

Kopja Informali ta' Sentenza



**QORTI TA' L-APPELL**

**S.T.O. PRIM IMHALLEF  
SILVIO CAMILLERI**

**ONOR. IMHALLEF  
TONIO MALLIA**

**ONOR. IMHALLEF  
JOSEPH AZZOPARDI**

Seduta tal-25 ta' Ottubru, 2013

Appell Civili Numru. 29/2002/1

**Electronic Products Limited**

**v.**

**Emanuel Micallef u Josephine Micallef, Saviour  
Micallef u Gemma Micallef**

Rat ic-citazzjoni li s-socjeta` rikorrenti pprezentat fl-14 ta' Jannar 2002, li taqra hekk:

“Peress illi l-konvenuti, ezercitanti l-kummerc taht l-isem ‘Supermaster Discount Store’, kienu nkarigaw lis-socjeta’ attrici sabiex din tal-ahhar tikkonsenjara xi computer

Kopja Informali ta' Sentenza

hardware kif ukoll biex tipprovielha servizz ta' *maintenance* fis-sistema tal-computer.

“Peress illi l-ammont dovut mill-konvenuti jammonta għall-ammont ta' erbat elef mitejn u erbgha u hamsin Liri Maltin u tmien centezmi (Lm4,254.08), liema ammont minkejja diversi interpellazzjonijiet baqa' ma thallasx mill-konvenuti.

“Peress illi l-istess konvenuti qed jallegaw li dan in-negozju ma sarx magħhom fil-vesti personali izda mas-socjeta' 'Supermaster Limited', liema socjeta' tinsab f'likwidazzjoni.

“Peress illi matul l-istess likwidazzjoni tas-socjeta' 'Supermaster Limited', irrizulta bl-aktar mod car li l-istess socjeta' u cioe' Supermaster Limited avvanzat lil socjeta' ohra tal-konvenuti, u ezattament E&S Trading Limited, is-somma ta' hamsin elf tlett mija u disgha u tmenin Liri Maltin u sebgha u sittin centezmu (Lm50,389.67).

“Peress illi dan l-agir min-naha tal-konvenuti sar sabiex il-kredituri tas-socjeta' Supermaster Limited jigu ddefrawdati mill-ammonti li għandhom jieħdu bhala dovut lilhom.

“Peress illi l-ammont pagabbli lis-socjeta' attrici mis-socjeta' Supermaster Limited, proprjeta' tal-konvenuti, huwa ta' erbat elef mitejn u erbgha u hamsin Liri Maltin u tmien centezmi (Lm4,254.08), liema ammont gie kanonizzat anke minn sentenza tal-Prim' Awla tal-Qorti Civili wara li l-istess socjeta' baqghet kontumacija fl-istess kawza.

“Peress illi s-socjeta' attrici hija wahda mill-kredituri tal-konvenuti kif ukoll tas-socjeta' Supermaster Limited għall-ammont fuq indikat.

“Peress illi l-agir fuq spjegat min-naha tal-konvenuti jammonta għall-agir frawdolenti min-naha tal-istess konvenuti ad dannu tal-kredituri tal-istess konvenuti, li fosthom hemm l-istess socjeta' attrici.

Kopja Informali ta' Sentenza

“Peress illi f’kaz ta’ agir frawdolenti min-naha tal-azzjonisti ta’ socjeta’ b’responsabilita’ limitata, id-diretturi ghandhom jitqiesu li huma personalment responsabbli ghad-debiti tal-istess socjeta’ li jirraprezentaw.

“Peress illi l-konvenuti kienu diretturi u azzjonisti fis-socjeta’ ‘Supermaster Limited’.

“Peress illi il-konvenuti huma kemm azzjonisti u diretturi fis-socjeta’ E&S Trading Limited.

“Peress illi jidher car li l-agir tal-istess konvenuti fil-vesti taghhom ta’ direttur tas-socjeta’ Supermaster Limited meta approvaw self fl-ammont ta’ hamsin elf tlett mija u disgha u tmenin Liri Maltin u sebgha u sittin centezmu (Lm50,389.67) lil socjeta’ ohra taghhom u cioe’ E&S Trading Limited sar biss biex il-kredituri tas-socjeta’ Supermaster Limited – li wiehed minnhom hija s-socjeta’ attrici – ma jithallsux l-ammont dovut lilhom.

“Peress illi dan l-agir min-naha tal-konvenuti jikkostitwixxi agir frawdolenti ghad-dannu tal-kredituri tas-socjeta’ Supermaster Limited, li wiehed minnhom hija proprja s-socjeta’ attrici.

“Jghidu ghalhekk il-konvenuti ghaliex din l-Onorabbli Qorti m’ghandhiex:

“1. Taqta’ u tiddikjara li l-agir tal-konvenuti meta l-istess konvenuti fil-vesti taghhom tad-diretturi tas-socjeta’ Supermaster Limited approvaw self lil socjeta’ ohra tal-istess konvenuti jammonta ghall-agir frawdolenti ad dannu tal-kredituri tas-socjeta’ Supermaster Limited.

“2. Tiddikjara li minhabba f’hekk, il-konvenuti bhala personalment responsabbli li jhallsu l-ammont dovut lis-socjeta’ attrici kif fuq spjegat.

“3. Tikkundanna lill-konvenuti jhallsu lis-socjeta’ attrici s-somma ta’ erbat elef mitejn u erbgha u hamsin Liri Maltin u tmien centezmi (Lm4,254.08) rapprezentanti ammonti dovuti mis-socjeta’ Supermaster Limited lis-

socjeta' attrici fir-rigward ta' konsenja ta' computer hardware kif ukoll bhala hlasijiet ghal servizz ta' *maintenance* fis-sistema tal-computer, kif kanonizzat minn sentenza tal-Prim' Awla tal-Qorti Civili fl-10 t'Ottubru 2001, kollox kif intqal fuq u ghar-ragunijiet premessi.

“Bl-ispejjez u bl-imghaxijiet legali sad-data tal-effettiv pagament kontra s-socjeta` konvenuta li hija minn issa ngunta ghas-subizzjoni.”

Rat in-nota tal-eccezzjonijiet tal-konvenuti li in forza taghha dawn eccepew illi:

“1. Illi Josephine Micallef u Gemma Micallef la huma azzjonisti u l-anqas huma diretturi fis-socjeta` Supermaster Limited jew fil-kumpanija E&S Trading Limited u ghalhekk t-talbiet tal-attur ma jistghux jigu ndirizzati kontra dawn il-konvenuti peress illi zgur ma wettqux xi allegat frodi kontra xi kredituri u ghalhekk ghandhom jigi liberati mill-osservanza tal-gudizzju;

“2. Illi l-allegazzjonijiet huma infondati kemm bhala fatt kif ukoll bhala dritt u dan kif ser jigu ppruvati eaqt it-trattazzjoni tal-kawza;

“3. Illi l-allegazzjonijiet li kien hemm xi self da parte ta' Supermaster Limited sabiex jigu ddefrawdati l-kredituri huwa ghall-kollox infondat kemm bhala fatt kif ukoll bhala dritt u dan ser jigi ppruvat waqt it-trattazzjoni tal-kawza;

“4. Illi l-iskop ta' din il-kawza hija mmirata sabiex tipprova tivvesta u ddejjaq lill-azzjonisti ta' Supermaster Limited fil-kwalita` personali taghhom u dan wara li l-istess attur rebah kawza kontra Supermaster Limited sabiex dan il-kreditu jigi mhallas mill-istess ditta u dan wara li l-likwidatur ma kkontestax din it-talba pero` tilef il-kawza kontra l-konvenuti fil-kwalita` taghhom personali peress li n-negozju sar dejjem ma' Supermaster Limited u mhux mall-azzjonisti fil-kwalita` personali taghhom.”

Rat is-sentenza moghtija mill-Prim' Awla tal-Qorti Civili fl-4 ta' Marzu 2010 li in forza taghha l-kawza giet deciza billi:

“... .. ssib li l-intimati mexxew in-negozju bi hsieb ta' frodi u kwindi zzomhom responsabbli personalment u ghalhekk, taqta u tiddeciedi billi tilqa' l-ewwel eccezzjoni tal-konvenuti u tillibera lil Josephine Micallef u Gemma Micallef mill-osservanza tal-gudizzju u fil-waqt li tichad l-eccezzjonijiet l-ohra tal-konvenuti, tilqa' l-ewwel talba tas-socjeta' attrici, tilqa' t-tieni talba u tilqa' t-tielet talba u tikkundanna lill-konvenuti ihallsu lis-socjeta' attrici s-somma ta' €9,909.34 ekwivalenti ghal Lm4,254.08. Bl-ispejjez u imghaxijiet kif mitluba.

“L-ispejjez tal-kawza jithallsu mill-konvenuti, minbarra dawk in konnessjoni mal-konvenuti Josephine Micallef u Gemma Micallef ghandhom jithallsu mis-socjeta' attrici.”

Dik il-Qorti tat is-sentenza taghha wara li ghamlet is-segwenti konsiderazzjonijiet:

“Ikkunsidrat illi permezz ta' din il-kawza, is-socjeta' attrici qed titlob dikjarazzjoni li d-diretturi tas-socjeta' Supermarket Limited agixxew b'mod frawdolenti a dannu tal-kredituri tas-socjeta' u konsegwentement ghandhom jigu dikjarati personalment responsabbli. Id-diretturi u n-nisa taghhom jirribattu li l-allegazzjonijiet huma infondati.

“L-ewwel eccezzjoni tal-konvenuti tirrigwarda l-pozizzjoni ta' Josephine Micallef u Gemma Micallef fil-kawza. Il-Qorti tinnota li l-kawza hija dwar allegat kummerc bi frodi u ghalhekk a tenur tal-Art. 1327 tal-Kodici Civili, kull ammont dovut per konsegwenza ma jiggravax il-komunjoni tal-akkwisti. Ghaldaqstant, l-imsemmija Josephine Micallef u Gemma Micallef ma messhomx gew inharrka.

“Il-Qorti kkunsidrat illi l-Kap. 386 tal-Ligijiet ta' Malta jipprovdi ghall-kummerc bi frodi da parti ta' diretturi ta' socjeta' fl-Art. 315 li testwalment jipprovdi illi:

“315 (1) Jekk waqt l-istralc ta' kumpanija sew jekk b'ordni tal-Qorti jew volontarjament ikun jidher li xi negozju tal-kumpanija jkun tmexxa bil-hsieb ta' frodi ta' kredituri tal-

kumpanija jew ta' kredituri ta' xi persuna ohra jew bil-ghan ta' frodi, il-Qorti tista' fuq rikors tar-ricevitur ufficjali, jew ta' l-istralcarju jew ta' xi kreditur jew ta' xi kontributorju tal-kumpanija jekk jidhrilha xieraq li taghmel hekk, tiddikjara li xi persuni li xjentement kienu partijiet fit-tmexxija tan-negozju bil-mod qabel imsemmi tkun responsabbli personalment, minghajr ebda limitazzjoni ta' responsabbilta' ghal kull jew ghal xi dejn jew responsabbiltajiet ohra tal-kumpanija kif il-Qorti tista' tordna.”

“Il-provvediment tal-ligi jimponi zewg kundizzjonijiet ghall-applikazzjoni tal-istess. L-ewwel minn dawn il-kundizzjonijiet hi li s-socjeta' trid tkun fi stadju ta' stralc; sitwazzjoni li fil-kaz li ghandha quddiemha, il-Qorti llum tezisti.

“Imbaghad, sabiex tkun, tista' tasal ghall-konkluzjoni ta' kummerc bi frodi, il-Qorti trid tkun sodisfatta li jezistu provi ta' intenzjoni li jigu frodati kredituri.

“F'dan il-kuntest, il-Professor Andrew Muscat fil-ktieb “Principles of Maltese Company Law” jghid:

““Another – and certainly more crucial – condition is that the applicant will have to discharge the burden of proving that the “business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose”.

“Professor Andrew Muscat ikompli:

““The test will however be satisfied where directors allow a company to incur credit when they have no reason to think that the creditors will ever be paid. It can also be satisfied where the directors obtain credit at a time when they have no good reason to believe that funds will become available to pay the creditors when their debts become due or shortly thereafter”.

“Skond Charlesworth's Company Law (Stevens 13th Edit. 1987) jinghad illi:

“In general it may be properly inferred that there is an intent to defraud creditors if a company carries on business and incurs debts when, to the knowledge of the directors, there is no reasonable prospect of the company being able to pay them. It is not necessary to show that there is no prospect of the creditors ever being paid. It is enough that there is no reason for thinking that they will be paid as the debts fall due or shortly thereafter”.

“Il-Qorti taghmel referenza ukoll ghall-istudju estensiv tal-kuncett ta' kummerc bi frodi moghti mill-Prim' Awla tal-Qorti Civili fis-sentenza Dr. Andrew Borg Cardona bhala stralcarju vs Victor Zammit et.

“Il-Qorti ghalhekk ser tghaddi biex tezamina jekk fil-kaz li ghandha quddiemha, u fid-dawl tal-principji hawn fuq elenkati, jissussistux l-elementi ta' kummerc bi frodi skonf l-Art. 315 tal-Kap.386.

“Xehed Steve Cachia (Fol. 29 tal-process et seq) rapprezentant tal-likwidaturi Deloitte and Touche li pprezenta interim report tal-istralc tas-socjeta' Supermaster, liema rapport jikkonferma l-krediti taz-zewg socjetajiet l-ohra tal-konvenuti fil-konfront ta' Supermaster. L-istess likwidaturi f'dak l-istadju kkonfermaw li dawn il-krediti ma kienu ngabu ebda prova tagghom.

“Jirrizulta ukoll mill-estratti ta' BoardMeetings tas-Socjeta', prezentati in atti mil-likwidaturi (fol. 52) illi sa mill-1997, minute 133/97 fil-prezenza tal-awditur tghid illi:

“It was resolved by all members present that all pre-trading expenses (Lm140k) be capitalized under intangible assets. This situation should improve the balance sheet figures and matter regularized”.

“Fl-istess vena kienet minuta tal-Board datata 23 ta' April 1998. Nru. 136/98 fejn intqal:

“...the Auditor explained that the company should have had adequate funds to operate with during the year. The major concern, however, was the substantial pre-trading

expenses incurred in the initial period of the business before the company had actually started operating. Such a situation had placed the company in dire financial constraints.”

“Dawn, flimkien ma’ l-estratti l-ohra tal-minuti tal-laqghat tad-diretturi kollha jaghtu x’tifhem illi l-problemi finanzjarji tas-socjeta’ kienu ilhom hemm mill-bidu nett, anke qabel ma bdiet topera l-istess socjeta’. Kien biss f’Marzu tas-sena 2001 li gie deciz li ma jinxtrawx iktar oggetti ghall-bejgh u li jigu likwidati stocks ezistenti biex jithallsu d-debituri privileggiati.

“Il-konvenuti nnifishom lanqas ma taw spjegazzjoni accettabbli ghall-ezistenza taz-zewg debiti sostanzjali li kellha s-socjeta’. Huma flimkien mal-awditur Henry Micallef jikkonfermaw illi Supermaster kienet tgawdi minn beneficcji mis-socjetajiet l-ohra, li kienu jhallsu xi pagi u xi kera.

“Madanakollu, huwa fil-fatt jikkonferma illi:

““Ma hemm l-ebda konferma bil-miktub tal-bilanci dovuti, peress li fil-board meetings, l-azzjonisti u d-diretturi kienu jikkonfermaw il-bilanci dovuti. Jiena ma nafx min izomm il-kotba ta’ E&S Trading Ltd. Jiena l-awditur ta’ Master Electric Ltd. Nikkonferma li fil-kotba tal-Master Electric Ltd jidher kreditu favur Supermaster Ltd ta’ Lm50,196, kien hemm tant credits to be set off against amount referred to above li kieku kellu jsir dan l-ezercizzju jirrizulta li Supermaster Ltd ghandha taghti lil Master Electric Ltd. Qatt ma ssettajnihom minhabba ragunijiet ta’ taxxa, fiskali”.

“F’dawn ic-cirkostanzi, il-Qorti, filwaqt li tirreferi ghall-“Company Directors’ Responsibilities to Creditors” ta’ Prof. Andrew Keay (Cavendisti 2007) kif kwotat minn din il-Qorti diversament presjeduta (Imhalled Tonio Mallia) fis-sentenza fuq citata;

““Whether, and if so when, Courts can infer intent to defraud with respect to a respondent is not without some doubt, but it is submitted that Courts can do so either



Kopja Informali ta' Sentenza

where respondents incur debts at a time when they know that their company will clearly not be able to make repayment, or where there is considerable risk in not being able to repay the creditor(s) when the debts are due or shortly thereafter.””

Rat ir-rikors tal-appell tal-konvenuti Emanuel Micallef u Saviour Micallef li in forza tieghu, ghar-ragunijiet minnhom premessi, talbu illi din il-Qorti joghgobha:

“... .. tirrevoka l-imsemmija sentenza moghtija mill-Prim' Awla tal-Qorti Civili fl-4 ta' Marzu 2010 fl-ismijiet fuq premessi billi tilqa' dan l-Appell u ghalhekk tilqa' l-eccezzjonijiet ossia r-risposta tal-konvenuti bl-ispejjez taz-zewg istanzi kontra s-socjeta` attrici.”

Rat ir-risposta tas-socjeta` attrici li in forza taghha, ghar-ragunijiet minnha premessi, talbet illi din il-Qorti joghgobha:

“... .. tichad l-aggravji kollha imressqa mill-appellanti, u tikkonferma is-sentenza appellata fl-intier taghha, bl-ispejjez tal-proceduri kollha kontra l-istess appellanti.”

Semghet id-difensuri tal-partijiet;

Rat l-atti kollha tal-kawza u d-dokumenti esebiti;

Ikkunsidrat:

Illi jirrizulta li s-socjeta` attrici hi kreditrici tas-socjeta` Supermaster Limited li tinsab fi stadju ta' stralc. Din l-ahhar socjeta` kienet titmexxa u kienet tappartjeni lil Emanuel Micallef u Saviour Micallef (u l-konsorti taghhom) u kienu joperaw hanut bl-isem ta' “Supermaster Discount Store”. Is-socjeta` Supermaster Ltd ma hallsitx id-dejn li ghandha mas-socjeta` attrici, u l-istess socjeta` attrici qed titlob ir-responsabbilta` personali tal-konvenuti peress li qed tallega li dawn mexxew in-negozju tal-kumpanija bi frodi. Partikolarment, irreferiet ghal avvanz ta' flus mis-socjeta` Supermaster Ltd lis-socjeta` E&S Trading Ltd, li hi socjeta` ohra tal-istess konvenuti.

L-ewwel Qorti sabet favur is-socjeta` attrici wara li kkonkludiet li mill-provi kien jirrizulta li verament kien hemm negożju bi frodi, u b'applikazzjoni tal-Artikolu 315(l) tal-Att dwar il-kumpaniji (Kap. 386 tal-Ligijiet ta' Malta), ikkundannat lill-konvenuti Emanuel Micallef u Saviour Micallef (wara li illiberat lil zwiġhom mill-osservanza tal-gudizzju) sabiex personalment ihallsu d-dejn tal-kumpanija mas-socjeta` attrici.

L-imsemmija zewg konvenuti appellaw mis-sentenza u ssottomettew li l-kawza attrici ma kinitx ibbazata fuq l-Artikolu 315(l) imsemmi, u f'kull kaz, li huma ma agixxewx bi frodi.

Trattat l-ewwel aggravju, din il-Qorti taqbel mas-socjeta` attrici illi imkien fil-ligi ma hu impost xi obbligu fuq attur li fl-att promotorju tal-gudizzju jindika l-artikolu tal-ligi li fuqha jkun qed jibbaza l-meritu tat-talba tiegħu. Il-ligi tesigi biss tifsira cara u sewwa tal-fatti li minnhom torigina l-kawza u l-kawzali li jagħtu lok għall-istess talba li jiggustifikawha (ara **Alfred Hili & Co. Ltd. Et noe v. Master Electric Co. Ltd** deciza mill-Prim' Awla tal-Qorti Civili fl-10 ta' Novembru 2004). F'dan il-kaz, jirrizulta car x'inhu l-oggett tal-kawza, u cioe`, li l-konvenuti jinzammu personalment responsabbli għad-dejn li s-socjeta` Supermaster Ltd għandha mas-socjeta` attrici minhabba agir b'frodi.

Dwar il-fatt li l-kawza infethet b'citazzjoni flok b'rikors, kif titlob il-ligi, din il-Qorti tara illi dan huwa kaz fejn għandu japplika l-Artikolu 789(2) tal-Kodici ta' Organizzazzjoni u Procedura Civili (Kap. 12 tal-Ligijiet ta' Malta), fis-sens li l-ecezzjoni dwar in-nullita` tal-att ma tistax tingħata, meta l-parti li tatha tkun baqgħet tagħmel jew, għad li tkun taf biha, tkun halliet li jibqgħu jsiru atti oħra wara, mingħajr ma teccepixxi dik in-nullita` (ara applikazzjoni ta' dan il-principju fil-kaz **Schembri v. Vassallo** deciza minn din il-Qorti, Sede Inferjuri fl-24 ta' Jannar 1979). F'dan il-kaz, il-konvenuti kienu jafu mill-bidu dwar l-allegata nullita, izda mhux biss ma issollewawx il-kwistjoni fin-nota tal-

eccezzjonijiet taghhom izda wkoll baqghu jaghmlu u hallew li jsiru atti ohra fil-kawza.

Lanqas ma jirrizulta illi din il-kawza hi simili ghall-kawza l-ohra bejn l-istess partijiet u deciza minn din il-Qorti fl-24 ta' Settembru 2004. F'dik il-kawza l-ohra gie deciz li d-dejn kien tal-kumpanija Supermaster Ltd, u ma kienx hemm assunzjoni tal-istess mill-konvenuti personalment. F'din il-kawza, min-naha l-ohra, ir-responsabbilta' personali tal-konvenuti qed tintalab bhala konsegwenza tal-allegat agir bi frodi tad-diretturi, li hi kwistjoni toto caelo differenti mill-materja diskussa fil-kawza l-ohra.

Trattat il-meritu, din il-Qorti tirrileva illi l-kuncett ta' kummerc bi frodi jinsab deskreitt fl-Artikolu 315 tal-Kap. 386 tal-Ligijiet ta' Malta, cioe`, l-Att dwar il-Kumpaniji, waqt li l-kuncett ta' kummerc hazin huwa deskritt fl-Artikolu 316 tal-istess Kap. 386. Skont dawn l-artikoli, ikun hemm kummerc bi frodi meta jkun jirrizulta li xi negozju tal-kumpanija jkun tmexxa bil-hsieb ta' frodi ta' kredituri tal-kumpanija jew ta' kredituri ta' xi persuna ohra jew bil-ghan ta' frodi, filwaqt li jkun hemm kummerc hazin meta persuna li kienet direttur ta' kumpanija tkun agixxiet filwaqt li tkun taf, jew kellha tkun taf qabel ix-xoljiment tal-kumpanija, li ma kienx hemm prospett xieraq li l-kumpanija setghet tevita x-xoljiment minhabba l-insolvenza taghha. Dawn l-artikoli tal-ligi Maltija gew mehuda kelma b'kelma mil-ligi Ingliza li tirregola x-xoljiment tal-kumpaniji (The Insolvency Act, 1986), u l-artikoli ekwivalenti fil-ligi Ingliza huma l-Artikolu 213 ('*fraudulent trading*'), u l-Artikolu 214 ('*wrongful trading*').

Iz-zewg kuncetti ta' kummerc bi frodi u kummerc hazin jixxiebhu, bid-differenza tkun li f'kaz ta' kummerc bi frodi irid jirrizulta li kien hemm il-hsieb li jigu ppregjudikati l-kredituri tal-kumpanija. F'kaz li jirrizulta kummerc bi frodi jew hazin, il-ligi tkontempla it-tnehhija tar-responsabilita' limitata tad-diretturi, bir-responsabilita' personali taghhom tkun kompluta u ampia f'kaz li jirrizulta kummerc bi frodi.

Qabel l-introduzzjoni ta' dawn il-provedimenti, diretturi setghu dejjem jinstabu responsabbli ta' agir bi frodi, ghax

il-principju ta' *fraus omnia corrumpit* ma kienx jippermetti li xi hadd jiehu vantagg mill-agir frawdolenti tieghu. L-awtur L.S.Sealy fil-ktieb "Cases and Materials in Company Law" (Butterworths, 7<sup>th</sup> Edit. 2004), jghid, f'pagna 616, li l-kuncett ta' '*fraudulent trading*' kif kien jigi enuncjat mill-Qrati inglizi jista' jigi adottat ghall-fini ta' interpretazzjoni tal-legislazzjoni l-gdida, "*but the introduction of the concept of 'wrongful trading', which can lead to the same consequences with a much lighter burden of proof, will surely mean that s 213 will be very rarely invoked in the future*". Fil-kaz taghna, is-socjeta` attrici qed tinvoka l-kuncett ta' kummerc bi frodi.

Analizi taz-zewg kuncetti juru li, anke konsegwenza tal-izvilupp li sar fl-Ingilterra, id-differenza ta' bejnietom mhux dejjem kienet daqshekk netta.

Kummerc bi frodi jehtieg, skont Sealy (ibid pagna 615) "*actual dishonesty*". L'istess jinghad fil-ktieb Farrar's Company Law (Butterworths, 4<sup>th</sup> Edit. 2002) fejn jinghad, f'pagna 737, li "*in cases of fraudulent trading, liability arises in respect of persons knowingly a party to the carrying on of any business of the company with intent to defraud creditors of the company, or creditors of any other person, or for any fraudulent purpose. It should be noted therefore that the section is wider than simply defrauding creditors....The conduct must involve actual dishonesty, involving, according to current notions of fair trading among commercial man, real moral blame*". Din l-intenzjoni, pero`, tista' u ghandha tirrizulta mill-agir innifsu, u certu agir gie meqjus bhala kummerc bi frodi peress li, fih innifsu, juri hsieb li jigu frodati l-kredituri. Fil-fatt, fil-ktieb indikat, Farrar's Company Law, jinghad li "*this requirement can also be satisfied where the directors have no good reason to think funds will become available to pay the creditors when their debts become due or shortly thereafter*". Dan il-principju huwa importanti ghall-fini ta' din il-kawza, ghax jekk jirrizulta li d-diretturi tal-kumpanija, fil-waqt li agixxew kif inhu allegat, kienu jafu li ma kienx hemm possibilita' li jsir il-hlas fiz-zmien miftiehem, allura dan l-agir jitqies bhala kummerc bi frodi.

L-istess veduta hija espressa fil-ktieb "Charlesworth's Company Law" (Stevens, 13<sup>th</sup> Edit. 1987). Hu jaghti tifsira cara ta' kummerc bi frodi u, f'pagna 736, jghid:

*"In general it may be properly inferred that there is an intent to defraud creditors if a company carries on business and incurs debts when, to the knowledge of the directors, there is no reasonable prospect of the company being able to pay them. It is not necessary to show that there is no prospect of the creditors ever being paid. It is enough that there is no reason for thinking that they will be paid as the debts fall due or shortly thereafter".*

L-awturi Mayson, French & Ryan fil-ktieb "Company Law" (Oxford, 22<sup>nd</sup> Edit. 2006), jikkonfermaw li "a person's intent usually has to be inferred from what the person did", u li, allura, "it is almost inevitable that finding a defendant knowingly participated in dishonest activity implies that the defendant was dishonest". (pagna 773). Bhala ezempju ta' kummerc bi frodi, dawn l-awturi isemmu sitwazzjoni fejn d-diretturi ikunu responsabbli ta' "inducing people to give credit to a company knowing that they will not be paid when they expect to be paid" (pagna 774).

Li d-disonesta' tista' u ghandha tigi desunta minn agir partikolari hu affermat ukoll minn ktieb ricenti ippubblikat mill-Professor Andrew Keay "Company Directors' Responsibilities to Creditors" (Cavendish, 2007), fejn, pagna 63 jghid hekk in konkluzzjoni tat-trattat tieghu fuq 'fraudulent trading':

*"Whether, and if so when, Courts can infer intent to defraud with respect to to a respondent is not without some doubt, but it is submitted that Courts can do so either where respondents incur debts at a time when they know that there company will clearly not be able to make repayment, or where there is considerable risk in not being able to repay the creditor(s) when the debts are due or shortly thereafter".*

F'dan il-kaz, jirrizulta illi l-minuti tal-bord tad-diretturi tal-kumpanija Supermaster Ltd kien gia` jindikaw, fl-1997 u f'April tal-1998, li s-socjeta` kienet *'in dire financial constraints'*. Il-konvenuti appellanti, diretturi tal-kumpanija, komplew bin-negozju qisu qatt ma kien xejn; anzi hajjru persuni u entitajiet biex jahdmu maghhom, u fil-fatt ghadew ammonti sostanzjali ta' flus, f'cirkostanzi suspettuzi u mhux validament spjegabbli, lil zewg kumpaniji ohra taghhom waqt li dan kien qieghed isehh. B'dan il-mod, il-kapital gie mghoddi minn kumpanija ghal ohra biex jinheles mill-morsa tal-kredituri ta' Supermaster Ltd imma jibqa' fl-ahhar ghall-beneficcju tal-istess konvenuti. L-agir fic-cirkostanzi tat-trasferiment tal-fondi mis-Supermaster Ltd ghal kumpaniji l-ohra, huwa fih innifsu agir frawdolenti.

Fl-atti, hemm rapport preliminari tal-istralcjarju tal-kumpanija. F'parti mir-rapport jghid li jidher li saru xi hlasijiet lil certi kredituri bi preferenza fuq ohrajn, agir minnu nnifsu hazin. F'parti ohra jitkellem b'dan il-mod dwar is-suspost raguni tat-trasferiment ta' flus lis-socjetajiet l-ohra:

*"The liquidator reminded the Committee that the company's records indicated that Supermaster was owed the amounts of Lm45,000 and 50,000 by E&S Trading Limited and Master Electric Co Limited respectively. The liquidator informed that the committee that he had been verbally informed that the two companies might be claiming to be creditors (rather than debtors) of Supermaster and that claims might be received from these companies in the future. The Committee questioned how such claims might arise at this late stage, especially, after the liquidator noted that neither company had lodged their proof of debt, together with other creditors, according to normal procedure. Although the companies were separate legal entities from Supermaster Ltd, they had common shareholders and directors. Moreover, it was pointed out that upon inspection of the board minutes, as mentioned above, directors of these same two companies, had sat at the board meetings of*

*Supermaster and that the affairs of the companies together with those of Supermaster were discussed.”*

Minn dan ir-rapport johrog car illi l-konvenuti kienu qed jippruvaw “jilghabu” bil-personalita` guridika distinta tal-varji kumpaniji taghhom biex jiddefrawdaw lill-kredituri. Anke l-mod kif kienu jinzammu l-kotba tal-kumpaniji juri li l-konvenuti kellhom interess jippruvaw joholqu konfuzjoni bejn il-kumpaniji taghhom a hsara tal-kredituri.

Ghalkemm jista' jinghad li diretturi huma biss agenti tal-kumpanija u d-doveri taghhom huma biss lejn is-socjeta` li huma jirrapprezentaw, l-obbligu tad-diretturi li jiehdu hsieb l-interessi tal-kredituri meta l-kumpanija tkun fi stat hazin, hu accettat anke koncettwalment. F'artikolu fil-Modern Law Review, (Vol. 66 Settembru 2003, nru.5), bl-isem ta' “Directors’ Duties to Creditors: Contractarian Concerns Relating to Efficiency and Over-Protection of Creditors”, il-gia` msemmi Professur Andrew Keay janalizza l-bzonn tad-diretturi li jipprotegu l-interessi tal-kredituri, u jiddefendi kull akkuza li saret kontra min jilmenta fuq dan id-dover tad-diretturi. Fil-konkluzjoni tieghu, hu jghid dan fuq il-htiega tad-dover:

*“The article has accepted that efficiency is an important value to be considered in evaluating any law, but it has suggested that fairness is a value that also needs to be taken into account and that that value dictates that directors should consider creditor interests when their companies are in financial difficulty. This is based on the following: many creditors are in vulnerable positions when negotiating ex ante and are really unable to protect their interests; and creditors have legitimate expectations that their interests will be taken into account when the company is, or is potentially, in financial distress, as they have the residual claim over the company, and the company is trading with their money. An ex post adjustment, such as examining whether the directors acted in creditor interests at a time when the company was in financial difficulty, is fairer in that it eliminates the risks endemic in ex ante action, and it is based upon what*

Kopja Informali ta' Sentenza

*actually occurred, not what everyone guesses might occur."*

F'dan il-kaz, id-diretturi mhux biss injoraw l-interessi tal-kredituri, pero`, sahansitra raw kif jaghmlu biex jippregudikaw il-pozizzjoni taghhom u dan meta kienu jafu perfettament x'kienet is-sitwazzjoni tal-kumpanija. Il-fatt li l-flus gew trasferiti qabel ma l-kumpanija marret fi stralc hu irrilevanti meta jirrizulta, bhalma hu f'dan il-kaz, li d-diretturi kienu jafu jew messhom kienu jafu, li l-kumpanija kienet *"in some form of financial distress"*, li kienet tirrikjedi minnhom kawtela u attenzjoni fl-interess tal-kredituri.

Ghaldaqstant, ghar-ragunijiet premissi, tiddisponi mill-appell interpost mill-konvenuti Emanuel Micallef u Saviour Micallef billi tichad l-istess u tikkonferma s-sentenza tal-ewwel Qorti bl-ispejjez taz-zewg istanzi jithallsu mill-konvenuti appellanti in solidum, hlief dawk in konnessjoni mal-konvenuti Josephine Micallef u Gemma Micallef li ghandhom jithallsu mis-socjeta` attrici kif ordnat l-ewwel Qorti.

**< Sentenza Finali >**

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