QORTI CIVILI PRIM`AWLA

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum il-Hamis 31 ta` Mejju 2018

Kawza Nru. 1
Rik. Nru. 703/16 JZM

Donald Cassar (KI 374175M), Michael Cassar (KI 116178M), Maria Goretti Fava (KI 589452M), Rosemarie Fava (KI 399584M) u Michael Fava (KI 524285M)

kontra

Fuxya Company Limited (C-7541); Nicholas Fava (KI 151160M) fil-kwalita` tieghu ta` direttur uniku ta` Fuxya Company Limited; u b`digriet tal-15 ta` Dicembru 2017 Salvina Fava (KI 433461M), Michaeles sive Michael (KI 0582282M), Silvio (KI 83184M) u Nicholas (KI 0006693M), ilkoll ahwa Fava assumew l-atti tal-kawza fil-persuna taghhom minflok Nicholas Fava, stante l-mewt tieghu; Mario Fava (KI 94559M) fil-kwalita` tieghu ta` Segretarju tal-istess u Andrew Fava (KI 332764M) ghall-kull interess illi jista` jkollu.

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors prezentat fis-17 ta` Awwissu 2017 li jaqra hekk :

IT-TALBA

1. Illi din hija talba proposta a tenur tal-Artikolu 402 tal-Att dwar il-Kumpanniji (Kap. 386 tal-Ligijiet ta` Malta). L-esponenti qed jezercitaw dan ir-rimedju u qed jagixxu f`isimhom proprju qua azzjonisti tas-socjeta` intimata. It-talba hija ghal rimedju inkluza u mhux limitata ghax-xoljiment tas-socjeta` intimata kif ukoll ghal dikjarazzjoni ta` responsabbilita` tal-intimati jew min minnhom u kundanna konsegwenzjali ta` danni u telf soffert;

L-INTERESS TAL-PARTIJIET

2. Illi r-rikorrenti huma lkoll azzjonisti fil-kumpanija Fuxya Company Limited (C-7541) (Kopja tal-Memorandum and Articles of Association hija annessa bhala "Dok. A"). Donald Cassar, Michael Cassar u Maria Goretti Fava jippossjedu hamsin (50) azzjoni kull wiehed filwaqt illi Michael Fava u Rosemarie Fava jippossjedu hamsa u ghoxrin (25) azzjoni kull wiehed. Konguntivament, l-atturi jippossjedu bejniethom mitejn (200) azzjoni tas-socjeta` konvenuta;

3. Illi f`din il-kumpanija hemm b`kollox hames mitt (500) azzjoni u l-azzjonisti l-ohra f`din il-kumpanija huma Nicholas Fava (KI 151160M), Andrew Fava (KI 332764) u Mario Fava (KI 94559M) ghandhom mitt (100) azzjoni kul wiehed;

IS-SOCJETA` INTIMATA

4. Illi l-uniku skop reali li ghalih twaqqfet din il-kumpanija huwa sabiex tamministra porzjon art ta` circa erba` u ghoxrin elf, seba` mija u tletin punt tnejn (24,730.20m$^2$) metru kwadru imlaqqma ta` "Wied il-Geddies" fil-kuntrada ta` "Wied il-Knejjes" f`Hal Luqa, liema art kienet giet akkwistata mill-kumpanija minghand Maria Grazzja Fava li tigi n-nanna u/jew il-kunjata tar-rikorrenti u omm l-azzjonisti l-ohra. (Kopja tal-kuntratt tal-akkwist datat 1 ta` Novembru 1985 in atti tan-Nutar Dott. Antoine Agius hija annessa bhala "Dok B");

IL-LANJANZI

5. Illi t-tmexxija tal-kumpanija ghamlet perjodu twil f`idejn Nicholas Fava u Andrew Fava bhala diretturi filwaqt li Mario Fava huwa s-segretarju tal-kumpannija. (Records ufficjali tar-Registru tal-Kumpanniji annessi bhala "Dok. C") ;

6. Illi b`effett mit-23 ta` Settembru 2014, Andrew Fava irrizenja minn direttur u b`hekk, fil-mument tal-prezentata ta` dan ir-rikors, l-uniku direttur huwa Nicholas Fava. Jigi rilevat illi dan l-istat ta` fatt huwa in kontravenzjoni tal-klawsola 8 tal-Memorandum of Association tas-socjeta` intimata illi jghid `the number of directors in the company* ***shall be not less than two*** *and not more than five`;

7. Illi mid-data surreferita sal-gurnata odjerna, ma sar ebda` attentat minn naha tal-ufficjali tas-socjeta` intimata sabiex jigi elett direttur gdid;

8. Illi jidher illi ghal perjodu twil ta` zmien, Nicholas Fava kien jahdem l-artijiet tas-socjeta` intimata u dan ghall-qliegh u gwadann personali tieghu minghajr ma jikkontribwixxi xejn lejn l-istess socjeta` la bhala kera tal-art u wisq anqas bhala profitti;

9. Illi inoltre, jidher li ghall-perjodu twil ta` zmien, kien isir kiri ta` diversi porzjonijiet mill-artijiet tas-socjeta` intimata lil terzi persuni u dan ad insaputa tar-rikorrenti qua azzjonisti u stakeholders fis-socjeta` intimata. Jigi rilevat illi r-rikorrenti ma jafux x`sar mill-introju generat minn dawn il-kirjiet u ghalhekk ghandhom suspett ben fondat illi dawn il-flejjes gew misapproprijati mill-intimati jew min minhom in lezjoni tad-drittijiet kemm tas-socjeta` intimata innifisha kif ukoll tar-rikorrenti;

10. Illi fis-sena 2004, ir-rikorrenti Donald Cassar u Michael Cassar intavolaw ir-Rikors ***1351/2003 GCD*** *quddiem dina l-Onorabbli Qorti u dan bil-ghan illi jigi indirizzat il-pregudizzju illi kienu qieghdin jissubixxu qua azzjonisti rizultat tal-amministrazzjoni hazina u malizzjuza tas-socjeta` intimata. Fid-Digriet taghha tal-11 ta` Gunju 2004, il-Qorti ordnat illi `ssir laqgha generali ta` kull sena sa mhux aktar tard mill-31 ta` Lulju ta` kull sena u tordna lid-diretturi u lis-segretarju jaghtu l-avviz tal-laqghat kif trid il-ligi`. Il-Qorti wissiet ukoll lid-diretturi ta` dak iz-zmien, cioe` Nicholas u Andrew Fava (intimati fir-rikors odjern) illi `jekk il-laqghat ma jsirux regolarment, jinghataw provvedimenti kontra taghhom personalment` (Kopja tad-Digriet annessa bhala "Dok. D");*

11. Illi ir-rikorrenti ilhom `l fuq minn tnax-il sena ma jigu notifikati bl-avviz tal- laqgha generali annwali. Appropositu, l-ahhar laqgha li sehhet kienet dik straordinarja imsejjha ai termini tal-provvediment ta` dina l-Onorabbli Qorti fis-26 ta` Lulju 2004 u minn dakinhar qatt ma giet konvenuta laqgha generali ohra. Jigi rilevat illi dan l-agir huwa mhux biss in pjena kontravenzjoni tal-Artikolu 128 tal-Att Dwar il-Kumpanniji (Kap. 386 tal-Ligijiet ta` Malta) izda ukoll in disprezz lampanti tal-provvidiment moghti minn dina l-Onorabbli Qorti indirizzat b`mod dirett u specifiku ghas-socjeta` intimata;

12. Illi l-uniku direttur Nicholas Fava kif ukoll wiehed minn uliedu, cioe` Michaeles Fava (KI 582282M) (li lanqas biss huwa azzjonista fis-socjeta` intimata), abbuzivament okkupaw kamra agrikola illi tinsab fl-artijiet tas-socjeta` u ghamlu bidliet fiha kif ukoll kambju ta` destinazzjoni taghha b`mod illegali minn agricultural store ghal post ta` residenza. Filfatt, dan l-agir minn naha tal-intimati huwa mertu ta` azzjoni ta` infurzar mill-Awtorita` tal-Ippjanar kif ukoll applikazzjoni ghal sanctioning u change of use. (EC/00488/10 u PA/03818/15 – vide "Dok. E" hawn anness). Fil-gurnata odjerna, dan il-post qed jigi okkupat abbuzivament minn Michaeles Fava u l-mara tieghu (vide estratt mir-registru elettorali ta` April 2016 "Dok. F"). Intant ukoll, l-intimati unilateralment u arbitrarjament ghalqu passagg illi kien jaghti minn Sqaq tal-Karmnu ghal gor-raba` de quo;

13. Illi kwindi, sal-gurnata odjerna, ir-rikorrenti ma jafux x`qieghed jigri fit-tmexxija tal-kumpanija u wisq anqas x`inhu jsir mill-assi taghha. Qatt ma rcevew ebda` introjtu per via ta` dividend;

14. Illi l-agir tal-ufficjali tas-socjeta` intimata sar totalment in mala fede, huwa ghal kollox abbuziv, illegali u, apparti li jmur kontra l-obbligi impost mill-ligi fuq id-diretturi, inkluz taht l-Artikolu 136A ta` l-Att dwar il-Kampanniji (Kap. 386 tal-Ligijiet ta` Malta), huwa ghal kollox frawdolenti. Huwa car illi l-iskop principali ta` l-intimati huwa li jarrikkixxu ruhhom palezament kontra l-interessi tas-socjeta` intimata u tar-rikorrenti;

15. Illi bil-mod kif qieghda titmexxa l-kumpanija, ir-rikorrenti ma huma qieghdin jiehdu ebda` frott jew beneficcju in korrispettiv tal-patrimonju taghhom investit fil-kumpanija qua azzjonijiet u lanqas hemm possibilita` ragjonevoli illi dan jista` jsehh stante s-sabutagg sistematiku fl-amministrazzjoni tal-istess;

IR-RIMEDJU

16. Illi certament jirrizulta li saru atti prima facie irregolari li, flimkien mal-mod kif qed titmexxa s-socjeta` intimata, huma pregudizzjali, ingusti u oppressivi mhux biss ghall-istess socjeta`, izda wkoll ghar-rikorrenti quo azzjonista ta` l-istess;

17. Illi in riepilogu, jinghad illi l-bazi tat-telf soffert mis-socjeta` intimata u li konsegwenzjalment qed isofru r-rikorrenti jirrisali ghall-isfruttament minghajr skruplu u incessanti di parte tal-intimati tar-rizorsi immobiljari tas-socjeta` intimata;

18. Illi minhabba l-ghemil taghhom, l-intimati qed jilledu u jippregudikaw d-drittijiet u l-interessi tal-kumpannija u tar-rikorrenti oltre li ikkawzaw u qed ikomplu jikkawzaw danni ingenti lill-kumpannija u lir-rikorrenti konsistenti f`telf ta` qliegh li ergo prattikament jgib fix-xejn il-valur ta` l-ishma tar-rikorrenti. Ghalhekk, l-intimati ghandhom jirrispondu personalment ghal dan it-telf ai termini tal-Artikolu 402 (3) (f) tal-Att dwar il-Kumpanniji (Kap. 386 tal-Ligijiet ta` Malta);

19. Illi f`dawn ic-cirkostanzi, jigi rilevat illi r-rikorrenti ma ghandhom ebda fiducja fl-intimat Nicholas Fava fil-posizzjoni tieghu ta` direttur uniku tas-socjeta` intimata;

20. Illi qed jigi umilment ritenut mir-rikorrenti illi l-gustizzja tkun possibiliment qed tigi bl-ahjar mod servita fil-kaz odjern jekk il-kumpannija tigi xolta u wara l-istralc konsegwenzjali taghha l-proprjeta` immobbli formanti l-assi taghha tigi diviza pro-rata fost l-azzjonisti biex b`hekk kulhadd isir sid assolut ta` sehmu;

21. Illi ghalhekk kellhu jigi ntavolat ir-rikors odjern.

***GHALDAQSTANT**, l-esponenti jitolbu bir-rispett illi dina l-Onorabbli Qorti joghgobha taghti dawk l-ordnijiet a tenur tal-Artikolu 402 tal-Att dwar il-Kumpanniji (Kap. 386 tal-Ligijiet ta` Malta) u taht dawk il-kundizzjonijiet li jidrulha xierqa, sabiex :*

1. Tordna x-xoljiment tal-kumpannija u tipprovdi ghall-istralc konsegwenzjali taghha u dan anke permezz tal-opera ta` periti nominandi;

2. Tiddikjara u tiddeciedi illi l-intimati jew min minnhom ikkawza danni, jew telf patrimonjali inkluz telf ta` qliegh lir-rikorrenti b`responsabbilita`, misura u ammont illi ghandhom jigi determinati mill-Qorti;

3. Tillikwida t-telf patrimonjali hekk ikkawzat;

4. Tikkundanna lill-intimati jew min minnhom ihallsu d-danni u t-telf hekk kif likwidati;

5. Tiddikjara illi stante l-malamministrazzjoni di parte tal-ufficjali tas-socjeta` intimata, huma ghandhom jinzammu esklussivament u personalment responsabbli ghal hlas ta` kwalunkwe multi, penali amministrattivi jew sommom ohra illi jistaghu jkunu dovuti lir-Registratur tal-Kumpanniji jew Awtoritajiet koncernati ohrajn;

6. Taghti kull ordni u provvediment li jidhrula opportuni;

7. Taghti ordni provvizorja u immedjata illi ma jsir ebda` moviment jew trasferiment ta` assi mis-socjeta` intimata Fuxya Company Limited (C-7541) minghajr il-prevja awtorizzazzjoni ta` dina l-Onorabbli Qorti u taht dawk il-kundizzjonijiet illi jidhrilha opportuni.

Bl-ispejjez kontra l-intimati u b`riserva ghall-kull dritt u azzjoni ulterjuri skond il-ligi.

Rat ir-risposta li pprezentaw l-intimati kollha fis-16 ta` Settembru 2016 li taqra hekk :-

1) Illi fl-ewwel lok l-infondatezza tat-talbiet rikorrenti stante illi assolutament mhuwiex minnu illi hemm xi mal-amministrazzjoni tas-socjeta` Fuxya Company Limited. Illi biex tinghata ftit retroxena u kif ser imbaghad jigi ampjament spjegat, is-socjeta` de quo giet iffurmata biex tixtri u tamministra proprjeta` immobbli f`Hal Luqa. Illi din l-art hija art baghli u li tinsab barra miz-zona tal-izvilupp. Meta nxtrat din l-art kien hemm il-hsieb jew ahjar it-tama li din l-art xi darba tidhol fiz-zona tal-izvilupp pero` sal-lum-il gurnata din l-art baqghet barra z-zona tal-izvilupp. Ghalhekk l-unika amministrazzjoni li tista` tghid li ssir hija li din l-art jew partijiet minnha tinkera fuq bazi ta` perijodi ta` sena-il wahda lil inkwilini diversi. Apparti hekk ghad fadal xi partijiet li ghadhom imqabbla` lill-inkwilini li kienu diga` hemm fil-mument li l-kumpanija akkwistat l-art de quo. Kif jista` jikkonferma anke l-accountant tas-socjeta`

esponenti, Alex Mamo, l-introjtu li jidhol minn dawn il-kirjiet huwa wiehed minimu (inqas minn hames mitt Ewro [€500]) fis-sena li lanqas biss ikopru l-ispejjez amministrattivi tal-istess kumpanija;

Illi l-esponenti ma jdahhlu assolutament l-ebda introjtu minn din il-kumpanija u dana stante kif spjegat l-introjtu jghaddi kollu kemm hu ghand Alex Mamo sabiex jigu amministrati kif inghad;

2) Illi l-operat tal-kumpanija intimata gie stultifikat mir-rikorrenti nnifishom u dan stante li huma waqfu jikkontribwixxu ghall-ispejjez amministrattivi u per konsegwenza ma setghux jibqghu jsiru l-audited accounts u ghalhekk ma kien hemm l-ebda skop li jinzammu laqghat tal-kumpanija, specjalment meta ma kien hemm xejn x`jigi diskuss. Difatti tul dan iz-zmien kollu r-rikorrenti qatt ma talbu li ssir xi laqgha jew li riedu jiddiskutu xi haga in partikolari. Ghaldaqstant certament li dawn il-proceduri huwa fl-ahjar ipotesi intempestivi f`dan ir-rigward;

3) Illi dwar l-allegazzjoni kontenuta fil-premessa numru 12, din hija wahda kompletament infondata stante li l-art okkupata minn Nicholas Fava u ibnu Michaeles Fava hija di proprjeta` esklussiva ta` l-istess Nicholas Fava u dana in forza ta` kuntratt in atti Nutar Dottor Mario Bugeja tad-19 ta` Ottubru 1990. Illi dwar dan il-kuntratt, din l-Onorabbli Qorti diga` esprimiet ruhha u tat id-decizjoni taghha nhar il-11 ta` Gunju 2004 fejn cahdet il-pretensjonijiet u t-talbiet kollha tar-rikorrenti f`dan ir-rigward;

4) Illi bir-rispett kollu u minghajr pregudizzju ghas-suespost, u in ogni kaz, l-esponenti ma jqisux li t-talba ghax-xoljiment hija l-ahjar wahda fic-cirkostanzi u dana stante li l-ispejjez konnessi ma` tali xoljiment meta mqabbla mal-valur baxx tal-assi tal-kumpanija ma tkunx soluzzjoni li taghmel sens. Illi ghalhekk f`kaz li dina l-Onorabbli Qorti b`xi mod thoss li ghandha taghti rimedju ai termini tal-Artikolu 402 tal-Kap. 386 tal-Ligijiet ta` Malta, l-esponenti umilment jissuggerixxu li jkun iktar idoneju li tordna li l-azzjonijiet appartjenenti lir-rikorrenti jigu trasferiti lill-esponenti Nicholas Fava, Mario Fava u Andrew Fava ai termini tal-Artikolu 402(3)(d) tal-Kap. 386 tal-Ligijiet ta` Malta;

5) Illi in ogni kaz l-esponenti assolutament ma kkawzaw ebda telf ta` qligh jew ta` patrimonju lir-rikorrenti.

Bl-ispejjez.

Semghet ix-xiehda u rat il-provi l-ohra li tressqu fil-kors tal-kawza.

Rat illi l-kawza thalliet ghal-lum ghall-provvediment bil-fakolta` li l-partijiet jipprezentaw noti ta` osservazzjonijiet.

Rat in-noti ta` osservazzjonijiet tal-partijiet.

Rat l-atti l-ohra tal-kawza.

II. <u>Provi</u>

<u>Ir-rikorrent Donald Cassar</u> ipprezenta affidavit.

Ikkonferma l-fatti kif esposti fir-rikors promotur.

Xehed illi ghandu hamsin (50) sehem fil-kumpannija ntimata ("**<u>Fuxya</u>**").

Kompla jixhed illi l-azzjonisti l-ohra huma Michael Cassar, Maria Goretti Fava, Michael Fava u Rosemarie Fava.

Hemm ukoll l-intimati Nicholas Fava (illum mejjet), Mario Fava u Andrew Fava.

Stqarr illi l-ishma tieghu kienu gejjin minghand ommu Carmen Cassar nee` Fava li kellha 100 sehem u b`hekk inqasmu 50 ghalih u 50 ghal huh Michael.

Il-konvenuti ghandhom 100 sehem kull wiehed.

Qal li l-ishma gew ghandhom ghax fl-1997, meta l-ligi kienet tesigi konformita` mal-Att dwar il-Kumpanniji tal-1995, ommu Carmen ma xtaqitx tibqa` fil-kumpannija u ghalhekk ghaddiet l-ishma taghha lilu u lil huh Michael.

L-iskop li ghalih twaqqfet Fuxya jmur lura ghas-snin tmenin u kien sabiex

tamminstra porzjon art ta` circa 27,730.20 m.k. maghrufa bhala Ta` "Wied il-Geddies" fil-kontrada ta` "Wied il-Knejjes", Hal Luqa, liema art kienet trasferita lill-kumpannija min-nanna tieghu Maria Grazzja Fava. L-artijiet li saru tal-kumpannija kienu gew trasferiti b`kuntratt tal-1 ta` Novembru 1985 fl-atti tan-Nutar Dr. Antoine Agius. L-iskop kien biex dak li kien ser ikun wirt tan-nanna wara l-mewt taghha jigi minflok aministrat bhala kumpannija fejn minflok kulhadd jiehu bicca art, jiehu ishma li suppost kellhom irendu valur. L-azzjonisti originali kienu ulied Maria Grazzja Fava ossija Carmen, Francis, Mario, Nicholas u Andrew ahwa Fava.

Xehed illi wara li hu u huh saru azzjonisti, huwa ordna r-ricerki dwar trasferimenti li setghu saru mill-kumpannija minhabba li kellu suspetti serji dwar x`kien qed isir fl-amministrazzjoni taghha minn wara dahar ommu. Din kienet ukoll wahda mir-ragunijiet ghalfejn ma riditx tibqa` fil-kumpannija. Minn dawn ir-ricerki, irrizulta li fid-19 ta` Ottubru 1990 sar kuntratt fl-atti tan-Nutar Dottor Mario Bugeja, liema kuntratt kien korrett b`att iehor tal-5 ta` Ottubru 1992 fl-atti ta` l-istess Nutar, fejn Andrew Fava ghan-nom u in rapprezentanza tal-kumpannija assenja b`titolu ta` permuta lid-direttur l-iehor Nicholas Fava, bicca art minn tal-kumpannija ta` l-kejl ta` 204 m.k. bhala "kontrokambju" ghal xi xoghol fuq cnut li Nicholas Fava kien allegatament ghamel. Dan il-kuntratt ikkonfermat is-suspetti tieghu li l-affarijiet tal-kumpannija kienu qed jitmexxew b`mod li jnissel dubbji.

Kompla jixhed li fl-2004, wara li kienu ntbaghtu numru ta` ittri legali lill-intimati, hu u huh ghamlu kawza kontra l-intimati bil-hsieb li jigu ndirizzati l-problemi fil-kumpannija li kienu simili ghal dawk li fuqhom saret il-kawza odjerna. Il-kawza kellha n-nru. 1351/2003 GCD. Fil-11 ta` Gunju 2004, il-Qorti ordnat li ssir laqgha generali ta` kull sena sa mhux aktar tard mill-31 ta` Lulju ta` kull sena u ordnat lid-diretturi u lis-segretarju jaghtu l-avviz tal-laqghat kif trid il-ligi. Il-Qorti wissiet ukoll lid-diretturi ta` dak iz-zmien, cioe` Nicholas u Andrew Fava, li jekk il-laqghat ma jsirux regolarment, jinghataw provvedimenti kontra taghhom personalment. Wara dan, kienet saret laqgha izda fiha ma kien sar xejn. Minn dak iz-zmien, qatt ma rega` saru laqghat sal-gurnata tal-lum.

Stqarr illi Nicholas Fava kif ukoll wiehed minn uliedu, cioe` l-kugin Michaeles Fava, qabdu u hadu kamra agrikola li tinsab fl-artijiet tal-kumpannija u bidlulha b`mod illegali minn *agricultural store* ghal post ta` residenza. Fl-2001, Nicholas Fava applika ghal permess PA/06513/01 biex jaghmel *"dismantling of existing agricultural store & reconstruction of same store maintaining same area & materials".* Ghall-bidu l-applikazzjoni kienet respinta izda in segwitu l-permess hareg fl-2003. Kien hemm azzjoni ta` rinfurzar mill-Awtorita` tal-Ippjanar kif ukoll applikazzjoni ghal *sanctioning* u *change of use* (EC/00488/10 u PA/03818/15). Huma baghtu ittra legali lill-MEPA fis-27 ta` Lulju 2011 sabiex din tikkonkludi l-azzjoni ta` infurzar taghha. Illum il-post qed jigi okkupat minn

Michaeles Fava u l-mara tieghu. Inoltre l-intimati ghalqu passagg li kien jaghti minn Sqaq tal-Karmnu ghal gor-raba` tal-kumpannija.

Kompla stqarr illi Nicholas Fava kien jahdem l-artijiet tal-kumpannija u jkabbar prodotti agrikoli. Ighid li hu qatt ma rcieva *dividend* mill-profitti li setghu saru mill-frott tal-artijiet tal-kumpannija. Sar jaf ukoll li fit-23 ta` Settembru 2014, Andrew Fava rrizenja minn direttur u b`hekk, spicca bhala uniku direttur Nicholas Fava. Dan il-fatt kompla jkun ta` thassib ghalih ghaliex assuma li Nicholas Fava ser ikompli jaghmel kollox tieghu. Cahad li hu u huh qatt ma talbu li jsiru laqghat jew li jigu diskussi l-problemi li seta` kellha l-kumpannija. Fid-19 ta` Mejju 2011, inkitbet ittra legali lil Mario Fava bhala segretarju tal-kumpannija sabiex tinzamm laqgha fejn ikun diskuss l-istat tal-kumpannija. Fl-istess ittra, Mario Fava kien wkoll interpellat biex izomm l-*annual general meeting* tal-kumpannija li kien ilu zmien twil ma jsir.

Fisser illi Mario Fava wiegeb ghal din l-ittra b`ittra legali tal-24 ta` Mejju 2011 fejn la nghatat raguni ghaliex ma sarux laqghat u wisq anqas ma nghatat garanzija li l-laqghat kienu ser jibdew isiru kif suppost. Fis-16 ta` Gunju 2011, intbaghtet ittra ohra ghan-nom ta` r-rikorrenti kollha fil-procediment tal-lum lil Mario Fava bhala segretarju, kif ukoll lil Nicholas Fava u lil Andrew Fava bhala diretturi. Hemm rega` saret talba biex isiru laqghat hekk kif rikjesti mil-ligi. La kien hemm risposta u lanqas saru laqghat.

Stqarr illi huma baqghu ma nghatawx informazzjoni dwar kirjiet tal-artijiet tal-kumpannija li kienu qed isiru u x`kien qed isir mill-introjtu li jidhol mill-istess. Huwa qatt ma rcieva hlas mill-kumpannija. Qal li kien hemm okkazjonijiet fejn meta resaq lejn ir-raba` tal-kumpannija, huwa kien intimidat, mhedded u nsulentat minn Nicholas u Michaeles Fava. Gieli qalulu li huwa ma ghandu xejn hemmhekk. Minhabba li l-problema ma setghetx tkun risolta, huwa ma kellux triq ohra ghajr hlief li jressaq il-kwistjoni quddiem il-Qorti.

Qal illi l-kumpannija illum hija stagnata specjalment illi minhabba l-fatt li fil-mori tal-kawza miet Nicholas Fava, li kien l-uniku direttur.

Michael Fava xehed illi huwa azzjonista ta` Fuxya. Wiret l-ishma li ghandu minghand missieru Francis Fava. Fisser illi wara li miet missieru, nofs l-ishma li kien hemm f`ismu marru ghand ommu Maria Goretti Fava. In-nofs l-iehor inqasam bejn l-ulied fosthom hu.

Kompla jixhed illi wara li fl-2004, kienet deciza l-kawza li Donald Cassar u Michael Cassar kienu ghamlu kontra d-diretturi u l-kumpannija biex issir laqgha generali tal-kumpannija, missieru Francis Fava kien notifikat li ser issir

laqgha. Qabel saret il-laqgha, kien hemm qbil bejn missieru li kellu 100 sehem fil-kumpannija, Donald Cassar li kellu 50 sehem, Michael Cassar li kellu 50 sehem, u Andrew Fava li kellu 100 sehem u li kien direttur, li jersqu ghal din il-laqgha u jaghmlu talba biex il-kumpannija tigi xjolta u jinqasmu l-assi *pro rata* skont l-ishma ta` kull wiehed.

Kompla jghid illi huwa kien prezenti ghaliex missieru kien talbu biex jakkumpanjah minhabba li sahhtu kienet sejra lura. Meta marru ghal-laqgha, huwa sar jaf li Andrew Fava kien dawwar il-pozizzjoni tieghu u ma kienx aktar favur li l-kumpannija tigi xjolta. Il-proposta tax-xoljiment ghalhekk ma tressqitx. Fl-istess laqgha, missieru ppropona li titressaq quddiem l-awtoritajiet il-proposta sabiex b`investiment minn kull *shareholder* ikun zviluppat progett ta` agriturizmu fir-raba` tal-kumpannija. Din il-proposta kienet respinta. Mir-reazzjoni li kien hemm, kien evidenti li haddiehor ma kienx interessat li l-kumpannija timxi `l quddiem izda sempliciment li jzomm kontroll assolut fuq l-assi tal-kumpannija. Il-laqgha spiccat bla rizultat.

Qal illi fil-laqgha ma kienu prezentati l-ebda dokumenti jew esposti fatti min-naha tat-tmexxija tal-kumpannija li b`xi mod kienu jindikaw li l-kumpannija kienet qeghda taghmel profitti jew telf.

Kompla jghid li missieru miet fis-6 ta` Novembru 2008.

Hu, ohtu u ommu inkarigaw lin-Nutar Ritianne Bugeja Fenech biex taghmel id-dikjarazzjoni tas-successjoni.

Fuq talba tan-Nutar u bil-kunsens ta` ohtu u ommu, lejn il-bidu tal-2009, huwa talab lil Nicholas Fava *qua* direttur tal-kumpannija ghall-*accounts* ta` tliet snin b`lura biex ikunu jistghu jipprocedu bit-*transfer of shares* bhala l-werrieta ta` missieru.

Saret riferenza ghall-accountant Alex Mamo.

Qal illi huwa ghamel kuntatt ma` Alex Mamo. Dan talab dikjarazzjoni ta` perit sabiex issir stima ta` l-valur ta` l-assi tal-kumpannija la darba l-assi kienu jikkonsistu biss fl-art.

Kien inkarigat il-Perit Joseph Borg Grech li wara li ghamel spezzjoni fuq il-post fis-7 ta` Marzu 2009, ipprovda d-dikjarazzjoni mitluba.

Id-dikjarazzjoni kienet mghoddija lil Alex Mamo u lejn l-ahhar ta` April, bidu ta` Mejju 2009, infurmahom li l-*accounts* kienu lesti u sahansitra offra li jiltaqa` maghhom biex jghaddilhom kopja.

Alex Mamo ghadda l-*accounts* lil ommu Maria Goretti Fava.

Dakinhar Mamo talab lil ommu EUR 600 spejjez. Hija rreferietu lil Nicholas Fava.

Qal li minn mindu nqasmu l-ishma ta` missieru, qatt ma semghu xejn dwar il-kumpannija.

Sahaq illi hu u l-familja tieghu talbu biex isiru laqghat izda l-ittri taghhom dejjem baqghu minghajr risposta.

Huwa qatt ma nghata ebda informazzjoni dwar il-kumpannija, l-attivita` li kienet qeghda tiggestixxi, x`qed jigri mill-introjtu li jidhol u lanqas qatt ma rcieva xi forma ta` hlas.

Ghalhekk saret il-kawza tal-lum.

<u>Ir-rikorrenti Maria Goretti Fava</u> xehdet illi hija azzjonista ta` Fuxya. Ghandha 50 sehem. Wirtet l-ishma minghand zewgha Francis Fava. Ir-ragel taghha kien qalilha li wara li fl-4 ta` April 1982 miet missieru Michael Fava, ommu Maria Grazzja kienet ser iccedi r-raba` lill-ahwa izda biex dan isehh kellhom jiffurmaw kumpannija. Ghalhekk saret Fuxya fit-18 ta` Lulju 1985. Id-diretturi taghha kienu r-ragel taghha u huh iz-zghir Andrew Fava. Fl-1990, zewgha tnehha minn direttur bi ksur tal-istatut ta` dak iz-zmien u ghalhekk ma kienx aktar fil-kontroll tal-kumpannija. Minfloku lahaq Nicholas Fava.

Kompliet tixhed illi wara li saret il-kawza l-ohra, issejhet laqgha fl-2004. Qabel din il-laqgha, Andrew Fava kien mar id-dar taghha biex jitkellem ma` zewgha u dawn kienu qablu li l-kumpannija kellha tigi xjolta u jinqasam kollox. Meta saret il-laqgha, zewgha hareg mil-laqgha nkwetat ghaliex Andrew kien bidel il-hsieb u ghalhekk ma setax isir il-qsim.

Stqarret illi wara li miet zewgha fis-6 ta` Novembru 2008, hija riedet thallas is-successjoni u ghalhekk kellha titlob rendikont dwar il-kumpannija.

Wara hafna diffikultajiet l-accountant Alex Mamo ghamel rendikont ta` tliet snin dwar Fuxya wara stima li ghamel il-Perit Joseph Borg Grech. Mamo ghaddielha kopja ta` l-*accounts* u talabha hlas ta` EUR 600. Kellmet lil binha Michael u dan kellem lil zijuh Nicholas Fava fejn dan qallu biex ma jhallsu xejn lil Mamo ghaliex huwa kien dejjem ihallsu.

Kompla stqarret illi la hi u lanqas uliedha qatt ircevew xi avviz dwar laqghat tal-kumpannija. Lanqas inghatat xi informazzjoni dwar il-kumpannija nkluz dwar l-assi u d-dhul taghha minkejja li kienet talbet dik l-informazzjoni.

Il-kawza tal-lum saret sabiex Fuxya tigi xjolta u kulhadd jiehu s-sehem tieghu.

<u>James Gauci</u> mill-*Agriculture and Rural Payments Agency* xehed li huwa kien imharrek biex jaghti informazzjoni u jipprezenta dokumenti dwar registrazzjonijiet bhala produttur kif ukoll ta` artijiet, produzzjoni, introjtu u figuri ohrajn relatati ma` Nicholas Fava, Mario Fava, Andrew Fava u Fuxya Company Limited.

Xehed illi l-uniku informazzjoni li sabu fl-agenzija kienet dwar sussidju mill-UE li kien jirrigwarda lil Nicholas Fava.

Ipprezenta dettalji dwar l-ghelieqi li rregistra Nicholas Fava f`ismu fejn iddikjara li huwa qed jahdem dawk l-ghelieqi. Ippreciza li l-*parcel list* hija n-numru ta` ghelieqi li ghandu. Imbaghad hemm l-ghelieqi l-ohra kollha li ghandu tahtu, flimkien ma` *site plans* u rendikont ta` x`sussidju ha fl-ahhar hames snin.

Fuxya Company Limited ma tissemma mkien.

<u>P.L. Quentin Tanti</u> mir-Registru tal-Kumpanniji pprezenta d-dokumenti registrati ta` Fuxya li kienet registrata fit-18 ta` Lulju 1985.

<u>Oliver Magro</u> mill-Awtorita` ta` l-Ippjanar ipprezenta l-applikazzjoni PA 6513/01, kif ukoll il-permess u l-pjanti approvati.

Xehed illi hareg avviz ta` nfurzar fis-26 ta` Awissu 2010.G

Saret applikazzjoni PA 03818/15 li ghadha pendenti. L-applikazzjoni saret biex tipprova tissana l-irregolaritajiet li dwarhom inhareg l-avviz tal-nfurzar.

Kompla jixhed illi l-applikant kien Nicholas Fava. L-*enforcement notice* kienet harget fuqu. Fuxya Company Limited ma tissemma mkien.

Spjega li meta jinbidel l-uzu ta` proprjeta` minghajr awtorizazzjoni ta` l-Awtorita`, dan jitqies bhala zvilupp illegali. Ghalhekk hareg l-*enforcement notice.* L-avviz johrog kemm fuq is-sid kif ukoll fuq l-*occupier.*

Jekk l-applikazzjoni PA 03818/15 tkun respinta, l-Awtorita` tghaddi ghat-twettiq tal-avviz ta` nfurzar.

Fil-**kontroezami** xehed illi mill-file ta` l-applikazzjoni PA 03818/15, ma jirrizultax li hemm korrispondenza minghand terzi li qed jallegaw li l-applikazzjoni saret f`isem hazin.

Joseph Muscat xehed illi huwa kera ghalqa ghall-uzu ta` nsib sitwata Ta` Wied il-Knejjes jew Ta` Wied il-Geddies, Hal-Luqa. Huwa kera minghand Nicholas Fava. Ihallas kera ta` EUR 233 fis-sena u dejjem hallas lil Nicholas Fava. Kien ilu jikri ghal sitta jew seba` snin. Il-ftehim sar bil-fomm u ma kellux ricevuti. Huwa dejjem hallas *cash.* Kien ghadu fil-kirja. Qablu l-ghalqa kienet tinkera lil haddiehor. Kien hemm huh Mario Muscat u qablu kien hemm Saviour Bugeja. Kollha hallsu lil Nicholas Fava. Qal li Nicholas Fava kien semmielu xi kumpannija u li l-kera kienet tmur ghax-xoghol tal-kumpannija.

Fil-**kontroezami** spjega li l-ahhar kera thallset lil Mario Fava ghax Nicholas Fava miet.. Huwa jaf li Nazju Cassar jigi missier Donald. Kien Nazju Cassar li kien indahal u hajjar lil huh biex jikri l-ghalqa.

Ismael Tanti xehed illi huwa kera ghalqa minghand Nicholas Fava. Ihallas EUR 250 fis-sena. Wara sena li kien ilu jikri sar jaf illi Nicholas Fava kien miet. Ghalhekk huwa hallas EUR 300 lil Michael Fava li jigi iben Nicholas Fava. Qal li ma jafx jekk qablu l-ghalqa kenitx tin kera lil haddiehor. Ighid li qatt ma sema` bil-kumpannija Fuxya Company Limited.

Fil-**kontroezami** spjega li fl-ghalqa hemm biss haxix hazin ghaliex huwa juzaha biex idur bil-kelb. Ighid li fl-inhawi gieli jara lil Michael Fava. Qal li huwa jaf lil uhud mill-partijiet peress li jghix Hal Luqa.

<u>Alex Mamo</u> xehed illi huwa l-*accountant* ta` Fuxya Company Limited.

Xehed illi Nicholas Fava kien talbu biex izomm il-kotba madwar 15-il sena ilu.

Fuxya ma kienet taghmel ebda negozju.

Nicholas Fava kien jaghtih xi flus li ufficjalment kienu *shareholders` loan.*

Huwa kien jaf li kienet qeghda tinkera art sabiex bir-rikavat jithallsu l-ispejjez tal-kumpannija.

L-azzjonisti tal-kumpannija fil-bidu kienu hamest ahwa Fava. Tul iz-zmien mietu Francis u Nicholas Fava.

Stqarr illi bejn l-azzjonisti ma kienux isiru laqghat jew ftehim. Kien hemm nuqqas ta` ftehim bejniethom. Kien hemm min ried ixolji Fuxya u min ma riedx.

Spjega li safejn jaf hu d-diffikulta ta` bejniethom hija li dawn ghandhom art. Ir-raguni ghalfejn din il-kumpannija giet iffurmata ma ghadhiex tezisti u huwa ma jara l-ebda raguni ghalfejn ghandha tibqa` tezisti l-kumpannija. Spjega li l-art tista` facilment tinqasam u kulhadd ikun kuntent.

L-unika problema li hemm hija li kien sar trasferiment ta` parti minn din l-art mid-direttur ta` dak iz-zmien, Francis Fava. Fiz-zmien li Francis Fava kien ghadu haj, kien ghamel trasferiment billi biegh bicca minn din l-art. Hutu ma kinux jafu b`dan. Meta saret ricerka, il-kuntratt ma deherx ghax kien hemm xi zball f`xi isem. Francis Fava ttrasferixxa erbat itmiem mill-art tal-kumpannija lil hu l-mara tieghu, ossija xi hadd Cortis. Nicholas Fava kien dejjem isostni li dak il-kuntratt mhuwiex validu u ma jghoddx.

Stqarr illi l-azzjonisti jridu li jxolju izda bil-kundizzjoni li dawk l-erbat itmiem jittiehdu in konsiderazzjoni meta ssir il-qasma. Din hija r-raguni ghalfejn l-affarijiet wehlu. Spjega li huwa ghamel elenku ta` x`jridu jinhargu bhala spejjez biex ikun jista` jsir xoljiment u stralc volontarju peress li kellhom isiru *updates* ta` l-*accounts,* jithallsu l-multi, u tithallas it-taxxa. Meta miet

Francis Fava, huwa kien mitlub ihejji l-accounts ghall-*audit*. L-audit baqa` ma sarx ghaliex il-hlas li talab ghax-xoghol tieghu baqa` ma sarx. Ghandu kien imur Nicholas Fava li kien imur ihallsu xi haga mill-kera li kien jigbor.

Xehed illi l-kumpannija ghandha assi konsistenti minn 22 tomna art.

Kompla jixhed illi huwa gieli ltaqa` ma` l-eredi ta` Francis Fava izda qatt ma qalulu xejn dwar dawn l-erbat itmiem. Dak li jaf, jafu minghand Nicholas Fava u ohrajn li kkonfermaw li dak il-kuntratt tassew kien sar.

Qal illi Nicholas Fava u wara li miet, ibnu, tawh total ta` EUR 4,323 li minnhom uza EUR 700 biex hallas l-*annual return* tal-MFSA u spejjez ohra tal-*audit* u *fees* ohra ta` *accountancy*.

Spjega li huwa kellu zewg verzjonijiet dwar minn fejn kienu jigu dawn il-flus. Nicholas Fava kien ighidlu li dawn gew bhala *shareholders` loan* da parti tas-*shareholders* kollha kollettivament, pero` kien ighidlu wkoll illi kienu jikru xi bicca art ghall-insib u b`hekk jigbor xi flus. Spjega li dawn il-kirjiet kienu ghadhom isiru ghaliex kienu ghadhom igibulu flus.

Qal illi huwa ma jafx jekk kulma jidhol kienx jasal ghandu, izda huwa jafda lil Nicholas Fava. Qal li Nicholas Fava kien ragel u li kien jigbor, kien ighaddih lilu ghalkemm ma kienx ikun mieghu meta kien jigbor il-flus.

Kompla jghid li wara li hallas in parte lill-MFSA, kellu ghandu EUR 3,600. Kien ghad fadal hlasijiet xi jsiru lill-MFSA. Qal li huwa kellu lista tal-flus li rcieva bid-dati. Kellu wkoll lista tal-ispejjez.

Stqarr illi l-kera tal-art ghall-insib kienet titnizzel bhala *shareholders` loan* fl-*accounts* tal-kumpannija.

Ikkonferma li l-kumpannija kellha spejjez biss. Id-dhul mill-kera li semma` ma kienux ikopri l-ispejjez. Dejjem kien jinghad lilu li l-azzjonisti kollha kienu ser johorgu sehemhom halli jkopru l-ispejjez izda dawn bhala fatt spiccaw qatt ma hargu sehemhom.

Spjega li kien biss fi zmien ricenti li sar jaf bit-trasferiment li kien ghamel Francis Fava wara li dan kien diga` miet.

Sostna li wara l-mewt ta` Nicholas Fava, iridu jsiru *audits* ohra.

Fil-**kontroezami** stqarr illi t-trasferiment tal-art sar permezz ta` kuntratt ta` permuta. L-iskambju sar ma` xoghol fuq bini ta` cnut. Spjega li huwa dejjem qaghad fuq dak li kien jghidlu Nicholas Fava. Jaf li Nicholas Fava kien jahdem xi partijiet mir-raba` sabiex dawn ma jigux abbandunati. Ix-xoghol tar-raba` ma kienx jidhol fil-kontijiet tal-kumpannija, peress li huwa fehem li kien isir hekk biex l-art tintuza u ma tispiccax.

Stqarr illi ma kienx jaf illi Nicholas Fava kien applika ghal fondi mill-Unjoni Ewropeja. Dawn il-fondi jekk kien hemm, qatt ma dahlu fil-kotba tal-kumpannija.

Stqarr illi l-problema ta` Nicholas Fava sabiex jiehu passi dwar il-validita` ta` l-kuntratt tal-erbat itmiem kienet li huwa kien jibza` ghaliex bejniethom l-azzjonisti qatt ma kienu jaqblu li johorgu l-flus u ghalhekk kien jahseb li ser jispicca johrog il-flus kollha hu.

Johanna Bartolo mill-Bank of Valletta plc xehdet illi l-kont nru 17304887022 kien ighajjat lil Nicholas Fava K.I. 1155600. Il-kont infetah fis-27 ta` April 1999. Huwa *savings account* li ghadu miftuh izda li huwa *blocked* billi Nicholas Fava miet.

Ipprezentat *statement* dwar il-kont.

Ikkonferma li ma kien hemm l-ebda kontijiet bankarji fl-isem ta` Fuxya.

Andrew Psaila xehed illi huwa ghandu tomna u nofs raba` li daru mill-1966 ghal fuqu minghand missieru. Huwa jhallas qbiela ta` EUR 7.50 fis-sena. Qabel kien hallas din il-qbiela lil Grazzja Fava izda wara l-mewt taghha, huwa beda jhallas lil Nicholas Fava sa minn tlettax-il sena ilu.

Spjega li meta hallas l-ahhar qbiela, Nicholas Fava kien ghadu haj. Wara li dan miet, huwa ma hallas lil had.

Qal illi huwa kellu ktieb tal-kera.

Wera l-ktieb lill-Qorti.

L-ahhar ricevuta kienet dik tal-15 ta` Awissu 2016.

Fl-ircevuta jinghad illi Fuxya Company Limited irceviet is-somma ta` EUR 7.50c minghand Andrew Psaila bhala qbiela fuq ghalqa fil-Wied il-Knejjes, Hal Luqa. Ricevuti ohra jghidu l-istess. Iffirma dejjem Nicholas Fava.

Spjega li l-art tinhadem izda maghha hemm mansab li juzah hu. Il-mansab inghata lilu minn Grazzja Fava.

Mario Psaila xehed li missieru jhallas qbiela fuq bicca raba` f`Tal-Wied tal-Knejjes jew ta` Wied il-Geddies, Hal Luqa. Huwa kien jaf lil Graziella Fava, peress li missieru kien ihallas lilha. Huwa jaf lil Nicholas Fava peress li missieru kien beda jhallas lilu ghal qbiela wara li Graziella Fava mietet. Spjega li missieru kien ghadu ma hallasx wara l-mewt ta` Nicholas Fava. L-ghalqa kien qed juzaha Andrew Psalia.

Anthony sive Ninu Psaila xehed li Andrew Psaila jigi l-kugin tieghu.

Xehed li missieru kellu raba` bi qbiela fl-arijitet maghrufa bhala Ta` Wied il-Knejjes jew ta` Wied il-Geddies, Hal Luqa. Imbaghad missieru kien ftiehem ma` Grezz Fava li jcedi r-raba` kollu hlief ghal bicctjen zghar biex juzahom hu. Imbaghad missieru kien ghaddielu bicca wahda minn dan ir-raba`. Qal li Grezz tigi omm Nicholas Fava. Fl-ghalqa huwa jizra` ful, basal u naqra patata kif ukoll juzaha ghal insib. Huwa jhallas Lm 2 qbiela lil Grezz Fava u aktar tard meta mietet huwa beda jhallas EUR 5 lil Nicholas Fava. L-ahhar qbiela thallset lil Mario Fava.

Ipprezenta ktieb bir-ricevuti tal-qbiela tal-flus li hallas. L-ahhar ircevuta hija dik tat-18 ta` Awissu 2016 li tghid li Fuxya Company Limited irceviet minghandu s-somma ta` EUR 5 ghall-ghalqa. Ir-ricevuti hija ffirmata minn Mario Fava. Ir-ricevuti li jaslu sal-2004 huma ffirmati kollha minn Nicholas Fava. Ta` qabel u cioe` bejn 1985 u 2003 huma ffirmati minn Grace Fava. Fuxya Company Limited bdiet tidher fl-ircevuti b`effett mill-15 ta` Awissu 2004 `il quddiem.

Andrew Fava xehed li Fuxya kienet iffurmata fl-1985. Id-diretturi kienu hu u Francis Fava. L-azzjonisti kienu hu, Francis Fava, Nicholas Fava, Mario Fava u Carmen Cassar – ilkoll ahwa. L-ewwel segretarju kien Mario Fava u

baqa` sal-lum. Fuxya twaqqfet ghaliex missierhom kien xtara 24 tomna raba` fl-1979 minghand Victor u Joseph Debono ahwa mill-Floriana u l-hsieb kien li l-kumpannija tiggestixxi r-raba` ghax kien minghalihom li ser johorgu l-permessi ta` l-bini.

Kompla jixhed illi billi l-permessi baqghu ma hargux, l-art inkriet lill-gabilotti u n-nassaba ghal kera rhisa hafna. Meta ntrat l-art, kien hemm diga` partijiet minnha li kienu mqabblin. Il-qbiela dejjem kienet tingabar minn Nicholas Fava ghan-nom tal-kumpannija ; imbaghad kienet tinghata lill-accountant. L-ewwel accountant kien Patrick Camilleri u mbaghad fl-2003, inhatar Alex J Mamo. Dan il-hlas kien jaghmel tajjeb ghal parti mill-ispejjez tal-*accounts* tal-kumpannija. Id-differenza kienet tinhareg minnhom l-ahwa hlief ghal Francis Fava li darba biss hareg flus meta kienet iffurmata l-kumpannija.

Stqarr illi huma kienu hargu Lm 20 kull wiehed ghax is-*share capital* kien ta` Lm 100. Ftit wara indunaw li huh Francis kien qabad u hareg il-Lm 100 shiha mill-bank u zammha ghandu. Ghalaq il-kont li kien hemm mal-Mid Med Bank Limited dak iz-zmien u wara Fuxya qatt ma rega` kellha kontijiet tal-bank. Meta ndunaw x`kien ghamel Francis, tnehha minn direttur u minfloku nhatar Nicholas. Id-decizjoni kienet ittiehdet waqt laqgha generali straordinarja li saret fis-16 ta` Ottubru 1989.

Kompla stqarr illi fil-bidu kien hemm zmien li ma kinux izommu *accounts* ghaliex ma kinux jafu li kien hemm htiega ghal dan.. Indunaw meta rcivew avviz mid-Dipartiment tal-Kummerc u kien ghalhekk illi hatru lil Patrick Camilleri biex ihejji l-*accounts.* Kellhom ihallsu l-penali li kienet tammonta ghal xi Lm 2,000. L-azzjonisti ta` dak iz-zmien kollha kkontribwew ghal din il-penali hlief ghal Francis Fava. Francis miet fis-6 ta` Novembru 2008. L-ishma tieghu fil-kumpannija marru ghand martu Maria Goretti Fava, u uliedu Rosemarie Fava u Michael Fava.

Qal illi f`Ottubru 2016, huwa nduna li fl-1989 Francis Fava kien deher fuq kuntratt ghan-nom tal-kumpannija u kien ittrasferixxa iktar minn erbat itmiem raba` favur Rosario Cortis li jigi hu Maria Goretti Fava. Xi ftit tal-jiem wara Rosario Cortis rega` ttrasferixxa l-art lil ohtus Maria Goretti Fava. Ghal xi raguni meta saru r-ricerki tal-kumpannija, dan il-kuntratt baqa` ma rrizultax. Inghata parir biex isiru ricerki bic-*c number* tal-kumpannija u kien b`hekk li rrizulta dan il-kuntratt.

Kompla jghid illi Francis Fava qatt ma semma xejn dwar dawn iz-zewg kuntratti u lanqas qatt kien hemm xi hjiel li jindika li l-proprjetarji ta` l-art kienu differenti minn Fuxya. Ma dahlu ebda flus minn dawn il-kuntratti fil-

kontijiet jew kotba tal-kumpannija. Fil-fatt kienu qeghdin fil-process li jikkontestaw dawn il-kuntratti.

Xehed illi bejn l-1994 u l-1997, ohtu Carmen ghaddiet l-ishma taghha lil uliedha Donald u Michael Cassar. Ikkonferma li laqghat formali tal-kumpannija ma kinux isiru ghax ma kienx ikun hemm x`tiddiskuti apparti d-diskussjonijiet li kienu jsiru b`mod informali. L-unika diskussjonijiet li kienu jsiru kien meta jissemma li jkun se johrog permess tal-izvilupp. Darba Francis sejjah laqgha formali fejn qal li kien hemm xi hadd interessat li jizviluppa l-art tal-kumpannija f`*agriturismo* izda din il-persuna qatt ma tfaccat u baqa` ma sar xejn.

Kompla jixhed illi matul iz-zmien kien hemm diversi nies interessati biex jixtru imma qatt ma kien hemm xi diskussjonijiet fid-dettal, minhabba l-kwistjoni li r-raba` qieghed barra z-zona tal-izvilupp. Qal illi huwa mhuwiex kontra li l-kumpannija tigi xjolta u stralcjata, purche` l-erbat tmiem nieqsa jittiehdu in konsiderazzjoni fil-qasma u purche` l-ispejjez jinqasmu bejn kulhadd skont l-ishma li kull azzjonista prezenti ghandu.

Fil-**<u>kontroezami</u>** stqarr li wara li kienet iffurmata l-kumpannija huma ma kienu jafu xejn x`ghandhom jaghmlu. Lanqas kienu jafu li jrid isir l-awditjar tant li kiednu wehlu multa sostanzjali.

Xehed illi huh Nicholas dejjem ghadda xi EUR 500 lil Alex Mamo mill-gbir tal-qbiela.

Meta kienu jitkellmu b`mod informa li l-azzjonisti kienu jiltaqghu fid-dar ta` ommu Grace Fava. Ikkonferma li kien disgwid bejn Carmen Cassar u Nicholas Fava. Huwa cahad li qatt ircieva ittri sabiex isiru laqghat ufficjali tal-kumpannija. Huwa kien jircievi kontijiet mill-MFSA biex imorru jhallsu l-multi. Dawn il-kontijiet kien jaghtihom lil Nicholas li imbaghad kien jghaddihom lill-*accountant.*

Ikkonferma li ma kinux isiru laqghat formali bl-agenda. Fl-2002, kienet saret laqghaa izda imbaghad ma sarux iktar.

Qal illi meta Francis tnehha minn direttur, huwa ma kienx prezenti ghal-laqgha straordinarja li kienet saret.

Ighid illi gieli applikaw ghal permessi ta` l-zvilupp ta` l-art izda kien hemm rifjut.

Spjega li fil-kuntratt tal-1990, kienu dehru hu u Nicholas Fava. Dak iz-zmien kien hemm zewg diretturi tal-kumpannija. Sostna li mal-kuntratt ma gewx ipprezentati dokumenti li huwa kien awtorizzat jidher ghan-nom tal-kumpannija. Izda insista li kienet saret laqgha qabel u lkoll qablu li jsir hekk.

Michaeles sive Michael Fava xehed illi huwa jigi iben Nicholas Fava li miet fl-10 ta` Novembru 2016.

L-affarijiet li jaf dwar Fuxya jafhom minn dak li kien jghidlu missieru. Dwar il-porzjon ta` art li fir-rikors qed jigi allegat li jokkupaw hu u missieru, huwa jghid li dik hija art li kien effettivament akkwista missieru b`kuntratt tad-19 ta` Otturbu 1990, hekk kif korrett b`kuntratt tal-1992 fl-atti tan-Nutar Mario Bugeja.

Dik l-art mhijiex proprjeta` tal-kumpannija.

Spjega li wara l-mewt ta` missieru huma bdew il-procedura tal-*causa mortis*. Is-superstiti ta` missieru huma hu, ommu Salvina, u hutu Silvio u Nicholas.

Mario Fava kkonferma dak li xehed Andrew Fava.

Fil-**kontroezami** xehed illi huwa s-segretarju tal-kumpannija.

Stqarr illi gieli rcieva ittri minghand ir-rikorrenti biex isiru laqghat, li mbaghad saru.

Il-laqghat ma baqghux isiru ghax kull darba li ssir laqgha, l-*accountant* kien irid jithallas ; u la l-kumpannija ma kinitx qed topera, dawk kienu spejjez zejda. L-ahhar laqgha saret fl-2004. Mhux kulhadd kien lest li jaqsam l-ispejjez ugwalment.

Ikkonferma li l-flus li jidhlu mill-kirjiet jinghataw lil Alex Mamo biex jithallsu parti mill-ispejjez tal-kumpannija. Wara l-mewt ta` Nicholas Fava, ma kienx hemm gbir ta` kera mill-kumpannija..

Saviour Bugeja xehed illi huwa kien jonsob fir-raba` mertu tal-kawza. Kien inghata mansab u ghamel sentejn jonsob hemm. Dan ilu xi ghoxrin sena. Is-sidien tar-raba` kienu krewlu l-mansab. Nicholas Fava kien responsabbli. Huwa kien ihallas kera ta` Lm 100 fis-sena. Fava kien jaghhmillu karta li fuqha kien hemm miktub xi haga Fuxya Company. Kien juza` r-raba` ghall-insib biss..

Donald Sant xehed illi huwa kien avvicinat minn Alex Mamo biex jaghmel l-audit ta` Fuxya. L-*audit* sar fl-2009 u kien ghas-snin ta` bejn 2005 u 2008. Il-kumpannija ma kenitx taghmel negozju. Kulma kien hemm kienu *audit fees*, xi *professional fees* u *general annual registration fee.*

B`referenza ghal *shareholders` loans* fl-ammont ta` EUR 12,638, stqarr li dawk kienu bilanci li kienu gejjin mill-2004 u allura qabel ghamel l-audit hu. Qal li ma jafx mnejn originat dik il-figura. Il-kumpannija ma kellhiex kontijiet bankarji izda fejn fl-*audit report* hemm referenza ghal *bank balance* , dik giet imnizzla bhala *policy*. Ikkonferma li huwa ma ra l-ebda *bank statements* u kulma kien hemm *cash in hand*.

Dwar il-valutazzjoni taht l-intestatura ta` *assets investment property,* xehed illi dik kienet inkluza wara valutazzjoni li saret mill-Perit Joseph Borg Grech datata 7 ta` Marzu 2009 fejn dan stima l-valur ta` l-art fl-ammont ta` EUR 192,000.

Spjega li huwa qatt ma ltaqa` mad-dirigenti ta` Fuxya.

Qal li ma kienx hemm dokumenti li juru li l-kumpannija kienet qed taghmel xi negozju jew li kienet qed tircievi xi kera.

Perit Jesmond Mugliett xehed li wara l-applikazzjoni PA 6513/01 kien hareg permess Nicholas Fava dwar *store.* Fil-kaz ta` l-applikazzjoni PA 3818/15, is-sit huwa bicca art li tinsab ma` Sqaq 4 fi Triq il-Karmnu, Hal-Luqa. L-art hija forma ta` trapizju. Kif thares lejn il-faccata fuq in-naha tax-xellug, Fava kien ghamel bidliet sabiex jirrendi jaghmel l-i*store* abitabbli. Ghalhekk saret applikazzjoni ghal sanzjonar tal-proprjeta` u ghal bdil fl-uzu. Din kienet l-applikazzjoni PA 3818/15. Saret minn Nicholas Fava. Kien hemm imbaghad bdil fl-isem ta` l-applikant fis-sens illi wara li miet Nicholas l-applikazzjoni giet registrata fuq l-isem tal-armla tieghu Salvina Fava. Sal-lum ghadha qeghda tigi processata. Ikkonferma li kien hareg avviz ta` infurzar fuq dan is-sit minhabba l-bdil ta` l-uzu ta` l-ambjenti.

Nutar Dr Mario Bugeja pprezenta kopja ta` kuntratt fl-atti tieghu tad-19 ta` Ottubru 1990 li sar bejn Andrew Fava noe u Nicholas Fava, kif ukoll il-kuntratt korrettorju tal-ewwel kuntratt bejn l-istess partijiet ; dan it-tieni kuntratt sar fil-5 ta` Ottubru 1992.

Fil-**kontroezami**, huwa xehed illi l-isem tal-kumpannija kien moghti lilu minghand il-partijiet.

III. L-Art 402 tal-Kap 386

Ir-rikorrenti qeghdin iressqu t-talbiet taghhom abbazi tal-**Art 402 tal-Kap 386**.

Dan ifisser illi l-procediment tentat mhuwiex azzjoni naxxenti minn ligi ordinarja izda azzjoni li titwieled minn *lex specialis.*

Dan ikompli jfisser illi l-parametri tal-azzjoni huma definiti mill-Att dwar il-Kumpanniji, kif dibattuti u trattati fid-dottrina nostrana u dik estera, kif ukoll fil-gurisprudenza taghna u dik estera.

Ikompli jfisser illi propju ghaliex l-azzjoni hija delineata minn *lex specialis* it-talbiet li jista` jaghmel rikorrent u d-difiza li jista` jaghmel intimat ghal azzjoni skont l-Art 402 mhumiex dawk li jistghu jsiru f`azzjonijiet li huma regolati bil-ligi sostantiva ordinarja u procedurali.

Dan qed jinghad *in primis* ghaliex huwa rilevanti ghall-fini tal-kaz taht ezami tenut kont ta` kif kienu mpostati t-talbiet u l-eccezzjonijiet.

Dan premess, il-Qorti sejra taghmel riferenza ghal dawk mis-subartikoli tal-Art 402 li tqis rilevanti ghall-istanza tal-lum –

(1) Kull membru ta' kumpannija li jilmenta li l-affarijiet tal-kumpannija jkunu tmexxew jew qed jitmexxew jew aktarx jitmexxew b'mod li, jew li xi att jew ommissjoni tal-kumpannija kienu jew huma jew x'aktarx se jkunu, oppressivi b'mod mhux gust diskriminatorji kontra, jew b'mod mhux gust ta' pregudizzju, ghal membru jew membri jew b'mod li jkunu kontra l-interessi tal-membri in generali, jista' jaghmel rikors lill-qorti ghal ordni taht dan l-artikolu

…

(3) Jekk dwar rikors maghmul skond is-subartikolu (1) … il-qorti tkun tal-fehma li l-ilment ikun bazat sewwa u li jkun gust u ekwu li hekk taghmel, il-qorti tista' taghmel ordni taht dawk il-kondizzjonijiet li jidhrilha xierqa –

(a) li jirregola t-tmexxija ta' l-affarijiet tal-kumpannija fil-futur ; jew

(b) jirrestringi jew jipprojbixxi l-ghemil ta' xi att propost ; jew

(c) jehtieg lill-kumpannija li taghmel xi att li r-rikorrent ikun ilmenta li kienet naqset li taghmel ; jew

(d) jipprovdi ghax-xiri ta' l-azzjonijiet ta' xi membri tal-kumpannija minn membri ohra tal-kumpannija jew mill-kumpannija nnifisha u, f'kaz ta' xiri mill-kumpannija, ghat-tnaqqis li jkun mehtieg fil-kapital azzjonarju mahrug tal-kumpannija ; jew

(e) jordna lill-kumpannija li tibda, tiddefendi, tkompli jew ma tkomplix procedimenti tal-qorti, jew jawtorizza lil membru jew membri tal-kumpannija li jibdew, jiddefendu, ikomplu jew ma jkomplux procedimenti tal-qorti f'isem u ghan-nom tal-kumpannija ; jew

(f) jipprovdi ghall-hlas ta' kumpens minn dik il-persuna li tista' tkun instabet responsabbli mill-qorti ghal telf jew danni li jkunu ggarrbu minhabba att jew nuqqas li dwaru jkun sar ilment lill-persuna li tkun garrbet dak it-telf jew danni ; jew

(g) ixolji l-kumpannija u jipprovdi ghall-istralc konsegwenzjali taghha.

(4) Meta jsir ordni ghax-xoljiment ta' kumpannija skond is-subartikolu (3)(g), il-kumpannija ghandha titqies li tkun xoljiet fid-data meta jkun sar l-ordni u d-disposizzjonijiet tas-Sub-Titoli I u III tat-Titolu II tat-Taqsima V ta' dan l-Att li jirregolaw l-istralc ta' kumpanniji ghandhom japplikaw.

(5) Ordni maghmul taht dan l-artikolu jista' jehtieg lil kumpannija biex ma taghmilx xi emenda, jew li taghmel emenda mehtiega, fil-memorandum jew fl-istatut taghha.

Ghalkemm id-dicitura tal-Art 402(1) ittiehdet testwalment minn disposizzjoni simili li tirrizulta fil-Companies Act ta` New Zealand (u cioe` Sec 174 – NZ Companies Act 1993) tajjeb jinghad illi l-ligi ta` New Zealand segwiet l-izvilupp legislattiv tar-Renju Unit.

Fir-Renju Unit, kien hemm l-ewwel il-Companies Act 1985 (Sec 459).

Imbaghad fi zminijiet aktar ricenti kienet hemm il-Companies Act 2006 [Sec 994(1)].

Fil-fatt Sec 459 thassret ghal kollox mill-Companies Act 1985 u dahlet ezatt kif kienet bl-Art 994(1) fil-Companies Act 2006.

Fil-pag 485 ta` l-ktieb **Company Law** (Fourth Edition – 2016 – OUP) **Brenda Hannigan** tghid :-

"Where the court is satisfied that a petition under s. 994 is well founded, it may make such order as it thinks fit for giving relief in respect of matters complained of [s 996(2)]"

Dan premess, riferibbilment ghall-kaz tal-lum, sabiex il-Qorti taghti konsiderazzjoni ghal dawk it-talbiet tar-rikorrenti fejn intalbu rimedji, skont kif previst fis-subartikoli (3), (4) u (5) ta` l-Art 402, hija tassattiva l-prova tal-att li minnu qeghdin jilmentaw ir-rikorrenti.

Dan ifisser illi jekk abbazi tal-provi akkwiziti, il-qorti tkun sodisfatta li jirrizulta dak previst fis-subartikolu (1), allura tghaddi mbaghad biex taghti l-ordni skont is-subartikoli l-ohra.

Jekk il-prova tkun insodisfacjenti ghaliex ma jkunx irrizulta dak previst mis-subartikolu (1), allura l-qorti ghandha tieqaf hemm, u ma ghandhiex tapplika dak previst fis-subartikoli l-ohra tal-Art 402 u t-talbiet l-ohra jkunu rigettati.

Ghalhekk il-prova tas-sussistenza legali u fattwali ta` dak li jipprovdi s-subartikolu (1) tal-Art 402 hija pregudizzjali ghall-prosegwiment tal-azzjoni.

IV. Il-prova

Fil-Pag 970 ta` **Principles of Maltese Company Law** (MUP – 2007) **Andrew Muscat** ighid illi –

... fuq ir-rikorrent jinsab il-piz tal-prova li l-att jew omissjoni jaqa` fl-ambitu tas-subartikolu (1).

Ighid infatti li –

This wording (tal-subartikolu 1) *clearly suggests that the member **<u>need only prove one effect</u>** of the conduct, act or omission, that is, that such conduct, act or omission, has been, is or is likely to be "oppressive" or "unfairly discriminatory" or "unfairly prejudicial" (to a member or members) or contrary to interests (of the members as a whole).* (<u>enfasi u sottolinear tal-qorti</u>)

Fis-sentenza ta\` din il-Qorti diversament presjeduta tat-30 ta\` Jannar 2008 fil-kawza "**<u>Cutajar pro et noe et vs S.C. & Company Limited et</u>**" inghad hekk –

*Illi **<u>l-prova biex tirnexxi dina l-azzjoni tispetta lir-rikorrenti</u>*** (enfasi u sottolinear ta\` din il-qorti) *li ressqu dina l-azzjoni. Huma jridu jippruvaw li (a) l-affarijiet tal-kumpanija jkunu tmexxew jew qed jitmexxew jew aktarx jitmexxew b'mod li... (b) jew li xi att jew ommissjoni tal-kumpannija kienu jew huma jew x'aktarx se jkunu, oppressivi b'mod mhux gust diskriminatorji kontra, jew b'mod mhux gust ta' pregudizzju, ghal membru jew membri jew b'mod li jkunu kontra l-interessi tal-membri in generali.*

Il-ligi taghna ma taghtix spjegazzjoni ta' x'inhu oppressiv b'mod mhux gust diskriminatorji kontra, jew b'mod mhux gust ta' pregudizzju. Kull kaz ghalhekk irid jigi trattat u deciz fuq il-mertu tieghu proprju, u dana kaz b'kaz. L-iskop tal-ligi hu biex il-Qorti tkun tista' tintervjeni f'dawk il-kazijiet fejn hemm bzonn li jinghata rimedju minhabba unfair dealing fejn jigi pruvat li kien hemm azzjonijiet jew ommissjonijiet li ma kienux gusti u li kienu ta' pregudizzju jew li l-affarijiet tal-kumpanija mhux qed jitmexxew sew.

Fil-pag 492 ta\` **<u>Company Law</u>** (op. cit.) **<u>Brenda Hannigan</u>** tghid :-

"Whether the company\`s affairs are being or have been conducted in a manner which is unfairly prejudicial to the petitioner\`s interest is an objective, not a subjective, matter. The prejudice must be real, rather than merely technical or trivial, and the petitioner does not have to show that the persons controlling the company have acted deliberately in bad faith or with a conscious intent to treat him unfairly.

The conduct complained of must be prejudicial in the sense of causing prejudice or harm to the relevant interest of the member (usually, but not limited to financial damage) and also unfairly so (usually connoting some breach of company law or the constitution but not limited to that) and it is not sufficient if the conduct satisfies only one of these tests." [enfasi u sottolinear ta\` din il-qorti].

V. <u>Il-legittimu kontradittur</u>

Fil-Pag 995 tal-"**Principles of Maltese Company Law**" (op. cit.) Andrew Muscat jittratta l-kwistjoni ta` kontra min tista` tigi istitwita azzjoni ta` din ix-xorta. Ighid hekk :-

"The Companies Act does not specify the person or persons against whom an action under article 402 is to be brought. It does well not to do so. The reason is that the choice of the defendant or defendants depends on the facts of the case and on the type of relief sought. … the persons responsible for the conduct complained of would typically vary from the current or past majority shareholder to the managing director or the controlling directors acting on behalf of company. Control may also be vested in a shadow director, a provisional administrator, a liquidator, an official receiver and even the pledgee of shares in the company, who, in terms of the pledge agreement, may exercise the shareholder`s voting rights or appoints directors on the board.

Moreover, as will be noted in the following pages, the forms of relief that may be granted by the court are considerably wide-ranging; a court order could be issued against a number of persons, typically the company itself and one or more shareholders. In Joseph Calleja vs Vincent Calleja, an article 402 was filed only against one of the shareholders. The company itself was not a party. The defendant pleaded that the company itself were wrongly instituted, as the action had to be filed against the company and not against himself as a member. The Court, in a judgement in parte, considered article 402 to provide a flexible and equitable remedy and agreed with the applicant`s submissions that an article 402 action had to be instituted against the person or persons who were allegedly responsible for the wrongdoing and that the court`s order need not in all cases be issued against the company itself. The Court remarked that as the applicant`s allegations of wrongdoing were directed towards the defendant, it was clear that the defendant was a proper party to the proceedings. It also stated that the fact that the action was not also filed against the company did not nullify the proceedings.

…

Given the fundamental principle of Maltese procedural law that no person can be bound by a court`s decision or judgement unless he is a party to the relative proceedings, it is important for the complainant to carefully identify the person or persons against whom the action is to be filed."

VI. Gurisprudenza

Fis-sentenza li tat il-Qorti ta` Ghawdex (Gurisdizzjoni Superjuri) fl-4 ta` Frar 2009 fil-kawza "**Ellis vs Ellis**" inghad hekk –

Jibda biex jinghad li dan il-provvediment jista' jigi nvokat mill-membri kollha, u mhux biss minn membri minoritarji u m'hemmx dubju li d-diskrezzjoni u l-poteri moghtija lill-qorti f'dan il-kuntest huma wesghin. Minn dan il-provvediment hu evidenti li :

(a) Dan il-provvediment japplika wkoll f'kaz ta' att jew ommissjoni izolata ;

(b) Ir-rimedju jista' jinghata kemm ghal dak li jkun gara fil-passat u wkoll xi att propost li jsir fil-futur ;

(c) L-ilment jrid ikun fuq it-tmexxija tal-affarijiet tal-kumpannija jew fuq att jew omissjoni tal-kumpannija.

Fis-sentenza taghha tad-9 ta` Marzu 2007 fil-kawza "**Vella et vs Vella Brothers Ltd et**", il-Qorti tal-Appell qalet hekk –

… l-Artikolu 402 ta' l-Att dwar il-kumpaniji jaghti diskrezzjoni pjuttost wiesa' lill-Qrati u dan ghaliex dawn il-provvedimenti ghandhom l-ghan li jissalvagwardjaw u jipprotegu lill-azzjonisti ta' socjeta' kummercjali, partikolarment lil dawk li huma minoritarji u li ghalhekk qeghdin fl-impossibilita' li jirregolaw il-mod li bih tkun qed titmexxa s-socjeta' li fiha huma jkollhom interess …

*… din id-disposizzjoni, li hija bbazata fuq l-Art.459 tal-Companies Act (1985) Ingliza, hija ispirata fuq principji ta' ekwita' aktar milli minn drittijiet strettament legalistici biex ikun jista' jigi moghti rimedju. Dak li hu necessarju hu li l-azzjonista jipprova li minhabba l-gestjoni tas-socjeta' partikolari hu qed isofri, jew ukoll jista' jsofri, pregudizzju ta' natura oppressiva, ingusta jew diskriminatorja. Tali gestjoni tista' tirreferi sempliciment ghal xi att specifiku jew xi ommissjoni tal-kumpanija. Il-pregudizzju jista' jirreferi ghall-azzjonist li qed jippromwovi l-proceduri, ghal xi azzjonist iehor jew ghall-interess in generali ta' l-azzjonisti. Ma hemmx ghalfejn li huwa jipprova li huwa zgur ser isofri xi pregudizzju fil-futur. Tali prova tista' ssir fuq bazi ragjonevoli ta' possibilita' **("Vincent Monreal et v. Lino Delia noe"** deciza mill- Prim'Awla tal-Qorti Civili fit-13 ta' Mejju, 1999). Infatti gie deciz mill-Qrati Inglizi fil-kawza in re **Bovey Hotel Ventures Ltd** [(1983) B.C.L.C. 290] li 'the Court will not give a list of situations when this remedy may be resorted to however one principle remains clear. A shareholder may make use of this article when his shareholding in the company has been seriously diminished at least seriously jeopardized by reason of a course of conduct or the part of those who have the de facto control of the company, which has been unfair to the member concerned".*

*… Fid-decizjoni **O'Neill v Phillips** moghtija mill-House of Lords fl-20 ta' Mejju 1999, gie ritenut illi l-legislatur ried illi biex jinghata rimedju taht l-artikolu jigi kkunsidrat il-kriterju ta' dak li huwa 'fair'. Izda Lord Hoffman izid ighid li - "Although fairness is a notion which can be applied to all kinds of*

activities, its content will depend upon the context in which it is being used … The requirement that prejudice must be suffered as a member should not be too narrowly or technically construed.

Fid-decizjoni **<u>In Re Bovey Hotel Ventures Ltd.</u>** (1983) Slade J ighid dwar *'unfair prejudice'* –

The test for unfairness must, I think, be an objective, not a subjective, one. In other words it is not necessary for the petitioner to show that the persons who have de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith ; the test, I think is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner's interests."

Fis-sentenza "**<u>Monreal et vs Delia noe</u>**" (op. cit.) inghad –

Dawn il-provedimenti huma ta' salvagwardja u ta' protezzjoni ghall-azzjonisti ta' socjeta` kummercjali, b'mod partikolari ghal dawk li huma minoritarji. Ir-rimedji li johorgu minn dawn il-provedimenti huma moghtija lil kull azzjonist ta' socjeta` kummercjali. Kull azzjonist, anke jekk hu minoritarju, ta' socjeta` kummercjali, anke jekk hi pubblika, jista' jitlob li jinghataw l-ordnijiet kollha necessarji u opportuni, f'kaz li jirnexxielu jipprova illi minhabba l-gestjoni tal-istess socjeta` huwa qed isofri jew ukoll jista' jsofri xi pregudizzju ta' natura oppressiva, ingusta jew diskriminatorja. Tali gestjoni tista' tirreferi semplicement ghal xi att specifiku jew xi ommissjoni tal-kumpanija. Il-pregudizzju jista' jirreferi ghall-azzjonist li qed jippromuovi l-proceduri, ghal xi azzjonist iehor jew ghall-interessi in generali tal-azzjonisti. In vista ta' dan kollu jista' jinghad li hu bizzejjed li l-azzjonista jipprova li huwa qed isofri jew eventwalment jista' jsofri xi pregudizzju minhabba xi agir tas-socjeta` li taghha huwa jippossjedi xi ishma. Ma hemmx ghalfejn li huwa jipprova li huwa zgur li ser isofri xi pregudizzju fil-futur. Tali prova tista' ssir fuq bazi ragjonevoli ta' probabbilita`. Inoltre, skond dak li hemm provdut fis-subartikolu (3) tal-istess artikolu 402, il-Qorti tista' tipprocedi biex taghmel kull ordni necessarja u opportuna skond dawn il-provedimenti, jekk jirrizulta li l-ilment tal-azzjonista hu sewwa bbazat u jekk il-Qorti thoss li huwa ekwu u gust li taghmel.

Fis-sentenza taghha tal-31 ta` Jannar 2003 fil-kawza "**<u>Ellul vs Ellul</u> <u>pro et noe</u>**", il-Qorti tal-Appell qalet hekk –

… Fil-ligi Ingliza (ara Art 459 tal-Companies Act, 1985) jinstab rimedju simili li hu maghruf bhala "The Unfair Prejudice Remedy". Il-Qorti ta' l-Appell Ingliza stabbiliet fil-kaz "in Re Saul D. Harrison & Sons plc ([1995]) 1BCLC 14)" il-linji ta' gwida dwar kif kellu jkun l-operat biex ikun jista' jigi kkwalifikat bhala, "unfairly prejudicial" (fit-test tal-Ligi Maltija din il-frazi hi

tradotta "b'mod mhux gust ta' pregudizzju"). Wiehed kellu, fl-ewwel lok, jara jekk dak l-operat kienx jew le skond l-istatut tal-kumpanija. Izda fl-applikazzjoni tal-imsemmija dispozizzjoni – ispirata fuq principji ta' ekwita` aktar milli minn drittijiet strettament legali – il-Qorti tiehu in konsiderazzjoni l-aspettattivi legittimi ("legitimate expectations") li r-rikorrent jista' jkollu u li sikwiet ikunu ferm aktar wiesgha mid-drittijiet strettament legali li johorgu mill-istatut tas-socjeta`. Dawn l-aspettativi legittimi jitwieldu minn xi relazzjonijiet personali partikolari bejn l-azzjonisti. Fil-kaz Ebrahimi vs Westbourne Galleries Ltd. ([1973] AC 360) Lord Wilberforce elenka numru ta' sitwazzjonijiet fejn dan ir-rimedju jista' jinghata, sitwazzjonijiet dawn li x'aktarx jinstabu f' kumpaniji zghar privati li ta' sikwiet jissejhu "quasi partnerhsips", fosthom is-segwenti :-

"(i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company ;

(ii) an agreement, or understanding, that all, or some (for there may be "sleeping members") of the shareholders shall participate in the conduct of the business ;

(iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere".

Fid-decizjoni ta` din il-Qorti diversament presjeduta tas-7 ta` Ottubru 2016 fil-kawza **Av. Dr. Pio M. Valletta noe vs Jeno Torocsik et** inghad illi sabiex ikun hemm *unfair prejudice,* (a) it-*test irid ikun wiehed oggettiv* ; (b) *M`hemmx htiega li l-attur jipprova l-mala fede* ; (c) *M`hemmx htiega li l-attur jipprova li kien hemm intenzjoni li tikkawza pregudizzju* ; *(d) Mhux gust ma jfissirx bilfors li l-agir irid ikun illegali ;* u (e) *L-agir irid ikollu effett negattiv fuq l-attur bhala azzjonist.*

Fid-decizjoni **Re Coroin Ltd** – 2012 – All ER (d) 58(Feb) – EWHC 129 (Ch) – moghtija mic-Chancery Division tal-Ingilterra – David Richards J. qal hekk :-

"630 Prejudice will certainly encompass damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member ... The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in character. A disregard of the rights of a member as such, without any financial consequences, may amount to prejudice falling within the section.

631 Where the acts complained of have no adverse financial consequences, it may be more difficult to establish relevant prejudice. This may particularly be the case where the acts or omissions are breaches of duty owed to the company rather than to shareholders individually. If it is said that the directors or some of them had been in breach of duty to the company but no loss to the company has resulted, the company would not have a claim against those directors. It may therefore be difficult for a shareholder to show that nonetheless as a member he has suffered prejudice …"

VII. **Dottrina**

Fil-pag. 464 ta`**Ferrar's Company Law** – Third Edition - jinghad hekk –

… *The position will vary greatly from the small private companies, commonly called quasi-partnerships, to public companies of considerable size. As a quasi-partnership, the company will usually have been formed or continued on the basis of a personal relationship involving mutual confidence. There may be an agreement or understanding that all or some of the shareholders are to participate in the conduct of the business. Restrictions on the transfer of shares will be the rule rather than the exception. The individuals involved may also have made relatively substantial capital contributions to the company. Shareholders in such companies will be a small close-knit group, actively involved in many instances in the daytoday operations and financially and personally committed to the company. Here the scope for legitimate expectations beyond their strict legal rights is obviously greatest.*

However, as Lord Wilberforce stressed in Ebrahimi v Westbourne Galleries Ltd, the case for giving effect to equitable considerations must be made in each instance and it is not sufficient simply to assert that the company is small or private, for in many cases the basis of the relationship will be adequately and exhaustively laid down in the articles. If it is so defined by the articles or, for example, by the articles supplemented by a shareholders' agreement, then there is little room for finding further legitimate expectations beyond those outlined in the documents.

The interests of shareholders in larger private and public companies, on the other hand, are likely to be quite different from those of shareholders in quasi-partnerships and considerably more restricted. In these larger companies there is usually no underlying personal relationship, employment is rarely an issue and the shareholders are more interested in such matters as dividend yield and capital appreciation than involvement in the day-to-day running of the company. If they become dissatisfied, especially if it is a public company, they can sell their shares and withdraw from the company. Here the members rarely have expectations beyond their strict legal rights as provided by the articles.

"That is not to say that s.459 does not apply to larger private companies and public companies for the section is clearly not limited to quasi-partnerships. The point is that it may be harder to establish conduct which is unfairly prejudicial to the interests of the members in such companies.

Fil-pag. 409 ta` **Cases and Materials on Company Law** – Fifth Edition – **Hicks and Goo** – ighidu :-

In the early days of S.459, it was thought that the petitioner must have unfairly suffered prejudice to an interest as a member only (and not eg. as a director). This requirement has never been relaxed in that the Court is prepared to recognise that members may have different interests having regard to their rights, expectations and obligations (re a company (No 00477 of 1986 [1986 BCLC 376; O'Neill v Phillips. [1999] 1 WLR 1092). This is particularly so in quasi-partnership cases where a minority is excluded from management. But where the articles make detailed provision for any departing members to sell their shares at a fair price, the position may be different …Section 459 has proved to be a powerful weapon for minority shareholders, particularly in the case of quasi-partnerships. In such companies, minorities who are excluded from management participation or who unfairly suffer loss as a result of wrongdoing by directors or majority shareholders may get relief under the section.

Fil-pag. 449 ta` **Farrar's Company Law** - Fourth Edition - jinghad illi –

A member's interests are not necessarily limited, therefore, to his strict legal rights under the Articles and the Companies' Act but can extend also to legitimate expectations as to the conduct of the company's affairs arising from the nature of the company and the agreements and understandings between the parties.

Fil-pag. 506 ta` **Company Law** (op. cit.) **Brenda Hannigan** tghid :-

"Mere deadlock between the parties who have lost trust and confidence in one another is insufficient then to merit relief under CA 2006, s 994, ***in the absence of prejudicial conduct****."* [enfasi u sottolinear ta` din il-qorti].

Fil-pag. 711 ta` **Boyle & Birds` Company Law** (Eight Edition – 2011 – Jordans) l-awturi jghidu :-

"The term "unfair prejudice" whether analysed as a `standard` or a `concept` is a arelatively more objective one which is concerned with running the company in a way that is clearly unfair in its consequences to the complaining shareholder, even if the respondents can claim to have acted in the best of good faith."

Fil-pag. 691-692 ta` l-ktieb **<u>Gower and Davies</u>** - **<u>Principles of Modern Company Law</u>** (Eighth Edition – 2008 – Sweet & Maxwell) jinghad illi :-

" … the courts recognised that sec 994 protects expectations and not just rights. Borrowing from public law, it is sometimes said that the section protects the "legitimate expectations" of the petitioner, though more recently the courts have preferred the private law phrase "equitable considerations" [Qorti tal-Appell Ingliza fil-kawza "Saul D Harrison & Sons plc" – 1995 – ghall-uzu tal-frazi "legitimate expectations" ; House of Lords – "O`Neill vs Phillips" – 1999 – ghall-uzu tal-frazi "equitable considerations"] Whatever the language used, the difficult issue is to distinguish those expectations of the petitioner which are to be classified as "legitimate" or which considerations are to fall within the category of "equitable considerations" and so as deserving of legal recognition and protexction from those expectations which the petitioner may harbour as a matter of fact but which the courts will not protect."

Fil-pag 569-570 tal-ktieb **<u>Company Law</u>** (26th Edition – 2009/2010 – OUP) l-awturi **<u>Mayson, French & Ryan</u>** ighidu hekk b`riferenza ghad-decizjoni ta` Re Saul D Harrison and Sons, citata aktar kmieni :-

"The words `unfairly prejudicial` are general words and they should be applied flexibly to meet the circumstances of the particular case … The conduct [being complained of] must be both prejudicial [in the sense of causing prejudice or harm to the relevant interest) and also unfairly so ; conduct may be unfair without being prejudicvial or prejudicial without being unfair, and it is not sufficient if the conducts satisfies only one of these tests."

Ikomplu billi jaghmlu riferenza ghal "**<u>O`Neill vs Phillips</u>**" (op. cit.) in partikolari dwar l-ghazla li ghamel il-Parlament Ingliz –

"Parlament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief … it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The conc ept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. Although fairness is anotion which can be applied to all kinds of activities its content will depend upon the context in which it is being used."

VIII. <u>L-ilmenti</u>

Il-Qorti sejra tqis jekk l-ilmenti li ghamlu r-rikorrenti jissoddisfawx il-vot ta` l-Art 402(1) tal-Kap 386.

Tajjeb li jkun ribadit illi sabiex ikun sodisfatt il-vot tal-ligi jkun bizzejjed jekk tirrizulta mqar wahda mic-cirkostanzi ndikati fl-Art 402(1). Il-legislatur infatti ghazel il-konguntiv *jew* mhux *u* fit-test tal-ligi. Dan ifisser illi r-rekwiziti huma alternattivi mhux kumulattivi.

1. <u>L-allegata vjolazzjoni tal-klawsola 8 tal-*Memorandum* tas-socjeta` intimata</u>

Ir-rikorrenti jghidu illi b`effett mit-23 ta` Settembru 2014, Andrew Fava irrizenja minn direttur (fol 110) u b`hekk fil-mument tal-prezentata ta` r-rikors promotur tal-azzjoni, l-uniku direttur tal-kumpannija kien Nicholas Fava (Vide fol 27). Skont ir-rikorrenti dak il-fatt kien jammonta ghal ksur tal-klawsola 8 tal-*memorandum of association* tas-socjeta` intimata, li tghid illi n-numru ta` diretturi tal-kumpannija ma ghandux ikun ta` anqas minn tnejn u mhux aktar minn hamsa.

Kien lamentat mir-rikorrenti li ma sar l-ebda tentattiv min-naha ta` l-ufficjali tas-socjeta` intimata sabiex jigi elett direttur gdid.

Kien rilevat ukoll illi fil-mori ta` din il-kawza, miet Nicholas Fava sabiex b`hekk il-kumpannija spiccat minghajr diretturi.

Mir-*records* tar-Registru tal-Kumpanniji jidher li d-diretturi tal-kumpannija kienu Nicholas Fava u Andrew Fava waqt li Mario Fava huwa s-segretarju tal-kumpannija.

Fil-Pag 1096 ta` "**<u>Principles of Maltese Company Law</u>**" (op cit) Andrew Muscat ighid :-

"If the number of directors is reduced below the statutory minimum, any member of the company may at any time after the lapse of thirty days, therefrom make an application to the court for the court to appoint a director or directors in accordance with the company`s memorandum"

Dan hu in linea ma` dak li jghid l-**<u>Art 137(7) tal-Kap 386</u>** li jaqra:

"Jekk in-numru ta` diretturi ta` kumpannija jinzel inqas minntnejn kull membru tal-kumpannija jista` f`kull zmien wara li jghaddu tletin jum minn meta jigri dan, b`rikors jitlob lill-qorti biex tahtar direttur jew diretturi tal-kumpannija

skont il-memorandum taghha u dan bla hsara ghall-jedd tad-direttur li jkun baqa` li jimla kull vakanza li hekk tinholoq skont id-disposizzjonijiet tal-artikolu140(6) matul it-tletin jum specifikati fih jew f`kull zmien iehor wara sakemm id-direttur ma jkunx mahtur mill-qorti."

Fil-kaz ta` kumpannija, il-*membri* huma l-azzjonisti (Art 2 tal-Kap 386).

Ir-rikorrenti fil-kawza tal-lum huma azzjonisti (ara fol 27 sa 29).

Ir-rikorrenti setghu jipprevalixxu ruhhom mill-Art 136(7) tal-Kap 386 sabiex jitolbu l-intervent tal-Qorti ghall-hatra tad-diretturi mankanti skont l-istatut tal-kumpannija.

Jidher illi din it-triq kienet skartata.

Fil-kors tal-kawza, diversi kienu li xehdu miz-zewg nahat li Fuxya ghandha tigi xjolta u stralcjata.

Jekk dak kien il-fini primarju tal-azzjoni, kif jidher illi kien meta l-Qorti tqis l-assjem tax-xiehda, allura seta` nghazel il-perkors traccjat bl-Art 214 et seq tal-Kap 386.

Jidher li anke din it-triq kienet skartata ; minghajr raguni plawsibbli.

Minflok intghazlet l-azzjoni skont l-Art 402 tal-Kap 386 li – kif inghad aktar kmieni - ghandha binarji partikolari taghha.

Ladarba kien skartat rimedju specifiku previst mill-Kap 386 sabiex jindirizza l-assenza ta` diretturi jew tan-numru ta` diretturi previst mill-*memorandum* tal-kumpannija, ir-rikorrenti ma jistghux jipprospettaw dak il-fatt bhala raguni ghat-talbiet taghhom meta kellhom l-opportunita`, propju ghaliex membri, li jipprevalixxu ruhhom minn disposizzjoni specifika biex imexxu `l quddiem il-lanjanza taghhom.

Dan l-ilment partikolari mhuwiex sufficjenti bhala prova a tenur tal-Art 402(1) tal-Kap 386.

2. **L-imgieba ta` Nicholas Fava**

Ir-rikorrenti lmentaw li ghal zmien fit-tul, Nicholas Fava (li miet fil-mori tal-kawza) hadem l-artijiet tas-socjeta` intimata ghal qliegh u gwadann personali tieghu minghajr ma kkontribwixxa lejn il-kumpannija.

Kien allegat li dan Fava la qatt ma hallas kera tal-art u lanqas ghadda profitti li ghamel lill-kumpannija.

Skont l-**Art 136A(1) tal-Kap 386**, direttur ghandu jagixxi b`mod onest u in bona fede fl-ahjar interess tal-kumpannija.

Skont l-**Art 136A(3)(b) u (d)** id-diretturi ta` kumpannija ma ghandhomx jaghmlu profitti sigrieti jew personali mill-pozizzjoni taghhom minghajr il-kunsens tal-kumpannija.

Lanqas ma ghandhom jaghmlu gwadan personali minn informazzjoni konfidenzjali tal-kumpannija.

Lanqas ma ghandhom juzaw xi proprjetà, informazzjoni jew opportunità tal-kumpannija ghall-beneficcju taghhom stess jew ta` xi hadd iehor, jew jiehdu xi beneficcju b`xi mod iehor b`konnessjoni mal-ezercizzju tas-setghat taghhom, hlief bil-kunsens tal-kumpannija f`laqgha generali jew hlief kif permess mill-memorandum u l-istatut ta` assocjazzjoni tal-kumpannija.

Fil-Pag 449 tal-"**Principles of Maltese Company Law**" (op cit) Andrew Muscat ighid :-

The Companies Act encapsulates the no profit rule by expressly prohibiting directors from (a) making secret or personal profits from their position without the consent of the company, (b) making personal gain from confidential company information and (c) using any property, information or opportunity of the company for their own or anyone else`s benefit.

…

The basis for the no profit rule is that any profit derived from an activity engaged in or for the company`s benefit belongs to the company. The misuse by directors of corporate property is a clear breach of the no profit rule and usually presents no

particular problem. It is self-evident that a director cannot make use of the company`s property as if it were his won. Indeed, as Gower and Davies remark, "even the most unsophisticated director should realise that he must not use the company`s property as if it were his own (although even this is frequently overlooked or ignored in a "one-man company")"

Il-Qorti qieset il-lanjanza tar-rikorrenti.

Fuq l-assjem, ma ssibx provi li juru tassew illi dan Nicholas Fava hadem ir-raba` tal-kumpannija ghall-gwadann personali tieghu.

Ir-rikorrenti ressqu bhala xhud lil James Gauci mill-Agriculture & Rural Payments Agency fi hdan il-Pitkalija ta` Malta.

Dan ix-xhud ipprezenta rendikont dwar pagamenti ta` sussidju li Nicholas Fava nghata matul is-snin flimkien ma` dettalji ta` artijiet li l-istess Fava rregistra f`ismu fi hdan l-istess agenzija (fol 72 sa 96).

Madanakollu abbazi tad-dokumenti esebiti ma hemm xejn x`juri li l-bicciet ta` art li kienu registrati minn Nicholas Fava kienu raba` appartenenti lil Fuxya.

Prova ta` din ix-xorta kienet tispetta lir-rikorrenti.

Mhuwiex il-kompitu tal-Qorti li timla l-vojt tar-rikorrenti.

Lanqas ma ghandha tasal ghal konkluzjonijiet mhux ippruvati skont il-ligi.

Il-Qorti m`ghandhiex ic-certezza morali li r-raba` li kien registrat minn Nicholas Fava f`ismu, bhala ghelieqi li kienu qed jinhadmu, ghall-iskopijiet ta` l-ghajnuna mill-UE, kienu in effetti l-istess raba` proprjeta` tal-kumpannija intimata.

Dan in-nuqqas ta` identifikazzjoni ta` l-artijiet registrati bhala l-istess artijiet proprjeta` tal-kumpannija intimata jwassal lil din l-Qorti biex ma taghti l-ebda piz lix-xiehda ta` James Gauci ghall-fini ta` dan il-procediment.

Daqstant huma privi minn utilita` ghall-fini tal-kawza tal-lum l-*statements* tal-kont bankajru li fih kienu jigu depozitati s-sussidji li kienu jithallsu lil Nicholas Fava (fol 276 sa fol 321) stante li ma tressqitx prova sodisfacjenti u sal-grad rikjest mil-ligi li dawk is-sussidji kienu jirrigwardaw proprju art ta` Fuxya.

B`zieda ma` dan, anke li kieku b`xi mod kellha titqies li ngabet xi prova li Nicholas Fava kien verament jahdem art tal-kumpannija, ma tressqux provi dwar l-ghadd tal-qliegh li suppost ghamel ; kif lanqas ma tressqu provi dwar spejjez li nkorra dan Fava biedx jahdem dak ir-raba`.

3. <u>Kirja</u>

Ir-rikorrenti jikkontendu li partijiet mill-art ta` Fuxya inkrew lil terzi minghajr konsultazzjoni ma` hadd inkluz huma.

Ilmentaw illi ma jafux x`sar mill-introjtu generat mill-kirjiet.

Ilmentaw ukoll minn lezjoni ghad-drittijiet taghhom u ta` Fuxya.

In kwantu jirrigwarda provi, il-Qorti ssib li dwar il-flus li kienu percepiti mill-kiri tal-art, l-accountant Alex Mamo xehed illi l-flus kienu jmorru ghandu.

Kien prezentat rendikont tal-flejjes li ghadda Nicholas Fava.

Skont Mamo huwa kellu EUR 3,623.00 (fol 249).

L-ammont jaqbel circa mal-kera li xi inkwilini xehdu li kienu jhallsu ta` kull sena lil Nicholas Fava jew qabel lil Grazia Fava.

Barra minn dan, mill-provi rrizulta li kien hemm xi bicciet mill-art li kienu mqabbla ghand inkwilini **<u>qabel</u>** il-kumpannija intimata akkwistat l-art *de quo*.

Il-Qorti nnotat ukoll li r-ricevuti tal-kera li kienu johorgu fl-isem ta` Fuxya (fol 342 sa 346).

Tenut kont tal-provi fl-assjem taghhom il-Qorti ma tarax li l-ilment tar-rikorrenti jissodisfa l-Art 402(1).

4. <u>**Laqghat generali**</u>

Sar ilment ukoll li r-rikorrenti ilhom ghal diversi snin ma jigu notifikati b`avviz ghal sejha ta` laqgha generali. L-ahhar laqgha li sehhet kienet fis-26 ta` Lulju 2004, u kien allegat li din il-laqgha ssejhet bhala konsegwenza tal-provvediment li kien nghata fil-kawza 1351/2003 GCD. Fil-11 ta` Gunju 2004, inghata digriet fejn il-qorti ordnat li ssir laqgha generali ta` kull sena sa mhux aktar tard mill-31 ta` Lulju ta` kull sena b`dan illi d-diretturi u s-segretarju kellhom jaghtu l-avviz tal-laqghat kif trid il-ligi. Id-digriet kien ighid ukoll illi jekk il-laqghat ma jsirux b`mod regolari, kien ser ikun hemm provvedimenti ohra kontra Nicholas u Andrew Fava personalment.

Jirrizulta li r-rikorrenti Donald Cassar u Michael Cassar kienu hadu passi kontra Fuxya fl-2003 skont l-Art 402 tal-Kap 386 (1351/03 GCD). *Inter alia* kienu talbu sabiex il-bord tad-diretturi ta` Fuxya jkun ordnat sabiex jottempera ruhu mal-ligi billi kull sena tissejjah laqgha generali tal-azzjonisti, taht sanzjoni ta` disprezz tal-awtorita` tal-qorti.

Jirrizulta li wara l-provvediment tal-11 ta` Gunju 2004, id-diretturi u s-segretarju tal-kumpannija kienu mwissja li fin-nuqqas li jinzammu laqghat regolari kull sena, kienu ser jittiehdu provvedimenti kontra taghhom personalment.

Inghad :

"Mit-twegiba ta` l-intimata jidher illi tassew illi ma humiex qeghdin isiru laqgha generali ta` kull sena. Ghalkemm huwa minnu illi huwa l-art. 132 tal-Kap 386 illi jaghti l-qorti s-setgha li ssejjah laqghat generali, madanakollu taht l-art. 402(3) (c) ukoll ghandha s-setgha li ggieghel lis-socjeta` "taghmel xi att li r-rikorrent ikun ilmenta li kienet naqset li taghmel."

Ghalhekk tordna illi ssir laqgha generali ta` kull sena sa mhux aktar tard mill-31 ta` Lulju ta` kull sena, u tordna lid-diretturi u lis-segretarju tas-socjeta` jaghtu l-avvizi tal-laqghat kif trid il-ligi, b`dan illi flimkien mal-laqgha tas-sena 2004, li ghandha ssir sa mhux aktar tard mill-31 ta` Lulju 2004, ghandha ssir laqgha straordinarja biex tinghata informazzjoni u ssir diskussjoni dwar l-attivitajiet tas-socjeta`, dwar l-uzu li jsir mill-beni taghha u dwar il-pozizzjoni finanzjarja.

Twissi lid-diretturi u lis-segretarju illi, jekk il-laqghat ma jsirux regolarment, jinghataw provvedimenti kontra taghhom personalment. Hekk tipprovdi dwar is-seba` talba tar-rikorrenti." (ara fol 30 sa 31).

Wara dan id-digriet, irrizulta li saret laqgha wahda, izda mbaghad ma baqghux jinzammu aktar laqghat.

Il-Qorti tqis li jekk tassew ir-rikorrenti odjerni riedu li jkunu hemm laqghat b`mod regolari, kien messhom hadu azzjoni immedjata wara li ma nzammitx il-laqgha ta` wara jew ta` l-anqas kien messhom hadu passi sabiex tigi inizjata procedura ta` disprezz fil-konfront ta` min kiser l-ordni tal-Qorti. Minflok sar hekk, ghazlu li jhallu sa Awissu 2016 sabiex jergghu jilmentaw li ma kienux inzammu laqghat.

Imgieba din li baqghet bla spjegazzjoni jew gustifikazzjoni.

Ikompli jinghad illi minkejja li l-azzjoni li kienet ittiehdet minn uhud mir-rikorrenti odjerni fl-2003 kienet fondata fuq l-Art 402 tal-Kap 386, dik il-Qorti ma ghamlet l-ebda indagni ta` jekk kinux sodisfatti r-rekwiziti tal-Art 402(1).

Huwa fatt maghruf illi l-gurisprudenza wara l-2009 hadet linja cara u kristallina fis-sens illi qabel qorti tista` taghti xi rimedju abbazi tal-Art 402(3), trid tkun sodisfatta li hem mil-prova skont il-ligi tar-rekwiziti tal-azzjoni skont l-Art 402(1). Ghalhekk l-ghoti ta` rimedju ma jistax jigi distakkat mill-prova tar-elementi tal-Art 402(1).

Ir-rikorrenti jikkontendu li n-nuqqas li jissejhu laqghat generali imur mhux biss kontra d-digriet tal-Qorti tal-11 ta` Gunju 2004 izda kontra l-Art 128 tal-Kap 386.

<u>Art 128 tal-Kap 386</u> ighid :-

(1) Kull kumpannija ghandha kull sena zzomm laqghagenerali bhala l-laqgha generali annwali taghha b`zieda ma` kull laqghat ohra f`dik is-sena, u ghandha turi illi l-laqgha hija dikannwali fl-avvizi li bihom tissejjah; u m`ghandhomx jghaddu izjed minn hmistax-il xahar bejn id-data ta` laqgha generali annwali tal-kumpannija u dik ta` warajha:Izda sakemm kumpannija zzomm l-ewwel laqgha generaliannwali taghha fi zmien tmintax-il xahar mir-registrazzjoni taghhama jkollhiex bzonn izzommha fis-sena tar-registrazzjoni taghha jew fis-sena ta` wara.

(2) Kull laqgha generali li ma tkunx il-laqgha generali annwali tkun laqgha generali straordinarja.

(3) Fin-nuqqas ta` tharis mad-disposizzjonijiet tas-subartikolu (1), kull ufficjal tal-kumpannija li jkun naqas jehel penali u, ghalkull jum li matulu jkompli n-nuqqas, penali ohra.

Ghandu jinghad li "*general meetings are usually summoned by the directors. The articles of a company in fact frequently empower the board of director to convene general meetings*". (ara Pag. 504 ta` **<u>Principles of Maltese Company Law</u>** op .cit).

Fil-Pag 985 tal-istess ktieb ikompli jinghad :-

"*The failure to observe the rules of the memorandum or articles of association* ***may amount to unfairly prejudicial conduct, but a lot will depend on the cricumstances of the case, the seriousness of the irregularity and the effect on the complainant*** *(Robin Hollington,* ***<u>Shareholders` Rights</u>*** *(4th ed. 2004) at p 210). In* ***<u>McGuinness vs Bremner plc</u>*** *(1988, BCLC 673) an unreasonable delay in convening a general meeting following a requisition by a member constituted unfair prejudice as "delay is prejudicial to the interests of a person who seeks to work out a legal remedy." The Court ordered an extraordinary general meeting to be held on a set date. And in* ***<u>Re Nuneaton Borough Association Football Club Ltd., ex p. Shooter and Broadhurst</u>*** *(1990 BCLC 384) the repeated failure to hold annual general meetings and to lay accounts (thereby depriving members of their right to know and consider the state of the company`s affairs) was also held to constitute unfairly prejudicial conduct."* (enfazi u sottolinear ta` din il-Qorti)

Il-Qorti qieset il-fatti u c-cirkostanzi ta` l-kaz tal-lum.

Jirrizulta li hemm disgwid bejn l-azzjonisti.

Billi whud minnhom irrifjutaw li jhallsu sehemhom mill-ispejjez amministrativi tal-kumpannija, ma setghux jibqghu jsiru l-kontijiet finanzjarji ta` l-kumpannija ghaliex min kellu jhejji l-kontijiet u min kellu jaghmel l-audit taghhom ma kienx hemm mnejn jithallsu mill-flus tal-kumpannija.

Fl-ittra ezebita a fol 56, Mario Fava jghid illi kien hemm diversi spejjez xi jridu jithallsu sabiex l-*accounts* relattivi jigu pprezentati l-MFSA. In-nuqqas ta` hlas wassal ghal sitwazzjoni fejn ma kienx hemm lok li jsiru iktar laqghat minhabba li ma kien hemm xejn x`jigi diskuss, filwaqt li kienu wkoll qed jizdiedu l-ispejjez.

Dan kollu jirrizulta mid-dokument ezebit bhala Dok AM2 a fol 250 sa 252 li fih hemm spjegat l-ammonti li huma dovuti sabiex il-kotba finanzjarji tal-kumpannija jigu aggornati flimkien ma` spejjez ohra relatati. Mill-istess dokument, jirrizulta li wara li tnaqqsu l-hlasijiet li ghadda Nicholas Fava lill-*accountant*, kien jifdal is-somma ta` EUR 9,715.72c li kellha tingabar minghand l-azzjonisti kollha.

Irrizulta wkoll li l-kumpannija qatt ma ghamlet negozju.

Fil-fatt irrizulta li twaqqfet sabiex tamministra art li kienet akkwistata bil-ghan illi xi darba johrog permess tal-izvilupp. Ir-rikorrenti stess fir-rikors promotur sostnew illi l-uniku skop li ghalih twaqqfet il-kumpannija intimata kien sabiex tamministra porzjon art ta` 24,740.20 m.k. maghrufa bhala ta` "Wied il-Geddies" fil-kuntrada ta` "Wied il-Knejjes", Hal Luqa.

Huwa fatt ippruvat illi l-art mhux biss tinsab barra miz-zona tal-izvilupp izda kull tentattiv li sar matul iz-zmien sabiex johrog permess kien rigettat. Ghalhekk l-ghan ewlieni li ghalih kienet kostwita l-kumpannija baqa` ma tlahhaq qatt sal-lum.

Ghalkemm il-ligi tipprefigi meta u kif ghandhom jissejhu laqghat generali ta` kumpannija, fl-istess waqt il-Qorti tghid illi bil-fatt <u>wahdu</u> li dawk il-laqghat ma ssejhux ma jfissirx bhala konsegwenza li kien hemm ksur tal-Art 402(1).

B`zieda ma` dan, mill-ittri ezebiti a fol 54 sa 55 u 56 sa 58, jirrizulta li r-rikorrenti (jew uhud minnhom) talbu lill-ufficjali tal-kumpannija intimata sabiex izommu laqghat rigward il-qaghda tal-kumpannija. Ladarba dik it-talba ma wasslet imkien, ir-rikorrenti stess setghu talbu li tissejjah laqgha generali straordinarja fejn punt tal-agenda seta` jkun in-nuqqas li jissejhu laqghat generali annwali.

Skont **<u>Reg 31 ta` l-Ewwel Skeda tal-Kap 386</u>**, "*id-diretturi jistghu, kull meta jidhrilhom xieraq, isejhu laqgha generali straordinarja, u laqghat generali straordinarji ghandhom jissejhu wkoll fuq dik it-talba, jew, f`nuqqas, jistghu jissejhu minn dawk li jkunu hekk talbu, kif provdut bl-artikolu 129 tal-Att.*"

Imbaghad l-**Art 129 tal-Kap 386** jaghti dritt lill-membri illi jitolbu li tissejjah laqgha generali straordinarja :

(1) Id-diretturi ta` kumpannija fuq talba ta` membru jew membri tal-kumpannija li jkollhom fid-data tal-konsenja tat-talba mhux anqas minn ghaxra wahda minn dak il-kapital azzjonarju imhallas tal-kumpannija li fid-data tal-konsenja jaghti l-jedd ghall-vot f`laqghat generali tal-kumpannija, ghandhom jipprocedu minnufih kif jixraq biex isejhu laqgha generali straordinarja tal-kumpannija.

(2) It-talba ghandha turi l-iskopijiet tal-laqgha, u ghandha tigi ffirmata minn min jitlob il-laqgha u konsenjata fl-ufficcju registrattal-kumpannija u tista` tkun maghmula minn diversi dokumenti tal-istess ghamla kull wiehed iffirmat minn min ikun qed jitlob il-laqgha jew jekk ikun hemm iktar minn wiehed li jaghmel it-talbaf`xi dokument minnhom kollha.

(3) Jekk id-diretturi fi zmien wiehed u ghoxrin jum mid-datatal-konsenja tat-talba ma jipprocedux kif jixraq biex isejhu l-laqgha, dawk li jkunu talbuha jistghu huma stess isejhu laqgha bl-istess mod, kemm jista` jkun, bhal meta laqghat jigu msejha mid-diretturi, izda laqgha hekk imsejha ma ghandhiex tinzamm wara lijghaddu tliet xhur mid-data tad-depozitu tat-talba.

(4) Kull nefqa ragonevoli li ssir minn dawk li jitolbu l-laqghaminhabba li d-diretturi jkunu naqsu milli jsejhu l-laqgha kif imiss ghandha tithallas lura mill-kumpannija lil dawk li jkunu talbu l-laqgha, u kull somma hekk imhallsa tkun dovuta personalment mid-diretturi li kienu naqsu u tista` tinzamm mill-kumpannija minn xi ammont dovut jew li ghad ikun dovut mill-kumpannija ghal drittijiet jew kumpens iehor ghas-servizzi taghhom lil dawk id-diretturi li kienu naqsu.

Ikompli jinghad illi l-legislatur haseb ghal mezz iehor kif tista` tigi ordnata sejha ghal laqgha generali.

Dan huwa l-**Art 132 tal-Kap 386** li jghid :-

(1) Jekk ghal xi raguni ma jkunx prattikabbli li tissejjah laqgha ta` kumpannija bil-mod li bih jistghu jissejhu laqghat tal-kumpannija, jew li jitmexxew il-laqghat ta` dik il-kumpannija bil-mod stabbilit bl-istatut jew b`dan l-Att, il-qorti tista`, jew minnrajha jew fuq it-talba ta` xi wahda mill-partijiet fil-procedimentiwaqt dawk il-procedimenti jew, fin-nuqqas ta` xi procedimenti, fuqrikors ta` xi direttur tal-kumpannija jew ta` xi membru tal-kumpannija li jkollu dritt jivvota fil-laqgha, tordna li laqgha tal-kumpannija tissejjah, tinzamm u titmexxa b`dak il-mod li l-qorti jidhrilha xieraq, u meta jinghata xi ordni bhal dan, tista` taghti dawk id-direttivi ancillari jew konsegwenzjali li jidhrilha xieraq, inkluza d-direttiva illi membru wiehed tal-kumpannija prezentipersonalment jew bi prokura jitqies li jikkostitwixxi laqgha.

(2) Id-disposizzjonijiet tas-subartikolu (1) ghandhom japplikaw ukoll ghas-sejhiet ta` laqghat tal-bord tad-diretturi ta` kumpannija, jekk lill-qorti jidhrilha, li c-cirkustanzi jitolbu li tittiehed azzjoni bhal dik.

Ghalhekk xejn ma kien izomm lir-rikorrenti milli jiehdu passi sabiex ta` l-anqas laqgha generali straordinarja.

Il-Qorti tishaq illi n-nuqqas *ut sic* li jissejhu laqghat ma jammontawx fic-cirkostanzi partikolari tal-kaz ghal sitwazzjoni li tissodisfa dak li jrid l-Art 402(1) tal-Kap 386.

L-ilment kif dedott qed ikun michuda bhala bazi ghall-fini tal-Art 402 tal-Kap 386.

5. <u>Kamra agrikola</u>

Ir-rikorrenti lmentaw ukoll li Nicholas Fava ul Michaeles Fava okkupaw kamra agrikola li tinsab fl-artijiet tas-socjeta` intimata u ghamlu bidliet fiha, inkluz illi bidlu l-uzu taghha, dan kollu b`mod illegali.

Jinghad illi l-agir ta` l-missierr u tal-iben Fava huwa mertu wkoll ta` azzjoni ta` infurzar mill-Awtorita` ta` Ippjanar.

Skont ir-rikorrenti, il-post kien qed jigi okkupat abbuzivament minn Michaeles Fava u l-mara tieghu (fol 34) u kif ukoll nghalaq passagg li kien jaghti minn Sqaq tal-Karmnu ghal gor-raba` *de quo.*

Da parti tieghu, Nicholas Fava fisser illi b`kuntratt tad-19 ta` Ottubru 1990 fl-atti tan-Nutar Mario Bugeja (fol 263 sa fol 267), liema kuntratt kien korrett b`kuntratt iehor tal-5 ta` Ottubru 1992 fl-atti ta` l-istess Nutar (fol 268 sa 269), id-direttur ta` dak iz-zmien Andrew Fava ghan-nom u in rapprezentanza tal-kumpannija intimata, assenja b`titolu ta` permuta lid-direttur l-iehor Nicholas Fava, porzjon tal-kejl ta` mitejn u erbgha metri kwadri (204 m.k) mill-art proprjeta` ta` Fuxya Company Limited u in kontrakkambju, il-kumpannija irceviet mobbli tal-valur ta` elf lira Maltin (Lm 1,000).

Jirrizulta li din il-kwistjoni kienet ezaminata mill-Qorti hekk kif diversament ippreseduta fir-rikors li ghamlu Donald u Michael Cassar skont l-

Art 402 tal-Kap 386. Hemm kien intalab li jinghataw provvedimenti sabiex il-kumpannija intimata tiehu l-passi skont il-ligi sabiex tirrexxindi u/jew titlob dikjarazzjoni ta` nullita` tal-kuntratt ta` permuta tad-19 ta` Ottubru 1990 fl-atti tan-Nutar Mario Bugeja u dak korrettorju datat 5 ta` Ottubru 1992 fl-atti tal-istess nutar. Intalab ukoll li l-kumpannija tiehu l-passi skont il-ligi kontra Nicholas u Andrew Fava ghad-danni sofferti b`konsegwenza tal-agir abbuziv u irregolari taghhom meta sar l-imsemmi kuntratt ta` permuta.

Fil-provvediment taghha tal-11 ta` Gunju 2004, il-Qorti qalet :

"Dwar il-kuntratt ta` tpartit fid-19 ta` Ottubru 1990 fl-atti tan-Nutar Mario Bugeja, il-qorti rat illi dan il-kuntratt sar aktar minn tlettax-il sena qabel ma` nfethu l-proceduri tallum, meta r-rikorrenti lanqas kellhom ishma fis-socjeta. Ghalhekk, hija tal-fehma illi ma hux il-kaz illi llum, wara dan iz-zmien kollu, jittiehdu provvedimenti dwar dan l-episodju, u ghalhekk ma tqisx aktar dan l-ilment u tichad l-ewwel zewg talbiet tar-rikorrenti." (fol 30).

Ghalhekk, din il-kwistjoni diga` nghata provvediment dwarha.

Il-validita` ommeno ta` l-kuntratt qatt ma giet attakkata fi proceduri gudizzjarji u ghalhekk ghandu jitqies bhala validu ghall-finijiet u effetti kollha tal-ligi.

L-ilment huwa nfondat fil-kuntest tal-azzjoni odjerna.

6. <u>Id-*dividends*</u>

Ir-rikorrenti jghidu li ma jafux x`qed jigri fit-tmexxija tal-kumpannija u x`inhu jsir mill-assi tal-kumpannija intimata.

Fil-Pag. 509 et seq ta` **<u>Principles of Maltese Company Law</u>** (op. cit.) Andrew Muscat ighid :-

"The directors are required to prepare a report ….in respect of each accounting period. The principal purpose of the report is to review the progress of the company`s business….. The directors` report is to be approved by the board of directors….Every copy of the report which is laid before the company in general meeting, or which is otherwise circulated, published or issued, must state the name of ther person who signed it on behalf of the board….The officers of the company should ensure that not less than fourteen days before the date of the general meeting at which the annual accounts are to be laid, a cop of the accounts

be sent (a) every member of the company; (b) every holder of the company`s debentures and (c) all other persons who are entitled to receive notice of general meetings…..In respect of each accounting period, the directors are obliged to lay before the company in general meeting for its approval, copies of the annual accounts of the company for that period…….”

Il-Qorti tifhem x`qed ighidu r-rikorrenti.

Izda tenut kont li ma kienx hemm bizzejjed flus sabiex setghu jsiru l-a*nnual accounts* u *directors` reports,* kien ferm difficli li dawn isiru.

Ir-rikorrenti setghu ppruvaw isejhu laqgha generali straordinarja biex jaraw x`kien qed jigri, almenu b`mod informali u sabiex ta` l-inqas jaraw il-*financial statements* li kienu lahqu saru fir-rigward tal-kumpannija intimata. Jidher li l-*audits* saru biss wara l-mewt ta` Francis Fava, liema *audits* baqghu ma thallsux.

Ir-rikorrenti lmentaw li huma qatt ma rcivew introjtu mill-kumpannija bhala *dividends.*

Peress li fl-*articles of association* ma kienx hemm imnizzel liema organu ghandu jiddikjara l-hrug ta` *dividends*, huma d-diretturi li ghandhom din is-setgha abbazi tal-**<u>Art 137(3) tal-Kap 386</u>.**

Il-Qorti taghmel taghha l-posizzjoni li ha <u>Andrew Muscat</u> fil-Pag 756 ta` Principles of Maltese Company Law (op. cit.).

Hemm inghad hekk :-

Directors may however be given power to declare dividends as well as, or to the exclusion of, the general meeting. If the articles are silent as to which organ is authorized to declare dividends, it would seem that this power vests in the directors rather than in the general meeting. Again this view relies on the principle in article 137(3) of the Companies Act that the directors may exercise all the powers of the company as are not by law or by the memorandum or articles of association, required to be exercised by the company in general meeting.

Kif inghad fil-gurisprudenza, meta ssir azzjoni skont l-Art.402 tal-Kap 386, il-protezzjoni gudizzjarja tal-membru hija fis-sens li min b`xi mod ikollu kontroll fuq l-ishma ta` kumpanija ma jikkommettix atti li jopprimu b`mod

ingust u diskriminatorju lil min jippossjedi ishma ohra.

Fil-kaz odjern, ma tressqux provi li sar xi hlas ta` *dividends* lil xi hadd mill-azzjonisti filwaqt li ma thallasx lil azzjonisti ohra. Id-dritt tar-rikorrenti li jipprecepixxu *dividends* ma giex b`xi mod impregudikat.

Ghalhekk, anke fir-rigward ta` dan l-ilment, il-Qorti ma ssib ebda agir da parti tal-intimati li jmur kontra l-Art 402(1) tal-Kap 386.

7. ***<u>Mala fede</u>***

Ir-rikorrenti sostnew illi l-agir tal-ufficjali ta` Fuxya sar totalment in mala fede u b`mod abbuziv, illegali u kontra l-obbligi impost mil-ligi fuq id-diretturi inkluz Art 136A tal-Kap 386.

Inghad illi l-iskop principali ta` l-intimati huwa li jarrikixxu ruhhom palezament kontra l-interessi tas-socjeta` intimata u tar-rikorrenti.

In sostenn ta` allegazzjoni daqstant serja, il-Qorti tistqarr ma tressqux provi li jaslu sal-grad li tirrikjedi l-ligi fi procedimenti ta` din ix-xorta.

Ma rrizultax ippruvat li kien hemm xi tip ta` arrikkiment da parti ta` l-intimati jew uhud minnhom.

Jekk l-ilment kien qed jirreferi ghall-kuntratt ta` permuta fuq riferit, allura l-Qorti diga` ghamlet l-osservazzjonijiet taghha.

Ladarba dak il-kuntratt baqa` mhux attakkat gudizzjarjament, dak li gie akkwistat permezz ta` dak il-kuntratt ma jistax jigi skrutinizzat u meqjus bhala li kien arrikkiment indebitu.

Dak li r-rikorrenti ma jsemmux huwa li kien sar kuntratt iehor fl-4 ta` Dicembru 1984 atti tan-Nutar Dottor Antonio Carbonaro, f`liema kuntratt (fol 257 sa 262 u fol 351 sa 354) Francis Fava awtur fit-titlu ta` uhud mir-rikorrenti kien ghan-nom ta` Fuxya Company Limited biegh porzjon art mill-proprjeta` ta` l-istess kumpannija Fuxya Company Limited lil Rosaria nee` Costa versu l-prezz ta` Lm 500. Imbaghad fis-6 ta` Dicembru 1989, din l-istess art rega` nbieghet lir-

rikorrenti odjerna Maria Goretti Fava, li tigi mart Francis Fava li kien originarjament biegh din l-art ghan-nom tal-kumpannija (fol 355 sa fol 358).

8. Aktar

Tajjeb illi jinghad illi r-rwol ta` din il-Qorti mhuwiex li toffri soluzzjoni, kif donnu qeghdin jippretendu r-rikorrenti, anke jekk din ma tkunx konformi ma` dak li ntalab, izda l-kompitu taghha huwa li tistabilixxi jekk abbazi tal-provi akkwiziti jirrizultawx fondati t-talbiet tar-rikorrenti skont l-Art 402 tal-Kap 386. Kollox meqjus il-Qorti tghid li dan tal-lum mhux kaz fejn hi ghandha tintervjeni bl-ghoti ta` rimedji, abbazi tal-Art 402(3), ghaliex ma rrizultax li da parti ta` l-intimati jew min minnhom kien hemm ksur ta` dak li jitlob l-Art. 402(1).

Provvediment

Ghar-ragunijiet kollha premessi, il-Qorti qeghda tipprovdi hekk :-

Tilqa` l-eccezzjoniiet.

Tichad it-talbiet kollha.

Wara li rat l-Art 223(3) tal-Kap 12, tordna li kull parti fil-kawza tbati l-ispejjez taghha.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur