



QORTI CIVILI PRIM'AWLA

**ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON**

Illum it-Tlieta 3 ta` Novembru 2015

**Kawza Nru. 1
Rik. Nru. 75/15 JZM**

Galleria Properties Limited (C-38989)

kontra

**Cassar & Schembri Marketing Ltd.
(C-33174)**

u

**MORE Supermarkets (Fgura)
Limited (C-61496)**

u

**b`digriet tal-10 ta` Marzu 2015
A.A.S.K. Enterprises Limited giet
awtorizzata tintervjeni fil-kawza *in
statu et terminis***

u

**b`digriet tal-10 ta` Marzu 2015
Galleria Trading Limited giet
awtorizzata tintervjeni fil-kawza *in
statu et terminis***

u

**b`digriet tad-29 ta` Settembru 2015
Agdel Limited giet awtorizzata
tintervjeni fil-kawza *in statu et
terminis***

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentat fl-20 ta` Jannar 2015 li jaqra hekk :-

1. *ILLI s-socjeta` esponenti hija s-sid tal-fond li minnu kienet topera More Supermarkets Ltd ;*

2. *ILLI s-socjeta` esponenti kienet tikri tali fond lil Cassar & Schembri Marketing Ltd, li bdiet topera bhala More Supermarkets sakemm giet imwaqqfa l-kumpannija More Supermarkets (Fgura) Limited, li taghha Cassar & Schembri Marketing Ltd. baqghet azzjonista principali, u More Supermarkets (Fgura) Ltd. bdiet topera mill-fond proprjeta` ta` l-esponenti bil-kunsens ta` l-esponenti bhala assenjatarja tal-kirja ;*

3. *ILLI sakemm Cassar & Schembri Marketing Ltd. u More Supermarkets (Fgura) Ltd. ivvakaw mill-fond u gie tterminat il-kuntratt ta` kera fuq imsemmi ai termini ta` l-istess kuntratt, ingemghu tnejn u disghin elf, tmien mija u sbatax-il euro (€92,817) f`arretrati ta` kera u fi spejjez dovuti lill-esponenti, inkluzi VAT relattiv zborzat mill-esponenti u kontijiet ta` elettriku u ilma ;*

4. *ILLI l-insolvenza taz-zewg kumpanniji hija llum sfortunatament ben nota, izda sfortunatament qed isiru diversi mandati kontra z-zewg socjetajiet, inkluz fil-proprjeta` ta` l-esponenti, li jistghu ifixklu serjament il-likwidazzjoni ta` l-istess socjetajiet skond il-ligi u skond il-gradwazzjoni tal-kredituri ;*

Ghaldaqstant l-esponenti, ghar-ragunijiet premissi, titlob umilment lil dina l-Onorabbli Qorti sabiex tordna l-likwidazzjoni tas-socjetajiet intimati ai termini ta` l-Art. 214(2)(a)(ii) tal-Kap.386, tahtar likwidatur sabiex jillikwidaw iz-zewg kumpanniji kontestwalment in vista tar-relazzjoni ta` bejniethom (minghajr pregudizzju ghal konnessjoni ta` tali likwidazzjoni ma` likwidazzjonijiet ohra ta` kumpanniji ohra relatati) u tordna li jittiehdu mill-kuratur/i l-azzjonijiet kollha necessarji sabiex jigu salvagwardjati l-assi tas-socjetajiet likwidandi, inkluz li tinghata kull ordni necessarja sabiex titwaqqaf l-ezekuzzjoni ta` kull mandat sija kawtelatorju u sija ezekuttiv ai termini ta` l-Art. 222 Kap. 386, u dan flimkien ma` kull ordni ohra li joghgobha taghti dina l-Onorabbli Qorti.

Rat id-dokumenti li kienu esebiti mar-rikors.

Rat id-digriet li tat fl-udjenza tal-10 ta` Marzu 2015 fejn laqghet it-talba tas-socjeta` A.A.S.K. Enterprises Limited (minn issa `l quddiem tissejjah “**A.A.S.K.**”) sabiex tintervjeni fil-kawza *in statu et terminis*.

Rat id-digriet li tat fl-istess udjenza fejn laqghet it-talba tas-socjeta` Galleria Trading Limited (minn issa `l quddiem tissejjah “**Gallerija Trading**”) sabiex tintervjeni fil-kawza *in statu et terminis*.

Rat illi fl-istess udjenza, id-difensur tal-intimata More Supermarkets (Fgura) Limited (minn issa `l quddiem tissejjah “**More (Fgura)**”) iddikjara illi din il-kumpannija ntimata ma kenitx qeghda topponi x-xoljiment u l-istralc taghha abbazi tal-Art 214(2)(a)(ii) tal-Kap 386.

Rat illi fl-istess udjenza kien rilevati mid-difensur tal-intervenuta A.A.S.K. illi r-rikorrenti (minn issa `l quddiem tissejjah “**Galleria Properties**”) m`ghandhiex *locus standi* fil-procedura odjerna skond l-Art 218 tal-Kap 386 ghaliex ma tikkwalifikax bhala ‘kreditur’. Min-naha tieghu, id-difensur tar-rikorrenti kkonferma li r-rikorrenti ghandha *locus standi*.

Rat id-digriet li tat fid-9 ta` April 2015 fejn laqghet it-talba tas-socjeta` Alf. Mizzi & Sons (Marketing) Ltd. (minn issa `l quddiem tissejjah "**Alf. Mizzi**") sabiex tintervjeni fil-kawza *in statu et terminis*.

Rat illi ghalkemm l-intimata Cassar & Schembri Marketing Limited (minn issa `l quddiem tissejjah "**Cassar & Schembri**") kienet debitament notifikata skond il-ligi, ma pprezentatx risposta.

Semghet ix-xiehda ta` Emanuel Sciriha, Registratur Qrati Civili u Tribunali, fl-udjenza tat-22 ta` Gunju 2015, u rat id-dokumenti li kienu prezentati waqt l-istess udjenza.

Rat id-digriet li tat fl-istess udjenza fejn laqghet it-talba tal-intervenuta A.A.S.K. ghall-allegazzjoni tal-atti tal-procediment fl-ismijiet "*A.A.A.K. Enterprises Limited vs More Supermarkets (Fgura) Limited*" (*Rik Nru 28/15 JZM*) deciz fit-12 ta` Frar 2015.

Rat l-atti tal-process allegat.

Rat in-noti b`dokumenti li pprezentat Galleria Properties fit-2 ta` Lulju 2015 u fid-29 ta` Settembru 2015.

Rat id-dikjarazzjoni li ghamel id-difensur ta` Galleria Properties fl-udjenza tad-29 ta` Settembru 2015 fis-sens illi kienet qeghda tinsisti li z-zewg intimati ma kienux fil-qaghda li jhallsu d-djun taghhom skond l-Art 214(2)(a)(ii) tal-Kap 386 in kwantu ghal Cassar & Schembri abbazi tal-Art 214(5)(b) u in kwantu ghal More (Fgura) abbazi tal-Art 214(5)(a) u (b).

Semghet ix-xiehda ta` Malcolm Sant fl-udjenza tad-29 ta` Settembru 2015.

Rat id-digriet li tat fl-istess udjenza fejn laqgħet it-talba tas-socjeta` Agdel Limited (minn issa `l quddiem tissejjah "**Agdel**") sabiex tintervjeni fil-kawza *in statu et terminis*.

Rat ix-xieħda bl-affidavit ta` Malcolm Sant u d-dokumenti li kienu annessi.

Rat in-nota b`dokumenti li pprezentat Galleria Properties fis-6 ta` Ottubru 2015.

Semgħet ix-xieħda in kontroezami ta` Malcolm Sant u d-deposizzjoni ta` Marvin Sapiano fl-udjenza tal-15 ta` Ottubru 2015.

Rat id-digriet li tat fl-istess udjenza fejn halliet il-kawza għas-sentenza.

II. Dritt

Qabel tghaddi sabiex tqis il-mertu, il-Qorti jidhrilha li jkun opportun jekk tagħmel analizi ta` d-disposizzjonijiet li fil-fehma tagħha huma attwali u rilevanti għall-vertenza.

1) L-Art 218(1) tal-Kap 386

Riferibbilment għall-mertu tal-kaz, persuna li tkun trid titlob ix-xoljiment u l-istralc ta` kumpannija trid toqgħod għal dak li jipprovdi l-Art 218(1) tal-Kap 386 li jaqra hekk –

Talba lill-qorti (aktar `il quddiem imsejha "rikors għal stralc") għal -

- (a) *stralc ta' kumpannija mill-qorti skont l-artikolu 214(1)(a) ;*
- (b) *xoljiment u stralc ta' kumpannija mill-qorti skont l-artikolu 214(2)(a) ; jew*
- (c) *xoljiment u stralc ta' kumpannija skont l-artikolu 214(2)(b),*

ghandha ssir b'rikors li jista' jsir jew mill-kumpannija wara decizjoni tal-laqgħa generali jew mill-bord tad-diretturi tagħha jew minn xi detentur ta' obbligazzjoni, kreditur jew kredituri, jew minn xi kontributorju jew kontributorji :

Izda rikors skont il-paragrafi (b) jew (c) jista' wkoll isir minn xi azzjonist jew direttur tal-kumpannija.

Fil-kaz tal-lum, Galleria Properties mexxiet bl-istanza tax-xoljiment u tal-istralc taz-zewg soċjetajiet intimati għaliex fir-rikors promotur tikkontendi illi hija kreditur tagħhom it-tnejn.

Irnexxielhiex l-istanti tagħmel il-prova jirrizulta `l quddiem.

2) L-Art 214(2)(a)(ii) tal-Kap 386

B`din id-disposizzjoni, il-ligi tagħti lill-Qorti diskrezzjoni li xxolji u tistralcja kumpannija *jekk il-kumpannija ma tkunx tista` thallas id-djun tagħha.*

Id-disposizzjoni trid tinqara flimkien ma` l-**Art 214(5)** li jistabilixxi meta kumpannija skond il-ligi tagħna għandha titqies li ma tkunx tista` thallas id-djun tagħha.

Tnejn huma c-cirkostanzi definiti fil-ligi –

(a) jekk id-dejn dovut mill-kumpannija jkun baqa' ma thallasx għal kollox jew f`parti wara erbgha u ghoxrin gimgha mill-ezekuzzjoni ta' titolu eżekuttiv kontra l-kumpannija b`xi wiehed mill-atti eżekuttivi msemmijin fl-artikolu 273 tal-Kodici ta' Organizzazzjoni u Procedura Civili ; jew

(b) jekk ikun ippruvat għas-sodisfazzjon tal-qorti li l-kumpannija ma tkunx tista' thallas id-djun tagħha, meta din tqis ukoll il-passiv kontingenti u prospettiv tal-kumpannija.

Billi Galleria Properties issostni li fil-kaz ta` Cassar & Schembri mhijiex f`qaghda li din thallas id-djun taghha abbazi tal-Art 214(5)(b), waqt li fil-kaz ta` More (Fgura) din mhijiex f`qaghda li thallas id-djun taghha abbazi tal-Art 214(5)(a) u (b), allura l-Qorti sejra taghmel analizi taz-zewg disposizzjonijiet.

3) Generali

Il-Qorti tirrileva illi meta tfassal il-mudell ghal-ligi taghna l-gdida dwar il-kumpanniji, sabiex tiehu post il-Commercial Partnerships Ordinance 1962, il-qafas maghzul kien dak tal-Companies Act Ingliza 1985. Fil-ligi Ingliza, ix-xoljiment u l-istralc ta` kumpanniji kien trattat permezz ta` legislazzjoni *ad hoc* u cioe` l-Insolvency Act 1986. Meta sar l-Att XXV tal-1995 dwar il-Kumpanniji, ix-xoljiment u l-istralc kienu integrati permezz ta` disposizzjonijiet fl-Att stess.

Kif diga` accennat, li *kumpannija ma tkunx tista' thallas id-djun taghha* ghandu **sinjifikat preciz u definit** fil-ligi taghna. Fil-ligi Ingliza, il-posizzjoni hija aktar wiesgha. Il-koncett ta` insolvenza fil-kaz 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”) ...

Dan premess, il-Qorti sejra tghaddi sabiex tqis iz-zewg disposizzjonijiet fejn il-ligi taghna taghti tifsira ghal dak li l-legislatur taghna ried ifisser meta persuna ma tkunx f`qaghda li thallas id-djun taghha.

4) L-Art 214(5)a tal-Kap 386

B`mod aktar ristrett, dak previst mill-Art 214(5)(a) jixbah il-koncett ta` *cash flow insolvency* fil-ligi Ngliza.

Fil-kaz ta' *cash flow insolvency* din il-Qorti tghid illi filwaqt fil-ligi taghna huwa specifikat **bil-preciz** x'm`ghandhiex taghmel kumpannija debitrici sabiex ma tkunx meqjusa li ma tistax thallas id-djun taghha, fil-ligi Ngliza il-kriterju huwa aktar generiku ghax ikun hemm dik it-tip ta' insolvenza *if it unable to pay its debts as they fall due*.

Fil-**Boyle & Birds` Company Law** (op. cit.) ikompli jinghad hekk –

Failure to pay a debt which is due and not disputed amounts to evidence of cash flow insolvency. Thus a company which has a policy of late payment of bills could find itself the subject of a petition for a winding-up order or administration order. Such a petition will not be struck out at an early stage as a form of improper pressure and an abuse of the process of the court, because, as Staughton LJ explained in Taylor`s Industrial Flooring (1990. BBC 44 at 51) creditors, not late payers, are more worthy of insolvency law`s protection.

“Many people today seem to think that they are lawfully entitled to delay paying their debts when they fall due or beyond the agreed period of credit, if there is one ... This can cause great hardship to honest traders, particularly those engaged in small businesses recently started. Anything which the law can do to discourage such behaviour in my view should be done.”

Fil-ktieb **Insolvency Law – Corporate and Personal** ta' Andrew Keay u Peter Walton (pubblikat minn Pearson Longman – 2003) pg 17 jinghad hekk dwar *cash flow insolvency* kif mifhuma fil-kuntest tal-Insolvency Act 1986 –

The court, in examining whether a company is suffering cash flow insolvency, will consider whether the company is actually paying its debtors. Courts must take into account what current revenue the company has as well as what the company can procure by realising assets within a relatively short time ... A company can rely upon money which might be obtained from the sale of assets or upon money which might be obtained on the strength of its assets ... It is possible that sometimes a debtor might be able to establish solvency by demonstrating that funds can be obtained through an unsecured loan. In considering whether a person or a company is insolvent, the debtor`s whole financial position must be studied ... and a temporary lack of liquidity does not necessarily mean that the company is insolvent ...

At one time courts were rather strict on what they required to be established before they were willing to deem a person or a company insolvent, but in more recent times they have become more liberal as far as creditors are concerned and have held that a debtor is insolvent if a creditor is able to prove that he or she has not paid an undisputed debt after a demand has been made ... and this is the case even if there is other evidence which suggests that the value of the assets outweighs liabilities ...

Whether a company is cash flow insolvent is principally a question of fact and one which may be established in any number of ways, such as the existence of a large number of outstanding debts and unsatisfied judgments ... or there is lack of assets on which execution can be levied ...

It has been said that a debtor is not regarded as solvent just because if sufficient time were granted the debts could be paid off ...

5) **L-Art 214(5)(b) tal-Kap 386**

Dak previst minn din id-disposizzjoni fil-ligi taghha 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** (op. cit.) 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 ...

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 –

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.

III. Risultanzi

1) Locus standi

Il-Qorti tibda billi taghmel riferenza ghad-deposizzjoni ta` Malcolm Sant li kien ix-xhud principali ta` Galleria Properties.

Il-Qorti trid tghid illi x-xiehda ta` Malcolm Sant kienet konfuza u ghal xi waqtiet kontradittorja meta mqabbla mad-dokumenti li kienu prezentati bhala prova u ma` dak li nghad fir-rikors promotur. Mhijiex tghid li dak mistqarr mix-xhud ma kienx mis-sewwa izda certament kien boghod ferm mill-kjarezza tant illi sabiex hargu certi fatti kien mehtieg kontroezami serrat da parti tad-difensuri ta` Alf. Mizzi u ta` A.A.S.K. fejn ix-xhud kellu jaccetta li kien hemm zbalji fil-presentazzjoni tal-kaz ta` Galleria Properties.

Malcolm Sant jirreferi ghall-kuntratt tal-kera tal-14 ta` Gunju 2013 li kien konkluz bejn Galleria Properties u Cassar & Schembri. Tal-ewwel kienet is-sid filwaqt li Cassar & Schembri kienet l-inkwilin. Stqarr illi l-

invoices li kienu johorgu kienu ghall-hlas tal-kera, ghall-hlas tal-manutensjoni tal-partijiet komuni tal-Galleria Complex u ghall-hlas tad-dawl u tal-ilma taz-zona li kienet soggetta ghall-kirja.

Ighid illi ghalkemm fil-premessi tar-rikors jinghad *illi s-socjeta` esponenti kienet tikri tali fond lil Cassar & Schembri Marketing Ltd, li bdiet topera bhala More Supermarkets sakemm giet imwaqqfa l-kumpannija More Supermarkets (Fgura) Limited, li taghha Cassar & Schembri Marketing Ltd. baqghet azzjonista principali, u More Supermarkets (Fgura) Ltd. bdiet topera mill-fond proprjeta` ta` l-esponenti bil-kunsens ta` l-esponenti bhala assenjatarja tal-kirja fir-realta` l-kirja baqghet issejjah lil Cassar & Schembri u ma kien hemm l-ebda assenjazzjoni tal-kirja lil More (Fgura) ghall-finijiet u effetti kollha tal-ligi. Inghad li kien hemm assenjazzjoni ghaliex kemm fil-kaz ta` Cassar & Schembri kif ukoll fil-kaz ta` More (Fgura) kienu qeghdin jittrattaw mal-istess nies. Isostni li More (Fgura) qatt ma saret l-inkwilin ; din baqghet Cassar & Schembri tant illi l-invoices baqghu jintbaghtu lil Cassar & Schembri ghalkemm kien hemm hlasijiet illi saru minn More (Fgura).*

Malcolm Sant jimputa zbalji evidenti li kien hemm fil-fatturi illi nhargu minn Galleria Trading ghall-fatt illi dahal accountant gdid. Li ghamel dan l-accountant kien li hareg fatturi ghal hlas ta` kera minn Galleria Trading meta l-fatturi kellhom ikunu ta` Galleria Properties. Ghalhekk insista li huma zbaljati l-‘invoices’ kollha li nhargu ghall-hlas ta` kera minn Galleria Trading lil Cassar & Schembri jew lil More (Fgura). Galleria Trading qatt ma kienet il-lokatur. Fil-fatt More (Fgura) mhijiex debitur ta` Galleria Properties.

Daqstant dwar il-kera.

Ghar-rigward taz-zona komuni, Malcolm Sant xehed illi Galleria Trading kienet tohrog ‘invoice’ ghall-hlas ta` dawn l-ispejjez lil Cassar & Schembri. Fil-kuntratt tal-kirja ma kien hemm xejn specifikat dwar dan izda l-ispartizzjoni tal-hlasijiet saret fuq parir tal-accountant li kellhom qabel. Ghalkemm il-hlas kellu jsir minn Cassar & Schembri, l-‘invoice’ harget lil More (Fgura). Dak kien zball li ha l-accountant il-gdid. Sostna li Galleria Trading (mhux Galleria Properties) tiehu hsieb tmexxi l-Galleria Complex u l-manutensjoni tal-kumpless. L-ispejjez taz-zona komuni jkopru t-t-tindif, id-dawl, il-marketing tal-kumpless u dak kollu li hemm bzonn biex tmexxi kumpless ta` dik ix-xorta.

Daqstant dwar l-manutensjoni taz-zoni komuni tal-kumpless.

Ghar-rigward tal-hlas tad-dawl u l-ilma, il-hlas kellu jsir lil Galleria Trading minn More (Fgura). Jaccetta li dan ma jirrizultax mill-kuntratt tal-kirja izda kien hemm arrangament li kien konkluz bil-fomm. Galleria Trading ghandha tiehu minghand More (Fgura) hlas tal-‘utilities’ li kienu kkonsmati fiz-zona li kienet mikrija lil Cassar & Schembri. Gara li huma kienu accettaw it-talba ta` Ryan Schembri sabiex il-konsum tad-dawl u l-ilma jigi fatturat lil More (Fgura). Galleria Properties ma tiehu xejn mill-hlas ta` dawn il-‘utilities’.

Malcolm Sant fisser illi Galleria Trading hija socjeta` distinta minn Galleria Properties. Il-hlasijiet li tircievi jmorru fil-kotba taghha mhux ta` Galleria Properties. U jibqghu fil-kotba taghha.

In konkluzjoni Malcolm Sant ikkonferma li fil-kaz tal-kera tal-kera, il-kreditur hija Galleria Properties, waqt li d-debitur hija Cassar & Schembri ; fil-kaz tal-‘common areas’, il-kreditur hija Galleria Trading waqt li d-debitur hija Cassar & Schembri ; waqt li fil-kaz tal-‘utilities’ taz-zona mikrija lil Cassar & Schembri, il-kreditur hija Galleria Trading, waqt li d-debitur hija More (Fgura).

Fuq l-iskorta ta` din id-deposizzjoni, huwa evidenti li Galleria Properties tikkwalifika bhala *kreditur* ta` Cassar & Schembri biss u limitament ghall-hlas tal-kera skond l-Art 218(1) tal-Kap 386.

Ghalhekk Galleria Properties ma tistax titlob ix-xoljiment u l-stralc ta` More (Fgura) skond l-Art 218(1) tal-Kap 386 billi ma tikkwalifikax bhala *kreditur* ta` More (Fgura).

Ghal din il-Qorti huwa ghal kollox irrilevanti illi More (Fgura) accettat permezz tad-difensur taghha li mhijiex fqaghda li thallas id-djun taghha kif previst mid-disposizzjonijiet tal-Kap 386 u ghalhekk mhijiex sejra tinghata konsiderazzjoni mill-Qorti. Se mai fejn jirrigwarda More (Fgura) t-talba kellha ssir minn Galleria Trading li tant hija kumpannija distinta minn Galleria Properties illi

talbet (u kienet ammessa) biex tintervjeni fil-kawza *in statu et terminis* bhala kreditur.

Issa bil-fatt li nterveniet *in statu et terminis* Galleria Trading ma saritx parti fil-kawza izda baqghet osservatur. Ghalhekk ma libset qatt ir-rwol ta` attur fil-kawza u kwindi ma tistax – almenu fil-procediment tal-lum – titlob ix-xoljiment u l-istralc ta` More (Fgura).

2) Il-posizzjoni ta` Cassar & Schembri

Il-Qorti sejra tqis jekk huwiex ippruvat inkella le illi Cassar & Schembri m`hijiex fqaghda li thallas id-djun taghha skond l-Art 214(5)(a) u (b) tal-Kap 386.

a) Skond l-Art 214(5)(a) tal-Kap 386

Il-Qorti tirrileva li ghalkemm kienu prezentati bhala prova dokumenti li juru li saru kawzi kontra Cassar & Schembri, kif ukoll illi saru mandati anke ezekuttivi kontra taghha, ma tressqet l-ebda prova mill-persuni li hargu l-mandati ezekuttivi sabiex jigi determinat jekk sal-erbgha u ghoxrin gimgha wara l-ezekuzzjoni tal-mandat ezekuttiv kienx effettwat inkella le hlas totali jew parzjali tal-kreditu.

Hija l-fehma konsiderata tal-Qorti illi abbazi tal-provi akkwisti mhuwiex ippruvat fil-konfront tal-intimata Cassar & Schembri dak li l-ligi trid bl-Art 214(5)(a).

b) Skond l-Art 214(5)(b) tal-Kap 386

Jirrizulta ppruvat illi Cassar & Schembri ghandha pendenzi ta` hlas ta` kera versu Galleria Properties (ara fol 20).

Jirrizulta ppruvat illi hija debitur ta` Alf. Mizzi fl-ammont ta` €150,464.90 (ara fol 43 et seq u x-xiehda ta` Marin Sapiano).

Jirrizulta li saru kawzi kontrieha u miksuba sentenzi favorevoli ghal ghadd gmielu ta` kredituri oħra (ara x-xiehda ta` Emanuel Sciriha u d-dokumenti li pprezenta). Mad-daġqa t`ghajn, il-krediti jaqbu z-zewg miljun Ewro.

Fuq kollox hemm l-kontenut tar-rikors li fit-28 ta` Settembru 2015 ipprezenta Etienne Cassar li huwa wiehed mill-azzjonisti u diretturi ta` Cassar & Schembri ddikjara *inter alia* :-

Illi matul is-sena 2014 u s-sena 2015 sar ovvju illi s-socjeta` Cassar & Schembri (Marketing) Limited kienet insolventi u dan minhabba l-fatt illi l-istess socjeta` kienet is-suggett ta` frodi u dikjarazzjonijiet foloz lkoll magħmula mid-direttur Ryan Schembri.

Ma jirrizultax li Cassar & Schembri llum għandha assi sabiex bihom thallas id-djun tagħha.

Hija l-fehma konsiderata tal-Qorti illi abbazi tal-provi akkwisti huwa ppruvat fil-konfront tal-intimata Cassar & Schembri dak li l-ligi trid bl-Art 214(5)(b).

3) Id-diskrezzjoni tal-Qorti

Accertat illi jirrizultaw ippruvati fil-kaz tal-intimata Cassar & Schembri r-rekwiziti tal-Art 214(2)(a)(ii) u tal-Art 214(5)(b), il-Qorti sejra tara jekk fuq il-provi akkwiziti, għandhiex hi tezercita d-diskrezzjoni tagħha li tordna x-xoljiment u l-istralc tal-istess intimata.

Il-Qorti tagħmel riferenza għal Pg 913-914 ta` Boyle & Birds` Company Law (op. cit.) :

Unpaid creditors of a company may consider commencing winding-up proceedings against the company as an alternative to suing for payment. As a debt collection mechanism, winding up proceedings may be swifter and, for the individual creditor, less expensive than a claim that may come to trial for some time ; on the other hand, winding up is a collective procedure for

the benefit of creditors generally and it does not benefit specific creditors individually (F. Odita "Winding Up Recalcitrant Debtors" 1995 LMCLQ 107) ...

Since winding up is a collective procedure for the benefit of creditors generally, one situation where the court may exercise its discretion against winding-up is where other creditors in the same class oppose the making of the order. In this regard the court will usually have regard to the majority of the creditors and will refuse the petition if its opposed by the majority.

Dan premiss, hija l-fehma konsiderata tal-Qorti illi l-inkwiet intern fi hdan Cassar & Schembri karatterizzat minn allegazzjonijiet ta` qerq u frodi fit-tmexxija tas-socjeta` kellu l-konsegwenza li sallab lis-socjeta` b`partita dejn li fis-sitwazzjoni attwali certament ma jistax jithallas u dan a skapitu tal-kredituri. Ghalhekk huwa fl-ahjar interess tal-kredituri bhala assjem li Cassar & Schembri tigi xjolta u stralcjata. Mhux biss is-socjeta` ma ghamlet propju xejn sabiex tittenta thallas id-djun taghha izda kien hemm abbandun totali tan-negozju taghha b`direttur minnhom litteralment jaqghad fin-nofs jipprova jaffronta l-kredituri u bid-direttur l-iehor jitlaq minn Malta, bil-konsegwenza li b`direttur wiehed (mhux tnejn) bl-assi sparpaljati b`dejn ingenti, il-kumpannija giet fix-xejn. Ma rrizulta li sar xejn mill-azzjonisti sabiex jaghtu hajja lis-socjeta` anzi kulhadd ghamel li seta` biex ifarfar kull responsabilita` ta` xi haga minn fuq spallejh. In-negozju jinbena fuq il-fiducja u meta din tigi nieqsa jisfaxxa kollox. Kumpannija li ma tiggerax attivita` ekonomika ma jistax ikollha dhul, u minghajr dhul, ma tista` qatt thallas id-dejn taghha. Ghal din il-Qorti, ix-xoljiment u l-istralc tal-intimata Cassar & Schembri huwa inevitabli.

Provvediment

Ghar-ragunijiet kollha premissi, il-Qorti qeghda tipprovdi dwar it-talba tas-socjeta` rikorrenti billi :

1) Tiddikjara u tiddeciedi illi l-kumpannija intimata Cassar & Schembri (Marketing) Limited (C33174) mhijiex f`qaghda li thallas id-djun taghha abbazi ta` l-Art 214(2)(a)(ii) u l-Art 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta.

2) Tordna x-xoljiment tal-kumpannija intimata Cassar & Schembri (Marketing) Limited (C33174) b`effett mit-28 ta` Jannar 2015 kif irid l-Art 223(1) tal-Kap 386 tal-Ligijiet ta` Malta. Tordna wkoll l-istralc taghha.

3) Tiddikjara illi s-socjeta` rikorrenti m`ghandhiex 'locus standi' sabiex titlob ix-xoljiment u stralc tal-kumpannija intimata l-ohra MORE Supermarkets (Fgura) Limited (C61496). Ghalhekk qeghda tichad it-talbiet tas-socjeta` rikorrenti kif dedotti kontra din is-socjeta` ntimata.

4) Tahtar lill-Avukat Dottor Richard Galea Debono bhala stralcjarju tal-kumpannija intimata Cassar & Schembri (Marketing) Limited (C33174) bis-setghat u bid-dmirijiet kollha stabbiliti fil-Kap 386 tal-Ligijiet ta` Malta. Bla hsara ghall-generalita` ta` dawk is-setghat u dmirijiet –

a) wara li jikseb dikjarazzjoni dwar il-qaghda ta' Cassar & Schembri (Marketing) Limited (C33174), kif irid l-Art 226 tal-Kap 386 tal-Ligijiet ta` Malta, jaghmel rapport lill-Qorti, kif irid l-Art 227 tal-Kap 386 tal-Ligijiet ta` Malta.

b) jaghmel verifika ta` l-assi u tad-djun ta` Cassar & Schembri (Marketing) Limited (C33174) u dwar il-gradwazzjoni tad-djun.

c) jiehu taht il-kustodja jew kontroll tieghu l-assi kollha ta` Cassar & Schembri (Marketing) Limited (C33174), kif ighid u jrid l-Art 237 tal-Kap 386 tal-Ligijiet ta` Malta.

d) jaghmel jew jiddefendi kull azzjoni jew procediment legali iehor fl-isem u fl-interess kollha ta` Cassar & Schembri (Marketing) Limited (C33174).

e) jirrelata dwar il-mizuri mehtiega ghall-harsien tal-assi tal-kumpannija intimata Cassar & Schembri (Marketing) Limited (C33174).

f) jipprezenta r-rapport mhux aktar tard minn tliet (3) xhur mil-lum.

5) Tordna lill-persuni kollha li talbu, u li kienu ammessi sabiex jintervjenu fil-kawza *in statu et terminis*, sabiex ihallsu l-ispejjez taghhom.

6) Tordna li l-ispejjez l-oħra kollha ta` dan il-procediment, kif ukoll l-ispejjez kollha tal-istralc, inkluzi d-drittijiet u l-ispejjez tal-istralcjarju, jithallsu mis-socjeta` rikorrenti Galleria Properties Limited (C38989), u dan bl-applikazzjoni tal-Art 236(2) tal-Kap 386.

7) Thalli l-istralc għall-udjenza ta` nhar il-Hamis 3 ta` Marzu 2016 fid-9.00 a.m.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur