MALTA

QORTI CIVILI
PRIM' AWLA

ONOR. IMHALLEF
JOSEPH ZAMMIT MC KEON

Seduta tat-30 ta' Jannar, 2014

Citazzjoni Numru. 1045/2011

L-Arkitett Raymond Vassallo (ID 107544(M), bhala azzjonist fis-socjeta` Regent Holdings Limited (C21310) u martu Mariella Vassallo (ID 2649M), ghal kull interess li jista` jkollha li qed jagixxu u jezercitaw azzjoni derivativa fl-interess tas-socjeta` Regent Holdings Limited (C21310)

kontra

L-Arkitett William Carbonaro (ID 12045M), Anthony Parlato Trigona (ID 251045M), l-Arkitett Edward Micallef (ID 317945M) kemm f`isimhom propju u kemm bhala diretturi tas-socjeta` Regent Holdings Limited stess (C21310) li qeghda tissejjah bhala intimata ghar-ragunijiet ta` procedura u ghal kull interess li jista` jkollhom Gabriella sive` Gay Carbonaro (ID 774644M) mart l-istess Arkitett William, Anna Micallef (ID 298551M) mart l-Arkitett Edward u Ingrid Parlato Trigona (ID 413348M) mart Anthony

Il-Qorti :

I. <u>Preliminari</u>

1. <u>Ir-rikors guramentat</u>

Illi fil-bidu nett tar-rikors guramentat li pprezentaw fil-<u>25 ta` Ottubru 2011</u> l-atturi jghidu illi din taghhom hija *l-azzjoni derivativa (derivative action) klassika maghrufa fil-Company Law Ingliza, u accettata mil-ligi nostrali.*

Illi l-atturi jghidu li mexxew b`din l-azzjoni ghaliex jallegaw li *twettqu u ghadhom qed jitwettqu abbuzi fil-kumpannija Regent Holdings Limited mid-Diretturi intimati jew minn xi whud minnhom.*

Illi bhala azzjonisti ta` Regent Holdings Limited, l-atturi jghidu li hadu l-azzjoni tal-lum, f`isem l-istess Regent Holdings Limited, *eccezzjonalment bhala azzjoni derivativa, azzjoni u drittijiet vestiti fil-kumpannija, minhabba inattivita` u nuqqasijiet tal-kumpannija attribwibbli lill-Bord tad-Diretturi.*

Illi l-atturi jfissru b`dettall il-fatti u cirkostanzi li skond huma wassluhom biex jiehu din l-azzjoni u biex iressqu serje ta` talbiet.

Illi t-talbiet lill-Qorti huma illi –

1. Tiddikjara u tiddeciedi illi bin-nuqqasijiet taghhom il-konvenuti Arkitett William Carbonaro, Anthony Parlato Trigona, l-Arkitett Edward Micallef, solidament jew min minnhom ikkawzaw nuqqas patrimonjali, telf u danni

lis-sicjeta` Regent Holdings Limited, li ghalihom huma responsabbli u ghandhom iwiegbu ;

2. Tiddikjara u tiddeciedi illi l-intimati solidament jew min minnhom Arkitett William Carbonaro, Anthony Parlato Trigona, l-Arkitett Edward Micallef, naqsu fid-doveri taghhom lejn is-socjeta` Regent Holdings Limited u anzi komplew jaggravaw l-assi tal-kumpannija ;

3. Tillikwida n-nuqqas patrimonjali, it-telf u danni ghar-ragunijiet fuq esposti sofferti u subiti mill-kumpannija Regent Holdings Limited ;

4. Tikkundanna lill-konvenuti Arkitett William Carbonaro, Anthony Parlato Trigona, l-Arkitett Edward Micallef, solidament jew min minnhom, ihallsu lis-socjeta` Regent Holdings Limited l-ammont hekk likwidat ;

5. Tikkundanna u tordna lill-konvenuti Arkitett William Carbonaro, Anthony Parlato Trigona, l-Arkitett Edward Micallef, solidament jew min minnhom, iroddu lura lis-socjeta` Regent Holdings Ltd l-ammont misluf mill-Bank ;

6. Tordna lill-istess socjeta` Regent Holdings Limited trodd l-istess ammont lura lill-Bank biex ma jkomplux jakkumulaw interessi kontra l-istess socjeta`.

Bl-imghax min-notifika ta` din ic-citazzjoni, u bl-ispejjez kontra l-konvenuti li huma ngunti ghas-subizzjoni, bir-riserva ta` kull dritt u azzjoni fil-ligi.

Illi ma` l-att promotorju, l-atturi pprezentaw *dikjarazzjoni ta` fatti* li kienet konfermata bil-gurament mill-attur, flimkien ma` lista tax-xhieda.

2. <u>Ir-risposta guramentata</u>

Illi fir-risposta guramentata li l-konvenuti <u>flimkien</u> ipprezentaw fid-<u>9 ta` Dicembru 2011</u> iddefendew ruhhom hekk mill-azzjoni attrici –

1. Illi preliminarjament l-eccepjenti ghandhom jigu liberati mill-osservanza tal-gudizzju stante li l-azzjoni derivattiva proposta mill-atturi ma hijiex permessa jew azzjonabbli skond il-ligi socjali Maltija ;

2. Illi preliminarjament ukoll u minghajr pregudizzju ghas-suespost l-eccepjenti ghandhom jigu liberati mill-osservanza tal-gudizzju stante li l-atturi konjugi Vassallo ma kellhomx u m`ghandhomx l-awtorita` rikjesta skond il-ligi u skond il-Memorandum and Articles of Association ta` Regent Holdings Limited sabiex jistitwixxu l-azzjoni odjerna ghan-nom ta` l-istess socjeta` Regent Holdings Limited ;

3. Illi preliminarjament ukoll u minghajr pregudizzju ghas-suespost l-eccepjenti ghandhom jigu liberati mill-osservanza tal-gudizzju stante li s-socjeta` Regent Holdings Limited ma kellhiex u m`ghandhiex l-awtorita` rikjesta skond il-ligi u skond il-Memorandum and Articles of Association taghha sabiex tistitwixxi l-azzjoni odjerna u ghalhekk hija nieqsa mill-interess guridiku rikjest mil-ligi sabiex tistitwixxu l-azzjoni odjerna ;

4. Illi preliminarjament ukoll u minghajr pregudizzju ghas-suespost, l-attrici Mariella Vassallo ma kellhiex u m`ghandhiex l-interess guridiku rikjest mil-ligi sabiex tistitwixxi l-azzjoni odjerna, ghalhekk l-eccipjenti odjerna ghandhom jigu liberati mill-osservanza tal-

gudizzju ghal dak li jirrigwarda l-pretensjonijiet minnha migjuba fl-azzjoni odjerna ;

5. Illi preliminarjament ukoll u minghajr pregudizzju ghas-suespost l-atturi ghandhom jissodisfaw lil dina l-Onorabbli Qorti li ma kellhomx rimedji ohrajn jew li jekk kellhom rimedji ohrajn dawn gew minnhom ezawriti inutilment qabel ma pprezentaw il-kawza odjerna u fin-nuqqas l-eccipjenti odjerna ghandhom jigu liberati mill-osservanza tal-gudizzju ;

6. Illi preliminarjament ukoll u minghajr pregudizzju ghas-suespost l-eccipjenti Gabriella Carbonaro la hija azzjonista u lanqas hija direttrici tas-socjeta` Regent Holdings Limited. Ghalhekk ma hijiex legittimu kontraditrici u ghaldaqstant ghandha tigi liberata mill-osservanza tal-gudizzju ;

7. Illi subordinatament u minghajr pregudizzju ghal dak precitat ma jezistu l-ebda ragunijiet li jistghu jiggustifikaw rimedju fil-forma ta` azzjoni derivattiva (f`kaz li dina l-Onorabbli Qorti kellha ssib li tali forma ta` azzjoni hija valida ai termini tal-ligi socjali nostrali) u wisq anqas li t-talbiet attrici jigu akkolti, u dana kif ser jirrizulta ahjar fil-mori tal-kawza ;

8. Illi ghalhekk l-atturi ghandhom jippruvaw li gew ezegwiti xi atti minghajr l-awtorizzazzjoni tal-magoranza specjali rikjesta mill-Memorandum and Articles of Association tas-socjeta` Regent Holdings Limited u fin-nuqqas l-eccipjenti odjerni ghandhom jigu liberati mill-osservanza tal-gudizzju ;

9. Illi ghalhekk ukoll l-atturi ghandhom jippruvaw li l-konvenuti ma osservawax l-formalitajiet procedurali applikabbli ghas-socjeta` Regent Holdings Limited u fin-

nuqqas l-eccipjenti odjerni ghandhom jigu liberati mill-osservanza tal-gudizzju ;

10. Illi ghalhekk ukoll l-atturi, apparti milli ghandhom jippruvaw li l-agir tal-konvenuti kien b`xi mod illecitu, abbuziv, ultra vires jew li ma kkonformax ruhu mal-formalitajiet procedurali applikabbli ghas-socjeta` Regent Holdings Limited, ghandhom jippruvaw ukoll li tali agir irreka danni lill-atturi jew lil min minnhom ;

11. Illi subordinatament u minghajr pregudizzju ghas-suespost it-talbiet attrici huma infondati fil-fatt u fid-dritt u ghandhom jigu michuda, apparti ghar-ragunijiet precitati, ukoll ghas-segwenti ragunijiet :-

i. Illi socjeta` Regent Holdings Limited titmexxa fuq principji demokratici regolati permezz tal-Memorandum and Articles of Association ta` l-istess socjeta` u anke mill-provvedimenti ta` l-Att dwar il-Kumpanniji, liema principji demokratici gew pattwiti bonarjament bejn is-socji meta huma qaghdu flimkien u kkostitwew l-imsemmija socjeta`, u dana skond kif jirrizulta mill-annessa kopja tal-imsemmija Memorandum and Articles of Association (Dok. WC1) ;

ii. Illi s-socjeta` Regent Holdings Limited dejjem aggixxiet entro t-termini tal-Memorandum and Articles of Association taghha (Dok. WC1) u cioe` qatt ma aggixxiet b`mod ultra vires ;

iii. Illi ghal dak li ghandu x`jaqsam mas-socjeta` Regent Holdings Limited, il-konvenuti dejjem agixxew fl-ahjar interessi tas-socjeta` u entro t-termini tal-Memorandum and Articles of Association taghha (Dok. WC1) u cioe` qatt ma aggixxew b`mod ultra vires ;

iv. Illi l-Arkitett Vassallo ma jistax jippretendi li jesponi s-socjeta` ghal azzjoni legali kull darba li l-istess Arkitett Vassallo jidhirlu li s-socjeta` mhijiex qed titmexxa bil-mod kif jidhirlu li ghandha titmexxa. F`kwalunkwe kaz is-socjeta` Regent Holdings Limited, apparti milli qed titmexxa b`mod demokratiku kif tezigi l-ligi, qed titmexxa b`mod li l-organi demokratici taghha jidhrulha li huwa fl-ahjar interess taghha fic-cirkostanzi, u dana entro t-termini Memorandum and Articles of Association tas-socjeta` Regent Holdings Limited u anke ai termini tal-ligijiet socjali nostrali ;

12. Illi subordinatament u minghajr pregudizzju ghal dak precitat kif jghidu ben tajjeb l-atturi odjerni, l-istess atturi gja pprezentaw il-kawza numru 750/2009 JZM fl-ismijiet "Il-Perit Raymond Vassallo et vs Regent Holdings Limited et" (Diff: 10.01.2012) fejn huma talbu rimedji kontra l-konvenuti taht l-artikolu 402 tal-Att Dwar il-Kumpanniji. Ghalhekk f`dan ir-rigward qed tigi sollevata l-eccezzjoni ta` lis alibi pendens ;

Ghaldaqstant it-talbiet kollha tar-rikorrenti ghandhom jigu michuda bl-ispejjez kontra l-istess rikorrenti li huma minn issa stess ngunti ghas-subizzjoni.

Illi mar-risposta guramentata, il-konvenuti pprezentaw lista tax-xhieda u l-Memorandum u l-Articles of Association ta` Regent Holdings Limited (Dok WC1).

3. <u>L-"iter" tal-kawza sal-lum</u>

Illi l-attur xehed fl-udjenza tat-2 ta` April 2012.

Illi l-attur ipprezenta nota (u dokumenti) fl-14 ta` Mejju 2012.

Illi l-attur rega` xehed fl-udjenza tal-15 ta` Ottubru 2012 fejn ipprezenta wkoll dokument.

Illi fl-istess udjenza, il-konvenuti talbu sabiex *f`dan l-istadju l-Qorti tiddeciedi l-eccezzjonijiet preliminari ntizi biex jolqtu l-validita` li titressaq id-derivative action u dan qabel ma tghaddi ghall-konsiderazzjoni tal-mertu.*

Illi min-naha taghhom l-atturi rrilevaw illi sabiex il-Qorti taghmel dak illi jixtiequ l-konvenuti *ser ikollha tisma` l-provi fuq il-mertu, almenu limitatament ghall-konsiderazzjonijiet generali fuq il-mertu minghajr dettall.*

Illi wara li semghet lid-difensuri tal-partijiet fl-udjenza tas-6 ta` Dicembru 2012, il-Qorti tat <u>provvediment</u> fl-udjenza tal-14 ta` Jannar 2013, fejn *inter alia* qalet hekk –

Din il-Qorti hija tal-fehma li sabiex tigi deciza l-ewwel eccezzjoni ma hemmx il-htiega li jingabru aktar provi oltre dawk li diga` jinsabu in atti. Huwa evidenti illi kif dedotta l-ewwel eccezzjoni hija ta` natura legali. Ghaliex dak li sejra tghid din il-Qorti bid-decizjoni taghha dwar l-ewwel eccezzjoni huwa jekk l-azzjoni derivattiva kif proposta mill-atturi hijiex permessa mil-ligi taghna nkella le. L-unici provi li jistghu jkunu rilevanti ghal decizjoni dwar l-eccezzjoni huma diga` akkwiziti (ara Dok WC1) u cioe` li l-attur Perit Raymond Vassallo huwa azzjonist ta` Regent Holdings Limited, li fil-kawza tal-lum ighid illi agizza fl-interess ta` Regent Holdings Limited, li l-konvenuti Perit William Carbonaro, Anthony Parlato Trigona u Perit Edward Micallef huma diretturi ta` Regent Holdings Limited u li Regent Holdings Limited hija wkoll imharrka bhala konvenut fil-kawza. Il-prova tal-fatti jew cirkostanzi li wasslu lill-Perit Vassallo biex jipprezenta azzjoni derivattiva mhumiex rilevanti biex din il-Qorti tiddeciedi jekk l-azzjoni derivattiva kif promossa bl-azzjoni tal-lum hijiex permess skond il-ligi taghna.

Illi bhala konsegwenza, il-Qorti pprovdiet hekk –

Tiddikjara illi sabiex tiddeciedi l-ewwel eccezzjoni preliminari ma hemmx htiega ta` provi godda. Ghaldaqstant qeghda tordna li ssir trattazzjoni tal-eccezzjoni sabiex wara thalli l-kawza ghal decizjoni dwar l-istess eccezzjoni.

Illi l-konvenuti pprezentaw nota ta` sottomissjonijiet fit-28 ta` Frar 2013 li ghaliha wiegbu l-atturi b`nota ta` osservazzjonijiet taghhom fil-15 ta` April 2013.

Illi fl-udjenza tat-2 ta` Mejju 2013, il-Qorti tat digriet fejn halliet il-kawza ghas-sentenza dwar l-ewwel eccezzjoni preliminari.

Ikkunsidrat :

II. Is-sottomissjonijiet fil-qosor

Fin-nota ta` l-atturi** huwa rilevat illi bl-azzjoni derivattiva, li ssib l-origini taghha fil-*common law* Ingliza, il-Qorti ghandha diskrezzjoni illi f`cirkostanzi **eccezzjonali, bhal meta diretturi ma jkunux iridu jagixxu minhabba xi konflitt ta` interess jew minhabba negligenza fit-tmexxija, tmur kontra r-regola generali (u cioe` illi r-rappresentanza hija vestita fid-diretturi) u tippermetti li azzjoni f`isem kumpannija ssir minn azzjonist. Mill-*common law* l-azzjoni derivattiva evolviet f`disposizzjoni *ad hoc* inserita fil-Companies Act Ingliza.

Skond l-atturi, l-azzjoni derivattiva favur l-azzjonista fil-Ligi Ngliza hija **agguntiva** ghall-azzjoni tal-azzjonista ghal *unfair prejudice.* Fil-ligi Maltija, l-istat tad-dritt huwa divers ghaliex ir-rimedju kontemplat bl-Art 402(3)(e) tal-

Kap 386 mhuwiex imfassal bhala *azzjoni “free-standing” disponibbli lir-rikorrent (petitioner) skond l-ghazla tieghu.*

Hija l-fehma tal-atturi li fis-sistema guridiku taghna l-azzjoni derivattiva u l-azzjoni skond l-Art 402 tal-Kap 386 la jeskludu lil xulxin u lanqas huma nkompatibbli ma` xulxin. L-atturi jaghmlu riferenza ghal gurisprudenza tal-Qrati taghna fosthom is-sentenzi ta` din il-Qorti fil-kawzi “<u>J. Calleja pro et noe vs V. Calleja</u>” deciza fit-8 ta` Lulju 2004 u “<u>George Borg vs Primrose Poultry Products Limited</u>” tas-16 ta` Jannar 2012.

L-atturi jaghmlu elenku ta` differenzi bejn l-azzjoni derivattiva “klassika” u l-azzjoni skond l-Art 402. Ighidu li filwaqt li fl-azzjoni tal-ewwel, l-azzjoni hija *company-oriented* fil-kaz tat-tieni, l-azzjoni hija *petitioner-oriented.* Differenza ohra hija illi fl-azzjoni tal-ewwel, il-hsara tkun qeghda tiggarrab mill-kumpannija, waqt li fil-kaz tat-tieni, il-pregudizzju jkun tal-azzjonista. In kwantu ghar-rimedji, fil-kaz tal-azzjoni skond l-Art 402, il-Qorti ghandha diskrezzjoni wiesgha ta` kif taghti rimedju, mentri fil-kaz tal-azzjoni derivattiva, ir-rimedju huwa preciz, u intiz biex ikun ta` beneficcju tal-kumpannija *ut sic*.

L-atturi jaghmlu riferenza ghall-mertu ta` diversi mill-kawzi li hemm pendenti bejn il-partijiet.

**<u>Fin-nota ta` l-konvenuti</u>**, huwa rilevat illi kien fir-Renju Unit li l-azzjoni derivattiva twieldet bhala eccezzjoni ghar-regola fondamentali citata fil-kaz “*Foss vs Harbottle*” li logikament fassal il-principju illi socjeta` ghandha tkun hi stess attrici jew konvenut f`kull vertenza gudizzjarja. Maz-zmien kien zviluppat id-dritt ta` azzjonist minoritarju illi jistitwixxi azzjoni minflok is-socjeta` f`certi cirkostanzi, permezz ta` *derivative claims*, fejn membru jkun jista` jagixxi anke sabiex jipprotegi l-interessi tieghu taht l-istess socjeta` u anke sabiex jipprotegi d-drittijiet tal-istess

socjeta`. Eventwalment il-legislatur fl-Ingilterra ipprovda ghaliha, kif ghamel wara l-legislatur taghna wkoll b`legislazzjoni *ad hoc* bl-artikolu 402 tal-Att XXV tal-1995. Huwa dan l-artikolu li jipprovdi l-metodu procedurali ta` kif ghandha ssir talba minn azzjonist minoritarju minhabba dak li ghandu x`jaqsam ma` *unfair prejudice* u *derivative claims* ;

Il-konvenuti jsostnu li l-azzjoni odjerna ma hijiex dik kontemplata taht id-disposizzjonijiet tal-Art 402 fejn membru ta` kumpannija, li jinkludi l-persuni specifikati fis-subartikolu (6) tal-istess artikolu, jista` jagixxi u jitlob lill-Qorti sabiex tiehu dawk id-decizjonijiet opportuni, inkluzi dawk specifikati taht is-subartikolu (3) tal-istess artikolu. Il-legislatur Malti ried jeskludi d-*derivative action* kif prattikata fil-*common law* Ingliza, u stabilixxa *ope legis* ir-rimedju skond l-Art 402(3)(e).

Ikkunsidrat :

III. <u>Id-“derivative action” fil-ligi tal-Ingilterra</u>

1. <u>Skond il-“Common Law”</u>

Fil-Pag 692-693 tat-Tmien Edizzjoni ta` **<u>Boyle & Birds` Company Law</u>** pubblikata minn Jordans fl-2012 jinghad hekk –

There is a general principle of company law that minority shareholders cannot sue for wrongs done to their company or complain of irregularities in the conduct of its internal affairs. This principle came to be known as the rule in “Foss v Harbottle” from the decision in which it was first clearly established. The cases show that this rule rests upon two related propositions: (a) the right of the majority to bar a minority action whenever they might lawfully ratify alleged misconduct ; and (b) the normally

exclusive right of the company to sue upon a corporate cause of action. In "Edwards v Halliwell" Jenkins L.J. elucidated the relationship between the two propositions by contending that the will of the majority, vis-a-vis the minority is to be identified with that of the company. Consequently to say that the company is "prima facie" the proper plaintiff (claimant) in actions concerning its affairs is only another way of saying that the majority, within the limits of their power to ratify, have the sole rights to determine whether or not a dispute shall be brought before the courts.

The courts have justified the policy expressed by the rule by certain practical arguments of convenience. In "Gray v Lewis", James L.J. justified the principle that any body corporate is the proper plaintiff in proceedings to recover its property by pointing to the obvious danger of a multiplicity of shareholders` suits in the absence of a rule such as "Foss v Harbottle" …

The rule did not extend to a case where the act complained of is either illegal or is a fraud upon the minority, and there is also an exception in cases where the act done, although regular in form, is unfair and oppressive as against the minority. This will include acts by directors which are an abuse of powers contained in the company`s constitution and may only be approved by the unanimous consent of the shareholders …

A single shareholder may sue in his own name to restrain an act which is an infringement of his individual rights, for example a wrongful refusal to accept his vote at a general meeting of the company or a wrongful exclusion of him from the board of directors. The rule of "Foss v Harbottle" has of course no application to any statutory right conferred by the Companies Act 2006 on individual shareholders or a minimum of them. There is also judicial authority for the view that the rule has no application to any individual right conferred by the articles or memorandum. However whether such rights are an exception to the rule or are beyond its scope is largely a matter of language.

2. <u>Skond l-"Statutory Law"</u>

Il-ligi statutorja in kwistjoni hija l-Companies Act 2006.

Fil-Pag 698-699 tat-Tmien Edizzjoni ta` **<u>Boyle & Birds` Company Law</u>** pubblikata minn Jordans fl-2012 jinghad hekk –

The Companies Act 2006 sets out a statutory replacement for the old common law derivative procedure. This has replaced those aspects of the "Foss v Harbottle" that used to apply to such claims …

Section 260 of the Companies Act 2006 defines a derivative claim in traditional terms : proceedings by a member in respect of a cause of action on behalf of the company seeking relief on behalf of the company. Such claims can be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of a company. "Director" is widely defined as a former director or a "shadow director". Moreover the cause of action may be against "the director or another person or both". This would appear to allow derivative claims where the controlling or dominant shareholders (or possibly senior managers) are involved in a director`s breach of duty to the company.

The procedure for making an application to court for permission to continue a derivative claim is contained in s 261. Section 261(1) provides that if it appears to the court that the application, and the evidence filed by the applicant in support of it, do not disclose a "prima facie" case for giving permission, then the court must dismiss the application and may make any consequential order if it thinks appropriate. Under s 261(3) where the application

is not dismissed the court may give directions as to the evidence to be provided by the company, and may adjourn the proceedings to enable the evidence to be obtained. On hearing the petition the court may : (1) give permission to continue the claim on such terms as it thinks fit ; (2) refuse permission and dismiss the claim ; or (3) adjourn the proceedings on the application and give such directions as it thinks fit.

Section 262 of the Companies Act 2006 follows the Law Commission`s Report, in allowing a member to continue a claim (brought originally by the company) as a derivative where it is founded on an appropriate cause of action. The member may apply to the court for permission to continue the claim where the company has failed to prosecute the claim diligently or the manner in which the company commenced the claim amounts to an abuse of the rpocess of the court and it is appropriate for the member to continue the claim as a derivative claim. The procedure set out in s 262 (as to applications to continue a claim as a derivative claim) follows the same pattern as that set out in respect of applications for permission to continue a dervative claim in s 261. There is a similar provision (in s 264) allowing an application to court to continue a derivative claim brought by another member. The court may give its permission on the same grounds as a company claim which the court permits a member to bring as a derivative claim.

Ikkunsidrat :

IV. <u>Il-fehma ta` din il-Qorti</u>

Fil-bidu nett tal-istanza taghhom, l-atturi kienu cari dwar in-natura tal-azzjoni taghhom. Skond kliemhom, l-azzjoni tal-lum hija *l-azzjoni derivativa (derivative action) klassika maghrufa fil-Company Law Ingliza, u accettata mil-ligi nostrali.* Il-konferma tan-natura tal-azzjoni attrici tirrizulta b`mod kristallin mill-*occhio* tal-kawza fejn jinghad

illi l-Perit Raymond Vassallo ghamel il-kawza *bhala azzjonist fis-socjeta` Regent Holdings Limited (C21310)* u fejn hu *u martu Mariella Vassallo, ghal kull interess li jista` jkollha,* kienu qeghdin *jagixxu u jezercitaw azzjoni derivativa fl-interess tas-socjeta` Regent Holdings Limited (C21310).*

L-eccezzjoni preliminari <u>ewlenija</u> tal-konvenuti hija li kawza hekk kif promossa mill-atturi mhijiex permessa mid-dritt socjetarju Malti.

Il-Qorti hasbet fit-tul dwar din il-kwistjoni u qeghda tesprimi ruhha hekk –

1) Fin-noti taghhom, il-partijiet ghamlu riferenza ghall-gurisprudenza tal-Qrati taghna. Jekk wiehed ifittex b`reqqa mhux daqstant il-fatti ta` kull kawza citata, ghaliex il-fatti huma differenti, izda jmur ghall-*common denominator* tal-kawzi citati, wiehed isib illi l-*common denominator* kien illi si trattava ta` istanzi fejn azzjonisti kienu qeghdin ifittxu rimedju skond l-Art 402 tal-Kap 386 u fil-kuntest ta` <u>**dik**</u> l-azzjoni nsorgiet il-kwistjoni tad-"derivative action" minhabba l-vesti ta` l-persuni li ppromwovew l-azzjoni u dik ta` l-persuni kontra min tmexxiet l-azzjoni. F`kull kawza, ir-riferenza ghad-"derivative action" kif applikata l-Ingilterra kienet marbuta mal-kwistjoni tal-legittimita` o meno tal-kontendenti fl-ambitu ta` azzjoni skond l-Art 402.

2) Fil-kawza tal-lum, ma garax hekk ghaliex l-istanza tal-atturi ma kenitx promossa abbazi tal-Art 402 tal-Kap 386 izda <u>**unikament u esklussivament**</u> fuq il-pretiza tal-atturi li huma jistghu jintavolaw fil-kuntest Malti "derivative action" minghajr riferenza ghall-Art 402 tal-Kap 386.

3) F`dan l-istadju, il-Qorti taghmel riferenza ghas-sentenza ta` din il-Qorti hekk kif presjeduta tas-16 ta` Jannar 2012 fil-kawza "**George Borg vs Primrose Poultry Products Limited et**", mhux daqstant biex ticcita gurisprudenza taghha, izda ghar-raguni li dik is-sentenza ssemmiet mill-atturi fin-nota taghhom in sostenn ta` l-fondatezza tal-azzjoni taghhom kif llum promossa.

4) Il-Qorti tibda biex tghid illi anke "**George Borg vs Primrose Poultry Products Limited et**" kienet azzjoni mpernjata fuq l-Art 402 tal-Kap 386. Din il-Qorti tirrikonoxxi li r-rikorrent hemm irrefera ghad-"derivative action". Taccetta wkoll li fil-preambolu tad-decide l-Qorti ghamlet riferenza ghad-"derivative action". Izda jekk tassew wiehed irid jaqra **korrettement u b`gustizzja** t-tmienja u hamsin (58) pagna li jaghmlu dik is-sentenza, in partikolari l-*considerandi* u fuq kollox il-provvedimenti tas-sentenza jsib illi l-ordnijiet tal-Qorti ma kienu xejn aktar u xejn anqas minn applikazzjoni jew twettieq tad-disposizzjonijiet tal-Art 402, propju ghaliex hekk kienet evidentement intiza li tkun l-azzjoni.

5) Huwa tassew illi fil-kawza "**George Borg vs Primrose Poultry Products Limited et**" saret riferenza ghad-"derivative action" fil-parti tal-ahhar tas-sentenza qabel l-ghoti tal-provvedimenti fid-dettall, propju ghaliex fl-azzjoni tieghu, ir-rikorrent kien accenna ghad-"derivative action" izda mill-kumpless tal-provi huwa evidenti li l-attur indirizza l-azzjoni lejn l-Art 402. U l-Qorti ttrattat *in extenso* l-applikazzjoni tal-Art 402, u ddedikat mhux aktar minn paragrafu ghall-azzjoni derivativa. Jinsorgi hawn il-kwesit : ifisser dan illi l-Qorti llum qeghda tibdel il-posizzjoni taghha ? Propju xejn minn dan. Ghaliex f`dik il-kawza l-Qorti kellha tiddeciedi fuq il-premessi u t-talbiet wara li tiehu konjizzjoni tal-eccezzjonijiet. U f`dik il-kawza kif del resto qalet il-Qorti stess *nero su bianco* fis-sentenza stess : *l-impostazzjoni tal-azzjoni mir-rikorrent ma kenitx kontestata mill-intimati fuq bazi ta` dritt izda fuq il-fatt.* Tant hekk kien il-kaz illi l-konvenuti hemm ma taw l-ebda eccezzjoni jew ressqu xi pregudizzjali abbinata mal-

kwistjoni tad-"derivative action". Li kieku nghatat eccezzjoni diretta lejn id-"derivative action" f`dik il-kawza, forsi l-esitu fejn jolqot id-"derivative action" kien ikun divers. Jibqa` l-fatt inkonfutabbli li l-provvedimenti tal-Qorti dakinhar kienu cirkoskritti ghall-applikazzjoni tal-Art 402. Dan kollu qed jigi senjalat ghas-skans ta` ekwivoci ghaliex din il-Qorti hija tal-fehma illi huwa vitali fil-qasam sensittiv u delikat tad-dritt socjetarju Malti illi l-gurisprudenza tevolvi b`mod car u inekwivoku.

6) Hija l-fehma konsiderata ta` din il-Qorti illi meta l-legislatur Malti ghamel l-Att dwar il-Kumpanniji fl-1995, illum il-Kap 386 tal-Ligijiet ta` Malta, huwa ried jindirizza d-dritt ta` azzjoni tal-"membru" ta` kumpannija, anke dwar ic-cirkostanzi lamentati mill-atturi, fuq il-binarji tal-Art 402. Fil-fehma ta` l-Qorti, din ghandha tkun *la chiave di lettura* korretta ta` dak li qieghed jigi deciz illum. U ghalhekk **<u>mhijiex kondivisa</u>** l-fehma tal-atturi li d-"derivative action" kif thaddmet fil-*common law* tal-Ingilterra ghandha titqies anke fil-kuntest Malti bhala *a plus* favur l-azzjonista, u kwindi agguntiva ghall-azzjoni skond l-Art 402.

7) Il-Qorti tkompli tisvolgi l-hsieb taghha bil-mod segwenti. Meta l-Att dwar il-Kumpanniji sar ligi tal-pajjiz fl-1995 biex jiehu post l-Commercial Partnerships Ordinance 1962, il-legislatur Malti kien jaf bl-esistenza tad-"derivative action" kif kienet applikata mill-*common law* fl-Ingilterra. Eppure ma holoq l-ebda "derivative action" fuq il-binarji kif thaddmet l-Ingilterra bhala eccezzjoni ghall-principji stabbiliti fis-sentenza ta` "*Foss v Harbottle*". **<u>Anzi l-legislatur ried li kollox idur mal-Art 402</u>**. Tant dan huwa hekk illi l-legislatur ma kienx kuntent illi jfassal il-mudell tal-Art 402 fuq il-ligi tal-Ingilterra. Infatti filwaqt illi l-ewwel subinciz ta` l-Art 402 huwa mibni fuq disposizzjoni identika li tinsab fin-New Zealand Companies Act 1993 (ara wkoll – Andrew Muscat : "**<u>Principles of Maltese Company Law</u>**"), it-tielet subinciz fejn huma nkorporati r-rimedji huwa intervent legislattiv prettament Malti – u din il-Qorti tistqarr u zzid tghid -

intervent legislattiv ghaqli hafna.

8) Xi jfisser dan kollu ? Ifisser illi l-legislatur ried illi l-"membru" jagixxi skond l-Art 402, jaghmel il-prova li tispetta lilu ta` dak li jghid is-subinciz (1) u jekk issir dik il-prova sal-grad rikjest mil-ligi, hemm miftuha u disponibbli r-rimedji kontemplati mis-subinciz (3) li jinkludu l-paragrafu (e).

9) Din il-Qorti **tikkondividi** l-fehma ta` Andrew Muscat (op. cit.) illi "*article 402(3)(e) of the Companies Act contemplates a **statutory form** of derivative action. The court is in fact empowered by the provisions to authorise "a member or members of the company to institute, defend, continue or discontinue court proceedings in the name and on behalf of the company."*

10) Hekk ukoll sostnew dawn il-Qrati.

11) Fis-sentenza taghha tad-29 ta` April 2008 fil-kawza **"Gordon Mizzi et v. Dr. John C. Grech et"** il-Qorti tal-Appell qalet hekk –

27. Ghalhekk din il-Qorti taqbel ma` dak li rriteniet l-ewwel Qorti li l-Artikolu 402(3)(e) ta' l-Att dwar il-Kumpaniji huwa l-verzjoni Maltija ta' l-azzjoni derivattiva. Ladarba llum il-gurnata l-legislatur Malti irregola b'mod statutorju l-azzjoni derivattiva, huma d-disposizzjonijiet tal-ligi Maltija rilevanti li ghandhom jigu applikati. L-Artikolu 402(1) jipprovdi li r-rimedji kontemplati fl-Artikolu 402(3) – li jinkludi anki l-versjoni Maltija ta' l-azzjoni derivattiva – jistghu jigu esercitati biss minn kull membru tal-kumpannija …

Il-Qorti qalet dan wara li aktar qabel fl-istess sentenza (ara para. 24) kienet irrilevat b`riferenza ghal dak illi kiteb Andrew Muscat fil-pag 901 footnote 105 ta` "**Principles of Maltese Company Law**" (op. cit.) illi *xi*

awturi esprimew id-dubji taghhom jekk ir-rikonoxximent tal-kuncett ta' l-azzjoni derivattiva mill-Qrati Maltin huwiex kompatibbli mal-ligi tal-procedura Maltija.

12) Mhuwiex il-kompitu ta` din il-Qorti li tqis il-vantaggi u zvantaggi ta` l-intervent legislattiv kif twettaq. Dak huwa kompitu tal-akkademici. Ir-rwol preciz tal-Qorti huwa li tinterpreta l-ligi kif inhi u tapplikaha b`gustizzja. Mhuwiex il-kompitu taghha li tintraprendi spedizzjonijiet fl-incert. Anzi huwa d-dmir taghha li tinterpreta bis-sewwa biex tistabilixxi c-certezza u mhux tfittex jew tnissel l-incertezza a skapitu tal-gustizzja.

13) Din il-Qorti hija tal-fehma konvinta illi kieku l-legislatur ried tassew jestendi d-drittijiet tal-"membru" sal-limiti li l-atturi qeghdin jippretendu li ghandhom huwa kien ighid hekk fil-ligi stess u mhux ihalli kollox ghall-interpretazzjoni. Tant il-Qorti hija konvinta minn dan illi kif diga` rajna fl-Ingilterra, il-legislatur ghamel qabza ta` kwalita` bejn il-Companies Act 1985 u l-Companies Act 2006. Kif diga` rajna, f`dik tal-ahhar, dahhal disposizzjoni *ad hoc* li kjarament tmur ben oltre dak kontemplat bl-Art 402 taghna. Il-legislatur Malti ma ghamilx dak il-pass. B`daqshekk pero` ma jfissirx illi xi hadd ghandu l-jedd jaqleb ta` taht fuq dak li kien kjarament intiz bl-Art 402 billi jirreferi ghal "derivative action" imhaddma *per via di eccezione* fl-Ingilterra.

14) Din il-Qorti tifhem li forsi raguni ghala l-*statutory form of the derivative action* dahlet mil-legislatur Malti fl-ambitu tal-Art 402 setghet kienet ukoll dik moghtija minn Lord Justice James fi "*Gray v Lewis*" diga` citata minn **Boyle & Birds Company Law** (op. cit.) u cioe` li jirriafferma l-principju illi *any body corporate is the proper plaintiff in proceedings to recover its property* sabiex ma jkunx hemm *the obvious danger of a multiplicity of shareholders` suits in the absence of a rule such as "Foss v Harbottle".*

15) F`dan il-kuntest, hemm hafna x`jinghad dwar l-argument li gabu l-atturi fin-nota taghhom illi filwaqt li l-azzjoni derivattiva hija *company-oriented* l-azzjoni skond l-Art 402 li hija *petitioner-oriented.* Il-Qorti tghid illi bil-procedura stabbilita mil-legislatur Malti, il-"membru" jaf fejn hu. Jekk biex jigi stabbilit dritt ta` azzjoni se tidhol il-kwistjoni ta` liema talbiet huma *company-oriented* u liema huma dawk li huma *petitioner-oriented* hafna drabi bil-linja ta` demarkazzjoni bejn it-tnejn tkun kwazi operazzjoni ta` kirurgija mikroskopika allura s-sistema kif prospettata mill-atturi twassal ghal fehmiet kontrastanti u c-certezza tad-dritt titqieghed fid-dubbju.
Fil-ligi taghna kif inhi llum iz-zewg interessi huma tutelati fl-ambitu tas-subinciz (1) tal-Art 402. Anzi l-ligi taghti lill-"membru" dritt ta` azzjoni fil-kaz illi t-tmexxija tal-"affarijiet tal-kumpannija" jirrizulta li jkunu qeghdin jitmexxew bil-mod kontemplati fl-istess subinciz. Il-Qorti tara l-ghaqal tal-legislatur illi tant wessa` l-ilmenti ghad-disposizzjoni tal-"membru" li purche` jaghmel il-prova sal-grad rikjest mil-ligi illi r-rimedji li jista` jitlob u li huma fid-diskrezzjoni tal-Qorti huma wiesa` bizzejjed biex jinkludu l-paragrafu (e).

16) It-tutela tal-"membru" hija ben riposta bl-assjem tal-Art 402 u kwindi ma hemm ebda kwistjoni ta` "derivative action" x`tigi ntavolata addirittura in aggunta ma` dak illi l-legislatur Malti ried jeskludi bil-mod kif fassal u kiteb l-Art. 4-2 tal-Kap 386.

Decide

Ghar-ragunijiet kollha premessi, il-Qorti qeghda tilqa` l-ewwel eccezzjoni preliminari tal-konvenuti u qeghda tilliberahom mill-osservanza tal-gudizzju, spejjez ghall-atturi.

< Sentenza Finali >

---------------------------------TMIEM---------------------------------