



MALTA

QORTI CIVILI

PRIM' AWLA

ONOR. IMHALLEF

JOSEPH ZAMMIT MC KEON

Seduta tad-29 ta' Jannar, 2015

Rikors Numru. 772/2014

**Rikors tas-socjeta` P. Buffa & Co Limited (C9907), u b`digriet tal-4 ta`
Novembru 2014 l-isem tar-rikorrent inbidel ghal `Nadine De Conti
Manduca bhala azzjonista tas-socjeta` P. Buffa & Co Limited (C9907),
skond l-Artiklu 218 et seq tal-Att VVX tal-1995**

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentat fl-4 ta' Settembru 2014 li jaqra hekk –

Illi l-azzjonista tal-kumpannija rikorrenti qieghda tinforma lill-Onorabbli Qorti illi din il-kumpannija hawn fuq imsemmija tinsab fi stat ta' falliment u ghalhekk l-istess soċjeta` ma tistax aktar thallas id-dejn li ghandha kif kien issolitu jsir u ghalhekk il-Kumpannija mhix aktar f`pozizzjoni li thallas id-debiti taghha ;

Li gja` kien hemm kawza bin-numru 50/03/GC li marret dezerta fuq l-istess haga ;

Ghaldaqstant in vista tal-premess is-soċjeta` attrici qed tadixxi lil din l-Onorabbli Qorti u bir-rispett titlobha illi l-kumpannija tigi xolta u jigi appuntat stralcjarju sabiex jiehu l-passi kollha necessarji skont il-Ligi.

Rat il-verbal tal-udjenzi tal-20 ta' Ottubru 2014 u tal-4 ta' Novembru 2014. In partikolari ghar-rigward tal-ahhar udjenza, rat id-digriet taghha fejn, wara talba mir-rikorrenti, ordnat li jigu allegati l-atti tal-kawza fl-ismijiet "P. Buffa & Co Limited (C9907) vs X" : Rikors Nru 520/2003/AL b'dan illi dawk l-atti jkunu jikkostitwixxu prova ghall-fini tal-procediment tal-lum.

Rat l-atti tal-kawza fl-ismijiet "P. Buffa & Co Limited (C9907) vs X" : Rikors Nru 520/2003/AL.

Semghet ix-xiehda tar-rikorrenti fl-udjenza tad-19 ta` Jannar 2015.

Rat id-digriet taghha moghti fl-istess udjenza fejn halliet il-kawza ghas-sentenza ghal-lum.

Ikkunsidrat :

II. Il-provi fil-qosor

Il-procediment tal-kawza fl-ismijiet "*P. Buffa & Co Limited (C9907) vs X*": *Rikors Nru 520/2003/AL* kien istitwit fid-29 ta` Mejju 2003. Skond ir-rikorrenti Nadine de Conti Manduca, is-socjeta` P. Buffa & Co Ltd kienet ilha li waqfet ghal kollox in-negozju taghha sa minn qabel kien istitwit dak il-procediment.

Il-kumpannija kienet kostitwita skond il-Kap 386 tal-Ligijiet ta` Malta ("Kap 386"). Fl-*objects clause* inserita fil-*memorandum of association*, bhala l-ghan principali, jinghad li s-socjeta` kienet kostitwita *to import, buy and sell on wholesale or retail basis building materials, building decoration materials, ironmongery goods, tiles, timber, soft furnishing materials, electrical or mechanical tools and equipment and any other goods which could be sold by law in the Maltese Islands.*

L-*Authorised Share Capital* kien ta` Lm 20,000 *divided into twenty thousand (20,000) Ordinary Shares of Lm 1 each* waqt illi l-*Issued Share Capital*

Kopja Informali ta' Sentenza

kien ta` Lm 10,000 *divided into ten thousand (10,000) Ordinary Shares of Lm 1 each.*

L-azzjonisti kienu in kwantu ghal *480 shares – fully paid up u 4,845 – 20% paid up* registrati f'isem Nadine de Conti Manduca, filwaqt li *20 shares – fully paid up u 4,655 shares – 20% paid up* registrati f'isem Catherine Grech Mallia.

L-ewwel diretturi tas-socjeta` kienu Paolo Buffa u Nadine de Conti Manduca. It-tnejn irrizenjaw minn diretturi fit-18 ta` April 2002. Ma jirrizultax li kien mahtur haddiehor minflok.

Skond l-ahhar balance sheet li ggib id-data tal-1 ta` Ottubru 2004, jirrizulta li l-kumpannija kellha *fixed assets* ta` Lm 282,408 ; *current assets* ta` Lm 65,540.47 ; u *current liabilities* ta` Lm 78,717.38. Il-*profit and loss account* juri “nil”.

Kien prezentat l-*annual report* tal-kumpannija ghas-sena li ghalqet fit-30 ta` Settembru 1992. Din il-Qorti mhijiex tqis rilevanti dan ir-rapport ghaliex ma jirriflettix il-qaghda finanzjarja tal-kumpannija fid-data tal-presentata tal-kawza fl-ismijiet “*P. Buffa & Co Limited (C9907) vs X*” : *Rikors Nru 520/2003/AL*.

Jirrizulta li fil-25 ta` Frar 2005, is-socjeta` ma kellhiex *turnover* izda kellha djun totali fl-ammont ta` Lm 14,982.13.

Kopja Informali ta' Sentenza

Fil-procediment l-iehor kien inhatar l-Av. Louis Cassar Pullicino bhala amministratur provvizorju permezz ta` digriet moghti minn din il-Qorti diversament presjeduta fl-10 ta` Jannar 2006. L-amministratur provvizorju pprezenta nota fil-25 ta` April 2006 fejn iddikjara : 1) li l-ahhar audited accounts tas-socjeta` kienu dawk tal-1992 ; 2) li d-dejn tal-kumpannija jammonta ghal Lm 14,982.13 ; u 3) li l-uniku assi li kellha s-socjetas` kienet vettura FIAT UNO CAP 576 tal-1998.

Skond rapport guramentat li l-*motor surveyor* George Stagno Navarra hareg fil-11 ta` April 2007, jirrizulta li l-vettura in kwistjoni kienet fi stat hazin hafna u *beyond economical repair*. Kellha valur fis-suq ta` Lm 150.

Ikkunsidrat :

III. Risultanzi

Skond l-**Art 218(1) tal-Kap 386**, talba lill-Qorti ghal xoljiment u stralc ta` kumpannija mill-Qorti skond l-Art 214(2)(a) tal-Kap 386 *ghandha ssir b`rikors li jista` jsir jew mill-kumpannija wara decizjoni tal-laqgha generali jew mill-bord tad-diretturi taghha jew minn xi detentur ta` obligazzjoni, kreditur jew kredituri jew minn xi kontributorju jew kontributorji ...*

Ir-rikorrenti tikkwalifika bhala *kontributorju* – wara li jitqies it-tifsir ta` *kontributorju* skond l-Art 215 tal-Kap 386. Ghalhekk ir-rikorrenti ghandha *locus standi* biex tinizzja dan il-procediment.

Skond l-**Art 214(2)(a) tal-Kap 386**, *kumpannija tista` xxolji u tkun stralcjata mill-qorti f`zewg cirkostanzi li huma –*

(i) *jekk in-negozju tal-kumpannija jkun sospiz ghal perjodu bla waqfien ta` erbgha u ghoxrin xahar ; jew*

(ii) *jekk il-kumpannija ma tkunx tista` thallas id-djun taghha.*

Fl-udjenza tal-20 ta` Ottubru 2014, kien dikjarat mir-rikorrenti illi l-istanza tal-lum kienet qeghda tkun promossa abbazi tal-Art 214(2)(a)(ii) tal-Kap 386 ghalkemm fid-deposizzjoni taghha quddiem il-Qorti tad-19 ta` Jannar 2015, ir-rikorrenti ddikjarat li n-negozju tal-kumpannija kien wieqaf ghal kollox sa minn qabel id-29 ta` Mejju 2003.

Ir-rekwizit tal-paragrafu **(i)** tal-Art 214(2)(a) hija s-sospensjoni tan-negozju tal-kumpannija ghal perijodu **bla waqfien** ta` erbgha u ghoxrin **(24) xahar**. Dan ir-rekwizit huma kwistjoni ta` fatt – li fil-kaz tal-lum jirrizulta ppruvat mhux daqstant ghaliex il-Qorti ghandha dikjarazzjoni guramentata tar-rikorrenti izda ghaliex il-ftit dokumenti ta` kontabilita` li kienu esebiti hekk juru.

Id-disposizzjoni fil-ligi taghna kellha s-*source* taghha fl-Art.12(1)(d) tal-UK Insolvency Act 1986, liema disposizzjoni Ingliza m`ghadhiex taghmel parti mill-Act, ghax kienet superata b`legislazzjoni aktar ricenti.

Fil-Palmer`s Company Law (Edition 25 - Sweet & Maxwell) jinghad hekk –

The court`s jurisdiction is discretionary and the fact that the petitioner can establish this ground does not give him an automatic right to an order (re. Metropolitan Railway Warehousing Co. Ltd 1887.36.LJCh 827). The court has refused to make an order where there are good reasons for the delay and where the great majority of members desire that the company shall continue. An order may however be made in appropriate circumstances against the majority`s wishes.

Kopja Informali ta' Sentenza

Where the business has merely been suspended the court must be satisfied of an abandonment or inability to carry on. In ascertaining such intention the court will have regard to the opinion and wishes of the majority of shareholders whose names appear on the register. Merely abandoning one of several objects is insufficient (re. Norwegian Titanic Iron Co. (1866) 35 Beav.223).

Il-kwadru li johrog mill-fatti ta` dan il-kaz huwa li l-kumpanija de qua m`ghandhiex dhul ghaliex mhijiex topera, u ilha s-snin ma toperax ; kwindi ma ghandhiex *revenue* biex thallas id-djun taghha.

Bl-**Art 214(2)(a)(ii) tal-Kap 386** il-ligi taghti lill-Qorti diskrezzjoni li xxolji u tistralcja kumpanija *jekk il-kumpanija ma tkunx tista` thallas id-djun taghha.*

Dan is-subinciz (ii) irid jinqara flimkien ma` l-**Art 214(5)** li jistabilixxi meta kumpanija skond il-ligi taghna ghandha titqies li ma tkunx tista` thallas id-djun taghha.

Tnejn huma c-cirkostanzi definiti mil-ligi –

(a) *jekk id-dejn dovut mill-kumpanija jkun baqa` ma thallasx ghal kollox jew fparti wara erbgha u ghoxrin gimgha mill-ezekuzzjoni ta` titolu ekekuttiv kontra l-kumpanija b`xi wiehed mill-atti ekekuttivi msemmin fl-artikolu 273 tal-Kodici ta` Organizzazzjoni u Procedura Civili ; jew*

(b) *jekk ikun ippruvat ghas-sodisfazzjon tal-qorti li l-kumpanija ma tkunx tista` thallas id-djun taghha, meta din tqis ukoll il-passiv kontingenti u prospettiv tal-kumpanija.*

Ir-rikorrenti qeghda tindirizza l-lanjanza taghha abbazi tal-paragrafu **(b)**.

Il-Qorti tirrileva illi meta tfassal il-mudell ghal-ligi taghna l-gdida dwar il-kumpanniji, il-qafas maghzul kien dak tal-Companies Act Ingliza 1985. Fil-ligi Ingliza, ix-xoljiment u l-istralc ta` kumpanniji kien trattat f'legislazzjoni *ad hoc* u cioe` l-Insolvency Act 1986. Meta fl-1995 saret il-ligi taghna l-gdida dwar il-kumpanniji li hadet post il-Commercial Partnerships Ordinance 1962, id-disposizzjonijiet li jolqtu x-xoljiment u l-istralc kienu integrati fl-Att tal-1995.

Fil-ligi taghna, li *kumpannija ma tkunx tista` thallas id-djun taghha* ghandu sinjifikat preciz u definit mil-ligi stess fl-Art 214(5). Fil-ligi Ingliza, il-posizzjoni hija aktar wiesgha. Il-koncett ta` insolvenza fil-ligi taghna huwa aktar ristrett minn dak tal-ligi Ingliza ghalkemm hemm *overlaps*.

Fit-Tmien Edizzjoni (2012) ta` l-ktieb **Boyle & Birds` Company Law** (pubblikat minn Jordans) pg 859 jinghad hekk –

There are two principal, although not exclusive or exhaustive, tests of insolvency : a company is insolvent if it unable to pay its debts as they fall due (“cash flow insolvency”) ; it is also insolvent if its liabilities exceed its assets (“balance sheet insolvency”) ...

Ghall-fini tal-Kap 386, dak prospettat mir-rikorrenti bhala bazi ghat-talba taghha skond l-Art 214(5)(b) jabbina ruhu ma` *balance sheet insolvency*.

Dan l-abbinament jista` jsir minhabba d-dicitura tad-disposizzjoni rilevanti tal-Insolvency Act 1986 (li hija kwazi identika ghal taghna) u cioe` l-**Art 123(2)** li taqra hekk –

A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company`s assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.

Fil-ktieb **Insolvency Law – Corporate and Personal** ta` Andrew Keay u Peter Walton (pubblikat minn Pearson Longman – 2003) pg 19 jinghad hekk dwar *balance sheet insolvency* kif mifhuma fil-kuntest tal-Insolvency Act 1986 –

In determining whether the assets are outweighed by the liabilities a court is able to take into account contingent and prospective liabilities, but not contingent and prospective assets [Byblos Bank SAL v. Al-Khudhairi (1986) 2 BCC99, 549 (CA)] It has been said that “liabilities” is a broadened term compared with “debts” [Re A debtor (No 17 of 1966) (1967) Ch 590 ; (1967) 1 All ER 668]. “Liabilities” is defined for the purposes of winding up in rule 13.12 (4) to mean “a liability to pay money or money`s worth, including any liability under an enactment, any liability for breach of trust, any liability in contract, tort or bailment and any liability arising out of an obligation to make restitution”. Then rule 13.12 (3) states that it is immaterial whether the liability is present or future, whether it is certain or contingent, or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion.

Clearly with this test it is only possible to take into account the assets owned by the company including the uncalled capital of the company [Re National Livestock Insurance Co (1858) 26 Beav 153 ; 53 ER 855 ...

Kopja Informali ta' Sentenza

Dwar l-Art 214(5)(b) din il-Qorti diversament presjeduta (**PA/GV**) fis-sentenza taghha tat-28 ta' Mejju 2003 fil-kawza “**Axel John International AB vs Aluminium Extrusions Limited**” qalet hekk –

Din il-kondizzjoni tista` tigi verifikata permezz tal-balance sheets wara li jigi kunsidrat jekk l-assets are less than its liabilities. Izda ... it is not sufficient for the company to be able to meet its current obligations if its total liabilities can ultimately be met only by the realisation of its assets over a lengthy period (Re : European Life Assurance Society 1869 LR 9 Eq 122). Ghalhekk ma hemmx raguni ghaliex il-kredituri ghandhom joqghodu jistennew sakemm il-kumpannija tbiegh l-assets taghha biex forsi xi darba jithallsu.

Fil-Pag 114 tar-Raba` Edizzjoni (2011) ta' **Principles of Corporate Insolvency Law** (ippubblikat minn Sweet & Maxwell) l-awtur Roy Goode ighid hekk –

The idea underlying this test ... is that it is not sufficient for the company to be able to meet its current obligations if its total liabilities can ultimately be met only by the realisation of its assets and these are insufficient for the purpose ...

Fil-Pag 130 ikompli hekk –

The mere excess of liabilities over assets is not in itself determinative. What has to be shown is that by reason of the deficiency of its assets the company has reached the point of no return.

Fil-Pag 134 ighid –

Kopja Informali ta' Sentenza

To give the phrase “contingent liability” any meaning we must restrict it to a liability or other loss which arises out of an existing legal obligation or state of affairs but which is dependent on the happening of an event which may or may not occur. Many of the cases have stressed the need for the liability to arise out of an existing obligation.

Fil-Pag 136 ighid –

The phrase “prospective liability” is neither a legal nor an accounting term of art. It has been judicially defined as : “ ... a debt which will certainly become due in the future, either on some date which has already been determined or some date determinable by reference to future events.” ... it has been described ... as unmatured liability which will inevitably ripen into a debt with the passage of time. Such a definition encompasses all forms of debitum in praesenti, solvendum in futuro including an indisputable claim for unliquidated damages which remains only to be quantified and will result in a debt far more than a nominal amount. “Prospective liability” thus embraces both future debts, the sense of liquidated sums due, and unliquidated claims.

Fil-kaz tal-lum, irrizulta li kemm ilha kostitwita sal-lum il-kumpannija de qua pprezentat *annual report and financial statement* wiehed biss lir-Registratur tal-Kumpanniji fl-1992.

Irrizulta wkoll fic-cert illi ghandha d-dejn bla ma ghandha assi.

Hija l-fehma konsiderata tal-Qorti li ghalkemm hija sprovvista mill-prova aggornata tal-accounts, u accertat il-fatt li l-kumpannija ghandha d-djun u mhijiex tiggera *revenue*, ir-rekwizit tal-Art 214(5)(b) huwa sodisfatt.

Mill-kumpless tal-provi, ma rrizultax li fil-kaz tal-kumpanija de qua, il-waqfien tan-negozju taghha kien temporanju, kif lanqas ma rrizultat mqar l-icken inizjattiva da parti tal-azzjonisti li jkomplu bin-negozju, lanqas permezz ta` tqeghid ta` *fresh capital* min-naha taghhom fil-kumpanija.

Mill-atti, irrizulta l-maqlub ; u cioe` illi l-kumpanija hija nadempjenti fl-obbligi statutorji taghha vis-a-vis ir-Registratur tal-Kumpaniji, ghaliex l-ahhar *audited accounts* li pprezentat kienu dawk tal-1992. Irrizulta wkoll illi bil-qaghda finanzjarja negattiva li tinsab fiha mhijiex f`qaghda li thallas id-djun taghha.

Hija ghalhekk il-fehma konsiderata tal-Qorti illi ghandha tordna x-xoljiment u l-istralc tal-kumpanija de qua.

Provvediment

Ghar-ragunijiet kollha premessi, il-Qorti qeghda tid-disponi kif gej mit-talba tar-rikorrenti kif dedotta fl-ambitu ta` dan il-procediment :-

1) Tiddikjara illi fil-kaz tal-kumpanija P. Buffa & Co Limited (C9907) jirrizultaw ippruvati l-elementi rikjesti mill-Art 214(2)(a)(ii) u l-Art 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta.

2) Tordna x-xoljiment tal-kumpanija P. Buffa & Co. Limited (C9907) b`effett mill-4 ta` Settembru 2014 kif ighid l-Art 223(1) tal-Kap 386 tal-Ligijiet ta` Malta.

3) Tordna wkoll l-istralc tal-istess kumpanija.

4) Tahtar lir-Ricevitur Ufficjali bhala stralcjarju tal-kumpanija P. Buffa & Co Limited (C9907) bis-setghat u bid-dmirijiet li huma stabbiliti fil-Kap 386 tal-Ligijiet ta` Malta.

5) Bl-applikazzjoni tal-Art 236(2) tal-Kap 386 tal-Ligijiet ta` Malta, tordna li l-ispejjez ta` dan il-procediment, kif ukoll l-ispejjez tal-istralc jithallsu mir-rikorrenti Nadine de Conti Manduca, inkluzi d-drittijiet u l-ispejjez tar-Ricevitur Ufficjali fil-vesti tieghu ta` stralcjarju.

6) Thalli l-istralc ghall-udjenza ta` nhar it-Tlieta 17 ta` Marzu 2015 fid-9.00 a.m.

< Sentenza Finali >

-----TMIEM-----