



QORTI CIVILI PRIM'AWLA

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum il-Hamis 26 ta` Mejju 2016

Kawza Nru. 9
Rik. Nru. 20/16 JZM

Western Union Business Solutions
(Malta) Limited (C 22339)

kontra

Interweb Limited (C 44642)

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentat fit-8 ta` Jannar 2016 li jaqra hekk :-

Illi permezz ta` sentenza moghtija minn dina l-Qorti fit- 13 ta` Jannar, 2015 fil-kawza fl-ismijiet 'Western Union Business Solutions (Malta) Limited (C-22339) vs Interweb Limited (C-44642)' (Rikors Numru.

722/2014 JRM) kopja hawn annessa u mmarkata bhala Dokument "A", is-socjeta` rikorrenti giet kanonizzata kreditur tas-socjeta` intimata fis-somma ta` tnejn u sittin elf, tliet mija u tmintax-il Ewro u tlieta u erbghin centezmi (€62,318.43) u bl-imghaxijiet legali mid-data ta` kull wahda mill-fatturi relattivi sal jum tal-hlas effettiv kontra s-socjeta` konvenuta liema sentenza ghaddiet in gudikat ;

Illi s-socjeta` rikorrenti kienet otteniet il-hrug ta` Mandat ta` Sekwestru Ezekuttiv bin-numru 523/2015 kopja hawn annessa u mmarkata bhala Dokument "B" minn din il-Qorti kontra s-socjeta` intimata u dan l-imsemmi Mandat ta` Sekwestru Ezekuttiv gie nnotifikat lis-sekwestratarji kollha cioe` Bank of Valletta p.l.c, HSBC Bank Malta p.l.c., Lombard Bank Malta p.l.c., APS Bank Limited, u Banif Bank (Malta) plc fit-2 ta` April 2015 u d-dejn dovut mis-socjeta` ntimata baqa` ma thallasx ghal kollox wara erbgha u ghoxrin (24) gimgha mill-ezekuzzjoni tal-imsemmija Sentenza permezz ta` dan l-imsemmi Mandat ta` Sekwestru Ezekuttiv u ghalhekk dan jissodisfa r-rekwiziti tal-Artikolu 214(5)(a) tal-Att Dwar il-Kumpanniji, Kapitolu 386 tal-Ligijiet ta` Malta biex is-socjeta` ntimata titqies li ma` tkunx tista` thallas id-djun peress illi tistipula li :

"(5) Ghall-finijiet tas-subartikolu (2)(a)(ii), kumpannija titqies li ma tkunx tista` thallas id-djun taghha -

(a) jekk id-dejn dovut mill-kumpannija jkun baqa` ma thallasx ghal kollox jew f`parti wara erbgha 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."

u din hija wahda mir-ragunijiet ghaliex tista` tintalab ix-xoljiment u l-istralc tas-socjeta` intimata ai termini tal-Artikolu 214(2)(a)(ii) tal-Att Dwar il-Kumpanniji, Kapitolu 386 tal-Ligijiet ta` Malta ;

Illi ai termini tal-Artikolu 214(2)(a)(i) u (ii) tal-Att Dwar il-Kumpanniji, Kapitolu 386 tal-Ligijiet ta` Malta

"(2) Barra mill-mod ta` xoljiment imsemmija fis-subartikolu (1) -

(a) kumpannija tista` xxolji u tkun stralcjata mill-qorti fic-cirkostanzi li gejjin -

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

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

Illi dan il-kreditu baqa` qatt ma gie saldat mis-socjeta` intimata ;

Illi huwa evidenti illi s-socjeta` intimata mhijiex fqaghda li thallas id-djun taghha u in vista tad-debitu sostanzjali li ghandha fil-konfront tas-socjeta` rikorrenti, jidher car illi s-socjeta` intimata fic-cirkostanzi attwali mhijiex ser tkun fqaghda li thallas ebda pagament akkont tad-djun li ghandha ;

Illi fuq kollox is-socjeta` rikorrenti ghandha x`tifhem illi s-socjeta` intimata mhijiex topera u n-negozju taghha ilu sospiz ghal perjodu twil bla waqfien ta` erbgha u ghoxrin (24) xahar ;

Illi ghal dawn ir-ragunijiet hawn fuq imsemmija s-socjeta` rikorrenti ghandha d-dritt li titlob ix-xoljiment u l-istralc tas-socjeta` intimata ai termini tas-subartikolu (2)(a)(i) u (ii) tal- Artikolu 214 tal-Att Dwar il-Kumpanniji, Kapitolu 386 tal-Ligijiet ta` Malta ;

Ghaldaqstant l-esponenti titlob lil din l-Onorabbli Qorti sabiex :

(1) *Tiddikjara u tiddeciedi illi s-socjeta` intimata Interweb Limited naqset li thallas id-dejn kollhu dovut lis-socjeta` rikorrenti minkejja l-ezekuzzjoni ta` Mandat ta` Sekwestru Ezekuttiv bin-numru 523/2015 u l-skadenza ta` erbgha u ghoxrin (24) gimgha mill-ezekuzzjoni tal-imsemmija Sentenza permezz ta` dan l-imsemmi Mandat ta` Sekwestru Ezekuttiv u ghalhekk mhijiex fqaghda li thallas id-djun taghha u n-negozju tas-socjeta` intimata ilu sospiz ghal perjodu bla waqfien ta` erbgha u ghoxrin (24) xahar u dan a tenur tal-Artikolu 214(2)(a)(i) u (ii) u l-Artikolu 214(5)(a) u / jew (b) [“u / jew b” mizjuda b`digriet tas-17 ta` Mejju 2016] tal-Att Dwar il-Kumpanniji, Kapitolu 386 tal-Ligijiet ta` Malta u konsegwentement tordna x-xoljiment u l-istralc konsegwenzjali tal-istess socjeta` intimata a tenur tal-Artikolu 214(2)(a)(i) u (ii) tal-Att Dwar il-Kumpanniji, Kapitolu 386 tal-Ligijiet ta` Malta.*

(2) *Taghti kull provvediment opportun sabiex jinhatar l-istralcjarju u jigi kondott l-istralc konsegwenzjali skond id-disposizzjonijiet tal-Att Dwar il-Kumpanniji, Kapitolu 386 tal-Ligijiet ta` Malta.*

Bl-ispejjez.

Rat id-dokumenti li pprezentat ir-rikorrenti mar-rikors promotur.

Rat illi ghalkemm is-socjeta` ntimata kienet notifikata bir-rikors promotur u bl-avviz tas-smigh tal-kawza, baqghet ma pprezentatx risposta.

Semghet ix-xiehda ta` Dunstan Zammit, ta` Stuart Marsh u ta` Mark Bonnici fl-udjenza tas-17 ta` Mejju 2016.

Rat id-digriet li tat fl-istess udjenza fejn halliet il-kawza ghall-provvediment ghal-lum.

II. Xiehda

Dunstan Zammit – direttur tas-socjeta` ntimata – xehed illi huwa l-uniku direttur. Mistoqsi x`tip ta` negozju ghandha Interweb, wiegeb : *propjament ma nafx kif ezatt topera* ghalkemm imbaghad isemmi l-*iswiping* ta` *cards* u li jgibu vetturi mill-Ingilterra. Ighid illi jaf li Interweb hija debitrici tas-socjeta` rikorrenti ; anke b`sentenza tal-Qorti. Illum is-socjeta` intimata mhi taghmel xejn. Ghalkemm is-socjeta` mhijiex maghluq *bil-karti* (kliem ix-xhud) mhijiex qeghda tintuza. M`ghandhiex impjegati u n-negozju taghha ilu wieqaf *forsi tliet snin* (kliem ix-xhud). Waqfet tahdem ghal kollox. Kien mistoqsi ghala l-ahhar accounts prezentati lir-Registratur tal-Kumpanniji kienu dawk tas-sena li ghalqet fil-31 ta` Dicembru 2010. Wiegeb billi qal : *jien mhux qed nuzaha, hux*. U kompla qal : *Fil-verita' kont ser nipprova naghlaqha*. U sahaq li ghalih il-Qorti tista` taghlaqha lil Interweb Limited. Sostna li s-socjeta` m`ghandhiex assi ; lanqas flus il-bank. Ghandha biss djun. Mnejn kienet tahdem fiz-zmien kien mikri. Il-post illum inghata lura lis-sid.

Stuart Marsh xehed illi huwa l-awditur tas-socjeta` ntimata. Fil-fatt hekk ghadu registrat sal-lum ghaliex qatt ma tnehha mill-kariga jew irrizenja. Ghalkemm l-ahhar audited accounts li dahlu ghand ir-Registatur tal-Kumpanniji kienu dawk tas-sena finanzjarja 2010, fil-fatt huwa kien hejja wkoll l-audit tal-2011 u l-2012, izda ghal xi raguni, id-direttur baqa` ma pprezentax id-dokumenti lir-Registru tal-Kumpanniji. Il-presentata tal-financial statements lir-Registatur mhijiex responsabilita` tal-awditur. Safejn jaf hu, id-direttur tas-socjeta` ntimata kien iffirma l-financial statements. Ikkonferma l-osservazzjoni li ghamel fl-accounts tal-2010 li tghid : *“Without qualifying my opinion, I draw attention to note 1 in the financial statements which indicates the company incurred a net loss of €9,489 during the year ending 31st December 2010, and as at that date the company’s total liabilities exceeded its total assets by €41,554. These financial statements have been prepared on a going concern basis which assumes that the company’s shareholders will continue to provide support for the company for the foreseeable future.”* Sostna li sal-ahhar tal-2012, is-socjeta` ntimata kienet ghadha a going concern. X`gara wara l-1 ta` Jannar 2013 ma setax ighid ghaliex ma ghamilt l-audit mill-2013 `il hawn billi tilef kull kuntatt mas-socjeta` ntimata. Dwar il-qaghda finanzjarja tas-socjeta` ntimata fl-2011 u 2012, ix-xhud jiftakar illi ghalkemm is-socjeta` ntimata ghamlet bejgh il-qaghda finanzjarja attwali taghha kienet iddeterjorat fis-sens illi zdied id-dejn. Qal illi n-negozju tas-socjeta` kien jinvolvi l-importazzjoni ta` *second hand motor vehicles*. Ghalkemm originarjament in-negozju taghha kien id-disinji ta` website, biz-zmien is-socjeta` bidlert il-generu tan-negozju.

Mark Bonnici – rapprezentant tas-socjeta` rikorrenti – xehed kkonferma d-dokumenti li kienu prezentati esebiti mar-rikors promotur. Wara s-sentenza Dok A, sar mandat ta` sekwestru Dok B. Cio` nonostante is-socjeta` rikorrenti baqghet ma thallset xejn.

III. Dokumenti

Bhala prova, kienu pprezentati hames dokumenti :-

- (a) **Dok A** : sentenza ta` din il-Qorti tat-13 ta` Jannar 2015 fil-kawza “Western Union Business Solutions (Malta) Limited (C22339) vs Interweb Limited (C44642)” [Rik. Gur. Nru 722/2014 JRM]
- (b) **Dok B** : mandat ta` sekwestru ezekuttiv Nru 523/2015
- (c) **Dok C** : company search dwar Interweb Limited

(d) **Dok D** : Memorandum u Articles of Association ta` Interweb Limited

(e) **Dok E** : *Report and financial statements* ta` Interweb Limited *as at* 31 ta` Dicembru 2010

(a) Dokument A

Skont is-sentenza li tikkostitwixxi Dok A, is-socjeta` ntimata kienet kanonizzata debitrice tas-socjeta` rikorrenti fl-ammont ta` €62,318,43, flimkien mal-imghax u l-ispejjez.

Waqt li kien qed jixhed Dunstan Zammit, direttur tas-socjeta` ntimata, accetta li s-socjeta` ntimata ghadha debitrice tas-socjeta` rikorrenti.

(b) Dokument B

Fit-30 ta` Marzu 2015, is-socjeta` rikorrenti pprezentat rikors ghall-hrug ta` Mandat ta` Sekwestru Ezekuttiv kontra s-socjeta` ntimata. Ir-rikors kien akkordat fl-1 ta` April 2015. Ghalkemm is-socjeta` ntimata ma kenitx notifikata bil-Mandat, is-sekwestratarji kienu kollha notifikati fit-2 ta` April 2016.

(c) Dokument C

Mill-company search li sar fil-website tal-MFSA, jirrizulta illi l-ufficju registrat tas-socjeta` ntimata huwa St Joseph, Triq l-Irmigg, Msida. L-issued share capital u l-authorized share capital tas-socjeta` huwa ta` 1500. Hargu 1500 ordinary shares, valur ta` Euro kull sehem. L-ishma huma kollha 20% paid up. L-azzjonisti huma Six Seven Eight Limited (750 sehem) u Amir Sherafatmand (750 sehem). L-uniku direttur tas-socjeta` huwa Dunstan Zammit. Fl-14 ta` Dicembru 2013, irrizenja l-uniku direttur Roderick Grech u nhatar minfloku l-imsemmi Dunstan Zammit. Hekk jirrizulta wkoll minn Dok D.

(d) Dokument D

Skont il-Memorandum, *the main object for which the Company is established is : (i) To undertake internet/web design and development services, software design and development and the performance of computer hardware sourcing, installation and servicing and internet marketing services.*

(e) Dokument E

Dan huwa l-annual report and financial statements tas-socjeta` intimata ghall-2010 - li dwarhom xehed l-awditur Stuart Marsh.

(i) Directors` Report

Jinghad illi *the company was set up to import second hand vehicles and also provides website development services.*

Jinghad illi *the company incurred a loss before taxation of €38,220 (2009 : loss of €3,634). After accounting for taxation, the loss for the year amounted to €39,489 (2009 : loss of €2,365). Accumulated losses carried forward amounted to €41,854.*

(ii) Independent Auditors` Report

Fost hwejjeg ohra, jinghad hekk :-

Basis for Qualified Opinion

I was unable to obtain sufficient appropriate audit evidence and explanations about the results and financial situation of the company when compared to previous year`s results. Consequently I was unable to determine whether any adjustments to these amounts were necessary.

Opinion

... Without qualifying my opinion, I draw attention to note 1 in the financial statements which indicates that the company incurred a net loss of €39,489 during the year ending 31 December 2010, and as at that date, the company's total liabilities exceed its total assets by €41,554. These financial statements have been prepared on a going concern basis which assumes that the company's shareholders will continue to provide support to the company for the foreseeable future.

(iii) Trade and other payables

Fl-2010 kien hemm debiti ta` €104,693 mqabbel ghal €54,445 tal-2009. Bhala *receivables* fl-2010 kien hemm €17,770 mqabbel mas-€27,625 tal-2009. Flus il-bank fl-2010 kien hemm €41,470 mqabbel ma` €18,090 tas-sena precedenti.

IV. It-talba tar-rikorrenti

Is-socjeta` rikorrenti ghandha **locus standi** sabiex tmexxi bil-kawza tal-lum billi tikkwalifika bhala *kreditor* ghall-fini u effett tal-**Art 218** tal-Kap 386.

It-talba ghax-xoljiment u l-istralc tas-socjeta` ntimata qeghda ssir abbazi :

- (a) tal-**Art 214(2)(a)(i) tal-Kap 386** ;
- (b) tal-**Art 214(2)(a)(ii) u l-Art 214(5)(a) u/jew (b) tal-Kap 386**

V. Risultanzi

- (a) **L-Art 214(2)(a)(i) tal-Kap 386**

Skont l-**Art 214(2)(a)(i) tal-Kap 386**, kumpannija **tista'** xxolji u tkun stralcjata mill-qorti ... jekk in-negozju tal-kumpannija jkun sospiz ghal perjodu bla waqfien ta' erbgha u ghoxrin xahar.

Ir-rekwiziti tad-disposizzjoni huma :

- (i) is-sospensjoni tan-negozju ;
- (ii) ghal erbgħa u ghoxrin (24) xahar ;
- (iii) bla waqfien.

Is-sussistenza tar-rekwiziti hija fattwali ; għalhekk trid tirrizulta mill-provi.

Jidher illi d-disposizzjoni kellha l-origini tagħha fl-**Art12(1)(d) tal-UK Insolvency Act 1986**, liema disposizzjoni Ingliza m`għadhiex tagħmel parti mill-Act, għax kienet superata b`legislazzjoni aktar ricenti.

Fil-kaz tal-lum, ir-rekwiziti ta` l-Art 214(2)(a)(i) kienu ppruvati kollha, billi rrizulta :-

(a) li s-socjeta` mhux biss issospendiet in-negozju tagħha izda waqfet għal kollox ;

(b) li skont Dunstan Zammit is-socjeta` waqfet tagħmel negozju fl-2013 ;

(c) li dan isib konferma ndiretta fix-xieħda ta` Stuart Marsh meta dan iġid li l-aħħar audited accounts li hejja hu kienu dawk tal-2012, u wara dik is-sena, hadd ma rreferielu accounts għall-audit, għad illi baqa` l-awditur tas-socjeta` ntimata ;

(d) li skont Dunstan Zammit, ma bagħatx aktar accounts għaliex is-socjeta` ma kenitx qegħda tintuza ;

(e) li mnejn kienet topera għalaq, u l-fond tan-negozju li kien mikri mar lura għand is-sid ;

(f) li mpjegati m`hemmx u lanqas assi ; hemm biss djun.

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

Jista` jkun hemm xoljiment u stralc ta` kumpannija jekk il-kumpannija ma tkunx tista' thallas id-djun tagħha.

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 XXV tal-1995.

Kif sejr in naraw, fil-ligi taghna, li *kumpannija ma tkunx tista' thallas id-djun taghha* ghandu **sinjifikat preciz u definit** mil-ligi stess. Fil-ligi Ingliza, il-posizzjoni hija aktar wiesgħa. 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”) ...

c) Art 214(5) tal-Kap 386

L-**Art 214(5)** li jistabilixxi meta skont il-ligi taghna, kumpannija ghandha titqies li ma tkunx tista' thallas id-djun taghha.

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 ghas-sodisfazzjon tal-qorti li l-kumpannija ma tkunx tista' thallas id-djun taghha, meta din tqis ukoll il-passiv kontingenti u prospettiv tal-kumpannija.

Fil-kaz tal-lum, ir-rikorrenti qeghdin joqghodu fuq l-Art 214(5)(a) u/jew (b) tal-Kap 386.

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

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

Fil-kaz ta` *cash flow insolvency* din il-Qorti tghid illi filwaqt fil-ligi taghna huwa specificat **bil-preciz** x`m`ghandhiex taghmel kumpannija debitrici sabiex ma tkunx meqjusa li ma tistax thallas id-djun taghha, fil-ligi Ingliza 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** (8th Edition – 2011 – Jordans) jinghad hekk fil-pag 860 –

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 ...

Dan premiss, u biex jigu għall-kaz tal-lum, riferibbilment għall-Art 214(5)(a) tal-Kap 386, irrizulta ppruvat illi l-Mandat ta` Sekwestru Ezekuttiv Nru 523/2015 (Dok B) li nhareg fl-1 ta` April 2015, kien notifikat lis-sekwestratarji fit-2 ta` April 2015.

Hija l-gurisprudenza ta` din il-Qorti illi fejn si tratta ta` atti ezequttivi ndikati fl-Art 273 tal-Kap 12, il-fattur rilevanti sabiex jiskatta l-perijodu ta` erbgha u ghoxrin (24) gimgha għall-fini tal-Art 214(5)(a) tal-Kap 386 huwa l-ezequzzjoni tal-Mandat. Fil-kaz ta` Mandat ta` Sekwestru, l-ezequzzjoni tal-Mandat issehh bin-notifika tal-att lis-sekwestratarji. In-notifika o meno tad-debitur bil-Mandat

Ezekuttiv mhijiex rilevanti. Dment li jkun hemm l-ezekuzzjoni tal-Mandat Ezekuttiv, l-erbgha u ghoxrin gimgha jiskattaw, anke jekk id-debitur ma jkunx notifikat bil-Mandat.

Skont ix-xiehda ta` Mark Bonnici, rrizulta li minkejja l-ezekuzzjoni tal-Mandat Ezekuttiv, is-socjeta` debitrici ma hallset xejn, ghalkemm Dunstan Zammit, direttur taghha, jaccetta li hija debitrici tas-socjeta` rikorrenti.

Irrizulta li s-socjeta` rikorrenti pprezentat din il-kawza wara li ghaddew 24 gimgha mill-ezekuzzjoni tal-mandat. Infatti r-rikorrenti pprezentat l-azzjoni fit-8 ta` Jannar 2016 waqt li l-ezekuzzjoni tal-Mandat saret fit-2 ta` April 2015.

Din il-Qorti hija sodisfatta li saret il-prova ta` dak li jipprovdi l-Art 214(5)(a) tal-Kap 386.

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

It-test bl-Ingiliz l-Art 214(5)(b) tal-Kap 386 jaqra hekk :-

For the purposes of subarticle (2)(a)(ii), a company shall be deemed to be unable to pay its debts ...

if it is proved to the satisfaction of the court that the company is unable to pay its debts, account being taken also of contingent and prospective liabilities of the company.

Fl-Insolvency Act 1986 tar-Renju Unit, insibu disposizzjoni li TIXBAH dik tal-ligi taghna, ghalkemm mhijiex l-istess.

Il-Qorti qeghda tirreferi ghall-Art 123(2) tal-Insolvency Act 1986 li jaqra 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.

Il-Qorti diga` rrilevat illi d-disposizzjoni fil-ligi taghna TIXBAH PERO` MHIJIEX IDENTIKA ghal dik tal-ligi Ingliza.

Id-divergenza bejn iz-zewg legislazzjonijiet hija li filwaqt li fil-kaz taghna l-mizura hija semplici : u cioe`

the company is unable to pay its debts account being taken also of contingent and prospective liabilities of the company.

Fil-kaz tal-ligi Ingliza, il-kriterju huwa divers ghaliex il-Qorti tkun trid tqis illi :

the value of the company`s assets is less than the amount of its liabilities ...

billi tiehu kont tal- ... *contingent and prospective liabilities.*

Ghal din il-Qorti, id-differenza mhijiex ta` *drafting* izda ta` sostanza.

Fl-istess waqt, il-Qorti hija tal-fehma li xorta wahda ghandha tfittex sintesi bejn id-disposizzjoni tal-ligi taghna u dik tal-ligi Ingliza. U s-sintesi hija kostitwita mill-koncett ta` *contingent and prospective liabilities.*

Il-Qorti sejra tirreferi ghal dak li tghid id-dottrina fl-Ingilterra dwar il-materja li tikkostitwixxi l-mertu tal-istanza tal-lum.

Bid-debiti riservi, u tenut kont tad-disparita` fid-disposizzjonijiet ta` bejn il-ligi Ingliza u dik taghna, il-Qorti sejra tirreferi ghal dak li tghid id-dottrina Ingliza dwar dak li huwa maghruf bhala balance sheet insolvency meta abbinat mal-Art 123(2) tal-Insolvency Act 1986 tar-Renju Unit.

Fil-Pag 19 tal-ktieb Insolvency Law – Corporate and Personal (2003 – Pearson Longman) Andrew R Keay u Peter Walton ighidu 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-Khudhairy (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 Beau 153 ; 53 ER 855 ...

Fil-Pag 114 tar-Raba` Edizzjoni (2011) ta` **Principles of Corporate Insolvency Law** (Sweet & Maxwell) 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 sa 136, l-awtur jittratta n-nozzjoni ta` **contingent liability** u jghid hekk –

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.

... in considering whether there is a contingent liability the court has regard to the existing commercial situation, not merely an existing legal obligation. In this regard, assistance can be derived from Financial Reporting Standard 12 which defines a contingent liability in the following terms :

(a) “A possible obligation that arises from past events and whose existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the entity’s control ; or

(b) a present obligation that arises from past events but is not recognised because :

(i) it is not probable that a transfer of economic benefits will be required to settle the obligation ; or

(ii) the amount of the obligation cannot be measured with sufficient reliability.”

... the term “contingent liabilities” is ultimately not a term of art and its precise meaning will depend on its context. The court is thus entitled to have regard to commercial realities ...

Fil-Pag 136 u 137, l-awtur jittratta n-nozzjoni ta` **prospective liability** u jghid hekk –

... 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, jirrizulta ppruvat illi s-socjeta` intimata waqfet taghmel negozju fl-2013, m`ghandhiex assi, m`ghandhiex mnejn topera, u ghandha biss djun. Ghalkemm il-Qorti hija sprovvista mill-ahhar accounts

tas-socjeta`, l-istampa li tohrog mill-accounts tal-2010 mhijiex felici ghalix id-dejn kien diga` jissupera l-assi. U anke dakinhar l-awditur kien ghamilha cara, u sostna fix-xiehda tieghu, illi huwa qies s-socjeta` bhala *a going concern* - nonostante d-dejn - fuq l-assunzjoni li l-azzjonisti kienu sejrjn johrogu il-flus minn tagghom biex isostnu l-operations tas-socjeta`. Billi sostanzi mnejn jithallas id-dejn ma hemmx u hija evidenti l-intenzjoni tal-azzjonisti ma jhallsu xejn aktar minn bwiethom. Ir-rekwiziti tal-Art 214(5)(b) huma ppruvati.

d) Id-diskrezzjoni tal-Qorti

Accertat illi jirrizultaw ippruvati r-rekwiziti tal-Art 214(2)(a)(i), tal-Art 214(2)(a)(ii), tal-Art 214(5)(a) u tal-Art 214(5)(b), il-Qorti sejra tara jekk dak li rrizulta mill-provi, ghandhiex hi tezercita d-diskrezzjoni taghha li tordna x-xoljiment u l-istralc tas-socjeta`.

Il-Qorti taghmel riferenza ghal Pg 913-914 ta` **Boyle & Birds` Company Law** (op. cit.) fejn jinghad :

*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.

Fil-**Palmer’s Company Law** (Edition 25 - Sweet & Maxwell) jinghad hekk b`riferenza ghas-sitwazzjoni kontemplata bl-Art 214(2)(a)(i) –

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. 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).

Dan premiss, hija l-fehma konsiderata tal-Qorti illi ladarba n-negozju tas-socjeta` ntimata ilu wieqaf tal-inqas ghal aktar minn tliet snin, dak il-fatt wahdu fid-dinja tan-negozju huwa zmien twil speċjalment fejn jirrenja d-dejn. Ghax id-dejn versu s-socjeta` rikorrenti mhuwiex *in dispute* anzi huwa accettat bhala dovut, dak ifisser illi se jkompli jizdied effett tal-imghaxijiet ladarba ma qieghed isir xejn mill-azzjonisti sabiex is-socjeta` ntimata tinsorgi, anzi jidher evidenti sahsitra mid-deposizzjoni ta` Dunstan Zammit illi mhux biss qatghu qalbhom izda bhal donnu qeghdin jistennew herqana lil din il-Qorti sabiex ixxolji s-socjeta` kwazi kwazi sabiex taghmillhom pjacir ! Kumpannija li ma taghmilx negozju hija entita` bla ruh ghaliex ma tkunx qeghda taqdi l-ghanijiet taghha. Anke dwar l-*objects* spiccat din il-Qorti skoncertata : fejn jinsab in-ness bejn socjeta` li tizviluppa l-websites ma` socjeta` li ggib vetturi second-hand minn barra ? Kwesit dan tal-Qorti li baqa` minghajr twegiba sodisfacjenti. Fi kwalunkwe kaz, kumpannija li ma tiggerax attivita` ekonomika ma jistax ikollha dhul, u minghajr dhul, ma tista` qatt thallas id-dejn taghha, aktar u aktar meta fil-kaz tal-lum irrizulta illi l-azzjonisti wrew li m`ghandhom l-ebda hajra jew intenzjoni li jinvestu fil-kumpannija. Ghal din il-Qorti, ix-xoljiment u l-istralc tal-intimata mhux biss huwa inevitabbli izda huwa fl-interess tas-socjeta` b`mod partikolari dik involuta fil-kummerc.

Provvediment

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

1) Tiddikjara li fir-rigward tal-kumpannija Interweb Limited (C44642) jirrizultaw pruvati sal-grad rikjest mil-ligi r-rekwiziti tal-Art 214(2)(a)(i), tal-Art 214(2)(a)(ii), tal-Art 214(5)(a) u tal-Art 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta.

2) A tenur tal-istess disposizzjonijiet tal-ligi, tordna x-xoljiment tal-kumpanija Interweb Limited (C44642) b'effett mit-8 ta' Jannar 2016.

3) Tordna wkoll l-istralc tal-kumpanija Interweb Limited (C44642).

4) Tahtar lill-Avukat Dottor Malcolm Mallia bhala stralcjarju bis-setghat u bid-dmirijiet kollha previsti mid-disposizzjonijiet tal-Kap 386 tal-Ligijiet ta' Malta.

5) Bl-applikazzjoni tal-Art 236(2) tal-Kap 386, tordna li l-ispejjez ta' dan il-procediment, kif ukoll l-ispejjez kollha tal-istralc, inkluzi d-drittijiet u l-ispejjez tal-istralcjarju, jithallsu mis-socjeta' rikorrenti, mis-socjeta' ntimata, u minn Dunstan Zammit (K.I. 116587M) *in solidum* bejniethom.

6) Thalli l-istralc ghall-udjenza ta' nhar il-Hamis 29 ta' Settembru 2016 fid-9.00 a.m.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur