



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

**ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON**

Illum it-Tnejn 14 ta` Dicembru 2020

**Kawza Nru. 5
Rikors Nru. 27/2019 JZM**

**Dr Marlon Borg bhala mandatarju
specjali ta` Amanda Sai Wang,
detentrici tal-karta tal-identita`
Svediza bin-numru 8110171264**

kontra

**Sleipnir Entertainment Limited (C
74967)**

u

**b`digriet tal- 21 ta` Jannar 2020 l-
Avukat Dr Yanika Bugeja giet
mahtura bhala kuratur *ad litem* tas-
soccjeta` intimata Sleipnir
Entertainment Limited**

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentat fil-31 ta' Ottubru 2019 li jaqra hekk :-

1. *Illi s-socjeta` Sleipnir Entertainment Limited (C 74967) hija socjeta` b`responsabbilta` limitata registrata Malta, u li topera fil-qasam tal-Online Gaming tramite s-sit taghha casinopop.com bl-uzu ta` pjattaforma ta` socjeta` terza licenzjata mill-Malta Gaming Authority (Dok AW1).*

2. *Illi s-socjeta` intimata hija indirettament ffinanzjata b`mod sostanzjali minn entitajiet Svedizi fejn l-esponenti hija azzjonista.*

3. *Illi ulterjorment l-esponenti ffinanzjat personalment lis-socjeta` intimata diversi drabi billi hallset direttament lil numru ta` kredituri tas-socjeta` intimata ghal servizzi provduti fuq struzzjonijiet tal-istess socjeta` intimata, u dan kif jirrizulta ampjament minn numru ta` fatturi li qeghdin jigu hawn annessi u kollettivament mmarkati bhala `Dok AW2a`, `Dok AW2b`, `Dok AW2c`, u `Dok AW2d`.*

4. *Illi l-esponenti taf dan kollu ghaliex kellha sehem fl-operat tas-socjeta` intimata flimkien mas-socju taghha Zheng Zheng sakemm minhabba ragunijiet personali li effettwaw is-sahha tal-esponenti, l-operat tas-socjeta` intimata thalla kompletament f`idejn is-socju Zheng Zheng (Dok AW3).*

5. *Illi minghajr ebda pre-avviz fit-2 ta` Gunju 2019, l-esponenti rceviet numru ta` korrisondenza bl-email fejn is-socju taghha Zheng Zheng irreferiet kredituri tas-socjeta` intimata lill-esponenti minghajr l-ebda spjegazzjoni, u dan kif jirrizulta minn kopja ta` uhud minn dawn l-emails, liema korrisondenza qieghda tigi hawn annessa u mmarkata bhala `Dok AW4`.*

6. *Illi l-esponenti ma setghetx tistabilixxi kuntatt ma` Zheng Zheng u rrealizzat illi s-socju taghha kienet halliet is-sitwazzjoni finanzjarja tas-socjeta` intimata f` qaghda prekarja ghall-ahhar tant illi d-dhul generat mis-sit "casinopop.com" kien wisq baxx biex s-socjeta` intimata thallas il-kredituri taghha.*

7. *Illi sadanittant, l-esponenti sabiex timminimizza l-ispejjez ingenti marbuta mal-operat tas-sit "casinopop.com" talbet lis-socjeta` terza li kienet tipprovdi s-servizz tal-pjattaforma ghas-sit sabiex tissospendi s-servizzi taghha.*

8. *Illi kif jinghad fil-premess is-socjeta` intimata hija debitrice tal-esponenti fl-ammont ta` wiehed u tmenin elf mitejn u sebgha u sittin ewro (€81,267) rapprezentanti self ta` flus kif jirrizulta mill-ghadd ta` fatturi pprezentati ma` dan ir-rikors `Dok AW2a`, `Dok AW2b`, `Dok AW2c`, u `Dok AW2d`.*

9. *Illi illum s-socjeta` intimata hija insolventi u ma tistax thallas id-djun taghha. Ghalhekk ghandha tigi xjolta u stralcjata minn dina l-Onorabbli Qorti peress illi ma tistax thallas id-djun taghha kif inghad u kif ser jigi ampjament ippruvat matul dawn il-proceduri, u dan ai termini tal-Artikolu 214(2)(a)(ii) tal-Kap. 386 tal-Ligijiet ta` Malta.*

10. *Illi ghalhekk l-esponenti tinsab kostretta illi tipprocedi b` dan ir-rikors sabiex tissalvagwardja l-interessi taghha.*

GHALDAQSTANT u in vista tas-suespost, ir-rikorrenti noe jitlob bir-rispett illi dina l-Onorabbli Qorti joghgobha, prevja kwalsiasi dikjarazzjoni necessarja u opportuna:-

i. Tiddikjara u Tiddeciedi illi s-socjeta` intimata mhijiex f` qaghda illi thallas id-djun taghha ai termini tal-Artikolu 214(2)(a)(ii) tal-Kapitolu 386 tal-Ligijiet ta` Malta.

ii. Tordna x-xoljiment u l-istralc konsegwenzjali tas-socjeta` intimata a tenur tal-Artikolu 214(2)(a)(ii) tal-Kapitolu 386 tal-Ligijiet ta` Malta.

iii. Tappunta amministratur provvizorju sabiex jiehu kontroll tal-assi kollha tas-socjeta` intimata u jaqdi dawk il-funzjonijiet indikati lilu mill-Qorti, u taghtih dawk il-poteri kollha li l-Qorti jidhrilha xierqa u opportuni fic-cirkostanzi li jkunu ezercitabbli taht dawk il-kundizzjonijiet kollha illi dina l-Onorabbli Qorti jidhrilha xierqa.

iv. Taghti kull provvediment iehor opportun sabiex jinhatar stralcjarju u jigi kondott l-istralc konsegwenzjali tas-socjeta` intimata ai termini tal-Kapitolu 386 tal-Ligijiet ta` Malta.

Bl-ispejjez u b`riserva ghal kwalsiasi azzjoni ulterjuri spettanti lill-esponenti.

Rat il-lista tax-xhieda.

Rat id-dokumenti li kienu prezentati mar-rikors.

Rat ir-risposta li pprezentat il-kuratur *ad litem* fit-2 ta` Marzu 2020 li taqra hekk:-

- 1. Illi f` dan l-istadju l-esponenti mhix edotta mill-fatti.*
- 2. Illi l-esponenti qieghda minn issa tiriservaw li tipprezentaw ecezzjonijiet ulterjuri.*

Illi r-rikorrenti huma minn issa ngunt in subizzjoni.

Bl-ispjjez.

Rat il-lista tax-xhieda u d-dokument li kien prezentat mar-risposta.

Rat id-digriet li tat fl-udjenza tad-9 ta` Marzu 2020 (fol 681 u 682) fejn hatret lir-Ricevitur Ufficjali bhala Amministratur Provvizorju tal-kumpannija ntimata b`setghat wiesgha li jinkludu l-kontroll shih tal-assi tal-kumpannija ntimata.

Rat illi b`dan id-digriet inghata wkoll provvedimenti dwar it-tielet (3) talba tar-rikors promotur.

Rat dokumenti ohra li kienu prezentati fil-kors tat-trattazzjoni tal-kawza.

Rat illi wara li nghalaq il-gbir tal-provi l-kawza thalliet ghal provvedimenti ghal-lum.

Rat l-atti l-ohra tal-kawza.

II. L-Avviz Legali 373 tal-2020

Fil-15 ta` Settembru 2020 kien ippubblikat fil-Gazzetta tal-Gvern, u dahal fis-sehh, l-Avviz Legali 373 tal-2020.

Ir-regolamenti japplikaw ghal kawzi istitwiti fis-**16 ta` Marzu 2020 jew wara** minn **any debenture holder, creditor or creditors** dwar drittijiet li jirrizultaw fl-Art 214 u fl-218 tal-Kap 386.

Ighoddu wkoll ghal kawzi istitwiti fis-**16 ta` Marzu 2020 jew wara** ghall-applikazzjoni tal-Art 316 tal-Kap 386.

Billi r-rikors promotur tal-azzjoni tar-rikorrent kienet prezentata qabel is-16 ta` Marzu 2020, l-Avviz Legali 373 tal-2020 mhuwiex applikabbli.

III. Dritt/Ezami Komparattiv/Gurisprudenza

Tajjeb li ssir referenza ghad-disposizzjonijiet tal-Kap 386 li huma **rilevanti** ghall-kwistjoni tal-lum.

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

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

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

- (a) *stralc ta` kumpannija mill-qorti skont l-artikolu 214(1)(a) ;*
- (b) *xoljiment u stralc ta` kumpannija mill-qorti skont l-artikolu 214(2)(a) ; jew*
- (c) *xoljiment u stralc ta` kumpannija skont l-artikolu 214(2)(b),*

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

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

Fil-kaz tal-lum, l-azzjoni kienet istitwita minn kreditur.

Jirrizulta li Amanda Sai Wang mandanti ta` r-rikorrent ghandha *locus standi* sabiex tippromwovi l-azzjoni odjerna.

Dan premiss, ir-rikorrent noe qieghed issejjes it-talbiet abbazi : tal-Art 214(2)(a)(ii) tal-Kap 386.

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

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

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

L-Art 214(2)(a)(ii) jaghti lill-qorti diskrezzjoni li xxolji u tistralcja kumpannija *jekk il-kumpannija ma tkunx tista` thallas id-djun taghha*.

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

Fil-ligi taghna li *kumpannija ma tkunx tista` thallas id-djun taghha* ghandu sinjifikat preciz u definit, mentri fil-ligi Ingliza, il-posizzjoni hija aktar wiesgha.

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

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

Fil-ligi taghna, **tnejn** huma c-cirkostanzi definiti fejn kumpannija titqies li ma tistax thallas id-djun taghha :-

- *jekk id-dejn dovut mill-kumpannija jkun baqa` ma thallasx ghal kollox jew f`parti wara erbgha u ghoxrin gimgha mill-*

eżekuzzjoni ta` titolu eżekuttiv kontra l-kumpannija b`xi wiehed mill-atti eżekuttivi msemmijin fl-artikolu 273 tal-Kodici ta` Organizzazzjoni u Procedura Civili ;

jew

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

Abbazi ta` li jirrizulta mill-kawzali tar-rikors promotur, ir-rikorrent noe kien generiku fir-rigward ta` liema subinciz tal-Art 214(5) qiegħed isejjes il-pretensjoni tal-insolvenza tal-kumpannija ntimata.

Għalhekk il-qorti sejra tirreferi għaz-zewg sitwazzjonijiet.

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

Fil-ligi tagħna li *kumpannija ma tkunx tista` thallas id-djun tagħha* għandu sinjifikat preciz u definit, mentri fil-ligi Ingliza, il-posizzjoni hija aktar wiesgħa.

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

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

Filwaqt illi fil-ligi tagħna huwa specificat **bil-preciz** x` m`għandhiex tagħmel kumpannija debitrici sabiex ma tkunx meqjusa li ma tistax thallas id-djun tagħha, fil-ligi Ingliza il-kriterju huwa aktar generiku, għaliex dik l-għamla ta` insolvenza ssehh meta kumpannija tkun *unable to pay its debts* **as they fall due.**

Fil-Pag 860 ta' **Boyle & Birds` Company Law** (op. cit.)
jinghamd illi :-

Failure to pay a debt which is due and not disputed amounts to evidence of cash flow insolvency. Thus a company which has a policy of late payment of bills could find itself the subject of a petition for a winding-up order or administration order. Such a petition will not be struck out at an early stage as a form of improper pressure and an abuse of the process of the court, because, as Staughton LJ explained in Taylor`s Industrial Flooring (1990. BBC 44 at 51) creditors, not late payers, are more worthy of insolvency law`s protection.

"Many people today seem to think that they are lawfully entitled to delay paying their debts when they fall due or beyond the agreed period of credit, if there is one ... This can cause great hardship to honest traders, particularly those engaged in small businesses recently started. Anything which the law can do to discourage such behaviour in my view should be done.

Fil-Pag 17 tal-ktieb **Insolvency Law - Corporate and Personal - Andrew Keay u Peter Walton** (Pearson Longman - 2003) jinghamd hekk dwar *cash flow insolvency* fil-kuntest tal-Insolvency Act 1986 -

The court, in examining whether a company is suffering cash flow insolvency, will consider whether the company is actually paying its debtors. Courts must take into account what current revenue the company has as well as what the company can procure by realising assets within a relatively short time ... A company can rely upon money which might be obtained from the sale of assets or upon money which might be obtained on the strength of its assets ... It is possible that sometimes a debtor might be able to establish solvency by demonstrating that funds can be obtained through an unsecured loan. In considering whether a person or a company is insolvent, the debtor`s whole financial position must be studied ... and a temporary lack of liquidity does not necessarily mean that the company is insolvent ...

At one time courts were rather strict on what they required to be established before they were willing to deem a person or a company insolvent, but in more recent times they have become more liberal as far as creditors are concerned and have held that a debtor is insolvent if a creditor is able to prove that he or she has not paid an undisputed

debt after a demand has been made ... and this is the case even if there is other evidence which suggests that the value of the assets outweighs liabilities ...

Whether a company is cash flow insolvent is principally a question of fact and one which may be established in any number of ways, such as the existence of a large number of outstanding debts and unsatisfied judgments ... or there is lack of assets on which execution can be levied ...

It has been said that a debtor is not regarded as solvent just because if sufficient time were granted the debts could be paid off ...

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

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

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

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

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

Il-qorti qeghda tirreferi ghal **Sec 123(2)** tal-Insolvency Act 1986 li tghid –

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

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

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

Id-differenza bejn iz-zewg ligijiet mhijiex kosmetika jew ta` *drafting* izda ta` sostanza.

Premessa d-distinzjoni bejn iz-zewg ligijiet, il-qorti sejra tirreferi ghad-dottrina Ingliza dwar kif din ittrattat il-koncett ta` *contingent* u dak ta` *prospective liabilities*.

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

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

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

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

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

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

Fil-Pag 130 ikompli hekk –

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

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

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

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

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

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

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

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

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

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

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

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

e) Gurisprudenza

Il-qorti sejra tirreferi ghall-gurisprudenza tal-qradi Inglizi kif tghodd kemm ghall-cash flow test kif ukoll ghall-balance sheet test.

Fid-decizjoni li tat The mCourt of Appeal fil-kaz ta' **Byblos Bank SAL v. Al-Khudhairy** [1987] inghad hekk :-

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

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

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

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

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

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

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

ii) The cash-flow test looks to the future as well as to the present : para 25. The future in question is the reasonably near future ; and what is the reasonably near future will depend on all the circumstances, especially the nature of the company's business: para 37. The test is flexible and fact-sensitive : para 34.

iii) The cash-flow test and the balance sheet test stand side by side: para 35. The balance sheet test, especially when applied to contingent and prospective liabilities is not a mechanical test: para 30. The express reference to assets and liabilities is a practical recognition

that once the court has to move beyond the reasonably near future any attempt to apply a cash-flow test will become completely speculative and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test : para 37.

iv) But it is very far from an exact test: para 37. Whether the balance sheet test is satisfied depends on the available evidence as to the circumstances of the particular case: para 38. It requires the court to make a judgment whether it has been established that, looking at the company`s assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to meet those liabilities. If so, it will be deemed insolvent even though it is currently able to pay its debts as they fall due: para 42.

*In the course of his judgment in Eurosail Lord Walker approved what he described as the "perceptive judgment" of Briggs J in **Re Cheyne Finance plc** (No 2) [2007] EWHC 2402 (Ch), [2008] 2 All ER 987, [2008] Bus LR 1562. Two of the points that Briggs J made bear on our case :*

i) Cash-flow solvency or insolvency is not to be ascertained by a blinkered focus on debts due at the relevant date. Such an approach will in some cases fail to see that a momentary inability to pay is only the result of temporary illiquidity. In other cases, it will fail to see that an endemic shortage of working capital means that a company is on any commercial view insolvent, even though it may continue to pay its debts for the next few days, weeks, or even months: para 51.

ii) Even if a company is not cash-flow insolvent, the alternative balance-sheet test will afford a petitioner for winding up a convenient alternative means of proof of a deemed insolvency: para 57."

IV. Risultanzi

Il-qorti qieset ir-risultanzi fattwali ta` dan il-kaz fil-kuntest tal-**Art 214(2)(a)(ii) tal-Kap 386.**

Qieset ukoll x`rrizulta ppruvat ghall-fini tal-**Art 214(5) (a) u (b) tal-Kap 386.**

Il-provi tar-rikorrent noe jistrieħu għal kollox fuq id-dokumenti li pprezenta.

Għar-rigward tal-Art 214(5)(a),
il-prova tar-rekwiziti tad-disposizzjoni ma tirrizultax.

Għar-rigward tal-Art 214(5)(b),
il-prova tirrizulta għaliex il-premessi tar-rikors promotur kienu korraborati mid-dokumenti li kienu prezentati mir-rikorrent noe waqt il-kawza.

Għal din il-qorti jirrizulta sodisfatt dak rikjest fl-Art 214(5)(b) tal-Kap 386.

V. Id-diskrezzjoni tal-qorti

Il-qorti tagħmel referenza għall-pag. 913-914 ta' **Boyle & Birds` Company Law** (op. cit.) fejn ingħad illi :-

*Unpaid creditors of a company may consider commencing winding-up proceedings against the company as an alternative to suing for payment. As a debt collection mechanism, winding up proceedings may be swifter and, for the individual creditor, less expensive than a claim that may come to trial for sometime ; on the other hand, winding up is a collective procedure for the benefit of creditors generally and it does not benefit specific creditors individually (F. **Oditah "Winding Up Recalcitrant Debtors" 1995 LMCLQ 107**) ...*

Fis-sentenza li tat fit-18 ta' Settembru 2009 fil-kawza "**Avukat John Refalo noe vs Garden of Eden Limited**" il-Qorti tal-Appell qalet hekk :-

"L-Artikolu 214 tal-Att dwar il-Kumpaniji jiddetermina kif u meta kumpanija għandha "titqies" ("shall be deemed" fit-test Ingliz) li ma tkunx tista' thallas id-djun tagħha. Ir-regoli huma cari u ma jhallu ebda lok għall-provi in kuntrarju. Jekk il-kumpanija ma thallasx fi zmien 24 gimgha, hija titqies li ma tistax thallas id-djun tagħha, u jekk

tirrizulta din ic-cirkostanza, il-Qorti tista` tipprocedi ghall-istralc taghha.”

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

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

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

Kien specifikat li l-ghanijiet huma :-

“... to recognise that the world in which we live and the creation of wealth depend upon a system founded on credit and that such a system requires, as a correlative, an insolvency procedure to cope with its casualties; ... to relieve and protect where necessary the insolvent, and in particular the individual insolvent, from any harassment and undue demands by his creditors ... at the same time, to have regard to the rights of creditors whose own position may be at risk because of the insolvency; ... to realise the assets of the insolvent which should properly be taken to satisfy his debts, with the minimum of delay and expense; to distribute the proceeds of the realisations among the creditors in a fair and equitable manner, returning any surplus to the debtor; to ensure that the processes of realisation and distribution are administered in an honest and competent manner, To recognise that the effects of insolvency are not limited to the private interests of the insolvent and his creditors, but that other interests of society or other groups in society are vitally affected by the insolvency and its outcome and to ensure that these public interests are recognised and safeguarded, ... to provide the means for the preservation of viable commercial enterprises capable of making a useful contribution to the economic life of the country.”

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

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

Fuq l-iskorta tal-provi akkwiziti, il-qorti sejra tezercita d-diskrezzjoni taghha favur ix-xoljiment u l-istralc tal-kumpannija ntimata.

Provvediment

Ghar-ragunijiet kollha premessi, il-qorti qeghda tipprovdi dwar it-talbiet kif gej :-

1. Tiddikjara li jirrizulta ppruvat ghas-sodisfazzjon taghha kull ma jiggustifika l-applikazzjoni tal-Art 214(2)(a)(ii) u tal-Art 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta fil-konfront tal-kumpannija ntimata.

2. Tordna x-xoljiment u l-konsegwenzjali stralc tal-kumpannija intimata b`effett mill-31 ta` Ottubru 2019.

3. Tahtar lir-Ricevitur Ufficjali bhala stralcjarju.

4. Taghti lill-istralcarju s-setghat u d-dmirijiet kollha li huma previsti fil-Kap 386 tal-Ligijiet ta` Malta.

5. Tordna lill-istralcjarju sabiex jipprezenta rapport tal-hidma tieghu sa zmien tliet (3) xhur mil-lum.

6. Tordna li l-ispejjez u drittijiet kollha naxxenti minn dan il-procediment - inkluzi l-ispejjez tal-kuratur ad litem, l-ispejjez kollha tal-istralc u l-ispejjez u d-drittijiet tal-istralcjarju - ghandhom jithallsu mir-rikorrent noe u mill-kumpannija intimata *in solidum* bejniethom.

Thalli l-istralc ghall-udjenza ta` nhar it-Tlieta 20 ta` April 2021 fid-9.00 a.m.

**Onor. Joseph Zammit McKeon
Imhalled**

**Amanda Cassar
Deputat Registratur**