



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

**ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON**

Illum il-Hamis 25 ta` Frar 2021

**Kawza Nru. 8
Rikors Nru. 33/2019 JZM**

GO p.l.c. (C22334)

kontra

**Mobile Systems Limited (C49536)
u b`digriet tal- 14 ta` Lulju 2020
gie mahtur Dr Joseph Brincat
bhala kuratur *ad litem* ta` Mobile
Systems Limited (C 49536)**

Il-Qorti :

I. Preliminari

Rat ir-rikors li kien prezentat fit-2 ta` Decembru 2019 li jaqra :-

1. *Illi s-socjeta` intimata hija debitrici tal-esponenti fl-ammont ta` erba` mija tnejn u sittin elf u disgha u tletin ewro u sitta u sittin centezmu (€462,039.66) ma` liema ammont jridu jizdiedu imghaxijiet u spejjez legali.*

2. Illi l-imsemmi ammont jirraprezenta bilanc dovut lill-esponenti wara li s-socjeta` intimata gablet hlasijiet minghand il-klijenti tal-esponenti permezz ta` mobile payment kiosks maghrufa bhala Maltapay u li naqset li tghaddi l-flus migbura lis-socjeta` esponenti.

3. Illi in kawtela tal-interessi taghha, l-esponenti intavolat kawza quddiem il-Prim`Awla tal-Qorti Civili, liema kawza li ggib ir-riferenza 69/19 MH tinsab differita ghas-seduta tat-2 ta` Marzu 2020.

4. Illi l-esponenti qed tintavola dan ir-rikors ai termini tal-artiklu 218(1) tal-Kap. 386.

5. Illi l-esponenti tinsab infurmata li s-socjeta` Vodafone Malta Limited intavolat kawza quddiem il-Prim`Awla tal-Qorti Civili, liema kawza li ggib ir-riferenza 561/19 RM tinsab differita ghas-seduta tal-5 ta` Dicembru 2019, u permezz ta` liema s-socjeta` Vodafone Malta Limited, qed titlob sabiex is-socjeta` intimata thallasha s-somma ta` mitejn u sitta u ghoxrin elf tliet mija u sitta u erbghin ewro u centezmu (€226,346.01), liema talba giet ammessa mis-socjeta` intimata.

6. Illi mir-rapport finanza rju tas-socjeta` intimata ghas-sena 2017, jidher li s-socjeta` intimata ghandha passiv sostinzjali.

7. Illi fl-umli fehma tal-esponenti, is-socjeta` intimata mhix gestita sew tant illi hemm lok ta` ezami tal-operat taghha, u dak tal-ufficjali taghha inkluzi Vera Boyajyan u Ashot Boyajyan, ai termini tar-Kapitolu V tal-Kap 386 u b` mod partikulari fid-dawl tal-artikli 307(1)(h), 312(1), 312(2), 313(1)(a), u 315(1).

8. Illi l-esponenti m`ghandhiex is-serhan il-mohh li s-socjeta` intimata hija f` qaghda li tirregolarizza l-pozizzjoni taghha.

9. Illi ghalhekk, fl-umli fehma tal-esponenti, fic-cirkostanzi hemm lok li jigu applikati l-mizuri kontemplati fl-artikli 214(2)(a)(ii) u/jew 214(2)(b)(iii) tat-Kap 386.

10. Illi ghaldaqstant, a bazi ta`dak hawn fuq espost u b`rizerva li tressaq dawk il-provi kollha opportuni matul is-smigh, l-esponenti umilment titlob li din l-Onorabbli Qorti sabiex :

(i) tiddikjara li hemm ragunijiet bizzejjed sabiex ikun hemm ix-xoljiment u konsegwentement l-istralc tas-socjeta` intimata ai termini tal-artikli 214(2)(a)(ii) u/jew 214(2)(b)(iii) tat-Kap 386;

(ii) tordna x-xoljiment u l-istalc tas-socjeta` intimata ai termini tal-Kap 386, u dan anki fid-dawl tal-artiklu 219, u dan prevja kull dikjarazzjoni` u/jew kundizzjoni li din l-Onorabbli Qorti jidhrilha opportuni u xierqa.

(iii) tappunta stralcjarju ghall-iskop tal-imsemmi stralc.

(iv) tiddikjara u tordna lill-ufficjali tas-socjeta` intimata, inkluz Vera Boyajyan u Ashot Boyajyan, responsabbli in solidum bejniethom u mal-istess socjeta` intimata sabiex personalment jaghmlu tajjeb ghad-djun u responsabbilitajiet kollha tal-istess socjeta` intimata u dan ai termini tal-artiklu 315(1) tal-Kap 386.

Bl-ispejjez.

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

Rat ir-risposta li pprezenta Av. Dr. Joseph Brincat fil-15 ta` Ottubru 2020 bhala kuratur *ad litem* tas-socjeta` ntimata li taqra :-

1. Illi fl-ewwel lok jiddikjara li mhux edott mill-fatti u ghandu biss l-allegazzjonijiet tar-rikorrenti.

2. Illi lanqas jaf bil-procedura li qed issir referenza ghaliha fejn is-socjeta intimata ammettiet it-talba ghall-ammont hekk sostanzjali.
Salva kull risposta ulterjuri.

Rat il-provi.

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

Rat l-atti l-ohra.

III. Provi

L-intimata kienet kostitwita bhala *limited liability company* fit-30 ta` April 2010 b` ufficcju registrat f` Malta. Sa mit-twaqqif taghha, l-intimata kellha direttur u azzjonista wiehed u cioe` : Vera Boyajyan. Ma jirrizultax hijiex residenti Malta jew barra.

L-*Authorised* u l-*Issued Share Capital* kien l-istess : €5,001,200 maqsum :

1200 Ordinary A shares of €1
each subscribed and 20% paid up

5,000,000 Ordinary B shares of €1
each subscribed and fully paid up

Jirrizulta li l-intimata gabret hlasijiet minghand il-klijenti ta` diversi socjetajiet fil-kamp tat-telekomunikazzjoni, inkluz ukoll klijenti tar-rikorrenti. Il-gbir tal-flus b` sistema ta` *mobile payment kiosks* maghrufa bhala Maltapay.

Marisa Galea Debono - Manager - Dipartiment tal-Credit Control - GO plc - xehdet illi l-intimata hija debitrici tar-rikorrenti fl-ammont ta` **€459,818** oltre imghax kummercjali u spejjez.

Sal-lum ir-rikorrenti ghad m` ghandhiex titolu ezekuttiv kontra l-intimata.

Mhux biss ir-rikorrenti tirreklama kreditu kontra l-intimata :

- Permezz ta` sentenza moghtija fil-5 ta` Dicembru 2019 mill-Prim`Awla tal-Qorti Civili fil-kawza fl-ismijiet *Vodafone Malta Ltd v. Mobile Systems Limited* (Rik. Gur. Nru. 561/19 RGM) l-intimata (wara ammissjoni) kienet ikkundannata thallas lil Vodafone Malta Ltd sorte fl-ammont ta` **€226,346.01**.
- B`kuntratt ta` kostituzzjoni ta` debitu tal-5 ta` Dicembru 2019 fl-atti tan-Nutar Dottor Marco Burlo`, l-intimata ikkostitwiet ruhha bhala debitrice ta` Melita Limited fl-ammont ta` **€561,509.96**.

Ghal dak li jirrigwarda l-***financial statements*** tal-intimata, jirrizulta li l-ahhar li kienu prezentati kienu dawk ghas-sena li ghalqet fil-**31 ta` Dicembru 2017**. Skont l-audit li sar ghal dik is-sena, jirrizulta li l-intimata ghandha :

• Total Assets	:	€3,995,942
• Total Liabilities	:	€5,259,442 u cioe`
Dejn ma` terzi	:	€ 19,326
Dejn mal-azzjonista	:	€5,240,296

Irrizulta ppruvat li llum bhala dejn l-intimata ghandha bil-wisq aktar milli kellha f`gheluq l-2017.

L-assi tal-intimata kien kostitwit minn *computer software*. Minn note 4 annessa mal-*financial statements* ghas-sena 2017 jirrizulta illi dan il-*computer software* kien stmat li kellu *net book value* ta` €3,874,340. Peress illi ma gewx ipprezentati l-*financial statements* wara l-2017, mhux maghruf x`hinuma l-assi attwali tal-kumpanija.

Fit-22 ta` Jannar 2018 kienet ikkapitalizzata *s-shareholder`s loan* bis-sahha ta` risoluzzjoni (fol 25). Din il-kapitalizzazzjoni hija prova li sabiex ma tkunx insolventi, l-intimata tiddependi ghal kollox fuq *capital injection* mill-azzjonista. Mhux maghruf jekk l-intimata ghadhiex topera.

Sal-lum jirrizulta li l-intimata ghandha **dejn kapitali** ma` terzi (mhux l-azzjonista) :

- GO Plc : €459,818
- Vodafone Malta Ltd : €226,346.01
- Melita Limited : €561,509.96

III. Konsiderazzjonijiet

1. Locus standi

Qabel tghaddi biex tqis it-talbiet, il-qorti tirrileva li 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-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.

Jirrizulta li r-rikorrenti hija kreditur tal-intimata. Billi t-talba ghax-xoljiment u l-istralc tal-intimata qeghda ssir abbazi tal-Art 214(2)(a)(ii) u tal-Art 214(2)(b)(iii) tal-Kap 386, ir-rikorrenti ghandha *locus standi* sabiex tippromwovi l-azzjoni.

2. L-ewwel (1) u t-tieni (2) talbiet

Fl-ewwel talba, ir-rikorrenti tirreferi ghall-Art 214(2)(a)(ii) u/jew l-Art 214(2)(b)(iii) tal-Kap 386.

a) 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, 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 jistabilixxi 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 ezequttiv kontra l-kumpannija b`xi wiehed mill-atti ezequttivi*

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.

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

Fil-kaz tal-lum ma kienx specificat mir-rikorrenti fuq liema miz-zewg sitwazzjonijiet qieghda tistrieħ.

Madanakollu huwa evidenti li r-rekwiziti tal-paragrafu (a) ma jirrizultawx billi mhuwiex sodisfacientement ippruvat li titolu eżekuttiv miksub kontra l-intimata kien eżegwit kontra taghha u l-kreditu baqa` ma thallasx fi zmien 24 gimgha mill-eżekuzzjoni tat-titolu eżekuttiv.

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

Fit-test bl-Ingiliz 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 Ingliża, insibu disposizzjoni li **tixbah** dik tal-ligi taghna, **ghalkemm mhijiex l-istess**.

Il-qorti qeghda tirreferi għall-**Sec 123(2)** tal-Insolvency Act 1986 li jaqra hekk –

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 għad 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 għaliex 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 għad-dottrina Ingliza dwar kif din ittrattat il-koncett ta` *contingent* u dak ta` *prospective liabilities*.

Il-qorti sejra tirreferi għal dak li d-dottrina Ingliza tirreferi għalih bhala **balance sheet insolvency** fl-ambitu tal-**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 broad 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** jghid 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.

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

Fid-decizjoni li tat il-Court of Appeal fil-kaz ta' **Byblos Bank SAL v. Al-Khudhairi** [1987] fejn *inter alia* nghad illi :

"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` Mejjju 2013 mis-Supreme Court Ingliza, saret analizi fid-dettall tal-izviluppi illi sehhe fil-ligi Ingliza fir-rigward tal-Art. 123 tal-Insolvency Act.

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

*"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)

Premessa d-dottrina u l-gusisprudenza fuq citata, il-qorti tirrileva li l-*financial statements* esebiti jaghtu stampa tal-qaghda tal-intimata kif kienet fl-ahhar tal-2017. Bhala fatt jidher li fl-2017 il-kumpanija kienet diga` f`sitwazzjoni finanzjarja prekarja ghaliex ghas-sostenn taghha ma kenitx qeghda tiddependi fuq id-dhul min-negozju taghha izda fuq finanzjament tal-azzjonista Vera Boyajyan. Bis-sahha tar-rizoluzzjoni tat-22 ta` Jannar 2018 (fol 25) kien ikkapitalizzat is-*shareholders loan*. Sabiex tirkupra l-flus li harget personalment, l-azzjonista (u direttur) trid jew tkattar in-negozju tal-kumpanija sabiex forsi tithallas minn hemm inkella tiddisponi mill-assi jew addirittura tittrasferixxi l-ishma lil investiture li jkun dispost jaghmel *cash injections* adegwati, xenarju dan bil-wisq improbabbli u mhux fattibbli anke minhabba d-dejn li l-kumpanija ghandha ma` terzi (apparti dak li harget l-azzjonista bhala self).

Jirrizulta li wara l-2017, id-dejn tal-intimata favur terzi baqa` kull ma jmur jakkumula. Vodafone Limited, Melita plc u Go plc ghandhom krediti kontra l-intimata fl-ammont kapitali ta` €1,249,895.63 oltre imghax u spejjez. Tirrizulta ppruvata qaghda **serja** ta` nuqqas ta` likwidita` li ilha tippersisti mill-2017. Il-konsegwenza ta` din il-qaghda finanzjarja negattiva hija li kredituri baqghu ma thallsu xejn minn dak li ghandhom jiehdu. L-intimata m`ghandhiex likwidita` u d-djun illi ghandha jissuperaw l-assi. Din il-qaghda finanzjarja avversa mhijiex sitwazzjoni tal-mument u x-xejra hija li se tkompli taggrava.

Ir-rekwiziti tal-Art 214(5)(b) tal-Kap 386 huma ppruvati.

B`hekk ghall-iskop tal-ewwel talba tirrizulta l-insolvenza tal-intimata abbazi tal-Art 214(2)(a)(ii) tal-Kap 386.

iii) Id-diskrezzjoni tal-Qorti

Ghalkemm ikun jirrizulta ppruvat li kumpannija debitrice ma tkunx f`qaghda li thallas id-djun taghha ghall-fini tal-Art 214(2((a)(ii) tal-Kap 386, tibqa` diskrezzjoni tal-qorti li tordna x-x-xoljiment u l-istralc tal-kumpannija debitrice. Qed jigi rilevat dan fil-kuntest tat-tieni talba.

Fil-pagna 216 tal-ktieb **Insolvency Law – Corporate and Personal** 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 ...

Il-qorti taghmel referenza ghall-pag. 913-914 ta` **Boyle & Birds` Company Law** 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**) ...*

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."

Meta tqis il-fatti u cirkostanzi ta` dan il-kaz, kif kienu esposti aktar kmieni, il-qorti sejra tezercita d-diskrezzjoni taghha u tordna x-xoljiment u l-istralc tal-intimata, kif intalab fit-tieni domanda.

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

Skont din id-disposizzjoni, kumpanija **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-kumpanija.

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

Ghalhekk il-Qorti m`ghandha tiskarta xejn.

Il-Qorti m`ghandhiex toqghod fuq grajjiet li jkun sehew sad-data tal-prezentata tar-rikors promotur tal-azzjoni, izda ghandha taghti piz ukoll ghal kull ma jigri anke wara, sa ma tigi biex tinghata d-decizjoni taghha.

F` **Sec 122 tal-Insolvency Act 1986 tal-Ingilterra**, tirrizulta lista ta` cirkostanzi li jwasslu ghax-xoljiment u ghall-istralc ta` kumpanija.

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 taghna hija **aktar stretta** fis-sens illi fil-kaz taghna l-qorti ghandha xxolji u tistralcja meta fil-fehma taghha jkunu jirrizultaw ragunijiet gravi bizzejjed, mentri fil-ligi Ingliza, il-kriterju li fuqu l-qorti trid tibni l-fehma

taghha huwa dak tal-gustizzja u l-ekwita`. L-istrettezza tad-disposizzjoni tal-ligi taghna taghmel hafna sens anke ghaliex jekk il-qorti tesprimi l-fehma li hemm ragunijiet gravi bizzejjed, allura minn hemm tkun obligata tordna x-xoljiment u l-istralc tal-kumpannija.

Il-qorti tghid li r-riferenza ghall-Art 122(1)(g) tal-Insolvency Act 1986 hija utili ghaliex il-linja li hadu l-qrati Inglizi biex jghidu x`ghandhom ifissru *just and equitable* ghall-fini ta` *winding up* ta` kumpannija jghin sabiex jiftah tieqa lill-qrati taghna ghall-interpretazzjoni ta` x`jistghu jkunu ragunijiet gravi bizzejjed.

Ghax kull kaz ghandu l-istorja tieghu, il-Qorti trid tibni l-fehma taghha fuq il-fatti u cirkostanzi ta` kull kaz.

Fil-kaz tal-lum tirrizulta ppruvata qaghda gravi ta` nuqqas ta` likwidita` kif kien imfisser aktar kmieni. Il-qorti fliet b`reqqa l-atti li jsawru l-procediment odjern, u filwaqt li qeghda tilqa` l-ewwel talba safejn din tirrigwarda l-Art 214(2)(b)(iii) tal-Kap 386 sejra tordna x-xoljiment u l-istralc tal-kumpannija skont it-tieni talba anke abbazi tal-provi li saret tar-rekwiziti ta` din id-disposizzjoni.

3. It-tielet (3) talba

Anke din it-talba sejra tkun milqugha. Ladarba qed ikun ordnat ix-xoljiment u l-istralc tal-kumpannija, se ssir il-hatra ta` stralcjarju.

4. Ir-raba` (4) talba

Ir-rikorrenti qeghda tressaq din it-talba abbazi tal-Art 315(1) tal-Kap 386 li tghid hekk :-

Jekk waqt l-istralc ta` kumpannija sew jekk b`ordni tal-qorti jew volontarjament ikun jidher li xi negozju tal-kumpannija jkun tmexxa bil-hsieb ta` frodi ta` kredituri tal-kumpannija jew ta` kredituri ta` xi persuna ohra jew bil-ghan ta` frodi, il-qorti tista` fuq rikors tar-ricevitur ufficjali, jew tal-istralcjarjun jew ta` xi kreditur jew ta` xi kontributorju tal-kumpannija, jekk jidhrilha xieraq li taghmel hekk, tiddikjara li xi persuni li xjentement kienu partijiet fit-tmexxija tan-negozju bil-mod qabel imsemmi tkun responsabbli personalment, minghajr ebda limitazzjoni ta` responsabbiltà ghal kull jew ghal xi dejn jew responsabbiltajiet ohra tal-kumpannija kif il-qorti tista` tordna. (enfasi u sottolinear tal-qorti)

Dwar id-disposizzjoni, **Andrew Muscat** jikteb hekk fil-Pag. 363 ta` **Principles of Maltese Company Law** (Second Edition – Volume 1 – 2019 – MUP) :-

*Although ... the fraudulent trading provision appears to be rather wide in its scope, the effectiveness of the provision is unfortunately considerably weakened by the conditions that have to be satisfied for its application. One such condition is that it can **only** be invoked when the company is in the course of winding up. This is not in itself a very serious **impediment**, but it does mean that a creditor or contributory of the company who seeks to utilize the remedy may **first** have to institute proceedings to have the company dissolved with the delay, expense and inconvenience that such proceedings usually involve.* (enfasi u sottolinear tal-qorti)

L-Art 315(1) tal-Kap 386 huwa mfassal fuq l-**Art 213 tal-Insolvency Act 1986** tal-Ingilterra. Id-dottrina Ingliza hija utli ferm ghall-konsiderazzjoni tal-elementi li jsawru d-disposizzjoni u sabiex issir analizi tal-gurisprudenza. Fl-istess waqt, ghall-**ispecifiku tal-kwistjoni** li qeghda tigi trattata llum, l-esperjenza Ingliza ghandha applikazzjoni limitata, ghaliex filwaqt li fil-ligi taghna, il-jedd li jstitwixxi l-azzjoni jispetta : a) lir-ricevitur ufficjali ; **jew** b) lill-istralcjarju ; **jew** c) lill-kreditur ; **jew** d) lill-kontributorju tal-kumpannija, fil-kaz tal-Insolvency Act 1986, l-azzjoni tispetta **biss** lill-istralcjarju. Dan ifisser illi fil-ligi Ingliza, l-azzjoni ghal kummerc bi frodi tista` tigi promossa **biss** wara li kumpannija tkun xjolta, u l-fatti li jaghtu lok ghall-istanza jirrizultaw fil-kors tal-istralc. Il-fatt li l-mudell tal-ligi taghna kienet l-Insolvency Act 1986, u l-fatt illi z-zewg disposizzjonijiet jirreferu t-tnejn ghal *in the course of winding up of a company*, ghal din il-qorti, dan huwa bil-wisq

indikattiv illi **anke** fil-hsieb tieghu l-legislatur Malti kien illi l-procediment ikun jista` jigi ntavolat **biss** wara li l-kumpanija tkun giet xjolta u l-fatt tat-tmexxija bil-hsieb ta` frodi jkun riskontrat fil-kors tal-istralc. L-uniku differenza mal-ligi Ingliza kienet illi fil-kaz taghna, il-legislatur ghazel li jaghti d-dritt tal-azzjoni mhux biss lill-istralcjarju izda lil persuni ohra wkoll.

Ir-raba` talba qeghda tkun respinta ghaliex hija inproponibbli.

Provvediment

Ghar-ragunijiet kollha premissi, il-qorti qeghda tipprovdi billi

Riferibbilment ghall-ewwel (1) talba, tiddikjara li rrizulta ppruvat ghas-sodisfazzjon taghha kull ma jiggustifika l-applikazzjoni tal-Art 214(2)(a)(ii), tal-Art 214(5)(b) u tal-Art 214(2)(b)(iii) tal-Kap 386 tal-Ligijiet ta` Malta kontra l-kumpanija ntimata Mobile Systems Limited (C49536).

Tilqa` t-tieni (2) talba billi tordna x-xoljiment u l-konsegwenzjali stralc tal-kumpanija ntimata Mobile Systems Limited (C49536) b`effett mil-lum.

Tilqa` t-tielet (3) talba billi tahtar lir-Ricevitur Ufficjali bhala stralcjarju, u taghtih is-setghat u d-dmirijiet kollha li huma previsti fil-Kap 386 tal-Ligijiet ta` Malta. Tordna lill-istralcjarju sabiex jipprezenta rapport tal-hidma tieghu sa zmien tliet (3) xhur mil-lum.

Tichad ir-raba` (4) talba.

Tordna li l-ispejjez ta` dan il-procediment, inkluzi l-ispejjez tal-kuratur *ad litem*, u l-ispejjez tal-istralc, komprizi l-ispejjez u d-drittijiet tal-istralcjarju, ghandhom jithallsu mill-kumpannija rikorrenti u mill-kumpannija ntimata *in solidum* bejniethom.

Thalli l-istralc ghall-udjenza ta` nhar il-Hamis 13 ta` Mejju 2021 fl-10.15 a.m.

**Onor. Joseph Zammit McKeon
Imhalled**

**Amanda Cassar
Deputat Registratur**