MALTA

QORTI CIVILI
PRIM' AWLA

ONOR. IMHALLEF
JOSEPH AZZOPARDI

Seduta tas-16 ta' Dicembru, 2013

Citazzjoni Numru. 1902/2001/1

Valle Del Miele Limited

vs

Raphael Aloisio, Malcolm Booker, Steve Cachia, Edward Camilleri, Andrew Manduca, Paul Mercieca u Stephen Paris personalment u fil-kapacita` tagħhom ta' *partners* tal-kumpanija Deloitte & Touche Certified Public Auditors & Accountants.

Il-Qorti,

Rat iċ-ċitazzjoni tas-soċjeta' attriċi li permezz tagħha ġie premess:

Illi s-soċjeta' attriċi hija kreditriċi tas-soċjeta' Price Club Operators Limited fis-somma ta' mija u ħamsin elf, mitejn, tlieta u sittin Liri Maltin u sitta u għoxrin ċenteżmu (Lm150,263.26) rappreżentanti din is-somma prezz ta'

merkanzija mibjugħa u kkonsenjata mis-soċjeta' attriċi lil diversi stabbilimenti ġestiti u / jew amministrati mis-soċjeta' Price Club Operators Limited.

Illi sal-aħħar ta' Settembru 2000 dan il-kreditu kien diġa' jammonta għal tmienja u sebgħin elf, mitejn u tlieta u disgħin Liri Maltin (Lm78,293).

Illi l-konvenuti kienu nkarigati sabiex iħejju l-*audit report* tas-soċjeta' Price Club Operators Limited a bażi tal-*accounts*, liema *audited accounts* kienu ffinaliżżati u ffirmati mill-konvenuti fit-30 ta' Ġunju 2000.

Illi sadanittant is-soċjeta' Price Club Operators Limited żiedu sostanzjalment l-ordnijiet għax-xiri ta' prodotti mingħand is-soċjeta' attriċi.

Illi, qabel ma ddeċidew li jkomplu jissuplixxu lis-soċjeta' Price Club Operators Limited, is-soċjeta' attriċi ħadet konjizzjoni tal-*accounts* tal-imsemmija soċjeta' ppubblikati fit-13 ta' Settembru 2000 u dan sabiex tiddetermina l-qagħda finanzjarja tal-istess soċjeta'.

Illi, in vista tal-fatt li l-*accounts* u r-rapport tal-awdituri magħmul mingħajr ebda kwalifika tal-konvenuti kienu juru stampa ottimista ta' soċjeta' b'attivita' kbira, u bl-ebda mod ma kienu jindikaw li din is-soċjeta' Price Club Operators Limited kellha jew seta' jkollha xi problema finanzjarji serji, s-soċjeta' attriċi ddeċidiet li tkompli tissuplixxi lill-imsemmija Price Club Operators Limited tant illi l-kreditu tas-soċjeta' attriċi baqa' jiżdied sakemm f'Marzu 2001 laħaq is-somma ta' mija u ħamsin elf, mitejn, tlieta u sittin Lira Maltin u sitta u għoxrin ċenteżmu (Lm150,263.26).

Illi, minkejja l-istampa riflessa fl-*accounts* kif ikkonfermat mir-rapport tal-awdituri datati 13 ta' Settembru 2000, f'April 2001 s-soċjeta' Price Club Operators Limited intimat li kienet ser twaqqaf il-pagamenti ta' debitu pendenti.

Illi għalhekk il-kredituri kollha tal-Price Club ħatur konsulenti sabiex jeżaminaw il-qagħda finanzjarja u dawn irrelevaw li sal-31 ta' Dicembru 2000 kien hemm telf totali ta' diversi miljuni ta' Liri Maltin.

Illi ftit xhur wara s-soċjeta' Price Club Operators Limited iddikjarat li ma kinitx iżjed f'pożizzjoni li tkompli tagħmel pagamenti tant illi nbdew proċeduri għax-xoljiment tagħha.

Illi dan kollu jindika illi l-konvenuti aġixxew b'mod negliġenti u / jew frawdolenti fir-redazzjoni tal-*accounts* u fl-opinjonijiet li esprimew fl-istess *accounts* u li ppublikaw fit-13 ta' Settembru 2000 b'mod illi pinġew stampa li ma kienitx tirrifletti l-qagħda finanzjarja attwali u reali.

Illi a kawża tal-premess is-soċjeta' attriċi sofriet danni *stante* li ddeċidiet li tkompli tissuplixxi lis-soċjeta' Price Club Operators Limited a bażi tal-istampa finanzjarja riflessa biex b'hekk żdied sostanzjalment il-kreditu tagħha u ppreġudikat il-possibbilta' li tirkupra l-kreditu eżistenti f'Settembru 2000.

Illi l-konvenuti debitament interpellati sabiex jagħmlu tajjeb għal tali danni baqgħu nadempjenti.

Jgħid il-konvenut għaliex m'għandhiex din l-Onorabbli Qorti:

1. Tiddikjara illi bil-mod kif il-konvenuti ħejjew ir-rapport mhux kwalifikat tal-awditur, fir-rigward tas-soċjeta' Price Club Operators Limited, l-istess konvenuti aġixxew b'mod negliġenti u / jew frawdolenti, u b'hekk ikkaġunaw danni lis-soċjeta' attriċi.

2. Tillikwida d-danni sofferti mis-soċjeta' attriċi.

3. Tikkundanna lill-konvenuti sabiex iħallsu d-danni hekk likwidati.

Bl-ispejjeż, inkluż dawk tal-protest ġudizzjarju u l-imgħax kontra l-konvenuti nġunti in subizzjoni.

Rat in-nota tal-eċċezzjonijiet tal-konvenuti (fol.10) li in forza tagħha eċċepew:

Preliminarjament, illi l-eċċipjenti, kemm personalment kif ukoll bħala *partners* ta' Deloitte & Touche, qatt ma kellhom relazzjoni ta' kwalsiasi natura mas-soċjeta' attriċi, u illi s-soċjeta' attriċi m'għandha l-ebda dritt ta' azzjoni kontra tagħhom. Għalhekk, l-eċċipjenti għandhom jiġu liberati mill-osservanza tal-ġudizzju.

Subordinatament u mingħajr preġudizzju għall-ewwel eċċezzjoni hawn fuq sollevata, ukoll preliminarjament, l-intempestivita' tal-azzjoni *stante* li s-soċjeta' attriċi sal-lum ma sofriet l-ebda ħsara u n-nuqqas ta' interess ġuridiku biex is-soċjeta' attriċi tippromuovi din l-azzjoni *stante* li din hija biss ipotetika u mhux reali.

Subordinatament, fil-meritu u mingħajr preġudizzju għall-eċċezzjonijiet preliminari, l-eċċipjenti, kemm personalment kif ukoll bħala *partners* ta' Deloitte & Touche, jiċħdu kategorikament kull allegazzjoni ta' responsabbilta' u ta' aġir frawdolenti jew negliġenti da parti tagħhom u jiddikjaraw illi huma aġew b'diliġenza, bi prudenza u bil-ħsieb u skont il-liġi u kif tirrikjedi l-professjoni tagħhom, u għalhekk it-talbiet attriċi huma nfondati fil-fatt u fid-dritt u għandhom jiġu miċħuda bl-ispejjeż.

Salvi eċċezzjonijiet oħra.

Rat is-sentenza tagħha tal-1 ta' Diċembru 2003, fejn il-Qorti ċaħdet l-ewwel eċċezzjoni tal-konvenuti, u filwaqt li ċaħdet ukoll it-tieni eċċezzjoni fir-rigward tal-ewwel talba, irriservat li tiddeċiedi dwar istess fi stadju ulterjuri wara li tkun semgħet il-provi;

Rat l-affidavits ta' diversi xhieda u semgħet ix-xhieda u provi oħra;

Rat id-dokumenti u l-atti kollha tal-kawża;

Rat il-verbal tas-seduta tal-10 ta’ Lulju 2013 fejn il-kawża tħalliet għas-sentenza;

Rat in-noti ta’ sottomissjonijiet tal-partijiet li ġew preżentati bl-ilsien Ingliż minħabba n-natura tar-riferenzi li kellhom bżonn jagħmlu l-partijiet;

Ikkunsidrat:

Illi kif jidher mill-premess is-soċjeta’ attriċi qed tattribwixxi telf li hija għamlet minħabba l-falliment tas-soċjeta’ Price Club lill-konvenuti li kienu l-awdituri tal-istess soċjeta’. Huma qed jallegaw li l-konvenuti fir-rapport u *accounts* illi irrideġew f’Settembru tas-sena 2000 kienu negliġenti u / jew frawdolenti u minħabba li huma straħu fuq dawn id-dokumenti, billi taw aktar kreditu lill-kumpanijia Price Club, sofrew telf li allura qed jirreklamawhom mingħandhom.

Illi huwa evidenti li din hija kawża insolita; din il-Qorti ġja’ ppronunzjat ruħha fis-sens li avolja ma hemm ebda relazzjoni kuntrattwali bejn il-partijet, dan ma jfissirx li *prima facie* l-konvenuti fil-kapaċita’ professjonali ma jistgħux jinstabu responsabbli għal danni li jistgħu jikkaġunaw minħabba negliġenza, u aktar u aktar minħabba frodi; naturalment dawn iridu jiġu ppruvati mill-attur, u jrid ikun hemm ness bejn dan l-aġir u d-danni kawżati kif jiġri f’kawżi oħra.

Illi f’din is-sentenza preliminari din il-Qorti iċċitat sentenza tal-Qrati Inglizi fl-ismijiet **“Candler vs Crane et”** deċiża fil-1951; għall-preċiżjoni dakinhar il-Qorti ċċitat lil **Lord Denning** iżda wieħed irid jgħid li tiegħu kien hekk imsejjaħ *dissenting judgement* li pero’ ġie segwit f’sentenzi li ngħataw sussegwentement. Minħabba n-novita’ ta’ din il-kawża fil-ġurisprudenza tagħna u l-importanza evidenti għall-professjoni in kwistjoni, tajjeb li l-Qorti tittraċċa l-iżvilupp tal-kunċetti warajha fil-Qrati Ngliżi.

Illi fil-każ ta’ Candler fuq imsemmi, l-attur kien interessat jinvesti somma f’kumpanija jekk jara l-*accounts* tagħha.

Illi għalhekk is-soċjeta' konvenuta, ditta ta' *accountants*, ħejjiet dawn l-*accounts* li ġew murija lill-attur fil-preżenza t'uffiċjal tagħha. L-attur investa elfejn Lira Sterlina iżda fil-fatt il-kumpanija kienet fi stat ħażin u eventwalment falliet. Għalhekk huwa fittex lill-*accountants 'for negligently misrepresenting the state of the company'.* Il-maġġoranza tal-Qorti tal-Appell straħet fuq każ precedent, **"Derry vs Peek"**, u ċaħdet it-talba tal-atturi, minħabba li: *"that loss resulting from negligent misstatement was not actionable in the absence of any contractual or fiduciary relationship between the parties."*

Illi **Lord Denning** pero' kien kritiku ħafna għal dan ir-raġunament u l-Qorti se tirriproduċi l-fehma tiegħu li kif ġja' ssemma ġiet eventwlament aċċettata mill-Qrati Ngliżi għaliex fil-fehma ta' din il-Qorti il-konklużjonijiet raġġunti minnu huma ineċċepibbli:

"This case raises a point of law of much importance; because Mr. Lawson on behalf of the plaintiff submitted that, although there was no contract between the plaintiff and the accountants, nevertheless the relationship between them was so close and direct that the accountants did owe a duty of care to him within the principles stated in "Donoghue vs Stevenson"; whereas Mr. Foster on behalf of the accountants submitted that the duty owed by the accountants was purely a contractual duty owed by them to the company, and therefore they were not liable for negligence to a person to whom they were under no contractual duty... The only defences raised by the accountants at the hearing of the appeal were:

(1) that Fraser was not acting in the course of his employment; and

(2) that, even if he were, they owed no duty of care to the plaintiff.

The judge appears to have treated it as beyond question that Fraser was acting in the course of his employment; and I agree with him. There is no doubt that Fraser was

acting within his actual authority in writing up the books and preparing the accounts, and indeed his action in so doing was ratified and confirmed by the senior partner who signed the certificate; but it is said that Fraser had no authority to show the draft accounts to the plaintiff or to answer his queries, at any rate not without asking his principals for permission to do so. The senior partner admitted that it was a very common thing for accountants at the request of the chairman or person in control of a company to give details of the company's accounts to a prospective investor so as to induce him to invest money, but he said that it was for the principal of the firm to do it, and not for a clerk. That may well be so. It may not have been within Fraser's actual authority, but that is not the point. A master is often made responsible for the unauthorized or forbidden acts of his servant, when he has for his own purposes put the servant in a position where he can do the acts. Practical good sense demands that, even though the master is not at fault himself, he should be responsible if the servant conducts himself in a way which is injurious to others. He takes the benefits of the servant's rightful acts and should bear the burden of his wrongful ones; and he is, as a rule, the only one who has the means to pay. So here, I have no doubt that the accountants are responsible for the way in which Fraser conducted himself in preparing the accounts and showing them to the plaintiff who, after all, was perfectly innocent in the matter and had not the slightest idea that Fraser had no authority to do what he did.

Now I come to the great question in the case: did the accountants owe a duty of care to the plaintiff? If the matter were free from authority, I should have said that they clearly did owe a duty of care to him. They were professional accountants who prepared and put before him these accounts, knowing that he was going to be guided by them in making an investment in the company. On the faith of those accounts he did make the investment, whereas if the accounts had been carefully prepared, he would not have made the investment at all. The result is that he has lost his money. In the circumstances, had he not every right to rely on the accounts being prepared with proper care; and is he not

entitled to redress from the accountants on whom he relied? I say that he is, and I would apply to this case the words of Knight Bruce, L.J., in an analogous case ninety years ago:

"A country whose administration of justice did not afford redress in a case of the present description would not be in a state of civilization": ***"Slim vs Croucher"****.*

Turning now to authority, I can point to many general statements of principle which cover the case made by some of the great names in the law: Lord Eldon, LC, in ***"Evans vs Bicknell"****, Lord Campbell, LC, in* ***"Slim vs Croucher"****, Lord Selborne, L.C., in* ***"Brownlee vs Campbell"****, Lord Herschell in* ***"Derry vs Peek"****, Lord Shaw in* ***"Nocton vs Ashburton"****, and Lord Atkin in* ***"Donoghue vs Stevenson"****. But it is said that effect cannot be given to these statements of principle, because there is an actual decision of this court in 1893 which is to the contrary, namely* ***"Le Lievre vs Gould"****. Before I consider the decision in* ***"Le Lievre vs Gould"*** *itself, I wish to say that, in my opinion, at the time it was decided current legal thought was infected by two cardinal errors. The first error was one which appears time and time again in nineteenth century thought, namely, that no one who is not a party to a contract can sue on it or on anything arising out of it. This error has had unfortunate consequences both in the law of contract and in the law of tort. So far as contract is concerned, I have said something about it in* ***"Smith vs River Douglas Catchment Board"****. So far as tort is concerned, it led the lawyers of that day to suppose that, if one of the parties to a contract was negligent in carrying it out, no third person who was injured by that negligence could sue for damages on account of it: see* ***"Winterbottom vs Wright"****,* ***"Alton vs Midland ry".****, and the notes to* ***"Pasley vs Freeman"****; except in the case of things dangerous in themselves, like guns: see* ***"Dixon vs Bell"****. This error lies at the root of the reasoning of Bowen, L.J., in* ***"Le Lievre vs Gould"****, when he said that the law of England:*

"does not consider that what a man writes on paper is like a gun or other dangerous instrument",

meaning thereby that, unless it was a thing which was dangerous in itself, no action lay. This error was exploded by the great case of ***"Donoghue vs Stevenson"****, which decided that the presence of a contract did not defeat an action for negligence by a third person, provided that the circumstances disclosed a duty by the contracting party to him.*

The second error was an error as to the effect of ***"Derry vs Peek"****, an error which persisted for thirty-five years at least after the decision, namely, that no action ever lies for a negligent statement even though it is intended to be acted on by the plaintiff and is in fact acted on by him to his loss. This error led the Court of Appeal in* ***"Low vs Bouverie"*** *to deny the correctness of* ***"Slim vs Croucher"****; and in* ***"Le Lievre vs Gould"*** *to deny the correctness of* ***"Cann vs Willson"****. The cases thus denied were so plainly just that the very denial of them was itself an error. The error was, however, exposed by the important case of* ***"Nocton vs Ashburton"****, which decided that an action did lie for a negligent statement where the circumstances disclosed a duty to be careful; and that all that is to be deduced from (though not decided by)* ***"Derry vs Peek"*** *is that in the particular circumstances of that case there was no duty to be careful. Lord Haldane observed significantly that the authorities subsequent to* ***"Derry vs Peek"*** *had shown "a tendency to assume that it was intended to mean more than it did".*

In my opinion these decisions of the House of Lords in ***"Donoghue vs Stevenson"*** *and* ***"Nocton vs Ashburton"*** *are sufficient to entitle this court to examine afresh the law as to negligent statements, and that is what I propose to do.*

Let me first be destructive and destroy the submissions put forward by Mr. Foster. His first submission was that a duty to be careful in making statements arose only out of

a contractual duty to the plaintiff or a fiduciary relationship to him. Apart from such cases, no action, he said, had ever been allowed for negligent statements, and he urged that this want of authority was a reason against it being allowed now. This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress in our law, and it has always, or nearly always, been rejected. If you read the great cases of ***"Ashby vs White"****,* ***"Pasley vs Freeman"*** *and* ***"Donoghue vs Stevenson"*** *you will find that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed. Whenever this argument of novelty is put forward I call to mind the emphatic answer given by Pratt, C.J., nearly two hundred years ago in* ***"Chapman vs Pickersgill"*** *when he said:*

"I wish never to hear this objection again. This action is for a tort: torts are infinitely various; not limited or confined, for there is nothing in nature but may be an instrument of mischief".
The same answer was given by Lord Macmillan in ***"Donoghue vs Stevenson"*** *when he said:*

"The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed".

I beg leave to quote those cases and those passages against those who would emphasize the paramount importance of certainty at the expense of justice. It needs only a little imagination to see how much the common law would have suffered if those decisions had gone the other way.

The second submission of Mr. Foster was that a duty to take care only arose where the result of a failure to take care will cause physical damage to persons or property. It

was for this reason that he did not dispute two illustrations of negligent statements which I put in the course of the argument, the case of an analyst who negligently certifies to a manufacturer of food that a particular ingredient is harmless, whereas it is in fact poisonous, or the case of an inspector of lifts who negligently reports that a particular lift is safe, whereas it is in fact dangerous. The analyst and the lift inspector would, I should have thought, be liable to any person who was injured by consuming the food, or using the lift, at any rate if there was no likelihood of intermediate inspection: see ***"Donoghue vs Stevenson"****; **"Haseldine vs CA Daw & Son LD"**. Mr. Foster said that that might well be so because the negligence there caused physical damage, but that the same would not apply to negligence which caused financial loss. He referred to some observations of Wrottesley, J., which were in his favour on this point: sec* ***"Old Gate Estates LD v Toplis"****. I must say, however, that I cannot accept this as a valid distinction. I can understand that in some cases of financial loss there may not be a sufficiently proximate relationship to give rise to a duty of care; but, if once the duty exists, I cannot think that liability depends on the nature of the damage.*
The third submission of Mr. Foster was that the duty owed by the accountants was purely a contractual duty and therefore they were not liable for negligence to a person to whom they were under no contractual obligation. This seems to me to be simply a repetition of the nineteenth century fallacy which was stated in ***"Alton vs Midland Rly"*** *and exploded by "**Donoghue vs Stevenson"**.*

Let me now be constructive and suggest the circumstances in which I say that a duty to use care in statement does exist apart from a contract in that behalf. First, what persons are under such duty? My answer is those persons such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts, and other things, and to make reports on which other people - other than their clients - rely in the ordinary course of business. Their duty is not merely a duty to use care in their reports. They have also a duty to use care in their work which results in their

reports. Herein lies the difference between these professional men and other persons who have been held to be under no duty to use care in their statements, such as promoters who issue a prospectus: ***"Derry vs Peek"*** *(now altered by statute), and trustees who answer inquiries about the trust funds:* ***"Low vs Bouverie"****. Those persons do not bring, and are not expected to bring, any professional knowledge or skill into the preparation of their statements: they can only be made responsible by the law affecting persons generally, such as contract, estoppel, innocent misrepresentation or fraud. But it is very different with persons who engage in a calling which requires special knowledge and skill. From very early times it has been held that they owe a duty of care to those who are closely and directly affected by their work, apart altogether from any contract or undertaking in that behalf. Thus Fitzherbert, in his new Natura Brevium (1534) 94D, says that:*

"If a smith prick my horse with a nail, I shall have my action on the case against him, without any warranty by the smith to do it well"; and he supports it with an excellent reason: "for it is the duty of every artificer to exercise his art rightly and truly as he ought".

This reasoning has been treated as applicable not only to shoeing smiths, surgeons and barbers, who work with hammers, knives and scissors, but also to shipbrokers and clerks in the Custom House who work with figures and make entries in books, "because their situation and employment necessarily imply a competent degree of knowledge in making such entries": ***see "Shiels vs Blackburne"****, per Lord Loughborough, which was not referred to by Devlin J, in Heskell v Continental Express LD.*

The same reasoning has been applied to medical men who make reports on the sanity of others: see ***"Everett vs Griffiths"****. It is, I think, also applicable to professional accountants. They are not liable, of course, for casual remarks made in the course of conversation, nor for other statements made outside their work, or not made in their*

*capacity as accountants: compare **"Fish vs Kelly"**; but they are, in my opinion, in proper cases, apart from any contract in the matter, under a duty to use reasonable care in the preparation of their accounts and in the making of their reports.*

Secondly, to whom do these professional people owe this duty? I will take accountants, but the same reasoning applies to the others. They owe the duty, of course, to their employer or client; and also I think to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some other action on them. But I do not think the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts. Once the accountants have handed their accounts to their employer they are not, as a rule, responsible for what he does with them without their knowledge or consent.

*A good illustration is afforded by the decision in **"Le Lievre vs Gould"** itself, which I certainly would not wish to call in question. The facts are somewhat differently stated in the various reports, but collecting them together they come to this: A surveyor there surveyed work for a building owner and handed certificates to him so that he could know the amounts which he had to pay the builder. The building owner then chose to show the certificates to his own mortgagees who advanced money on them instead of on the certificates of their own surveyor. The mortgagees then said that the owner's surveyor owed a duty of care to them. That was obviously untenable, because they should have had the work surveyed by their own surveyor. Indeed they had actually stipulated for it. The relationship was therefore one in which the inspection of an intermediate person might reasonably be interposed, and was consequently too remote to raise a duty of care: see per Lord Atkin in **"Donoghue vs Stevenson"**. But excluding such cases as those, there are some cases - of which the present is one - where the*

accountants know all the time, even before they present their accounts, that their employer requires the accounts to show to a third person so as to induce him to act on them: and then they themselves, or their employers, present the accounts to him for the purpose. In such cases I am of opinion that the accountants owe a duty of care to the third person.

The test of proximity in these cases is: did the accountants know that the accounts were required for submission to the plaintiff and use by him? That appears from the case of ***"Langridge vs Levy"*** *as extended by Cleasby B in* ***"George vs Skivington"****; and from the decision of that good judge, Chitty J, in* ***"Cann vs Willson"*** *which is directly in point. In that case a valuer made a valuation of property for the very purpose of enabling his client to raise a mortgage on it; and, in order to further the transaction, the valuer himself actually put the valuation before the mortgagee's solicitor saying that it was a very moderate valuation and not made in favour of the borrower. The mortgagee advanced money on the faith of the valuation, but it turned out that the valuer had been grossly careless, and the mortgagee lost his money. Chitty, J., held that the valuer was liable in negligence, apart from any contract at all. He said that the valuation was sent by the valuers direct to the mortgagee's solicitor*

"for the purpose of inducing the plaintiff and his co-trustee to lay out the trust money on mortgage. It seems to me that the defendants knowingly placed themselves in that position, and in point of law incurred a duty towards him to use reasonable care in the preparation of the document called a valuation. I think it is like the case of the supply of an article - the supply of the hairwash in the case of ***"George vs Skivington"****.*

That reasoning seems to me to be good sense and good law. I know that in ***"Le Lievre vs Gould"*** *the Court of Appeal said that* ***"Cann vs Willson"*** *was wrongly decided; but it must be remembered that at that time the general opinion of the profession was that the case of* ***"George vs Skivington"****, on which Chitty J, relied,*

was itself wrongly decided, or at any rate that the principle stated in it by Cleasby, B., was wrong: see per Field and Cave, JJ., and Bowen and Cotton, LJJ, in ***"Heaven vs Pender"****, and per Hamilton, J., in* ***"Blacker vs Lake and Elliott"****. If* ***"George vs Skivington"*** *was wrong, then, of course,* ***"Cann vs Willson 115"*** *was wrong, for it was based on it. But in* ***"Donoghue vs Stevenson"*** *the House of Lords fully restored* ***"George vs Skivington"****, and Lord Atkin himself approved the reasoning of Cleasby, B. 118 . It seems to me that by so doing the House of Lords have implicitly restored* ***"Cann vs Willson"****, because they have restored the case on which it was based; and if* ***"Cann vs Willson"*** *is good law it follows that in the present case the accountants owed a duty of care to the plaintiff, for the circumstances are indistinguishable.*

Thirdly, to what transactions does the duty of care extend? It extends, I think, only to those transactions for which the accountants knew their accounts were required. For instance, in the present case it extends to the original investment of 2,0001, which the plaintiff made in reliance on the accounts, because the accountants knew that the accounts were required for his guidance in making that investment; but it does not extend to the subsequent 2001, which he made after he had been two months with the company. This distinction, that the duty only extends to the very transaction in mind at the time, is implicit in the decided cases. Thus a doctor, who negligently certifies a man to be a lunatic when he is not, is liable to him, although there is no contract in the matter, because the doctor knows that his certificate is required for the very purpose of deciding whether the man should be detained or not; but an insurance company's doctor owes no duty to the insured person, because he makes his examination only for the purposes of the insurance company: see ***"Everett vs Griffiths"****, where Atkin LJ, proceeds on the self-same principles as he expounded fully later in* ***"Donoghue vs Stevenson"****. So, also, a Lloyd's surveyor who, in surveying for classification purposes, negligently passes a mast as sound when it is not, is not liable to the owner for damage caused by it breaking, because the surveyor makes his survey only for the*

purpose of classifying the ship for the Yacht Register and not otherwise: ***"Humphery vs Bowers"****. Again, a scientist or expert (including a marine hydrographer) is not liable to his readers for careless statements in his published works. He publishes his work simply for the purpose of giving information, and not with any particular transaction in mind at all. But when a scientist or an expert makes an investigation and report for the very purpose of a particular transaction, then, in my opinion, he is under a duty of care in respect of that transaction.*

It will be noticed that I have confined the duty to cases where the accountant prepares his accounts and makes his report for the guidance of the very person in the very transaction in question. That is sufficient for the decision of this case. I can well understand that it would be going too far to make an accountant liable to any person in the land who chooses to rely on the accounts in matters of business, for that would expose him to "liability in an indeterminate amount for an indeterminate time to an indeterminate class": see ***"Ultramares Corporation vs Touche"*** *per Cardozo CJ. Whether he would be liable if he prepared his accounts for the guidance of a specific class of persons in specific class of transactions, I do not say. I should have thought he might be, just as the analyst and lift inspector would be liable in the instances I have given earlier. It is perhaps worth mentioning that Parliament has intervened to make the professional man liable for negligent reports given for the purposes of a prospectus: see ss. 40 and 43 of the Companies Act 1948. That is an instance of liability for reports made for the guidance of a specific class of persons - investors, in a specific class of transactions – applying for shares. That enactment does not help, one way or the other, to show what result the common law would have reached in the absence of such provisions; but it does show what result it ought to reach.*

My conclusion is that a duty to use care in statement is recognized by English law, and that its recognition does not create any dangerous precedent when it is remembered that it is limited in respect of the persons by

whom and to whom it is owed and the transactions to which it applies.

One final word: I think that the law would fail to serve the best interests of the community if it should hold that accountants and auditors owe a duty to no one but their client. Its influence would be most marked in cases where their client is a company or firm controlled by one man. It would encourage accountants to accept the information which the one man gives them, without verifying it; and to prepare and present the accounts rather as a lawyer prepares and presents a case, putting the best appearance on the accounts they can, without expressing their personal opinion of them. This is, to my way of thinking, an entirely wrong approach. There is a great difference between the lawyer and the accountant. The lawyer is never called on to express his personal belief in the truth of his client's case; whereas the accountant, who certifies the accounts of his client, is always called on to express his personal opinion as to whether the accounts exhibit a true and correct view of his client's affairs; and he is required to do this, not so much for the satisfaction of his own client, but more for the guidance of shareholders, investors, revenue authorities, and others who may have to rely on the accounts in serious matters of business. If we should decide this case in favour of the accountants there will be no reason why accountants should ever verify the word of the one man in a one-man company, because there will be no one to complain about it. The one man who gives them wrong information will not complain if they do not verify it. He wants their backing for the misleading information he gives them, and he can only get it if they accept his word without verification. It is just what he wants so as to gain his own ends. and the persons who are misled cannot complain because the accountants owe no duty to them. If such be the law, I think it is to be regretted, for it means that the accountants' certificate, which should be a safeguard, becomes a snare for those who rely on it. I do not myself think that it is the law. In my opinion accountants owe a duty of care not only to their own clients, but also to all

those whom they know will rely on their accounts in the transactions for which those accounts are prepared."

Illi kif ġja' ssemma, il-Qrati Ngliżi adottaw din il-pożizzjoni wara dan il-każ, u fil-kawża **"Hedley Byrne and Co. Ltd vs Heller and Partners Limited (1964)"** il-House of Lords laqgħet talba tas-soċjeta' attriċi (aġenti tar-reklamar) li fittxew lill-Bank li kien irrapporta favorevolment dwar soċjeta' klijenta tiegħu li falliet wara li l-istess Bank kien iċċertifika li dik is-soċjeta' kienet *considered good for its ordinary business engagements.*

Illi l-Qorti hawn hekk introduċiet il-principju ta' ***sufficient proximity*** fis-sens li bejn l-att negliġenti u d-danni kawżati jrid ikun hemm din il-prossimita' suffiċjenti. Dan huwa nsenjament mhux wisq differenti minn dak adottat mill-Qrati tagħna f'kawżi fejn jintalbu d-danni b'applikazzjoni tal-artikolu 1029 *et sequitur* tal-Kodiċi Ċivili, ara per eżempju sentenza riċenti tal-Qorti tal-Appell fl-ismijiet **"Maria Xuereb vs Anthony Taylor et"** deċiża fil-25 t'Ottubru 2013. F'din il-kawża fost affarijiet oħra ngħad illi:

*"Fil-kawża **"Cassone vs Calamatta"** deċiża minn din il-Qorti fid-29 ta' Frar 2008, saru dawn l-osservazzjonijiet fir-rigward:*

*'Id-dottrina legali tagħti diversi definijzzonijiet ta' culpa; **Carrara** (Parte Generale Vol. 1 para. 80) jgħid hekk:*

"Si mutino come piace le formule, ma il tripode sul quale si asside la colpa sara' sempre questo (1) volontarieta`dell'atto, (2) mancata previsione dell'effetto nocivo, (3) possibilita' di prevedere."

Aktar 'l isfel eżattament fil-paragrafu 83, dan l-awtur jirribadixxi hekk:

"..... la essenza della colpa sta tutta nella prevedibbilita'"

Prevedibilita' din li trid tkun ta probabilita' raġonevoli u mhux ta' possibiltajiet remotissimi u u inverosimili **(Vol XLVIII –I-ewwel parti pagna 258.)***"*

Illi fis-sentenza fl-ismijiet **"Cefalu vs Crown Hotels Limited"** (deċiża mill-Prim' Awla tal-Qorti Ċivli fis-26 t'April 2012) ukoll intqal illi *in linea* ta' prinċipju jinsab enunċjat li: *"hu mprexxindibilment rikjest sabiex ikun hemm lok għad-danni li jkun hemm ness ta' kawżalita' bejn il-fatt kolpevoli u l-konsegwenza dannuża (kollez. Vol. XLIV P1 p343)."*

Illi fil-kawża msemmija **"Hedley Byrne and Co. Ltd vs Heller and Partners Limited (1964)"**, wieħed mill-Lords **(Lord Morris**) qal jgħid:

"I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.

I do not propose to examine the facts of particular situations or the facts of recently decided cases in the light of this analysis but I proceed to apply it to the facts of the case now under review. As I have stated, I approach the case on the footing that the bank knew that what they said would in fact be passed on to some unnamed person who was a customer of the National Provincial Bank. The fact that it was said that "they," that is, the National Provincial Bank, "wanted to know" does not prevent this conclusion. In these circumstances, I think some duty towards the unnamed person, whoever it was, was owed

by the bank. There was a duty of honesty. The great question, however, is whether there was a duty of care. The bank need not have answered the inquiry from the National Provincial Bank. It appears, however, that it is a matter of banking convenience or courtesy and presumably of mutual business advantage that inquiries as between banks will be answered. The fact that it is most unlikely that the bank would have answered a direct inquiry from Hedleys does not affect the question as to what the bank must have known as to the use that would be made of any answer that they gave but it cannot be left out of account in considering what it was that the bank undertook to do. It does not seem to me that they undertook before answering an inquiry to expend time or trouble "in searching records, studying documents, weighing and comparing the favourable and unfavourable features and producing a well-balanced and well-worded report." (I quote the words of Pearson L.J. n110 Nor does it seem to me that the inquiring bank (nor therefore their customer) would expect such a process. This was, I think, what was denoted by Lord Haldane in his speech in ***"Robinson vs National Bank of Scotland Ltd."*** *n111 when he spoke of a "mere inquiry" being made by one banker of another. In* ***"Parsons v. Barclay & Co. Ltd."*** *n112 Cozens-Hardy M.R. expressed the view that it was no part of a banker's duty, when asked for a reference, to make inquiries outside as to the solvency or otherwise of the person asked about or to do more than answer the question put to him honestly from what he knew from the books and accounts before him. There was in the present case no contemplation of receiving anything like a formal and detailed report such as might be given by some concern charged with the duty (probably for reward) of making all proper and relevant inquiries concerning the nature, scope and extent of a company's activities and of obtaining and marshalling all available evidence as to its credit, efficiency, standing and business reputation. There is much to be said, therefore, for the view that if a banker gives a reference in the form of a brief expression of opinion in regard to credit-worthiness he does not accept, and there is not expected from him, any higher duty than that of giving an honest answer. I need not, however,*

seek to deal further with this aspect of the matter, which perhaps cannot be covered by any statement of general application, because, in my judgement, the bank in the present case, by the words which they employed, effectively disclaimed any assumption of a duty of care. They stated that they only responded to the inquiry on the basis that their reply was without responsibility. If the inquirers chose to receive and act upon the reply they cannot disregard the definite terms upon which it was given. They cannot accept a reply given with a stipulation and then reject the stipulation. Furthermore, within accepted principles (as illustrated in ***"Rutter vs Palmer"*** *n113 the words employed were apt to exclude any liability for negligence.*

Illi sentenzi sussegwenti tal-Qrati Ngliżi li jistgħu jiġu ċitati f'dan is-sens huma **"Home Office vs Dorset Yacht Co."** (1970), **"White vs Jones"** (1995) u **"Henderson vs Merret Syndicates Limited"** (1995) kollha deċiżi mill-Qorti tal-Appell .

Illi l-Qorti għalhekk trid tara jekk hemmx il-fatt kolpuż u jekk dan ikkawżax id-danni mitluba mill-attriċi.

Illi dwar jekk kienx hemm fatt kolpuż din il-Qorti kellha quddiemha żewġ esperti *ex-parte* li wkoll xehdu quddiemha. Is-soċjeta' attriċi pproduċiet rapport li sar f'kawża oħra (li dwaru l-Qorti tal-Appell aċċettat it-talba tagħha biex dan ir-rapport jiġi prodott) minn John Zarb li mbagħad kif ingħad xehed quddiem il-Qorti.

Illi s-Sur Zarb kien ċar ħafna fir-rapport u d-depożizjonijiet tiegħu quddiem il-Qorti u għalhekk il-Qorti se tiċċita partijiet sostanzjali mill-affidavit li kien ħejja quddiem il-Qorti (PCO ifisser Price Club Operators):

"Fil-fehma tiegħi, il-mod ta' kif ġiet strutturata din it-tranżazzjoni poġġiet lil PCO f'pożizzjoni prekarja u żvantaġġata mill-bidu net tal-operat tagħha (fol.29).

PCO ġiet mgħobbija b'dejn ta' LM2.6 miljun lejn il-krediturі tagħha. Dan id-dejn eċċeda l-istokk li ġie akkwistat

b'Lm1.2 miljun. Dan il-bilanċ ta' Lm1.2 miljun, dejn ta' natura short term dovut lill-krediturі, kien pero' ntuża sabiex jiġu ffinanzjati assi ta' natura long-term bħal ma huma plant u makkinarju, u assi mhux tanġibbli (intangibles), li kellhom jiġu ffinanzjati fuq bażi long-term, idealment permezz ta' kapitali. Fil-fehma tiegħi, il-finanzjament ma kellux isir b'dan il-mod, billi poġġa lil krediturі f'riskju żejjed (fol.29).

Il-krediturі, li preżumibbilment ma kienux konxji ta' kif ġie strutturat u ffinanzjat il-Grupp, bdew ifornu lill-kumpannija l-ġdida fuq bażi ta' credit. Ir-rikavat mill-bejgħ mill-istokks li dawn il-krediturі kienu qed ifornu, kellu jintuża sabiex jitħallsu l-ammonti rispettivi dovuti lilhom, apparti salarji u spejjeż oħra. Iżda l-ewwel Lm1.2 miljun ta' bejgħ kienu mill-bidu net intiżi sabiex jiffinanzjaw it-take over – minflok il-kapital li l-azzjonisti kellhom jipprovdu inizjalment. Il-pjan finanzjarju kien jiddpendi fl-intier tiegħu fuq qliegħ prospettiv sabiex jimtela dak il-vojt (fol. 30).

Li kieku dan il-pjan iffunzjona, l-azzjonisti kienu jagħmlu qliegħ sostanzjali minn fuq investiment baxx, u ċjoe dak ta' Lm101,000. Iżda, dan il-kapital limitat ma pprovda ebda tip ta' fond li PCO setgħet tuża fil-każ illi l-qliegħ prospettiv ma kiens iseħħ. Fid-dawl ta' dan, wieħed għandu, fil-fehma tiegħi, jasal biex jikkonkludi li l-konsegwenzi finanzjarji ta' falliment kienu maħsuba, sa mill-bidu nett, li jbagħtuhom il-krediturі (fol.30).

Fil-fehma tiegħi, l-arranġamenti li spjegajt hawn fuq kienu, b'mod grossolan, imprudenti u rresponsabbli fir-rigward ta' PCO, b'riskju prinċipali għall-krediturі tal-kumpannija aktar milli b'riskju għall-azzjonisti. Dawn tal-aħħar kienu fit-triqthom li joħolqu negozju ta' supermarkets ta' proporzjon liema bħalu, kumpannija b'bejgħ annwali ta' Lm22 miljun u li kellha tiffaċċja bosta sfidi. Din l-impriża kienet teħtieġ:

Esperjenza u kompetenza maniġerjali. Dawn kienu serjament nieqsa mill-bidu nett. It-tim maniġerjali, jew almenu parti minnu, kien diġa sofra telf sostanzjali fir-rigward ta' l-operazzjoni tad-Day to Day (Birkirkara u Carters), kif jidher mill-istatements finanzjarji tal-

kumpannija Day to Day Limited (ara Dokument B) iżda minkejja dan, huma daħlu f'impriża ferm akbar, li għaliha ma kienux ippreparati. Qed nannetti ma dan l-affidavit rapport li PwC għaddiet lill-kredituri f'Mejju 2001 u nimmarkah bħala Dokument C, liema dokument jispjega b'mod aktar dettaljat in-nuqqasijiet maniġerjali li, fil-fehma tiegħi, kienu jeżistu (fol. 30, 31).

Immedjatament wara l-akkwist, id-diretturi bdew jestendu l-perjodu ta' ħlas mogħtija mill-kredituri, u għaldaqstant ġew iġġenerati flejjes addizzjonali fuq bażi temporanja. Għalkemm PCO bdiet immedjatament topera agħar milli kien proġettat, il-pożizzjoni tagħha mil-lat ta' cash kienet posittivia billi l-bejgħ tagħha kien kollu f'kontanti, filwaqt li l-kredituri bdew jitħallsu aktar bil-mod. Sa Settembru 1998, l-egħluq tal-ewwel perjodu finanzjarju, id-diretturi sellfu Lm400,000 mill-fondi ta' PCO lill-kumpannija Taormina Holdings Limited, permezz ta' liema kumpannija l-familja Gauci kienet tippossjedi l-ishma tagħha fil-Grupp Priceclub (fol. 33).

Il-plant u l-makkinarju (bejn wieħed u ieħor Lm292,000) u l-istokks tal-kumpannija sal-1 t'Ottubru 1998 ġew trasferiti lil PCO, u saret tpaċċija bi ħlas lill-kredituri minn PCO f'isem Day to Day Limited. Għal darb'oħra, u mmedjatament, PCO tpoġġiet f'pożizzjoni finanzjarja żvantaġġata għaliex hi kella tiffinanzja long term fixed assets billi terġa' tittardja l-ħlas lill-kredituri tagħha, minflok ma kien hemm kapital ġdid investit mill-azzjonisti. Dan kollu kompla jgħakkes u jżid l-iżbilanċ fil-cash flow ta' PCO (fol. 34).

Madankollu, jirriżulta illi qabel l-istralċ, PCO kienet ilha fi stat ta' insolvenza għal perjodu konsiderevoli ta' żmien, fis-sens illi l-passiv tagħha kien jeċċedi bil-kif l-assi ta' l-istess, kellha problema serja ħafna ta' nuqqas ta' cash, u ma kinitx f'pożizzjoni li tħallas id-dejn tagħha fil-ħin. Għalhekk, fil-fehma tiegħi, il-Kumpannija ma kelliex prospett xieraq illi tevita li tiġi stralċjata minħabba l-insolvenza tagħha. Kien biss għaliex ħafna mill-kredituri qagħdu lura – fattur li, fil-fehma tiegħi, id-diretturi ma kellhom ebda dritt iserrħu fuqu – u minħabba li l-istess

krediturigew inkoraġġati b'metodi oħra (ara Sezzjoni V ta' dan l-affidavit), illi n-negozju tal-Kumpannija dam kemm fil-fatt dam (fol. 55).

Wieħed jista' realistikament jargumenta illi l-pożizzjoni ta' insolvenza kienet teżisti sa mill-bidu nett. Sakemm kellu jiġi ffurmat in-negozju kollu ta' PCO (li kellu jirriżulta minn negozju tal-Priceclub u tad-Day to Day), kien ser ikun hemm xi telf u xi spejjeż li fil-fehma tiegħi, kienu ser jeċċedu x-share capital ta' Lm101,000. Di piu, d-deficit ta' working capital li assumiet il-Kumpannija kien sostnut, fil-parti l-kbira tiegħu, minn assi mhux tanġibbli illi ma għandhom ebda valur rejaliżżabbli (fol. 55).

L-aspettattiva tad-diretturi illi l-ispejjeż u t-telf tal-merġer inizjali kienu ser jiġu evitati – kif jidher mill-business plans li ġew ppreżentati lil banek f'dak iż-żmien – kienu, fl-opinjoni tiegħi, ottimisti żżejjed. Fil-fatt, fi żmien sitt xhur, sat-30 ta' Settembru 1998, in-negozju kien ġarrab telf (irrappurtat) ta' Lm 74,000 meta mqabbel ma' qliegħ ppjanat ta' Lm360,000. Kif spjegajt aktar qabel f'paragrafu 67, it-telf li ġġarrab tassew għal dak il-perjodu seta' kien ta' ċirka Lm225,000. Rapporti sussegwenti (ara Dokument J) jenfasiżżaw fuq fatturi bħal ... (fol. 55).

Ir-rapport ta' Deloitte & Touche ta' Ġunju 1999 (ara Dokument J) jikkumenta wkoll fuq ir-riżultati għall-perjodu ta' ħames xhur sat-28 ta' Frar 1999. Għal darb'oħra, f'dan il-perjodu kien hemm varjanzi negattivi meta mqabbla mal-pjanijiet tal-kumpannija; fil-fatt ir-riżultati li ġew rapportati kienu agħar minn dawk li kienu mistennija b'Lm351,000. Telf sostanzjali ġenerali lkien qed jiġi mġarrab f'dan il-punt, il-kapitali tal-bidu ta' PCO kien ilu li spiċċa; u ħarsa għaqlija 'l quddiem kienet turi li l-Kumpannija ma setgħetx tevita xoljiment minħabba l-insolvenza tagħha, mingħajr investiment kapitali sostanzjali (u tibdil f'fatturi oħra). Il-Kumpannija baqgħet sal-aħħar turi varjanzi negattivi meta mqabbla mal-pjanijiet ottimisti u mhux rejalistiċi tagħha (fol. 57).

Ir-rapport ta' Deloitte & Touche ġie formalment ippreżentat lill-Bord ta' PCO f'Ġunju 1999 in konnessjoni ma talba lill-

bank għal finanzjament ulterjuri li ma ntlaqatx – il-Grupp kapitali addizzjonali u tmexxija ġdida kellu bżonn, mhux aktar self. Għalhekk dan kien mument meta d-diretturi kellhom iħarsu b'serjeta' u fil-fond, forsi aktar minn mumenti oħra, lejn il-qagħda finanzjarja ta' PCO. It-talba lill-bank kienet ibbażata fuq previżjoni li l-Kumpannija kienet sejra tara titjib materjali u li ser tagħmel profitti li, fil-fatt, qatt ma avveraw ruħhom; anzi, minn dan il-punt 'il quddiem, ir-rata ta' telf żdiedet. Fil-fehma tiegħi, dak iż-żmien, jiġifieri f'Ġunju tal-1999, u ċertament ftit wara, meta sar magħruf r-rifjut tal-bank, kien – jew kellu jkun – ovvju li PCO kella avarija negattiva sostanzjali bejn il-passiv u l-attiv, u li kellha problemi ta' cash flow serjissimi tant li ma kellhiex prospetti xierqa li tevita xoljiment minħabba l-insolvenza tagħha (fol. 57).

Fil-Management Accounts ta' Frar 1999, il-Kumpannija kienet qed turi telf ta' Lm346,000 kontra kapital ta' Lm101,000. Diġa kellha tieħu madwar Lm400,000 mingħand soċjeta' relatata, Day to Day Limited, li kienet insolventi, u mhux qed topera. Id-diretturi kienu, jew kellhom ikunu, jafu li kien hemm inċertezzi sostanzjali dwar il-komputazzjoni tal-istokk u tal-gross profit. Pero', anke jekk wieħed kellu jieħu l-valur tal-istokk u tad-debituri kif rappurtat fil-kotba, l-passiv kurrenti ta' PCO kien jeċċedi l-attiv kurrenti b'madwar Lm2,000,000. Li kieku wieħed kellu jagħmel tibdil fil-figuri neċessarju, fil-fehma tiegħi, biex jagħmel tajjeb għat-telf fl-istokk u d-debituri, allura l-avarija negattiva tkun iktar viċina għal Lm3,000,000. Barra minn hekk, il-balance sheet kien qed juri assi mhux tanġibbli li ma kellhom ebda valur rejalizzabbli. Il-Kumpannija ma setgħetx tħallas id-djun tagħha fil-ħin; u fil-fatt il-perjodi li fihom kienet obbligata tħallas (il-credit periods) kienu qiegħdin jiżdiedu b'mod sostanzjali, ħafna drabi unilateralment. Rapport ieħor dwar il-Management Accounts ta' PCO ta' Frar 1999 (Dokument K) li Deloitte & Touche għaddew lill-likwidatur (pero' li ma nafx min kitbu) jagħti stampa iktar rejalistika, u ferm inqas ottimista, minn dak ippreżentat lill-bank. Dan ir-rapport isemmi l-problemi serji ta' cash flow li PCO kienet ġiet assoġġettata għalihom; u jindika li l-credit period li kien qed jittieħed mingħand ħafna fornituri kien

diġa żdied għal 120 ġurnata, u jinkludi s-segwenti kummenti:

"The effects of this cash outflow are being felt during the current months of April and May 1999 as during these months December 98 invoices fall due for settlement. The result of this is a tighter and more dangerous cash flow management..."(fol. 58).

It-tieni statutory accounts li ġew ippubblikati minn PCO, flimkien mal-Consolidated Accounts għall-PCH u s-sussidjarji tagħha, koprew is-sena sħiħa sat-30 ta' Settembru 1999 (ara Dokument G u L). Dawn għandhom importanza kbira għal numru ta' raġunijiet:

Fil-fehma tiegħi, ġja' espressa hawn fuq, id-diretturi kellhom jirrealiżżaw sa Ġunju 1999, u ċertament sa ftit wara, meta l-bank ma' laqax it-talba tagħhom, illi PCO kienet f'diffikultajiet finanzjarji serji u li ma kellha ebda prospett raġonevoli illi tevita li tiġi stralċjata minħabba fl-insolvenza tagħha. It-telf fin-negozju kien qiegħed jiżdied, il-flus kienu qed jiġu assorbiti minn transazzjonijiet oħrajn, u l-ħlasijiet lill-fornituri kienu kontinwament qed jaqgħu lura. L-istatements finanzjarji sa Settembru 1999 ġew prodotti f'dan il-kuntest" (fol. 62).

...

L-opening balance sheet ta' PCO, b'kapital ta' Lm101,000 kienet ta' kumpannija solventi. Pero' kif jidher ċar mill-iskeda f'paragrafu 11, Lm730,000 mill-assi akkiwstati mill-kumpannija kienu intangibles (goodwill, fil-forma ta' rigal fuq proprjeta' mikrija fil-Marsa, trade marks, u ħlasijiet sostanzjali lis-Sur Frans Gauci). Intangibles ta' din in-natura għandhom ftit, jew kważi ebda, valur jekk il-kumpannija li tippossjedihom ma tagħmilx qliegħ u tfalli, kif fil-fatt ġara. L-intangibles żiedu b'mod sostanzjali mal-pożizzjoni ta' risku kbir li PCO tpoġġiet fiha mill-bidu nett. Kull telf li jeċċedi l-Lm101,000 kien ser jikkreja balance sheet insolvency, li jekk jipproġetta ruħu fuq temp ta' żmien, kien ser inaqqas il-valur tal-intangibles u kwindi jinħoloq aktar telf.

Mill-figuri li jidhru hawn fuq, eskludejt tibdil ieħor li potenzjalemnt kellu jsir fil-financial statements ta' PCO bħalma huma telf tal-assi intanġibbli (Lm718,000 sat-30 ta' Settembru 1999), il-valur ta' liema, fl-opinjoni tiegħi, kellu jiġi evalwat serjament fl-1999. Eskludejt anke dak it-telf li possibbilment seta' kien hemm fuq is-self li sar lil PCH u lil Price Club (Birkirkara) Limited. Nagħraf imma li seta' kien aktar diffiċli li tikkalkula dan ir-riskju partikolari fil-kumpilazzjoni tal-kontijiet finanzjarji ta' PCO għas-snin in kwistjoni".

Il-Qorti kienet sodisfatta mill-operat tas-Sur Zarb li kien hemm element ta' negliġenza da parti tal-konvenuti li seta' kien prevedibbli fil-kuntest tas-sentenzi mogħtija mill-Qrati tagħna. Dwar dan ma hemmx għalfejn ta' wisq aktar dettalji għaliex ir-rapport kif ġja msemmi huwa ċar biżżejjed biex jindika lil min hu espert, bħalma ndubbjament huma l-konvenuti, li kien hemm indikazzjonijiet ta' problem serji dwar l-operat tas-soċjeta' Price Club Operators. Il-fatt li ftit xhur wara l-kumpanija kkrollat jitkellem waħdu, kif ngħidu bil-malti – jew kif kienu jgħidu l-ġuristi antiki *'res ipsa loquitur'.*

Illi l-kwistjoni hija allura jekk kienx hemm ness dirett bejn dan u d-danni kawżati lis-soċjeta attriċi. Il-Qorti, wara li eżaminat il-proċess, jidhrilha lis-soċjeta' attriċi ma ħaditx hija stess il-kura neċessarja qabel ma tat aktar kreditu lill-Price Club u għalhekk il-ħsara *nonostante* dak li ġja' ssemma, ġabitha fuqha hija stess. L-ewwelnett mid-depożizzjonijet tal-istess diretturi tas-soċjeta' attriċi jidher li huma kienu jafu fiż-żmien indikat li kien hemm problemi serji fl-operat tal-Price Club. Carm Fenech (fl-affidavit tiegħu a fol 237 sa 250 tal-proċess) per eżempju qal:

"Nispjega illi jiena l-konsulent finanzjarju u riċentement Direttur tas-soċjeta' attriċi Valle del Miele Ltd, u ċjoe' kumpanija li n-negozju tagħha jikkonsisti prinċipalment fil-qatla u il-bejgħ tat-tiġieġ frisk u ipproċessat.

Ngħid illi għal ħabta ta' Ottubru tas-sena 2000, issejjaħ 'director's meeting', għal liema laqgħa jiena, bħala

konsulent, ġejt mitlub illi nattendi. Id-diretturi ta' Valle del Miele Ltd kienu mmħasba ferm fir-rigward tal-kont pendenti illi kellha l-kumpanija Price Club Operators Ltd., u ċjoe' waħda mill-akbar klijenti tagħhom. Il-bilanċ dovut minn Price Club kien żdied b'mod allarmanti, u kien destinat illi jiżdied ferm aktar stante illi dak iż-żmien kienet faqqgħet il-'mad cow disease' bil-konsegwenza li l-ordnijiet ta' Price Club Operators Ltd għall-prodotti ta' Valle del Miele Ltd kien ser jiżdied b'mod sostanzjali. Fl-istess ħin, nonostante d-debitu kbir illi kellhom, d-diretturi ta' Price Club kienu qegħdin jitolbu illi jingħataw further extended credit time minn dak ta' 60 ġurnata oriġinarjament mogħti lilhom. Jiena ġejt mitlub sabiex fil-kwalita' tiegħi ta' accountant professjonali u ta' konsulent finanzjarju ta' Valle del Miele Ltd., nagħmel l-investigazzjonijiet neċessarji dwar il-qagħda finanzjarja ta' Price Club, u sabiex sussegwentment nirraporta lura lil Valle del Miele dwar il-konklużjonijet tiegħi, qabel ma tittieħed deċiżjoni dwar din ir-rikjesta ta' Price Club Operators Ltd.

Ngħid illi jiena għandi kumpanija ta' awdituri, u ċjoe' Carm A. Fenech & Co. Tramite l-imsemmija kumpanija, niżżilna bl-internet mingħand il-Malta Financial Services Authority, ġja' Malta Financial Services Centre, kopja tal-audited accounts ta' Price Club Operators Limited għall-perjodu bejn Ottubru 1998 u Settembru 1999. Minn eżaminazzjoni tal-imsemmija audited accounts, ikkonkludejt is-segwenti:

1. Price Club OperatOrs Ltd. kienet sofriet telf ta' Lm184,698 wara deferred taxation ta' Lm79,943 u kellha balance sheet deficit ta' Lm150,125. La l-accounts u lanqas l-auditors' report m'aċċennaw għal dan u b'hekk, għar-raġunijiet li ser nagħti aktar 'il quddiem, wieħed seta' jikkonkludi li ma kienx hemm problemi ta' going concern.

2. L-istokk kien awmenta minn 1.8 miljun lira f'Settembru 1998 sa 3.1 miljun lira f'Settembru 1999.

3. It-turnover tal-kumpanija kien sploda minn 8.1 miljun lira għal 21.7 miljun lira. Kien hemm żieda fil-gross profit margin ta' minn 13.2% għal 14.9%.

4. Kien hemm deferred taxation asset ta' Lm88,012 li jindika ċertu ottimizu li l-kumpanija kienet ser tirkupra l-ftit telf li sofriet fi żmien qasir.

5. La d-Directors' Report u wisq inqas l-Auditors' Report ma taw xi ndikazzjoni li s-sitwazzjoni finanzjarja tal-kumpanija kienet prekarja. Għall-kuntlarju, kif ser nispjega aktar tard, l-inklużjoni ta' 'Deferred Tax Asset' ta' Lm88,012 kienet tindika li l-ftit telf li kien hemm sa 30 Settembru 1999 kien ser jiġi rkuprat fi żmien qrib.

Ngħid illi r-rakkomandazzjoni tiegħi lil Valle del Miele Ltd kienet illi qabel xejn kellhom jiġu avviċinati d-Diretturi ta' Price Club Operators Ltd biex tiġi stabbilita' l-qagħda finanzjarja kurrenti tal-kumpanija billi kienu għaddew ħmistax il-xahar mill-accounts li kkunsidrajt jien. In effetti, f'Jannar tas-sena 2001, jiena flimkien ma' Paul Gauci l-managing director ta' Valle del Miele Ltd., iltqajna ma' Wallace Fino, u ċjoe' wieħed mid-Diretturi ta' Price Club ġewwa l-uffiċċju tiegħu f'Birkirkara biex niddiskutu t-talba tiegħu għal extended credit.

Ngħid illi jiena kkonfrontajt lill-imsemmi Wallace Fino bl-audited accounts illi kont eżaminajt, u staqsejt jekk l-affarijiet kienux ammeljoraw mit-30 ta' Settembru 1999. Skond Wallace Fino, ma kellniex għalfejn nallarmaw ruħna dwar il-qagħda finanzjarja ta' Price Club għaliex il-kumpanija kienet sejra tajjeb, u li kieku dan ma kienx verament il-każ, id-Diretturi ta' Price Club qatt ma kienu jaslu biex jieħdu d-deċiżjoni li jiftħu u jibdew joperaw ħames supermarkets oħra.

Ngħid ukoll illi Wallace Fino infurmana li l-uniku problema tal-kumpanija f'dak il-perjodu kienet waħda ta' cash flow, iżda din kienet biss problema temporanja illi kienet fil-proċess li tiġi riżolta fi żmien qasir. Inoltre, huwa semma April – Ġunju tas-sena 2001 bħala l-perjodu illi fih Price Club Ltd. kienu ser jerġgħu jirritornaw għal credit time oriġinali tagħhom, u ċjoe' dak ta' 60 ġurnata, ma' Valle del Miele Ltd.

Għandu jingħad illi meta saret l-imsemmija laqgħa, u ċjoe' f'Jannar tas-sena 2001, kienet infirxet sew il-'mad cow disease' bil-konsegwenza li l-bejgħ tal-laħam tal-majjal kif ukoll tal-laħam taċ-ċanga, kien naqas drastikament, u minflok kienet kibret b'mod sostanzjali d-domanda għal-laħam tat-tiġieġ, u ċjoe' l-prodott li tinnegozja fih is-soċjeta' attriċi. Minħabba din id-domanda, Valle del Miele Ltd. bdiet tbiegħ il-prodotti tagħha lil klijenti ġodda. Dan kien ifisser ukoll illi anke Price Club kienu ser iżidu l-ordnijiet tagħhom mingħand Valle del Miele. Jiena ħassejt illi kien ikun għalhekk fl-aħjar interess ta' Valle del Miele jekk tkompli tonora l-kuntratt illi kellha ma' Price Club, u dana peress illi Price Club kienu ilhom jinnegozjaw ma' Valle del Miele għal żmien twil, bil-kuntrarju ta' klijenti ġodda. Inoltre, dak iż-żmien, Price Club kienu qed jiddominaw l-industrija tas-supermarkets.

Fuq il-bażi tal-konfort illi ħadt meta eżaminajt l-audited accounts u ta' dan li għadni kif spjegajt, jien issuġġerejt illi r-rikjesta ta' Price Club, u ċjoe' illi tingħata further extended credit, kellha tiġi akkolta. B'hekk ngħid illi Price Club kien ser ikollhom credit time assolut ta' disgħin ġurnata, minflok ta' sittin ġurnata kif oriġinarjament mogħti lilhom.

Bit-trapass taż-żmien, sar evidenti illi l-kumpanija Price Club Operators Ltd kienet għaddejja tabilħaqq minn problemi finanzjarji, u għalhekk jiena kkuntattjat lil Victor Zammit, u ċjoe' direttur ieħor ta' Price Club sabiex niltaqgħu fl-uffiċċju tiegħi ġewwa tas-Sliema sabiex niddiskutu l-pożizzjoni tal-kumpanija tiegħu. Pero' ngħid illi anke f'din l-okkażjoni, intqal lili li l-problema kienet waħda temporanja ta' cash flow li kienet qed tiġi riżolta, u li kwindi Valle del Miele kellha tieħu ftit paċenzja sakemm s-sitwazzjoni ssolvi ruħha. Dan l-ottimiżmu min-naħa ta' diretturi ta' Price Club Operators Ltd ġie anke mwassal u mxandar diversi drabi fil-medja (ara it-Times annessa).

Għall-ħabta ta' April tas-sena 2001, ħamsa mill-akbar kredituri ta' Price Club Operators Ltd ingaġġaw lill-kumpanija PriceWaterhouseCoopers sabiex, tinvestiga dwar il-pożizzjoni finanzjarja tal-istess Price Club. Ngħid

illi d-diretturi ta' Price Club taw il-kunsens tagħhom għal tali investigazzjonijiet. Ngħid ukoll illi ftit żmien wara, PricewaterHouseCoopers ikkuntattjaw lil Valle del Miele Ltd. u talbuha sabiex iżżomm lura milli tieħu azzjoni legali kontra Price Club għal ħlas tal-ammonti dovuti lilha. L-għan ta' PriceWaterhouseCoopers kien illi tipprova ssalva lil Price Club qabel ma jiġi ddikjarat l-istat ta' falliment tal-istess Price Club. Għalhekk PriceWaterhouseCoopers ħarġu bi pjan illi kull bejgħ magħmul lil Price Club kien ser jiġi kkontrollat minn PriceWaterhouseCoopers. Inoltre, ngħid illi kien hemm xniegħat illi Price Club Operators Ltd. kienet ser tinbiegħ. Għaldaqstant, flimkien mal-kredituri l-oħra, Valle del Miele, iddeċidew illi qabel ma jieħdu passi legali, jikkonċedu żmien ulterjuri lil Price Club sabiex tkun tista' tirkupra u taffettwa l-ħlasijiet dovuti minnha.

Mill-investigazzjoniijet magħmula minn PriceWaterHouseCoopers deher ċar illi:

i. Sa Diċembru tas-sena 2000 Price Club Operators Ltd. kienet għamlet telf ta' tlett miljun lira.

ii. Qatt ma kien sar interim jew annual stock taking kemm kienet ilha topera l-kumpanija, u allura dan kien ifisser illi l-audited accounts kienu nħarġu fuq valuri fittizji.

iii. Kien hemm probabilita' kbira li s-self ta' miljun lira magħmul minn Price Club a favur ta' 'related companies', ma kienux ser jiġu rkuprati u dana peress illi tali self kien sar mingħajr ebda garanzija ta' ħlas.

iv. Għaldaqstant in-negozju ta' Price Club kien sar b'nuqqas kbir ta' professjonalita' u b'mod irrisponsabbli għall-aħħar

Kien f'dan l-istadju illi Valle del Miele indunaw illi d-diretturi ta' Price Club Operators Ltd kif ukoll l-Awdituri li ffirmaw l-accounts mingħajr kwalifika kienu qarrqu bihom.

Ngħid illi flimkien ma' Edward Fenech, u ċjoe' direttur ieħor ta' Valle del Miele u partner fil-kumpanija tiegħi Carm A. Fenech & Co, iltqajna ma' John Bonello, u ċjoe' l-

kap ta' PriceWaterHouseCoopers u ssuġġerejna illi kellha tittieħed azzjoni sia kontra d-diretturi kif ukoll kontra l-awdituri ta' Price Club. L-imsemmi John Bonello qabel magħna illi eventwalment kienu ser jittieħdu passi legali kontra l-kumpanija, pero' ma qabilx magħna dwar il-fatt illi kellha tinfetaħ kawża kontra l-awdituri tagħha ukoll, peress illi ma xtaqux jieħdu passi kontra kollegi professjonali bħalhom. Inoltre, huwa kkonferma illi l-Ministru tal-Finanzi kien ta rakkomandazzjoni lil PriceWaterhouseCoopers fis-sens illi kellhom jiġu eżawriti l-possibilitajiet kollha ta' rkupru ta' Price Club Operators Ltd qabel ma l-krediturijieħdu kwalunkwe tip ta' azzjoni.

Ngħid illi kien f'Ġunju tas-sena 2001 illi Valle Del Miele waqfet tissuplixxi lil Price Club bil-prodotti tagħha. Dan nonostante, Valle del Miele ddeċidiet illi tistenna għal perjodu ulterjuri ta' erba' xhur qabel ma tieħu azzjoni. Pero' ngħid illi għal ħabta ta' Novembru 2001 kien jidher ċar illi kull possibilita' ta' rkupru jew ta' bejgħ tal-kumpanija Price Club Operators Ltd. kienet sfaxxat fix-xejn, u kien għalhekk li Valle del Miele Ltd inizjat proċeduri legali biex titħallas lura d-debitu dovut lilha. Ngħid illi nfetħet kawża sia kontra d-Diretturi ta' Price Club Operators Ltd, sia kontra l-awdituri tal-istess.

Illi a fol 484, tal-proċess, Carm Fenech qal ukoll (f' kawza oħra li l-atti tagħha ġew prodotti):

"Ngħid illi jien kkonfrontajt lill-imsemmi Wallace Fino bl-audited accounts illi kont eżaminajt u staqsejtu jekk l-affarijiet kienux ammeljoraw mit-30th September 1999. Skond Wallace Fino ma kellniex għalfejn nallarmaw ruħna dwar il-qagħda finanzjarja ta' Price Club Operators Limited għaliex il-kumpanija kienet sejra tajjeb, u li kieku dan ma kienx verament il-każ id-diretturi ta' Price Club Operators Limited ma kienux jaslu biex jieħdu d-deċiżjoni li jifthu u jibdew joperaw ħames supermarkets oħra. Ngħid ukoll illi Wallace Fino infurmana li l-uniku problema tal-kumpanija kienet waħda ta' 'cash flow' iżda din kienet problema temporanja illi kienet fil-proċess li tiġi riżolta fi żmien qasir. Inoltre huwa semma April-Ġunju tas-sena 2001 bħala l-perjodu illi fih Price Club Operators Limited

kienu ser jerġgħu jirritornaw għal credit limit oriġinali tagħhom, u ċjoe' 60 ġurnata ma Valle Del Miele Limited. Għandu jingħad illi meta saret l-imsemmija laqgħa, u ċjoe' f'Jannar tas-sena 2001, kienet infirxet sew il-'mad cow disease' bil-konsegwenza li l-bejgħ tal-laħam tal-majjal kif ukoll tal-laħam taċ-ċanga kien naqas drastikament u minflok kienet kibret b'mod sostanzjali d-domanda għal-laħam tat-tiġieġ, u ċjoe' l-prodott li tinnegozja fih is-soċjeta' attriċi. Minħabba din id-domanda, Valle Del Miele Limited bdiet tbiegħ il-prodotti tagħha lill-klijenti ġodda. Dan kien ifisser ukoll illi anke Price Club Operators Limited kienu ser iżidu l-ordnijiet tagħhom mingħand Valle Del Miele Limited. Jien ħassejt illi kien ikun għalhekk fl-aħjar interess ta' Valle Del Miele Limited jekk tkompli tonora l-kuntratt illi kellha ma' Price Club Operators Limited, u dana peress illi Price Club Operators Limited kienu ilhom jinnegozjaw ma' Valle Del Miele Limited għal żmien twil, bil-kuntrarju ta' klijenti ġodda. Inoltre, dak iż-żmien Price Club Operators Limited kienu qed jiddominaw l-industrija tas-supermarkets.

... ...

Fuq il-bażi ta' dan, għalhekk, issuġġerejt illi r-rikjeta ta' Price Club Operators Limited, u ċjoe' illi tingħata further extended credit, kellha tiġi akkolta. B'hekk ngħid illi Price Club Operators Limited kien ser ikollhom credit time assolut ta' disgħin ġurnata, minflok ta' sittin ġurnata, kif oriġinarjament mogħti lilhom."

Illi dan jindika li d-diretturi tas-soċjeta' attriċi kienu jafu bil-problemi u filwaqt li huwa minnu li l-*accounts* ma kienux jirrispekjaw għal kollox is-sewwa, huma iddeċidew li jieħdu riskju w jkomplu jagħtu kreditu għal somom kbar. F'każ bħal dan huma messhom inkarigaw espert huma stess u mhux joqogħdu fuq l-awdituri tal-istess soċjeta' debitriċi. Anke l-Qrati Ngliżi ħadu din il-pożizzjoni fil-kawża **"Caparo Industries plc vs Dickman"** deċiża fl-1990 mill-Qorti tal-Appell; dan kien każ fejn l-atturi xtraw il-maġġoranza tal-ishma f'soċjeta' wara li eżaminaw l-*accounts* imħejjin mill-konvenuti fejn il-profitti kienu ġew minfuħa. Il-Qorti irriteniet illi: *"the bidder could have paid for and done its own audit. Consequently there was*

neither a relationship of proximity nor was it fair, just and reasonable to make the auditor liable for the lost sums of money that the takeover incurred.”

Illi għalhekk il-Qorti kif ġja’ msemmi, tħoss li ma kienx hemm f’dan il-każ, kawża biżżejjed prossima bejn in-nuqqas tal-konvenuti u d-danni effettivament kaġunati lis-soċjeta’ attriċi.

DEĊIŻJONI
Għal dawn il-motivi, il-Qorti tiddeċiedi din il-kawża billi filwaqt li tiddikjara li l-konvenuti aġixxew b’mod negliġenti kif mitlub fiċ-ċitazzjoni, huma ma kkaġunawx id-danni mitluba mis-soċjeta’ attriċi, u għaldaqstant tiċħad it-talbiet attriċi kif dedotti.

L-ispejjeż, ħlief dawk ġja’ deċiżi mis-sentenzi ġja’ mogħtija bejn il-partijiet, fiċ-ċirkostanzi jkunu bla taxxa bejn il-kontendenti.

Moqrija.

< Sentenza Finali >

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