



QORTI CIVILI PRIM`AWLA

**ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON**

Illum il-Hamis 13 ta` Lulju 2017

**Kawza Nru. 5
Rikors Nru. 1088/16 JZM**

**Supreme Travel Limited
(C16048)**

kontra

Explore Malta Limited (C37884)

u

**b`digriet moghti fl-20 ta` Marzu
2017 gew nominati l-Avukat
Josette Sultana u l-Prokuratur
Legali Gerald Bonello bhala
kuraturi sabiex jirraprezentaw
lis-socjeta` intimata Explore
Malta Limited (C37884)**

Il-Qorti :

I. Preliminari

Rat ir-rikors ipprezentat fid-29 ta` Novembru 2016 li jaqra :-

Illi b`sentenza tal-Onorabbli Qorti tal-Magistrati (Malta) fil-kawza fl-ismijiet Supreme Travel Limited vs Explore Malta Limited datata 6 ta` Mejju 2015 (Avviz Nru: 362/12CSH), liema sentenza ghaddiet in gudikat, il-kumpannija rikorrenti giet kanonizzata kreditrici tal-kumpannija intimata fis-somma ta` €4,100 (erbat elef u mitt ewro), oltre imghaxijiet u spejjez.

Illi fit-12 ta` Jannar 2016 il-kumpannija rikorrenti intavolat Mandat ta` Sekwestru Ezekuttiv bin-numru 68/16 ghall-ammont pretiz u l-ispejjez u l-imghax.

Illi fil-11 ta` Frar 2016 il-kumpannija rikorrenti intavolat Mandat ta` Qbid Ezekuttiv bin-numru 325/16 ghall-ammont pretiz u l-ispejjez u l-imghax.

Illi izda sal-lum din is-somma baqghet ma thallsitx, minkejja diversi tentattivi da parti tal-kumpannija rikorrenti.

Illi ghaddew aktar minn erbgħa u ghoxrin (24) gimgha mill-prezentata tal-Mandat ta` Sekwestru Ezekuttiv Numru 68/16 u inoltre ghaddew aktar minn erbgħa u ghoxrin gimgha mill-prezentata tal-Mandat ta` Qbid Ezekuttiv Numru 325/16, u d-dejn tal-kumpannija intimata għadu dovut fl-intier tieghu.

Illi għalhekk il-kumpannija intimata ma tistax thallas id-djun tagħha fis-sens tal-artiklu 214(5) tal-Att dwar il-Kumpaniji (Kap. 386 tal-Ligijiet ta` Malta) u hemm lok li l-kumpannija xxolji u tigi stralcjata gudizzjarment kif irid l-artiklu 214(2)(a)(ii) tal-Kap. 386.

Illi minn ricerki li għamlet il-kumpannija rikorrenti fis-sit tal-MFSA qabel intavolat dan ir-rikors irrizultatħa wkoll li ::

(a) *Il-kumpannija intimata għandħa biss authorised u issued share capital ta` €1,164.69 konsistenti f`ħames mitt share;*

(b) *L-aħħar financial statement ipprezentat mar-Registratur tal-Kumpaniji jirrigwarda s-sena bazi li għalqet fil-31 ta` Mejju 2012 liema*

nuqqas johloq ukoll pregudizzju serju ghal kredituri u terzi li kienu jinnegozzjaw mal-kumpannija intimata li minhabba dan in-nuqqas mhumieq f'pozizzjoni li jivverifikaw il-qagħda finanzjarja tal-kumpannija intimata wara dik is-sena;

(c) Id-diretturi tal-kumpannija Monica Calvert (ID 400760M u Barry Calvert (ID 2013160P) irrizenjaw minn diretturi rispettivament fl-1 ta` April 2016 u fl-1 ta` Mejju 2016;

Illi fid-dawl ta` dawn il-fatti l-kumpannija attrici tissottometti li hemm lok li l-kumpannija intimata xxolji u tigi stralcjata wkoll ai termini tal-artiklu 214(2)(b)(iii) tal-Kap. 386 [“ragunijiet gravi bizzejjed li jiggustifikaw ix-xoljiment u konsegwentement l-istralc tal-kumpannija”].

Illi inoltre, għall-istess ragunijiet, il-kumpannija attrici bir-rispett tissottometti li mhux biss li l-kumpannija Explore Malta Limited hija insolventi imma wkoll li fit-tmexxija tagħha, d-diretturi tal-kumpannija Monica Calvert (ID 400760M) u Barry Calvert (ID 2013160P) wettqu kummerc bi frodi u/jew zbaljat fis-sens tal-Artikli 315 u/jew 316 tal-Att dwar il-Kumpannija (Kapitlu 386 tal-Ligijiet ta` Malta) u għalhekk fl-istadju opportun hemm lok li jinstabu personalment responsabbli għad-djun tal-kumpannija.

Għaldaqstant tghid il-kumpannija intimata għaliex din l-Onorabbli Qorti m`għandhiex, prevja kull dikjarazzjoni necessarja u opportuna, joghghobha :

1. Tordna x-xoljiment u konsegwentement l-istralc tal-kumpannija intimata Explore Malta Limited (C37884) u dan ai termini tal-Artikli 214(2)(a)(ii), 214(5), 214(2)(b)(iii) u 218 tal-Att dwar il-Kumpannija (Kapitlu 386 tal-Ligijiet ta` Malta);

2. Tagħti kull provediment iehor li din l-Onorabbli Qorti jidhrilha xieraq u opportun.

Bl-ispejjez kontra l-kumpannija intimata li minn issa hija ingunta għas-subizzjoni u b`rizerva għal kull azzjoni ulterjuri spettanti lill-kumpannija rikorrenti.

Rat illi l-kontenut tar-rikors kien konfermat bil-gurament minn Nazzareno Abela, direttur tas-socjeta` rikorrenti.

Rat il-lista tax-xhieda u l-elenku ta` d-dokumenti.

Rat ir-risposta li pprezentaw il-kuraturi deputati fil-5 ta` Mejju 2017 li taqra :-

i. Illi f`dan l-istadju l-esponenti mhumiex edotti mill-fatti u ghalhekk jirrizervaw li jipprezentaw risposta ulterjuri fi stadju aktar avvanzat tal-proceduri jekk ikun il-kaz.

ii. Salv eccezzjonijiet ulterjuri.

Bl-ispejjez.

Semghet ix-xiehda ta` Kenneth Dimech u tal-P.L. Quentin Tanti bhala rapprezentant tar-Registratur tal-Kumpanniji fl-udjenza tad-19 ta` Gunju 2017.

Rat id-dokumenti kollha li tressqu bhala prova fil-kors tal-kawza.

Rat id-digriet li tat fl-udjenza tad-19 ta` Gunju 2017 fejn halliet il-kawza ghal provvediment ghal-lum.

Rat l-atti l-ohra tal-kawza.

II. Xiehda

Kenneth Dimech xehed li huwa kien l-awditur tas-socjeta` ntimata. Kien mill-bidu nett li twaqqfet awditur taghha. L-ahhar audit li ghamel kien ghas-sena li ghalqet Mejju 2012. Ma ghamilx *audits* ohra, peress li baqa` ma thallasx dak dovut lilu. Kellu jithallas ta` sentejn b`lura ; bil-preciz ghas-snin 2011 u 2012.

Kompla jghid illi saru accounts fis-sens illi kienu aggornati, pero` audits ma kienux saru. L-*audit* tal-2012 sar madwar tmien xhur wara ghalqet is-sena.

Qal illi f`Mejju 2012, is-socjeta` ntimata kellha *net losses* ta` €63,531, u kellha *share capital* ta` €233. Dak iz-zmien kienet *trading* u kellha *turnover* ghal dik is-sena ta` EUR 46,000 li kien anqas mis-sena ta` qabel. Pero` kien hemm *accumulated losses*.

Stqarr illi n-negozju tas-socjeta` ntimata kien “*provision of audio visual, translation and audio guide services to the leisure and cultural industry*”.

Qal illi kienet ilha sentejn zgur topera *at a loss* u cioe` l-2011 u 2012 bil-konsegwenza li f`sentejn ghamlet telf ta` €34,000. Ippreciza illi Mejju 2010, ghalqet b`telf ta` €29,768. Fl-2011 ghamlet telf ta` €15,000, u fl-2012 ghamlet telf ta` €18,600.

Qal illi d-diretturi tal-kumpannija kienu konsapevoli li kienet qeghda topera *at a loss* peress li ffirmaw l-*accounts*. Spjega li meta huwa kien jigbed l-attenzjoni taghhom li l-kumpannija ma kinitx fil-pozizzjoni li thallas id-djun taghha, dawn kienu jassigurawh li kienu sejr in ighinu huma direttament il-kumpannija b`finanzjament minn taghhom. Kien ghalhekk illi fl-audit hemm note 15 li tghid illi s-socjeta` kienet trattata bhala *going concern* dment li jinstab *fresh capital*.

Gara li l-kumpannija baqghet bl-istess kapital, ghalkemm kien hemm *loans* ta` €66,000. Fil-fatt it-telf jidher li kien sostnut mill-azzjonisti ghax fl-2011, kien hemm *shareholders` loans* ta` €51,700, u fl-2012 kien hemm *shareholders loans* ta` €66,700. B`hekk l-*accumulated losses* kienu ta` €36,500.

Ikkonferma li jekk l-azzjonisti ma jibqghux jghaddu kapital gdid, il-kumpannija ma tistax tkompli ghaddejja `l quddiem ghaliex in-negozju taghha ma jiggenerax bizzejjed *revenue*.

P.L. Quentin Tanti ghar-Registratur tal-Kumpanniji pprezenta r-*registered documents* ta` Explore Malta Limited (C-37884), li kienet fis-26 ta` Jannar 2006. L-ahhar *annual return* li dahlet kienet tkopri sas-26 ta` Jannar 2016. Fl-4 ta` Mejju 2016 dahlet Form K permezz ta` liema Monica Culvert

rizenjat minn direttur ta` Explore Malta Limited sa mill-1 ta` April 2016. Qal li dahlet Form K ohra fil-15 ta` Lulju 2016, permezz ta` liema Barry E Culvert irrizenja wkoll minn direttur ta` Explore Malta Limited sa mill-1 ta` Mejju 2016. Hadd ma ha post dawn iz-zewg diretturi wara r-rizenja tagghom. Dan ifisser illi diga` ilha fuq sena minghajr diretturi.

Qal illi l-ahhar *abridged audited accounts* li dahlu huma *statement of financial position as at 31st May 2012*.

III. Dokumenti

Kienu prezentati bhala prova dawn id-dokumenti :-

- a. Dokument mill-*website* ta` l-MFSA li juri d-dettalji tal-kumpannija intimata (Dok ST1 a fol 4)
- b. Dokument mill-*website* ta` l-MFSA li juri l-*authorised* u l-*issued share capital* tal-kumpannija intimata (Dok ST2 a fol 5)
- c. Dokument mill-*website* ta` l-MFSA li juri d-dettalji ta` l-azzjonisti u ufficjali prezenti tal-kumpannija intimata (Dok ST3 a fol 6)
- d. Dokument mill-*website* tal-MFSA li juri l-lista tad-dokumenti ipprezentati mill-kumpannija intimata mar-Registratur tal-Kumpanniji (Dok ST 4 a fol 7 sa 8)
- e. Dokument mill-*website* tal-MFSA li juri d-data tar-rizenja ta` Monica Calvert minn direttur tal-kumpannija intimata (Dok ST 5 a fol 9)
- f. Dokument mill-*website* tal-MFSA li juri d-data tar-rizenja ta` Barry Calvert minn direttur tal-kumpannija intimata (Dok ST 6 a fol 10)
- g. Kopja tal-ahhar *abridged financial statements* tal-kumpannija intimata ipprezentati lir-Registratur tal-Kumpanniji (Dok ST 7 a fol 11 sa 21)
- h. Kopja legali tal-mandat ta` sekwestru eżekuttiv numru 68/16 fl-ismijiet *Supreme Travel Limited vs Explore Malta Limited* (Dok ST 8 a fol 22 sa 26)
- i. Kopja legali tal-mandat ta` qbid eżekuttiv numru 325/16 fl-ismijiet *Supreme Travel Limited vs Explore Malta Limited* (Dok ST 9 a fol 27 sa 30)

- j. Kopja tas-sentenza fl-ismijiet *Supreme Travel Limited vs Explore Malta Limited* datata 6 ta` Mejju 2015 (Dok ST 10 a fol 31 sa 51)
- k. Kopja tat-taxxa ufficjali tal-ispejjes tal-kawza fl-ismijiet *Supreme Travel Limited vs Explore Malta Limited* (fol 52)
- l. Kopja tar-*report and accounts* ghas-sena li ghalqet fil-31 ta` Mejju 2012 tal-kumpannija Explore Malta Limited (Dok ND1) ezebit fis-seduta tad-19 ta` Gunju 2017)
- m. Dokumenti ezebiti mir-Registratur tal-Kumpanniji (Dok MFSA1) fis-seduta tad-19 ta` Gunju 2017);
- n. Kopja tac-certifikat tar-registrazzjoni tal-kumpannija Explore Malta Ltd (Dok MFSA2) ezebit fis-seduta tad-19 ta` Gunju 2017)
- o. Kopja tal-bank slips tal-initial share capital (Dok MFSA3) ezebit fis-seduta tad-19 ta` Gunju 2017) u
- p. payment advice note (Dok MFSA4) ezebit fis-seduta tad-19 ta` Gunju 2017.

IV. Locus standi

Sabiex jintalab ix-xoljiment u l-istralc ta` kumpannija, irid jigi osservat il-vot tal-**Art 218(1) tal-Kap 386** li jghid hekk :-

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

(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-laqgha generali jew mill-bord tad-diretturi taghha 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.

Meqjusa d-disposizzjonijiet citati mis-socjeta` rikorrenti bhala bazi ghall-azzjoni taghha, u tenut kont illi kienet kanonizzata bhala kreditur tas-socjeta` ntimata bis-sahha ta` sentenza moghtija mill-Qorti tal-Magistrati (Malta) fil-kawza fl-ismijiet **Supreme Travel Limited vs Explore Malta Limited** tas-6 ta` Mejju 2015 Avviz Nru 362/2012 CSH li ghaddiet in gudikat, is-socjeta` rikorrenti ghandha *locus standi* biex tippromwovi l-azzjoni tal-lum.

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

Is-socjeta` rikorrenti tikkontendi li din il-Qorti ghandha tordna x-xoljiment u l-istralc tas-socjeta` ntimata abbazi tal-Art 214(2)(a)(ii) tal-Kap 386.

Id-disposizzjoni tghid illi kumpannija *tista`* xxolji u tkun stralcjata mill-qorti :

“... jekk il-kumpannija ma tkunx tista` thallas id-djun taghha.”

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 permezz ta` 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 ntegrati fl-Att XXV tal-1995, illum Kap 386.

Fil-ligi taghna, li kumpannija ma tkunx tista` thallas id-djun taghha ghandu sinjifikat preciz u definit mil-ligi stess. Infatti fl-Art 214(5) il-ligi tistabilixxi liema huma c-cirkostanzi fejn kumpannija titqies li ma tkunx tista` thallas id-djun taghha ghall-finijiet tal-Art 214(2)(a)(ii). Ghalhekk l-Art 214(2)(a)(ii) ma jistax jinqara minghajr ma ssir riferenza ghall-Art 214(5).

VI. **L-Art 214(5) tal-Kap 386**

Tnejn huma c-cirkostanzi definiti mil-ligi meta kumpannija ghandha titqies li ma tistax 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

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.

Fil-kaz tal-lum, ma kienx speċifikat mir-rikorrenti fuq liema miz-zewg sitwazzjonijiet qegħda ssostni li l-intimata ma tistax thallas id-djun tagħha.

Madanakollu minn ezami tal-premessi jidher illi qegħda toqghod fuq l-ewwel sitwazzjoni.

Dan premiss, sabiex ma thalli xejn barra, il-qorti sejra tqis iz-zewg sitwazzjonijiet u tara xi provi tressqu fir-rigward ta` kull waħda.

VII. L-Art 214(5)(a) tal-Kap 386

Dwar din id-disposizzjoni, tajjeb jingħad illi titkellem dwar l-eżekuzzjoni ta` atti eżekuttivi.

Għalhekk kumpannija ma tistax titqies illi mhijiex f` qagħda li thallas id-djun tagħha abbazi ta` mandat kawtelatorju, anke jekk dak il-mandat ikun gie eżegwit kontra d-debitur.

Tajjeb jingħad ukoll illi l-fattur rilevanti sabiex jiskattaw l-erbgha u għoxrin (24) gimgha huwa l-eżekuzzjoni tal-Mandat. Fil-kaz ta` mandat ta` sekwestru, l-eżekuzzjoni tal-mandat tiskatta bin-notifika tal-att lis-sekwestratarji mingħajr il-htiega tan-notifika tad-debitur.

Fil-kaz ta` mandat ta` sekwestru eżekuttiv, l-eżekuzzjoni tal-mandat issehh bin-notifika tal-att lis-sekwestratarji mingħajr il-htiega tan-notifika tad-debitur.

Għalkemm b`mod aktar strett, fil-ligi tagħna dak previst mill-Art 214(5)(a) jixbah il-koncett ta` cash flow insolvency fil-ligi Ingliza.

Fit-Tmien Edizzjoni (2012) ta` l-ktieb **Boyle & Birds` Company Law** (pubblikat minn Jordans) pg 859 jinghad illi –*“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-kaz ta` *cash flow insolvency* din il-Qorti tghid illi filwaqt fil-ligi taghna huwa specifikat bil-preciz x`m`ghandhiex taghmel kumpannija debitrice 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 illi –

“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 ...

VIII. L-Art 214(5)(b) tal-Kap 386

Fit-test bl-Ingiliz l-Art 214(5)(b) tal-Kap 386 jaqra :-*“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 Ingliza 1986, 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 – *“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 mhijiex identika ghalkemm tixbah lil dik tal-ligi Ingliza.

Id-divergenza bejn iz-zewg ligijiet hija li filwaqt li fil-kaz taghna l-kriterju huwa fis-sens illi *“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 kwistjoni 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-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 ...”

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.”

Dwar l-Art 214(5)(b) din il-Qorti diversament presjeduta fid-decizjoni 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.”

IX. L-Art 214(2)(b)(iii) tal-Kap 386

Ir-rikorrenti tikkontendi wkoll illi hemm bazi ghax-xoljiment u l-istralc tal-intimata abbazi tal-Art 214(2)(b)(iii) li jghid illi : *“kumpannija **ghandha** (enfasi ta` din il-Qorti) tkun xolta bil-qorti jekk ... il-qorti tkun tal-fehma li hemm ragunijiet gravi bizzejjed li jiggustifikaw ix-xoljiment u konsegwentement l-istralc tal-kumpannija”.*

Is-sinjifikat tad-disposizzjoni huwa car.

Tithalla diskrezzjoni wiesa` lill-Qorti sabiex tistabilixxi hi jekk fil-fehma taghha jirrizultawx fatti u cirkostanzi “gravi bizzejjed” li jwassluha sabiex taghmel id-dikjarazzjoni ta` xoljiment u stralc.

Fil-Kap 386 ma hemmx tifsira ta` “ragunijiet gravi”.

Il-Qorti ghalhekk ma ghandha tiskarta xejn. M`ghandhiex tillimita l-esercizzju tad-diskrezzjoni taghha ghal fatti jew cirkostanzi li jkunu sehew sad-data tal-presentata tar-rikors izda ghandha taghti piz ghal kull ma jigri anke wara sa ma tigi biex taghti d-decizzjoni taghha.

Fl-Art 122 tal-Insolvency Act 1986 tal-Ingilterra, hemm elenku tac-cirkostanzi fejn kumpannija tista` tigi xjolta u stralcjata mill-Qorti. Disposizzjoni identika ghal taghna fl-Art 214(2)(b)(iii) tal-Kap 386 ma hemmx fl-Insolvency Act 1986.

Il-wahda li tqarreb l-aktar lejha hija l-Art 122(1)(g) li jghid : *the court is of the opinion that it is just and equitable that the company should be wound up.*

Huwa evidenti anke mad-daqqa t`ghajn li d-disposizzjoni taghna hija aktar stretta fis-sens illi fil-kaz taghna l-Qorti xxolji u tistralcja meta fil-fehma taghha ikun hemm ragunijiet gravi bizzejjed, waqt li fil-ligi Ingliza, il-kriterju li fuqu l-Qorti trid tibni l-fehma taghha huwa dak tal-gustizzja u l-ekwita`.

U l-istrettezza tad-disposizzjoni taghna taghmel hafna sens anke ghaliex jekk il-Qorti tesprimi l-fehma li hemm ragunijiet gravi hija obbligata tordna x-xoljiment u l-istralc tal-kumpannija ; hemm m`ghandhiex aktar diskrezzjoni.

Dan premiss, il-Qorti tghid li r-riferenza ghall-Art 122(1)(g) tal-Insolvency Act 1986 hija utili ghaliex il-linja li hadu l-Qrati Inglizi biex ighidu x`inhu *just and equitable* ghall-fini ta` *winding up* tghin biex tiftah tieqa lill-Qrati taghna ghall-interpretazzjoni ta` x`hinuma ragunijiet gravi bizzejjed.

Kull kaz ghandu l-istorja tieghu u ghalhekk il-Qorti trid tibni l-fehma taghha fuq il-fatti u cirkostanzi ta` l-kaz.

X. Risultanzi

1. Dwar l-Art 214(5)(a)

Ghall-fini ta` din id-disposizzjoni, trid issir il-prova illi d-dejn dovut baqa` ma thallasx ghal kollox jew in parte wara erbgha u ghoxrin (24) gimgha mill-ezekuzzjoni ta` titolu ezeuttiv kontra l-kumpanija b`xi wiehed mill-atti ezeuttivi msemmijin fl-Art 273 tal-Kap 12.

Fil-kaz tal-lum, kienet esebita kopja tas-sentenza tal-Qorti tal-Magistrati (Malta) tas-6 ta` Mejju 2015 (Avviz Nru 362/12 CSH) fl-ismijiet **Supreme Travel Limited vs Explore Malta Limited** fejn jirrizulta illi Supreme Travel Limited giet kanonizzata kreditrici tas-socjeta` intimata fis-somma ta` EUR 4,100 oltre imghaxijiet u spejjez (fol 32 sa fol 51). Kienet ezebita taxxa ufficjali ta` l-ispejjez relatati ma` dik il-kawza liema taxxa ufficjali tinsab ezebita a fol 52.

Wara li d-decizzjoni ghaddiet in gudikat, kien prezentat rikors ghall-hrug ta` mandat ta` sekwestru ezeuttiv bin-numru 68/16 fit-12 ta` Jannar 2016 (fol 23 et seq). Il-hrug tal-mandat kien akkordat fit-13 ta` Jannar 2016. Jidher illi l-mandat kien notifikat lis-sekwestratarji kollha fil-15 ta` Jannar 2016 eskluza biss is-sekwestratarju 5D Limited li kienet notifikata fis-16 ta` Frar 2016 (fol 23 fuq wara u 26 fuq wara).

Ghalhekk jirrizulta ppruvat illi ghaddew l-24 gimgha mill-ezekuzzjoni ta` l-att ezeuttiv tas-socjeta` rikorrenti.

Kien ippruvat ukoll illi nonostante l-ezekuzzjoni tal-att ezeuttiv, id-dejn baqa` ma thallasx. Dan qed jinghad ghaliex il-kontenut fattwali tar-rikors promotur tal-azzjoni kien konfermat bil-gurament minn Nazzareno Abela direttur ta` Supreme Travel Limited, inkluz illi minkejja li ghaddew l-24 gimgha mill-ezekuzzjoni, ir-rikorrenti baqghet ma thallset xejn minn dak li kellha tiehu.

Ghaldaqstant il-Qorti hija sodisfatta li saret il-prova ta` dak rikjest fl-Art 214(5)(a) in kwantu dan ghandu x`jaqsam mal-mandat ta` sekwestru ezekuttiv nru 68/16.

Irrizulta illi sar ukoll mandat ta` qbid ezekuttiv nru 325/16 u dan ghall-ammont pretiz flimkien ma` l-ispejjez u imghax (fol 28 et seq).

Madanakollu, mill-atti ta` l-mandat, irrizulta illi l-mandat ma kienx x ezegwit minhabba li fil-post indikat fil-mandat ma kien hemmx assi appartenenti lis-socjeta` intimata (fol 30 fuq wara).

In vista ta` dan in-nuqqas ta` ezekuzzjoni, din il-Qorti mhijiex sodisfatta li saret il-prova ta` dak rikjest fl-Art 214(5)(a) limitament ghal dak li ghandu x`jaqsam mal-mandat ta` qbid ezekuttiv nru. 325/16.

2. Dwar l-Art 214(5)(b)

Minn ezami ta` *directors` report* ghas-sena li ghalqet fil-31 ta` Mejju 2012, irrizulta illi:

“During its operations, the company`s turnover decreased by EUR 64,827 to EUR 46,566, while its gross profit amounted to EUR 6,998 (2011: EUR 25,569) resulting in a gross profit margin of 15% (2011: 25%). Although administrative expenses decreased to EUR 33,492 (2011` EUR 40,373) the company still registered a net loss before tax for the year of EUR 17,450 compared to a corresponding net loss of EUR 15,195 in 2011.” (it-tielet pagna ta` Dok KD1 ezebit fis-seduta tad-19 ta` Gunju 2017).

Irrizulta wkoll minn pagna sitta ta` l-istess *audited accounts* ghas-sena li ghalqet f`Mejju 2012, hekk imfissra mill-awditur Kenneth Dimech, il-kumpannija kellha *net losses* ta` €63,551. In fatti, il-kumpannija ghalqet b`telf ta` €29,768 fis-sena 2010, b`telf ta` €15,195 f`2011 u b`telf ta` EUR 18,588 fis-sena tat-2012.

Minn ezami ta` Dok MFSA 1 li fih jinkludi *l-audited accounts* ghas-snin li ghalqu minn Mejju 2012 sa Mejju 2007 , irrizulta li f`Mejju 2009, kien hemm telf ta` EUR 34,257 mentri f`Mejju 2008, kien hemm telf ta` EUR 35,621. F`Mejju 2007, il-kumpanija ghamlet telf ta` EUR 11,167.

B`zieda ma` dan, il-Qorti tosserva illi *fl-audited accounts* ghas-sena li ghalqet f`Mejju 2012 kien sottolinjat illi :

“The Company incurred a net loss of EUR 18,588 during the year ended 31st May 2012 and as at that date, the company`s total liabilities exceeded its total assets by EUR 63,318. However, the company`s shareholders have undertaken to continue providing financial support to enable the company meet its financial commitments as and when they fall due.”

Sabiex ikun hemm *balance sheet insolvency*, *il-liabilities (contingent u prospective)* iridu jaqbzu l-assi.

Irrizulta b`mod car minn ezami ta` Dok KD1 illi jekk l-azzjonisti ma jaghtux kapital gdid f`din il-kumpanija, din il-kumpanija ma tistax timxi minhabba li l-operat taghha ma jiggenerax bizzzejjed *revenue*.

L-istampa li tirrizulta mill-*financial statements* hija dik ta` socjeta` li waslet at *a point of no return*. Tant is-sitwazzjoni hija hazina li l-kumpanija spiccat minghajr diretturi ghaliex wara r-rizenja taz-zewg diretturi, dawk il-karigi ma gewx assenjati lil haddiehor.

Fil-mori ta` din il-kawza, is-socjeta` intimata baqghet ma pprezentat l-ebda risposta u kien ghalhekk li kellhom jinhatru kuraturi deputati ghas-socjeta` ntimata.

Kif spjega l-istess awditur, minghajr l-input finanzjarju diret tal-azzjonisti, is-socjeta` mhijiex fil-qaghda li thallas id-dejn qawwi li ghandha ghaliex dak li taqla` imur biss biex jitnaqqru l-accumulated losses mhux biex tigi generata attivita` ekonomika gdida li thalli l-qligh.

Huwa evidenti ghall-Qorti li l-azzjonisti qatghu qalbhom ghal kollox.

Il-*liabilities* taghha huma evidenti fil-balance sheet.

Ghaldaqstant, il-Qorti ssib li saret il-prova sal-grad rikjest milligi ta` dak previst fl-Art 215(b) tal-Kap 386.

3. Id-diskrezzjoni tal-Qorti

Accertat illi jirrizultaw ippruvati r-reqwiziti tal-Art 214(2)(a)(ii) u tal-Art 214(5)(a) u Art 214(5)(b) tal-Kap 386, il-Qorti trid tara jekk fuq il-provi akkwiziti, ghandhiex hi tezercita d-diskrezzjoni taghha li tordna x-xoljiment u l-istralc tas-socjeta` intimata.

Fis-sentenza li tat fit-18 ta` Settembru 2009 fil-kawza “**Avukat John Refalo noe vs Garden of Eden Limited**” il-Qorti tal-Appell qalet hekk :-

“L-Artikolu 214 tal-Att dwar il-Kumpaniji jiddetermina kif u meta kumpanija ghandha “titqies” (“shall be deemed” fit-test Ingliz) li ma tkunx tista` thallas id-djun taghha. Ir-regoli huma cari u ma jhallu ebda lok ghall-provi in kuntrarju. Jekk il-kumpanija ma thallasx fi zmien 24 gimgha, hija titqies li ma tistax thallas id-djun taghha, u jekk tirrizulta din ic-cirkostanza, il-Qorti tista` tipprocedi ghall-istralc taghha.”

Il-Qorti taghmel riferenza ghal **Palmer`s Company Law** (Edition 25 - Sweet & Maxwell) fejn jinghad :-

“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.”

Dan premiss, il-Qorti ghamlet ezami akkurat kemm tad-dokumenti esebiti u kif ukoll ta` dak mistqarr mix-xhieda.

Huwa notevoli li fil-kawza s-socjeta` intimata baqghet ma pprezentat l-ebda risposta u gew inkarigati kuraturi deputati biex jirraprezentawha peress li baqghet bla diretturi.

Jidher ukoll li sa mill-formazzjoni taghha sal-2012 (li hija l-ahhar sena li fiha sar *audit*) din il-kumpannija dejjem kienet qed topera b`telf.

Inoltre ma tressqu l-ebda provi li juru li din il-kumpannija tista` b`xi mod thallas dawn id-djun taghha.

Tajjeb jinghad illi l-procedura ta` xoljiment u stralc ta` kumpannija mhijiex intiza sabiex taghmel pressjoni fuq id-debitur. Il-legislatur haseb ghal varji metodi u proceduri ohra kif persuna tista` tirkupra kreditu taghha. Dak li trid tara l-Qorti huwa jekk bil-fatt innifsu li gie ppruvat ir-rekwizit ai termini ta` l-Art. 214(5)(a) u f`dan il-kaz anke ta` l-Art. 214(5)(b) tal-Kap 386 u tenut kont tac-cirkostanzi ta` dan il-kaz, hijiex tal-fehma li ghandha tezercita d-diskrezzjoni taghha u tordna x-xoljiment u stralc ta` din il-kumpannija.

Fil-kaz tal-lum, il-Qorti sejra tezercita d-diskrezzjoni taghha - kif trid il-ligi - u cioe` li xxolji u tistralcja lil Explore Malta Limited.

4. Dwar l-Art 214(2)(b)(iii)

Meqjusa l-provi li tressqu fl-assjem taghhom, il-Qorti tghid illi m`ghandhiex prova ta` x`assi ghandha l-intimata u dana peress li l-ahhar *audit* li gie pprezentat kien dak ghas-sena li ghalqet f`Mejju 2012.

Lanqas ma tressqu provi dwar jekk hemmx assi li huma disponibbli sabiex jinbieghu halli thallas lill-kredituri taghha fi zmien ragonevolment qasir.

Ma tressqux provi li l-kumpannija tista` tkompli bl-operat li ghaliha kienet ikkostitwita.

In-nuqqas li jigu pprezentati *audited accounts* aggornati johloq pregudizzju serju ghal *bona fide creditors and third parties* li jaghmlu negozju mal-kumpannija intimata, peress li minhabba dan in-nuqqas

mhumieix f'pozizzjoni li jivverifikaw il-qagħda finanzjarja tal-kumpannija intimata.

Barra minn hekk huwa wkoll serju l-fatt li l-intimata baqgħet ma hallsitx id-debiti tagħha u spiccat mingħajr diretturi biex jiggwidawha.

Għaldaqstant, meta tqis l-assjem, din il-Qorti għandha c-certezza morali li x-xoljiment u stralc ta` Explore Malta Limited ikun gustifikat anke abbazi tal-Art 214(2)(b)(iii) tal-Kap 386.

Provvediment

Għar-ragunijiet kollha premessi, il-Qorti qegħda tipprovdi dwar l-istanza tar-rikorrenti billi :-

Riferibbilment għall-ewwel talba, tordna x-xoljiment ta` Explore Malta Limited (C37884) abbazi ta` l-Art 214(2)(a)(ii), ta` l-Art 214(5)(a) u (b), u ta` l-Art 214(2)(b)(iii) tal-Kap 386 tal-Ligijiet ta` Malta, b`effett mil-lum, kif previst mill-ewwel proviso ta` l-Art 223(1) tal-Kap 386 tal-Ligijiet ta` Malta.

Tordna wkoll l-istralc ta` Explore Malta Limited (C37884).

Riferibbilment għat-tieni talba, tahtar lir-Ricevitur Ufficjali bhala stralcjarju ta` Explore Malta Limited (C37884) bis-setgħat u bid-dmirijiet kollha li huma stabbiliti fil-Kap 386 tal-Ligijiet ta` Malta.

Tordna li l-ispejjez ta` l-kuraturi deputati jithallsu skont il-ligi.

Tordna li l-ispejjez l-oħra ta` dan il-procediment, inkluzi d-drittijiet u l-ispejjez tal-istralcjarju, għandhom jithallsu mill-kumpannija rikorrenti u minn Explore Malta Limited (C37884) *in solidum* bejniethom, u dan bl-applikazzjoni tal-Art 236(2) tal-Kap 386 tal-Ligijiet ta` Malta.

Thalli l-istralc ghal nhar it-Tlieta 3 ta` Ottubru 2017 fid-9.00a.m.

**Onor. Joseph Zammit McKeon
Imhallef**

Deputat Registratur