



**QORTI CIVILI
PRIM' AWLA**

**ONOR. IMHALLEF
JOSEPH ZAMMIT MC KEON**

Seduta tas-16 ta' Dicembru, 2010

Rikors Numru. 1039/2010/2

**Patricia Apap Bologna
(Karta tal-Identita' bin-
Numru 318881M)**

kontra

Raphael Bianchi

**(Karta tal-
Identita' bin-Numru
367581M); Michael Bianchi
(Karta tal-Identita'
bin-
657456M); Bianchi
and Sons Limited [C-14]; The
Dolphin Supermarkets
Limited [C-12021];
Investments
Limited [C-391];
Airport Investments Limited
[C-29973] u Bianchi Trading**

& Shipping Limited
u Vivian S

[C-1404]
Bianchi (Karta
tal-Identita' bin-Numru
353581M) ghal kull interess
li jista' jkollu

Il-Qorti :

Rat ir-rikors li Patricia Apap Bologna pprezentat fil-15 ta` Ottubru 2010 fejn, fil-kwalita` taghha ta` azzjonista minoritarja fid-diversi kumpanniji li jiffurmaw parti mill-grupp ta` kumpanniji maghrufa fil;-kummerc bhala l-Bianchi Group of Companies, u ghar-ragunijiet li indikat, talbet rimedji skond l-Art.402 tal-Kap.386 tal-Ligijiet ta` Malta ghax fil-fehma taghha l-affarijiet tal-grupp inkluzi tal-kumpanniji li taghhom hija azzjonista minoritarja qed jitmexxew jew aktar se jitmexxew b`mod oppressiv, b`mod mhux gust, diskriminatorju kontra taghha, jew b`mod mhux gust ta` pregudizzju ghaliha.

Rat li r-rikorrenti talbet lil din il-Qorti sabiex –

1. *Tiddikjara li l-affarijiet tal-kumpanniji intimati tmexxew jew qed jitmexxew jew aktarx jitmexxew b`mod li, jew li xi att jew omissjoni tal-kumpanniji ntimati kienu jew huma jew x`aktarx se jkunu, oppressivi b`mod mhux gust, diskriminatorji kontra, jew b`mod mhux gust ta` pregudizzju ghar-rikorrenti jew b`mod li jkunu kontra l-interessi tal-membri ta` l-istess kumpanniji in generalu u li jezistu ragunijiet ta` gravita` sufficjenti li jiggustifikaw rimedju kontemplat mill-Artikolu 402 tal-Att dwar il-Kumpanniji u konsegwentement ; u*

2. *Tipprovdi u tordna x-xoljiment tal-kumpanniji intimati kollha u l-istralc konsegwenzjali taghhom a tenur tal-Artikolu 402(3)(g) ta' l-Att dwar il-Kumpanniji ; jew*

3. *Taghti xi rimedju iehor illi din l-Onorabbli Qorti tqis illi huwa xieraq illi taghti fid-diskrezzjoni moghtija lilha a tenur ta' l-Artikolu 402 tal-Att dwar il-Kumpanniji ; u*

4. *Taghti dawk ir-rimedji immedjati illi jidhrilha xierqa sabiex jigu mharsa l-jeddijiet kollha nkluz bil-hatra immedjata ta' amministratur provvizorju sabiex jiehu f'idejh l-avvjament u tmexxija ta' l-istess kumpanniji sakemm tigi deciza din il-kawza u dan a tenur ta' l-Artikolu 228 ta' l-Att dwar il-Kumpanniji li ghandu applikazzjoni anke f'din il-kawza a tenur ta' l-Artikolu 402(4) ta' l-istess Att dwar il-Kumpanniji.*

U dan taht dawk il-provvedimenti u kundizzjonijiet li jidhrulha xierqa fic-cirkostanzi.

Bl-ispejjez kontra l-intimati ngunti li huma minn issa stess in subizzjoni u b'riserva ghal kwalsiasi azzjoni ghad-danni spettanti lir-rikorrenti kontra l-intimati.

Rat ir-risposta tal-intimat Vivian S. Bianchi prezentata fit-8 ta' Novembru 2010 fejn, ghar-ragunijiet hemm moghtija, sostna li l-agir ta' wliedu Raphael u Michael Bianchi huwa abusiv u pregudizzjevoli ghad-drittijiet tal-azzjonisti u l-uniku mod kif jistghu jigu salvagwardati verament l-interessi ta' kull azzjonista hu illi l-Qorti tipprovdi r-rimedju xieraq u opportun entro l-parametri tal-Artikolu 402 tal-Companies Act kif talbet r-rikorrenti Patricia Apap Bologna.

Rat ir-risposta tal-intimati Raphael Bianchi, Michael Bianchi, Bianchi & Sons Limited, The Dolphin

Supermarkets Limited, Investments Limited, Airport Investments Limited, Bianchi Trading & Shipping Limited prezentata fit-18 ta` Novembru 2010 fejn irrilevaw –

1. *It-talbiet attrici ghandhom jigu michuda, bl-ispejjez stante illi huma nfondati fil-fatt u fid-dritt, u li fi kwalunkwe kaz ma jezistux il-premessi u l-elementi necessarji biex dina l-Onorabbli Qorti tkun tista` tordna xi rimedju disponibbli ai termini tal-Artikolu 402 tal-Kap.386 tal-Ligijiet ta` Malta.*

2. *Illi inoltre, fil-kaz tar-raba` talba attrici, dina ghandha tigi michuda anki kieku jezistu il-premessi necessarji taht l-Artikolu 402, stante illi n-nomina ta` amministratur provvizorju ma tistax issir fl-isfond ta` talba msejsa fuq id-disposizzjonijiet tal-Artikolu 402. Dan ghaliex, skond l-Art.228 tal-Kap.386, dina l-Onorabbli Qorti tista` biss taghmel tali ordni fl-isfond ta` talba ghal stralc taht l-Art.214 tal-Kap.386. Il-fatt biss illi t-talba ghall-hatra ta` amministratur provvizorju, f`dan il-kaz, qed issir espressament fl-isfond tal-Artikolu 402 tal-Kap.386 u mhix qed ssir fl-isfond ta` rikors ta' stralc, wahedha teskludi l-possibilita` li din il-Qorti tkun tista` taghmel ordni ghall-hatra ta` amministratur provvizorju.*

Rat li fl-istess risposta, l-intimati ndikati fil-paragrafu precedenti taw ir-ragunijiet ghaliex, fil-fehma taghhom, kienu nfondati t-talbiet kollha tar-rikorrenti.

Rat li fl-udjenza tat-30 ta` Novembru 2010, il-partijiet qablu li fl-ewwel lok tigi trattata u deciza l-eccezzjoni tal-intimati Raphael Bianchi, Michael Bianchi, Bianchi & Sons Limited, The Dolphin Supermarkets Limited, Investments Limited, Airport Investments Limited, Bianchi Trading & Shipping Limited dwar jekk fil-procedura tentata mir-rikorrenti a tenur tal-Art.402 tal-Kap.386 setghetx issir talba ghall-hatra ta` Amministratur Provvizorju.

Semghet it-trattazzjoni tad-difensuri tal-partijiet dwar l-imsemmija eccezzjoni fl-udjenza tat-30 ta` Novembru 2010

Qieset bir-reqqa dawn is-sottomissjonijiet.

Rat in-noti tar-rikorrenti u tal-intimati Raphael Bianchi, Michael Bianchi, Bianchi & Sons Limited, The Dolphin Supermarkets Limited, Investments Limited, Airport Investments Limited, Bianchi Trading & Shipping Limited.

Rat id-digriet taghha moghti fl-udjenza tat-30 ta` Novembru 2010 fejn halliet il-kawza ghal provvedimenti dwar din l-eccezzjoni.

Ikkunsidrat :

Il-punt centrali li din il-Qorti trid tipprovdi dwaru llum huwa jekk din il-Qorti ghandhiex is-setgha skond il-Kap.386 li tahtar amministratur provvizorju fil-kuntest tal-procedura tentata mir-rikorrenti.

L-argument tal-intimati Raphael Bianchi, Michael Bianchi, Bianchi & Sons Limited, The Dolphin Supermarkets Limited, Investments Limited, Airport Investments Limited, Bianchi Trading & Shipping Limited huwa li fil-kuntest tal-azzjoni skond l-Art.402 tal-Kap.386 il-Qorti hija *ex lege* prekluzza milli taghmel din il-hatra, ghaliex il-ligi taghti lill-Qorti d-diskrezzjoni li tahtar amministratur provvizorju biss fil-procedura *ad hoc* tax-xoljiment u stralc ta` kumpannija skond l-Art.214 et seq tal-Kap.386.

Ghal dan l-argument, ir-rikorrenti wiegbet fis-sens li, ghalkemm il-procedura minnha tentata kienet a tenur ta` l-Art.402 tal-Kap.386, fl-istess waqt fost it-talbiet li ressqet kien hemm it-talba ghax-xoljiment u stralc tal-kumpanniji in kwistjoni u ghaldaqstant ladarba kienet inizjata l-procedura li tista` twassal ghax-xoljiment u stralc hija setghet tavvanza t-talba ghall-hatra ta` amministratur provvizorju.

Fi procedura ta` xoljiment u stralc skond l-Art.214 et seq tal-Kap.386 il-ligi tassattivament fl-Art.228(1) taghti lill-Qorti s-setgha li **b'ordni** (enfasi ta` din il-Qorti) *tahtar amministratur provvizorju f`kull zmien wara li jkun gie pprezentat rikors ghal stralc u qabel ma taghmel ordni ghal stralc.*

Din is-setgha tixbah hafna l-*interim orders* li tista` taghti l-Qorti fil-ligi Ingliza anke fil-kuntest ta` azzjoni ghal *unfair prejudice*.

Mayson, French & Ryan fil-ktieb "**Company Law**" (26th Edition - Oxford University Press - Pg. 579) ighidu hekk -

The court has a power under s 996(1) [tal-Companies Act 2006 tar-Renju Unit) to make such orders as it considers will enable the company, for the future, to be properly run, and for its affairs to be under the conduct of somebody who shareholders generally can be confident will conduct the affairs of the company properly (Re a Company (No.00789 of 1987) [1990] BCLC 384 per Harman J at p 395 followed in Re Hailey Group Ltd.)

Pero` l-Qrati Inglizi jaghtu *interim orders* fejn huma **specifikament** awtorizzati mil-ligi stess sabiex jaghmlu dan.

Issa fil-kaz taghna fejn il-ligi riedet li meta tigi tentata procedura ta` xoljiment u stralc skond l-Art.214 et seq il-Qorti tista` taghti ordni ghall-hatra ta` amministratur provvizorju f`kull zmien wara li jkun gie pprezentat rikors ghal stralc u qabel ma taghmel ordni ghal stralc, daqstant iehor din il-Qorti hija prekluzza milli taghti dak l-ordni fejn il-ligi ma tghid propju xejn bhal fil-kaz tal-Art.402.

Il-principju tad-dritt – *ubi lex voluit dixit* – japplika bis-shih fil-kaz tal-lum.

Fil-Kapitolu 16 (minn pag.959 sa 1029) tal-ktieb **“Principles of Maltese Company Law”** (Malta University Press – 2007) il-**Prof Andrew Muscat** jittratta s-suggett ta` *Statutory Shareholder Remedies : Unfair Prejudice and Winding Up*. Minn pag.997, jittratta *Remedies available under article 402*. In partikolari, iqis dawk maghrufa bhala *Interim orders* u jghid hekk –

Before examining the different types of order that can be made by the court, a preliminary question should be considered : whether a court may issue an interim order pending final judgement. The position in English law is that English courts do, where appropriate, have the power to issue interim orders – usually orders for payment on account or orders designed to preserve the status quo. The Maltese Companies Act is silent on the question of whether a court, seized of an issue under article 402, is entitled to issue an interim order. Nor does any jurisdiction result from any general provision in the Code of Organisation and Civil Procedure.

It is significant that where the legislator wished to grant to a court the power to make interim orders, the legislator did so by express provision, as with the power of the court to issue a “provisional order” under article 37(5) of the Merchant Shipping Act (prohibiting dealings in a ship until the court definitely decides on the merits) and the power of the

court to initially issue a warrant of prohibitory injunction for an “interim period” under article 873(7) of the Code of Organisation and Civil Procedure. In practice, situations may sometimes arise where the issue of an interim order would be necessary to protect the interests of the complainant or of the company. The introduction of an amendment to article 402 would allow the court to issue interim orders would be another helpful tool in the court’s arsenal against oppressive, unfairly prejudicial or unfairly discriminatory conduct ...

Din il-Qorti tikkondividi din id-dottrina u sejra tapplikaha ghall-kaz tal-lum.

Tghid ukoll li fil-kuntest tal-Ligi Ingliza, id-dottrina ppruvat taghrbel dawk is-sitwazzjonijiet fejn talba ghal xoljiment u stralc tigi nserita fi procedura ghal *unfair prejudice*.

Gower and Davies fil-ktieb **“Principles of Modern Company Law”** (Eight Edition - Sweet & Maxwell - Pg.706-707) ighidu hekk -

A winding up petition triggers s.127 of the Insolvency Act 1986, which requires the court’s consent for any disposition of the company’s property after the petition is presented. This ability to paralyse, or at least disrupt, the normal running of the company’s business adds to the negotiating strength of the petitioner but is hardly less legitimate if an unfair prejudice petition could give him or her all that is required. Consequently a Practice Direction seeks to discourage the routine joining of winding-up petitions to unfair prejudice claims unless a winding-up remedy is what is genuinely sought. The force behind the Practice Direction is provided by sec. 125(2) of the Insolvency Act 1986 to the effect that the Court need not grant a winding-up order if it is of the opinion that some

alternative remedy is available to the petitioners and that they have acted reasonably in pursuing it.

Ladarba l-azzjoni tal-lum hija a tenur tal-Art.402, l-ordnijiet li din il-Qorti ghandha diskrezzjoni li taghmel skond is-subinciz (3) fejn *tkun tal-fehma li l-ilment ikun bazat sewwa u li jkun gust u ekwu li hekk taghmel* huma dawk elenkati minn (a) sa (g) - fosthom hemm l-ordni ta` xoljiment u stralc konsegwenzjali skond (g). Anke mid-dicitura tal-Art.402 fl-assjem tieghu, huwa evidenti li l-Qorti ma tistax tahtar amministratur provvizorju kif qeghda titlob ir-rikorrenti. **Fl-istat tad-dritt kif inhu llum, il-Qorti hija prekluzza milli taghmel il-hatra li trid ir-rikorrenti.** Huwa **biss** meta l-Qorti (*ghax tkun tal-fehma li l-ilment ikun bazat sewwa u li jkun gust u ekwu*) li ghandha tordna x-xoljiment u stralc konsegwenzjali li japplikaw *id-disposizzjonijiet tas-Sub-Titoli I u III tat-Titolu II ta-Taqsim V ta` dan l-att li jirregolaw l-istralc ta` kumpanniji* (ara s-subinciz [4]).

Ghar-ragunijiet kollha premessi, din il-Qorti qeghda tilqa` l-eccezzjoni tal-intimati Raphael Bianchi, Michael Bianchi, Bianchi & Sons Limited, The Dolphin Supermarkets Limited, Investments Limited, Airport Investments Limited, Bianchi Trading & Shipping Limited, kif din tirrizulta dedotta a fol 49 sa 51 tal-process, u tichad ir-raba` talba tar-rikorrenti.

L-ispejjez jibqghu rizervati ghall-gudizzju finali.

< Sentenza In Parte >

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