



## QORTI CIVILI PRIM`AWLA

ONOR. IMHALLEF  
JOSEPH ZAMMIT MCKEON

Illum it-Tnejn 30 ta` Novembru 2015

Kawza Nru. 17  
Rik. Nru. 1065/14 JZM

Joseph Fenech Soler (ID 683649M), f  
ismu proprju u ghan-nom u in  
rapprezentanza tal-kumpannija Blues  
Limited (C-27393)

*kontra*

Chef Xpress Limited (C-48810)

Il-Qorti :

### I. Preliminari

Rat ir-rikors prezentat fil-25 ta` Novembru 2014 li jaqra hekk :-

*I. ILLI, permezz ta` sentenza moghtija mill-Onorabbli Prim` Awla tal-Qorti Civili nhar il-31 ta` Jannar 2013, il-kumpannija intimata, fuq ammissjoni taghha stess, giet ikkundannata thallas lill-esponenti s-somma ta` mija u ghaxart*

*elef Ewro (€110,000), rapprezentanti bilanc mhux imhallas u miftiehem dwar trasferiment ta` negozji, flimkien mal-imghax legali dekorribbli mis-27 ta` Frar 2012 sad-data tal-pagament effettiv u l-ispejjez kollha tal-kawza ;*

*II. ILLI, mill-imsemmija sentenza, ma sar l-ebda appell ;*

*III. ILLI nhar l-1 ta` Marzu 2013, l-esponenti talbet, u nhar l-4 ta` Marzu 2013 hija ottjeniet, il-hrug ta` mandat ta` sekwestru ezekuttiv (DOK : A), ossija mandat numru 312/2013, in ezekuzzjoni tal-kreditu taghha fis-somma komplessiva ta` mija u ghoxrin elf tlett mija u erbgha u erbghin Ewro u sitta u tletin centezmu (€120,344.36), rapprezentanti in kwantu ghas-somma ta` €110,000 bhala sorte, €8,800 bhala imghax, u €1,544.36 bhala spejjez ;*

*IV. ILLI, minkejja li l-imsemmi mandat ta` sekwestru ezekuttiv gie debitament ezegwit fuq hames (5) sekwestratarji, ma nstabu l-ebda assi sabiex jissodisfaw il-kreditu kanonizzat tal-esponenti kif inghad ;*

*V. ILLI s-somma totali dovuta lill-esponenti sat-12 ta` Novembru 2014 tammonta komplessivament ghal mija u hamsa u tletin elf, tlett mija u sebgha u disghin Ewro u erbgha centezmi (€135,397.04) rapprezentanti in kwantu ghal €110,000 bhala sorte, €23,852.68 bhala imghax, u €1,544.36 bhala spejjez, u, minkejja t-trapass ta` zmien, ghadu ma thallas xejn mill-kumpannija intimata akkont l-istess somma ;*

*VI. ILLI, ghalhekk, fil-fehma umli tal-esponenti, l-kumpannija intimata ma tistax thallas id-djun taghha, skond id-dispozizzjonijiet tal-Artikolu 214 (2) (a) (ii) tal-Att dwar il-Kumpanniji (Kapitolu 386 tal-Ligijiet ta` Malta), u dan billi, skond id-dispozizzjonijiet tal-Artikolu 214 (5) (a) tal-istess imsemmi Kapitolu, id-dejn imsemmi, dovut mill-kumpannija intimata, baqa` ma thallasx ghal kollox wara erbgha u ghoxrin gimgha mill-ezekuzzjoni tat-titolu ezekuttiv tal-esponenti, kontra l-kumpannija intimata, permezz ta` att ezekuttiv, ossija permezz tal-mandat ta` sekwestru ezekuttiv numru 312/2013.*

*VII. ILLI ghalhekk kellu jsir dan ir-rikors.*

*GHALDAQSTANT tghid il-kumpannija intimata ghaliex m`ghandhiex din l-Onorabbli Qorti, prevja kwalsiasi dikjarazzjoni ulterjuri necessarja u opportuna, u bl-ispejjez kontra l-istess kumpannija intimata :-*

*I. TIDDIKJARA illi l-kumpanija intimata Chef Xpress Limited (C-48810) ma tistax thallas id-djun tagħha skond id-dispozizzjonijiet tal-Artikolu 214 (2) (a) (ii) u tal-Artikolu 215 (5) (a) tal-Att dwar il-Kumpanniji (Kapitolu 386 tal-Ligijiet ta` Malta);*

*II. TORDNA x-xoljiment u l-istralc tal-kumpanija intimata Chef Xpress Limited (C-48810) taht dawk il-provedimenti kollha li din l-Onorabli Qorti jidhrilha li jkun xierqa u opportuni.*

Rat id-dokumenti li kienu annessi mar-rikors promotur.

Rat illi ghalkemm is-socjeta` ntimata kienet debitament notifikata skond il-ligi, ma pprezentatx risposta.

Rat id-digriet li tat fl-udjenza tad-29 ta` Ottubru 2015 fejn ordnat l-allegazzjoni tal-atti tal-kawza bejn l-istess partijiet bin-nru 1231/12 JRM li kienet deciza fil-31 ta` Jannar 2013 u l-atti tal-mandat ta` sekwestru ezekuttiv fl-istess ismijiet bin-nru 312/13.

Rat l-atti tal-procedimenti li kienu debitament allegati.

Semghet ix-xiehda ta` r-rikorrent fl-udjenza tad-29 ta` Ottubru 2015.

Rat id-digriet li tat fl-istess udjenza fejn halliet il-kawza ghas-sentenza ghal-lum *in difett ta` ostakolu*.

Rat illi ma rrizulta l-ebda ostakolu sabiex taghti l-provvediment tagħha tal-lum.

Rat l-atti l-ohra tal-kawza.

## **II. Dritt**

Ir-rikorrent pro et noe jikkwalifika bhala “**kreditur**” tal-kumpannija intimata skond l-**Art 218 tal-Kap 386 tal-Ligijiet ta` Malta**. Ghalhekk ghandu l-jedd skond il-ligi li jaghti bidu ghal dan il-procediment.

Ir-rikorrent qieghed jitlob ix-xoljiment u l-istralc tas-socjeta` ntimata abbazi tal-**Art 214(2)(a)(ii) u l-Art 214(5)(a) u tal-Kap 386**.

Bl-**Art 214(2)(a) tal-Kap 386** il-ligi taghti lill-Qorti diskrezzjoni li xxolji u tistralcja kumpannija f`zewg cirkostanzi. Dik invokata mir-rikorrent hija s-subinciz **(ii)** u cioe` *jekk il-kumpannija ma tkunx tista' thallas id-djun taghha*.

Dan is-subinciz **(ii)** ma jistax jitqies bhallikieku kien xi disposizzjoni izolata izda **ex lege** jrid jinqara flimkien ma` l-**Art 214(5) tal-Kap 386** li jistabilixxi meta kumpannija ghandha titqies li ma tkunx tista' thallas id-djun taghha.

Tnejn huma c-cirkostanzi definiti mil-ligi –

*(a) jekk id-dejn dovut mill-kumpannija jkun baqa' ma thallasx ghal kollox jew f`parti wara erbgħa u ghoxrin gimgha mill-ezekuzzjoni ta' titolu ezeuttiv kontra l-kumpannija b`xi wiehed mill-atti ezeuttivi 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 taghha, meta din tqis ukoll il-passiv kontingenti u prospettiv tal-kumpannija.*

**Ir-rikorrent qieghed jindirizza l-lanjanza taghha esklussivament fuq il-paragrafu (a).**

Il-Qorti tirrileva illi meta tfassal il-mudell għal-ligi taghna l-gdida dwar il-kumpanniji, il-qafas magħzul 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 fl-1995 saret il-ligi taghna l-gdida dwar il-kumpanniji (illum Kap 386) biex tiehu 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”) ...*

Fil-Kap 386, *cash flow insolvency* tista` tigi abbinata mal-paragrafu **(a)** tal-Art 214(5) waqt li *balance sheet insolvency* tista` tigi abbinata mal-paragrafu **(b)** tal-istess Art 214(5).

**Billi r-rikorrent pro et noe bena l-istanza tieghu esklussivament fuq l-Art 214(5)(a) tal-Kap 386, il-Qorti sejra taghmel riferenza ghad-dottrina Ingliza dwar *cash flow insolvency*.**

Fil-kaz ta' *cash flow insolvency* din il-Qorti tghid illi filwaqt illi fil-Kap.386 huwa specifikat bil-preciz x` m`ghandhiex taghmel kumpannija debitrice sabiex ma tkunx meqjusa li ma tistax thallas id-djun taghha, fil-ligi Ingliza, il-kriterju huwa aktar generiku ghax tkun tirrizulta 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."*

*The position is different if there is a bona fide dispute about a debt. A petition based on a disputed debt will usually be dismissed because the procedure is ill-equipped to resolve factual matters. However it will not be dismissed where the petitioning creditor has a good arguable case and the dismissal would deprive the petitioner of a remedy, injustice would otherwise result, or there is some other sufficient reason for the petitioner to proceed.*

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 ...*

### **III. Provi u risultanzi**

Ghall-fini tal-prova tar-rekwiziti tal-Art 214(5)(a) fil-kaz tal-lum, ir-rikorrent irrefera ghal sentenza moghtija fil-**31 ta` Jannar 2013** minn din il-Qorti diversament presjeduta fil-kawza fl-ismijiet *Joseph Fenech Soler f`imsu propju u ghan-nom u in rapprezentanza tal-kumpannija Blues Limited (C27393) vs Chef Xpress Limited (C48810)* fejn **wara ammissjoni** ta` Chef Xpress Limited il-kumpannija ntimata kienet ikkundannata thallas lir-rikorrent pro et noe s-somma ta` €110,000, bl-ispejjez u bl-imghax kif mitlub. Jirrizulta li s-sentenza ghaddiet in gudikat.

Din il-Qorti hadet konjizzjoni tal-atti ta` dik il-kawza. In partikolari qieset iz-zewg dokumenti li kienu annessi mar-rikors guramentat, kif ukoll in-nota a fol 19 tal-process allegat li permezz taghha s-socjeta` ntimata ammettiet it-talbiet attrici.

Irrizulta illi fl-**1 ta` Marzu 2013**, ir-rikorrent pro et noe pprezenta rikors fejn talab il-hrug ta` Mandat ta` Sekwestru **Esekuttiv** kontra s-socjeta` ntimata Nru 312/2013 ghall-ammonti li taghhom kien kanonizzat bhala kredituri tal-istess socjeta` ntimata skond is-sentenza citata fil-paragrafu precedenti. It-talba ghall-hrug tal-Mandat kienet milqugha fl-**4 ta` Marzu 2013**. Skond l-atti tal-Mandat li huma allegati mal-atti ta` din il-kawza, kemm il-kumpannija debitrice kif ukoll is-sekwestratarji kienu notifikati. In partikolari, is-sekwestratarji kienu kollha notifikati fil-**5 ta` Marzu 2013**. Ghall-fini tal-Art 214(5)(a) tal-Kap 386, ir-rekwizit rilevanti sabiex jiskatta l-perijodu ta` erbgha u ghoxrin (24) gimgha huwa **l-ezekuzzjoni** tal-Mandat, li jfisser in-notifika tas-sekwestratarji. **Il-perijodu ta` 24 gimgha skada fl-1 ta` Settembru 2013**. Il-kawza tal-lum kienet prezentata fil-**25 ta` Novembru 2014**. Abbazi tax-xiehda li ta l-attur fl-udjenza tad-**29 ta` Ottubru 2015** jirrizulta li ma thallas l-ebda ammont minn dak li kien dovut mis-socjeta` konvenuta skond il-Mandat Esekuttiv.

Saret il-prova sal-grad rikjest mil-ligi ta` dak li jipprovdi l-Art 214(5)(a) tal-Kap 386, bil-konsegwenza li jista` jkun hemm ix-xoljiment u l-istralc tas-socjeta` ntimata skond l-Art 214(2)(a)(ii) tal-Kap 386.

Accertat u ppruvat illi l-kumpannija ntimata mhijiex fqaghda li thallas id-djun taghha fis-sens tal-Art 214(5)(a), il-Qorti sejra tara jekk

**ghandhiex tipprocedi ghax-xoljiment u ghall-istralc tal-intimata fis-sens tal-Art 214(2)(a)(ii).**

Il-Qorti taghmel riferenza ghal Pg 913-914 ta' **Boyle & Birds` Company Law** – 8<sup>th</sup> Edition – 2011 :

*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. Oditah “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.*

Din il-Qorti ma ghandhiex prova tal-kontabilita` tal-kumpannija ntimata. Kellha pero` l-okkazjoni li tisma` d-deposizzjoni nkontestata tar-rikorrent.

Joseph Fenech Soler jixhed illi n-negozju tieghu mas-socjeta` ntimata kien il-bejgh tal-fakkrika bil-makkinarju li kellha s-socjeta` tieghu Blues Limited. Sar kuntratt fejn il-prezz ta` kollox kien ta` €190,000 ; minn dan il-prezz, thallas akkont ta` €80,000 izda l-bilanc baqa` ma thallasx. Billi ma sarx il-hlas, saret kawza kontra s-socjeta` ntimata li deciza favur tieghu anke bl-ammissjoni tas-socjeta` ntimata. Wara li kienet deciza l-kawza, hareg Mandat ta` Sekwestru kontra l-istess socjeta` ntimata. Ghalkemm kienu notifikati l-hames banek kummercjali bhala sekwestratarji, ma sar l-ebda depozitu fil-qorti mill-banek ghaliex s-socjeta` ntimata ma kellhiex flus. Baqa` ma thallas xejn mill-ammonti dovuti f`kapital, imghax u spejjez.

**Kompla jixhed – u hawn huwa importanti ghall-fini tal-ezercizzju tad-diskrezzjoni – illi safejn jaf hu, is-socjeta` attrici mhijiex qeghda taghmel negozju. Infatti jghid illi zarmaw il-fabbrika, bieghu kollox, u lilu ma tawh xejn. Dan sar sena biss wara li hadu l-fabbrika f`idejhom.**

Ghal din il-Qorti ma jaghmel l-ebda sens illi kumpannija li tassew ghandha l-interess li tibqa` fin-negozju tigi notifikata skond il-ligi bi procediment hekk serju,



b`konsegwenzi daqstant gravi, u mbaghad imqar taghmel l-icken sforz biex tiddefendi ruhha. Eppure, hekk gara fil-kaz tal-lum, ghaliex il-kumpannija ntimata la pprezentat risposta u wisq anqas baghtet rapprezentant taghha biex isegwi dan il-procediment. Is-socjeta` ntimata ma ghamlet propju xejn biex tagevola l-kompitu iebes ta` din il-Qorti. Il-kumpannija ntimata kellha l-opportunita` kollha li tigi quddiem il-Qorti fejn filwaqt li taccetta li baqghet inadempjenti versu r-rikorrenti skond l-Art 214(5)(a) tipprova tissoddisfa lill-Qorti illi ma timmeritax li tigi xjolta u stralcjata. Il-Qorti m`ghandhiex prova ta` x`assi ghandha l-kumpannija intimata llum u jekk ghandha, hemmx minnhom disponibbli biex jinbieghu halli thallas lir-rikorrent pro et noe fi zmien ragonevoli. Jidher il-maqlub u cioe` li n-negozju li twieldet biex tmexxi ghalaq u nbiegh il-makkinarju. B`kuntrast mal-inerzja u nuqqas ta` interess tal-kumpannija intimata u tad-diretturi taghha, il-Qorti ghandha l-prova nkonfutabbli li l-kumpannija intimata mhijiex f`qaghda li thallas id-djun taghha skond l-Art 214(5)(a). Ghalhekk mill-kumless tal-provi akkwiziti, il-kwadru li johrog huwa li l-kumpannija intimata tinsab fi stat ta` dissest, u kwindi ma jkunx gust u ragonevoli jekk il-Qorti ma tghaddix ghad-dikjarazzjoni tax-xoljiment u stralc taghha.

### **Provvediment**

**Ghar-ragunijiet kollha premessi, il-Qorti qeghda tipprovdi dwar it-talbiet tar-rikorrent proprio et nomine billi :**

**1) Riferibbilment ghall-ewwel talba, tiddikjara u tiddeciedi illi l-kumpannija intimata Chef Xpress Limited (C48810) mhijiex f`qaghda li thallas id-djun taghha abbazi ta` l-Art 214(2)(a)(ii) u l-Art 214(5)(a) tal-Kap 386 tal-Ligijiet ta` Malta.**

**2) Riferibbilment ghat-tieni talba, tordna x-xoljiment tal-kumpannija intimata Chef Xpress Limited (C48810) b`effett mill-25 ta` Novembru 2014 kif irid l-Art 223(1) tal-Kap 386 tal-Ligijiet ta` Malta. Tordna wkoll l-istralc taghha.**

**3) Riferibbilment ukoll ghat-tieni talba, tahtar lir-Ricevitur Ufficjali bhala stralcjarju tal-kumpannija intimata bis-setghat u bid-dmirijiet li huma 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 tal-kumpannija intimata, 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 dwar l-assi u d-djun tal-kumpannija intimata u dwar il-gradwazzjoni tad-djun.**

**c) jiehu taht il-kustodja jew kontroll tieghu l-assi kollha tal-kumpannija intimata, 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 tal-kumpannija intimata.**

**e) jirrelata dwar il-mizuri mehtiega ghall-harsien tal-assi tal-kumpannija intimata.**

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

**4) Ghar-rigward tal-ispejjez, il-Qorti qeghda tipprovdi hekk :-**

**a) Tordna li l-ispejjez ta` dan il-provvediment sal-lum jithallsu mill-kumpannija intimata.**

**b) Tordna li l-ispejjez kollha tal-istralc, inkluzi d-drittijiet u l-ispejjez tar-Ricevitur Ufficjali fil-vesti tieghu ta` stralcjarju, jithallsu mir-rikorrent proprio et nomine, u dan bl-applikazzjoni tal-Art 236(2) tal-Kap 386.**

**5) Thalli l-istralc ghall-udjenza ta` nhar il-Hamis 3 ta` Marzu 2016 fid-9.00 a.m.**

**Onor. Joseph Zammit McKeon  
Imhallef**

**Amanda Cassar  
Deputat Registratur**