



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

**ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON**

Illum it-Tnejn 14 ta` Dicembru 2020

**Kawza Nru. 13
Rikors Nru. 10/19 JZM**

**L-Avukat Peter Fenech bhala
mandatarju specjali tas-socjeta`
estera BRT Spa (C.f. e P.I.
04507990150)**

kontra

STK Europe Limited (C-61219)

Il-Qorti :

I. Preliminari

Rat ir-rikors ipprezentat fis-26 ta` Marzu 2019 li jaqra hekk :-

Illi l-esponenti hija kreditrici tas-socjeta` intimata.

Illi s-socjeta` BRT Spa ghandha tiehu s-somma ta` €608,687.66 minghand is-socjeta` ntimata rapprezentanti servizzi ta` transport rezi lill-istess socjeta` ntimata mis-socjeta` rikorrenti, liema ammont gie rez ezegwibbli b`sentenza tat-Tribunale di Bologna datata 29 ta` April 2015 (Dok BRT1).

Illi din is-sentenza hija direttament ezegwibbli hawn Malta skont ir-Regolament (UE) Nru 1215/2012 tal-Parlament Ewropew u tal-Kunsill tat-12 ta` Dicembru 2012 dwar il-gurisdizzjoni u r-rikonnoxximent u l-ezekuzzjoni ta` sentenzi fi kwistjonijiet civili u kummercjali u dan wara l-hrug tac-certifikat ai termini tal-istess Regolament, kopja ta` liema qed tigi hawn annessa u mmarkata bhala Dok BRT2.

Illi in kawsa u in ezekuzzjoni tad-drittijiet taghha s-socjeta` intimata rikorrenti harget il-mandat ta` sekwestru ezekuttiv numru 768/18 fl-ismijiet "BRT Spa (gja Bartoli Spa) vs STK Europe Limited (C-61219) (Dok BRT3).

Illi l-hrug ta` dan is-Sekwestru baqa` ineffettiv billi ma gie depozitat l-ebda ammont fil-Qorti u ma thallas xejn lis-socjeta` rrikorrenti.

Illi ghalhekk is-socjeta` hija fi stat insolventi u mhix kapaci thallas id-djun taghha.

Illi s-socjeta` tista` xxolji u tkun stralcjata mill-Qorti fejn ma tkunx tista` thallas id-djun taghha a tenur tal-Art 214(2)(a)(ii) tal-Kap 386 tal-Ligijiet ta` Malta.

Illi fi kwalsijasi kaz hemm ragunijiet gravi bizzejjed li jiggustifikaw ix-xoljiment u konsegwentement l-istralc tas-socjeta` a tenur tal-Art 214(2)(b)(iii) tal-Kap 386 tal-Ligijiet ta` Malta.

Ghaldaqstant in vista tas-suespost, is-socjeta` rikorrenti titlob lil din l-Onorabbli Qorti, prevja kull dikjarazzjoni ohra xierqa u opportuna, joghghobha :

1. *Tiddikjara li s-socjeta` STK Europe Ltd (C-61219) m` hijjex kapaci thallas id-djun taghha ghall-finijiet tal-Artikolu 214(2)(a)(ii) tal-Kap. 386 tal-Ligijiet ta` Malta.*

2. *Tiddikjara illi jezistu ragunijiet gravi bizzejjed li jiggustifikaw ix-xoljiment u konsegwentement l-istralc tas-socjeta` STK Europe Ltd (C-61219) a tenur tal-Artikolu 214(2)(b)(iii) tal-Kap. 386 tal-Ligijiet ta` Malta.*

3. *Tordna illi s-socjeta` ntimata STK Europe Limited tigi xjolta u konsegwentement stralcjata minn dina l-Onorabbli Qorti abbazi tal-Artikolu 214(2)(a)(ii) u/jew l-Artikolu 214(2)(b)(iii) tal-Kap. 386 tal-Ligijiet ta` Malta.*

4. *Tordna li sakemm tinghata decizjoni finali jigi appuntat amministratur provvizorju sabiex jiehu hsieb l-amministrazzjoni tal-istess socjeta` .*

5. *Taghti kull provvediment li jidhrilha xieraq u opportun.*

Bl-ispejjez kontra s-socjeta` ntimata u b` riserva ghal kwalsijasi azzjoni ulterjuri spettanti lis-socjeta` esponenti inter alia ai termini tal-Artikolu 303, 315 u 316 tal-Att dwar il-Kumpaniji.

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

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

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

Rat illi l-kawza thalliet ghal provvediment ghal-lum, bil-fakolta` li l-kumpanija ntimata tippresenta nota ta` osservazzjonijiet.

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

Rat l-atti l-oħra tal-kawza.

II. L-Avviz Legali 373 tal-2020

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

Id-disposizzjonijiet ta` dan l-Avviz Legali mhumiex applikabbli għaliex din il-kawza kienet istitwita gabel is-16 ta` Marzu 2020.

III. Dritt/Ezami Komparattiv/Gurisprudenza

Qabel tghaddi sabiex tqis il-mertu, ikun opportun jekk issir referenza u analizi tad-disposizzjonijiet tal-Kap 386 li huma rilevanti għall-vertenza tal-lum.

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

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

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

- (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),*

għandha ssir b`rikors li jista` jsir jew mill-kumpannija wara decizjoni tal-laqgħa generali jew mill-bord tad-diretturi tagħha 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, ir-rikorrent noe talab ix-xoljiment u l-istralc tal-kumpannija ntimata, ghaliex il-mandanti tieghu hija kreditur ta` STK Europe Ltd, kif jirrizulta ppruvat li huwa l-kaz.

Ghalhekk ir-rikorrent noe ghandu *locus standi* sabiex jippromwovi l-azzjoni.

Dan premiss, tajjeb jinghad illi r-rikorrent noe qieghed issejjes it-talba abbazi : tal-Art 214(2)(a)(ii) tal-Kap 386 ; u tal-Art 214(2)(b)(iii) 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 llum 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.

Tnejn huma c-cirkostanzi definiti fil-ligi :-

(a) jekk id-dejn dovut mill-kumpannija jkun baqa` ma thallasx ghal kollox jew f`parti wara erbgha u ghoxrin gimgha mill-ezekuzzjoni ta` titolu ezekuttiv kontra l-kumpannija b`xi wiehed mill-atti ezekuttivi msemmijin fl-artikolu 273 tal-Kodici ta` Organizzazzjoni u Procedura Civili ;

jew

(b) 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.

Ir-rikorrent noe qiegħed jistrieħ fuq iz-zewg paragrafi tal-Art 214(5), ghalkemm b`enfasi fuq il-paragrafu (a), kif jidher mill-ewwel hames paragrafi tar-rikors promotur.

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

Fil-ligi taghna li *kumpannija ma tkunx tista` thallas id-djun taghha* għandu 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) jingħad 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") ...

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

Filwaqt illi fil-ligi taghna huwa specifikat **bil-preciz** x`m`ghandhiex tagħmel kumpannija debitrice sabiex ma tkunx meqjusa li ma tistax thallas id-djun taghha, fil-ligi Ingliza il-kriterju huwa aktar generali, għaliex dik l-ghamla ta` insolvenza sseħh meta kumpannija tkun *unable to pay its debts* **as they fall due.**

Il-qorti sejra taghmel riferenza ghad-dottrina Ingliza, ghax tiswa biex tkun tista` tasal mhux daqstant biex tghid jekk jirrizultax ppruvat dak stipulat fl-Art 214(5)(a), izda biex tasal ghal decizjoni dwar jekk ghandhiex tghaddi ghal dikjarazzjoni ta` xoljiment u l-istralc.

Fil-Pag 860 ta` **Boyle & Birds` Company Law** (op. cit.) jinghad 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) jinghad 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 **I-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 broadened 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 to 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 ascertained 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 ghal giurisprudenza tal-qrati Inglizi kif tghodd kemm ghall-cash flow test kif ukoll ghall-balance sheet test.

Fid-decizjoni li nghatat mill-Court 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 jigi 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 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."

Fil-kawza **BNY Corporate Trustee Services Ltd & Ors v Neuberger** li kienet deciza fid-9 ta` Mejju 2013 mis-Supreme Court Ingliza, saret analizi fid-dettall tal-izviluppi illi sehew fil-ligi Ingliza fir-rigward tal-Art. 123 tal-Insolvency Act.

Ghal dak li ghandu x`jaqsam mal-cash flow test kien imfisser hekk :-

"The changes in form served, in my view, to underline that the "cash flow" test is concerned, not simply with the petitioner`s own

*presently-due debt, nor only with other presently-due debts owed by the company, but also with debts falling due from time to time in the reasonably near future. What is the reasonably near future, for this purpose, will depend on all the circumstances, but especially on the nature of the company's business. That is consistent with **Bond Jewellers, Byblos Bank and Cheyne Finance**. The express reference to assets and liabilities in my view a practical recognition that once the court has to move beyond the reasonably near future (the length of which depends, again, on all the circumstances) 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. But it is still very far from an exact test, the burden of proof must be on the party which asserts balance-sheet insolvency."*

(ara wkoll: **Ross & Anor vs Gaffney & Anor**, High Court Chancery Division, 2 ta` Gunju 2016 ; **BHS Group Ltd vs Retail Acquisitions Ltd**, High Court Chancery Division, 5 ta` Mejju 2017)

f) L-Art 214(2)(b)(iii) tal-Kap 386

Skont din id-disposizzjoni, kumpannija **ghandha** tkun xjolta jekk il-qorti tkun tal-fehma li hemm **ragunijiet gravi bizzejjed**.

Il-ligi thalli lill-qorti **diskrezzjoni wiesa`** sabiex tistabilixxi hi jekk fil-fehma taghha jirrizultawx fatti u cirkostanzi "**gravi bizzejjed**".

Jekk tistabilixxi l-gravita`, allura minn hemm `il quddiem, il-qorti ma jkollhiex aktar diskrezzjoni u **tkun obbligata** taghmel id-dikjarazzjoni ta` xoljiment u konsegwenti stralc tal-kumpannija.

Il-ligi ma taghti l-ebda tifsira ta` x`inhuma "**ragunijiet gravi bizzejjed**".

Ghalhekk il-qorti m`ghandha tiskarta xejn.

Il-qorti m`għandhiex toqghod fuq grajjiet li jkun sehhew sad-data tal-presentata tar-rikors promotur tal-azzjoni, izda għandha tagħti piz ukoll għal kull ma jigri anke wara sa meta tigi biex tagħti d-decizjoni tagħha.

F` **Sec 122 tal-Insolvency Act 1986 tal-Ingilterra**, tirrizulta lista ta` cirkostanzi li jwasslu għax-xoljiment u għall-istralc ta` kumpannija.

Tajjeb jinghad illi fl-Insolvency Act 1986 ma hemmx disposizzjoni bhall-Art 214(2)(b)(iii) tal-Kap 386. Il-wahda li tqarreb l-aktar lejha hija Sec. 122(1)(g) li tghid illi : *the court is of the opinion that it is **just and equitable that the company should be wound up.***

Huwa evidenti anke mad-daqqa t`ghajn li d-disposizzjoni fil-ligi tagħna hija **aktar stretta** fis-sens illi fil-kaz tagħna l-qorti għandha xxolji u tistralcja meta fil-fehma tagħha ikunu jirrizultaw ragunijiet gravi bizzejjed, mentri fil-ligi Ingliza, il-kriterju li fuqu l-qorti trid tibni l-fehma tagħha huwa dak tal-gustizzja u l-ekwita`. L-istrettezza tad-disposizzjoni fil-ligi tagħna tagħmel hafna sens anke għaliex jekk il-qorti tesprimi l-fehma li hemm ragunijiet gravi bizzejjed, allura minn hemm tkun obbligata tordna x-xoljiment u l-istralc tal-kumpannija.

Il-qorti tghid li r-riferenza għal Sec 122(1)(g) tal-Insolvency Act 1986 hija utili għaliex il-linja li hadu l-qorti Inglizi biex ighidu x`għandhom ifissru *just and equitable* għall-fini ta` *winding up* ta` kumpannija jgħin sabiex jiftah tieqa għall-qorti tagħna fl-interpretazzjoni tagħhom x`jistghu jkunu ragunijiet gravi bizzejjed.

Għax kull kaz għandu l-istorja tiegħu, il-qorti trid tibni l-fehma tagħha fuq il-fatti u cirkostanzi ta` kull kaz.

III. Risultanzi

1. Dwar l-Art 214(2)(a)(ii)

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

Dwar din id-disposizzjoni, tajjeb jinghad illi din titkellem dwar l-ezekuzzjoni ta' **atti ezekuttivi**.

Ghalhekk kumpannija ma tistax titqies illi mhijiex f'qaghda li thallas id-djun taghha abbazi ta' mandat kawtelatorju, anke jekk dak il-mandat ikun gie ezegwit kontra d-debitur.

Il-fattur rilevanti sabiex jiskattaw l-erbgħa u ghoxrin (24) gimgha huwa l-ezekuzzjoni tal-Mandat.

Fil-kaz tal-lum, si trattava ta' mandat ta' sekwestru ezekuttiv.

L-ezekuzzjoni ta' mandat ta' din ix-xorta tiskatta bin-notifika tal-att lis-sekwestratarji minghajr il-htiega tan-notifika tad-debitur.

A fol 34, kienet esebita kopja tal-mandat ta' sekwestru ezekuttiv nru. 768/18 fl-ismijiet "BRT Spa (gia' Bartolini Spa) v. STK Europe Ltd (C61219)"

Pero' l-att esebit mir-rikorrent noe huwa nkomplet, ghaliex minnu hija nieqsa l-prova tan-notifika tas-sekwestratarji, fattur li huwa kruċjali għall-fini tas-sussistenza tal-Art 214(5)(b).

Ladarba saret referenza għal dan l-att ezekuttiv, koxjenti kif inhi din il-qorti tal-importanza tieghu, il-qorti hadet konjizzjoni gudizzjali (judicial notice) tal-atti tal-att ezekuttiv.

Minn ezami akkurat tal-atti tal-mandat ezekuttiv jirrizulta li :-

- It-talba għall-hrug tal-mandat ezekuttiv saret fl-10 ta' Mejju 2018.
- It-talba kienet akkordata fil-11 ta' Mejju 2018.
- L-elenku tas-sekwestratarji huwa ndikat fid-Dok B.

- Is-sekwestrarji kienu notifikati fl-14 ta` Mejju 2018.
- Hadd minnhom ma ddikjara li kellu fil-pussess tieghu assi li jappartjenu lill-kumpannija ntimata.

Mill-atti tal-mandat, kif ukoll minn dak rrizulta fir-rikors promotur, jirrizulta li ma thallas xejn mill-ammont dovut lill-mandanti tar-rikorrent, la qabel l-ezekuzzjoni tal-mandat esekuttiv u lanqas wara sal-gurnata tal-lum.

Ir-rekwiziti tal-Art 214(5)(a) tal-Kap 386 jirrizultaw ippruvati għall-finijiet u effetti kollha tal-ligi.

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

Il-qorti tirreferi għal Dok QT1 (a fol 64 et seq tal-process) li kien esebit minn rapprezentant tar-Registratur tal-Kumpanniji. Fost it-tagħrif li jirrizulta mid-dokument, insibu li :-

- Il-kumpannija ntimata kienet registrata fid-19 ta` Lulju 2013 bin-nru. C61219.
- L-ewwel fost l-objects tal-kumpannija jghid illi kienet kostitwita : *To carry on the business of software designing, development, customisation, implementation, maintenance, testing, benchmarking, designing, developing and dealing in computer software and solutions.*
- L-authorized u l-issued share capital tal-kumpannija kien l-istess u cioe` : *€1,250 (one thousand two hundred and fifty euro) divided into 1,249 (one thousand two hundred and forty nine) Ordinary "A" Shares of one €1 (one euro) each and 1 (one) Ordinary "B" Share of one €1 (one euro), which have all been subscribed, allotted and taken up, 100% paid up.*
- L-azzjonisti huma tnejn : Beauty Holding Limited b` 1249 Class A Shares ; u Claris Capital Ltd b` 1 Class B Share.
- L-ewwel direttur tal-kumpannija kienet : Directa Management Limited.

- Fis-6 ta` Settembru 2013, Rhea Management Ltd kienet appuntata sabiex tkun ukoll direttur b`effett mit-28 ta` Awissu 2013.
- Rhea Management Ltd irrizenjat minn direttur b`effett mit-13 ta` Jannar 2014.
- L-*annual returns* tad-19 ta` Lulju 2014 u tad-19 ta` Lulju 2015 juru li l-uniku direttur tal-kumpannija baqghet Directa Management Limited.
- B`effett mid-19 ta` Ottubru 2015, Directa Management Limited irrizenjat minnu direttur tal-kumpannija u Francesco Luigi Ziccheddu inhatar direttur.
- L-*annual return* tad-19 ta` Lulju 2016 tikkonferma li Francesco Luigi Ziccheddu kien baqa` direttur.
- Mid-dokumenti li kienu ezebiti mar-rikors promotur, jirrizulta li BRT kienet kanonizzata kreditrici ta` STK Europe fl-ammont ta` € 608,687.66.
- Fid-19 ta` Jannar 2017, kienu registrati mar-Registru tal-Kumpanniji r-*Report and Financial Statements* tal-kumpannija ghaz-zmien li ghalaq fil-**31 ta` Dicembru 2014**. Minnhom jirrizultaw dawn il-figuri :

Total sales	:	€50,402,718
Operating expenses	:	€48,388,477
Profit after tax	:	€ 187,876
Tax	:	€ 102,163
Dividend paid	:	€ 187,876
Total assets	:	€ 3,384,644
Total liabilities	:	€ 3,383,394
No contingent liabilities		

- Fis-27 ta` Dicembru 2016, Claris Capital Ltd ma baqghetx azzjonista ghaliex ittrasferiet l-uniku sehem li kellha (Ordinary Class B) lil Francesco Luigi Ziccheddu.
- Fil-11 ta` Lulju 2017, kien registrat minn Francesco Luigi Ziccheddu mar-Registratur tal-Kumpanniji *memorandum* u

articles of association gdid tal-kumpannija in sostituzzjoni ta` dak precedenti. Id-differenzi mill-M&A precedenti jidher li huma li Francesco Luigi Ziccheddu kien sar azzjonista b` Ordinary B Share wiehed, li huwa ffirmat l-M&A bhala azzjonista kemm de proprio kif ukoll bhala direttur ta` Beauty Holding Ltd, u li kien l-uniku direttur. Dan huwa konfermat fl-*annual return* li kienet registrata mar-Registratur tal-Kumpanniji sad-data tad-19 ta` Lulju 2017.

- B`effett mill-10 ta` Lulju 2018, Francesco Luigi Ziccheddu ma baqax direttur u rapprezentant legali u gudizzjarju tal-kumpannija u nhatar fl-istess karigi Domenico Calvanese. Il-Form K kienet registrata fl-10 ta` Lulju 2019. Dan huwa rifless ukoll fl-*annual return* sad-data tad-19 ta` Lulju 2019.

Bil-provi li tressqu ghall-konsiderazzjoni taghha, il-qorti ma ssibx li kien sodisfatt dak rikjest bl-Art 2154(5)(b).

b) Id-diskrezzjoni tal-qorti

Il-qorti taghmel referenza ghall-pag. 913-914 ta` **Boyle & Birds` Company Law** (op. cit.) fejn inghad 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) ...

Fil-kaz tal-lum, il-qorti hija sodisfatta li l-kumpannija rikorrenti ma hadet l-ebda short-cut bil-prezentata tal-procediment odjern.

Anzi tghid li l-kumpannija rikorrenti mexxiet bil-procediment odjern wara li sabet maghluqa *all avenues* li

kellha sabet tirkupra l-kreditu taghha ta` `l fuq minn €600,000. Del resto dak kien l-interess tal-kumpanija kreditrici u cioe` li tithallas dak dovut lilha. Mexxiet kontra d-debitrici fl-Italja u hadet sentenza kontra d-debitrici li ghaddiet in gudikat. Fuq l-iskorta ta` dik is-sentenza, ottjeniet il-hrug ta` att ezekuttiv f` Malta. L-ezekuzzjoni tal-att ezekuttiv ma wassal ghal ebda esitu positiv. Minn hemm il-kumpanija kreditrici marret ghall-kawza odjerna.

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 ghandha "titqies" ("shall be deemed" fit-test Ingliz) li ma tkunx tista` thallas id-djun taghha. Ir-regoli huma cari u ma jhallu ebda lok ghall-provi in kuntrarju. Jekk il-kumpanija ma thallasx fi zmien 24 gimgha, hija titqies li ma tistax thallas id-djun taghha, u jekk tirrizulta din ic-cirkostanza, il-Qorti tista` tipprocedi ghall-istralc taghha."

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 ...

Fil-kaz tal-lum, il-qorti m`ghandhiex provi dwar jekk illum il-kumpanija ntimata ghandhiex assi sabiex jirribattu l-insolvenza taghha.

Kemm ilha kostitwita darba biss kienu prezentati l-*financial statements* taghha lir-Registratur tal-Kumpaniji u cioe` dak ghas-

sena li ghalqet fil-31 ta` Dicembru 2014. Wara ma kienux prezentati *financial statements*. Il-fatt li kienu prezentati *annual returns* ma jirrimedjx ghan-nuqqas fil-prezentata tal-*financial statements* ghaliex huma dawk li jaghtu stampa tal-qaghda finanzjarja ta` kumpannija anke ghaliex ikunu ghaddew mill-verifika u mill-gharbiel ta` awditur.

Il-qorti hija mhassba wkoll mill-fatt li l-kumpannija ntimata ma kkontestatx il-pretensjonijiet tal-kumpannija rikorrenti. Il-qorti mxiet mal-kumpannija ntimata b` kawtela u sabet li din baqghet lura milli mqar tippartecipa fil-procediment tal-lum – bhal donnu xejn mhu xejn !

Il-qorti sejra tezercita d-diskrezzjoni taghha favur ix-xoljiment u l-istralc tal-kumpannija ntimata.

c) L-Art 214(2)(b)(iii) tal-Kap 386

Billi l-kumpannija ntimata sejra tkun xjolta u stralcjata abbazi tal-Art 214(2)(ii) u tal-Art 214(5)(a) tal-Kap 386, sejra tastjeni milli tiehu konjizzjoni ulterjuri tat-talba tar-rikorrent noe ghax-xoljiment u ghall-istralc tal-kumpannija ntimata abbazi tal-Art 214(2)(b)(iii) tal-Kap 386.

Provvediment

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

1. Tiddikjara li l-kumpannija` STK Europe Ltd (C61219) m`hijiex f`qaghda li thallas id-djun taghha abbazi tal-Art 214(2)(a)(ii) u tal-Art 214(5)(a) tal-Kap 386 tal-Ligijiet ta` Malta.

2. Tastjeni milli tiehu konjizzjoni ulterjuri tat-tieni u tar-raba` talbiet.

3. Tordna x-xoljiment tal-kumpannija` STK Europe Ltd (C61219) b`effett mis-26 ta` Marzu 2019 a tenur tal-Art 223(1) tal-Kap 386 tal-Ligijiet ta` Malta.

4. Tordna l-istralc tal-kumpannija STK Europe Ltd (C61219).

5. Tahtar lir-Ricevitur Ufficjali bhala stralcjarju.

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

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

8. Bl-applikazzjoni tal-Art 236(2) tal-Kap 386 tal-Ligijiet ta` Malta, tordna li l-ispejjez kollha ta` dan il-procediment, inkluzi l-ispejjez kollha tal-istralc komprizi l-ispejjez u d-drittijiet tal-istralcjarju, ghandhom jithallsu mir-rikorrent noe u mill-kumpannija ntimata *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**