



MALTA

**QORTI CIVILI
PRIM' AWLA
ONOR. IMHALLEF
JACQUELINE PADOVANI GRIMA**

Seduta tat-28 ta' Mejju, 2014
Citazzjoni Numru. 458/2012

Saviour Cutajar (K.I. 276452(M)

VS

All Invest Company Limited (C22239)

Il-Qorti :

Rat r-rikors ta' Saviour Cutajar tad-9 ta' Mejju 2012, li jaqra hekk:

“1. Illi r-Rikorrent Saviour Cutajar huwa rtirat, u ilu rtirat mix-xoghol mis- sena elfejn (2000);

2. Illi flt-2 ta' Novembru 2009, Ramon Borg, financial advisor tas-socjeta' Intimata biegh il-prodott finanzjarju 'ARM - AIP 5 years' lir-Rikorrent minghajr ma spjega sew u fid-dettal ir-riskji li jappartjenu ghal dan il- prodott, kif ukoll billi nganna lill-istess Rikorrent u abbuza min-nuqqas ta' kompetenza teknika fil-qasam ta' l-investment fil-prodottt finanzjarji, kif hawn isfel ahjar spjegat;

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3. Illi Ramon Borg, fir-rwol tieghu ta' financial advisor tas-socjeta' Intimata, madwar gimgha u nofs qabel it-transazzjoni hawn fuq imsemmija, mar id-dar tar-Rikorrent minghajr ma kien hemm ftehim bejn ir-Rikorrent u s-socjeta' Intimata li ssir din il-laqgha;

4. Illi f'din l-istess laqgha, meta Ramon Borg staqsa lir-Rikorrent Saviour Cutajar jekk qatt investa flusu f'prodotti finanzjarji, dan ta l-ahhar spejga sew u fid-dettal illi hu dejjem kien izomm flusu f'fixed deposit accounts u enfasizza li, minhabba li huwa rtirat u m'huwiex pensjonant, ma setghax jirriskja jinvesti flusu sakemm ma kienx garantit ir-ritorn shih tal-kapital tieghu;

5. Illi ghal dan Ramon Borg irrisponda billi spjega illi s-socjeta' Intimata kellha prodott sabiex ir-Rikorrent mhux biss ikollu l-kapital garantit billi uza l-kliem specfici 100% secure, izda seta' wkoll jiehu lura l-kapital kollu tieghu fi kwalunkwe stadju, bl-unika kundizzjoni tkun Illi " l-imghax li tircievi sa mill-bidu tal-investment tieghek, jitnaqqas mis-somma [i.e. mill- kapital]", minghajr ma spjega lir-Rikorrent illi kien qieghed jirreferi ghall- prodott finanzjarju 'ARM - AIP 5 years';

6. Illi sabiex ikompli jirbah il-fiducja tar-Rikorrent u jgieghlu jixtri l-prodott li ried ibiegghu, Ramon Borg spjega lir-Rikorrent illi l-flus ser ikunu 'sodi';

7. Illi meta, abbazi ta' dak hawn fuq spjegat, ir-Rikorrent spjega illi kellu fixed deposit account mal-Lombard Bank li kien ser jimmatura fil-vicin Ramon Borg, fir-rwol tieghu ta' financial advisor tas-socjeta' Intimata, abbuza minn nuqqas ta' kompetenza teknika tar-Rikorrent u spjegalul illi "flok ha tinvestihom mal-Lombard, ha tinvestihom maghna";

8. Illi a bazi tal-fiducja fil-kliem ta' Ramon Borg, ir-Rikorrent investa mija u erbghin elf Euro (€140,000); minghalih li kien qisu qieghed johrog il-flus li kellu go fixed deposit account u jpoggihom go fixed deposit account iehor, mas-socjeta' Intimata All Invest Company Limited. Effettivament, ad insaputa tieghu ir-Rikorrent kien qieghed jinvesti fil-prodott finanzjarju 'ARM - AIP 5 years'. Dan ghamlu perrmezz ta' cheque mahrug f'isem is- socjeta' Intimata, All Invest Company Limited, datat 2 ta' Novembru, 2009, kif jidher car mir-receipt of payment hawn anness u mmarkat bhala Dok.'A';

9. Illi a kontrarju ta' dak li kiteb Ramon Borg fil- '*Client Confidential Fact Find*', datat 2 ta' Novembru 2009, hawn anness u mmarkat bhala Dok.'B', il-livell ta' edukazzjoni tar-Rikorrent m'huwiex dak ta' "*Secondary Level*", izda huwa ta' "*Primary Level*";

10. Illi a kontrarju ta' dak li kiteb Ramon Borg fil- '*Client Confidential Fact Find*' , l- "*Employment Status*" tar-Rikorrent m'huwiex dak ta' " *Self Employed*" , ghar-raguni hawn fuq imsemmija, jigiefieri illi r-Rikorrent ilu rtirat mis-sena elfejn (2000);

11. Illi a kontrarju, ta' dak li kiteb Ramon Borg fil- '*Client Confidential Fact Find*', l-okkupazzjont tar-Rikorrent m'hijiex ta' "*Building Contractor*", ghar-raguni hawn fuq imsemmi, jigiefieri illi r-Rikorrent ilu rtirat mis-sena elfejn (2000);

12. Illi se mai, ir-Rikorrent qabel ma' rtira mid-dinja tax-xoghol kellu s-sengha ta' "*builder*", jigiefieri li jahdem il-gebel, u mhux ta' "*building contractor*", jigifieri kuntrattur tal-bini;

13. Illi a kontrarju ta' dak li kiteb Ramon Borg fil- '*Client Confidential Fact Find*', l-introjtu annwali 'nett' tar-Rikorrent m'huwiex dak ta' madwar hamsin elf Euro (€50,000) , izda huwa ta' ferm anqas;

14. Illi fil-31 ta' Awissu, elfejn u hdax (2011), il-Communications Unit tal-Malta Financial Services Authority hareg Notice (hawn anness u nmarkat bhala Dok. 'C') sabiex jinforma lill-investituri kollha fis-socjeta' '*ARM Asset Backed Securities SA*' ("*ARM*") illi din tal-ahhar ma' natghatx licenzja minghand il-Commission de Suvrveillance du Secteur Financier sabiex topera fl-attivitajiet anticipati, u b'hekk:

"... until further notice, all payments by ARM are suspended, including redemptions of its bonds and coupon payments";

15. Illi r-Rikorrent m'huwiex pensjonant u b'hekk l-introjtu tieghu huwa limitat ghal imghaxijiet li jircievi minn fixed deposit accounts li ghandu, u ghal din ir-raguni, minn meta waqaf jircievi imghax fuq dan il-prodott finanzjarju, ir-Rikorrent qiegħed jitlef parti sostanzjali mill-introjtu annwali tieghu;

16. Illi minkejja l-interpellazzjor u ufficjali li ntbaghtet lis-socjeta' Intimata permezz ta' protest gudizzjarju, intavolat frs-7 ta' Marzu, elfejn u tnax (2012) (hawn anness u mmarkat bhala Dok. 'D'), kif ukoll ohrajn b'mod informali, is-socj eta' Intimata baqghet inadempjenti;

A Mis-selling

1. Illi huwa konsegwentement car minn dak fuq citat li bhala rizultat dirett tan-nuqqas tas-socjeta' Intimata, partikolarment Ramon Borg, fir-rw01 tieghu ta' financial advisor tas-socjeta' Intimata, li ddeskriva u kkategorizza l-mezz ta' kif ser jinvesti l-flus tar-Rikorrent Saviour Cutajar bhata " appropriate" ghar-Rikorrent, minghajr ma spjega sew u fid-dettal kif ser jigu investiti l-flus tar-Rikorrent, meta effettivament l-prodott finanzjarju li investa fih ma kienx idoneu kemm ghas-sitwazzioni finanzjarja u kif ukoll ghall-kompetenza teknika tar-Rikorrent Saviour Cutajar, ir-Rikorrent qed jiffaccja problemi finanzjarji;

2. Illi r-Rikorrent ma kienx jinvesti flusu fil-prodott frnanzjarju hawn fuq imsemmi, li kieku kien konsapevoli tal-fatti kollha, fosthom u principalment illi kien hemm ir-riskju li l-kapital tieghu, jew parti minnu, seta' jintilef;

3. Illi r-Rikorrent kien vittma kemm ta' mis-selling da parti tas-socjeta' Intimata, kemm ta' ambigwita fil-kliem uzat mill-istess Ramon Borg, u kif ukoll ta' spjegazzjonijiet li ma kienux korretti u li qarrqu bih;

4. Illi minkejja l-fatt illi l-'Investment Services Rules for Investment Services Providers - Part BII: Standard Licence Conditions applicable to Investment Services Providers (Excluding UCITS Management Companies)', hawn annessi u mmarkati bhala 'Dok. E', mahruga mill- Ministru responsabbli ghal-finanzi taht artikolu numru tnax (12) tal-Att dwar Servrzi ta' Investment (Kap. 370 tal-Ligijiet ta' Malta), (regola 2.27 jistipulaw illi:

" [t]he Licence Holder shall provide appropriate information, in a comprehensible form to its clients or potential clients such that they are reasonably able to understand the nature and risks of the

Investment Service to be provided by the Licence Holder and of the specific type of Instrument that is being offered, and consequently to take investment decisions on an informed basis. This information may be provided in standardized format and should include details about:

- a. the Licence Holder and its services;*
- b. Instruments and proposed investment strategies. This should include appropriate guidance on and warnings of the risks associated with investments in those Instruments or in respect of particular investment strategies;*
- c. execution venues;*
- d. costs and associated charges."* ,

il-brochure tal-prodott mahrug mis-socjeta ARM hawn fuq imsemmi, jew materjal promotorju iehor ta' kwalukwe tip, ma nghatax minn Ramon Borg lir-Rikorrent qabel l-ezekuzzjor tal-'File Note' (hawn anness u mmarkat bhala 'Dok. F'), u fil-fatt, ghadu sal-gurnata tal-lum ma nghatax dan l-istess materjal promotorju;

5. Illi 1-'Investment Services Rules for Investment Services Providers – Part BII: Standard Licence Conditions applicable to Investment Services Providers (Excluding UCITS Management Companies)', f'regola 2.01 jghid illi:

*" [w]hen providing Investment Services to clients, a Licence Holder shall act **honestly, fairly and professionally in accordance with the best interests** of its clients and shall comply with the relevant provisions of the Act, the Regulations issued thereunder, these Rules as well as with other relevant legal and regulatory requirements, in particular those set out in the Prevention of Money Laundering Act, 1994, and the Prevention of Financial Markets Abuse Act, 2005 and Regulations issued thereunder, The Licence Holder is also expected to take due account of any relevant Guidance Notes which may be issued by the MFSA or other relevant body to assist the Licence Holder in complying with its legal and regulatory obligations" ,*

u s-societa' Intimata naqqset milli ssegwi l-istess regola hekk kif se jigi provat fit-trattazzjoni tal-kawza;

6. Illi minkejja illi fl-istess 'Investment Services Rules', f'regola 2.13 hemm stipulat illi:

" [w]hen providing investment advice or portfolio management services, the Licence Holder shall obtain the necessary information, in accordance with SLCs 2.16 to 2.20 and SLC 2.22 to 2.24 regarding the client's or potential client's knowledge and experience in the investment field relevant to the specific type, of product or service, his financial situation and his investment objectives so as to enable the Licence Holder to recommend to or, in the case of portfolio management, to effect for the client or potential client, the Investment Services and Instruments that are suitable for him" ,

il-prodott finanzjarju in kwistjoni ma kienx dak "suitable" ghas- sitwazzjoni, kemm finanzjarja kif ukoll ta' kompetenza teknika, tar- Rikorrent Saviour Cutajar ;

7. Illi in oltre u ghal dan l-istess than, regola numru 2.1,6 tal-istess 'Investment Services Rules' ikompli jzid illi:

" [t]he Licence Holder shall obtain from clients or potential clients, such information as is necessary for the Licence Holder to understand the essential facts about the client and to have a reasonable basis for believing, giving due consideration to the nature and extent of the service provided, that the specific transaction to be recommended, or entered into in the course of providing a portfolio management service, satisfies the following criteria:

- a. it meets the investment objectives of the client in question;*
- b. it is such that the client is able financially to bear any related investment risks consistent with his investment objectives;*

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c. it is such that the client has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio" ,

izda minkejja li r-rikorrent ma kienx " able financially to bear any related investment risks" tal-prodott in kwistjoni, is-socjeta' Intimata ghazlet li tbiegħ dan l-istess prodott lir-Rikorrent, b'konsegwenza ta' liema dan ta' l-ahhar soffra, u għadhu qed isofri, problemi finanzjarji;

8. Illi in oltre, ir-Rikorrent ma jista' bl-ebda mod jitqies bhala persuna li għandu " the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio";

9. Illi dan l-agir da parti tas-socjeta Intimata huwa għal kollox illegali abbuziv;

10. Illi għalhekk kellha ssir din il-kawza;

Standard Form Contracts

1. Illi kif gie spjegat iktar 'l fuq, is-socjeta' Intimata ma tat l-ebda materjal promotorju dwar il-prodott finanzjarju lir-Rikorrent qabel l-iffirmar tal- 'File Note', u b'hekk, il-klawsola fil-'File Note' fis-sezzjoni 'Client Declarations' li tghid illi:

"I/We confirm that I/we have received the Brochures; Copy of Prospectus; Latest Annual Report in respect of the above products" ,

ma tikkorrespondix mal-verita u tqiegħdet fl-istess 'File Note' bl-intenzjoni illi tinganna lir-Rikorrent u sabiex tezimi lis-socjeta' Intimata mir-responsabbilita għal-danni;

2. Illi in oltre, ir-Rikorrent kellu fidi fil-kliem ta' Ramon Borg, li min-naha tiegħu nganna lir-Rikorrent billi tah dokument jigfieri l-'File Note', li kienet tinkorpora dikjarazzjonijiet allegatament magħmulin minnħu, bħal:

- i. " I/we confirm that the Client Account Manager has clearly explained to me/us that investments in emerging markets can be subject to risks which are not normally associated with more developed markets" ,
- ii. " I/we confirm that the features of the above products have been explained to us" , u
- iii. "I/we confirm that I/we have had the medium/long term nature of stock exchange investments explained to me/us, that the value of investments and the income derived there from can fluctuate, and that we may not receive the amount originally invested. I/we also understand that selling the investment at an inopportune time could result in a loss" ,

li mhux talli ma kienux jirriflettu d-diskors li sar fit-laqgħa bejn ir- Rikorrent u Ramon Borg, izda kienu pjutost kontrarju ta' dak li ntqal fl-istess laqgħa, u dan mingħajr ma s-socjeta' Intimata gibdet l-attenzjoni tal-istess sezzjoni fil-konfront tar-Rikorrent;

3. Illi s-socjeta' Intimata dahhlet fl-istess 'File Note' is-sussegwenti klawnsoli fis-sezzjoni entitolata 'Assessment of Appropriateness' :

- i" *Has the client provided information with respect to his occupation to enable the one to determine the client's knowledge and experience in the investment field? YES",*
- ii. *"Does the client have the necessary knowledge and experience in the investment field to enter into this transaction? YES" ,*
- iii. *" Is the client familiar with the type of service, transaction and financial instrument/s being offired? YES",*
- iv. *"Has the nature, volume, frequency of the client's financial instruments and the period over which they have been carried out been established? YES";*
- v. *"Does the client understand the risks involved with respect to the product or investment service offered? YES";*
- vi. *" Following the appropriateness test, does the licence holder believe that the requested product or service is appropriate to the*

client? If the answer to this question is No, the client should be informed that the 'requested product is inappropriate. YES" ,

minghajr ma s-socjeta' Intimata gibdet l-attenzjoni tal-istess sezzjoni fil- konfront tar-rikorrent, bhala mezz ta' ezenzjoni mir-responsabbilita ghal-danni u sabiex jikkonformaw mal-'Investment Services Rules for Investment Services Providers - Part BII: Standard Licence Conditions applicable to Investment Services Providers (Excluding UCITS Management Companies)', specifikament regola numru 2.13;

4. Illi dan l-agir da parti tas-socjeta' Intimata huwa ghal kollox illegali u abbuziv;

5. Illi ghalhekk, u ghar-raguni hawn fuq imsemmi, kellha ssir din il-kawza.

Ghaldaqstant ir-Rikorrent jitlob bir-rispett illi dina l-Onorabbli Qorti joghgobha, ghar-ragunijiet fuq premissi:

- 1. Tiddikjara illi s-socjeta' Intimata naqset minn diversi dmirijiet taghha bhala Investment Services Provider, fosthom li naqset milli taghti informazzjoni adegwata matul il-process tal-promozzjoni u l-bejgh ta' prodott finanzjarju, li naqset mid-dmir li timxi b'mod onest xieraq u professjonali u fl-ahjar interess tal-klijent matul dan l-istess process, u l-bejgh ta' prodott finanzjarju lil-persuna li ma kinetx " able financially to bear any related investment risks" tal-prodott in kwistjoni u li ma kellix " the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio", u li dan irrizulta fil-mis-selling tal-prodott finanzjarju 'ARM - AIP 5 years' lir- Rikorrent Saviour Cutuajar;*
- 2. Tiddikjara illi s-socjeta' Intimata inkludiet dikjarazzjonijiet allegatament maghmulin mir-Rikorrent fil-'File Note' hawn fuq riferit minghajr ma gibdet l-attenzjoni tal-istess Rikorrent, u dan bl-intenzjoni illi tinganna lir- Rikorrent u sabiex tezimi lis-socjeta' Intimata mir-responsabbilita ghad- danni;*
- 3. Tillikwida d-danni kollha sofferti mir-Rikorrent a kawza ta' dan l-agir tas-socjeta' Intimata, kif fuq spjegat, occorrendo bil-hatra ta' periti nominandi; u*

4. *Tikkundanna lis-socjeta Intimata sabiex thallas lir-Rikorrent id-danni hekk likwidati.*

Bl-ispejjez, inkluz dawk tal-Protest Gudizzjarju intavolat fis-7 ta' Marzu, 2012, u bl-imghaxijiet legali kontra s-socjeta intimata, li hija minn issa ngunta in subizzjoni”.

Rat il-lista tax-xhieda ndikati mir- rikorrenti u l-eleku ta' dokumenti esebiti mar-rikors promotorju;

Rat illi l-atti tar-rikors promotorju, d-digriet u tal-avviz tas-smiegh gew debitament notifikati lis-socjeta'intimata skond il-ligi;

Rat ir-risposta guramentata ta' All Invest Company Limited tal-5 ta' Gunju 2012 li taqra hekk:

“ 1. Illi t-talbiet tar-rikorrenti huma nfondati fil-fatt u fid-dritt u ghandhom jigu michuda bl-ispejjez stante illi mhux minnu li s-socjeta' intimata naqset mid-dmirijiet taghha bhala Investment Services Provider;

2. Illi subordinament u minghajr ebda pregudizzju ghal fuq eccepit, il-proceduri odjerni kif ntavolati mir-rikorrenti huma intempestivi u kellu r-riskji tieghu [vide pagni 6/7 u u, pagni 14 et seq tal-informative brochure rigward il-prodott anness bhala “DOK A1 01”];

4. Illi r-rikorrenti qeghdin bl-akbar rispettt jonqsu milli jaghmlu distinzjoni bejn l-obbligazzjonijiet ta' Financial Advisor fejn japplikaw ir-regoli, inter alia, ta' suitability test u l-obbligazzjonijiet tal- intimata fil-kors ta' Promotion and Selling fejn l-obbligazzjoni hi wahda ta' ezami ta' appropriateness;

5. Illi dakinhar li gie konkluz il-bejgh tal-prodott finanzjarju r-rikorrenti mar fl-ufficini tas-socjeta' intimata hu stess, flimkien ma' ibnu, b'Lombard Bank draft mahrug fl-ammont investit [kopja tal-Bank draft annessa bhala "DOK A1 02”];

6. Illi r-rikorrenti rcieva varji pagamenti f'dividends fuq l-investment tieghu kif jirrizulta mil-kopja tac-cekki jiet mahruga f' ismu hawn annessi u mmarkati bhala “DOK A1 03”;

7. Illi s'issa ghad m'hemm ebda decizjoni rigward l-investment tar- rikorrenti stante illi s-socjeta' ARM Asset Backed Securities SA, qua sid tal-prodott finanzjarju de Quo, tinsab prezentement ghaddejja minn proceduri ta' ristrutturar li r-rikorrenti huwa nfurmat bihom. F'dan ir-rigward, l-Awtorita' kompetenti fir-rigward tal-investment tar-rikorrenti hija l-Commission de Surveillance du Secteur Financier (Luxembourg) illi jidher li ghandha l-kontrol assolut fuq l-assi kollha tas-socjeta Arm Asset Backed Securities SA;

8. Illi l-interess fil-proceduri ta' ristrutturar tas-socjeta' ARM Asset Backed Securities SA huwa konfermat mil-korrispondenza hawn annessa bhala **“DoK A1 04”** liema korrispondenza tikkonferma illi hemm probabbilita' gholja li ARM Asset Backed Securities SA tigi ristrutturata fl-ahjar interess tal-investituri kollha;

9. Illi s-socjeta' intimata ghada sallum il-gurnata ssegwi l-izviluppi rigward dan il-prodott finanzjarju u qieghdha zzomm lill-klijenti taghha aggornati b'dak kollu li qed jigri;

10. Illi m'huwix minnu li xi rapprezentant tas-socjeta' intimata mar f'dar r-rikorrenti minghajr ma kien hemm ftehim rigward it-tali laqgħa. Kien ir-rikorrenti nnifsu li ta data meta l-istess rapprezentant seta jmur f'daru sabiex jispjegalu xi prodotti finanzjarji hemm fis-suq;

11. Illi r-rikorrenti gharaf sew x'kienu r-riskji assocjati mal-prodott li fih iddecieda li jinvesti flusu, iddetermina hu x'ammont rid jinvesti f'dan il-prodott, u wera illi din ma kienetx l-ewwel transazzjoni ta' dan it-tip tieghu;

12. Illi ebda decizjoni sabiex isir il-bejgh u x-xiri tal-prodott finanzjarju ma saret f'daqqa. Ir-rikorrenti nghata z-zmien kollu li ried sabiex jevalwa sew x'kienu l-implikazzjonijiet tal-partecipazzjoni u ma ffirmat ebda dokument qabel ma mar minn jeddu fl-ufficji tas-socjeta' intimata flimkien ma ibnu u ghazel li jikkonkludi t- transazzjoni;

13. Illi l-fatti kollha dokumentati fil-"Client Confidential Fact Find" tas- socjeta' intimata nghataw mir-rikorrenti nnifsu u kienu kkonfermati minnu bil-firma tieghu stess. Din il-"Client Confidential Fact Find" kienet akkumpanjata mit-Terms of Business, ukoll iffirmati mir- rikorrenti stess, illi konvenjentement ma gewx ezebiti mir-rikorrenti mar-rikors

promotur tieghu. F'dawn it-Terms of Business hemm specifikat illi 'all the information provided to All Invest Co Limited by me/us in the Client Confidential Fact Find is true, complete, and accurate' [Klawsola 11]. Kopja tal-"Client Confidential Fact Find" kompluta bit-Terms of Business qiegħda tigi hawn annessa u mmarkata bhala "'DOK A1 05".Inoltre, kif jigi pruvat fit-trattazzioni ta' din il-kawza, l-istess fatti ma kienux tali li setghew b'xi mod qajmu dubbju f'mohh ir-rapprezentanti tas-socjeta' intimata;

14. Illi r-rikorrenti gie wkoll fornit b'kopja tat-Terms of Business datati Jannar 2009 tas-socjeta' intimata [kopja] annessa bhala "DOK A1 06"] li minnhom jirrizulta, inter alia, illi "when providing investment Services other than Investment Advice, the Company [All Invest] shall assess whether the investment service or product envisaged is appropriate for the Client, based on the information provided in the Client Confidential Fact Find [...]"[Klawsola 5.10];

15. Illi s-socjeta' intimata ma tghat ebda servizz ta' "investment advice" u/jew "portfolio management" lir-rikorrenti. Is-servizz li offriet lir-rikorrenti kien biss ta' promozzjoni u bejgh tal-prodott finanzjarju 'ARM - AIP 5 years' illi s-socjeta' intimata qieset bhala idonju ghar-rikorrenti wara li wettqet l-"appropriateness test" relattiv. Dan jirrizulta car mil-"Client Confidential Fact Find" [annessa bhala 'DOK A1 04") u l-File Note hawn anness bhala , "DOK A1 07". F'dan ir-rigward, ir-rapprezentanti tas-socjeta' intimata spjegaw biss in-natura u l-implikazzjonijiet tal-prodott wara li qisu l-istess prodott bhala tajjeb ghar-rikorrenti izda minghajr ma' ssuggerewh lir-rikorrenti. Fil-fatt, ir-rikorrenti nghata varji opzjonijiet min fejn jagħzel. Kien ir-rikorrenti nniffsu li, kif diga intqal, għazel illi jinvesti flusu f'dan il-prodott partikolari u kien hu li ddetermina x'ammont rid jinvesti. F'dan ir-rigward, kif diga ntqal, is-socjeta' intimata tinnota li r-rikorrenti bhal jallega illi hija kellha twettaq "suitability test". Jingħad pero' illi l-istess test isir biss f'kaz ta' "investment advice" li fil-kaz tar-rikorrenti, kif jlxhdu l-File Note u l-"Client Confidential Fact Find", ma ngħatax;

16. Illi l-fatti suesposti diga gew spjegati lir-rikorrenti mis-socjeta' intimata fil-kontroportest f'gudizzjarju numru 141/2012 [kopja annessa bhala "DOK A1 08"] li sar b'risposta għal-protest gudizzjarju tar-rikorrenti kopja ta liema tinsab fl-atti;

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17. Illi ai termini tal-Artikolu 158(3)(c) tal-Kapitolu 12, Ligijiet ta' Malta, jigi dikjarat illi l-fatti dikjarati mir-rikorrenti qieghdin jigu kontestati u jehtieg illi jigu ippruvati.

Bl-ispejjez, inkluzi dawk tal-kontroprotest gudizzjarju numru 141/2012 kontra r-ikorrenti li huwa minn issa ngunt in subizzjoni.

Is-socjeta' intimata tirriserva ulterjormeni, illi tezebixxi dokumenti addizzjonali li s'issa m'hijiex fil-pussess taghhom."

Rat ir-rikors ta' All Invest Company Limited tas-6 ta' Novembru 2013 li jaqra hekk:

"Illi fis-seduta tat-30 t' Ottubru, 2013, il-kumpannija esponenti nfurmat lill dina l Onorabbli Qorti bil-proceduri ta'stralċ minnha ntavolati permezz tar- rikors numru 888/2013 JZM u talbet sabiex tigi awtorizzata tipprezenta rikors ai termini tal-Artikolu 220 tal-Kapitolu 386, Ligijiet ta' Malta;

Illi din l-Onorabbli Qorti awtorizzat lill-esponenti tressaq dan ir-rikors permezz ta' liema, l-esponenti titlob illi dawn il-proceduri gudizzjarji jigu mwaqqfa fid-dawl tal-proceduri ta' stralċ imsemmija u ai termini tal-Artikolu 220 msemmi;

Illi l-esponenti tispjega illi dan it-twaqqif ikun fl-interess ahhari tal-gustizzja u tal-kredituri kollha li hija jista jkollha stante illi l-istess kredituri jkunu biss tassew u ugwalment protetti bil-proceduri tal-istralċ kurrentement pendenti quddiem din l-Onorabbli Qorti kif diversament presjeduta [kopja tal-verbal tal-ewwel seduta esebit bhala dokument A] u bil-proceduri li jsegwu l-istess primarjament, dawk tal-konkors tal-kredituri;

Illi l-Artikolu 220 tal-Kapitolu 386 huwa mahsub sabiex jevita multiplikazzjoni ta' azzjonijiet kontra entita' wahda li jfixklu l-proceduri ta' stralċ gudizzjarju li fuq kollox ikun qieghed isir taht l-Awtorita' tal-Qorti.

Ghaldaqstant, u ghar-ragunijiet spjegati, l-esponenti umilment titlob lill dina l-Onorabbli Qorti sabiex, ai termini tal-Artikolu 220, Kapitolu 386, Ligijiet ta' Malta, jogghobha twaqqaf il-procedimenti gudizzjarji pendenti quddiemha kontra tal-esponenti taht dawk il-provvedimenti kollha li jidhrilha li huma xierqa u opportuni."

Rat ir-risposta tat-22 ta' Novembru 2013 li taqra hekk :

“Illi permezz ta' dan ir-rikors, il-kumpanija intimata qed titlob sabiex il- proceduri odjerni jigu, mwaqqfa fid-dawl tat-talba ghal stralc intavolata permezz tar-rikors numru 888 / 2013 JZM;

Illi r-rikorrent esponenti qiegħed jopponi għal din it-talba għas-segħwenti ragunijiet:

(i) Fl-ewwel lok, it-talba għall-istralc għada ma gietx milqugħa u għaldaqstant tali talba hija intempestiva u inopportuna u se mai kellha ssir meta jsir l-ordni għall-istralc, li għadu ma ingħatax;

Illi fil-fatt, fil-proceduri ta' stralc imsemmija diga intervjeniet il-Malta Financial Services Authority ("MFSA"), li qed topponi għal din it-talba għall-istralc bil-qawwa abazi ta' diversi ragunijiet, fosthom li qabel ma jsir tali ordni għall-istralc, il-kumpanija rikorrenti għandha tonora l-obbligi tagħha fil-konfront ta' l-investituri, fosthom l-esponenti;

Illi in oltre, fil-frattemp giet intavolata talba da parti ta' aktar minn 40 investitur (inkluz l-esponent) sabiex jintervjenu fil-proceduri ta' stralc imsemmija;

(ii) Illi fit-tieni lok, u mingħajr pregudizzju għal dak appena espost tajjeb li jingħad li din il-kumpanija m'hijiex kumpanija ordinarja u topera taht licenzja mandatorja mahruġa mill-MFSA. Għaldaqstant, tali kumpanija ma tistax tippretendi li tigi stralcjata b'mod ordinarju mingħajr ma jittieħdu in konsiderazzjoni l-obbligi fiducjarji u regolatorji tagħha u kien għalhekk li intervjeniet bil-mod li għamlet l-MFSA;

Illi dan il-punt għandu wkoll ramifikazzjonijiet differenti, fis-sens illi l-vertenza li qed tigi dibattuta f'din il-kawza m'hijiex kreditu kummercjali normali li tista' tigi mressqa lill-eventwali u potenzjali likwidatur bħala semplici claim, izda allegazzjoni ta' bejgħ ta' prodott li qatt ma messu sar lill-esponenti li għandha tigi ppruvata, sostanzjata u esposta;

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Illi konsegwentement huwa importantissimu u vitali li l-provi li jixtieq iressaq l-esponenti f'din il-kawza jigu mressqa ghaliex tali provi ser ikollhom effett determinanti mhux biss fuq din il-kawza, izda anke fuq il-proceduri ta' l-istralc;

Illi dan qed jinghad anke' in vista' tal-pozizzjoni personali tad-direttur uniku Wallace Falzon;

(iii) Illi minghajr pregudizzju ghat dak appena espost, kif qalet din l-Onorabbli Qorti diversament presjeduta il-kawza fl-ismijiet "Dr. Edward Gatt f'isem u in rapprezentanza tal-assenti Ali Abdalla Ali Gtesla Zentani vs TRM Limited Malta' (Cit. Nru. 185/2006 LFS) decia fl-10 ta' Ottubru, 2007, meta ffaccjata b'rikors a bazi tal-Artikolu 220 tal-Kap.385, din l-Onorabbli Qorti m'ghandiex ideja marbutin u tista' tezercita d-diskrezzjoni taghha sabiex tilqa' jew tichad tali talba;

Illi l-istess decizjoni tikkonferma li din id-diskrezzjoni ghandha tigi ezercitata a beneficcju tal-kredituri u mhux tal-azzjonisti tal-kumpannija. Hawnhekk gie kkwotat fil-kaz, Gwyer € & Associates Limited vs London Whard Limited (2002) :

"In relation to an insolvent company, the directors when considering the company's interests must have regards to the interests of the creditors"

Illi l-Qorti, ghalkemm f'dak il-kaz laqghet it-talba ghall-waqfien tal-proceduri, ikkunsidrat li dan ghandu jsir biss sakemm ma jkunx hemm ragunijiet sostanzjali sabiex jigi deciz il-kontra ossia dak li gie deskritt bhala special reason mill-istess Onorabbli Qorti;

IIIi f'dan is-sens u fis-sentenza appena msemija, din l-Onorabbli Qorti kkwotat lill-Professor Ian Fletcher f'The Law of Insolvency, Third Edition, page 957:

"In exercising their discretionary powers...the courts have evolved an approach which aspires to balance the collective interest against the relative hardship and injustice, which may be experienced by the individual creditor, under circumstances where it is inevitable that any mitigation of that person's loss will be at the expense of the general body of creditors, and hence will amount to a judicially-sanctioned exception to the pari passu principle".

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Illi fil-kaz odjern, jigi sottomess umilment li huwa fl-interess tal-kredituri kollha li dan il-kaz ikompli, u mhux biss fl-interess tar-rikorrenti esponent;

Illi di piu, jinghad li l-prosegwiment tal-kaz odjern m'huwa bl-ebda mod ser jippregudika u/jew johloq xi preferenza fil-konfront ta' l-esponenti jew johloq xi pregudizzju fil-konfront tal-kredituri l-ohrajn li xorta waha ikunu jistghu jikkonkorru bhal kredituri ohrajn. Anzi, kif qed jinghad f'din ir-risposta, dak li qed jigi espost f'din il-kawza jista' jiswa' ta' gid ghalihom ukoll;

Illi dan qieghed jinghad ghaliex dan il-kaz kien l-ewwel wiehed ta' din in-natura li gie intavolat fil-konfront tal-kumpannija intimata u jinstab (fazi matura fejn qed johorgu provi u sejrjn johorgu provi serjissimi;

Illi bit-tkomplija ta' dan il-kaz, m'huwiex l-interess wahdieni tal- esponent li jkun qieghed jigi salvagwardjat, izda l-interess kollettiv tal-investituri kollha, u stante l-posizzjoni li hadet l-MFSA fil-proceduri tal- istralc, dan ghandu jibbenefika wkoll l-MFSA;

Illi is-sustanza ta' dak li gie appena espost jinstab fil-fatt li bil-provi li ser jigu prodotti f'dan il-kaz, ser jigu esposti fatti li jistghu ikollhom effett fuq il-posizzjoni ta' l-kredituri kollha, stante l-agir tal-kumpannija intimata, u partikolarment tad-direttur uniku taghha Wallace Falzon. Fl-eventwalita' li dan il-kaz ma jitkompliex, dawn il-fatti m'humix ser johorgu u konsegwentement dak li gara lill-esponenti u l-investituri kollha jista' jintesa' u kif jghid il-Malti, iz-zejt qatt ma jitla' f'wicc l-ilma. Din tkun hasra u ingustizzja kbira;

Illi l-fatt li din il-posizzjoni hija kondiviza wkoll mill-investituri ohrajn hija kkonsolidata mill-fatt li l-esponent intavola rikors sabiex jintervjeni u jwaqqaf it-talba ghall-istralc flimkien ma' l-investituri ohrajn li ghalhekk ilkoll ghandhom interess, flimkien ma' l-MFSA, li z-zejt jitla' f'wicc l-ilma.

Illi ghal dawn ir-ragunijiet l-esponent huwa ta' l-umili fehma li f'dan il-kaz altru milli tissussiti, l-ispecial reason li trid tissussisti sabiex din l-Onorabbli Qorti tichad it-talba ghall-waqfien ta' dawn il-proceduri, talba li jekk tigi milqugha tkun effettivament qieghedha tifga u tohnoq mhux biss lehen l-esponent, izda lehen l-investituri kollha li tant batew u ghadhom

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qed isofru a kawza ta' l-agir illegali tal-kumpannija intimata u tad-direttur uniku taghha, Wallace Falzon.

Daqstant ghandu x'jissottometti l-esponenti ghas-savju u superjuri gudizzju ta' din l-Onorabbli Qorti."

Semghet it-trattazzjoni tal-partijiet;

Rat id-dokumenti ezebiti u l-atti kollha tal-kaz;

Ikkonsidrat:

It-talba li ghandha quddiemha din il-Qorti tirrigwarda talba da parti ta' All Invest Company Limited, sabiex din il-Qorti twaqqaf l-proceduri odjerni ai termini tal-Artikolu 220 tal-Kapitolu 386 tal-Ligijiet ta' Malta in vista tal-proceduri tal-istralc (Rik. Nru: 888/2013/JZM) intavolati mill-istess socjeta'. Din it-talba qed tigi kkontestata da parti tal-attur li rribatta li jezistu dawk ir-ragunijiet specjali li permezz taghhom din il-Qorti ghandha tichad it-talba tas-socjeta' intimata.

Ikkonsidrat:

L-Artikolu 220 tal-Kapitolu 386 tal-Ligijiet ta' Malta jipprovdi li:

220. F'kull żmien wara li jkun ippreżentat rikors għal stralċ, u qabel ma jinghata ordni għal stralċ, il-kumpannija, jew kull kreditur jew kontributorju, jistgħu jagħmlu rikors lill-qorti biex twaqqaf il-proċedimenti ġudizzjali tal-qorti pendenti kontra l-kumpannija, u l-qorti tista' twaqqaf dawk il-proċedimenti b'dawk il-kondizzjonijiet li jidhrilha xierqa.

Skond l-insenjament moghti fis-sentenza fl-ismijiet "Dr. Edward Gatt f'isem u in rappreżentanza tal-assenti Ali Abdalla Ali Gtesla Zentani vs TRM Limited Malta' (Cit. Nru. 185/2006 LFS) deciza **fl-10 ta' Ottubru, 2007**,:

“meta ffaccjata b'rikors a bazi tal-Artikolu 220 tal-Kap.385, din l-Onorabbli Qorti m'ghandiex ideja marbutin u tista' tezercita d-diskrezzjoni taghha sabiex tilqa' jew tichad tali talba.”

L-istess decizjoni iccitat dak ritenut fis-sentenza **“Kinsela vs Russell Kinsela Pty Ltd”** :

“In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise ... But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration”.

Gie ccittat ukoll is-sentenza **“Gwyer € & Associates Limited vs London Whard Limited”** (2002):

"In relation to an insolvent company, the directors when considering the company's interests must have regards to the interests of the creditors"

Huwa inkontestat illi l-Artikolu 220 tal-Kapitolu 386, jakkorda lil Qorti id-diskrezzjoni li tissalvagwarda l-principju fundamentali tal-*par condicio creditorum*.

In fatti l-Professur Ian Fletcher f'*The Law of Insolvency* , Third Edition , page 957:

“In exercising their discretionary powers ... the courts have evolved an approach which aspires to balance the collective interest against the relative hardship and injustice, which may be experienced by the individual creditor, under circumstances

where it is inevitable that any mitigation of that person's loss will be at the expense of the general body of creditors, and hence will amount to a judicially-sanctioned exception to the pari passu principle."

Illi ghalhekk iridu jirrizultaw ragunijiet specjali w ta' certu gravita' tali li jiggustifikaw lil din il-Qorti li ma takkordax it-twaqqif mitlub tal-proceduri pendenti.

Illi l-attur qed jibbaza l-azzjoni tieghu fost affarijiet ohra fuq il-fatt li hu (Saviour Cutajar), bhala bennej, kien gie allegatament zgwidat mis-socjeta' intimata meta ghamel investment 'l ghaliex ma kellux l-esperjenza u tgharif necessarju sabiex jifhem ir-riskji involuti f'istess investment jew fl-maniggjar tieghu; li s-socjeta' intimata kienet allegatament responsabbli ta' *mis-selling* tal-prodott (investment) finanzjarju lill-attur u ta' agir li allegatament jammonta ghal-ingann da parti tas-socjeta' intimata.

Illi wiehed ma jistax' ma jistax ma jinnotax li l-Awtorita' ghas-Servizzi Finanzjarji ta'Malta intervjeniet *in statu et terminis* fil-proceduri ghal-stralc li hemm pendenti quddiem l-Imhalled Joseph Zammit McKeon, liema Awtorita' sahhansitra opponniet ghal-talba tas-socjeta' All Invest ghal-hatra t'Amministratur Provvvisorju. Illi r-ragunijiet ghall-tali opposizzjoni jinsabu fid-digriet ta' dik il-Qorti datat 17 ta' Marzu 2014, liema digriet huwa esebiet in atti.

Illi di piu dik il-Qorti cahdet ad direttura il-hatra t'Amministratur Provvvisorju ghal-diversi ragunijiet fid-digriet taghha datat 17 ta' Marzu 2014, u partikolarment irriteniet:

"Meta jkun tentat procediment ta' xoljiment u stralc speċjalment mill-kumpannija de quo, il-Qorti ghandha tezercita kawtela kbira. Meta mbaghad tkun il-kumpannija li titlob il-hatra ta' amministratur provvizorju – b`mod speċjalment fil-kaz tal-lum meta hemm qbil li All Invest Company Limited – mhijiex

a going concern, allura l-interess tal- kredituri u /jew l-investituri jassumi rilevanza massima...”- Ibid a fol. 9

“...Il-Qorti hija tal-fehma illi fil-kaz tal-lum m`ghandhiex tezercita d- diskrezzjoni taghha u tghaddi ghall-hatra ta` amministratur provvizorju ta` kumpannija li llum mhijiex a going concern. Mhuwiex dan kaz fejn l-assi tal- kumpannija jinsabu in jeopardy. Mhuwiex dan kaz ta` paralizi provokata minn titwim bejn id-diretturi u l-azzjonisti ; bil-maqlub fil-kaz tal-lum, il-kumpannija, id-direttur u l-azzjonist huma kollha rolled in one. Mhuwiex dan kaz ta` dissipation of assets ghaliex fil-kamp taghha u cioe` servizzi finanzjarji, il-kumpannija ma tistax tmur ghal new business.” - Ibid a fol. 10

Ikkonsidrat:

Din il-Qorti tqis illi allegazzjoni ta' *mis-selling* ta' prodott finanzjarju, allegazzjoni ta' frodi, huma minnhom infushom ragunijiet specjali u gravi. Ma dawn il-Qorti tqis li ghandu jinghata piz lil-fattur iehor ta' certu importanza u cioe' l-oppozizzjoni da parti tal-Malta Financial Services Authority ghat-talbiet tas-socjeta' All Invest fil-proceduri ta' stralc quddiem Qorti kif diversament preseduta. Dana ghandu jitqies fl-isfond tal-rwol legali tal-Malta Financial Services Authority fuq is-socjetajiet involuti f'servizzi finanzjarji u hija mghonija b'poteri li tinizja *de sua sponte* proceduri ta' stralc tal-kumpaniji. Dawn ir-ragunijiet jikkostitwixxu fil-fehma tal-Qorti, ragunijiet specjali u gravi bizzejjed biex jghelbu ir-riluttanza inerenti tal-Qorti li tuza' l-poter diskrezzjonali taghha biex tichad it-talba ghal-waqfien tal-proceduri odjerni.

Ghal dawn il-mottivi l-Qorti tichad it-talba All Invest Company Limited skond ir-rikors tas-6 ta' Novembru 2013.

Bl-ispejjez kontra is-socjeta' All Invest Company Limited.

Moqrija.

< Sentenza In Parte >

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