



## QORTI CIVILI PRIM'AWLA

ONOR. IMHALLEF  
JOSEPH ZAMMIT MCKEON

Illum it-Tlieta 31 ta` Jannar 2017

Kawza Nru. 10  
Rikors Nru. 1269/2012 JZM

CMV S.p.A gia` maghrufa bhala Casino  
Municipale di Venezia rapprezentata  
mill-mandatarju specjali taghha l-  
Avukat Dottor Louis Cassar Pullicino  
(K.I. 441061)

*kontra*

Vittoriosa Gaming Limited

Il-Qorti :

Dan huwa digriet fil-miftuh dwar rikors illi pprezenta l-Kummissarju tal-Artijiet fit-28 ta` Novembru 2016 fejn talab permess lil din il-Qorti skont l-Art 224(2) tal-Kap 386 sabiex il-Qorti diversament presjeduta tkompli tisma`, tittratta u tiddeciedi l-kawza fl-ismijiet “*Il-Kummissarju tal-Artijiet vs Port Cottonera Hotel Development Limited et*” (Rik. Gur. Nru. 461/2015/JPG)

## **I. Preliminari**

Rat ir-rikors u d-dokumenti annessi..

Rat id-digriet taghha tad-29 ta` Novembru 2016.

Rat ir-risposta li pprezentat CMV S.p.A fid-9 ta` Dicembru 2016.

Semghet is-sottomissjonijiet bil-fomm illi ghamlu d-difensuri tal-Kummissarju tal-Artijiet u ta` CMV S.p.A dwar ir-rikors fl-udjenza tat-12 ta` Jannar 2017.

Rat id-digriet illi tat fl-istess udjenza fejn halliet ir-rikors ghal provvediment fil-miftuh ghal-lum.

## **II. L-Art 224(2) tal-Kap 386**

Id-disposizzjoni taqra hekk :-

*Meta jkun sar ordni ghal stralc jew ikun inhatar amministratur provvizorju, skont id-disposizzjonijiet tal-artikolu 228, ma tista` tittiehed ebda azzjoni jew jinbdew xi proceduri kontra l-kumpannija jew il-proprjeta` taghha hlief bil-permess tal-qorti u taht dawk il-kondizzjonijiet li tista` timponi l-qorti.*

Id-disposizzjoni tghodd ghall-kaz tal-lum ghaliex ghalkemm sal-lum din il-Qorti ghadha ma ppronunzjatx ruhha dwar ix-xoljiment tal-kumpannija Vittoriosa Gaming Limited u allura gha m`hemmx ordni ghal stralc, fil-kors ta` dan il-procediment hatret lill-Avukat Dottor Richard Galea Debono bhala Amministratur Provvizorju ta` Vittoriosa Gaming Limited skont l-Art 228 tal-Kap 386.

## **III. L-Art 130(2) tal-Insolvency Act 1986 tal-Ingilterra**

L-Art 224(2) tal-Kap 386 huwa mfassal fuq l-Art 130(2) tal-Insolvency Act 1986 tal-Ingilterra li jaqra hekk :-

*When a winding up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property except by leave of the court and subject to such terms as the court may impose.*

#### IV. Il-kawza tal-lum

Fil-procediment mertu ta` l-kawza odjerna, is-socjeta` rikorrenti qeghda titlob ix-xoljiment u tal-istralc tas-socjeta` Vittoriosa Gaming Limited abbazi tal-pretensjoni illi din tal-ahhar mhijiex f`qaghda li thallas id-djun taghha, u allura fi stat ta` insolvenza, kif previst fl-Art 214(2)(a(ii) tal-Kap 386.

#### V. In-natura kollettiva ta` procediment ghal xoljiment u stralc

Fil-pag 501 tal-ktieb "The Law of Insolvency" (Sweet & Maxwell - 1998) Ian Fletcher ighid hekk :-

***"The fundamental principle upon which winding up is based is the collective nature of proceedings.** The objective underlying the relevant legal provisions is to ensure that an orderly regime is imposed upon all interested parties, so that none of them individually may contrive to enhance his position by exploiting some fortuitous circumstance which may yield some personal advantage, in the form of a larger proportional return on debts which are due, or a direct and more rapid recovery of payment, than would result from participated in the processes of the winding up, and receiving dividend in common with all other creditors whose debts carry an equal ranking in order of priority ... In order to ensure that the above objective is achieved the law establishes a series of barriers to the exercise by a company of its normal rights and remedies when it is prospectively or actually in litigation. By this means, the remaining assets of the company are maintained intact so that they may be administered in accordance with the principles of insolvency law".* (enfasi u sottolinear ta` din il-qorti).

Issir ukoll riferenza ghal Pg 913-914 ta` Boyle & Birds` Company Law – 8<sup>th</sup> Edition – 2011 fejn jinghad illi :

*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 ... (enfasi u sottolinear ta` din il-qorti)

## VI. Id-diskrezzjoni wiesgha tal-Qorti

Il-Qrati ghandhom diskrezzjoni wiesgha meta jkunu mitluba jaghtu l-permess skont l-Art 224(2) tal-Kap 386.

Fil-kawza In Re Aro Ltd – 1980 Ch. 196, inghad illi :-

*“In determining whether, in a compulsory liquidation, leave should be given to proceed with a claim, the court has an extensive discretion, it is free to do what is right and fair in the circumstances.”*

Fil-kawza In Re Exchange Securities & Commodities Ltd (1983) BCLC 186, inghad illi :-

*“Generally leave will only be given where some question arises that cannot properly be determined in the winding up and where litigation is needed to resolve matters”*

Fil-kawza In Re David Lloyd & Co (1877) inghad illi :-

*“There are several circumstances where, generally, the court will allow the action to proceed. One is when the plaintiff is seeking to enforce his security, because a secured creditor is in a position where he can fairly claim that he is independent of the liquidation, since he is enforcing a right, not against the company, but to his own property.”*

Fil-kawza In Re Barrow (Leeds) Ltd (1982) inghad illi :-

*“Leave will readily be given if the plaintiff undertakes not to enforce against the company any judgment he may obtain, without leave of the court”.*

L-awturi Andrew Keay u Peter Walton fil-pag 110-111 tal-ktieb **“Insolvency Law – Corporate and Personal”** (Pearson – Longman : 2003) jaghmlu riferenza ghall-kaz ta` In Re Atlantic Computer Systems plc (1992) Ch 505 li kien jittratta l-kwistjoni ta` kif *the court is to approach the exercise of its discretionary power to grant permission*. Din il-Qorti qeghda tissenjala dan il-kaz mhux daqstant

minhabba l-mertu tieghu (stante li l-mertu huwa divers minn dak tal-lum anke mill-punto di vista ta` dritt) izda minhabba l-linji gwida li hargu mill-pronunzjament tal-Qorti tal-Appell tal-Ingilterra. Ghad-differenza tal-kaz taghna, dak kien kaz fejn *some of the company`s machinery was held under a hire purchase contract, the administrator had no use for the machinery ... The owners of the computers who were receiving no rental payments from the company wanted to repossess the computers.*

Il-punti li hargu mid-decizjoni kienu dawn :-

1. *The party seeking permission must always make out a case.*
2. *Where the party seeking permission to exercise his proprietary rights over his own property such as by repossessing his own goods then if this repossession is unlikely to impede the purpose of the administration the court would normally grant permission.*
3. *In other cases, the court must undertake a balancing exercise. The interests of the party claiming to repossess must be balanced with the interests of the other creditors.*
4. *As part of this balancing exercise due weight needs to be given to the owner`s proprietary rights. The owners of such property as computers should not have to finance indirectly the administration for the benefit of the unsecured creditors, This was effectively what was going on in the case.*
5. *It will usually be the case that permission will be granted if significant loss would be caused to the owner by refusal. However as part of the balancing exercise, if substantially greater loss would be caused to others by the grant of leave, that may outweigh the projected loss caused to the owner. In making this judgement the court looks at a number of factors. The company`s financial position, its ability to make payments unders the agreements (arrears and current liabilities) the administrator`s proposals, the effect on those proposals of granting permission, the effect on the owner of refusal, the duration of the administration and the conduct of the parties will all be relevant considerations.*
6. *If permission is refused the administrator may be ordered to act in a certain way to ensure fairness.*

## VII. Konsiderazzjonijiet

Tal-lum huwa kaz li **legalment u sostanzjalment** huwa divers minn dak li kien *In Re Atlantic Computer Systems plc* (op. cit.). Fil-kaz tal-lum, Vittoriosa

Gaming Limited tippossjedi *animo domini* bhala sub-enfitewta s-sit indikat fil-kuntratti mertu tal-kawza Rik. Gur. Nru. 461/2015 JPG.

Fil-kaz ta` Vittoriosa Gaming Limited, dak li jrid jikseb il-Kummissarju tal-Artijiet bil-kawza Rik. Gur. Nru. 461/2015 JPG mhuwiex daqstant li jkun kanonizzat kreditur mill-qorti izda li l-qorti tholl il-kuntratt ta` subcens li bih Vittoriosa Gaming Limited tippossjedi *animo domini*.

Kif jirrizulta anke mir-risposta li pprezentat CMV S.p.A ghar-rikors tal-Kummissarju tal-Artijiet, il-kreditu ta` dan tal-ahhar fil-konfront ta` Vittoriosa Gaming Limited huwa rikonoxxjut u accettat bhala dovut kif jirrizulta mill-accertamenti li ghanmel l-Amministratur Provvizorju.

**Din il-Qorti hija tal-fehma meqjusa illi jekk taghti l-permess li qed jintalab mill-Kummissarju tal-Artijiet ikun qed jigi stultifikat l-ghan li huwa ntiz li jintlahaq bi procediment ta` xoljiment u stralc ta` kumpannija.**

Jekk taghti permess lill-Kummissarju tal-Artijiet sabiex ikompli jmexxi bit-talbiet li ressaq fil-kawza Rik. Gur. Nru. 461/2015 JPG, il-procediment tal-lum mhux se jibqa` **a collective procedure for the benefit of creditors generally**

Ghaliex li se jigri huwa illi l-uniku attiv li ghandha Vittoriosa Gaming Limited, u cioe` is-subcens tas-sit, imur ghall-beneficcju ta` **specific creditors individually** bil-konsegwenza li l-*winding up and liquidation procedure* pendenti quddiem din il-Qorti tkun saret ta` xejn ghaliex kreditur partikolari ser ikun thalla jdur mal-procediment u jenforza l-pretensjonijiet tieghu a skapitu tal-kredituri l-ohra.

Din il-konsiderazzjoni li tirrendi inutili l-*winding up and liquidation procedure* tassumi aktar rilevanza fil-kaz tal-lum meta tqis illi l-kawza Rik. Gur. Nru. 461/2015 JPG kienet prezentata tliet snin wara li bdiet l-*winding up and liquidation procedure*, u l-Kummissarju tal-Artijiet ma talabx li jippartecipa fil-procediment skont l-Art 218(6) tal-Kap 386.

**Din il-Qorti mhijiex sejra taghti l-permess rikjest mill-Kummissarju tal-Artijiet u b`hekk izzomm bilanc bejn l-interessi tal-kredituri ta` Vittoriosa Gaming Limited.**

## **Provvediment**

**Ghar-ragunijiet kollha premessi, il-Qorti qeghda tichad it-talba tal-Kummissarju tal-Artijiet kif dedotta fir-rikors tieghu tat-28 ta` Novembru 2016. L-ispejjez ta` dan il-provvediment jibqghu bla taxxa.**

**Onor. Joseph Zammit McKeon  
Imhallelf**

**Amanda Cassar  
Deputat Registratur**