzjoni. Il-konsegwenza kienet li l-interess generali tqieghed fil-genb. **Simion** xehdet illi : "*Afegra Trading SA, Geneva has been set up as the trading arm of Afegra Group of Companies (...). Not any restrictions were established by the shareholders.*"⁴³ Dan ma kienx kontestat.

Bosscher u Simion thallew wahedhom fil-gestjoni ta` Afegra Trading, minkejja li fil-laqgħa tas-6 ta` Settembru 2011 kien hemm qbil illi Aghaei u Bosscher kellhom "*to run the company and managing it in the future*"⁴⁴.

MSA Holdings Limited tghid illi minkejja s-sitwazzjoni finanzjarja tal-Grupp, li għaliha kien jahti in parte Bosscher, dan kien koncernat biss illi ma jitlef xejn mill-investment tieghu.

Il-qorti diga` esprimiet ruhha aktar kmieni dwar dan il-punt. Għalhekk, a skans ta` repetizzjoni, tirreferi għal dak li diga` osservat.

MSA Holdings Limited issostni li Bosscher ghamel rapprezentazzjonijiet foloz meta pprogetta sitwazzjoni fejn il-valur tal-ishma ta` GBCom ma kellux ikun inqas mill-valur nominali tagħhom. Fil-premessa numru 12 tal-kontrotalba tghid ukoll illi peress li Bosscher u Simion ma riedux ikompli jmexxu n-negozju, "*hija ma kelliex alternattiva hlief li taccetta li tixtri l-ishma ta` GBCom*".

Tghid ukoll illi konsegwenza tal-agir ta` Bosscher u Simion wara li kien iffirmit is-*Share Purchase Agreement*, il-Grupp garrab hsara sostanzjali, bl-attivit` kummercjali tkompli tonqos.

⁴³ A fol. 78, Vol. 1 tal-process Rik. Gur. 1001/13 JZM.

⁴⁴ Fol. 391, Vol. II tal-process Rik. Gur. 627/13 JZM.

Il-prezz tal-ishma kien dettat minn GBCom billi Bosscher talab li l-bejgħ isir skont il-valur nominali tal-ishma. L-iskambju ta` korrisondenza li sar bejn Bosscher u Asadi fis-7 ta` Mejju 2013 jikkonferma li Asadi accetta li jakkwista l-ishma ta` GBCom bil-valur nominali tagħhom.

Skont klawwola numru 4.3 tax-*Share Purchase Agreement* :

*"The Purchaser represents and warrants to Seller that Purchaser **has had access to such information regarding the Company, including without limitation, the Company`s organization, corporate records, financial statements, tax liabilities, title to properties, contracts and pending or threatened claims, as Purchaser deems relevant for the purpose of entering into this Agreement.** The Purchaser acknowledges that Seller makes no representations or warranties with respect to the Company except for title to the Shares."* (enfasi mizjuda)

Asadi xehed illi ma kienx jaf bil-klawwola numru 4.3 ta` *Share Purchase Agreement*.

Ighid ukoll illi mhux minnu illi qabel sar l-akkwist tal-ishma, huwa ra l-*financial statements*, it-*tax liabilities*, it-titolu tal-proprjeta` jew kuntratti ohra.

Lanqas ma għamel verifiki dwar proceduri legali.

Il-klawwola hija car. Ma tagħtix lok għal ekwivoci. Lanqas ma tagħti lok ebda interpretazzjoni. Kwindi kull tentattiv ta` prova kontra dak li tgħid hija legalment insostenibbli : *contra testimonium scriptum testimonium non scriptum non fertur*.

In-nuqqas kien ta` Asadi għal MSA Holdings Limited. Kien hu illi ma talabx li ssir valutazzjoni tal-ishma. Ma hax parir legali dwar il-ftehim tal-bejgħ tal-ishma. Lanqas biss kien jaf bi klawwoli li ffirma għalihom. Accetta l-prezz li hallas lil GBCom mingħajr rizervi.

Ferm il-premess, il-qorti tqis infondata l-pretensjoni ta` Asadi li GBCom pprezentat stampa qarrieqa tal-qagħda finanzjarja qabel sar il-ftehim tat-trasferiment tal-ishma.

Asadi kien konxju tas-sitwazzjoni finanzjarja.

Dan il-fatt jirrizulta mill-email li kienet mibghuta minn Bosscher fis-7 ta` Mejju 2013 fejn hemm stampa cara tas-sitwazzjoni.

Hemm imbaghad il-fatt tal-hatra minn Asadi ta` Marzbani (persuna ta` fiducja tieghu) sabiex jaghmel analizi tal-qagħda finanzjarja tal-Grupp u jirrapporta lura lilu. Skont id-deposizzjoni ta` Marzbani jirrizulta illi ghalkemm kellu d-dokumenti li kien jehtieg, u ltaqa` ma` Genito, ma kienx hemm hin bizzejjed sabiex jara jagħrbel b` reqqa d-dokumenti kollha.

Huwa plawsibbli li fil-jumejn ta` qabel kien iffirmit il-kuntratt ma kienx hemm zmien bizzejjed sabiex issir analizi fid-dettall u fl-irqaqat tad-dokumenti. Fl-istess waqt pero` tajjed jinghad ukoll li Marzbani kien ilu jigi konsultat attivament minn Asadi sa minn Mejju 2012. U għalhekk kellu zmien altru minn bizzejjed biex jizen il-qagħda finanzjarja anke mingħajr l-awzilju tad-dokumenti kollha li jagħmlu l-accertament aktar komplet. Mhuwiex verosimili li MSA Holdings Limited kienet injara tas-sitwazzjoni reali.

Il-qorti ssib li MSA Holdings Limited ma kellha ebda diffikulta` illi takkwista l-ishma ta` GBCom skont il-valur nominali tagħhom. Minkejja li kienet taf ben tajjed li l-Grupp kien jinstab f` diffikultajiet finanzjarji serji, xorta wahda konxjament accettat li takkwista l-ishma mhux biss ta` GBCom izda anke ta` Aghaei. F` ebda waqt ma talbet li ssir valutazzjoni tal-ishma, anke għall-beneficcju tagħha stess, sabiex ma thallasx valur oghla minn dak li l-ishma kienu jiswew tassew.

Fid-dawl tal-premess, il-qorti tqis bhala mhux ippruvata l-ewwel talba rikonvenzjonali. Billi t-tliet talbiet l-ohra huma konsegwenzjali għall-ewwel wahda, qegħdin jigu respinti wkoll.

Decide

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

In kwantu jirrigwarda t-talbiet tal-kumpannija attrici, qegħda tichad l-eccezzjonijiet preliminari l-ohra tal-konvenuti, li ma kinux decizi mill-Qorti tal-Appell bis-sentenzi tagħha tat-30 ta` Ottubru 2015 u tad-29 ta` Marzu 2019.

Tilqa` l-eccezzjonijiet kollha fil-mertu tal-konvenuti.

Tichad it-talbiet kollha attrici.

In kwantu jirrigwarda l-kontrotalba tal-konvenuta, tilqa` l-eccezzjonijiet tal-kumpanija attrici.

Tichad it-talbiet rikonvenzjonali kollha.

In kwantu jirrigwarda l-kap tal-ispejjez, u bla hsara ghal dak li kien deciz mill-Qorti tal-Appell dwar l-ispejjez fis-sentenzi taghha tat-30 ta` Ottubru 2015 u tad-29 ta` Marzu 2019 :

Tordna li safejn jirrigwarda l-eccezzjonijiet preliminari decizi illum, l-ispejjez relattivi ghandhom jithallsu minn dak il-konvenut jew dik il-konvenuta li tat l-eccezzjoni jew eccezzjonijiet preliminari.

Tordna lill-kumpanija attrici sabiex thallas l-ispejjez kollha l-ohra relatati mat-talbiet taghha li kienu michuda.

Tordna lill-konvenuta MSA Holdings Limited sabiex thallas l-ispejjez kollha relatati mat-talbiet rikonvenzjonali taghha li kienu michuda.

**Onor. Joseph Zammit McKeon
Imhalled**

**Amanda Cassar
Deputat Registratur**