



QORTI CIVILI PRIM'AWLA

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum il-Hamis 8 ta` Frar 2018

Kawza Nru. 6

Fl-atti tal-istralc tal-kumpannija D.A. Holdings Limited (C18064) li kienet dikjarata xjolta bi provvedimenti ta` din il-Qorti tas-17 ta` Marzu 2016 wara l-procediment Rik. Nru. 494/14 JZM fl-ismijiet :

Panta Contracting Limited (C-15725)

kontra

D.A. Holdings Limited (C-18064) ;

u

b`digriet tat-23 ta` Ottubru 2014 is-socjeta` Mediterranean Corporate Bank Limited (C-30432) gia` Volksbank Malta Limited, giet awtorizzata tintervjeni fil-kawza *in statu et terminis* ;

u

b`digriet tat-23 ta` Jannar 2015 is-socjeta` Tal-Herba Group Limited (C-46790) giet

awtorizzata taghmel sottomissjonijiet fil-kors tal-procediment ;

u

b`digriet tal-24 ta` Marzu 2015 il-Perit Dr Edwin Mintoff gie awtorizzat jaghmel sottomissjonijiet fil-kors tal-procediment ;

u

b`digriet tat-30 ta` Lulju 2015 Mark Vassallo ghan-nom u in rapprezentanza ta` Aluserv Limited (C-10207), gie awtorizzat jintervjeni fil-kawza ;

u

b`digriet tat-2 ta` Ottubru 2015 Xuereb Installations Limited (C-15321), giet awtorizzata tintervjeni fil-kawza *in statu et terminis* ;

u

b`digriet tat-2 ta` Frar 2016 Rabie Maloul (I.D. 235229A) gie awtorizzat jintervjeni fil-kawza

Dan huwa provvediment dwar rikors tal-15 ta` Jannar 2018 li kien prezentat quddiem din il-Qorti mis-socjeta` Alison Investments Limited bhala successur u aventi kawza tas-socjeta` Panta Contracting Limited.

Il-Qorti :

I. Preliminari

Rat ir-rikors.

Rat id-dokumenti li kienu prezentati mar-rikors.

Rat il-verbal tal-udjenza tal-procediment ta` stralc tal-15 ta` Jannar 2018.

Rat in-noti li pprezentaw il-kredituri ta` D.A. Holdings Limited li ppartecipaw fil-procediment li wassal ghad-dikjarazzjoni ta` xoljiment tal-istess socjeta` u li baqghu jiehdu sehem attiv fil-process ta` stralc taghha.

Rat id-digriet li tat fl-imsemmija udjenza fejn halliet ir-rikors ghal provvediment ghal-lum.

Rat l-atti l-ohra.

II. Ir-rikors

Is-socjeta` rikorrenti kienet surrogata fid-drittijiet li kellha Panta Contracting Limited bhala kreditrici ta` D.A. Holdings Limited. Id-dokumenti li jixhdu r-relazzjoni guridika attwali tas-socjeta` rikorrenti huma in atti.

Alison Investments Limited qeghda titlob ir-revoka *contrario imperio* ta` l-provvediment li din il-Qorti kienet tat fis-17 ta` Marzu 2016 fejn kien ordnat ix-xoljiment u l-istralc tas-socjeta` D.A. Holdings Limited, u dan sabiex tinghata l-opportunita` li timplimenta u tesegwixxi pjan ta` rkupru kif imfisser fir-rikors.

III. It-talba

Il-Qorti tibda b`rimarka dwar it-talba tas-socjeta` rikorrenti.

Ir-rikorrenti qeghda titlob r-revoka *contrario imperio* ta` dik li ssejjah *decizjoni* tas-17 ta` Marzu 2016.

Tghid mill-ewwel illi dak tas-17 ta` Marzu 2016 kien *provvediment* mhux *decizjoni*.

Decizjoni ma tistax tigi revokata *contario imperio* izda biss b`*decizjoni* ohra li tinghata in sede ta` appell.

Fil-kaz in ezami, id-dikjarazzjoni ta` xoljiment u stralc ta` D.A. Holdings Limited saret permezz ta` *provvediment* li - din il-Qorti tghid - mhuwiex *sentenza* jew *decizjoni* fil-kuntest ta` kif dawn it-termini huma ntizi fil-*lex generalis* u cioe` l-Kap 12 tal-Ligijiet ta` Malta.

Fil-kaz in ezami, id-dikjarazzjoni ta` xoljiment u stralc ta` D.A. Holdings Limited saret skont *lex specialis* u cioe` l-Kap 386 tal-Ligijiet ta` Malta.

Il-punt kruċjali li qed jigi trattat fil-provvediment tal-lum, l-ewwel wiehed tax-xorta tieghu, huwa jekk il-provvediment tas-17 ta` Marzu 2016 propju ghalieq mhuwiex *decizjoni* jew *sentenza* jistax jigi revokat abbazi tad-disposizzjonijiet tal-Kap 386 tal-Ligijiet ta` Malta.

IV. Il-provvediment tas-17 ta` Marzu 2016

Il-procediment li wassal ghall-provvediment tas-17 ta` Marzu 2016 kien istitwit b`rikors prezentat minn Panta Contracting Limited **bhala kreditur** ta` D.A. Holdings Limited kontra l-istess D.A. Holdings Limited. *Pendente lite* dahlu **kredituri ohra** fil-kawza. Il-kredituri kollha hadu sehem attiv fil-procediment.

Panta Contracting Limited talbet ix-xoljiment u l-istralc ta` D.A. Holdings Limited abbazi tal-**Art 214(2)(a)(ii) u l-Art 214(5)(b) tal-Kap 386**.

Wara li qieset il-passiv kontingenti u prospettiv tal-kumpannija, din il-Qorti dehrilha li kien ippruvat ghas-sodisfazzjon taghha li D.A. Holdings Limited ma kenitx f`qaghda li thallas id-djun taghha.

U abbazi ta` dan, ezercitat id-diskrezzjoni li tipprovdi ghalha l-ligi stess, u ordnat ix-xoljiment u l-istralc ta` D.A. Holdings Limited.

Fil-konsiderazzjonijiet taghha, il-Qorti rreferiet ghax-xebh (u ghad-differenzi) li hemm bejn l-Art 214(5)(b) tal-Kap 386 u l-Art 123(2) tal-Insolvency Act 1986 tal-Ingilterra.

A skans ta` repetizzjoni, taghmel referenza ghall-konsiderazzjonijiet taghha fil-provvediment tas-17 ta` Marzu 2016.

Tirrimarka biss illi minhabba l-mod kif intervjena l-legislatur Malti fil-Kap 386 meta fassal x`jikkostitwixxi insolvenza ghall-fini tad-dikjarazzjoni ta` xoljiment u stralc ta` kumpannija, ir-referenza ghal disposizzjonijiet tal-Insolvency Act 1986 tal-Ingilterra tibqa` rilevanti anke ghall-fini tal-provvediment tal-lum.

F`dan l-isfond, tinsorgi l-kwistjoni ta` jekk ladarba l-Qorti tkun ezercitat id-diskrezzjoni li xxolji u tistralcja kumpannija, ghaliex issib li dik il-kumpannija ma kenitx fil-qaghda li thallas id-djun taghha, tistax tregga` lura d-diskrezzjoni esercitata, jekk fil-kors tal-istralc jirrizultaw fatti u cirkostanzi godda li ma kienux jezistu sal-mument li nghata l-provvediment tax-xoljiment u tal-istralc.

V. Dottrina

Il-procedura ta` *winding up* ta` kumpannija ghalkemm tista` tiskatta b`inizjattiva mqar kreditur wiehed, fl-essenza taghha tibqa` *a collective procedure for the benefit of creditors generally* (ara Pg 913-914 ta` **Boyle & Birds` Company Law** [8th Edition – Jordans – 2011] ; ara wkoll Pg 694 - **Brenda Hannigan – Company Law** [Fourth Edition – OUP] ; kif ukoll Pg 36 - **Roy Goode – Principles of Corporate Insolvency Law** [Fourth Edition – Sweet & Maxwell])

VI. Konsiderazzjonijiet

Huwa mill-aktar evidenti min-noti li pprezentaw il-kredituri illi, filwaqt illi saz-zmien meta l-kawza ghax-xoljiment u stralc thalliet ghall-provvediment tas-17 ta` Marzu 2016 kienu konkordi fil-fehma illi D.A. Holdings Limited kellha tkun xjolta u stralcjata, illum illi fil-kors tal-istralc sehew fatti godda kostitwiti mill-involviment konkret, attiv u dirett ta` investitur, mhux biss iridu li jieqaf l-istralc izda addirittura jridu li l-kumpannija ma tibqax fi stat ta` xoljiment.

Tal-istess fehma huwa l-istralcjarju/amministratur provvizorju li kien mahtur bil-provvediment tas-17 ta` Marzu 2016.

Il-kredituri hadu din il-linja ghar-raguni li l-investitur koncernat mhux biss akkwista l-ishma kollha ta` D.A. Holdings Limited, izda accetta li jhallas lill-kredituri abbazi ta` kuntratt ta` transazzjoni.

Il-hsieb evidenti tal-investitur huwa li, kemm jista` jkun bl-inqas spiza ghalih, jassikura li l-kumpannija ma tibqax xjolta, ma tkunx stralcjata, jissalda d-debiti, jikseb *tabula rasa* u jqabbad lil D.A. Holdings Limited fuq in-negozju taghha minghajr aktar taqlib.

Issem mew minn xi kredituri disposizzjonijiet tal-Kap 386 tal-Ligijiet ta` Malta li, fil-fehma taghhom, jistghu jaghtu direzzjoni lill-Qorti fil-konsiderazzjoni tat-talba ta` Alison Investments Limited.

Kien indikat l-Art 300B tal-Kap 386.

Il-Qorti tghid illi din id-disposizzjoni ma tghoddx ghall-kaz tal-lum.

Ghax ma tghoddx wiehed isib twegiba fil-provvedimenti li tat din il-Qorti : Rik. Nru. 715/10 – **Lay Lay Co Limited vs Peter Paul Darmanin et** – 7 ta` Lulju 2011 ; Rik. Nru. 650/11 – **Joseph Aquilina et vs Dr Edward Woods et** – 29 ta` Novembru 2012 u 23 ta` April 2013 ; Rik. Nru. 581/13 – **Av. Dr. Nikolai Vella Falzon noe vs ir-Registratur tal-Kumpanniji** – 14 ta` Novembru 2013 ; u Rik. Nru. 780/2014 – **A X Holdings Limited et vs Registratur tal-Kumpanniji** – 24 ta` Marzu 2015.

Issemmiet Sec 147 tal-Insolvency Act 1986 tal-Ingilterra.

Din id-disposizzjoni ssemmiet anke mill-istralcjarju / amministratur provvizorju sabiex il-Qorti ttipprova tfittex kenn fejn kien argumentat il-legislatur baqa` ma pprovdix fil-Kap 386.

Il-Qorti sejra tissofferma fuq Sec 147 tal-Insolvency Act 1986.

Qabel ma tesprimi ruhha aktar `il quddiem, il-Qorti sejra tittratta dak li tghid din id-disposizzjoni, u kif kienet meqjusa fid-dottrina u fil-gurisprudenza tal-Ingilterra.

Sec 147 tal-Insolvency Act 1986 tghid hekk :-

(1) *The court may at any time after an order for winding up, on the application either of the liquidator or the official receiver or contributory, and on proof to the satisfaction of the court that all proceedings in the winding up ought to be stayed or sisted, make an order staying or sisting the proceedings, either altogether or for a limited time, on such terms and conitions as the court thinks fit.*

(2) *The court may, before making an order, require the official receiver to furnish it with a report with respect to any facts or matters whicxh are in his opinion relevant to the application.*

(3) *A copy of every order made under this section shall forthwith be forwarded by the company or otherwise as may be prescribed to the registrar of companies who shall enter it in his records relating to the company.*

Dwar din id-disposizzjoni, **Andrew Keay & Peter Walton** fil-ktieb "**Insolvency Law – Corporate and Personal**" (Pearson – Longman – 2003) ighidu hekk fil-Pg 231 u 232 :-

While its corporate status and powers are not affected by the liquidation, the fact is that the company exists, after the commencement of

winding up, only so that it can be wound up, and then dissolved. The directors` powers pass to the liquidator and there are restrictions on what can be done with company property. This all happens because of statutory enactment and so the company of its own motion cannot revert to its former state. It can only be achieved by obtaining an order of the court staying proceedings in the winding up [section 147(1)]. Such orders are most commonly applied for where the company has paid off all its debts and wishes to re-commence business or where it is desired to give effect to a plan of reconstruction or a scheme of arrangement [Re Stephen Walters & Sons (1926) WN 236] or a proposal for the entering into of a company voluntary arrangement ...

Usually companies are not permitted to apply for stay where they are appealing the making of winding-up orders [Re A & BC Chewing Gum Ltd (1975) 1 All ER 1017] In applications for a stay, the court has a discretion [Re Telescriptor Syndicate Ltd (1903) 2 Ch 174 at 180] whether or not to stay proceedings and while there are no firmly binding rules [Re Calgary and Edmonton Land Co Ltd (1975) 1 All ER 1046 at 1051] this discretion is exercised pursuant to certain principles many of which derive from those used in bankruptcy when considering applications for annulments [Re Telescriptor Syndicates] Before exercising its discretion the court has to find some valid reason why it should do so [Aetna Properties Ltd (in liq) v GA Listing & Maintenance Pty Ltd (1994) 13 ACSR 422] So an application for a stay must make out a convincing case [Re Calgary and Edmonton Land Co Ltd (1975) 1 All ER 1046 ; (1975) 1 WLR 355] and if a court has doubts, a stay should not be ordered [Re Calgary and Edmonton Co Ltd ; Re Lawston Ltd (1991) BCLC 570].

Where there is an application for a stay, the interests of the liquidator, the creditors and the members are considered [Re Calgary & Edmonton Land Co Ltd]. Courts will not order a stay merely because all of the creditors agree to it and it will benefit them (Re Telescriptor Syndicate Ltd at 180) although the agreement of the creditors will be matter that is considered by the court in coming to its decision [In re Hester (1889) 22 QBD 632 at 634, 636 and in the appeal at 640, 641] A court will determine whether a stay would be detrimental to commercial morality and the interests of the public (In re Hester). A court will be concerned that an insolvent company is not given a licence to trading (Re Telescriptor Syndicate Ltd). Matters which a court may take into account are :

directors have not complied with their duty to assist the official receiver

an investigation is warranted into aspects of the promotion, formation or demise of the company

the business affairs of the company require investigation (Re Telescriptor Syndicate Ltd)

If there is evidence of misfeasance or improper activities the court will deny a stay (Re Calgary and Edmonton Land Co Ltd).

...

There can be no doubt that section 147 applies to voluntary winding up as well as compulsory winding up [Re South Barrule State Quarry Co (1869) 8 Eq 688 ; Re Calgary and Edmonton Land Co Ltd]. The section can be invoked "at any time during the winding up of a company".

The winding-up process ends on a stay order being made ; all proceedings in relation to the winding up may be made by the court at any stage following a winding up order. This means that the whole effect of winding up ceases and the company can resume its business and affairs as if no winding up existed.

...

Fin-nota tieghu, wiehed mill-kredituri, precizament Xuereb Installations Limited, jirrileva li din il-Qorti tista` tfittex konfort sabiex tilqa` t-talba tar-rikorrenti fl-**Art 248 tal-Kap 386**.

Bl-Ingliz **l-Art 248** ighid hekk :-

(1) The court may at any time after a winding up order, on the application either of the liquidator or the official receiver or any creditor or contributory, and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, for such duration and on such terms and conditions as the court thinks fit. Any such stay of proceedings shall not affect the continuing validity and operation of the winding up orders.

(2) On an application under this article the court may, before making an order, require the official receiver or liquidator to furnish to the

court a report with respect to any facts or matters which are in its opinion relevant to the application.

(3) *A copy of every order made under this article shall forthwith be forwarded by the Registrar of Courts to the Registrar for registration.*

Fit-test bil-Malti, id-disposizzjoni taqra hekk :-

(1) *Il-qorti tista', f'kull żmien wara li jkun sar ordni għal stralċ, fuq ir-rikors jew tal-istralċjarju jew tar-riċevitur ufficjali jew ta' xi kreditur jew kontributorju, u mal-prova għas-sodisfazzjon tal-qorti li l-proċedimenti kollha dwar l-istralċ għandhom jitwaqqfu, tagħmel ordni li jwaqqaf il-proċedimenti għal dak iż-żmien u b'dawk il-pattijiet u l-kondizzjonijiet li l-qorti jidhrilha xieraq. Kull twaqqif tal-proċedimenti bħal dan ma jolqotx il-kontinwità fil-validità u fl-operat tal-ordni tal-istralċ.*

(2) *Fuq rikors taħt dan l-artikolu l-qorti tista', qabel tagħmel l-ordni, teħtieg lir-riċevitur ufficjali jew l-istralċjarju li jagħti lill-qorti rapport dwar xi fatti jew hwejjeġ li fil-fehma tagħha, ikunu rilevanti għar-rikors.*

(3) *Kopja ta' kull ordni magħmul taħt dan l-artikolu għandha tintbagħat minnufih mir-Registratur tal-Qrati lir-Registratur għar-registrazzjoni.*

Id-disposizzjoni hija nserita fil-Kapitolu V tal-Kap 386 li jittratta dwar is-setgħat generali ta` stralċ mill-qorti fi stralċ mill-qorti.

Għal din il-Qorti, huwa evidenti illi għalkemm l-Art 248 tal-Kap 386 kien imfassal fuq Sec 147 tal-Insolvency Act 1986 tal-Ingilterra, iz-zewg disposizzjonijiet mhumie x kopja tal-ohra.

Dan qed jingħad għaliex għalkemm fiz-zewg sistemi ta` dritt, tipprevali d-diskrezzjoni, hemm differenza ta` sostanza bejn it-tnejn fis-sens illi filwaqt illi fis-Sec 147(1) tal-Insolvency Act 1986 il-qorti *may make an order staying or sisting the proceedings, either altogether or for a limited time, on such terms and conditions as the court thinks fit*, fil-kaz tal-Art 248(1) tal-Kap 386 is-setgħa tal-qorti hija ristretta għaliex il-qorti tista` tagħti *an order staying (twaqqaf : fit-test bil-Malti) the proceedings, for such duration and on such terms and conditions as the court thinks fit* izda m`għandhiex is-

setgha li twaqqaf ghal kollox l-istralc u tirroristabilixxi l-*status quo ante* id-dikjarazzjoni ta` xoljiment u stralc.

Il-Qorti tghid dan ghaliex fl-Art 248(1) thalliet barra il-kelma *altogether* li tirrizulta fis-Sec 147(1) tal-Insolvency Act 1986.

Mhux biss izda thalliet barra l-kelma *sisted* li ghad-differenza ta` l-frazi *stayed* tfisser waqfien komplet. Il-kelma *sisted* issib l-gheruq taghha fil-ligi Skocciza.

Mhux biss izda l-legislatur Malti dahhal l-ahhar sentenza fl-Art 248(1) li ma tirrizultax fis-Sec 147(1) tal-Insolvency Act 1986 li taghlaq kull bieb sabiex ix-xoljiment u l-istralc ta` kumpannija jitregghu lura u cioe` : *Any such stay of proceedings shall not affect the continuing validity and operation of the winding up orders.*

Ghal din il-Qorti huwa bil-wisq car illi l-legislatur Malti ghalkemm ried jislet dak li tghid Sec 147 tal-Insolvency Act 1986 u jintroducieha fil-ligi taghna kellu f` mohhu li jintroduci biss waqfien limitat u temporanju tal-process ta` stralc, *punto e basta* bl-intiza cara u inekwivoka illi *kull twaqqif tal-procedimenti ... ma jolqotx il-kontinwità fil-validità u fl-operat tal-ordni tal-istralc.*

Ghalhekk dak tal-lum mhuwiex kaz fejn il-legislatur baqa` sieket u allura halla fl-idejn tal-qorti sabiex timla l-vojt, izda kaz fejn il-legislatur wera dak li ried, iddistingwa ruhu mis-sorsi tad-dritt li fittex biex idahhal disposizzjoni fil-ligi taghna, u fuq kollox dahhal differenzi ta` sostanza li jaghmlu d-disposizzjoni taghna distinta minn fejn instiltet.

Id-dottrina fuq citata dwar Sec 147 tal-Insolvency Act 1986 hija konferma ulterjuri ta` kemm il-posizzjoni fil-ligi taghna hija distinta minnha fuq materja ta` sostanza.

Il-Qorti tistqarr li ghandha idejha marbuta.

Tkompli tistqarr id-diffikulta` taghha dwar x`tista` taghmel meta l-kredituri b`vuci wahda waqt stralc jiehd u linja ghal kollopposta ghal dik li jkun hadu qabel ix-xoljiment tal-kumpannija, mhux b`kapricc izda ghaliex ikun graw fatti li jaqilbu s-sitwazzjoni ta` taht fuq.

Tkompli tistqarr illi mhijiex felici s-sitwazzjoni fejn Qorti hija prekluziva milli tintervjeni meta grajjiet li jsehhu waqt stralc ikollhom effett li ma kienx mistenni fiz-zmien ta` qabel ix-xoljiment tal-kumpannija.

Tkompli tistqarr illi l-legislatur Malti hallieha minghajr is-setgħa li tregga` l-arlogg lura ghaliex ma tahiex id-diskrezzjoni – kif hija l-ligi tal-Ingilterra – li thassar l-ordni ta` xoljiment.

Fil-kaz tal-lum, jidher illi l-interess tal-kredituri, tal-kumpannija u fatturi ohra kontingenti li rrizultaw fil-kors tal-istralc kien jiddetta xort`ohra.

Fl-istess waqt, il-Qorti ma tistax tintervjeni b`mod avventat.

Trid tapplika l-ligi anke jekk *dura lex sed lex*.

Provvediment

Għar-ragunijiet kollha premissi, il-Qorti qegħda tichad it-talba tar-rikorrenti kif dedotta fir-rikors tagħha tal-15 ta` Jannar 2018. Spejjez bla taxxa.

Onor. Joseph Zammit McKeon
Imhalled

Amanda Cassar
Deputat Registratur