



QORTI CIVILI PRIM`AWLA

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum it-Tlieta 31 ta` Ottubru 2017

Rik. Nru. 572/2017 JZM

Fl-atti tar-rikors ipprezentat kontestwalment ai termini tal-Artiklu 402 tal-Kap 386 tal-Ligijiet ta` Malta fl-ismijiet:

Calamatta Cuschieri Investment Services Limited (C13729) bhala nominee shareholder ghan-nom ta` l-AMB Capital Ireland Limited; ii. Jamrae Capital Corp; iii. Refucan Limited; iv. Warren Friedland; v. Mondo Investments and Finance Ltd.; vi. Evan Gregory Hoff; vii. Andrew James Reader; viii. Shane Thompson; u ix. Bellerive Capital (BCP) 13 Limited; u l-Avukat Dr Joseph Camilleri bhala mandatarju specjali ta` Genesis PFC, socjeta` estera registrata l-Mauritius bin-numru 134001C1/GBL

kontra

Pefaco International plc

u

b`digriet tat-18 ta` Lulju 2017 moghti fil-kawza fl-ismijiet: Calamatta Cuschieri Investment Services Limited (C13729) bhala nominee shareholder ghan-nom ta` l-AMB Capital Ireland Limited ; ii. Jamrae Capital Corp; iii. Refucan Limited; iv. Warren Friedland; v. Mondo Investments and Finance Ltd.; vi. Evan Gregory Hoff; vii. Andrew James Reader; viii. Shane Thompson; u ix. Bellerive Capital (BCP) 13 Limited ; u l-Avukat Dr Joseph Camilleri bhala mandatarju speċjali ta` Genesis PFC, socjeta` estera registrata l-Mauritius bin-numru 134001C1/GBL *kontra* Pefaco International plc (Rikors Nru. 571/2017 JZM), is-socjeta` estera GRUPO Pefaco S.L. kienet ammessa tintervjeni *in statu et terminis*

Il-Qorti :

Dan tal-lum huwa provvediment dwar it-tieni (2) u dwar it-tielet (3) talbiet ta` rikors li kien ipprezentat minn Calamatta Cuschieri Investment Services Limited u ohrajn fit-23 ta` Gunju 2017. Provvediment dwar l-ewwel (1) talba kif dedotta fl-istess rikors kien inghata fl-1 ta` Awissu 2017.

I. Preliminari

It-tieni (2) talba tar-rikors taqra hekk :-

Tordna lil Pefaco (tramite d-diretturi li ghandhom access ghal tali informazzjoni) sabiex immedjatament tghaddi l-informazzjoni kollha dwar l-

istess Pefaco lid-diretturi kollha taghha, inkluz izda mhux limitatament ghall-istatements of account tal-kontijiet bankarji kollha ta` Pefaco ;

It-tielet (3) talba tar-rikors taqra hekk :-

Taghti dawk l-ordnijiet kollha li jidhrilha xierqa fic-cirkustanzi sabiex id-drittijiet tal-esponenti u tal-istess intimata jigu adekwatament protetti pendente lite.

Semghet ix-xiehda u rat il-provi l-ohra li tressqu fil-kors ta` dan il-procediment.

Semghet is-sottomissjonijiet li ghamlu d-difensuri tal-partijiet.

Rat il-verbali tal-udjenzi.

Rat illi l-kaz thalla ghal-lum sabiex tipprovdi dwar it-tieni (2) u t-tielet (3) talbiet.

Rat il-bqija tal-atti.

II. Interim relief

A skans ta` repetizzjoni, il-Qorti taghmel riferenza ghad-dottrina u ghall-gurisprudenza citata fil-provvediment taghha tal-1 ta` Awwissu 2017.

Il-Qorti tkompli tirrileva illi fil-kaz tal-lum ma hemmx kontestazzjoni bejn il-kontendenti dwar il-punt ta` dritt illi b`mod generali, fi procediment skont l-Art 402 tal-Kap 386, il-Qorti ghandha s-setgha taghti *interim relief*.

U l-Qorti tghid frankament illi ma setax ikun xort`ohra meta wiehed iqis kif svolgiet id-dottrina u l-gurisprudenza fl-Ingilterra, ghal liema sorsi dawn il-Qrati jaghmlu referenza b`mod konsistenti, minhabba l-mudell maghzul mil-legislatur taghna meta kien introdott l-Art 402.

Anke fil-gurisprudenza taghna llum huwa assodat il-principju illi fil-kazi approprijati, il-Qorti tista` taghti *interim relief* jew kif hu maghruf ukoll injunctive relief wara talba tar-rikorrent fi procedimenti dwar *unfair prejudice*.

It-tajjeb ta` ordnijiet ta` din ix-xorta, li huma intizi bhala temporanji, ghalhekk *interim*, huwa li jservu sabiex ikun rispettati l-*istatus quo* sakemm tkun mistharrga u deciza l-kwistjoni bejn l-azzjonisti jew sakemm tigi rizolta sitwazzjoni ta` konflitt fi hdan il-kumpannija.

L-awturi **Mayson, French & Ryan on Company Law** (26th Edition – 2009/2010 – OUP) ighidu hekk fil-pag 580 :-

It is desirable that the status quo should be preserved in the time between presentation and hearing of a petition under CA 2006, s.994, and the court will grant injunctions to achieve this [Re a Company (No 002612 of 1984) (1985) BCLC 80; Re a Company (No 00330 of 191) (1991) BCLC 597; Re a Company (No 00306 of 1993) (1994) BCC 883]

Ikompli jinghad hekk :-

... As usual when considering whether to grant an interim injunction, the court will not do if the balance of probabilities is against it [Rutherford (1994) BCC 876]

III. It-tieni talba

Mela l-principju primarju huwa li *interim relief* ghandu jkun disponibbli sabiex ihares il-posizzjoni tal-kumpannija u tar-rikorrent waqt li jkun qed isir is-smigh ta` procediment inizjat abbazi tal-Art 402.

Ir-rikorrenti gabu `l quddiem bhala xhud lil David Shimkins li pprezenta wkoll ghadd ta` dokumenti.

L-impressjoni li tiehu l-Qorti wara li qieset id-deposizzjoni tieghu hija li aktar milli sabiex isostni t-talba għall-ghoti ta' *inter relief* x-xiehda ta' David Shimkins marret mill-ewwel fil-mertu tal-kwistjoni bejn il-partijiet.

Bhala kontrobalanc għal li xehed David Shimkins, l-intervenuta fil-kawza gabet `il quddiem bhala xhud lil Olivier Cauro, li fis-sostanza kkontesta l-mertu tal-istanza principali, bid-differenza li waqt li kien qed jixhed, semma fatti li, fil-fehma ta' din il-Qorti, għandhom rilevanza għall-esitu tal-procediment odjern, fatti dawn li jigu kkunsidrati aktar `il quddiem fil-provvediment tal-lum.

Billi d-deposizzjoni ta' David Shimkins tittratta l-mertu, il-Qorti mhijiex sejra tilqa' t-tieni talba għaliex kwalsiasi pronunzjament tagħha dwar it-talba għall-fini tal-procediment tal-lum jincidi sostanzjalment fuq il-mertu ta' l-kawza principali li sal-lum għadha biss fl-istadju tal-ewwel dehra. Isostni din il-fehma anke l-fatt illi kif dedotta, it-tieni talba tirrispekkja bil-preciz dak li kien mitlub ukoll fil-kawza principali.

Anke għal dawn ir-ragunijiet, il-Qorti mhijiex sejra tqis il-pregudizzjali ta' l-interess sollevata mill-intervenuta fil-kawza waqt id-dibattiment għaliex dik hija materja li certament sejra tinsorgi fil-kors tal-kawza fil-mertu u li din il-Qorti jkollha tippronunzja ruhha dwarha.

In sostenn ta' dak li qed jinghad, il-Qorti tagħmel riferenza għall-provvedimenti li tat fit-12 ta' Mejju 2016 fil-kawzi : “**Dr Suzanne Wolfe Martin noe vs Geraldine Schembri et**”

Għalhekk qeghda tichad it-tieni talba.

IV. It-tielet talba

Il-Qorti sejra ticcita branc mill-kontroezami tax-xhud Olivier Cauro :-

Dr. Joseph Camilleri :

I refer to the issue of the allegedly forged bank statement. If I can refresh your memory, am I correct to state that towards the end of 2016 you were specifically asked as to the position regarding the bank accounts at Millennium and that stage you had stated that there were deposits there of about 13,600,00. Is this correct ?

Xhud :

Yes

Dr Joseph Camilleri :

Am I correct to state that even during a board meeting in April the funds were referred to as at Millennium ?

Xhud :

Yes

Dr Joseph Camilleri :

But now you have given information to the board that several months back the sum of 13,600,000 was transferred from Pefaco to GPSL ? Is that correct ?

Xhud :

Yes

Dr Joseph Camilleri :

So isn't there a contradiction here ?

Xhud :

Clearly.

Dr Joseph Camilleri :

So can you explain where this comes from ?

Xhud :

*It's very simple. We believed at the time that we would recuperate the funds, GPSL, private funds, and therefore being in a position to correct basically the withdrawal of funds, that's it, and we were convinced we would succeed. In fact I must state that the applicants were fully aware of the problems in getting back our funds. I'm talking GPSL funds. We had discussion with them, we in fact showed them documents to demonstrate that we had different funds in private bank accounts, and in fact one of the private advisers of the chairman of Genesis came to see us in Barcelona to assist to recover those funds. So the fact that GPSL had difficulty in getting those funds is a well known fact. Also I should mention that we had an agreement to provide a 16,000,000 line to the company alongside the capital increase. **We requested back I think in November 2016 that this obligation be postponed precisely because we had financial issues with recuperating our own capital, so it's, although I lied to the board, I agree.***

(enfasi ta` din il-Qorti)

Dr Joseph Camilleri :

I hope I'm misunderstanding.

Xhud :

No, I saying the truth, I lied to the board, I was convinced we should recuperate our funds and the applicants were fully aware that we had those problems.

(enfasi ta` din il-Qorti)

Dr Joseph Camilleri :

But am I correct to state that the applicants were aware of alleged problems which GPSL had not Pefaco ?

Xhud :

GPSL, exactly what I'm saying, equity, sure.

Dr. Joseph Camilleri :

So I hope I misunderstood, but you're stating that there was a transfer from Pefaco to GPSL but you hoped you would reverse it in time so as not to have to inform the board of this transfer.

Xhud :

Let me come back to you, number one the interests of PFC and GPSL are exactly the same, so I object. They may be two different companies but I'm sorry we founded and we created one and we founded and created the other, and we have the majority, we have 67% of the company. So I object to the line of questioning. Now acted in good faith to save projects which were going to be lost if we didn't have the recourse to do it, that's all. Now I'm not denying that I did not tell the truth to the board, that's true, end of the story.

(enfasi ta` din il-Qorti)

Fuq il-livell ta` *prima facie* l-fatt li Olivier Cauro jaccetta li gideb lill-bord tad-diretturi huwa fatt li jqajjem thassib anke jekk il-partecipazzjoni tas-socjeta` li jirrapprezenta ghandha il-kwota ta` maggoranza tal-ishma.

Tajjeb jinghad illi l-Art 402 tal-Kap 386 huwa ispirat mhux minn koncetti legalistici izda minn principji ta' ekwita` u ta' gustizzja li jirrikonoxxu interessi u aspettativi li jmorru ben oltre l-istatut tas-socjeta` jew addirittura tal-ligi stess.

X'effett se jkollha l-istqarrija ta' Olivier Cauro fuq il-mertu tal-kawza principali huwa prematur li jinghad. Daqstant iehor tkun intempestiva kull

konsiderazzjoni dwar jekk dik kinetx tassew stqarrija *in good faith* jew inkella stqarrija spregudikata. Kif tant`iehor hija boghod milli tiggudika jekk dak li nghad huwiex tassew *the end of the story*.

Dan premiss, il-fatt fuq livell ta` *prima facie* jitlob mill-Qorti li turi kawtela billi tintervjeni hi sabiex il-kondotta futura tad-diretturi tkun tassew in linea mal-obbligi taghhom, trasparenti, *al di fuori di ogni sospetto* u fuq kollox fl-interess tal-kumpannija. Ghal dan il-ghan, il-Qorti sejra tghaddi ghall-hatra ta` direttur *ad hoc* bla hsara ghal dak li jirrizulta mill-memorandum u mill-articles of association tal-kumpannija.

Dwar il-hatra ta` direttur bhala mizura *interim* Arden LJ ghamel din l-osservazzjoni fil-kawza “**Pringle v Callard**” [(2007) EWCA Civ 1075 ; (2008) 2 BCLC 505 at 26 et seq) :

“ ... *in essence it is contrary to principle to impose a director on a company. It is highly impracticable so to do in any event where there are disputes between directors or allegations of improper conduct. Accordingly a court would have to extraordinary cautious before imposing a director on a company by way of interim remedy. [“Mission Capital plc vs Sinclair and anr” (2010) 1 BCLC 304.*”

Tajjeb jinghad illi saret din l-osservazzjoni in vista tac-cirkostanzi partikolari ta` dak il-kaz.

Fil-kaz tal-lum, din il-Qorti tahsibha diversament minn Arden LJ wara li qieset ic-cirkostanzi li rrizultaw sal-lum. Din il-Qorti ma ssib xejn imprattikabbli fil-hatra ta` direttur *ad hoc*. Anzi tghid illi bil-hatra tkun qeghda turi kawtela bhala mezz sabiex tipprevjeni kwalsiasi *improper conduct* fil-futur mill-ufficjali tal-kumpannija.

Hekk kienet ghamlet din il-Qorti stess fil-provvediment li tat fit-2 ta` Settembru 2016 fil-kawza “**Av. Jonathan Abela Fiorentino noe vs Vroon Containers B.V. et**”

Provvediment

Ghar-ragunijiet kollha premissi, il-Qorti qeghda tipprovdi dwar it-tieni u t-tielet talbiet tar-rikorrenti noe kif dedotti fir-rikors taghhom tat-23 ta` Gunju 2017 billi :-

Tichad it-tieni talba.

Tipprovdi dwar it-tielet talba billi taghti mizura *interim* hekk kif sejjer jinghad :-

Ghaz-zmien kollu li tibqa` pendent i-kawza principali bejn il-partijiet fl-istess ismijiet (Rikors Nru. 571/2017 JZM), u b`effett millum, qeghda tahtar lill-Avukat Dottor Richard Galea Debono bhala direttur iehor tas-socjeta` intimata Pefaco International plc (C65718), bis-setghat u bid-dmirijiet kollha li jirrizultaw kemm mill-istatut tas-socjeta` u kif ukoll mil-ligi.

Tidderiegi lill-Avukat Dottor Richard Galea Debono sabiex bhala direttur jikkonserva, jipprotegi u jhares l-interessi tas-socjeta` Pefaco International plc.

Tordna lill-Avukat Dottor Richard Galea Debono sabiex ghaz-zmien kollu li jibqa` direttur tas-socjeta` Pefaco International plc jassikura li hadd mill-membri taghha ma jbati l-ebda xorta ta` oppressjoni, pregudizzju jew diskriminazzjoni.

Tordna illi provvizorjament kwalsiasi drittjiet u spejjez li jkunu dovuti lill-Avukat Dottor Richard Galea Debono fl-esercizzju tad-dmirijiet tieghu bhala direttur jithallsu provvizorjament mir-rikorrenti, liema spejjez u drittijiet ikun mbaghad definiti fil-gudizzju finali dwar il-mertu.

Onor. Joseph Zammit McKeon
Imhallel