



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

**ONOR. IMHALLEF  
JOSEPH ZAMMIT McKEON**

**Illum il-Hamis 18 ta` Marzu 2021**

**Kawza Nru. 2  
Rikors Nru. 5/2018 JZM**

**Miclis Company Limited (C40575)**

***kontra***

**Kevin Fitzpatrick (Passaport  
Irlandiz PW6943720) bhala  
direttur ta` FM Environmental  
(Malta) Ltd.**

**Edmond John Fitzpatrick  
(Passaport Ingliz 28568503)  
bhala direttur ta` FM  
Environmental (Malta) Ltd**

**FM Environmental (Malta) Ltd.  
(C22822)**

**Il-Qorti :**

**I. Preliminari**

Rat ir-rikors li kien prezentat fil-12 ta` Gunju 2018 li jaqra :-

*Illi s-socjeta` rikorrenti Miclis Company Ltd ghandha ghoxrin fil-mija (20%) tal-kapital socjali tas-socjeta` FM Environmental (Malta) Ltd. konsistenti f`ghaxart elef (10,000) sehem Ordinarju A ta` Ewro (€1) -il wiehed, filwaqt illi r-rimanti tmenin fil-mija (80%) tal-kapital socjali, konsistenti fi hmistax-il elf sehem (15,000) Ordinarju A ta` Ewro (€1) -il wiehed u hamsa u ghoxrin elf (25,000) sehem Ordinarju B ta` Ewro (€1) -il wiehed huma proprjeta` tas-socjeta` estera FM Environmental Limited, socjeta` kostitwita l-Irlanda bin-numru ta` registrazzjoni NI21657, kif jirrizulta mill-kopja tal-Memorandum and Articles tal-istess socjeta` intimata hawn anness bhala Dok. A.*

*Illi s-socjeta` rikorrenti Miclis Company Ltd, hija intestata f`isem Clara Farrugia ghal dak li huma erba` mija u hamsin ishma ordinarji u zewgha Mario Farrugia ghal dak li huma hamsin ishma ordinarji u illi is-socjeta` Miclis Company Ltd akkwistat is-sehem ta` ghoxrin fil-mija (20%) tal-kapital socjali tas-socjeta` FM Environmental (Malta) Ltd. konsistenti f`ghaxart elef (10,000) sehem Ordinarju A ta` Ewro (€1) -il wiehed minn Mario Farrugia permezz ta` trasferiment iddatat 15 ta` Gunju 2016.*

*Illi b`hekk Mario Farrugia u martu Clara Farrugia huma l-beneficial owners ta` 20 fil-mija tas-socjeta` FM Environmental (Malta) Limited, tramite s-socjeta` taghhom Miclis Company Limited. Qabel il-15 ta` Gunju 2016, dan l-20% fil-mija fis-socjeta` intimata kien intestat f`isem Mario Farrugia personalment. Mario Farrugia ghadu wiehed mid-diretturi ta` FM Environmental (Malta) Limited.*

*Illi l-affarijiet u n-negozju tas-socjeta` FM Environmental (Malta) Ltd kienu u ghadhom qed jitmexxew b`mod oppressiv, b`mod mhux gust u diskriminatorji u b`mod mhux gust ta` pregudizzju lir-rikorrenti.*

*Illi barra minn hekk, xi atti jew ommissjonijiet tal-kumpannija kienu, jew huma, oppressivi b`mod mhux gust diskriminatorji kontra, jew b`mod mhux gust ta` pregudizzju, ghas-socjeta` rikorrenti.*

*Illi fost l-attivitajiet kummercjali taghha is-socjeta` FM Environmental (Malta) Ltd timmanufattura prodotti mibjughin bil-`brand name` Grease Guardian, liema prodotti inixxu x-xahmijiet u z-zjut mid-discharge ta` kcejjen kummercjali qabel ma` dan jintrema` u illi dawn il-*

prodotti jinbieghu lill-azzjonist FM Environmental Limited fl-Irlanda biex din tal-ahhar taghmel il-marketing tal-imsemmi prodott u tbiegh u tforniehom lil klijenti madwar id-dinja.

Illi filwaqt li r-rikorrenti Miclis Company Ltd hija l-azzjonista fis-socjeta` Maltija FM Environmental (Malta) Ltd., mhijiex azzjonista fis-socjeta` Irlandiza FM Environmental Limited u ghalhekk kull transazzjoni bejn is-socjeta` Maltija FM Environmental (Malta) Ltd. u s-socjeta` Irlandiza FM Environmental Limited li mhijiex `arms length` timpattja lis-socjeta` rikorrenti b`mod li tispostja parti mill-profitt minn socjeta` fejn hi azzjonista ghall-socjeta` fejn m`hijiex azzjonista u b`hekk tippregudika l-investment tas-socjeta` rikorrenti.

Illi l-intimati diretturi Kevin Fitzpatrick u Edmond John Fitzpatrick huma diretturi kemm fis-socjeta` Maltija FM Environmental (Malta) Ltd u kemm fis-socjeta` Irlandiza FM Environmental Ltd.

**L-Ewwel Pregudizzju : L-ispustjar ta` profitti mis-socjeta` Maltija FM Environmental (Malta) Ltd lis-socjeta` Irlandiza FM Environmental Ltd permezz ta` tnaqqis fil-margini fil-bejgh ta` prodotti minn FM Environmental (Malta) Ltd lis-socjeta` Irlandiza FM Environmental Ltd u dan a skapitu ta` u bi pregudizzju lill-azzjonist minoritarju fis-socjeta` Maltija FM Environmental (Malta) Ltd.**

Illi mill-bidu nett sa Jannar tas-sena elfejn u hmistax is-socjeta` Maltija FM Environmental (Malta) Ltd li timmanufattura l-prodott Grease Guardian kienet tbiegh lis-socjeta` Irlandiza FM Environmental Ltd b`marginu ta` hamsa u ghoxrin fil-mija (25%) u dan il-`marginu` kien ihalli bizzejjed qligh Malta biex jikkompensa s-socjeta` Maltija ghall-investment li ghamlet biex zviluppat il-prodotti `Grease Guardian` u ghall-ispejjez li ggorr fil-produzzjoni tal-prodott Grease Guardian filwaqt li s-socjeta` Irlandiza da parti taghha kienet taghmel il-profit u l-`marginu` taghha meta hi tbiegh lil klijent ahhari.

Illi permezz ta` komunikazzjoni tas-27 ta` Jannar 2015, Kevin Fitzpatrick li huwa direttur kemm tas-socjeta` Maltija FM Environmental (Malta) Ltd u kemm tas-socjeta` Irlandiza FM Environmental Ltd informa lis-socjeta` Maltija FM Environmental (Malta) Ltd li b`effett immedjat il-`marginu` ta` hamsa u ghoxrin fil-mija (25%) li kienet taghmel is-socjeta` Maltija FM Environmental (Malta) Ltd meta tbiegh lis-socejta`

*Irlandiza FM Environmental Ltd kien ser jitnaqqas ghall-hmistax fil-mija (15%).*

*Illi din id-decizjoni giet imposta fuq is-socjeta` Maltija FM Environmental (Malta) Ltd mid-direttur Kevin Fitzpatrick li kellu kunflitt ta` interess palesi in kwantu kien direttur kemm tas-socjeta` Maltija FM Environmental (Malta) Ltd u kemm tas-socjeta` Irlandiza FM Environmental Malta Ltd u in kwantu l-interess proprjetarju u beneficiarju tieghu huwa akbar fis-socjeta` Irlandiza FM Environmental Ltd milli fis-socjeta` Maltija FM Environmental (Malta) Ltd u minkejja li din id-decizjoni ma kenitx fl-ahjar interess tas-socjeta` Maltija FM Environmental (Malta) Ltd.*

*Illi b`din id-decizjoni effettivament gew spustjati profitti mis-socjeta` Maltija FM Environmental (Malta) Ltd lis-socjeta` Irlandiza FM Environmental Ltd a skapitu ta` u bi pregudizzju lis-socjeta` rikorrenti Miclis Company Ltd, li hija azzjonista minoritarja fis-socjeta` Maltija FM Environmental (Malta) Ltd sal-lum. Gie wkoll rekat pregudizzju lis-socjeta` intimata stess.*

*Illi meta dan il-pregudizzju ngab ghal-konjizzjoni ta` Kevin Fitzpatrick, kien intlahaq ftehim li l-pregudizzju li sofra l-azzjonist minoritarju kellu jigi mitigat billi s-socjeta` Miclis Company Ltd tohrog fattura ta` management fee lis-socjeta` FM Environmental (Malta) Ltd biex il-pregudizzju jigi kkumpensat.*

*Illi din is-sistema ta` kumpens baqghet fis-sehh ghal tnax-il xahar imbaghad giet imwaqqfa unilateralment fuq istruzzjonijiet ta` Kevin Fitzpatrick f`Awwissu 2016 permezz ta` korrisondenza lil Reuben Cauchi General Manager ta` FM Environmental Malta Ltd. fejn dan gie ordnat jiddilitja mis-sistema tal-accounts tas-socjeta` Maltija FM Environmental Malta Ltd. kull transazzjoni ta` fattura li kienet diga` giet inkluza mill-1 t`April 2016 `il quddiem u ntab jinjora u ma jirrikonoxxiex transazzjonijiet futuri ta` fatturi ghal management fee mibghuta minn Miclis Company Ltd. F`korrisondenza li Kevin Fitzpatrick baghat lil Mario Farrugia fil-11 t`Awwissu 2016 dan ukoll gie ordnat biex Miclis Company Ltd tieqaf tibghat fatturi ta` "management fee" bhala kumpens.*

***It-Tieni Pregudizzju : L-ispustjar ta` profitti mis-socjeta` Maltija FM Environmental (Malta) Ltd lis-socjeta` Irlandiza FM Environmental Ltd permezz ta` "management charge" li s-***

**socjeta` Irlandiza FM Environmental Ltd kienet ta` kull sena tghabbi lis-socjeta` Maltija FM Environmental (Malta).**

*Illi minbarra l-pregudizzju suespost konsegwenza tat-tnaqqsis tal-`margin` mis-socjeta` Maltija FM Environmental (Malta) Ltd, li mis-sena 2010 `il quddiem is-socjeta` Irlandiza FM Environmental Ltd kienet u ghadha ta` kull sena tghabbi lis-socjeta` Maltija FM Environmental (Malta) Ltd b` "management charge" b`tali mod li tnaqqas il-qligh tas-socjeta` Maltija FM Environmental (Malta) Ltd u zdied il-qligh tas-socjeta` Irlandiza FM Environmental Ltd u dan a skapitu ta` u bi pregudizzju lir-rikorrenti, u lis-socjeta` intimata stess.*

*Illi inizjalment dan il-pregudizzju ghar-rikorrenti gie rikonoxxut mis-socjeta` Irlandiza FM Environmental Ltd tant hu hekk illi Mario Farrugia (li sa` Gunju 2016 kien azzjonist fis-socjeta` intimata minflok is-socjeta` rikorrenti)<sup>1</sup> inghata abbozz ta` "FM Malta shareholders terms of reference" datat Awwissu 2010 fejn kien kontemplat illi ghal kull ammont ta` "management charge" li s-socjeta` Irlandiza FM Environmental Ltd. kienet ser tghabbi fuq is-socjeta` Maltija FM Environmental (Malta) Ltd, Mario Farrugia (li dak iz-zmien kien azzjonista fis-socjeta` intimata) kien ser jigi kkumpensat proporzjonalment, ghalkemm dan tal-ahhar ma kienx ser jiehu l-ammonti dovuti b` mod immedjat biex jghin fil-"cash flow" tas-socjeta` u sahsitra f` Dicembru tas-sena 2015, Kevin Fitzpatrick bhala direttur ghan-nom u in rappresentanza tas-socjeta` FM Environmental (Malta) Ltd kiteb lil Mario Farrugia u pproponielu biex jiffirma ftehim ta` self fejn jigu kristallizzati l-ammonti dovuti lil azzjonist minoritarju u jigi miftiehem programm ta` hlas mis-socjeta` FM Environmental (Malta) Ltd lil Mario Farrugia (f`dak iz-zmien azzjonista minorejtarju tas-socjeta` intimata) fuq medda ta` hames snin.*

*Illi Mario Farrugia ma` kienx qabel mal-ammonti proposti mis-socjeta` FM Environmental (Malta) Ltd u kien ghamel kontro proposta sabiex il-ftehim jirrefletti b` mod korrett l-ammont dovut lilu qua allura azzjonist minoritarju biex jigu kkumpensat kemm ghat-tnaqqis ingust tal-`margin` fil-bejgh tal-prodotti `Grease Guardian` mis-socjeta` Maltija FM Environmental (Malta) Ltd lis-socjeta` Irlandiza FM Environmental Malta Ltd u kemm ghall-management charge li ta` kull sena s-socjeta` Irlandiza FM Environmental Ltd kienet ticcargja lis-socjeta` Maltija FM Environmental (Malta) Ltd. b` tali mod illi effettivamente gew spustjati profitti mis-socjeta` Maltija FM Environmental (Malta) Ltd lis-socjeta` Irlandiza FM Environmental Ltd a skapitu ta` u bi pregudizzju tal-allura azzjonist minoritarju.*

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<sup>1</sup> (Mario Farrugia huwa wkoll beneficial owner tas-socjeta` rikorrenti flimkien ma` martu, u f`Gunju tas-sena 2016 kien ittrasferixxa l-ishma tieghu lis-socjeta` tieghu Miclis Company Limited).

**It-Tielet Pregudizzju : Approvazzjoni tal-kontijiet tas-socjeta` sar b` mod skorrett u irregolari.**

Illi r-rikorrent Mario Farrugia insista li l-ammonti dovuti mis-socjeta` FM Environmental (Malta) Ltd jigu korrettement riflessi fil-financial statements tal-istess socjeta`, din l-insistenza lahqet il-qofol taghha fis-sena [2016] tant hu hekk illi Mario Farrugia minghajr ma gie nfirmat tnehha minn firmatarju fuq l-accounts tas-sena 2016 liema accounts gew iffirmati minn Kevin Fitzpatrick u Edmond John Fitzpatrick fil-kapacita` taghhom ta` diretturi tas-socjeta` Maltija FM Environmental (Malta) Ltd, (liema firmatarji jinzertaw li huma diretturi wkoll tas-socjeta` Irlandiza FM Environmental Ltd) u dana minghajr ma ssejhet laqgha tal-Bord tad-diretturi tas-socjeta` FM Environmental (Malta) Ltd biex jigu kkunsidrati u approvati l-accounts.

Illi saru diversi tentattivi mir-rikorrenti biex jaslu fi ftehim mal-intimati izda dan il-ftehim ma nltahaqx tant hu hekk illi s-socjeta` rikorrenti Miclis Company Ltd avzat fit-3 ta` Settembru 2017 lil awdituri tas-socjeta` intimata FM Environmental (Malta) Ltd li sal-31 ta` Marzu 2017, l-ammonti dovuti lilha mis-socjeta` rikorrenti FM Environmental (Malta) Ltd kienu jammontaw ghal tliet mija u hamest elef mitejn u sittax-il ewro (€305,216) in kwantu ghal ammont ta` self u seba` u tmenin elf erba` mija u sbatax-il ewro u disgha u hamsin centezmu (€87,417.59) in kwantu ghall-fatturi ta` management fees. Sal-4 ta` Gunju 2018, is-somma ta` seba` u tmenin elf erba` mija u sbatax-il ewro u disgha u hamsin centezmu (€87,417.59) telghet ghall-ammont ta` mija tnejn u sebghin elf mitejn wiehed u disghin ewro.

Illi f` Settembru tas-sena 2017 f` laqgha tal-Bord tad-diretturi tas-socjeta` FM Environmental Ltd li saret fl-Irlanda gew pprezentati abbozz tal-accounts konsolidati tal-Grupp FM Environmental li kienu jinkludu allura l-accounts tas-socjeta` Maltija FM Environmental (Malta) Ltd.

Illi Mario Farrugia bhala direttur tas-socjeta` intimata ilmenta li l-accounts konsolidati, ma setghux jigu approvati qabel ma jigu approvati l-accounts tas-socjeta` Maltija FM Environmental (Malta) Ltd u ghal dan il-ghan kellha l-ewwel tisesejjah laqgha tal-Bord tad-diretturi tas-socjeta` FM Environmental (Malta) Ltd u illi minkejja dan l-accounts konsolidati tal-Grupp FM Environmental gew approvati.

Illi fl-istess laqgha tal-bord tad-diretturi tas-socjeta` Irlandiza FM Environmental Ltd, fuq insistenza ta` Mario Farrugia li huwa direttur u

segretarju tas-socjeta` FM Environmental (Malta) Ltd giet imsejha laqgħa tad-diretturi tas-socjeta` Maltija FM Environmental (Malta) Ltd bl-iskop li jigu diskussi u approvati accounts tas-socjeta` .

Illi ghalkemm Mario Farrugia huwa s-segretarju tas-socjeta` FM Environmental (Malta) Ltd huwa ma thallix izomm il-minuti tal-laqgħa tal-Bord tad-diretturi u d-direttur Kevin Fitzpatrick kien invita għal din il-laqgħa lil Gerry Torley segretarju tas-socjeta` Irlandiza FM Environmental Ltd. u innominah biex izomm il-minuti, liema minuti ttieħdu b`mod inkomplet.

Illi l-istess Kevin Fitzpatrick kien invita għal din il-laqgħa lil Darragh Cotter li huwa l-awditur tas-socjeta` Irlandiza FM Environmental Ltd. biex jipprezenta l-accounts lil board tad-diretturi ta` FM Environmental (Malta) Ltd, liema individwu la jiformaw parti mill-Bord tad-diretturi tas-socjeta` Maltija FM Environmental (Malta) Ltd u wisq anqas is-segretarju jew l-awditur tal-imsemmija socjeta` .

Illi fl-imsemmija laqgħa tal-Bord tad-diretturi, gew prezentati set ta` accounts li ma kienux jinkludu l-ammonti dovuti lis-socjeta` rikorrenti Miclis Company Ltd u illi l-abbozz ipprezentat lill-Bord tad-diretturi kien jinkludi nota fis-sens illi "During the financial year ending 31st March 2017, the company has received claims from a minority shareholder. As the board deems that these claims are unfounded, there is no expectation of a liability that may arise on these claims" u Illi din il-determinazzjoni saret qabel ma biss saret deliberazzjoni mill-Bord tad-diretturi tant hu hekk illi l-abbozz tal-accounts kien diga` jinkludi d-deliberazzjoni tal-Board qabel ma saret id-diskussjoni u l-accounts gew iffirmati minn Kevin Fitzpatrick u Edmond John Fitzpatrick b`astensjoni tar-rikorrent Mario Farrugia.

**Ir-Raba` Pregudizzju : il-ksur tal-obbligi fiducjarji u statutorji u nuqqas ta` governanza tajba u xierqa da parti tad-diretturi Edmond John Fitzpatrick u Kevin Fitzpatrick**

Illi d-diretturi Edmond John Fitzpatrick u Kevin Fitzpatrick naqsu li jagixxu "b`onestà u bona fide u fl-ahjar interessi tal-kumpannija" FM Environmental (Malta) Ltd ai terminu tal-artikolu 136A tal-Kap 386 tal-Ligijiet ta` Malta kull meta taw vantagg lis-socjeta` Irlandiza FM Environmental Ltd a skapitu tas-socjeta` Maltija FM Environmental (Malta) Ltd u spustjaw profitt bi transazzjonijiet li mhumiex `arms length` mis-socjeta` Maltija FM Environmental (Malta) Ltd għas-socejta`

*Irlandiza FM Environmental Ltd bi pregudizzju ghall-azzjonisti minoritarji tas-socjeta` FM Environmental (Malta) Ltd.*

*Illi d-diretturi Edmond John Fitzpatrick u Kevin Fitzpatrick naqsu ripetutamente li jmessu s-socjeta` b`governanza tajba u xierqa meta naqsu li jsejhu laqghat tad-diretturi b`mod regolari, meta naqsu jiddikjarw il-kunflitt ta` interess li kellhom, meta gew ffirmati l-kontijiet annwali tas-socjeta` FM Environmental (Malta) Ltd minghajr ma gew segwiti l-proceduri appoziti skont il-ligi b`mod li jledu d-drittijiet tar-rikorrenti ai termini tal-artikolu 402 tal-Kap. 386.*

### **Talbiet**

*Ghaldaqstant ir-rikorrenti jitolbu lil din il-Qorti bir-rispett li joghgobha a tenur tal-artikolu 402 tal-Att dwar il-Kumpaniji taghti rimedji, taht dawk il-kondizzjonijiet li jidhrilha xierqa u minghajr limitazzjoni tat-talba, li jinkludi li :*

*(a) tirregola t-tmexxija tal-affarijiet tas-socjeta` FM Environmental (Malta) Ltd fil-futur, billi taghti dawk il-provvedimenti li l-Qorti jidhrilha xierqa u opportuni sabiex l-interessi tas-socjeta` rikorrenti jigu ssalvagwardjati ; u*

*(b) ghal-futur tirrestringi jew tipprojbixxi l-ispustjar ingust ta` profitt mis-socjeta Maltija FM Environmental (Malta) Ltd lejn is-socjeta` Irlandiza FM Environmental Ltd permezz ta` management charges ; u*

*(c) ghal-futur tordna li l-margini fuq bejgh ta` prodotti mis-socjeta` Maltija FM Environmental (Malta) Ltd lejn is-socjeta` Irlandiza FM Environmental Ltd terga` titla` minn hmistax fil-mija (15%) ghal hamsa u ghoxrin fil-mija (25%) ; u*

*(d) issib lid-diretturi Edmond John Fitzpatrick u Kevin Fitzpatrick hatja ta` ksur tal-obbligi tagghom u tipprovdi ghall-hlas ta` danni li soffrew ir-rikorrenti konsegwenza tan-nuqqasijiet tagghom, wara li l-istess Qorti tillikwida l-pregudizzju finanzjarju li sofriet is-socjeta` rikorrenti bhala resultat tal-agir tal-istess diretturi intimati.*

Rat id-dokumenti li kienu prezentati mar-rikors.



Rat ir-risposta li pprezentaw l-intimati kollha fit-12 Lulju 2018 li taqra :-

1. *Illi l-esponenta hija debitament awtorizzata taghmel din ir-risposta u tikkonfermha bil-guarment ghan-nom tal-intimati u tal-kumpanija intimata peremzz ta` prokura specjali moghtija lilha mill-istess intimati mis-socjeta` intimata, u d-dikjazrazzjonijiet minnha maghmula u kkonfermati f`din ir-risposta huma ibbazati fuq fatti u cirkostanzi hekk kif dedotti lilha mill-mandanti taghha.*

2. *Illi t-talbiet it-talbiet tas-socjeta` rikorrenti huma nfondati fil-fatt u fid-ditt kif ser jigi ppruvat waqt it-trattazzjoni tal-kawza, u ghandhom jigu michuda bl-ispejjes.*

3. *Illi l-intimati Kevin Fitzpatrick u Edmond John Fitzpatrick dejjem imxew fl-ahjar interess tal-kumpanija FM Environmental (Marta) Limited.*

4. *FM Environmental (Marta) Limited hija parti minn grupp ta` kumpaniji fejn il-familja Fitzpatrick huma azzjonisti u maggoranza.*

5. *Illi s-socjeta` FM Environmental (Malta) Limited kienet mwaqqfa f` Malta mis-socjeta` Irlandiza FM Environmental Limited sabiex jigi mmanifatturat f` Malta il-prodott maghruf bhal "Grease Guardion", bl-iskop li tali prodott jinbiegh eskussivament lill-istess FM Environmental Limited.*

6. *Illi wahda mir-ragunijiet specifici ghaliex tintghazel Malta ghal din it-tip ta` struttura hija illi Malta ma timponix limiti fuq "transfer pricing" u ghalhekk il- prezz ta` prodotti mibjughin bejn is-socjeta` estera u s-socjeta` lokali tista` tigi ddeterminata fl-interessi tal-grupp.*

7. *Illi tali prezz jigi ddeterminat ukoll skont ragunijiet fiskali.*

8. *Illi l-intimati mhux talli ma hadmux kontra l-interessi ta` Mario Farrugia imma bil-kuntrarju dejjem fdawh u apprezzaw il-kontribut tieghu tant illi offrewlu l-kariga ta` direttur fuq is-socjeta` Irlandiza FM Environmental Limited, liema kariga huwa accetta, kif ukoll offrewlu azzjonijiet fl-istess socjeta` Irlandiza.*

9. *Illi kull decizjoni dwar prezz dejjem ittiehdet fl-ahjar interessi tal-grupp u ta` kull socjeta` fil-grupp, u dan kif ser jigi spjegat waqt it-trattament tal-kawza.*

10. *Illi inkwantu l-ewwel pregudizzju allegat fir-rikors promotur, li minnu huma naxxenti l-allegati pregudizzji l-ohra, wiehed irid jifhem illi t-tnaqqis fil-margini tal-bejgh tas-socjeta` Maltija, gie rifless minn tnaqqis fil-margini tal-biegh tas-socjeta` Irlandiza b`decizjoni mehudha fl-interess tal-grupp u l-kompetittivita` tieghu, u li kienet imposta mis-suq li fih jopera l-grupp, kif ser jigi spjegat waqt it-trattament tal-kawza.*

11. *Illi kien l-istess Mario Farrugia illi mexa kontra l-interessi tal-kumpanija FM Environmental (Malta) Limited bl-agir tieghu, fir-rigward ta` liema l-istess kumpanija qed tirtirizza kull dritt.*

12. *Salv eccezzjonijiet ulterjuri li jistghu jingiebu skont il-ligi.*

Rat il-lista tax-xhieda.

Rat illi fl-udjenza tas-27 ta` Jannar 2020 il-partijiet qablu illi waqt laqgħa straordinarja tas-socjeta` FM Environment (Malta) Ltd li saret dak ix-xahar stess, Mario Farrugia tnehha minn direttur u *company secretary* tal-istess socjeta`.

Semghet ix-xhieda u rat il-provi li tressqu fil-kors tal-kawza.

Rat in-noti ta` osservazzjonijiet.

Semghet is-sottomissjonijiet tal-ahhar li saru bil-fomm.

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

Rat l-atti l-ohra.

## **II. Provi**

FM Environment (Malta) Ltd ("**FM Malta**") kienet registrata Malta fit-22 ta` April 1998.

**Mario Farrugia** xehed illi huwa beda fl-impjieg tieghu ma` FM Malta fl-1998.

L-azzjonisti ta` FM Malta huma l-kumpannija rikorrenti ("**Miclis**") [kumpannija registrata Malta] li ghandha Ordinary B shares u FM Environmental Ltd ("**FM Ireland**") li ghandha Ordinary A shares u li hija registrata fl-Irlanda.

Waqt li Miclis hija kontrollata minn Mario u Clara Farrugia, l-azzjonisti ta` FM Ireland huma l-familja Fitzpatrick.

Fis-sena 2000 Mario Farrugia ("**Farrugia**") tramite Miclis Limited ("**Miclis**") akkwista 15% tal-Ordinary B shares ta` FM Malta u kien appuntat direttur taghha.

Fl-2002 Farrugia kien offrut impjieg *full time* ma` FM Ireland. F` April 2007 kien appuntat direttur taghha.

Fl-2007 l-azzjonisti l-ohra ta` FM Malta li bejniethom kellhom 35% tal-ishma riedu jbieghu l-ishma taghhom. Bi qbil ma` FM Ireland, Miclis akkwistat 5% tal-ishma li kienu ghall-bejgh. Ir-rimanenti 30% tal-ishma kienu akkwistati minn FM Ireland.

Ir-relazzjoni kontrattwali ta` bejn FM Ireland u Miclis hija regolata bil-Memorandum u Articles of Association ta` FM Malta ("**M&A**") ghaliex ma kienx sar *shareholders agreement* bejniethom.

FM Malta topera fis-settur tal-*water and waste-water*. Tipproduci prodotti li tbiegh lill-klijenti taghha, inkluz lil FM Ireland ; din imbaghad tbiegh dawk il-prodotti fis-swieq taghha.

Il-prezz tal-prodotti ta` FM Malta sija dawk li tbiegh hi direttament lil klijenti taghha kif ukoll dawk li tbiegh lil FM Ireland kien stabbilit waqt laqgħa tal-bord tad-diretturi qabel sari l-bejgh tal-ishma fl-2007.

Il-margini tal-profitt għall-bejgh dirett minn FM Malta kien ivarja.

Il-margini tal-profitt mill-bejgh tal-prodott Grease Guardian li kien manifatturat minn FM Malta u mibjugh lil FM Ireland kien stabbilit fi 30%. Dan baqa` fis-sehh sa Awwissu 2010 meta bi qbil il-margini tal-profitt nizel minn 30% għal 25%.

Fit-3 ta` Gunju 2010, wara talba ta` Edmond John Fitzpatrick, saret laqgħa informali bejn Mario Farrugia, l-istess Fitzpatrick u Gerry Daly, l-awditur ta` FM Ireland.

**Edmond John Fitzpatrick** ikkonferma illi s-sitwazzjoni tal-grupp ma kinitx wahda felici konsegwenza tas-sitwazzjoni finanzjarja gewwa r-Renju Unit u l-Irlanda. Zied jghid illi kienu hu u Daly li pproponew illi jsir trasferiment tal-profitt bejn il-grupp fis-sens illi jigi jidher illi l-profitti li kienet qegħda tagħmel FM Malta jigu devjati sabiex jidhru li saru minn FM Ireland. Biex isir dan FM Malta kellha tnaqqas il-prezz tal-bejgh u l-*profit margin* fuq bejgh lil FM Ireland sabiex il-profitt jibda jsir minn FM Ireland. Alternattivament kien propost illi fl-ahhar tas-sena FM Ireland tohrog fattura ta` *management fee* fil-konfront ta` FM Malta.

**Farrugia** xehed illi huwa ma kienx qabel dak li kien propost waqt il-laqgħa tat-3 ta` Gunju 2010 għaliex dan kien ser jimpatta fuq id-dhul tiegħu personali minn FM Malta. Daly u Fitzpatrick insistew illi t-trasferiment ta` profitt kien necessarju sabiex FM Ireland issalva.

**Darragh Cotter** ("**Cotter**") xehed illi fiz-zmien meta FM Ireland kienet tinsab tiffaccja sitwazzjoni finanzjarja diffiċli kien hemm bzonn ta` azzjoni konkreta sabiex din tidher illi qegħda tagħmel profitt. B`hekk setgħu jigu evitati diffikultajiet mal-bank fl-Irlanda u aghar minn hekk il-falliment tagħha. Sostna li li kieku FM Ireland kellha tfalli kienet tfalli magħha FM Malta għaliex dawn iz-zewg kumpanniji kienu parti minn grupp wiehed.

Fl-4 ta` Gunju 2010 saret laqgħa tal-Bord tad-Diretturi li għaliha kienu Farrugia, Edmond John Fitzpatrick, Kevin Fitzpatrick u Gerry Daly. Waqt din il-laqgħa ma sar ebda accenn għal dak kien diskuss fil-laqgħa nformali ta` lejliet.

**Farrugia** xehed illi l-kwistjoni tat-trasferiment tal-profitti rega` gamet ftit tal-jiem wara. Waqt laggha ma` Edmond John Fitzpatrick u Gerry Daly, ighid li kien prezentat b` dokument datat 23 ta` Gunju 2010 u ntitolat *Heads of Terms*. Intalab jaccetta *Transfer Pricing Policy Set annually* b` mod li l-*manufacturing margin* u l-profitti li jsiru minn FM Malta fuq prodotti li jinbieghu lil FM Ireland kellhom jigu rikonsiderati darba fis-sena. Riedu wkoll li jaccetta li FM Ireland titlob il-hlas ta` *management fee* minghand FM Malta. Din kellha tithallas kull sena abbazi tal-bejgh li taghmel FM Malta. Ma saret l-ebda proposta dwar kumpens ghall-profitti li kienet ser titef FM Malta.

**Farrugia** xehed li huwa oppona dak li kien qed jigi propost ghaliex b`dak propost FM Ireland kienet ser tnaqqar il-profitt ta` FM Malta u b`hekk jonqos il-valur taghha, apparti li Miclis bhala azzjonista minoritarja ma kien ser ikollha protezzjoni ghas-sehem taghha, apparti li Miclis kienet se garrab nuqqas.

**Farrugia** xehed illi nonostante n-nuqqas ta` qbil min-naha tieghu, fit-22 ta` Lulju 2010 Pat Kane, direttur finanzjarju ghal FM Malta u FM Ireland, fuq struzzjonijiet ta` Edmond John Fitzpatrick ikkomunikat ma` Price Waterhouse Coopers ("**PWC**") sabiex l-*accounts* ikunu jirriflettu *management fee* ta` ammont ta` €75,060 favur FM Ireland. Apparti l-impozizzjoni ta` *management fee*, il-bejgh ta` FM Malta favur FM Ireland kien diga nizef minn €980,876 fl-2009 ghal €466,645 fl-2010.

B`email tas-27 ta` Lulju 2010 Kevin Fitzpatrick, direttur manigerjali ta` FM Malta u FM Ireland, irrikonoxxa li t-tibdiliet li kienu sehew saru minghajr konsiderazzjoni ghad-drittijiet tal-azzjonista minoritarju u li tali tnaqqis fil-profitt ta` FM Malta ma setax isir ghaliex 20% tal-profitti kienu ta` Miclis.

**Kevin Fitzpatrick** xehed illi dak iz-zmien hu kien tal-fehma illi l-azzjonijiet u d-decizjonijiet li kienu ttiehdu minn missieru Edmond John Fitzpatrick u mill-awditur tal-kumpannija Gerry Daly kienu jmorru kontra l-interess ta` Miclis u ghalhekk kellha tkun ikkompensata. Kien ghalhekk li harget l-idea li jsir *shareholders` agreement* li jkun jirrifletti l-interessi tal-partijiet kollha.

**Kevin Fitzpatrick** zied jghid illi ma kien hemm ebda obligu da parti ta` FM Ireland illi taghti kumpens lil Farrugia tramite Miclis. Din kienet decizjoni li ha hu personalment favur persuna li kien iqis bhala habib u kollega li seta` jaghti kontribut siewi fil-kumpannija. Zied jghid

illi ressaq dik il-proposta quddiem il-bord ta` FM Ireland u rnexxielu jikkonvinci lid-diretturi l-ohra sabiex jithallas kumpens ta` 20% favur Farrugia. Huwa ra li l-hlas ta` dak il-kumpens seta` jservi bhala mezz ta` kif izommu lil Farrugia bhala parti mill-grupp.

**Farrugia** xehed illi dak iz-zmien Kevin Fitzpatrick kien assigurah li kien mehtieg jintlahaq kompromess fejn waqt li jigi rikonoxxjut id-dritt ta` Miclis ghal 20% tal-profitti, fl-istess waqt jigi assigurat li FM Ireland issalva. Ghalhekk accetta illi s-sehem ta` Miclis bhala azzjonista mill-profitti li taghmel FM Malta kienu ser jibqghu fil-kumpannija sabiex jigi assigurat *cashflow* tajjed u eventwalment meta titjeb is-sitwazzjoni jigi rizarcit.

**Kevin Fitzpatrick** ikkonferma illi bejn l-2009 u l-2010 Mario Farrugia tramite Miclis ma kienx ha dividends ghaliex kien accetta li l-ammont spettanti jibqghufil-kumpannija sabiex ikun hemm likwidita`. Id-dividends ghas-2009-2010 kien jammontaw ghal €38,000. Mario Farrugia qatt ma thallas dan l-ammont.

F`Dicembru 2012 FM Ireland ipproponiet lil Farrugia illi jcedi s-sehem tieghu ta` 20% f`FM Malta u minflok jakkwista l-5% tal-ishma f`FM Ireland. Is-sehem ta` Farrugia f`FM Malta kien stmat illi jiswa` £119.871. Farrugia ma accettax l-offerta.

**Kevin u Edmond John Fitzpatrick** xehdu illi l-hsieb tagghom ma kienx li jeliminaw lil Farrugia izda li jdahhluh bhala azzjonista ta` FM Ireland u b`hekk ikollu gwadann mill-istruttura tal-kumpannija kollha.

**Farrugia** xehed illi ma setax jifhem ghaliex riedu jnehhu lilu minn FM Malta tant li FM Ireland baqghet tippressa fuqu sabiex Miclis ma tibqax azzjonista ta` FM Malta.

**Edmond John Fitzpatrick** xehed illi bejn 60% u 70% tal-profitti li kienet tiggenera FM Malta kienu gejjin minn bejgh li kienet taghmel direttament lil FM Ireland. Il-bqija tal-profitt taghha kien generat minn bejgh lill-kljienti ohra.

**Cotter**, wiehed mill-awdituri ta` FM Ireland, xehed illi fis-sena 2014 FM Ireland espandiet in-negozju taghha lejn l-Amerka. Spjega li sabiex il-prodott taghha jkun kompetittiv fis-suq Amerikan il-*profit margin* ta` FM

Malta kellu jitnaqqas. Din kienet decizjoni fl-interess tal-grupp kollu. Dak iz-zmien il-prodott kien qiegħed jigi esportat lejn suq gdid u allura il-prezz tal-prodott kellu jkun vantaggjuż. It-tnaqqis fil-*profit margin* kien intiz sabiex jagħmel tajjeb għal tnaqqis fil-prezz tal-prodott. Dan in-negozju mar tajjeb hafna u l-bejgħ ittrippla fi ftit snin. FM Malta bdiet tipproduci kwantita` akbar tal-prodott li bieghet lil FM Ireland ; għalhekk FM Malta wkoll ibbenefikat mill-bejgħ tal-prodott lejn l-Amerka.

**Cotter** ikkonferma illi l-prodott kien qiegħed jigi esportat direttament minn Malta lejn l-Istati Uniti mingħajr ma jgħaddi mingħand FM Ireland. Madanakollu zied jgħid illi FM Malta ma setgħetx tbiegħ il-prodott direttament l-Istati Uniti għaliex l-arrangament bejn FM Malta u FM Ireland kien li kull waħda kellha s-suq rispettiv tagħha fejn tbiegħ direttament. FM Malta kienet tkopri pajjizi fil-Mediterran u l-Afrika waqt li FM Ireland kienet tkopri swieq oħra nkluz l-Istati Uniti. Għalhekk il-bejgħ tal-prodott fl-Amerika bilfors kellu jgħaddi tramite FM Ireland.

Fis-26 ta` Jannar 2015 Kevin Fitzpatrick informa lil Farrugia li l-*profit margin* fuq il-prodotti li FM Malta tbiegħ lil FM Ireland kien ser jonqos minn 25% għal 15%.

**Cotter** xehed illi kien hu li kien ta l-parir lil Kevin Fitzpatrick sabiex jitnaqqas il-*profit margin*. Tak dan il-parir meta diga` kien jaf ben tajjeb li Mario Farrugia kien kuntrarju għal li jsir dan.

Minn ezercizzju illi sar irrizulta illi hadd mill-impjegati ma kien sejjer igarrab xi telf fil-qligħ tiegħu konsegwenza tat-tnaqqis fil-*profit margin* ta` FM Malta. Madanakollu irrizulta illi Miclis kienet ser igarrab nuqqas fid-dividend tagħha.

**Reuben Cauchi** ikkonferma illi bhala General Manager ta` FM Malta hu qatt ma soffra telf. Fl-istess waqt ikkonferma illi Mario Farrugia tramite kien qiegħed igarrab telf konsegwenza tad-decizjonijiet interni li kienu ttieħdu.

**Cotter** xehed illi għalkemm Mario Farrugia kien qiegħed jigi affettwat b`mod negattiv, fl-istess waqt il-manuvraa kienet meħtiega sabiex tagħti spinta lin-negozju gdid fis-suq Amerikan.

**Farrugia** xehed illi t-tnaqqis fil-profit margin ma kienx jaghmel sens ghaliex sas-sena 2015 FM Ireland kienet regghet bdiet tiggenera l-profitti. Farrugia talab li biex tkun ikkompensata ghat-telf ta` introjtu FM Malta kienet ser tohrog fattura ta` *management fee* kontra FM Ireland. L-ewwel fattura kienet dik tas-16 ta` Marzu 2015. Dan l-arrangement dam fis-sehh ghal sena shiha u l-hlas sar minn FM Ireland.

**Kevin Fitzpatrick** ikkonferma illi l-arrangement twaqqaf b`decizjoni tal-bord tad-diretturi ta` FM Ireland.

**Reuben Cauchi** kkonferma illi kien Kevin Fitzpatrick illi talbu jwarrab il-fatturi ghaliex il-kwistjoni kienet ser tigi rizolta bejn Kevin Fitzpatrick u Farrugia.

**Farrugia** xehed illi f` Dicembru 2015 Kevin Fitzpatrick ippropona li jsir ftehim dwar *loan agreement* ghall-ammonti dovuti lil Farrugia tramite Miclis. Farrugia ressaq il-proposti tieghu. Skont il-ftehim Farrugia kellu jircievi minghand FM Ireland is-somma ta` €266,931 in kwantu ghal €38,252 rapprezentanti *dividends* ghas-sena 2009 u 2010 u l-ammont ta` €228,679 rapprezentanti kumpens ghal *management charges* li FM Ireland imponiet fuq FM Malta bejn is-sena 2010 u s-sena 2015. Dan l-ammont kellu jithallas fuq medda ta` 60 xahar.

**Kevin Fitzpatrick** ikkonferma illi fis-sena 2015 id-ditta tal-awdituri Daly Park tal-Irlanda abbozzat *loan agreement* li kellu jigi ffirmat bejn FM Ireland u Farrugia. Permezz ta` dan il-ftehim Farrugia kellu jigi rizarcit ghas-sehem ta` Miclis ghal 20% tal-profitti li kienet ghamlet FM Malta izda li gew imdawwra fuq FM Ireland. Fl-abbozz inkiteb illi sal-31 ta` Marzu 2015 Farrugia kellu jithallas is-somma ta` €203,352 liema somma kienet tkopri l-ammont dovut ghaz-zmien kollu ta` bejn is-sena 2010 u s-sena 2015.

Is-sitwazzjoni finanzjarja ta` FM Ireland bdiet titjieb lejn is-sena 2015 u baqghet tajba matul is-snin ta` wara.

**Kevin Fitzpatrick** ikkonferma illi l-ammont indikat fl-abbozz tal-*loan agreement* baqa` ma thallasx lil Farrugia u li dak kien imwieghed lil Farrugia fir-rigward ta` radd lura ghas-sehem tieghu ta` 20% spicca kien biss *a gentleman`s agreement*.



Il-*loan agreement* baqa` ma kienx iffirmit ghalix il-ftehim ma kienx accettabbli ghall-azzjonista maggoritarju. Kemm Kevin Fitzpatrick u kif ukoll Mario Farrugia kkonfermaw illi kien hemm dizgwid dwar l-ammonti dovuti lil Miclisa.

**Cotter** spjega illi l-ammont rifless fl-abbozz tal-*loan agreement* kien jirrapprezenta 20% tal-*management fee* li kienet giet imposta. Xehed illi l-kalkolu kien sar abbazi ta` informazzjoni li kien tah Kevin Fitzpatrick wara ftehim li kien intlahaq bejn l-istess Fitzpatrick u Farrugia.

F`April 2015 Edmond John Fitzpatrick ceda l-ishma tieghu lit-tliet uliedu : Kevin, Eamon u Cormac ahwa Fitzpatrick. Mal-bidla fl-azzjonisti, dawn bdew jikkellmu dwar tibdiliet li bhala azzjonisti maggoritarji kienu sejrin jimplementaw. Fl-ewwel lok, Miclis ma kinitx sejra tibqa intitolata ghal kumpens minhabba tnaqqis fil-*profit margin*. Kienet ser tigi mposta *management fee* kull xahar.

B`email tal-11 ta` Awwissu 2016 Kevin Fitzpatrick ghamilha cara li FM Ireland ma kinitx sejra tibqa` taccetta fatturi minghand Miclis dwar ammonti dovuti lilha bhala kumpens. Fl-istess email zied jghid illi FM Ireland "*will retain the right as majority shareholder to review the transfer pricing and management charges (either up or down) annually.*" Kien ikkonfermat ukoll li FM Ireland kienet ser tibda timponi *management charge* u li "*FM will not be paying monies to you or Miclis as perceived compensation for this charge.*"

**Kevin Fitzpatrick** ikkonferma li dawk id-decizjonijiet ittiehdu mill-bord tad-diretturi ta` FM Ireland qua azzjonista maggoritarja ta` FM Malta. Il-bord tad-diretturi ta` FM Malta ma kienx ikkonsultat qabel ittiehdu d-decizjonijiet. Spjega illi Mario Farrugia kien qiegħed jorbot idejn il-grupp in kwantu ma riedx li jittiehdu decizjonijiet li finalment kienu ser jaffettwaw l-introjtu tieghu u għalhekk l-azzjonisti maggoritarji hadu r-riedni f`idejhom waqt li għamluha cara li ma kinux ser ihallu lill-azzjonista minoritarju jxekkilhom. Zied jghid illi għalkemm kien hemm qbil li Mario Farrugia kellu jigi kkumpensat fl-istess waqt Farrugia ppretenda kumpens għal kull bidla fil-*price margin* izda dan ma kienx jagħmel sens. Jghid illi bl-agir tieghu Farrugia rabat idejn il-kumpanija li ma setgħet qatt tbiddel il-*price margin* għaliex jekk tbiddu kienet tispicca trid tagħti kumpens lil Farrugia.

**Fil-kontroezami Kevin Fitzpatrick** xehed li kull decizjoni li ttiehdet mill-bord tad-diretturi ta` FM Ireland kienet immirata lejn l-

interess generali tal-grupp. Spjega illi d-diffikultajiet finanzjarji ta' wahda mill-kumpanniji kienet sejra timpatta b`mod negattiv fuq il-kumpanniji l-oħra. Jekk FM Ireland, bhala l-azzjonista maggoritarja, tfalli kienet sejra tfalli FM Malta wkoll. Ghalhekk fil-perjodu ta' bejn is-sena 2010 u s-sena 2015, meta minhabba krizi ekonomika fil-pajjiz, FM Ireland garrbet diffikultajiet serji, din kellha bzonn is-sostenn ta' FM Malta sabiex tibqa` topera.

**Farrugia** xehed illi l-ammonti kollha dovuti lil Miclis ma kinux inkluzi fl-*accounts* ta' FM Ireland u ghalhekk irrifjuta li jiffirma l-*accounts*. Kompla jghid illi finalment l-*accounts* xorta wahda gew approvati u ffirmati minn Kevin Fitzpatrick u Edmond John Fitzpatrick minghajr ma saret laqgħa tal-bord.

**Edmond John Fitzpatrick** qal illi ma kien hemm xejn hazin bil-fatt li hu ffirmat l-*accounts* minflok Farrugia ghaliex hu kien taht l-impresjoni li kwalunkwe tnejn mid-diretturi setghu jiffirmaw l-*accounts*. Zied jghid illi ghalkemm ma saritx laqgħa tal-bord tad-diretturi ta' FM Malta għall-approvazzjoni tal-*accounts* tagħha, dawn gew diskussi waqt laqgħa tal-bord ta' FM Ireland.

**Farrugia** xehed illi Kevin Fitzpatrick beda jikkontesta l-ammonti li kien qed jitlob. Sahansitra talbu jieqaf jibghat fatturi dwar kumpens għal telf fil-margini tal-profitt. Fil-fatt il-fatturi li ntbagħtu gew ikkancellati.

**Fil-kontroezami Kevin Fitzpatrick** ikkonferma illi wara April 2016 ma gewx accettati aktar fatturi mingħand Miclis. Ghalkemm Miclis baqgħet tibghat il-fatturi lil FM Ireland dawn ma thallsux.

F`Settembru 2016 Miclis avzat lil PWC illi sal-31 ta' Marzu 2017, Miclis kellha tircievi s-somma ta' €305,216 rapprezentanti self u s-somma ta' €87,415 rapprezentanti fatturat.

**Cotter** xehed illi f`April 2017 Mario Farrugia kien dispot illi jintlahaq kompromess u li ghalhekk kien ser jaccetta hlas fl-ammont ta' €240,000 bil-kundizzjoni li kull fattura mahruga minn Miclis minn April 2016 `il quddiem kellha tigi kkancellata.

Fit-28 ta` Settembru 2017 saret laqgħa tal-bord tad-diretturi ta` FM Ireland fejn gew ipprezentati għall-approvazzjoni l-*consolidated accounts* tal-grupp.

**Farrugia** xehed illi peress illi l-*final accounts* ta` FM Malta kienu għadhom ma gewx diskussi, il-figuri għal FM Malta ma setghux jitnizzlu fil-*consolidated accounts* tal-grupp. Zied jghid illi bhala att ta` ritaljazzjoni Kevin Fitzpatrick wiegeb illi l-azzjonisti maggoritarji kienu diga` hadu d-decizjoni tagħhom u li l-azzjonista minoritarju ma setax iwaqqaf l-approvazzjoni tal-*consolidated accounts*. Inghad lilu wkoll li l-pretensjoni tiegħu kienet giet trattata u meqjusa bhala infondata. Il-*financial statements* gew finalizzati qabel saret il-laqgħa tal-bord.

Wara l-laqgħa tal-bord ir-relazzjoni bejn l-azzjonista minoritarju u dawk moggoritarji baqgħet kull ma jmur sejra għall-aghħar u Farrugia beda jigi mogħti l-geħb billi kien eskluż minn kull decizjoni inkluz decizjonijiet importanti dwar l-operat ta` FM Malta. Lanqas ma kien baqa` jigi kkopjat bil-korrispondenza u ma kienx mistieden jattendi għal-laqgħat.

**Reuben Cauchi** kkonferma li kien hemm dizgwid bejn Farrugia u Kevin Fitzpatrick u li maz-zmien Farrugia beda jigi mwarrab u eskluż minn dak li kellu x`jaqsam mal-kumpanija. Spjega li parti mid-dizgwid bejn Farrugia u Fitzpatrick kien geħ mill-fatt illi FM Ireland ma riditx li FM Malta tiffoka fuq is-suq lokali. FM Ireland riedet li FM Malta tibqa` tipproduci xogħol għal FM Ireland. Din it-tip ta` produzzjoni kellha profit margin ferm icken minn bejgħ lill-klijenti fis-suq lokali. B`decizjonijiet ta` dan it-tip FM Malta ma kellix fejn tikber u tespandi għaliex ix-xogħol kollu li kienet tagħmel għal FM Ireland kien wieħed ripetitiv.

**Farrugia** xehed illi l-agħir ta` Kevin Fitzpatrick kien immirat sabiex iħares esklussivament l-interessi ta` FM Ireland.

F`Mejju 2018 l-azzjonisti ta` FM Ireland talbu lil Farrugia sabiex jirriżenja minn direttur tagħha. Farrugia rriżenja minn direttur f`Mejju 2018 u minn impjegat f`Settembru 2018.

**Farrugia** xehed illi sat-28 ta` Ottubru 2018 Miċlis kellha tithallas is-somma ta` €480,332, eskluż imghax, in kwantu s-somma ta` €305,216 tirrorprezenta self li jmur lura sas-sena 2009 u s-somma ta` €175,116 rappreżentanti fatturat għal-telf ta` profitti.

**Fil-kontroezami Farrugia** xehed illi FM Malta Ltd kienet tbiegh bejn 50% u 70% tal-prodotti lil FM Ireland. Sas-sena 2010 l-*profit margin* ta` FM Malta fuq il-prodotti mibjugh lil FM Ireland kien ta` 30%. Kien biss fis-sena 2010 li bdiet issir referenza ghal *transfer pricing*.

**Farrugia** xehed illi minhabba l-fatt illi FM Ireland kienet tinsab f`sitwazzjoni finanzjarja difficili, fejn anke kecciet xi impjegati u naqqset il-pagi, huwa fittex li ma jpoggix aktar pressjoni fuq il-grupp u ghalhekk accetta li jsir trasferiment tal-profitti minn FM Malta ghal FM Ireland sabiex FM Ireland setghet tirkupra finanzjarjament. Spjega li dan it-trasferiment tal-profitti kien biss self li finalment ried jintradd lura lil FM Malta. Minn dawn il-profitti huwa kellu s-sehem ta` 20%. Spjega li konsegwenza ta` dan huwa ilu sa mis-sena 2009 ma jithallas *dividends*.

Sahaq illi ghalkemm kien hemm tentattivi sabiex jigi ffirmat *shareholders loan agreement*, baqa` qatt ma ntlahaq ftehim dwar l-ammont dovut. Spjega illi l-intimati bdew jinsistu li s-sehem ta` Miclis ta` 20% kellu jinhadem bhala persentagg mit-80% li rceview huma bhala profitti. Farrugia mill-banda l-oħra sahaq illi l-20% kellhom jinhadmu fuq it-total tal-profitti. Ghalkemm saru diversi skambji ta` proposti fl-ahhar mill-ahhar baqa` ma kienx iffirmit ftehim.

B`rizoluzzjoni li ttiehdet waqt l-*annual general meeting* ta` FM Malta f`Jannar 2020, Mario Farrugia tnehha kemm minn direttur kif ukoll minn *company secretary* tagħha.

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

Ir-rikorrenti ntavolat l-azzjoni odjerna abbzai tal-**Art 402 tal-Kap 386**.

Il-qorti sejra tagħmel riferenza ghal dawk mis-subartikoli tal-Art 402 li tqis **rilevanti** għall-istanza tal-lum :-

(1) *Kull membru ta` kumpannija li jilmenta li l-affarijiet tal-kumpannija jkunu tmexxew jew qed jitmexxew jew aktarx jitmexxew b`mod li, jew li xi att jew ommissjoni tal-kumpannija kienu jew huma jew x`aktarx se jkunu, oppressivi*

*b`mod mhux gust diskriminatorji kontra, jew b`mod mhux gust ta` pregudizzju, ghal membru jew membri jew b`mod li jkunu kontra l-interessi tal-membri in generali, jista` jaghmel rikors lill-qorti ghal ordni taht dan l-artikolu.*

...

*(3) Jekk dwar rikors maghmul skond is-subartikolu (1) ... il-qorti tkun tal-fehma li l-ilment ikun bazat sewwa u li jkun gust u ekwu li hekk taghmel, il-qorti tista` taghmel ordni taht daww il-kondizzjonijiet li jidhrilha xierqa -*

*(a) li jirregola t-tmexxija tal-affarijiet tal-kumpannija fil-futur ; jew*

*(b) jirrestringi jew jipprojbixxi l-ghemil ta` xi att propost ; jew*

*(c) jehtieg lill-kumpannija li taghmel xi att li r-rikorrent ikun ilmenta li kienet naqset li taghmel ; jew*

*(d) jipprovdi ghax-xiri tal-azzjonijiet ta` xi membri tal-kumpannija minn membri ohra tal-kumpannija jew mill-kumpannija nnifisha u, f`kaz ta` xiri mill-kumpannija, ghattnaqqs li jkun mehtieg fil-kapital azzjonarju mahrug tal-kumpannija ; jew*

*(e) jordna lill-kumpannija li tibda, tiddefendi, tkompli jew ma tkomplix procedimenti tal-qorti, jew jawtorizza lil membru jew membri tal-kumpannija li jibdew, jiddefendu, ikomplu jew ma jkomplux procedimenti tal-qorti f`isem u ghan-nom tal-kumpannija ; jew*

*(f) jipprovdi ghall-hlas ta` kumpens minn dik il-persuna li tista` tkun instabet responsabbli mill-qorti ghal telf jew danni li jkunu ggarrbu minhabba att jew nuqqas li dwaru jkun sar ilment lill-persuna li tkun garrbet dak it-telf jew danni ; jew*

*(g) ixolji l-kumpannija u jipprovdi ghall-istralc konsegwenzjali taghha.*

(4) Meta jsir ordni ghax-xoljiment ta` kumpannija skond is-subartikolu (3)(g), il-kumpannija ghandha titqies li tkun xoljiet fid-data meta jkun sar l-ordni u d-disposizzjonijiet tas-Sub-Titoli I u III tat-Titolu II tat-Taqsima V ta` dan l-Att li jirregolaw l-istralc ta` kumpanniji ghandhom japplikaw.

(5) Ordni maghmul taht dan l-artikolu jista` jehtieg lil kumpannija biex ma taghmilx xi emenda, jew li taghmel emenda mehtiega, fil-memorandum jew fl-istatut taghha.

Ghalkemm id-dicitura tal-Art 402(1) ittiehdet testwalment minn disposizzjoni simili li tirrizulta fil-Companies Act ta` New Zealand, tajjeb jinghad illi l-ligi ta` New Zealand segwiet l-izvilupp legislattiv tar-Renju Unit. Fl-Ingilterra, id-disposizzjoni li kienet tirregola l-*unfair prejudice action* fil-Companies Act 1985 kienet Sec 459. Meta saret il-Companies Act 2006, l-azzjoni bdiet tigi regolata b` Sec 994(1) fis-sens illi Sec 459 thassret ghal kollox mill-Companies Act 1985 u dahlet ezatt kif inhi f` Sec 994(1) tal-Companies Act 2006.

Fil-pag 485 tal-ktieb **Company Law** (Fourth Edition – 2016 – OUP) **Brenda Hannigan** tghid :-

*"Where the court is satisfied that a petition under s. 994 is well founded, it may make such order as it thinks fit for giving relief in respect of matters complained of [s 996(2)]"*

**Sabiex tinghata ordni skont kif previst fis-subartikoli (3), (4) u (5) tal-Art 402, hija tassattiva l-prova tal-att li minnu jkun qed jilmenta r-rikorrent. Dan ifisser illi jekk abbazi tal-provi, il-qorti tkun tal-fehma li l-ilment tar-rikorrent skont dak previst fis-subartikolu (1) ikun bazat sewwa, allura tghaddi mbaghad biex taghti l-ordni li jkun gust u ekwu skont is-subartikoli l-ohra. Jekk il-prova tkun insodisfacjenti ghaliex ma jkunx irrizulta li jkun bazat sewwa dak previst mis-subartikolu (1), allura l-qorti ghandha tieqaf hemm, u m`ghandhiex tapplika s-subartikoli l-ohra. Ghalhekk il-prova tas-sussistenza legali u fattwali ta` dak li jipprovdi s-subartikolu (1) huwa pregudizzjali ghall-prosegwiment tal-azzjoni.**

#### IV. Il-prova

Fil-Pag 1317 ta' **Principles of Maltese Company Law** (Volume Three : Second Edition : MUP : 2019) **Andrew Muscat** ighid illi fuq ir-rikorrent jistrieħ il-piz tal-prova li l-att jew omissjoni lamentata jaqa' fl-ambitu tas-subartikolu (1).

Ighid –

*"This wording (tal-subartikolu 1) clearly suggests that the member need only prove one effect of the conduct, act or omission, that is, that such conduct, act or omission, has been, is or is likely to be "oppressive" or "unfairly discriminatory" or "unfairly prejudicial" (to a member or members) or contrary to interests (of the members as a whole)."*

Fis-sentenza li tat il-Prim`Awla tal-Qorti Civili fit-30 ta' Jannar 2008 fil-kawza "**Cutajar pro et noe et v. S.C. & Company Limited et**" inghad hekk :-

*Illi l-prova biex tirnexxi dina l-azzjoni tispetta lir-rikorrenti li ressuq dina l-azzjoni. Huma jridu jippruvaw li (a) l-affarijiet tal-kumpanija jkunu tmexxew jew qed jitmexxew jew aktarx jitmexxew b`mod li... (b) jew li xi att jew omissjoni tal-kumpanija kienu jew huma jew x`aktarx se jkun, oppressivi b`mod mhux gust diskriminatorji kontra, jew b`mod mhux gust ta` pregudizzju, ghal membru jew membri jew b`mod li jkun kontra l-interessi tal-membri in generali.*

*Il-ligi taghna ma taghtix spjegazzjoni ta` x`inhu oppressiv b`mod mhux gust diskriminatorji kontra, jew b`mod mhux gust ta` pregudizzju. Kull kaz ghalhekk irid jigi trattat u deciz fuq il-mertu tieghu proprju, u dana kaz b`kaz. L-iskop tal-ligi hu biex il-Qorti tkun tista` tintervjeni f`dawk il-kazijiet fejn hemm bzonn li jinghata rimedju minhabba unfair dealing fejn jigi pruvat li kien*

hemm azzjonijiet jew ommissjonijiet li ma kienux gusti u li kienu ta` pregudizzju jew li l-affarijiet tal-kumpanija mhux qed jitmexxew sew.

Fil-pag 492 ta` **Company Law** (op. cit.) **Brenda Hannigan** tkompli tirrimarka :-

*"Whether the company`s affairs are being or have been conducted in a manner which is unfairly prejudicial to the petitioner`s interest is an objective, not a subjective, matter. The prejudice must be real, rather than merely technical or trivial, and the petitioner does not have to show that the persons controlling the company have acted deliberately in bad faith or with a conscious intent to treat him unfairly. The conduct complained of must be prejudicial in the sense of causing prejudice or harm to the relevant interest of the member (usually, but not limited to financial damage) and also unfairly so (usually connoting some breach of company law or the constitution but not limited to that) and it is not sufficient if the conduct satisfies only one of these tests."*

## **V. Legittimu Kontradittur**

Fil-"**Principles of Maltese Company Law**" (op. cit.) **Andrew Muscat** jittratta l-kwistjoni ta` kontra min tista` tkun promossa azzjoni ta` din ix-xorta.

Fil-pag. 995 tal-ktieb ighid hekk :-

*The Companies Act does not specify the person or persons against whom an action under article 402 is to be brought. It does well not to do so. The reason is that the choice of the defendant or defendants depends on the facts of the case and on the type of relief sought.*



... the persons responsible for the conduct complained of would typically vary from the current or past majority shareholder to the managing director or the controlling directors acting on behalf of company. Control may also be vested in a shadow director, a provisional administrator, a liquidator, an official receiver and even the pledgee of shares in the company, who, in terms of the pledge agreement, may exercise the shareholder`s voting rights or appoints directors on the board.

Moreover, as will be noted in the following pages, the forms of relief that may be granted by the court are considerably wide-ranging; a court order could be issued against a number of persons, typically the company itself and one or more shareholders. In **Joseph Calleja vs Vincent Calleja**, an article 402 was filed only against one of the shareholders. The company itself was not a party. The defendant pleaded that the company itself were wrongly instituted, as the action had to be filed against the company and not against himself as a member. The Court, in a judgement in parte, considered article 402 to provide a flexible and equitable remedy and agreed with the applicant`s submissions that an article 402 action had to be instituted against the person or persons who were allegedly responsible for the wrongdoing and that the court`s order need not in all cases be issued against the company itself. The Court remarked that as the applicant`s allegations of wrongdoing were directed towards the defendant, it was clear that the defendant was a proper party to the proceedings. It also stated that the fact that the action was not also filed against the company did not nullify the proceedings.

... Given the fundamental principle of Maltese procedural law that no person can be bound by a court`s decision or judgement unless he is a party to the relative proceedings, it is important for the complainant to carefully identify the person or persons against whom the action is to be filed.

Fil-Pag 218 tal-Kap 6 tal-ktieb **Minority Shareholders : Law, Practice and Procedure, Victor Joffe** jikteb :-

*The petitioner will be the member seeking relief, and the company of which he is a member and in relation to whose affairs he alleges unfairly prejudicial conduct will be made a respondent. Additionally, every member of the company (other than the petitioner) whose interests might be effected by the relief sought should be joined as a respondent, whether or not allegations of unfairly prejudicial conduct are made against him: in the case of a small private company, this will usually mean that every member ought to be joined as a respondent to the petition. The category of potential respondents (other than the company) is not, however, limited to members of the company. In an appropriate case, relief may be sought against a non- or former member. The width of the category of potential respondents is indicated by *Lowe vs Fahey* ((1996) 1 BCLC 262), where it was held that if the unfairly prejudicial conduct alleged was a diversion of corporate funds, a petitioner could seek relief not only against members and former members, but also against directors involved or third parties who knowingly received or improperly assisted in the diversion. Even a person who is not actively involved in the conduct of the affairs of the company complained of may be made a respondent, at least if he would be affected by the relief sought.*

## **VI. L-Art 402(1) tal-Kap 386**

### **1. Gurisprudenza**

Fis-sentenza li tat il-Qorti ta` Ghawdex (Gurisdizzjoni Superjuri) fl-4 ta` Frar 2009 fil-kawza "**Ellis v. Ellis**" inghad hekk :-

*Jibda biex jinghad li dan il-provvediment jista` jigi nvokat mill-membri kollha, u mhux biss minn membri minoritarji u m`hemmx dubju li d-diskrezzjoni u l-poteri moghtija lill-qorti f`dan il-kuntest huma wesghin. Minn dan il-provvediment hu evidenti li :*

(a) Dan il-provvediment japplika wkoll f`kaz ta` att jew ommissjoni izolata ;

(b) Ir-rimedju jista` jinghata kemm ghal dak li jkun gara fil-passat u wkoll xi att propost li jsir fil-futur ;

(c) L-ilment jrid ikun fuq it-tmexxija tal-affarijiet tal-kumpanija jew fuq att jew ommissjoni tal-kumpanija.

Fis-sentenza taghha tad-9 ta` Marzu 2007 fil-kawza "**Vella et v. Vella Brothers Ltd et**", il-Qorti tal-Appell qalet hekk :-

... l-Artikolu 402 tal-Att dwar il-kumpaniji jaghti diskrezzjoni pjuttost wiesa` lill-Qrati u dan ghaliex dawn il-provvedimenti ghandhom l-ghan li jissalvagwardjaw u jiprotegu lill-azzjonisti ta` socjeta` kummercjali, partikolarment lil dawk li huma minoritarji u li ghalhekk qeghdin fl-impossibilita` li jirregolaw il-mod li bih tkun qed titmexxa s-socjeta` li fiha huma jkollhom interess

...

din id-disposizzjoni, li hija bbazata fuq l-Art.459 tal-Companies Act (1985) Ingliza, hija ispirata fuq principji ta` ekwita` aktar milli minn drittijiet strettament legalistici biex ikun jista` jigi moghti rimedju. Dak li hu necessarju hu li l-azzjonista jipprova li minhabba l-gestjoni tas-socjeta` partikolari hu qed isofri, jew ukoll jista` jsofri, pregudizzju ta` natura oppressiva, ingusta jew diskriminatorja. Tali gestjoni tista` tirreferi sempliciment ghal xi att specifiku jew xi ommissjoni tal-kumpanija. Il-pregudizzju jista` jirreferi ghall-azzjonist li qed jippromwovi l-proceduri, ghal xi azzjonist iehor jew ghall-interess in generali tal-azzjonisti. Ma hemmx ghalfejn li huwa jipprova li huwa zgur ser isofri xi pregudizzju fil-futur. Tali prova tista` ssir fuq bazi ragjonevoli ta` possibilita` ("**Vincent Monreal et v. Lino Delia noe**" deciza mill- Prim`Awla tal-Qorti Civili fit-13 ta` Mejju,1999). Infatti gie deciz mill-Qrati Inglizi fil-kawza in **re Bovey Hotel Ventures Ltd** [(1983) B.C.L.C. 290] li `the Court will not give a list of situations when this remedy may be resorted to however one principle remains clear. A shareholder may make use of this

*article when his shareholding in the company has been seriously diminished at least seriously jeopardized by reason of a course of conduct or the part of those who have the de facto control of the company, which has been unfair to the member concerned”.*

...

*Fid-decizjoni **O`Neill v Phillips** moghtija mill-House of Lords fl-20 ta` Mejju 1999, gie ritenut illi l-legislatur ried illi biex jinghata rimedju taht l-artikolu jigi kkunsidrat il-kriterju ta` dak li huwa `fair`. Izda Lord Hoffman izid ighid li - “Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used ... The requirement that prejudice must be suffered as a member should not be too narrowly or technically construed.”*

Fid-decizjoni **In Re Bovey Hotel Ventures Ltd.** (1983) Slade J ighid hekk dwar *unfair prejudice* :-

*The test for unfairness must, I think, be an objective, not a subjective, one. In other words it is not necessary for the petitioner to show that the persons who have de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith ; the test, I think is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner`s interests.*

Fis-sentenza “**Monreal et v. Delia noe**” (op. cit.) inghad :-

*Dawn il-provedimenti huma ta` salvagwardja u ta` protezzjoni ghall-azzjonisti ta` socjeta` kummercjali, b`mod partikolari ghal dawk li huma minoritarji. Ir-rimedji li johorgu minn dawn il-provedimenti huma moghtija lil kull azzjonist ta` socjeta` kummercjali. Kull azzjonist, anke jekk hu minoritarju, ta` socjeta` kummercjali, anke jekk hi pubblika, jista` jitlob li jinghataw l-ordnijiet kollha necessarji u opportuni, f`kaz li jirnexxielu jipprova illi minhabba l-gestjoni tal-istess socjeta`*

huwa qed isofri jew ukoll jista` jsofri xi pregudizzju ta` natura oppressiva, ingusta jew diskriminatorja. Tali gestjoni tista` tirreferi semplicement ghal xi att specifiku jew xi ommissjoni tal-kumpanija. Il-pregudizzju jista` jirreferi ghall-azzjonist li qed jippromuovi l-proceduri, ghal xi azzjonist iehor jew ghall-interessi in generali tal-azzjonisti. In vista ta` dan kollu jista` jinghad li hu bizzejjed li l-azzjonista jipprova li huwa qed isofri jew eventwalment jista` jsofri xi pregudizzju minhabba xi agir tas-socjeta` li taghha huwa jippossjedi xi ishma. Ma hemmx ghalfejn li huwa jipprova li huwa zgur li ser isofri xi pregudizzju fil-futur. Tali prova tista` ssir fuq bazi ragjonevoli ta` probabbilita`. Inoltre, skond dak li hemm provdut fis-subartikolu (3) tal-istess artikolu 402, il-Qorti tista` tipprocedi biex taghmel kull ordni necessarja u opportuna skond dawn il-provedimenti, jekk jirrizulta li l-ilment tal-azzjonista hu sewwa bbazat u jekk il-Qorti thoss li huwa ekwu u gust li taghmel.

Fis-sentenza taghha tal-31 ta` Jannar 2003 fil-kawza "**Ellul v. Ellul pro et noe**", il-Qorti tal-Appell qalet hekk :-

... Fil-ligi Ingliza (ara Art 459 tal-Companies Act, 1985) jinstab rimedju simili li hu maghruf bhala "The Unfair Prejudice Remedy". Il-Qorti tal-Appell Ingliza stabbiliet fil-kaz "**in Re Saul D. Harrison & Sons plc** ([1995] 1BCLC 14)" il-linji ta` gwida dwar kif kellu jkun l-operat biex ikun jista` jigi kkwalifikat bhala, "unfairly prejudicial" (fit-test tal-Ligi Maltija din il-frazi hi tradotta "b`mod mhux gust ta` pregudizzju"). Wiehed kellu, fl-ewwel lok, jara jekk dak l-operat kienx jew le skond l-istatut tal-kumpanija. Izda fl-applikazzjoni tal-imsemmija dispozizzjoni - ispirata fuq principji ta` ekwita` aktar milli minn drittijiet strettament legali - il-Qorti tiehu in konsiderazzjoni l-aspettattivi legittimi ("legitimate expectations") li r-rikorrent jista` jkollu u li sikwiet ikunu ferm aktar wiesgha mid-drittijiet strettament legali li johorgu mill-istatut ta-ssocjeta`. Dawn l-aspettattivi legittimi jitwiieldu minn xi relazzjonijiet personali partikolari bejn l-azzjonisti. Fil-kaz **Ebrahimi vs Westbourne Galleries Ltd.** ([1973] AC 360) Lord Wilberforce elenka numru ta` sitwazzjonijiet fejn dan ir-rimedju jista` jinghata, sitwazzjonijiet

dawn li x`aktarx jinstabu f` kumpaniji zghar privati li ta` sikwiet jissejhu "quasi partnerhsips", fosthom is-segwenti :-

"(i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company

(ii) an agreement, or understanding, that all, or some (for there may be "sleeping members") of the shareholders shall participate in the conduct of the business ;

(iii) restriction upon the transfer of the members` interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere".

Fid-decizjoni tal-Prim`Awla tal-Qorti Civili moghtija fis-7 ta` Ottubru 2016 fil-kawza **Av. Dr. Pio M. Valletta noe vs Jeno Torocsik et** inghad illi sabiex ikun hemm *unfair prejudice*, (a) *it-test irid ikun wiehed oggettiv ;* (b) *m`hemmx htiega li l-attur jipprova l-mala fede ;* (c) *m`hemmx htiega li l-attur jipprova li kien hemm intenzjoni li tikkawza pregudizzju ;* (d) *mhux gust ma jfissirx bilfors li l-agir irid ikun illegali ;* u (e) *l-agir irid ikollu effett negattiv fuq l-attur bhala azzjonist.*

Fid-decizjoni **Re Coroin Ltd** – 2012 – All ER (d) 58(Feb) – EWHC 129 (Ch) – moghtija mic-Chancery Division tal-Ingilterra – David Richards J. qal hekk :-

"630. *Prejudice will certainly encompass damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member ... The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in character. A disregard of the rights of a member as such, without any*

*financial consequences, may amount to prejudice falling within the section.*

*631. Where the acts complained of have no adverse financial consequences, it may be more difficult to establish relevant prejudice. This may particularly be the case where the acts or omissions are breaches of duty owed to the company rather than to shareholders individually. If it is said that the directors or some of them had been in breach of duty to the company but no loss to the company has resulted, the company would not have a claim against those directors. It may therefore be difficult for a shareholder to show that nonetheless as a member he has suffered prejudice ..."*

## **2. Dottrina**

Fil-pag. 449 ta' **Farrar`s Company Law** (Fourth Edition) jinghad illi :-

*A member`s interests are not necessarily limited, therefore, to his strict legal rights under the Articles and the Companies` Act but can extend also to legitimate expectations as to the conduct of the company`s affairs arising from the nature of the company and the agreements and understandings between the parties.*

Fil-pag. 464 tat-Third Edition ta' **Farrar`s Company Law** jinghad illi :-

*... The position will vary greatly from the small private companies, commonly called quasi-partnerships, to public companies of considerable size. As a quasi-partnership, the company will usually have been formed or continued on the basis of a personal relationship involving mutual confidence. There may be an agreement or understanding that all or some of the shareholders are to participate in the conduct of the business. Restrictions on the transfer of shares will be the rule rather than the exception. The individuals involved may also*

*have made relatively substantial capital contributions to the company. Shareholders in such companies will be a small close-knit group, actively involved in many instances in the daytoday operations and financially and personally committed to the company. Here the scope for legitimate expectations beyond their strict legal rights is obviously greatest.*

*However, as Lord Wilberforce stressed in **Ebrahimi v Westbourne Galleries Ltd**, the case for giving effect to equitable considerations must be made in each instance and it is not sufficient simply to assert that the company is small or private, for in many cases the basis of the relationship will be adequately and exhaustively laid down in the articles. If it is so defined by the articles or, for example, by the articles supplemented by a shareholders` agreement, then there is little room for finding further legitimate expectations beyond those outlined in the documents.*

*The interests of shareholders in larger private and public companies, on the other hand, are likely to be quite different from those of shareholders in quasi-partnerships and considerably more restricted. In these larger companies there is usually no underlying personal relationship, employment is rarely an issue and the shareholders are more interested in such matters as dividend yield and capital appreciation than involvement in the day-to-day running of the company. If they become dissatisfied, especially if it is a public company, they can sell their shares and withdraw from the company. Here the members rarely have expectations beyond their strict legal rights as provided by the articles.*

*"That is not to say that s.459 does not apply to larger private companies and public companies for the section is clearly not limited to quasipartnerships. The point is that it may be harder to establish conduct which is unfairly prejudicial to the interests of the members in such companies.*

Fil-pag 409 ta` **Cases and Materials on Company Law** (Fifth Edition) l-awturi **Hicks and Goo** jirrimarkaw illi :-



*In the early days of S.459, it was thought that the petitioner must have unfairly suffered prejudice to an interest as a member only (and not eg. as a director). This requirement has never been relaxed in that the Court is prepared to recognise that members may have different interests having regard to their rights, expectations and obligations (**Re a company** (No 00477 of 1986 [1986 BCLC 376; **O`Neill v Phillips**. [1999] 1 WLR 1092). This is particularly so in quasi-partnership cases where a minority is excluded from management. But where the articles make detailed provision for any departing members to sell their shares at a fair price, the position may be different ...Section 459 has proved to be a powerful weapon for minority shareholders, particularly in the case of quasi-partnerships. In such companies, minorities who are excluded from management participation or who unfairly suffer loss as a result of wrongdoing by directors or majority shareholders may get relief under the section.*

Fil-pag 506 ta` **Company Law** (op. cit.) **Brenda Hannigan**  
tirrimarka li :-

*"Mere deadlock between the parties who have lost trust and confidence in one another is insufficient then to merit relief under CA 2006, s 994, in the absence of prejudicial conduct."*

Fil-pag 711 ta` **Boyle & Birds` Company Law** (Eight Edition – 2011 – Jordans) jinghad :-

*"The term "unfair prejudice" whether analysed as a `standard` or a `concept` is a arelatively more objective one which is concerned with running the company in a way that is clearly unfair in its consequences to the complaining shareholder, even if the respondents can claim to have acted in the best of good faith."*

Fil-pag 691-692 tal-ktieb **Gower and Davies - Principles of Modern Company Law** (Eighth Edition – 2008 – Sweet & Maxwell) jinghad illi :-

*" ... the courts recognised that sec 994 protects expectations and not just rights. Borrowing from public law, it is sometimes said that the section protects the "legitimate expectations" of the petitioner, though more recently the courts have preferred the private law phrase "equitable considerations" [Qorti tal-Appell Ingliza fil-kawza "**Saul D Harrison & Sons plc**" – 1995 – ghall-uzu tal-frazi "legitimate expectations" ; House of Lords – "**O`Neill vs Phillips**" – 1999 – ghall-uzu tal-frazi "equitable considerations"] Whatever the language used, the difficult issue is to distinguish those expectations of the petitioner which are to be classified as "legitimate" or which considerations are to fall within the category of "equitable considerations" and so as deserving of legal recognition and protection from those expectations which the petitioner may harbour as a matter of fact but which the courts will not protect."*

Fil-pag 569-570 tal-ktieb **Company Law** (26th Edition – 2009/2010 – OUP) l-awturi **Mayson, French & Ryan** ighidu hekk b`riferenza ghad-decizjoni ta` *Re Saul D Harrison and Sons* citata aktar kmieni :-

*"The words `unfairly prejudicial` are general words and they should be applied flexibly to meet the circumstances of the particular case ... The conduct [being complained of] must be both prejudicial [in the sense of causing prejudice or harm to the relevant interest) and also unfairly so ; conduct may be unfair without being prejudicial or prejudicial without being unfair, and it is not sufficient if the conduct satisfies only one of these tests."*

Ikomplu billi jaghmlu riferenza ghal "**O`Neill vs Phillips**" (op. cit.) in partikolari dwar l-ghazla li ghamel il-Parlament Ingliz –

*"Parlament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief ... it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. Although fairness is a notion which can be applied to all kinds of activities its content will depend upon the context in which it is being used."*

### **3. Risultanzi**

**Il-qorti sejra tqis jekk l-ilmenti tar-rikorrenti jissodisfawx il-vot rikjest fl-Art 402(1). Tajjeb li jkun ribadit illi sabiex ikun sodisfatt il-vot tal-ligi huwa bizzzejjed jekk tirrizulta mqar wahda mic-cirkostanzi ndikati fid-dispozizzjoni. Tant hu hekk illi l-legislatur ghazel il-konguntiv jew mhux l-konguntiv u fid-disposizzjoni. Ghalhekk ir-rekwiziti huma alternattivi mhux kumulattivi.**

#### **a) Fatti**

Ghalkemm il-familja Fitzpatrick kienet azzjonista ta` maggoranza kemm ta` FM Ireland kif ukoll ta` FM Malta, u ghalkemm il-familja Fitzpatrick kienet tqis lil FM Malta bhala wahda minn grupp ta` kumpanniji kontrollati minnhom, irrizulta mhux biss illi Miclis kienet azzjonista ta` minoranza ta` FM Malta (mhux ta` FM Ireland) izda kull kumpannija ghax distinta mill-ohra kellha s-swieq taghha. Infatti ghalkemm FM Malta kienet tbiegh prodott taghha lil FM Ireland, kellha swieq partikolari taghha fil-Mediterran u fl-Afrika. FM Ireland kellha swieq ohra li kienet tiggstihom hi minghajr l-intervent ta` FM Malta. Fejn FM Malta esportat lil swieq li ma kienux partikolari taghha, kienet tbiegh lil FM Ireland imbaghad din tiehu hsieb li l-prodott Malti jmur kemm fis-swieq taghha kif ukoll swieq ohra li kienet qeghda tipprospetta li tidhol fihom bhal ma kien is-suq Amerikan.

Irrizulta li FM Malta ma kellhiex telf lanqas fil-krizi finanzjarja dinija ta` xi snin ilu. Dejjem iggenerat profit li fil-bicca l-bira tal-kaz kien jigi tradott f`dividends ghall-beneficcju tal-azzjonisti. Tajjeb jinghad illi li bejn 60% sa 70% tal-produzzjoni ta` FM Malta kienet destinata ghal FM Ireland. Ghall-prodott li kienet timmanifattura u tbiegh lil FM Ireland kienet tithallas skont profit margin miftiehem bejn iz-zewg kumpanniji li kien ta` 30%.

Jidher illi fl-2010 FM Ireland bdiet ghaddejja minn inkwiet finanzjarju serju li kien jehtieg azzjoni tempestiva sabiex jigi skansat stat ta` falliment. L-awdituri u l-azzjonisti ta` FM Ireland (li r-rikorrenti ma kenitx fosthom) hasbu sabiex parti mill-profitti li kellha FM Malta iduru lejn FM Ireland sabiex jilqa` ghal pressjoni mill-banek fl-Irlanda billi jkun assikurat *cash flow* adegwat. Inoltre FM Ireland ipproponiet tnaqqis fil-profit margin li kellha FM Malta maghha.

Jirrizulta li r-rikorrenti bhala azzjonista minoritarja ta` FM Malta kienet kontra dak li kien qed jigi propost. U Mario Farrugia li sa Jannar 2020 kien direttur ta` FM Malta rregistra l-opposizzjoni tieghu. Nuqqas fil-profitti ta` FM Malta kien ifisser anqas investiment fil-kumpannija u inqas dividends speċjalment mar-rikorrenti. Minkejja l-opposizzjoni, il-familja Fitzpatrick bhala l-azzjonista maggoritarja baghet ghaddejja bil-pjan taghha u imponiet *transfer pricing policy*.

Rinfaccjata b`decizjoni ta` dik ix-xorta, ir-rikorrenti accettat bil-kondizzjoni li tkun ikkompensata ghat-telf ta` dividends skont l-ghadd ta` ishma li ghandha f` FM Malta.

Kevin Fitzpatrick accetta li d-decizjoni li kienet tavvorixxi lil FM Ireland kien tmur kontra d-drittijiet ta` r-rikorrenti bhala azzjonista ta` minoranza f` FM Malta u ghalhekk ippropona ftehim. Id-diskussjonijiet damu ghaddejjin izda ghalkemm ftehim kien abbozzat baqa` ma kienx finalizzaat u ffirmat. Ghalhekk kumpens ghar-rikorrenti baqa` regolat b`*gentleman`s agreement*. L-azzjonisti ta` FM Ireland dehrilhom illi l-ammont dovut lir-rikorrenti kellu jkun ta` 20% tal-profitti li kienu trasferiti lil FM Ireland mentri r-rikorrenti insistiet li kellha tkun ikkompensata b`20% tal-profitti li ghamlet

Mhux kontestat li r-rikorrenti ghamlet snin shah ma tithallasx *dividend* wara li kien deciz li mill-introjtu ta` FM Malta din prattikament tkun il-forcina sabiex FM Ireland terga` tigi fuq saqajha.

B`effett mill-2015 il-qagħda finanzjarja ta` FM Ireland jidher illi bdiet titjeb. Fl-istess zmien FM Ireland bdiet tesporta l-prodott tagħha lejn l-Amerika u l-bejgh kien success. Cio` nonostante FM Ireland xorta baqghet tinsisti fuq tnaqqis fil-*profit margin* ta` FM Malta. Dan apparti li l-azzjonisti maggoritarji ta` FM Malta u FM Ireland dehrilhom li ma kienx għad hemm lok għal kumpens favur ir-rikorrenti.

Wara li Mario Farrugia rrienza minn direttur ta` FM Ireland imbagħad f`Jannar 2020 tnehha minn direttur u *company secretary* ta` FM Malta.

**b) L-obbligi tad-diretturi :  
(dritt u giurisprudenza)**

L-iprem obbligu generali ta` direttur ta` kumpannija jilhaq il-milja tiegħu fl-**Art 136A(1) tal-Kap 386** li jgħid illi kull direttur għandu l-obbligu "*li jagixxi b`onestà u bona fede fl-ahjar interessi tal-kumpannija*".

F` **Howard v. Herrigel** [1991(2) SA 660(A)] ingħad illi :

*"At common law, once a person accepts appointment as a director, he becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf. That is the general rule and its application to any particular incumbent of the office of director must necessarily depend on the facts and circumstances of each."*

L-**Art 136A(2)** jistipola illi d-diretturi għandhom :

*"jippromwovu il-benessere tal-kumpannija u jkunu responsabbli ghal : (a) it-tmexxija generali tal-kumpannija u l-amministrazzjoni u l-immaniggjar taghha ; u (b) s-sorveljanza generali tal-affarijiet taghha."*

Fil-Pag 594 tat-Tieni Volum ta' **Principles of Maltese Company Law** (op. cit.) **Andrew Muscat** ighid :-

*" ... even if the directors act honestly for what they believe to be in the best interest of the company, they may still be liable for breach of duty if they exercise their powers for a purpose different from that for which the powers would have been conferred upon them."*

Issir ukoll referenza ghall-kaz **Treasure Trove Diamonds Ltd v Hyman** (1928 AD 464 at 479) fejn inghad:

*" ... and the directors as occupying a fiduciary position towards the company must exercise those powers bona fide in the best interest of the company as a whole, and not for an ulterior motive ..."*

Fuq l-istess linja kien il-pronunzjament **Re Smith and Fawcett Ltd** [1942] Ch 304, [1942] 1 All ER 542 fejn Lord Greene qal :-

*"The principles to be applied in cases where the articles of a company confer a discretion on directors ... are, for present purposes, free from doubt. They must exercise their discretion bona fide in what they consider – not what a court may consider – is in the interests of the company, and not for any collateral purpose."*

**c) L-ilmenti tar-rikorrenti**

Il-pregudizzju lamentat mir-rikorrenti huwa delineat fir-rikors promotur :-

- L-ispostament ta` profitti minn FM Malta lil FM Ireland bit-tnaqqis effettiv fil-margine tal-bejgh ta` prodotti minn FM Malta lil FM Ireland.
- L-ispostament ta` profitti minn FM Malta lil FM Ireland permezz ta` management charge li kienet imposta fuq FM Malta minn FM Ireland.
- L-approvazzjoni tal-kontijiet ta` FM Malta kien skorrett u mhux regolari.
- Il-ksur tal-obbligi fiducjarji, dawk statutorji kif ukoll in-nuqqas ta` governanza tajba mid-diretturi Edmond John Fitzpatrick u Kevin Fitzpatrick li kien jirraprezentaw l-azzjonisti ta` maggoranza f` FM Malta.

Fin-nota ta` osservazzjonijiet taghha r-rikorrenti fessret aktar u ahjar l-ilmenti taghha abbazi tal-provi li tressqu :-

- *Management Charge*
- *Transfer Pricing*
- *Dividends*
- Pregudizzju minhabba rifjut li jsir *share swap*
- Operat ristrett ta` FM Malta
- Tibdil fl-operat ta` FM Malta
- Kunflitt ta` interess

Fin-nota ta` sottomissjonijiet taghhom l-intimati fessru illi l-mizuri ntrodotti kienu mehtiega ghas-sopravivenza tal-grupp. Il-mizuri kienu temporanji u bl-ebda mod ma kkagunaw pregudizzju lir-rikorrenti. Inoltre l-intimati jaghmlu l-argument li r-relazzjoni ta` bejn il-kumpanniji kienet wahda ta` parent-subsidiary u ghalhekk l-azzjonista maggoritarja kellha kull jedd illi tiehu dawk id-decizjonijiet li kienu fl-interess tal-grupp, anke jekk dawk id-decizjonijiet ikunu kontra l-interess ta` FM Malta.

## i) **“Management Charge” u “Transfer Pricing”**

Il-*management charge* u *t-transfer pricing* kienu mposti fuq FM Malta sabiex isostnu lil FM Ireland minhabba l-qaghda finanzjarja negattiva li kienet ghaddejja minnha. Jidher li minghajr il-flus zejda li gew minghand FM Malta, FM Ireland kienet tispicca tfalli. Il-mizuri kienu proposti mill-awdituri ta` FM Ireland. U kienu diskussi waqt laqgħa nformali li ghaliha kien prezenti Mario Farrugia. Kemm waqt il-laqgħa nformali kif ukoll waqt il-laqgħa formali tal-bord tad-diretturi ta` FM Malta, Mario Farrugia (azzjonista u *beneficial owner* ta` r-rikorrenti) wera l-opposizzjoni tieghu kemm għall-introduzzjoni ta` *management fee* kif ukoll għat-*transfer pricing* ghaliex finalment il-mizuri kienu sejrin inaqqu mill-ammonti spettanti lir-rikorrenti bhala azzjonista b` 20% tal-ishma ta` FM Malta.

Tajjeb jingħad illi f` email tat-30 ta` Lulju 2010 li bagħat lil Mario Farrugia, Kevin Fitzpatrick irrikonoxxa illi l-impozizzjoni tal-*management fee* “ ... was handled without sensitivity towards the minority shareholder and even unfairly.” Ikompli jgħid illi hu kien esprima “my concerns at its handling” u li kien pprova jfiehem lil missieru Edmond John Fitzpatrick illi “Newry simply can` t strip whatever profits it wants from Malta without due consideration to you, as 20% belongs to you.” (Dok. MF 3 a fol. 27)

Tosserva li fl-abbozz tas-Shareholders Terms of Reference li kien anness mal-email fuq riferita ta` Kevin Fitzpatrick lil Mario Farrugia, jingħad illi :-

“In the last two years with its majority ownership of FMM (and its unquestionable support from Mario Farrugia) FMN has perhaps treated FMM as a wholly-owned subsidiary of Newry, rather than as an 80% owner. This “100% ownership” mindset has, I believe, led to a situation where the Company has largely ignored the rights of a minority shareholder and even resented that shareholders entitlements.” (Dok. MF 4 a fol. 32)

Fix-xieħda tieghu Kevin Fitzpatrick stqarr illi :-

“Over the period of from there it was 2010 maybe 2009 and 2010 through 2015, FM Environmental and Newry had taken a management charge across from Malta into Newry. We had taken a management charge to show revenue in the company in Newry because that is where we`re headquartered in Newry and we had gone through a recession at that time so we needed to show them profits in Newry, for the sake of the



*bank stakeholders, so we took that across. Mario at the time, it was not through Miclis, it was Mario Farrugia, was against us doing that for obvious reasons. We would take a profit out of the company in Malta where he has 20% shareholder, but we were doing it for the greater good. At the time we believed so anyway.”* (a fol. 91 u 92 tal-process)

Ikompli jiddeponi hekk :-

*“If you look at all the correspondence round that time between myself and Mario, you`ll clearly see that I was 100% supportive of him. I believed that as a minority shareholder he was entitled, to that point I believe, entitled for compensation for taking that money across and I fought for him with my fellow board members including my father to ensure that if we were going to do this, then we had to compensate Mario for that, hence the loan agreement started at this time.”* (a fol 98)

Il-qorti tirrimarka li fl-2010 Kevin Fitzpatrick hejja dokument intitolat FM Environmental (Malta) Ltd Agreeing Shareholder Terms of Reference fejn it-transfer pricing kellu jinzal minn 30% ghal 25% u li kellha tigi ntrodotta management fee ta` €20,000 fis-sena. Inghad ukoll illi Mario Farrugia ma kellux jizbanka d-dividend ghar-rikorrenti sabiex ighin fil-cashflow. Fid-dokument kien affermat illi sehem ir-rikorrenti ta` 20% kellu jitwarrab ghalih sabiex ir-rikorrenti bhala azzjonista minoritarja ma ggarrabx pregudizzju. Dan id-dokument twettaq ghal numru ta` snin. Ghal kull darba li thallset management charge twarrab minnha l-20% tar-rikorrenti.

Fir-rigward tat-*transfer pricing* Mario Farrugia ftiehem ma` Kevin Fitzpatrick li talli kien se jkun hemm riduzzjoni tal-profit margin ta` FM Malta minn 25% ghal 15% ir-rikorrenti kellha tohrog fattura bhala *management charge* kontra FM Ireland. Il-pagamenti dwar dan damu ghaddejin 12-il xahar. Kevin Fitzpatrick xehed illi l-arrangament twaqqaf arbitrjarjament minn FM Newry waqt laqgħa tal-bord tagħha għaliex irrizulta skont hu l-ftehim ma kienx *“feasible”*.

Il-qorti tosserva li waqt li Kevin Fitzpatrick u missieru Edmond John Fitzpatrick jinsistu li t-tnaqqis fil-profit margin kien mehtieg sabiex jghin lil FM Newry tirkupra finanzjarjament, fix-xieħda tiegħu Darragh Cotter jghid illi t-tnaqqis tal-profit margin minn 25% għal 15% sar sabiex ikun assigurat prezz kompetittiv għall-prodott li kien se jidhol fis-suq Amerikan. Għal darb`ohra il-piz tal-mizura ggarrab minn FM Malta li bieghet il-prodott b`inqas *profit* għaliha kif ukoll għad-detriment u bi

pregudizzju ngust u diskriminatorju tar-rikorrenti bhala azzjonista minoritarja li kellha tissokkombi.

Huwa bil-wisq ironiku u sinjifikanti ghall-prova tal-fatti ta` dan il-kaz illi wara li ghaddiet il-burraxka minn fuqha (anke bl-input finanzjarju ta` FM Malta) il-profitti li bdiet taghmel FM Ireland speċjalment wara li rnexxielha tidhol fis-suq Amerikan baqghu ghandha u ma jirrizultax li kien ristabbilit bilanc ma` FM Malta fis-sens illi FM Malta ma hadet xejn lura minn dak il-profitt. Il-qorti tqis illi t-tnaqqis fil-*profit margin* ta` FM Malta ma kienx applikat biss fir-rigward tal-bejgh tal-prodottagħha lejn l-Amerika (tramite FM Ireland) izda fuq il-bejgh kollu li FM Malta kienet taghmel lil FM Ireland.

Il-qorti tkompli tosserva li fl-2015 kien propost illi jsir *loan agreement* favur ir-rikorrenti li permezz tieghu kellhom jigu sodisfatti l-pretensjonijiet tagħha. Dak iz-zmien kienet indikata l-figura ta` €203,352 bhala *certament* dovuta u li kellha tithallas bhala dividend entitlement fuq medda ta` 60 xahar. Fix-xieħda tieghu Kevin Fitzpatrick stqarr li dak l-ammont baqa` ma thallasx. Intuzat il-frazi *certament* ghaliex dwar l-ammont kompleksiv li kien dovut baqa` ma kien intlaħaq qbil. Eppure lanqas l-ammont mhux ikkontestat baqa` ma thallas.

Dan in-nuqqas ta` qbil kompla xellef ir-relazzjoni bejn l-azzjonisti. Mill-korrispondenza skambjata jidher evidenti li l-azzjonisti maggoritarji irritaljaw għat-talbiet ta` Mario Farrugia u ma baqghux aktar disposti li jilhqu ftehim dwar l-ammonti dovuti lilu. L-email tal-11 t` Awwissu 2016 li baġhat Kevin Fitzpatrick lil Mario Farrugia hija inekwivoka u tirrispekkja l-pozizzjoni li hadu l-azzjonisti maggoritarji. Kevin Fitzpatrick kiteb hekk:

*" ... As owners and majority shareholders of all group companies the onus and responsibility is on us to optimise the interests of the majority shareholders ...*

*... none of us have confidence in your ability to see the bigger picture for FM Environmental, particularly given your vested interest in FM Malta. This is further evident in your email and the amendments to the loan agreement where you expect compensation for the change in transfer pricing and any future management charge, apparently for ever and a day. This is totally unacceptable.*

*You have been aware of our push to improve pricing – particularly recently for the US market – yet any suggestion of reducing the transfer price was met with resistance over the years."* (Dok. MF 12 a fol 48)

Fl-istess email Kevin Fitzpatrick qal illi kien sejrin jitwettqu bidliet important fit-tmexxija tal-affarijiet tal-kumpannija. Fosthom :

1. *The current transfer price margin of 15% will remain in place. However, from April 2016 FM Environmental will not accept any fictitious invoices from you or Miclis as perceived compensation for this margin change. FM Newry will retain the right as majority shareholder to review the transfer pricing and management charges (either up or down) annually.*

12. *A new monthly management charge will be booked from Newry to Malta ... FM **will not** be paying monies to you or Miclis as perceived compensation for this charge.*

...

4. *The monies due to you will be paid in full subject to mutual agreement. You never before disputed the amount owed. I am stunned that you now believe the monies due – agreed in good faith by me often against the wishes of others – should be treated as a dividend entitlement. They were not. You have known full well, and accepted, the mechanism that has been in place. I will not be signing that amended loan agreement.” (Dok. MF 12 a fol 48 u 49)*

Temm l-email billi qal :-

*“it is our intention to ensure that Environmental Newry is in control of its own destiny rather than having importers` strategic decisions influenced or impeded by any one individual.” (Dok. MF 12 a fol 49)*

Il-monthly management fee kienet rimpjazzata b`annual management fee. Il-mizura kienet imposta u kienet komunikata lil Mario Farrugia b`email ta`Kevin Fitzpatrick tal-11 ta` Awwissu 2016. Kif ikkonferma Kevin Fitzpatrick stess, id-decizjoni ttiehdet arbitrarjament mill-azzjonista maggoritarju waqt laqgħa tal-bord tad-diretturi ta` FM Ireland, bla ma kien involut u allura mingħajr l-approvazzjoni tal-bord tad-diretturi ta` FM Malta u wisq anqas mingħajr il-kunsens ta` Mario Farrugia.

Skont il-ftehim illi kien hemm bejn il-partijiet u kif ukoll ikkonfermat minn Kevin Fitzpatrick meta xehed, ir-rikorrenti tramite Mario Farrugia kellha dritt ta` kumpens għal management fee in excess ta` €20,000 fis-sena.

Jirrizulta illi bil-ghan illi tinstab soluzzjoni u jithallas dak li kien dovut, Mario Farrugia kien dispot jilhaq kompromess billi jilqa` l-proposta li saret minn Kevin Fitzpatrick b`email tal-5 ta` Dicembru 2016 u cioe *"to reach a compromise half way between the two figures."* (Dok. MF15 a fol. 57)

B`email tal-15 ta` Awwissu 2017 Darragh Cotter informa lil Mario Farrugia illi Kevin Fitzpatrick *"has agreed to accept the €240,000 loan amount payable to Miclis in addition to the existing €38K Dividend liability in the Malta Accounts but only on the basis of the strict understanding that all invoices issued by Miclis on account of management charges levied applying to the period 01.04.2016 to date are null and void and should not be raised from here on in as they will neither be accepted nor processed."*

Konsegwenza tal-introduzzjoni ta` din il-kondizzjoni sfratta kull tentattiv ta` ftehim.

Huwa fatt illi FM Ireland ghaddiet minn perjodu finanzjarju diffiċli li seta` jwassal ghal kollass. Fl-istess waqt il-qorti tirrileva li jekk kien hemm, b'zonn ta` pjan ta` sostenn dan ma kellux jingarr minn FM Malta a skapitu tar-rikorrenti. Tghid dan ghaliex mill-provi jirrizulta illi la l-azzjonisti ta` FM Ireland u lanqas l-impjegati ta` FM Malta qatt sofrew xi pregudizzju mill-mizuri li kienu mposti. L-azzjonisti ta` FM Ireland konsistentment baqghu jircievu dak spettanti lilhom. In kwantu ghall-impjegati ta` FM Malta, Reuben Cauchi kkonferma li l-introjtu ta` ebda impjegat ma kien mittiefes.

Mario Farrugia xehed illi kien dispot illi jaghmel il-parti tieghu sabiex jghin fis-salvatagg ta` FM Ireland. Kien biss ghalhekk illi ghazel li ma jizbankax id-dividend tar-rikorrenti ghas-sena 2009 u 2010. Pero` l-hsieb tieghu qatt ma kien li jhalli kollox ghaddej. Il-pozizzjoni tieghu kienet cara : kien dispot li jghin dment li jbati xejn mill-but direttament bhala azzjonista tramite r-rikorrenti u haddiehor jibqa` fuq ir-rih. Kien ghalhekk li baqa` jinsisti ghas-sehem tieghu, anke jekk l-ammont spettanti kellu jithallas meta c-cirkostanzi finanzjarjni kienu jippermettu.

Il-qorti tghid illi skont il-Heads of Terms tat-23 ta` Gunju 2010, il-*management fee* u *transfer pricing* kellhom ikunu mizuri temporanji sakemm titjeb is-sitwazzjoni finanzjarja ta` FM Ireland. Mill-atti jirrizulta illi FM Ireland bdiet tirkupra ghall-habta tas-sena 2015. Edmond John Fitzpatrick ikkonferma illi mill-2015 sal-lum is-sitwazzjoni tjiebet u l-

kumpannija ghandha futur sabih quddiemha. Madanakollu, kemm il-*management fee* u kif ukoll it-*transfer pricing* baqghu jigu imposti fuq FM Mata anki wara s-sena 2015.

### **L-element huwa ppruvat.**

#### **ii) Dividends**

Jirrizulta illi kien Mario Farrugia stess illi fis-sena 2009 u anke fis-sena 2010 ghazel illi ma jizbankax id-dividend spettanti lir-rikorrenti bil-ghan illi jkun hemm aktar likwidita fil-kumpannija.

Tajjeb jinghad illi waqt li Mario Farrugia halla s-sehem tieghu fil-kumpannija, FM Ireland irceviet xorta wahda dak li kellha tiehu.

Ghalkemm jirrizulta illi FM Ireland bdiet tirkupra finanzjarjament mis-sena 2015, Mario Farrugia baqa` ma thallasx.

### **Anke din l-ilment jirrizulta ppruvat.**

#### **iii) Rifjut ta` *share swap***

Fost il-proposti li r-rikorrenti kellha tqis kien hemm offerta li bhala hlas ghas-saldu tal-pretensjonijiet taghha ir-rikorrenti kellha taccetta li tpartat l-ishma ta` 20% li kellha f` FM Malta ma` sehem ta` 5% f` FM Newry.

Min-naha ta` FM Ireland jinghad li b`dak il-gest ir-rikorrenti kienet qeghda tinghata l-opportunita` li ssarraf favur taghha mill-introjtu li bdiet tgawdi minnu FM Ireland wara li halliet warajha l-inkwiet finanzjarju. Ireland.

Ir-rikorrenti tramite Mario Farrugia rifjutat il-proposta.

Fin-nota ta` sottomissjonijiet taghha r-rikorrenti tissottometti li konsegwenza ta` dak ir-rifjut Mario Farrugia spicca eskluż.

Li Mario Farrugia nghata l-genb huwa fatt ippruvat, dan kollu ghaliex ha hsieb jipprotegi l-interess ta` FM Malta li r-rikorrenti bhala azzjonista taghha *stood to benefit* li kieku t-tmexxija tal-affarijiet taghha tpoggiet fl-ewwel post.

Il-qorti tqis illi d-divergenzi bejn l-azzjonisti beda kull ma jmur jizzied tant illi waqt illi ghall-ewwel Kevin Fitzpatrick iddefenda l-interessi ta` r-rikorrenti, malajr bidel il-posizzjoni tieghu u ha posizzjoni li kien tiffavorixxi l-azzjonista maggoritarja u cioe` l-familja Fitzpatrick stess.

Minn ezami tal-provi jirrizulta bic-car illi l-azzjonista maggoritarja ma kenitx disposta taghti koncessjonijiet lill-azzjonista minoritarja. FM Ireland ippretendiet illi setghet tiehu kwalunkwe decizjoni biex thares l-interessi taghha akkost ta` effett negattiv fuq id-drittijiet tal-azzjonista minoritarju. Mill-banda l-ohra, l-azzjonista minoritarju fittex li jibqa` jhares l-interessi tieghu ghaliex del resto kien hu biss illi garrab l-effetti negattivi li hallew il-mizuri ntordotti arbitrarjament minn FM Ireland.

Fil-kuntest ta` dan l-ilment ir-rikorrenti tirreferi wkoll ghall-approvazzjoni tal-*consolidated accounts* li saret minghajr l-approvazzjoni tal-bord tad-diretturi ta` FM Malta. Konferma ta` dan tirrizulta mix-xieha Darragh Cotter. Kevin Fitzpatrick iggustifika dan billi qal illi ghalkemm ma saritx laqgha formali tal-bord ta` FM Malta, l-accounts taghha kien diskussi f` dik tal-bord ta` FM Ireland.

Ir-rikorrenti taghmel ukoll referenza ghall-fatt illi l-accounts ta` FM Malta ghas-sena 2017 gew iffirmati minn Kevin Fitzpatrick u minn Edmond John Fitzpatrick minflok Mario Farrugia. Edmond John Fitzpatrick xehed illi ma kinitx taghmel differenza min jiffirma l-accounts peress li kwalunkwe tnejn mid-diretturi setghu jiffirmaw. Anke jekk dan ghandu mis-sewwa, jibqa` l-fatt illi sakemm ir-relazzjoni bejn l-azzjonisti kienet ward u zahar, Mario Farrugia kien jigi mistieden biex jattendi ghal-laqghat, kien jigu kkupjat bil-korrispondenza, kellu sehem fid-decizjonijiet li kienu jittiehdu, access ghall-informazzjoni kollha u kien ukoll jiffirma l-accounts ta` FM Malta bhala direttur taghha.

Is-sitwazzjoni giet kapovolta meta Mario Farrugia beda jafferma bis-shih l-interess ta` FM Malta bhala persuna differenti minn FM Ireland u indirettament l-interess tar-rikorrenti.

**Anke dan l-ilment huwa ppruvat.**

#### **iv) Bdil fl-operat ta` FM Malta**

Il-profit margin ta` FM Malta mill-bejgh dirett li kienet taghmel lill-klijenti taghha kien akbar mill-profit margin li kienet tikseb mill-bejgh lil FM Ireland.

Reuben Cauchi xehed illi FM Malta kellha l-opportunita` illi tiffoka fuq bejgh ta` *wastewater treatment* fis-suq lokali. Ighid illi FM Malta kellha prospettiv tajjeb illi tirnexxi f`dan is-settur partikolarment ghaliex ma kellha ebda kompetizzjoni lokalment u ghalhekk il-bejgh tal-prodott kien garantit.

Il-qorti tghid illi ghandha ragun ir-rikorrenti meta tghid illi b`din id-decizjoni FM Malta kienet kostretta titbieghed mill-obbjettiv li ghalih giet imwaqqfa u cioe :

*"To design, manufacture and assemble water treatment and wastewater treatment plants and equipment, to sell, distribute and commission water treatment and waste water treatment plants and equipment and parts relating thereto."*

Jidher bic-car illi FM Ireland kienet ikkoncentrata fuq in-negozju li kienet qeghda taghmel hija stess mill-bejgh ta` Grease Guardian lill-klijenti taghha u ma riditx tissogra li FM Malta tiddevja mill-produzzjoni ta` dan il-prodott bil-konsegwenza li FM Ireland iggarab telf.

Dan l-agir huwa wiehed abbuзив fejn Kevin Fitzpatrick wahdu kien qiegħed jieħu decizjonijiet li bi dritt kellhom jittieħdu mill-Bord tad-Diretturi ta` FM Malta. Fir-rigward ta` dawn id-decizjonijiet l-azzjonista minoritarja komplet tigi eskluza bħal li kienu ma kellha ebda jedd li tesprimi l-opinjoni tagħha.

**Anke dan l-ilment ghandu mis-sewwa u huwa ppruvat.**

#### **iv) Konflitt ta` interess**

L-ilment jirreferi għall-interess li l-familja Fitzpatrick għandha f`kumpannija li twaqqfet fil-Malasja.

Kevin Fitzpatrick xehed li sar impjant ta` manifattura fil-Malasja minn fejn Edmond John Fitzpatrick ikkonferma illi jigi prodott "a cheaper version of the Grease Guardian."

Edmond John Fitzpatrick xehed illi d-disinn tal-prodott huwa wiehed komuni ghal diversi ditti madwar id-dinja li jipproducu dan it-tip ta` prodott. Mhux maghruf sewwa sew minn fejn origina d-disinn ta-prodott. Bhala fatt qatt ma giet registrata *trademark* tad-disinn ta` dan il-prodott.

Hija l-fehma tal-qorti li din kienet mossa, strategija, jew xort` ohra li tohloq konflitt ta` interess ghal FM Ireland ghaliex ladarba kellha impjant iehor minn fejn tipproduci l-prodott u tkopri s-suq Azjatiku, ma kelliex ghalfejn tuza s-servizzi ta` FM Malta ghal dan l-iskop. Konsegwentment, dik id-decizjoni kompliet ittellef lill-FM Malta milli tkabbar il-produzzjoni taghha u konsegwentment milli tiggera aktar profitt.

**Anke dan l-ilment huwa ppruvat.**

## **VII. L-Art 402(3) tal-Kap 386**

**Issib ghalhekk illi l-Art 402(1) tal-Kap 386 huwa bbazat sewwa.**

**Accertat illi l-ilmenti tar-rikorrenti skont l-Art 402(1) tal-Kap huma bbazati sewwa, il-qorti tqis ukoll li jkun gust u ekwu li taghti ordni fl-ambitu tal-Art 402(3) tal-Kap 386.**

Il-qorti tirrileva illi s-subartikolu (3) jakkordalha diskrezzjoni wiesgha sabiex taghti dik l-ordni li tkun gusta u ekwa tenut kont tal-fatti u cirkostanzi tal-kaz (ara d-decizjoni tal-Qorti tal-Appell tal-31 ta` Jannar 2003 fil-kawza "**Philomena Ellul vs Charles Ellul pro et noe et**"). Id-diskrezzjoni hija talment wiesgha illi sahansitra tista` twarrab t-talbiet specifici li jkunu saru mir-rikorrenti.

Fil-provvediment li nghata fl-1 ta` Awissu 2017 fil-kawza : **Calamatta Cuschieri Investment Services Limited et v. Pefaco International plc et** il-Prim` Awla tal-Qorti Civili irrimarkat :-



" ... kull wahda mid-disposizzjonijiet tal-Art 402(3) hija sottoposta ghad-diskrezzjoni tal-Qorti. Dan ikompli jfisser illi anke jekk issib li jissussisti dak li jghid l-Art 402(1), xejn ma jzomm lill-Qorti milli tapplika rimedju minflok iehor..."

Fil-Pag. 285 ta' "**Company Law – Theory, Structure and Operation**" (OUP – 1998) **Brian Cheffins** ighid illi Sec 459 (illum Art 94 tal-Companies Act 2006) *provides a judge with broad powers to grant to a successful applicant whatever remedy is appropriate.*

Il-qorti hasbet fit-tul dwar l-ordni li tkun l-aktar gusta u ekwa fic-cirkostanzi.

Fil-kaz **In re Westbourne Galleries Ltd.** (1973) A.C. 360 [op. cit.] Lord Wilberforce irrimarka :

*The words ("just and equitable") are a recognition of the fact that a limited liability company is more than a mere legal entity, with a personality of its own ; that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act (1948) and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small.*

**Farrugia** xehed illi sat-28 ta' Ottubru 2018 Miclis kellha tithallas is-somma ta' €480,332, eskus imghax, in kwantu s-somma ta' €305,216 tirrappresenta self li jmur lura sas-sena 2009 u s-somma ta' €175,116 rapprezentanti fatturat ghal-telf ta' profitti.

**Farrugia** xehed illi minhabba l-fatt illi FM Ireland kienet tinsab f' sitwazzjoni finanzjarja diffiqli, fejn anke kecciet xi impjegati u naqqset il-pagi, huwa fittex li ma jpoggix aktar pressjoni fuq il-grupp u ghalhekk accetta li jsir trasferiment tal-profitti minn FM Malta ghal FM Ireland

sabiex FM Ireland setghet tirkupra finanzjarjament. Spjega li dan it-trasferiment tal-profitti kien biss self li finalment ried jintradd lura lil FM Malta. Minn dawn il-profitti huwa kellu s-sehem ta` 20%. Spjega li konsegwenza ta` dan huwa ilu sa mis-sena 2009 ma jithallas *dividends*.

B` rizzoluzzjoni li ttiehdet waqt l-*annual general meeting* ta` FM Malta f` Jannar 2020, Mario Farrugia tnehha kemm minn direttur kif ukoll minn *company secretary* taghha.

### **Il-qorti ssib li jirrizultaw l-ilmenti kollha tar-rikorrenti.**

## **VII. L-Art 402(3) tal-Kap 386**

**Accertat illi l-ilmenti kollha tar-rikorrenti skont l-Art 402(1) tal-Kap huma bbazati sewwa, il-qorti tqis ukoll li jkun gust u ekwu li taghti ordni fl-ambitu tal-Art 402(3) tal-Kap 386.**

Il-qorti tirrileva illi s-subartikolu (3) jakkordalha diskrezzjoni wiesgha sabiex taghti dik l-ordni li tkun gusta u ekwa tenut kont tal-fatti u cirkostanzi tal-kaz (ara d-decizzjoni tal-Qorti tal-Appell tal-31 ta` Jannar 2003 fil-kawza "**Philomena Ellul vs Charles Ellul pro et noe et**"). Id-diskrezzjoni hija talment wiesgha illi sahsitra tista` twarrab t-talbiet specifici li jkunu saru mir-rikorrenti.

Fil-provvediment li nghata fl-1 ta` Awissu 2017 fil-kawza : **Calamatta Cuschieri Investment Services Limited et v. Pefaco International plc et** il-Prim` Awla tal-Qorti Civili irrimarkat :-

*" ... kull wahda mid-disposizzjonijiet tal-Art 402(3) hija sottoposta ghad-diskrezzjoni tal-Qorti. Dan ikompli jfisser illi anke jekk issib li jissussisti dak li jghid l-Art 402(1), xejn ma jzomm lill-Qorti milli tapplika rimedju minflok iehor..."*

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tal-Companies Act 2006) *provides a judge with broad powers to grant to a successful applicant whatever remedy is appropriate.*

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*The words ("just and equitable") are a recognition of the fact that a limited liability company is more than a mere legal entity, with a personality of its own ; that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act (1948) and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small.*

**Il-qorti hasbet fit-tul dwar l-ordni li tkun l-aktar gusta u ekwa fic-cirkostanzi u sejra tipprovdi in linea mat-talbiet li ghamlet ir-rikorrenti.**

### **Provvediment**

**Ghar-ragunijiet kollha premessi, il-qorti tipprovdi dwar it-talbiet u dwar l-eccezzjonijiet billi :**

**Tichad l-eccezzjonijiet kollha tal-intimati.**

**Tiddikjara li l-ilmenti li ressqet ir-rikorrenti skont l-Art 402(1) tal-Kap 386 tal-Ligijiet ta` Malta huma kollha bbazati sewwa.**

**Tiddikjara li jkun gust u ekwu li taghti ordnijiet skont l-Art 402(3) tal-Kap 386 tal-Ligijiet ta` Malta.**

**Riferibbilment ghat-talba tar-rikorrenti markata (a) tipprovdi billi tirregola t-tmexxija tal-affarijiet tal-kumpannija F M Environmental (Malta) Ltd (C22822) fis-sens illi b`effett minn xahar mil-lum Mario Farrugia [K.I. 271572M] ghandu jerga` jkun direttur tal-kumpannija F M Environmental (Malta) Ltd (C22822). Jekk jghaddi x-xahar mil-lum, u Mario Farrugia ma jkunx imnizzel fost id-diretturi tal-kumpannija F M Environmental (Malta) Ltd (C22822) fir-Registru tal-Kumpanniji, allura kull persuna li tkun responsabbli ghal dak in-nuqqas, tkun passibbli ta` procediment ghad-disprezz tal-qorti.**

**Tilqa` t-talbiet tar-rikorrenti markata (b) u (c).**

**Tipprovdi dwar it-talba tar-rikorrenti markata (d), billi tordna lill-kumpannija F M Environmental (Malta) Ltd (C22822) sabiex thallas lir-rikorrenti s-somma ta` sitt mija u zewgt elef ewro (€602,000) bl-imghax legali b`effett mil-lum.**

**Tordna li l-ispejjez kollha ta` din il-kawza ghandhom jithallsu mill-intimati *in solidum* bejniethom.**

**Onor. Joseph Zammit McKeon  
Imhalled**

**Amanda Cassar  
Deputat Registratur**