



**QORTI CIVILI
(SEZZJONI TAL-KUMMERC)**

**ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON**

Illum il-Hamis 31 ta` Jannar 2019

**Kawza Nru. 4
Rikors Nru. 616/2017 JZM**

Camilleri Paris Mode Limited (C-16536)

u

**Creations The Ultimate In Bathroom
Elegance Ltd. (C-23867)**

u

AGP Systems Limited (C-17009)

kontra

**A.L. Projects Limited gia` maghrufa
Auntie Lucy Ltd (C12622)**

u

**b`digriet tas-27 ta` Settembru 2018
Xuereb Installations Limited (C-15321)**

giet awtorizzata tintervjeni fil-kawza *in statu et terminis*

u

b`digriet tal-1 ta` Ottubru 2018 Kuehne + Nagel Limited (C-10626) giet awtorizzata tintervjeni fil-kawza *in statu et terminis*

Il-Qorti :

I. Preliminari

Rat ir-rikors li kien prezentat prezentat fis-7 ta` Lulju 2017 quddiem il-Prim`Awla tal-Qorti Civili li jaqra hekk :-

1. *Premess illi r-rikorrenti huma lkoll kredituri tas-socjeta` intimata;*

2. *U Billi s-socjeta` Camilleri Paris Mode Limited ghandha tiehu s-somma ta` **€97,250.23** minghand is-socjeta` intimata rapprezentanti prodotti u materjal konsenjat lis-socjeta` intimata. Liema ammont gie rez ezegwibbli b`sentenza tal-Prim`Awla tal-Qorti Civili datat 22 ta` Marzu 2017 nru 1106/2016 liema sentenza ghaddiet in gudikat;*

3. *U Billi s-socjeta` Creations The Ultimate In Bathroom Elegance Ltd ghandha tiehu s-somma ta` **€44,536.08** minghand is-socjeta` intimata rapprezentanti prodotti u materjal konsenjat merkanzija, apparat u armar relatat mal-kmamar tal-banju li installati fil-lukanda Intercontinental Malta. Liema ammont gie dikjarat dovut bis-sentenza tal-Prim`Awla tal-Qorti Civili datat 27 ta` Gunju 2017 nru 34/2017/JZM;*

4. U Billi s-socjeta` AGP Systems Limited ghandha tiehu s-somma ta` **€33,755.81** minghand is-socjeta` intimata rapprezentanti prodotti u materjal konsenjat lis-socjeta` intimata. Liema ammont gie rez ezeggwibbli b`sentenza tal-Prim` Awla tal-Qorti Civili datat 23 ta` Novembru 2016 nru 544/2016/SM liema sentenza ghaddiet in gudikat;

5. U Billi in kawtela u in ezekuzzjoni tad-drittijiet taghhom is-socjetajiet rikorrenti hargu diversi mandati, u mod specifiku s-segwentanti :-

Il-Mandat ta` sekwestru 1801/2016 fl-ismijiet: Camilleri Paris Mode Limited vs A.L. Projects Limited gja` Auntie Lucy Ltd, liema mandat gie rez ezekuttiv.

Il-Mandat ta` sekwestru 1908/2016 Creations the Ultimate in Bathroom Elegance Ltd vs A L Projects Limited et.

Il-Mandat ta` sekwestru 1007/2016 fl-ismijiet: AGP Systems Limited vs A.L. Projects Limited gja` Auntie Lucy Ltd, liema mandat gie rez ezekuttiv.

6. U Billi minkejja kienu nhargu dawn is-sekwestri, kienu ineffettivi billi ma gie depositat l-ebda ammont fil-Qorti u ma thallas xejn lil rikorrenti;

7. U Billi l-esponenti jifhmu li hemm kredituri ohrajn tas-socjeta` A.L. Projects Limited u li din l-istess socjeta` f`dan l-istadju ma ghandha l-ebda introjtu;

8. U Billi ghalhekk is-socjeta` hija fi stat insolventi u mhix kapaci li thallas id-djun taghha;

9. U Billi kumpanija tista` xxolji u tkun stralcjata mill-qorti fejn ma tkunx tista` thallas id-djun taghha a tenur ta` **I-Art 214(2)(a)(ii)** tal-Kap 386 tal-Ligijiet ta` Malta;

10. U Billi fi kwalsiasi kaz hemm ragunijiet gravi bizzejjed li jiggustifikaw ix-xoljiment u konsegwentement l-istralc tal-kumpanija a tenur ta` **I-Art 214(2)(b)(iii)** tal-Kap 386 tal-Ligijiet ta` Malta.

Ghaldaqstant in vista tas-suespost ir-rikorrenti jitolbu lil din l-Onorabbli Qorti, prevja kull dikjarazzjoni ohra xierqa u opportuna, joghghobha :-

1. Tiddikjara illi l-kumpanija m`hijiex kapaci thallas id-djun taghha ghal finijiet ta` **I-Art 214(2)(a)(ii)** tal-Kap 386 tal-Ligijiet ta` Malta.

2. Tiddikjara illi jezistu ragunijiet gravi bizzejjed li jiggustifikaw ix-xoljiment u konsegwentement l-istralc tal-kumpanija a tenur ta` **I-Art 214(2)(b)(iii)** tal-Kap 386 tal-Ligijiet ta` Malta.

3. Tordna l-istralc mill-Qorti tas-socjeta` intimata skont id-disposizzjonijiet tas-Sub-Titolu I tat-Titolu II tat-Taqsima V tal-Att dwar il-Kumpaniji (Kap. 386 tal-Ligijiet ta` Malta).

4. Tordna illi s-socjeta` intimata A.L. Projects Limited gia maghrufa Auntie Lucy Ltd tigi xolta u konsegwentement stralcjata minn dina l-Onorabbli Qorti abbazi tal-Art. 214(1)(a) u/jew l-Art. 214(2)(a)(ii) u/jew l-art. 214(2)(b)(iii) u dan a tenur ta` **I-Art 218(1)** tal-Att Dwar il-Kumpaniji.

5. Tordna li sakemm tinghata decizjoni finali jigi appuntat amministratur provvizorju sabiex jiehu hsieb l-amministrazzjoni tal-istess socjeta` rikorrenti.

6. Taghti kull provvediment li jidhrilha xieraq u opportun.

Bl-ispejjez kontra s-socjeta` intimata.

Rat ir-risposta li kienet prezentata fit-2 ta` Novembru 2017 u li taqra hekk :-

1. *Illi preliminarjament ma jissussistux ir-rekwiziti ai termini tal-Artikolu 214(2)(a)(ii) jew tal-Artikolu 214(2)(b)(iii) tal-Att dwar il-Kumpanniji sabiex jigi ordnat ix-xoljiment u l-konsegwenti stralc tal-kumpannija esponenti.*

2. *Illi in oltre u minghajr pregudizzju ghall-premess, mhux minnu li s-socjetà esponenti qeghda fi stat ta` insolvenza hekk kif qed jigi allegat fir-Rikors promotur.*

3. *Illi in oltre u minghajr pregudizzju ghall-premess, il-premessa kontenuta fir-Rikors promotur li tghid semplicement li jezistu ragunijiet gravi u bizzejjed li jiggustifikaw ix-xoljiment u l-konsegwenti stralc tas-socjetà esponenti, minghajr ebda spjegazzjoni ulterjuri dwar x`jistghu ikunu dawn ir-ragunijiet, hija nebuluza u di per se inkonklussiva.*

4. *Illi fic-cirkostanzi m`hemmx lok ghall-hatra ta` amministratur provizorju sabiex jjehu hsieb l-amministrazzjoni tas-socjetà esponenti.*

Ghaldaqstant, it-talbiet tar-rikorrenti ghandhom jigu michuda bl-ispejjez a karigu taghhom.

Rat il-verbal tal-udjenza tal-14 ta` Dicembru 2017 fejn ir-rikorrenti ddikjaraw illi, ghall-fini tal-Art 214(2)(a)(ii) tal-Kap 386 tal-Ligijiet ta` Malta, kienu qeghdin jibbazaw ruhhom kemm fuq il-paragrafu (a) kif ukoll fuq il-paragrafu (b) tal-Art 214(5) tal-Kap 386.

Rat id-digriet li nghata fl-udjenza tal-24 ta` Mejju 2018 fejn din il-Qorti ipprovdiet illi in vista tal-Att I tal-2018 il-kawza kienet sejra tkompli tinstema` minnha kif presjeduta.

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

Semghet is-sottomissjonijiet tal-ahhar bil-fomm li saru fl-udjenza tat-12 ta` Novembru 2018.

Rat id-digriet li tat fl-istess udjenza fejn halliet il-kawza ghal provvediment ghal-lum.

Rat l-atti l-ohra tal-kawza.

II. Fatti

Is-socjeta` intimata ("**ALP**") inghatat kuntratt ta` appalt minn Eden Leisure Group Limited ("**Eden Leisure**") fil-progett tal-estensjoni ta` The Intercontinental Hotel. ALP ghamlet kuntratt ta` sub-appalt mas-socjeta` Steel Structures Company Limited ("**Steel Structures**"). Din kellha tistalla hadid u konkrit bhala parti mill-estensjoni tal-lukanda fi zmien erba` xhur. Minhabba diffikultajiet, ix-xoghol skonfina sew iz-zmien kontrattat, u ALP kellha ttemm il-kuntratt ta` sub-appalt ma` Steel Structures u hadmet b` kuntratturi ohra.

Il-kuntratt bejn ALP u Steel Structures kien soggett ghal penali ta` €5,000 ghal kull gurnata li jdum il-progett oltre z-zmien pattwit. ALP dehrilha wkoll illi kien hemm xoghol li ma kienx tlesta waqt li xoghol iehor ma kienx sar skont kif kien miftiehem. Ghalhekk ALP ghamlet pretensjonijiet kontra Steel Structures ammontanti ghal €2.4 miljun, liema ammont kien ikopri hlas ghal xoghol li ma kienx sar kif ukoll penali ghal dewmien.

Il-kuntratt ta` bejn ALP u Eden Leisure kien ukoll soggett ta` penali ghal dewmien. Il-penali kienet ta` €2,300 kull gurnata. Telghet ghal massimu ta` €800,000.

Waqf illi kien ghadu ghaddej ix-xoghol, Eden Leisure tat inkariku lil ALP sabiex taghmel xoghol illi ma kienx inkluz fil-kuntratt. Ghal dan ix-xoghol ALP qeghda tippretendi hlas.

Ghat-twettieq tal-istess progett, ALP ikkontrattat is-servizzi ta` diversi socjetajiet fosthom dawk ir-rikorrenti fil-kawza tal-lum u l-intervenuti fil-kawza.

III. Provi

Tenut kont tan-natura tal-procediment, il-Qorti sejra tillimita ruhha ghal dawk il-provi li jirrigwardaw l-assi u d-djun tas-socjeta` li taghha qieghed jintalab ix-xoljiment u l-istralc.

1. L-abridged financial statements ta` ALP ghall-2014

Jirrizulta illi matul is-sena kalendarja 2014, ALP kellha *total liabilities* ta` €3,598,544 u *total assets* ta` €1,726,811

Av. Dr. Claudette Fenech bhala rapprezentant tar-Registratur tal-Kumpanniji xehdet illi l-*annual returns* tal-kumpannija kienu aggornata sal-2017 waqt li l-*financial statements* kienu qeghdin lura billi ma kienux prezentati ohrajn wara dawk tal-2014. Anke dawn kellhom jigu prezentati skont il-ligi sat-12 ta` Dicembru 2015 izda fil-fatt kienu prezentati Gunju 2017.

2. Ricerki

Kienu prezentati r-ricerki pubblici ta` ALP ghaz-zmien ta` bejn l-1 ta` Jannar 1950 u t-12 ta` Gunju 2017.

Minn dawn ir-ricerki jirrizultaw dawn l-ipoteki :-

Ipoteka generali gudizzjarja ;
favur Express Trailers Limited ;
ghal kreditu fl-ammont ta` €21,832.28 ;
Ref. Nru. H/5660/2014.

Ipoteka generali gudizzjarja ;
favur AGP Systems Limited ;
ghal kreditu fl-ammont ta` €33,755.81 ;
Ref. Nru. H/1063/2017.

Ipoteka generali gudizzjarja ;
favur Camilleri Paris Mode Limited ;
ghal kreditu fl-ammont ta` €97,250.23 ;
Ref. Nru. 11510.

Skont l-istess ricerki, ALP m` ghandhiex assi mmobiljari.

3. Procedimenti u atti ohra

a) Rik. Gur. Nru. 1106/2016 JRM

Fil-5 ta` Dicembru 2016, is-socjeta` rikorrenti Camilleri Paris Mode Limited ("**CPM**") harrket lil ALP sabiex din tkun tkun ikkundannata thallasha l-ammont ta` €97,250.23. B`sentenza tat-22 ta` Marzu 2017, ALP kienet ikkundannata thallas s-somma ta` €97,250.23, bl-ispejjez u bl-imghax kif mitlub. Id-decizjoni ghaddiet in gudikat.

b) Mandat ta` Sekwestru Ezekuttiv Nru. 1026/17

Fit-13 ta` Lulju 2017, CPM ipprezentat rikors ghall-hrug ta` Mandat ta` Sekwestru Ezekuttiv Nru. 1026/2017 kontra ALP ghall-ammont komplessiv ta` €108,380.52 (sorte, imghax u spejjez). It-talba ghall-hrug tal-Mandat kienet milqugha fl-14 ta` Lulju 2017.

c) Mandat ta` Sekwestru Ezekuttiv Nru. 671/17

Fit-2 ta` Mejju 2017 is-socjeta` Müller-BBM GmbH ipprezentat rikors ghall-hrug ta` Mandat ta` Sekwestru Ezekuttiv Nru. 671/2017 kontra ALP ghall-ammont komplessiv ta` €28,073.06 liema ammont kien dedott fid-Dikjarazzjoni ta` l-Infurzar fl-ismijiet *Müller-BBM GmbH vs Auntie Lucy Amtsgericht*_tad-9 ta` Marzu 2016. It-talba ghall-hrug tal-Mandat kienet milqugha fit-3 ta` Mejju 2017. Ma tressqet l-ebda prova li dan il-kreditu baqa` ma thallasx. Il-kredituri ma ppartecipawx fil-proceduri odjerni.

d) Mandat ta` Sekwestru Kawtelatorju Nru. 210/17

Fit-8 ta` Frar 2017, Steel Structures ipprezentat rikors ghall-hrug ta` Mandat ta` Sekwestru Kawtelatorju Nru. 210/2017 kontra ALP ghall-ammont ta` €1,425,191.00. It-talba kienet milqugha. Il-mandat hareg b`rabta ma` proceduri arbitrali li kienu istitwiti minn ALP kontra Steel Structures, fejn din tal-ahhar ipprezentat kontrotalba ghall-hlas ta` €1,425,191.00. Il-procediment ghadu pendenti.

e) Mandat ta` Sekwestru Kawtelatorju Nru. 225/17

Fid-9 ta` Frar 2017 is-socjeta` M.A. & A. Services Limited ipprezentat rikors ghall-hrug ta` Mandat ta` Sekwestru Kawtelatorju Nru. 225/2017 kontra ALP ghall-ammont ta` €100,546. Il-mandat hareg. Ma tressqet ebda prova dwar jekk il-hrug ta` l-mandat kienx segwit b`kawza. Lanqas ma tirrizulta provata` jekk il-kreditu pretiz thallasx inkella le.

f) Mandat ta` Sekwestru Kawtelatorju Nru. 1007/16

g) Rik. Gur. Nru. 544/2016 SM

Fis-6 ta` Lulju 2016 is-socjeta` AGP Systems Ltd ipprezentat rikors ghall-hrug ta` Mandat ta` Sekwestru Kawtelatorju Nru. 1007/2016 kontra

ALP ghall-ammont ta` €33,755.81. Kontestwalment kienet prezentata kawza.

Fit-23 ta` Novembru 2016, il-kawza kienet deciza kontra ALP ghall-ammont reklamat bl-imghax u bl-ispejjez. Is-sentenza ghaddiet in gudikat.

h) Rik. Gur. Nru. 34/2017 JZM

i) Mandat ta` Sekwestru Kawtelatorju Nru. 1908/2016

Is-socjeta` Creations The Ultimate in Bathroom Elegance Ltd ghamlet kawza fit-12 ta` Jannar 2017 kontra ALP u Auntie Lucy Retail Limited fejn talbet il-kundanna taghhom ghall-hlas ta` €44,536.08. Fis-27 ta` Gunju 2017. il-kawza kienet deciza kontra l-konvenuti ghall-ammont reklamat bl-imghax u bl-ispejjez. Is-sentenza ghaddiet in gudikat. Il-kawza kienet preceduta mill-prezentata u l-akkoljiment ta` Mandat ta` Sekwestru Kawtelatorju Nru. 1908/2016. Fis-27 ta` Lulju 2017, kienet prezentata nota mill-kreditur sabiex il-Mandat Kawtelatorju jsir Ezekuttiv.

j) Mandat ta` Sekwestru Ezekuttiv Nru. 1778/16

Fit-3 ta` Ottubru 2016 is-socjeta` PMD Coatings (Malta) Ltd pprezentat rikors fejn talbet il-hrug ta` Mandat ta` Sekwestru Ezekuttiv kontra Auntie Lucy Ltd Nru. 1778/2016 wara li kienet kanonizzata bhala kreditrici skont ittra ufficjali Nru. 914/16 tal-31 ta` Mejju 2016 a tenur tal-Art. 166A tal-Kap 12. It-talba ghall-hrug tal-Mandat kienet milqugha fl-4 ta` Ottubru 2016. Ma tressqet ebda prova li dan il-kreditu baqa` ma thallasx. Is-socjeta` kreditrici ma ppartecipatx fil-proceduri odjerni.

k) Cedola ta` Depozitu Nru. 1466/17

Wara li - bhala sekwestratarja - kienet notifikata bil-Mandati Nru. 1026/2017, 671/2017, 201/2017, 225/2017, 1007/2016, 1908/2016 u 1778/2016 (*supra*) HSBC Bank Malta p.l.c iddepozitat is-somma ta` €8,354.85 taht l-awtorita` tal-qorti.

l) Cedola ta` Depozitu Nru. 353/17

Wara li – bhala sekwestratarja – kienet notifikata bil-Mandati Nru. 143/2017, 178/2017, u 182/2017, Bank of Valletta plc fis-27 ta` Frar 2017 iddepositat s-somma ta` €2,892.32. Kopja ta` dawn l-atti ma kenitx esebita. Dawn huma l-uniku fondi li rrizultaw fil-kont tas-socjeta` Steel Structures.

m) Mandat ta` Sekwestru Kawtelatorju Nru. 143/17

Fis-27 ta` Jannar 2017 kien ordnat il-hrug ta` mandat ta` sekwestru kawtelatorju fl-ismijiet *A.L. Projects Limited vs Steel Structures Company Limited* ghall-ammont ta` €2,383,731.26. Fid-17 ta` Frar 2017, Steel Structures talbet ir-revoka tal-mandat skont l-Art 836(1)(c) u (e) tal-Kap 12. Talbet ukoll fil-kaz li ma jkunx hemm revoka, tinghata garanzija in kawtela tal-kreditu kawtelat bil-mandat. B`digriet tat-30 ta` Marzu 2017, il-Prim`Awla tal-Qorti Civili cahdet it-talbiet ta` Steel Structures ghar-revoka tal-mandat.

n) Nota fl-atti tal-Mandat ta' Sekwestru Kawtelatorju Nru. 143/17

B`nota tal-20 ta` Marzu 2017, is-socjeta` Bay Street Hotel Complex Limited iddikjarat illi, wara li saru l-verifiki dwar il-valur ta` xoghol illi ma kienx kompletat minn Steel Structures, jew li ma kienx sar skont is-sengha u l-arti mill-istess kumpannija fil-Be.Hotel ta` San Giljan, ebda bilanc ma kien dovut lil Steel Structures.

o) Arbitragg Nru. 4933/2016

Dan l-arbitragg bejn ALP u Steel Structures jittratta dwar allegat ksur ta' klawsoli kontrattwali min-naha ta` Steel Structures dwar allegat xoghol li ma kienx ezegwit, dwar xoghol li ma kienx sar skont l-arti u s-

sengha, u dwar dewmien fl-ezekuzzjoni tax-xoghol. L-ammont komplessiv mitlub minn ALP huwa ta` €2,383,731.26. Steel Structures ikkontestat il-pretensjonijiet ta` ALP u pprezentat kontrotalba ghall-hlas favur taghha ta` €1,425,191.00. L-arbitragg ghadu pendent.

p) Ittra ufficjali skont l-Art 166A tal-Kap 12

Fl-20 ta` Frar 2018 is-socjeta` Kuehne + Nagel Limited interpellat lil Auntie Lucy Limited ghall-hlas ta` kreditu fl-ammont ta` €8,560.71. Ghalkemm kien hemm notifika, l-intimata ma wegbitx u ghalhekk it-talba kienet reza ezequttiva b` effett mit-12 ta` April 2018.

4. Id-dejn ta` ALP

a) Il-pendenzi ma` Eden

Bejn Eden u ALP kien hemm hames kuntratti ta` appalt.

ALP thallset minghand Eden l-ammont ta` €15 –il miljun.

Wara Awissu 2016, Eden ghamlet hlasijiet favur terzi, fosthom CPM, sabiex tirrimedja ghal hwejjeg li baqghu neqsin. Hallset €100,000 b` kollox. Dan sar sabiex jithaffef ix-xoghol billi dewmien kien ifisser telf ghal Eden billi din ma setghetx tkompli bl-operat normali taghha waqt illi x-xogholijiet kienu ghaddejjin.

Eden hija kreditrici ta` ALP fl-ammont ta` €178,266 ghall-kera ta` ufficini. Sal-lum Eden ma hadet ebda azzjoni legali billi qieghda tipprova tasal ghal ftehim bonarju ma` ALP. Inoltre hemm il-kwistjoni tal-penali konsegwenzjali ghad-dewmien fit-twettieq tax-xogholijiet.

Kevin Vassallo, Direttur Manigerjali ta` ALP, xehed illi jekk jintlahaq ftehim ma` Eden, dan se jinvolti tpacija.

Mhux previst li ALP tithallas flus direttament minghand Eden.

b) L-ammont dovut lil CPM

B`sentenza li tat il-Prim`Awla tal-Qorti Civili fit-22 ta` Marzu 2017, CPM kienet kanonizzata kreditrici ta` ALP fl-ammont ta` €97,250.23 oltre l-imghax u l-ispejjez. Ghalkemm is-sentenza saret gudikat, CPM ma thallset xejn, ghalkemm diversi kienu t-tentattivi sabiex jintlahaq ftehim dwar il-pagament. Irrizulta wkoll illi CPM hija debitrici ta` kumpanniji ohra li magghom ALP hija relatata. Kienet esplorata l-possibilita` li ssir tpacija bejn CPM u ALP. Din kienet pero` skartata. Kevin Vassallo xehed illi ALP talbet l-*invoices* lil CPM sabiex ALP tkun tista` titlob rifuzjoni tal-VAT. B`dik ir-rifuzjoni, CPM kienet tithallas milli kellha tiehu. Skont Vassallo kien hemm madwar €40,000 involuti.

Tajjeb jinghad illi bhala fatt anke li kieku kellha ssir din ir-rifuzjoni, xorta wahda jkun jifdal ammont sostanzjali x` jithallas lil CPM.

Min-naha taghha, CPM fissret illi hija setghet biss tohrog ghal pagamenti illi jkunu diga` saru mentri ALP baqghet ma hallset xejn. CPM ghandha esenzjoni mid-Dipartiment tal-VAT sabiex tahdem *on cash basis*, u allura tiddikjara l-bejgh *una volta* illi hija stess tkun thallset.

c) Il-kreditu ta` Creations The Ultimate in Bathroom Elegance Limited kontra ALP

Jirrizulta illi Creations The Ultimate in Bathroom Elegance Limited ("**Creations**") kienet fornitrici ta` ALP fil-progett ta` The Intercontinental Hotel.

B`sentenza li tat il-Prim`Awla tal-Qorti Civili fis-27 ta` Gunju 2017, Creations kienet kanonizzata kreditrici ta` ALP fl-ammont ta` €44,536.08.

d) Il-kreditu ta` AGP Systems Limited kontra ALP

Jirrizulta li AGP Systems Limited ("**AGP**") kienet fornitrici ta` taghmir fuq inkariku ta` ALP dwar l-istess progett. Mill-fatturi li AGP harget wara li kien ikkonsenjat ix-xoghol sa Dicembru 2015, thallsu biss tliet pagamenti akkont. B`sentenza li tat il-Prim`Awla tal-Qorti Civili fit-23 ta` Novembru 2016, AGP kienet kanonizzata kreditrici ta`ALP fl-ammont ta` €33,755.81.

e) Il-kreditu ta` Xuereb Installations Limited kontra ALP

ALP inkarikat lil Xuereb Installations Limited ("**Xuereb**") sabiex taghmel xoghol ta` *gypsum* relatat mal-istess progett. Tenut kont tax-xoghol addizzjonali, Xuereb ghandha tiehu €648,000. Il-hlas ghadu pendent. Ma jirrizultax li Xuereb hadet passi legali kontra ALP.

f) Il-kreditu ta` Kuehne + Nagel Limited kontra ALP

Kuehne + Nagel Limited ipprestat servizzi b`inkariku ta` ALP. Ghal li ghamlet, fadallha tiehu l-ammont ta` €8,560.71. Ghamlet il-procedura skont l-Art 166A tal-Kap 12, u llum hija kreditrici kanonizzata ghal dak l-ammont.

IV. Dritt, dottrina u gurisprudenza

Qabel tghaddi sabiex tqis il-mertu, il-Qorti jidhrilha li jkun opportun jekk taghmel analizi ta` d-disposizzjonijiet li huma attwali u rilevanti ghall-vertenza tal-lum.

a) L-Art 218(1) tal-Kap 386

Persuna li tkun trid titlob ix-xoljiment u l-istralc ta` kumpannija, trid toqghod ghal dak li jipprovdi l-Art 218(1) tal-Kap 386 li jaqra hekk –

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

(a) stralc ta' kumpannija mill-qorti skont l-artikolu 214(1)(a) ;

(b) xoljiment u stralc ta' kumpannija mill-qorti skont l-artikolu 214(2)(a) ; jew

(c) xoljiment u stralc ta' kumpannija skont l-artikolu 214(2)(b),

ghandha ssir b'rikors li jista' jsir jew mill-kumpannija wara decizjoni tal-laqgħa generali jew mill-bord tad-diretturi tagħha jew minn xi detentur ta' obligazzjoni, kreditur jew kredituri, jew minn xi kontributorju jew kontributorji :

Izda rikors skont il-paragrafi (b) jew (c) jista' wkoll isir minn xi azzjonist jew direttur tal-kumpannija.

Fil-kaz tal-lum, ir-rikorrenti mexxew bl-istanza tax-xoljiment u tal-istralc ta` ALP ghaliex huma kredituri tagħha, kif jirrizulta huwa l-kaz, abbazi tal-provi li tressqu fil-kord ta` din il-kawza. Ghalhekk ghandhom *locus standi*.

Dan premiss, ir-rikorrenti qeghdin jitolbu x-xoljiment u l-istralc ta` ALP abbazi : tal-Art 214(2)(a)(ii) tal-Kap 386 ; u tal-Art 214(2)(b)(iii) tal-Kap 386.

b) L-Art 214(2)(a)(ii) tal-Kap 386

Meta tfassal il-mudell għal-ligi tagħna l-gdida dwar il-kumpanniji, dik li llum hija Kap 386, u li kellha tiehu post l-Ordinanza Dwar Socjetajiet Kummercjali – Kap 168, il-qafas magħzul kien dak tal-Companies Act Ingliza 1985.

Fil-ligi Ingliza, ix-xoljiment u l-istralc ta` kumpanniji kien trattat b` legislazzjoni *ad hoc* u cioe` l-Insolvency Act 1986.

Meta sar l-Att XXV tal-1995 dwar il-Kumpanniji, id-disposizzjonijiet li jirregolaw ix-xoljiment u l-istralc kienu integrati fil-ligi l-gdida, mhux kif sar fl-Ingilterra.

Dan premiss, tajjeb jinghad illi l-Art 214(2)(a)(ii) jaghti lill-Qorti diskrezzjoni li xxolji u tistralcja kumpannija *jekk il-kumpannija ma tkunx tista' thallas id-djun taghha.*

Id-disposizzjoni trid tingara flimkien ma` l-**Art 214(5)** li jistabilixxi s-sitwazzjonijiet fejn il-ligi taghna tqis illi kumpannija ma tkunx tista' thallas id-djun taghha.

Tnejn huma c-cirkostanzi definiti fil-ligi :-

(a) *jekk id-dejn dovut mill-kumpannija jkun baqa' ma thallasx ghal kollox jew f`parti wara erbgħa u ghoxrin gimgha mill-ezekuzzjoni ta' titolu eżekuttiv kontra l-kumpannija b`xi wiehed mill-atti eżekuttivi msemmijin fl-artikolu 273 tal-Kodici ta' Organizzazzjoni u Procedura Civili ;*

jew

(b) *jekk ikun ippruvat għas-sodisfazzjon tal-qorti li l-kumpannija ma tkunx tista' thallas id-djun taghha, meta din tqis ukoll il-passiv kontingenti u prospettiv tal-kumpannija.*

Ir-rikorrenti qeghdin jistrieħu fuq iz-zewg subincizi tal-Art 214(5) kif kien dikjarat minnhom fil-verbal ta` l-udjenza tal-14 ta` Dicembru 2017.

c) L-Art 214(5)(a) tal-Kap 386

Fil-ligi taghna li *kumpannija ma tkunx tista' thallas id-djun taghha* għandu sinjifikat preciz u definit mentri fil-ligi Ingliza, il-posizzjoni hija aktar wiesgha.

Fil-Pag 859 ta` **Boyle & Birds` Company Law** (Eighth Edition – Jordans – 2012) jinghad illi :-

There are two principal, although not exclusive or exhaustive, tests of insolvency : a company is insolvent if it unable to pay its debts as they fall due ("cash flow insolvency") ; it is also insolvent if its liabilities exceed its assets ("balance sheet insolvency") ...

B` mod aktar ristrett, fil-ligi taghna dak previst mill-Art 214(5)(a) jixbah dak maghruf bhala *cash flow insolvency* fil-ligi Ingliza.

Filwaqt illi fil-ligi taghna huwa specifikat **bil-preciz** x` m` ghandhiex taghmel kumpannija debitrice sabiex ma tkunx meqjusa li ma tistax thallas id-djun taghha, fil-ligi Ingliza il-kriterju huwa aktar general, ghaliex issehh dik l-ghamla ta` insolvenza meta kumpannija tkun *unable to pay its debts as they fall due*.

Il-Qorti sejra taghmel riferenza ghad-dottrina Ingliza, ghax tiswa biex tkun tista` tasal mhux daqstant biex tghid jekk jirrizultax ppruvat dak stipulat fl-Art 214(5)(a), izda biex tasal ghal decizjoni dwar jekk ghandhiex tghaddi ghal dikjarazzjoni ta` xoljiment u l-istralc.

Fil-Pag 860 ta` **Boyle & Birds` Company Law** (op. cit.) jinghad illi :-

Failure to pay a debt which is due and not disputed amounts to evidence of cash flow insolvency. Thus a company which has a policy of late payment of bills could find itself the subject of a petition for a winding-up order or administration order. Such a petition will not be struck out at an early stage as a form of improper pressure and an abuse of the process of the court, because, as Staughton LJ explained in Taylor`s Industrial Flooring (1990. BBC 44 at 51) creditors, not late payers, are more worthy of insolvency law`s protection.

"Many people today seem to think that they are lawfully entitled to delay paying their debts when they fall due or beyond the agreed period of credit, if there is one ... This can cause great hardship to honest traders, particularly those engaged in small businesses recently started. Anything which the law can do to discourage such behaviour in my view should be done.

Fil-Pag 17 tal-ktieb **Insolvency Law – Corporate and Personal - Andrew Keay u Peter Walton** (Pearson Longman – 2003) jinghad hekk dwar *cash flow insolvency* fil-kuntest tal-Insolvency Act 1986 –

The court, in examining whether a company is suffering cash flow insolvency, will consider whether the company is actually paying its debtors. Courts must take into account what current revenue the company has as well as what the company can procure by realising assets

within a relatively short time ... A company can rely upon money which might be obtained from the sale of assets or upon money which might be obtained on the strength of its assets ... It is possible that sometimes a debtor might be able to establish solvency by demonstrating that funds can be obtained through an unsecured loan. In considering whether a person or a company is insolvent, the debtor`s whole financial position must be studied ... and a temporary lack of liquidity does not necessarily mean that the company is insolvent ...

At one time courts were rather strict on what they required to be established before they were willing to deem a person or a company insolvent, but in more recent times they have become more liberal as far as creditors are concerned and have held that a debtor is insolvent if a creditor is able to prove that he or she has not paid an undisputed debt after a demand has been made ... and this is the case even if there is other evidence which suggests that the value of the assets outweighs liabilities ...

Whether a company is cash flow insolvent is principally a question of fact and one which may be established in any number of ways, such as the existence of a large number of outstanding debts and unsatisfied judgments ... or there is lack of assets on which execution can be levied ...

It has been said that a debtor is not regarded as solvent just because if sufficient time were granted the debts could be paid off ...

d) L-Art 214(5)(b) tal-Kap 386

Fit-test bl-Ingiliz **L-Art 214(5)(b) tal-Kap 386** jaqra :-

For the purposes of subarticle (2)(a)(ii), a company shall be deemed to be unable to pay its debts ...

if it is proved to the satisfaction of the court that the company is unable to pay its debts, account being taken also of contingent and prospective liabilities of the company.

Fl-Insolvency Act 1986 Ingliża, insibu disposizzjoni li **tixbah** dik tal-ligi taghna, **ghalkemm mhijiex l-istess**.

Il-Qorti qeghda tirreferi ghall-**Art 123(2)** tal-Insolvency Act 1986 li jaqra hekk –

A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.

Huwa evidenti li ghad li hemm xebh, iz-zewg disposizzjonijiet mhumiex identici.

Id-divergenza tinsab fil-fatt illi waqt illi fil-ligi taghna, il-mizura hija semplici : *the company is unable to pay its debts account being taken also of contingent and prospective liabilities of the company, fil-ligi Ingliza, il-kriterju huwa divers ghaliex il-qorti tkun trid tqis illi *the value of the company`s assets is less than the amount of its liabilities ... billi tiehu kont ta` ... contingent and prospective liabilities.**

Il-Qolrti tqis li d-differenza bejn iz-zewg legislazzjonijiet mhijiex ta` drafting izda ta` sostanza.

Premessa d-distinzjoni bejn iz-zewg legislazzjonijiet, il-Qorti sejra tirreferi ghad-dottrina Ingliza dwar kif din ittrattat il-koncett ta` contingent u dak ta` prospective liabilities.

Il-Qorti sejra tirreferi ghal dak li d-dottrina Ingliza tirreferi ghalih bhala **balance sheet insolvency** fl-ambitu tal-**Art 123(2)** tal-Insolvency Act 1986.

Fil-Pag 19 tal-ktieb **Insolvency Law – Corporate and Personal** (op. cit.) jinghad hekk dwar *balance sheet insolvency* :-

In determining whether the assets are outweighed by the liabilities a court is able to take into account contingent and prospective liabilities, but not contingent and prospective assets [Byblos Bank SAL v. Al-Khudhairy (1986) 2 BCC99, 549 (CA)] It has been said that "liabilities" is a broadened term compared with "debts" [Re A debtor (No 17 of 1966) (1967) Ch 590 ; (1967) 1 All ER 668]. "Liabilities" is defined for the purposes of winding up in rule 13.12 (4) to mean "a liability to pay money or money`s worth, including any liability under an enactment, any liability for breach of trust, any liability in contract, tort or bailment and any liability arising out of an obligation to make restitution". Then rule 13.12 (3) states that it is immaterial whether the liability is present or future,

whether it is certain or contingent, or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion.

Clearly with this test it is only possible to take into account the assets owned by the company including the uncalled capital of the company [Re National Livestock Insurance Co (1858) 26 Beav 153 ; 53 ER 855 ...

Fil-Pag 114 tar-Raba` Edizzjoni (2011) ta` **Principles of Corporate Insolvency Law** (Sweet & Maxwell) **Roy Goode** ighid hekk –

The idea underlying this test ... is that it is not sufficient for the company to be able to meet its current obligations if its total liabilities can ultimately be met only by the realisation of its assets and these are insufficient for the purpose ...

Fil-Pag 130 ikompli hekk –

The mere excess of liabilities over assets is not in itself determinative. What has to be shown is that by reason of the deficiency of its assets the company has reached the point of no return.

Fil-Pag 134 sa 136, l-awtur jittratta n-nozzjoni ta` **contingent liability** u jghid hekk –

To give the phrase "contingent liability" any meaning we must restrict it to a liability or other loss which arises out of an existing legal obligation or state of affairs but which is dependent on the happening of an event which may or may not occur. Many of the cases have stressed the need for the liability to arise out of an existing obligation.

... in considering whether there is a contingent liability the court has regard to the existing commercial situation, not merely an existing legal obligation. In this regard, assistance can be derived from Financial Reporting Standard 12 which defines a contingent liability in the following terms :

(a) "A possible obligation that arises from past events and whose existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the entity`s control ; or

(b) a present obligation that arises from past events but is not recognised because :

(i) it is not probable that a transfer of economic benefits will be required to settle the obligation ; or

(ii) the amount of the obligation cannot be measured with sufficient reliability."

... the term "contingent liabilities" is ultimately not a term of art and its precise meaning will depend on its context. The court is thus entitled to have regard to commercial realities ...

Fil-Pag 136 u 137, l-awtur jittratta n-nozzjoni ta' **prospective liability** u jghid hekk –

... The phrase "prospective liability" is neither a legal nor an accounting term of art. It has been judicially defined as : " ... a debt which will certainly become due in the future, either on some date which has already been determined or some date determinable by reference to future events."

... it has been described ... as unmatured liability which will inevitably ripen into a debt with the passage of time. Such a definition encompasses all forms of debitum in praesenti, solvendum in futuro including an indisputable claim for unliquidated damages which remains only to be quantified and will result in a debt far more than a nominal amount. "Prospective liability" thus embraces both future debts, the sense of liquidated sums due, and unliquidated claims.

e) **Gurisprudenza**

Il-Qorti sejra tirreferi wkoll ghal gurisprudenza tal-qradi Inglizi kif tghodd kemm ghall-cash flow test kif ukoll ghall-balance sheet test.

Tibda billi tirreferi ghad-decizjoni li tat il-Court of Appeal fil-kaz ta' **Byblos Bank SAL v. Al-Khudhairy** [1987] fejn *inter alia* ghad illi :

"If a debt presently payable is not paid because of lack of means, that will normally be sufficient to

prove that the company is unable to pay its debts. That will be so even if, on an assessment of all the assets and liabilities of the company, there is a surplus of assets over liabilities. That is trite law."

Fuq nota simili inghad minn Lord Justice Hoffmann fil-kaz **In Re a Company 12209 of 1991** [1992] BCLC 865, 868 :-

"A company`s non-compliance with a statutory demand, or non-satisfaction of execution of a judgment debt, is a matter that can be proved quite simply, usually by a single short witness statement. If proved, it establishes the court`s jurisdiction to make a winding up order, even if the company is in fact well able to pay its debts. If however a debt which has been made the subject of a statutory demand is disputed on reasonable grounds, the petitioner is adopting what has been called a high-risk strategy, and the petition may be dismissed with indemnity costs."

Tnejn mill-kawzi fl-Ingilterra fejn kien imfisser b`reqqa dak illi ghandu jigi mistharreg meta ssir talba ghal xoljiment u stralc ghar-raguni ta` nsolvenza huma : **Cheyne Finance Plc (No.2)** deciz fis-17 ta` Ottubru 2007 : u **BNY Corporate Trustee Services Ltd vs Eurosail-UK 2007-3BL Plc** deciz fit-30 ta` Lulju 2010. It-tnejn kienu decizi mill-High Court (Chancery Division) – England and Wales.

Il-punti saljenti illi hargu miz-zewg decizjonijiet citati kienu migbura fil-kawza li kienet deciza mill-Court of Appeal fit-3 ta` April 2014 fil-kaz ta` **Bucci vs Carman (Liquidator of Casa Estates (UK) Ltd)**, EWCA Civ 383, fejn inghad hekk :-

"In my judgment the following points emerge from the decision of the Supreme Court in Eurosail (and in particular the judgment of Lord Walker) :

- i) The tests of insolvency in s 123(1)(e) and 123(2) were not intended to make a*

significant change in the law as it existed before the Insolvency Act 1986 : para 37.

- ii) The cash-flow test looks to the future as well as to the present : para 25. The future in question is the reasonably near future ; and what is the reasonably near future will depend on all the circumstances, especially the nature of the company`s business: para 37. The test is flexible and fact-sensitive : para 34.*
- iii) The cash-flow test and the balance sheet test stand side by side: para 35. The balance sheet test, especially when applied to contingent and prospective liabilities is not a mechanical test: para 30. The express reference to assets and liabilities is a practical recognition that once the court has to move beyond the reasonably near future any attempt to apply a cash-flow test will become completely speculative and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test : para 37.*
- iv) But it is very far from an exact test: para 37. Whether the balance sheet test is satisfied depends on the available evidence as to the circumstances of the particular case: para 38. It requires the court to make a judgment whether it has been established that, looking at the company`s assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to meet those liabilities. If so, it will be deemed insolvent even though it is currently able to pay its debts as they fall due: para 42.*

*In the course of his judgment in Eurosail Lord Walker approved what he described as the "perceptive judgment" of Briggs J in **Re Cheyne Finance plc**(No 2) [2007] EWHC 2402 (Ch), [2008] 2 All ER 987, [2008] Bus LR 1562. Two of the points that Briggs J made bear on our case :*

- i) Cash-flow solvency or insolvency is not to be ascertained by a blinkered focus on debts due at the relevant date. Such an approach will in some cases fail to see that a momentary inability to pay is only the result of temporary illiquidity. In other cases, it will fail to see that an endemic shortage of working capital means that a company is on any commercial view insolvent, even though it may continue to pay its debts for the next few days, weeks, or even months: para 51.*
- ii) Even if a company is not cash-flow insolvent, the alternative balance-sheet test will afford a petitioner for winding up a convenient alternative means of proof of a deemed insolvency: para 57."*

Fil-kawza **BNY Corporate Trustee Services Ltd & Ors v Neuberger** li kienet deciza fid-9 ta` Mejju 2013 mis-Supreme Court Ingliza, saret analizi fid-dettall tal-izviluppi illi sehhe w fil-ligi Ingliza fir-rigward tal-Art. 123 tal-Insolvency Act.

Ghal dak li ghandu x` jaqsam mal-*cash flow test* kien imfisser hekk :-

"The changes in form served, in my view, to underline that the "cash flow" test is concerned, not simply with the petitioner`s own presently-due debt, nor only with other presently-due debts owed by the company, but also with debts falling due from time to time in the reasonably near future.

*What is the reasonably near future, for this purpose, will depend on all the circumstances, but especially on the nature of the company's business. That is consistent with **Bond Jewellers, Byblos Bank and Cheyne Finance**. The express reference to assets and liabilities in my view a practical recognition that once the court has to move beyond the reasonably near future (the length of which depends, again, on all the circumstances) any attempt to apply a cash-flow test will become completely speculative, and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test. But it is still very far from an exact test, the burden of proof must be on the party which asserts balance-sheet insolvency."*

(ara wkoll: **Ross & Anor vs Gaffney & Anor**, High Court Chancery Division, 2 ta` Gunju 2016 ; **BHS Group Ltd vs Retail Acquisitions Ltd**, High Court Chancery Division, 5 ta` Mejju 2017)

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

Skont din id-disposizzjoni, kumpannija **ghandha** tkun xjolta jekk il-qorti tkun tal-fehma li hemm **ragunijiet gravi bizzejjed**.

Il-ligi thalli lill-qorti **diskrezzjoni wiesa`** sabiex tistabilixxi hi jekk fil-fehma taghha jirrizultawx fatti u cirkostanzi **"gravi bizzejjed"**.

Jekk tistabilixxi l-gravita`, allura minn hemm `il quddiem, il-Qorti ma jkollhiex aktar diskrezzjoni u **tkun obligata** taghmel id-dikjarazzjoni ta` xoljiment u konsegwenti stralc tal-kumpannija.

Il-ligi ma taghti l-ebda tifsira ta` x` inhuma **"ragunijiet gravi bizzejjed"**.

Ghalhekk il-Qorti m`ghandha tiskarta xejn.

Il-Qorti m`għandhiex toqghod fuq grajjiet li jkun sehhew sad-data tal-presentata tar-rikors promotur tal-azzjoni, izda għandha tagħti piz ukoll għal kull ma jgħri anke wara, sa ma tigi biex tingħta d-decizjoni tagħha.

Fl-**Art 122 tal-Insolvency Act 1986 tal-Ingilterra**, tirrizulta lista ta` cirkostanzi li jwasslu għax-xoljiment u għall-istralc ta` kumpannija.

Tajjeb jingħad illi fl-Insolvency Act 1986 ma hemmx disposizzjoni identika għal dik li tirrizulta fl-Art 214(2)(b)(iii) tal-Kap 386.

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

Huwa evidenti anke mad-daqqa t`għajn li d-disposizzjoni fil-ligi tagħna hija aktar stretta fis-sens illi fil-kaz tagħna l-qorti għandha xxolji u tistralcja meta fil-fehma tagħha ikunu jirrizultaw ragunijiet gravi bizzejjed, mentri fil-ligi Ingliza, il-kriterju li fuqu l-qorti trid tibni l-fehma tagħha huwa dak tal-gustizzja u l-ekwita`.

L-istrettezza tad-disposizzjoni tal-ligi tagħna tagħmel hafna sens anke għaliex jekk il-qorti tesprimi l-fehma li hemm ragunijiet gravi bizzejjed, allura minn hemm tkun obbligata tordna x-xoljiment u l-istralc tal-kumpannija.

Il-Qorti tgħid li r-riferenza għall-Art 122(1)(g) tal-Insolvency Act 1986 hija utili għaliex il-linja li hadu l-qorti Inglizi biex ighidu x`għandhom ifissru *just and equitable* għall-fini ta` *winding up* ta` kumpannija jgħin sabiex jiftah tieqa lill-qorti tagħna għall-interpretazzjoni ta` x`jistgħu jkunu ragunijiet gravi bizzejjed.

Kull kaz għandu l-istorja tiegħu.

Għalhekk il-Qorti trid tibni l-fehma tagħha fuq il-fatti u cirkostanzi ta` kull kaz.

V. Risultanzi dwar insolvenza

Il-Qorti taghmel referenza ghall-kontijiet awditjati ta` ALP ghas-sena finanzjarja li ghalqet fil-31 ta` Dicembru 2014.

Dawn huma l-ahhar *financial statements* illi kienu pprezentati lir-Registratur tal-Kumpanniji. Inltre huma l-unici li kienu esebiti fl-atti.

Jirrizulta li sa dak iz-zmien, ALP kellha *total liabilities* ta` €3,598,544, u *total assets* ta` €1,726,811. Dan ifisser illi lura fl-2014, kien evidenti l-izbilanc li kellha ALP bejn l-assi u d-djun fis-sens illi d-dejn kien jeccedi l-valur tal-assi bid-doppju. Minn esami komparattiv tas-snin finanzjarji 2013 u 2014, jidher illi kien hemm zieda konsiderevoli fid-*deficit* billi dan zdieg minn €930,650 tal-2013 ghal €1,871,733 fl-2014, u cioe` d-doppju. Jirrizulta wkoll illi fl-istess zmien zdieg anki d-dejn li tela` minn €2,741,310 ghal €3,598,544.

Rinfaccjata b` din il-qagħda finanzjarja, l-Awdituri DFK Malta ghamlu din l-osservazzjoni :-

*“Without qualifying our opinion, we draw our attention to note 2.2 in the financial statements which indicates that the Company’s total liabilities exceed its total assets by €1,871,733. **These conditions, along with other matters as set forth in note 2.2 indicate the existence of a material uncertainty that may cast significant doubt about the Company’s ability to continue as a going concern.**”* (fol. 91 et seq.) (enfasi u sottolinear ta` din il-qorti)

Abbazi tar-ricerki pubblici ufficjali, ma jirrizultax li ALP ghandha assi mmobbli. Ir-ricerki jizvelaw illi ALP ghandha ipoteki li kredituri tagħha registraw favur tagħhom kontra tagħha.

Safejn jirrigwardja t-tlett kredituri rikorrenti, jirrizulta illi dawn lkoll kisbu sentenza kontra ALP li ghaddiet in gudikat. In virtu` tad-dispost tal-**Art. 253(a) tal-Kap. 12**, sentenza tikkostitwixxi titolu ezekuttiv li tigi reza ezegwibbli kif ighid l-**Art. 256 tal-Kap 12** illi jaqra :

1. Kull sentenza ohra definittiva illi ma jkunx fiha kondizzjonijiet sospensivi, u li tkun tikkundanna lid-debitur ghal hlas ta` somma likwida, jew biex jaghti jew jitlaq haga certa, jew biex jesegwixxi fatt jew obbligu partikolari, hija esegwibbli warajumejn minn dak in-nhar li tinghata.

2. L-esekuzzjoni ta` kull titolu esekuttiv iehor ma tistax issir hlief wara jumejn ghall-anqas min-notifika ta` sejha ghall-hlas maghmula b`att gudizzjarju.

Abbazi ta` dawn id-disposizzjonijiet, is-sentenzi li kienu decizi favur CPM fit-22 ta` Marzu 2017, favur Creations fis-27 ta` Gunju 2017 u favur AGP fit-23 ta` Novembru 2016 ghaddew in gudikat billi ma sar ebda appell minnhom. Billi sehħ dak li jghid l-Art 256(2) tal-Kap 12, it-tliet sentenzi saru ezegwibbli.

Jirrizulta ppruvat illi kemm CPM kif ukoll Creations kisbu l-hrug ta` mandati ta` sekwestru ezekuttivi.

Ghalkemm jirrizulta mill-atti li ALP ma kenitx notifikata bil-mandati ta` sekwestru, dak il-fatt ma jhassar xejn mit-twettieq tal-Art 214(5)(a) tal-Kap 386 billi sabiex isehħ dak previst, id-disposizzjoni bl-ebda mod ma tesigi n-notifika tad-debitur izda trid li jkun hemm esekuzzjoni. Dan ifisser li t-terminu ta` erbgha u ghoxrin (24) gimgha jibda jiddekorri mill-esekluzzjoni tal-mandat. Billi hawn si trattava ta` mandati ta` sekwestru, l-esekuzzjoni tal-mandat issehħ min-notifika tas-sekwestratarji. Fil-kaz tal-lum huwa ppruvat illi qabel kienet promossa l-azzjoni

odjerna, kienu ghaddew aktar minn erbgħa u ghoxrin (24) gimgha mill-ezekuzzjoni tal-mandati.

Għalhekk huwa sodisfatt dak previst mill-Art 214(5)(a) tal-Kap 386.

Il-Qorti sejra tghaddi sabiex tqis jekk huwiex sodisfatt ukoll dak rikjest mill-Art 214(5)(b) tal-Kap 386 tenut kont tal-fatti u cirkostanzi tal-kaz in esami.

Fil-ezami ta` x-xorta li jrid isir, il-Qorti m`ghandhiex toqghod fuq incident izolat li jkun ipendi lejn l-insolvenza kif prevista mil-ligi tagħna, jew inkella fuq zmien partikolari.

Fil-kaz tal-lum tirrizulta ppruvata qagħda **serja** ta` nuqqas ta` likwidita` *di medio e lungo periodo*.

Il-konsegwenza negattiva ta` din il-qagħda hija li kredituri (bhar-rikorrenti) b`titolu eżekuttiv f`idejhom baqghu ma thallsu propju xejn minn dak dovut lilhom.

Tar-rikorrenti mhuwiex kaz ta` *a bona fide disputed debt*.

Fid-deposizzjoni tieghu, Kevin Vassallo għal ALP stqarr illi l-kumpanija ma kenitx qegħda tikkontesta l-pretensjonijiet tar-rikorrenti. Stqarr illi ALP kienet tat bidu għal proceduri arbitrali kontra Steel Structures bil-ghan li tigbor mingħandha dak li kien dovut lilha. B`li tirkurpra kienet lesta thallas lill-kredituri tagħha. Ikkonferma pero` li ndipendentement mill-esitu tal-proceduri arbitrali, ALP ma kellhiex il-mezzi sabiex thallas id-djun tagħha.

Huwa evidenti li ALP kienet qegħda ssostni t-twettieq tal-obbligi tagħha fuq proceduri arbitrali li kienu kontestati u allura b`esitu incert.

Jirrizulta li ALP m`ghandhiex likwidita` u lanqas assi. L-esitu tal-proceduri arbitrali m`ghandux ikun ta` piz ghall-procediment odjern. Tajjeb jinghad illi fil-procedura arbitrali, ma hemmx biss it-talba li ALP ghandha kontra Steel Structures izda l-kontrotalba li din tal-ahhar ghandha kontra ALP.

Il-Qorti fliet b`reqqa l-atti li jsawwru l-procediment odjern. Wara li ghamlet l-apprezzament taghha tal-fatti li jemergu mill-provi fl-assjem taghhom, il-Qorti hija tal-fehma li anke abbazi tal-Art 214(5)(b) tal-Kap 386 ALP mhijiex fil-qagħda li thallas id-djun taghha.

Dan tal-lum mhuwiex kaz fejn ALP waqfet temporanjament milli thallas id-djun taghha izda huwa kaz fejn waqfet ghal kollox milli thallas, m`ghandhiex mnejn thallas, ma tat l-ebda konfort lill-kredituri kanonizzati taghha li sejra taghmel hlas, u qeghda toqghod ghal kollox fuq l-esitu incert ta` procedura arbitrali li ghandha pendenti ma` Steel Structures u fuq ipoteka specjali li rregistrat fuq propjeta` ta` din tal-ahhar fejn bhala gradwadazzjoni ma jidhirx li ALP hija l-ewwel "kreditur".

Jibqa` rrisolt il-kwesit kif Eden hallset lil ALP ta` li ghamlet fil-progett tal-Lukanda Intercontinental, imbaghad ALP ma hallsitx lir-rikorrenti li huma kredituri taghha fuq il-pretest li ghandha kwistjoni ma` Steel Structures. Anzi ALP ippretendiet li tasal f`arrangement mal-kredituri, vantaggjuz ghaliha pero` mhux ghalihom, meta l-kreditu taghhom mhuwiex kontestat u lanqas kontestabbli.

Irrizulta illi lura fl-2014 ALP kellha assi valutati u accertati mill-awdituri fl-ammont ta` €1,726,811. X`ghandha llum ALP bhala assi ma rrizultax ghalkemm jidher li m`ghandhiex. Il-Qorti hija sprovvista wkoll mill-*financial statements* taghha ghas-snin ta` wara l-2014 billi baqghu ma sarux. Il-fatt jibqa` illi d-dejn kanonizzati baqa` tiela` bla ma thallas ghaliex ma hemmx mnejn jithallas. Ma jidhirx li l-azzjonisti ta` ALP urew disponibilita` li jaghmlu tajjeb huma mqar b`garanziji taghhom biex iserrhu mohh il-kredituri kanonizzati. Mhuwiex accettabbli l-argument li l-kredituri ghandhom jistennew l-esitu tal-proceduri ta` arbitragg bejn ALP u Steel Structures, li ma jikkoncernawx lilhom.

VI. Id-diskrezzjoni tal-qorti

Accertat illi ALP mhijiex f`qagħda li thallas id-djun tagħha skont l-Art 214(5)(a) u (b) tal-Kap 386, il-Qorti trid tara jekk għandhiex tesercita d-diskrezzjoni tagħha kif irid l-Art 214(2)(a)(ii) tal-Kap 386.

Il-Qorti tagħmel referenza għall-pag. 913-914 ta` Boyle & Birds` Company Law (op. cit.) fejn ingħad illi :-

Unpaid creditors of a company may consider commencing winding-up proceedings against the company as an alternative to suing for payment. As a debt collection mechanism, winding up proceedings may be swifter and, for the individual creditor, less expensive than a claim that may come to trial for sometime ; on the other hand, winding up is a collective procedure for the benefit of creditors generally and it does not benefit specific creditors individually (F. Oditah "Winding Up Recalcitrant Debtors" 1995 LMCLQ 107) ...

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

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

Brenda Hannigan tghid hekk fil-ktieb **Company Law** (Lexis Nexis - Butterworths - 2003) :-

"winding up or liquidation ... is the process by which the assets of the company are collected in and realised, its liabilities discharged and the net surplus, if there is one, distributed to the persons entitled to it. Only when this has been done is the company's existence finally terminated by a process known as dissolution ... Insolvent winding up occurs essentially when companies are unable to pay their debts in full. When a company cannot pay its debts in full, difficult problems arise as to how the assets that are available should be distributed. In theory ... the law tries to maintain an equality between creditors so that assets are pooled and distributed pari passu ie rateably according to the size of each creditor's claim."

L-awtrici tirreferi ghall-Cork Committee Report dwar *good modern insolvency law*.

Kien specifikat li l-ghanijiet huma :-

"... to recognise that the world in which we live and the creation of wealth depend upon a system founded on credit and that such a system requires, as a correlative, an insolvency procedure to cope with its casualties; ... to relieve and protect where necessary the insolvent, and in particular the individual insolvent, from any harassment and undue demands by his creditors ... at the same time, to have regard to the rights of creditors whose own position may be at risk because of the insolvency; ... to realise the assets of the insolvent which should properly be taken to satisfy his debts, with the minimum of delay and expense; to distribute the proceeds of the realisations among the creditors in a fair and equitable manner, returning any surplus to the debtor; to ensure that the processes of realisation and distribution are administered in an honest and competent manner, To recognise that the effects of insolvency are not limited to the private interests of the insolvent and his creditors, but that other interests of society or other groups in society are vitally affected by the insolvency and its outcome and to ensure that these public interests are recognised and safeguarded, ... to provide the means for the preservation of viable commercial enterprises capable of making a useful contribution to the economic life of the country."

Fil-pagna 216 tal-ktieb **Insolvency Law – Corporate and Personal** (op. cit.) jinghad hekk :-

While a creditor is able to establish the fact that a company is unable to pay its debts ... it does not mean that a winding-up order will be automatically made ; the court has an unfettered discretion ... The company might be able to establish that it is solvent thereby rebutting the presumption of insolvency relied on by the creditor. Nevertheless a court may still make a winding up order if the company does not dispute the fact that it owes money to the creditor who has requested payment because non payment gives rise to a legitimate suspicion of inability to pay ...

Dan premiss, il-Qorti taghti piz lid-dikjarazzjoni li ghamel bil-gurament Kevin Vassallo fejn minghajr l-icken esitazzjoni stqarr illi ALP m`ghandhiex mnejn thallas id-dejn li ghandha mar-rikorrenti.

Il-Qorti rat id-dokumenti li kienu prezentati fil-kors ta` dan il-procediment. B`effett ta` diversi mandati ta` sekwestru eżekuttivi, kienu sekwestrati l-ammont ta` €8,354.85 li kien depozitat ma` HSBC Bank Malta plc u l-ammont ta` €2,892.32 li kien depozitat ma` Bank of Valletta plc. Huwa evidenti li l-ammonti sekwestrati mhux bizzejjed sabiex jigu sodisfatti l-krediti li r-rikorrenti ghandhom kontra ALP.

Bhala fatt irrizulta ghal din il-Qorti illi r-rikorrenti *qua* kredituri m`ghamlu ebda tentattiv ta` *arm twisting* fil-konfront ta` ALP. Marru ghall-procedura odjerna ghaliex minkejja d-decizjonijiet li kellhom favur taghom, il-kreditu tar-rikorrenti baqa` ma thallasx.

Tenut kont tal-assjem ta` fatti u dritt, il-Qorti sejra tghaddi ghax-xoljiment u ghall-istralc ta` ALP.

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

In vista tal-premess, ma tarax il-htiega li tistharreg jekk kienx ippruvat ukoll dak li jirrikjedi l-Art 214(2)(b)(iii) tal-Kap 386.

Provvediment

Ghar-ragunijiet kollha premissi, il-Qorti qeghda tipprovdi dwar it-talbiet u dwar l-eccezzjonijiet billi :-

Riferibbilment ghall-ewwel talba, tiddikjara illi l-kumpannija intimata A.L. Projects Limited (C12622) mhijiex f`qaghda li thallas id-djun taghha abbazi tal-Art. 214(2)(a)(ii), tal-Art 214(5)(a) u tal-Art 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta.

Tastjeni milli tiehu konjizzjoni ulterjuri tat-tieni talba.

Riferibbilment ghat-tielet u ghar-raba` talbiet, tordna x-xoljiment tal-kumpannija intimata A.L. Projects Limited (C12622) b`effett mis-7 ta` Lulju 2017 skont l-Art 214(2)(a)(ii) u l-Art 223(1) tal-Kap 386 tal-Ligijiet ta` Malta. Tordna wkoll l-istralc taghha.

Tastjeni milli tiehu konjizzjoni ulterjuri tal-hames talba.

Riferibbilment ghas-sitt talba, tahtar lir-Ricevitur Ufficjali bhala stralcjarju tal-kumpannija intimata A.L. Projects Limited (C12622) bis-setghat u bid-dmirijiet li huma previsti u stabbiliti fil-Kap 386 tal-Ligijiet ta` Malta, b`dan illi l-istralcjarju ghandu jipprezenta rapport tal-hidma tieghu sat-28 ta` Frar 2019.

Tordna lill-intimata A.L. Projects Limited sabiex tbatu l-ispejjez taghha u dawk tar-rikorrenti.

Tordna lill-intervenuti fil-kawza sabiex ibatu l-ispejjez taghhom.

Bl-applikazzjoni tal-Art 236(2) tal-Kap 386 tal-Ligijiet ta` Malta, tordna lir-rikorrenti u lill-intimata A.L. Projects Limited sabiex *in solidum* bejniethom ihallsu l-ispejjez kollha ta` l-istralc, inkluzi d-drittijiet u l-ispejjez tal-istralcjarju.

Thalli l-istralc ghall-udjenza ta` nhar il-Hamis 21 ta` Marzu 2019 fid-9.00 a.m.

**Onor. Joseph Zammit McKeon
Imhallef**

**Amanda Cassar
Deputat Registratur**