



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

**ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON**

Illum il-Hamis 28 ta` Marzu 2019

**Kawza Nru. 1
Rik. Nru. 571/2017 JZM**

Calamatta Cuschieri Investment Services Limited (C13729) bhala nominee shareholder ghan-nom ta` I-AMB Capital Ireland Limited ; ii. Jamrae Capital Corp ; iii. Refucan Limited ; iv. Warren Friedland ; v. Mondo Investments and Finance Ltd. ; vi. Evan Gregory Hoff ; vii. Andrew James Reader ; viii. Shane Thompson; u ix. Bellerive Capital (BCP) 13 Limited ;

u

I-Avukat Dr Joseph Camilleri bhala mandatarju specjali ta` Genesis PFC, socjeta` estera registrata I-Mauritius bin-numru 134001C1/GBL

kontra

Pefaco International plc (C65718);

u

b`digriet tat-18 ta` Lulju 2017 is-socjeta` estera GRUPO Pefaco S.L. kienet ammessa tintervjeni *in statu et terminis*

Il-Qorti :

I. Preliminari

Rat ir-rikors li kien prezentat fit-23 ta` Gunju 2017 u li jaqra :-

A. Sfond Fattwali – Introduzzjoni

1. *Illi, dan ir-rikors qiegħed issir a tenur tad-disposizzjonijiet tal-Artiklu 402 tal-Att Dwar Il-Kumpanniji (Kapitolu 386 tal-ligijiet ta` Malta);*

2. *Illi s-socjetajiet esponenti qegħdin jipproponu l-procedura odjerna qua azzjonisti minoritarji fis-socjeta` intimata Pefaco International plc, socjeta` nkorporata skond il-ligijiet ta` Malta u li hija registrata mar-Registratur tas-Socjetajiet bin-numru ta` registrazzjoni `C 65718` ("**Pefaco**") u dan kif hu rifless mill-estratt tal-Involved Parties tas-socjeta` intimata Pefaco meħud minn fuq is-sit elettroniku tar-Registratur tas-Socjetajiet (kopja hawn annessa u mmarkata bhala `**Dok PFC 1`**);*

3. *Illi s-socjeta intimata Pefaco International plc, kif jixhed isimha, hija kumpanija pubblika u għandha l-ishma tagħha kkwotati fuq il-Borża ta` Malta, u għalhekk għandha obbligi partikolari minhabba n-natura tagħha. Tajjeb li jingħad minn issa illi minhabba nuqqasijiet fl-*

operat tal-kumpanija li se jigu spjegati f`aktar dettall, l-elenkar (listing) tal-ishma ta` din il-kumpanija fuq il-Borza ta` Malta gie sospiz;

4. *Illi l-kapital azzjonarju awtorizzat attwali tas-socjeta` intimata Pefaco jammonta ghal tmienja u erbgħin miljun, erba` mija u tmenin elf u wiehed u tletin Euro (EUR 48,480,031.00), waqt li l-kapital azzjonarju mahrug ossija issued share capital jammonta ghal tlieta u tletin miljun hames mija u hamsa u ghoxrin elf u tnejn u tmenin Euro (€ 33,525,082) maqsuma fi tnejn u ghoxrin miljun, tlett mija u hamsin elf, u erbgha u hamsin Euro (EUR 22,350,054) ordinary "A" shares ta` valur nominali ta` Euro 1.50 kull sehem u ordinary "B" share ta` valur nominali ta` Euro 1;*

5. *Illi l-kapital azzjonarju mahrug gie sottoskritt mir-rikorrenti Calamatta Cuschieri Investment Services Limited billi s-socjeta` esponenti msemmija hadet sitt miljun, seba` mija u hamest elef u mija u hmistax (6,705,115) ordinary "A" shares ta` valur nominali ta` Euro 1.50 kull sehem, u dan kif hu riflless mill-estratt ta` l-Involved Parties tas-socjeta` esponenti mehud minn fuq is-sit elettroniku tar-Registratur tas-Socjetajiet (kopja hawn annessa u mmarkata bhala ` **Dok PFC 1`**).*

6. *Illi s-socjeta` esponenti, Calamatta Cuschieri Investment Services Limited ssottoskriviet għall-ishma fis-socjeta` intimata Pefaco bhala nominee company f`isem numru ta` socjetajiet u individwi esteri, senjatament :*

- i. Genesis PFC, socjeta` estera registrata l-Mauritius bin-numru 134001C1/GBL;*
- ii. AMB Capital Ireland Limited;*
- iii. Jamrae Capital Corp;*
- iv. Refucan Limited;*
- v. Warren Friedland;*
- vi. Mondo Investments and Finance Ltd.;*
- vii. Evan Gregory Hoff;*
- viii. Andrew James Reader;*
- ix. Shane Thompson; u*
- x. Bellerive Capital (BCP) 13 Limited.*

("Genesis Consortium")

7. Illi l-Bord tad-diretturi tas-socjeta` intimata Pefaco bhalissa huwa prezentement maghmul minn hdax (11) -il membru - sitt (6) membri eżekuttivi ("**Executives**") u hames (5) membri mhux eżekuttivi ("**Non-Executives**");

8. Illi fost in-Non Executives, hemm zewg Class B Directors, li ghandhom certi drittijiet speċjali u li inhatru mis-soġġetti esponenti Genesis PFC, bħala azzjonista tas-sehem ordinarju B fis-socjeta` intimata Pefaco ("**Class B Directors**")

9. Illi s-socjetajiet rikorrenti mhumiex f`qagħda li jappuntaw il-maggoranza tad-diretturi fuq il-Bord tal-intimata Pefaco u mill-Memorandum and Articles ta` Assocjazzjoni tas-socjeta` intimata Pefaco (kopja ta` l-aħhar verżjoni li giet registrata ma` l-awtoritajiet kompetenti qed tigi hawn annessa u mmarkata bħala "**Dok PFC 2**"), jirrizulta illi fil-kazijiet ta` deċiżjonijiet tal-bord, skond Artiklu 113 : "questions arising at any meeting shall be decided by a majority of votes";

10. Illi skont l-Artiklu 140 tal-Articles of Association ta` Pefaco, is-socjeta` esponenti Genesis PFC bħala detentrici ta` ordinary "B" share fl-intimata Pefaco, hija mogħti livell addizzjonali ta` protezzjoni b`rabta mal-operat ta` Pefaco fis-sens illi l-istess Artiklu jitolb illi l-Class B Directors jagħtu l-kunsens taġġhom dwar certi reserved matters.

11. Illi ricentement is-socjetajiet esponenti (kif ukoll l-entitajiet u l-persuni li għalihom ir-rikorrenti Calamatta Cuschieri Investment Services Limited taġġxi bħala nominee) saru jafu illi l-affarijiet tas-socjeta` intimata Pefaco qed jitmexxew b`mod mhux gust, b`mod ta` pregudizzju u b`mod li jmorru kontra l-interessi tal-membri tal-kumpannija in generali b`konsegwenza diretta ta` omissjonijiet gravi da parte Francis Perez (detentur ta numru tal-passaport Franciz 10AY73861) u Olivier Cauro (detentur ta numru tal-passaport Franciz 13FV18099) u l-eżekuttivi l-oħra li jidhru li qed jagħxu b`mod irregolari hafna u possibilmment frawdolenti;

12. Illi l-esponenti sejra ghalhekk tghaddi biex tispjega f`aktar dettall il-lanjanzi illi wassluha sabiex tirrikorri ghal dawn il-proceduri

B. Il-lanjanzi tal-esponenti

B.1 Nuqqas ta` informazzjoni moghtija lid-Diretturi

13. Kif intqal aktar kmieni, ghalkemm id-diretturi li gew nominati mill-esponenti li gew appuntati fuq il-bord ta` Pefaco (inkluzi il-Class B Directors) huma Non-Executives, ai termini tal-Memorandum and Articles of Association tas-socjeta, hemm numru ta` hwejjeg illi dwarhom tista` tittiehed decizjoni biss bi qbil mal-Class B Directors;

14. Decizjonijiet dwar dawn ir-reserved matters - izda mhux biss dawn - jistghu jittiehdu b`serenita` biss jekk dawn il-Class B Directors, kif ukoll in-Non-Executives l-ohra ikollhom f`idejhom certa informazzjoni dwar l-andament tal-kumpanija, u partikolarment dwar hwejjeg illi jidhru inkwetanti fl-operat tal-kumpanija;

15. Huwa b`dan il-mod biss illi l-azzjonijisti, li jkunu ghazlu li jinvestu fis-socjeta` intimata ukoll minhabba fis-sistema ta` corporate governance li tinkludi struttura b`non-executive directors u Chairman indipendenti (li del resto hija rikkjesta mir-Regoli ghall-Elenku [Listing Rules]), jistghu ikollhom mohhom mistrieh illi l-affarijiet tal-kumpanija in kwistjoni qieghdin jitmexxew kif suppost u kif ikun gie mwieghed fil-prospett meta kienu gew elenkati l-Ordinary "A" Shares fuq il-Borza ta` Malta;

16. Illi b`rabta ma` dan jinghad illi s-socjetajiet esponenti saru jafu illi n-Non Executives, minn Ottubru 2016, bdew jitolbu informazzjoni mill-Executives, li jinkludu, inter alia, talbiet ghal (i) informazzjoni dwar il-kontijiet tal-Kumpanija, (ii) dikjarazzjonijiet tal-bank tal-Kumpanija, (iii) informazzjoni dwar l-assi u l-obbligazzjonijiet tal-Kumpanija u (iv) informazzjoni dwar nuqqas ta` hlas ta` certi djun dovuti mill-Kumpanija, inkluz lill-awdituri taghha, diretturi u l-Borza ta` Malta. Sal-lum, minkejja

diversi weghdiet verbali u bil-miktub li din l-informazzjoni sejra tinghata, dawn it-talbiet baqghu minghajr risposta;

17. *Minn Ottubru 2016 lil hawn, fil-fatt, id-Diretturi eżekuttivi ma pprovdew ebda nformazzjoni ohra, u jidher illi qed jibblukaw u jirrezistu kull attentat illi n-Non-Executives (inkluz il-Class B Directors) qed jag]mlu biex jottjenu informazzjoni dwar l-intimata Pefaco li hija krucjali ghalihom sabiex iwettqu l-funzjonijiet taghhom bhala diretturi tal-istess kumpanija u sabiex jagixxu fl-interessi taghha;*

18. *Fid-dawl tal-insistenza ta` certi diretturi illi ma jipprovdex l-informazzjoni li qieghda gustament tintalab, is-socjetajiet esponenti huma wkoll preokkupati ferm illi jista` jkun hemm informazzjoni ohra jew kwestjonijiet illi dawn id-diretturi qeghdin izommu mistura mill-bqija tad-diretturi, mill-azzjonisti u mill-pubbliku in generali li jista` jkollu jinvesti, b`dan illi dawn id-diretturi, azzjonisti u l-pubbliku ma ghandhomx ebda hjjel dwarhom;*

B.2 Nuqqas ta` informazzjoni moghtija lill-awdituri li wasslet ghal sospensjoni

19. *Illi l-istess attitudni ta` nuqqas ta` trasparenza qed tidher ukoll fl-agir tal-Executive Directors fil-konfront tal-awdituri tas-socjeta rikorrenti;*

20. *Kemm hu hekk, minkejja t-talbiet maghmula mill-awdituri tal-Kumpanija, kif ukoll id-dritt tal-awdituri biex jitolbu tali informazzjoni jew spjegazzjonijiet li jidhrilhom mehtiega ghat-twettiq tad-dmirijiethom bhala awdituri tal-Kumpanija a tenur tal-Artikolu 154 tal-Att dwar Il-Kumpanniji (Kapitolu 386 tal-Ligijiet ta` Malta), il- kumpanija naqset milli tipprovdi l-awdituri taghha bl-informazzjoni mitluba u mehtiega, b`dan illi d-dikjarazzjonijiet finanzjarji verifikati taghha ghas-sena 2016 ma gewx iffinalizzati, approvati u ippubblikati, kif rikjest mil-ligi u lanqas ma setghu jigu pprezentati ghall-iskrutinju u ghall-approvazzjoni tal-azzjonijisti.*

21. Illi dan in-nuqqas tal-kumpanija intimata Pefaco li tippubblika d-dikjarazzjonijiet finanzjarji taghha ghas-sena 2016 wassal ghas-suspensjoni tal-elenkar (listing) u n-negozju tal-Ordinary A shares tal-intimata fuq il-Borża ta` Malta u dan in vista tal-"failure of Pefaco Internation plc to publish the financial statements within the time-frames stipulated in the Listing Rules" (vide kopja tal-avviz ippubblikat mil-Listing Authority nhar it-2 ta` Mejju, 2017, hawn anness u mmarkat bhala "**Dok PFC 3**");

22. Hawnhekk ghandu jinghad illi s-socjetajiet esponenti kienu gew mgharrfa precedentement mill-azzjonist magoritarju ta` Pefaco illi l-listing tal-ishma tas-socjeta` intimata fil-Borża ta` Malta kien element krucjali mill-business plan tal-kumpanija b`dan li kien hemm ukoll l-intenzjoni illi l-ishma ta` Pefaco jigu listed fuq stock exchange ohra. M`hemmx ghalfejn jinghad illi dawn il-pjanijiet, u l-prospetti illi jkun hemm dan in-negozju fuq stock exchanges ohra issa jinsabu pregudikati b`konsegwenza tal-imsemmija suspensjoni;

B.3 Nugqas ta` hlas lil diversi kredituri tal-kumpanija

23. Illi jirrizulta lill-esponenti illi s-socjeta` intimata Pefaco naqset milli thallas il-kontijiet taghha lil diversi partijiet terzi, u fid-dawl ta` din is-sitwazzjoni l-esponenti huma serjament preokkupati li dan jista` jaghti lok ghall-possibbiltà li ssir applikazzjoni ghall-stralc a tenur tal-Artikolu 218 tal-Att dwar Il-Kumpaniji (Kapitolu 386 tal-Ligijiet ta` Malta);

24. Jirrizulta nghidu ahna illi n-Non-Executive Directors u s-secretary tal-Kumpanija ma thallsux il-mizati taghhom, b`dan illi, jekk bhala rizultat id-diretturi jirrizenjaw, dan jaghti lok ghar-riskju li s-socjeta intimata Pefaco ma tkunx kapaci timla il-bord tad-diretturi taghha b`persuni ta` gharfien u esperjenza bizzejjed, kif rikkjest skond il-ligi u r-Regoli tal-Elenkar;

25. Illi d-diretturi Francis Perez u Olivier Cauro qatt ma taw raguni ghalfejn mhumix qeghdin isiru dawn il-hlasijiet – anzi, pjuttost kien hemm diversi wegħdi ta` hlas li qatt ma gew imwettqa u dan minkejja l-fatt li skont mill-ahhar sett ta` management accounts iccirkolata mis-

socjeta` intimata jirrizulta illi l-kumpanija ghandha bilanci fil-banek u cash holdings ta` madwar EUR 13.6 miljun;

B.4 Nuqqas ta` laqghat tad-diretturi

26. Illi fid-dawl ta` dawn il-problemi kollha impellenti, in-Non Executive directors ripetutamente talbu board of directors meetings (anke fuq talbiet espressa ta` rapprezentanti tas-socjeta rikorrenti Genesis PFC), izda l- Executives ripetutamente irrifjutaw li jattendu, b`hekk li dawn qatt ma setghu jinzammu;

27. Hekk nghidu ahna laqgha msejha ghall-25 t`April, 2017 thassret fuq talba tad-diretturi Francis Perez u Olivier Cauro bl-iskuza illi l-awditjar ghadu ghaddej, u laqgha msejha ghall-15 ta` Mejju, 2017 – li ssejhet biex jigu diskussi numru ta` problemi serji fl-andament ta` Pefaco giet ukoll kancellata wara li numru ta` executive directors fosthom Francis Perez u Olivier Cauro qalu li ghandhom "prior travel arrangements" u b`hekk ma ntlahaqx quorum;

28. Illi minkejja insistenza min-Non Executives u minn rapprezentanti tal-esponenti Genesis PFC illi jsiru laqghat urgenti, hemm ostruzzjonizmu kbir min-naha ta` Francis Perez, Olivier Cauro u ohrajn ghal dan (kemm hu hekk, issejjah board meeting iehor b`agenda simili ghal dak tal-15 ta` Mejju, 2017 ghall-14 ta` Gunju, 2017 imma, kif mistenni, hadd mill-Executive Directors m`attenda u ghal darb`ohra ma ntlahaqx il-quorum;

29. B`konsegwenza tan-nuqqas tal-kumpanija intimata illi zzomm laqghat f`perjodu daqshekk delikat, hemm numru ta` decizjonijiet kritici li jikkoncernaw lil Pefaco li baqghu ma ttihdux u s-sitwazzjoni qed tmur ghall-aghar ta` kuljum. Dawn jinkludu decizjonijiet marbuta ma` :

(i) It-tnedija ta` proceduri kontra whud mid-diretturi minhabba ksur tal-obbligi tagghom marbuta inter alia mal-Artiklu 154 tal-Att dwar

il-Kumpaniji, li ai termini tieghu kienu obbligati li jipprovdu certa informazzjoni lill-awdituri tal-kumpanija fuq talba tagghom;

(ii) Il-finanzi u d-dokumenti finanzjarji ta` Pefaco;

(iii) In-nuqqas kontinwat ta` whud mid-diretturi li jipprovdu informazzjoni finanzjarja u dokumentazzjoni lid-diretturi l-ohra;

(iv) L-appuntar ta` wiehed mill-Class B Directors bhala firmatarju fuq il-kontijiet bankarji ta` Pefaco;

(v) Is-sitwazzjoni prezenti ta` sospensjoni fil-listing u l-bejgh tal-ishma ordinarji "A";

(vi) Is-sejha ta` laqgha generali straordinarja bil-ghan illi jittiehdu r-risoluzzjonijet kollha meqjusa necessarji mill-Bord b`rabta ma` kwalunkwe` vertenza diskussa f`tali laqgha;

B.5 Nuqqas ta`osservanza tal-Articles of Association tal-Kumpanija intimata u obbligi ohra inkluzi imma mhux limitati ghal imgieba allegatament frawdolenti

30. Illi nhar l-20 ta` Gunju, 2017, s-socjetajiet esponenti gew mgharrfa illi fis-sena 2016 l-intimata Pefaco kienet dahlet fi ftehim ta` self mal-azzjonista magoritarja taghha stess Grupu Pefaco S.L. ("GPSL") fl-ammont ta` 13.6 miljun, li huwa bejn wiehed u iehor ekwivalenti ghall-ammont illi r-rikorrenti kienu fehmu li huwa il-cash balance tal-kumpanija fil-31 ta` Dicembru, 2016 (kopja ta` ittra li avzat lill-esponenti b`dan hija hawn annessa bhala `Dok PFC 4`).

31. Ghandu jinghad illi l-Articles of Association tas-socjeta intimata Pefaco, sabiex jaghtu protezzjoni addizzjonali lir-rikorrenti Genesis PFC bhala detentrici ta` Ordinary "B" share, jipprovdu illi certi

decizjoni, inkluz imma mhux biss, l-ghoti ta` self lil terz f`ammonti ikbar minn € 250,000, jirrikjedu l-kunsens tal-Class B Directors;

32. Ghandu jigi nnutat ukoll illi Genesis PFC, bhala d-detentrici ta` Ordinary "B" share fil-kumpanija intimata Pefaco, malli skopriet illi sar self bejn l-intimata Pefaco u l-azzjonista magoritarja taghhaGPSL., talbet u rceviet konferma mill-Class B Directors appuntati mill-istess Genesis PFC illi l-imsemmija diretturi ma gewx mgharrfa b`tali ftehim ta` self u li ma saret ebda laqgha tad-diretturi li ghalha kienu prezenti l-imsemmija diretturi li fiha giet diskussa mqar il-possibilita` li jsir ftehim simili;

33. Isegwi ghalhekk illi l-fatt li l-intimata Pefaco dahlet f`dan il-ftehim ta` self minghajr il-kunsens tal-Class B Directors kien ultra vires il-poteri tal-board tad-diretturi tal-kumpanija intimata Pefaco. B`zieda ma` dan jirrizulta illi, skont il-Listing Rules kif applikabbli ghall-intimata Pefaco, suppost kellu jsir company announcement u, possibilment, tigi ppubblikata cirkulari mill-kumpanija Pefaco. S`issa ma kien hemm ebda pubblikazzjoni jew avviz ta` din ix-xorta;

34. Illi jekk, kif jidher illi huwa l-kaz, l-unici diretturi ta` Pefaco illi hadu din id-decizjoni kienu d-diretturi Cauro u Perez, li ghandhom interess dirett u finanzjarju f`GPSL illi minnu jibbenenefikaw, mela - fid-dawl tal-kunflitt ta` interess car taghhom - dawn id-diretturi lanqas jedd jivvutaw dwar din id-decizjoni ma ghandhom, ahseb u ara d-dritt illi jiehdu decizjoni unilaterali f`isem il-kumpanija. Barra minn hekk, ic-cirkostanzi li fihom giet zvelata l-ezistenza ta` dan is-"self", jissugerixxu li s-Sur Cauro u s-Sur Perez qed jippruvaw jirregolarizzaw it-tnehhija tal-assi tal-kumpanija b`mod illegali billi b`mod retrospettiv jissugerixxu li gie konkluz self (ghalkemm jekk dan veru kien self, il-kunsens tal-Class B Directors kien ikun mehtieg jaghmlu dan is-"self" ultra vires;

35. Il-fatt illi sar ftehim ta` self bhal dan minghajr l-awtorizzazzjonijiet mehtiega mill-Bord u bi ksur tal-Articles of Association tas-socjeta` intimata, flimkien mal-fatt illi l-intimata Pefaco mhijiex taghti l-informazzjoni mehtiega lill-pubbliku kif mehtieg skont il-ligi, huwa prova ulterjuri illi l-intimata Pefaco mhijiex twettaq l-obbligi taghha kif mitlub

mil-ligi u li n-negożju tal-kumpanija Pefaco mhuwiex qed jitwettaq fl-ahjar interessi tal-kumpanija u l-azzjonisti qeghdin ghalhekk jigi pregudikati;

36. Illi b`rabta ma` dan, in-non-executive directors tal-intimata sejhu laqgħa urgenti tal-bord tad-diretturi għal nhar it-Tnejn, 19 ta` Gunju, 2017 fit-8.00 pm, imma għal darb`ohra, il-laqgħa mitlub ma saritx htija tal-ostruzzjonizmu ta` Olivier Cauro;

C. Konkluzjoni u talba

37. Illi fl-ahharnett ma jistax ma jingħadx illi fost id-dmirijiet fundamentali ta` direttur hemm id-dmir ta` onesta` u li direttur għandu dejjem jagħxi fl-ahjar interessi tal-kumpanija, u dan kif effettivamente huwa sancit taht fis-sub-artiklu 1 tal-artiklu 136A tal-Att Dwar Il-Kumpaniji (Kapitolu 386 tal-Ligijiet ta` Malta). Di piu, fis-sub-artiklu 2 ta` l-istess artiklu 136A hemm stipulat illi `diretturi ta` kumpanija għandhom jipromwovu il-benessere tal-kumpanija u jkunu responsabbli għal: (a) it-tmexxija generali tal-kumpanija u l-amministrazzjoni u l-immaniggjar tagħha, u (b) s-sorveljanza generali tal-affarijiet tagħha.

38. Huwa car illi s-sitwazzjoni tal-kumpanija intimata hija inkwetanti u, minkejja r-rieda tal-azzjonisti minoritarji u d-diretturi appuntati minn Genesis PFC li jahdmu sabiex dawn il-problemi jigi ndirizzati, l-azzjonisti magoritarji u d-diretturi li għandhom maggoranza fuq il-bord ta` Pefaco qeghdin jagħxu b`mod li huwa ta` pregudizzju għall-kumpanija intimata stess u għall-interessi tal-azzjonisti minoritarji u l-persuni li għalihom l-esponenti Calamatta Cuschieri Investment Services Limited tagħxi bhala nominee;

Għaldaqstant, għar-ragunijiet fuq mogħtija, is-socjetajiet rikorrenti Calamatta Cuschieri Investment Services Limited u Genesis PFC jitolbu umilment u bir-rispett li, prevja kwalunkwé dikjarazzjoni ohra xierqa, necessarja u opportuna, din l-Onorabbli Qorti joghghobha, ai termini tal-Artiklu 402 tal-Att dwar il-Kumpaniji :-

(1) taghti dawk l-ordnijiet mehtiega sabiex tirregola t-tmexxija tal-affarijiet tal-kumpanija; u/jew

(2) minghajr pregudizzju ghall-generalita tal-ewwel talba, todna illi l-kumpanija tipprovdi, lill-bord tad-diretturi, dawk id-dokumenti kollha li huma mehtiega biex il-bord jifhem l-affarijiet tal-kumpanija kollha; u/jew

(3) tissospendi l-funzjonijiet ezekuttivi tal-bord tad-diretturi ta` Pefaco u tahtar amministratur provizorju sabiex jaqdi dawk il-funzjonijiet u setghat dwar l-amministrazzjoni dwar l-estate jew in-negozju tal-istess Pefaco kif il-Qorti tista` tispecifika fl-ordni li jahtru;

(4) Taghti dawk l-ordnijiet kollha li jidhrilha xierqa u opportuni, inkluz - f`kaz li s-sitwazzjoni tal-kumpanija Pefaco hekk tiggustifika - ixxolji l-kumpanija u tipprovdi ghall-istralc konsegwenzjali taghha.

Bl-ispejjez u minghajr pregudizzju u b`riserva ghal kwalunkwe rimedju li l-esponenti jistghu jitolbu pendente lite.

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

Rat ir-risposta li kienet prezentata mill-intervenuta fil-kawza fis-7 ta` Awissu 2017 u li taqra hekk :-

1. Illi preliminarjament ir-rikors imressaq mis-socjetajiet rikorrenti huwa irritu u null in kwantu huwa indirizzat unikament kontra s-socjeta` Pefaco International plc ("Pefaco") liema socjeta` ma tistax twiegeb ghall-ebda wahda mis-sensiela ta` allegazzjonijiet imressqa kontriha. Ir-rikors promotur ma jidentifika la l-azzjonisti maggoritarji u lanqas id-diretturi tas-socjeta Pefaco li allegatament wettqu l-ghemejjel pregudizzjevoli ai termini tal-Artikolu 402 tal-Kap. 386 tal-Ligijiet ta` Malta u dan imur kontra kemm id-dispozizzjonijiet tal-istess Artikolu kif ukoll il-gurisprudenza assodata tal-Qrati taghna dwar min ghandu jkun il-legittimu kuntradittur ta` azzjoni taht l-Artikolu 402. Filwaqt illi l-

kumpanija li fiha tkun sehhet l-allegata oppressjoni tal-minoranza ghandha tkun dak illi jissejjah statutory defendant sabiex eventwali sentenza tkun torbot lilha u lill-organi taghha wkoll certament ma tista qatt tkun hi l-uniku konvenuta u dan ghaliex certament mhix hi responsabbli ghall-agir lanjat mir-rikorrenti. Minghajr pregudizzju ghall-eccezzjonijiet fuq il-mertu, jekk ghandhom ragun ir-rikorrenti jkun fl-interess ta` Pefaco li dawk il-lanjanzi jigu indirizzati u jekk ma ghandhomx Pefaco tkompli ghaddejja kif inhi; qatt izda ma tista` tkun il-kumpanija nfisha li tiddefendi agir allegatament pregudizzjevoli kommess mid-diretturi u/jew l-azzjonisti taghha kontra membri ohrajn. Huwa ghalhekk illi r-rikors promotur huwa irritu u null.

2. Illi, minghajr pregudizzju ghall-ewwel eccezzjoni preliminari, l-allegazzjonijiet kontenuti fir-rikors promotur huma, kif sejjer jigi ampjament ippruvat f`dawn il-proceduri, manifestament infondati fil-fatt u fid-dritt;

3. Fl-ewwel lok irid jinghad illi s-sussidjarji ta` Pefaco joperaw fil-maggor parti taghhom fl-Afrika tal-Punent, specifikament gewwa l-Burkina Faso, il-Kosta tal-Avorju, in-Nigerja, ir-Rwanda u t-Togo – pajjizi li ghandhom swieq volatili mmens u li huma nfluwenzati bil-kbir minn avvenimenti u zviluppi politici, religjuzi u kulturali. Dan jirrizulta bl-aktar mod car minn semplici qari tal-minuti tal-Bord tad-Diretturi, u huwa ghalhekk illi mill-ewwel irid jinghad illi t-tmexxija ta` Pefaco, il-kodici ta` corporate governance u t-tmexxija generali tas-sussidjarji kollha ma jisghux jinfatmu mir-realtajiet geo-politici li fihom topera l-kumpanija fil-Punent tal-Afrika;

4. Illi, parti kbira mil-lanjanzi tar-rikorrenti jiccentraw fuq l-allegat nuqqas ta` informazzjoni moghtija mid-diretturi Francis Perez u Olivier Cauro izda r-rikorrenti konvenjentement ma jghidux ghaliex riedu dik l-informazzjoni u kif kien bi hsiebhom juzaw l-istess, u dan qed jinghad ghaliex l-intervenjenti esponenti ghandha suspetti cari illi r-rikorrenti flimkien ma` David Shimkins u/jew Greg Kinross kienu qeghdin u kien bi hsiebhom jghaddu informazzjoni sensittiva lil terzi (kompetituri) u kwindi mhux talli ma kien hemm l-ebda nuqqas da parti ta` Cauro u Perez izda talli dawn tal-ahhar agixxew kif inhu mistenni u obligat illi jagixxi kull direttur sabiex jipprotegi l-ahjar interessi tal-kumpanija;

5. Illi f`dak li jirrigwarda l-lanjanzi dwar in-nuqqas ta` kompilazzjoni tal-kontijiet awditjati ta` Pefaco li wasslu ghas-sospensjoni fil-listing tal-kumpanija, filwaqt illi l-allegazzjonijiet kollha qed jigu fermament respinti, kuntrarjament ghall-istampa qarrieqa li jippruvaw jaghtu r-rikorrenti, is-sitwazzjoni hija s-segwenti :

a. L-ewwel nett ghalkemm Pefaco hija entita elenkata fil-Borza ta` Malta qatt - l-anqas darba wahda - ma kien hemm l-ebda l-icken trading tal-azzjonijiet ta` Pefaco ma` terzi u kwindi per se is-sospensjoni tohloq pregudizzju purament ipotetiku u li ma jsib l-ebda riskontru fattwali u lanqas ikkaguna l-ebda dannu reali;

b. Ta` min jghid illi kienu s-socjetajiet rikorrenti nfushom li dahlu f`negozzju ftit tax-xhur ilu li kellu jwassal ghal delisting tal-ishma ta` Pefaco;

c. Dak illi jrid jigi ppruvat f`kawza bhal dik odjerna mhux izda illi ma tlestewx il-kontijiet awditjati izda ghaliex ma tlestewx u li dik ir-raguni ghaliex ma tlestewx hija responsabbilta` unika tad-diretturi Cauro u/jew Perez jew tal-intervenjenti azzjonista maggioritarja, haga li ma tista` qatt tigi ippruvata ghaliex is-sitwazzjoni hija wahda kumplessa mmens u rizultat ta` numru kbir ta` fatturi li waslu ghal dan id-dewmien;

d. Fuq kollox huma l-istess Cauro u Perez illi baqghu (u ghadhom sal-lum minkejja dawn l-allegazzjonijiet gravi) jahdmu mill-qrib u diligentement mal-awdituri ta` Pefaco Grant Thorton Malta, u mal-Audit Committee ta` Pefaco maghmul minn Mark Bugeja (non-executive independent director) u David Shimkins (B Director) sabiex jigu finalizzati l-kontijiet ta` Pefaco sal-31 ta` Dicembru 2016.

6. Illi, b`mod inveritier fl-incizi 23 et seq tar-rikors promotur, illi huma "serjament preokkupati" li n-nuqqas ta` hlasijiet lil terzi minn Pefaco jista` jwassal ghax-xoljiment tal-kumpanija Pefaco. Kif sejjer jigi ampjament ippruvat fit-trattazzjoni ta` din il-kawza l-kredituri kollha ta` Pefaco jew thallsu jew huma fil-process illi jithallsu u l-kumpanija hija certament solventi u ma ghandha l-ebda riskju ta` xoljiment minhabba insolvenza. Fir-realta`, f`din il-kawza bhal fl-agir kollu tar-rikorrenti, l-

uniku haga li jinteressa lir-rikorrenti hija l-hlas lilhom tal-management fee u dan ghaliex huma dejjem raw lil Pefaco biss bhala opportunita` li minnha jippruvaw jahtfu kemm jistghu. L-esponenti tikkontesta bl-akbar qawwa l-pagament ta` din il-management fee ghaliex jekk tithallas din tkun thallset ta` xoghol li qatt ma sar. Ir-rikorrenti jimpurtahom biss minn din il-management fee u qeghdin jabbuzaw minn rimedji gudizzarji bhal din il-kawza sabiex ibezzghu lill-esponenti u lid-diretturi ta` Pefaco u jgieghluhom ihallsu ammonti mhux dovuti;

7. Illi, ir-rikorrenti jressqu lanjanzi wkoll dwar l-allegat nuqqas ta` laqghat tal-Bord tad-Diretturi. Kif sejjer jigi ampjament ippruvat f` din il-kawza l-allegazzjonijiet imressqa fl-incizi 26 et seq tar-rikors promotur li l-bord tad-diretturi mhux qed jiltaqa` hija fabbrikazzjoni totali. Fl-2016 biss saru seba` (7) laqghat tal-Bord u fl-2017 diga` saru erbgha (4) liema ammont xejn xejn diga` jilhaq in-numru minimu ta` laqghat annwi ta` Pefaco. Dawn saru fis-16 ta` Frar 2017, fis-6 ta` Marzu 2017, fis-6 ta` April 2017 u fis-27 ta` Lulju 2017. L-esponenti intervenjenti taf illi d-diretturi nominati minnha bi hsiebhom jattendu laqghat ohrajn fil-futur u kwindi bl-ebda mod ma qed jigi stultifikat in-negozju ta` Pefaco minhabba nuqqas ta` laqghat tal-Bord. Jidher illi r-rikorrenti qed jippruvaw jahbu l-interess personali taghhom u jghadduh bhala l-ahjar interess tal-kumpanija. Dan izda mhux minnu. Jista` jkun li l-agenda personali tar-rikorrenti twaqqfet izda dan ma jfissirx li n-negozju tal-kumpanija gie ostakolat;

8. Illi r-rikorrenti mbaghad iressqu lanjanzi dwar is-self moghti minn Pefaco lil GPSL imsemmi fl-incizi 30 et seq tar-rikors promotur fejn fil-konfront ta` tali allegazzjonijiet l-esponenti GPSL tissottometti illi (i) fl-ewwel lok l-ammont in kwistjoni huwa anqas mit-13.6m EUR imsemmija fir-rikors; (ii) il-fondi in kwistjoni gew uzati sabiex jiffinanzjaw progetti maghrufa lill-Bord tad-Diretturi ta` Pefaco (inkluz David Shimkins u Greg Kinross) kif ukoll lir-rikorrenti nfushom (!); u (iii) GPSL diga` ikkommettiet mal-Bord ta` Diretturi ta` Pefaco dwar il-hlas lura ta` tali facilita` billi, fost modalitajiet ta` pagament ohra, jigu trasferiti l-progetti nfushom lil Pefaco at cost kif sejjer jigi ippruvat f` din il-kawza;

9. Illi fir-realta` hija l-imgieba ta` David Shimkins, Greg Kinross u r-rikorrenti odjerni li hija ta` pregudizzju ghal kumpanija u li hija oppressiva, ingustament diskriminatorja u pregudizzjevoli fil-konfront tal-

intervenjenti GPSL. Kif ser jigi ppruvat, ir-rikorrenti tramite d-diretturi "B" appuntati minnhom iridu jiddettaw l-agenda u t-tmexxija ta` Pefaco u dan a skapitu tal-esponenti li hija l-azzjonista maggoritarja. Ma hemm xejn illegali jew ta` pregudizzju li l-maggoranza tezercita l-maggoranza u l-minoranza jkollha ssegwi dak li tghid il-maggoranza. Dan fih innifsu mhux biss ma hux agir abbusiv izda fuq kollox huwa dritt kuntrattwali bejn il-partijiet li jirrizulta mill-istatut tas-socjeta`. Din il-kawza u l-imgieba tar-rikorrenti u d-diretturi B appuntati minnhom jridu jigu kunsidrati fil-kuntest usa` anke ta` proceduri ohrajn imressqa kontra l-intervenjenti esponenti quddiem din il-Qorti (diversament ippreseduta). Din il-kawza ma hija xejn ghajr tentattiv kalkulat u premeditat sabiex issir pressjoni enormi fuq GPSL sabiex jixtru l-ishma tar-rikorrenti f`Pefaco bi prezz li jizboq bil-bosta l-prezz reali ta` dawk l-azzjonijiet;

10. Illi r-rimedji mitluba mir-rikorrenti, b`mod partikolari x-xoljiment u l-istralc ta` Pefaco, ma jistghux jintlaqghu minn din l-Onorabbli Qorti ghaliex, anke jekk l-eccezzjonijiet imressqa fuq kollha ma jintlaqghux, certament ma jkunx gust u ekwitattiv li jinghata dan ir-rimedju estrem f`din il-kawza. Pefaco u s-sussidjarji taghha joperaw fil-qasam tal-loghob tal-azzard (gaming) fil-Punent tal-Afrika. L-istruttura socjetarja ta` Pefaco hija kunsiderazzjoni ewlenija ghall-awtoritajiet regolatorji fil-gurisdizzjonijiet in kwistjoni u anke l-kompozizzjoni tal-Bord tad-Diretturi u l-ownership structure hija fundamentali ghal-licenzji liema licenzji jinhargu fuq evalwazzjoni tal-individwi nfushom. Huwa wkoll generalment il-kaz li Pefaco tagixxi bhala garanti ghall-obbligi tas-sussidjarji taghha li jkunu rebhu koncessjonijiet fid-diversi gurisdizzjonijiet Afrikani. Kif sejjer jigi ppruvat, jekk qatt kellha din il-Qorti tordna x-xoljiment u l-istralc ta` Pefaco ai termini tal-Artikolu 402(3)(g), dan jiskatta event of default taht il-licenzji prattikament kollha fil-gurisdizzjonijiet kollha u dan jissospendi u eventwalment ihassar il-licenzji relattivi tal-loghob tal-azzard, licenzji li l-valur taghhom huwa enormi.

11. Salv eccezzjonijiet ulterjuri skont il-ligi u bl-ispejjez ta` dawn il-proceduri kontra r-rikorrenti odjerni.

Rat ir-risposta li pprezentat l-intimata fl-14 ta` Awissu 2017 li taqra hekk :-

Illi din it-twegiba hija ghar-rikors promotur ibbazat fuq l-artikolu 402 tal-Kap 386.

Illi huwa car li l-Bord tad-Diretturi tas-socjeta` ntimata ghandu fih zewg fazzjonijiet, dawk li huma mahtura mir-rikorrenti f`din il-procedura u dawk mahtura minn Grupo Pefaco S.L. (GPSL). Hemm imbaghad zewg diretturi non-ezekuttivi li huma ndipendenti.

Illi fic-cirkostanzi una volta ma hemmx qbil fuq il-bord u l-materja li ma hemmx qbil fuqha giet riferuta lil din l-Onorabbli Qorti sabiex tigi determinate, u una volta GPSL thallew jintervjenu f`dawk il-proceduri sabiex jiddefendu l-posizzjoni taghhom ma jkunx korrett li s-socjeta` per se tallineja ruhha ma` xi naha jew ohra, izda ghandha tistenna` l-ezitu ta` dan ir-rikors sabiex tkun tista` tkompli bin-negozju taghha, u f`dan l-istadju twiegeb oggettivament.

Illi madankollu hemm xi aspetti fir-rikors promotur li jehtiegu risposta jew kjarifika da parti tas-socjeta` ntimata.

Nuqqas ta` informazzjoni moghtija lid-Diretturi

Illi qabel ma jigi mwiegeb dal-punt irid jinghad li in kwantu jirrigwarda informazzjoni lill-azzjonisti (li huma l-unika nies awtorizzati li jressqu talba ai termini tal-artikolu 402) din tinghata lill-azzjonisti biss waqt l-annual general meeting u azzjonist m`ghandu ebda dritt ghal informazzjoni ohra barra l-annual general meeting. Fil-fatt l-annual general meetings dejjem saru u l-informazzjoni opportuna dejjem inghatat.

Illi in kwantu jirrigwarda diretturi, dawn huma obbligati li jagixxu fl-interess tal-kumpanija, u mhux fl-interessi ta` xi azzjonisti partikolari, u kwindi anke kieku ghall-grazzja tal-argument ma nghatatx xi nformazzjoni lil xi direttur partikolari (li ma huwiex azzjonist) dan mhux necessarjament iwassal ghal bazi ta` dritt ai termini tal-artikolu 402 – ghax jista` jkun li hemm ragunijiet legittimi fl-interess tal-kumpanija li

tali nformazzjoni specifika ma tinghatax. Madankollu u minghajr pregudizzju ghal dak li nghad, ma hux minnu li d-diretturi ta` Pefaco mhux qed jinghataw l-informazzjoni dwar l-operat tal-kumpannija. Fil-fatt kien ippjanat li jsiru erba` board meetings fis-sena u fis-sena 2016 saru hames board meetings (fit-12/1, 27/4, 8/6, 25/8 u 19/10) u fis-sena kurrenti gia` saru tliet board meetings (fis-16/2, 6/4 u fit-28/7). F`kull board meeting jinghata pakkett ta` informazzjoni komprensiv u dettaljat lid-diretturi kollha, u l-minuti, l-agenda u informazzjoni finanzjarja relattiva hija disponibbli ghand is-segretarju tal-kumpannija hawn Malta, Dr Rachel Bonello. Is-socjeta` esponenti tiriserva li tesebixxi l-minuti u jekk inhu mehtieg il-board packs ta` kull board meeting sabiex jigi determinat kemm fil-fatt inghataw informazzjoni d-diretturi tas-socjeta`.

Illi barra minn hekk jsiru monthly financial reports li jinghataw lill-board, lill-B Directors u lill-azzjonisti (ghalkemm mhux intitolati ghalihom) u dan sar regolarment sal-ahhar ta` April 2017.

Illi jrid jinghad li recentement kienu qed isiru rikjesti ghal informazzjoni dettaljatissima u specifika, barra l-ambitu tal-Bord, li ma kenitx disponibbli kif gibe u lahaq u li kienet ukoll ta` natura sensittiva ferm li kienet qed tigi rikjesta mid-diretturi appuntati mir-rikorrenti. Mhuwix car jekk fir-rikors hux qed issir referenza ghal dan. F`liema kaz is-socjeta` esponenti tiriserva l-posizzjoni taghha waqt is-smiegh tal-kawza.

Nuqqas ta` informazzjoni moghtija lill-awdituri li waslet ghal sospensjoni

Illi huwa minnu li l-audit ghas-sena 2016 ghadu ma tlestix imma dan gara minhabba l-fatt li audit package request ghas-sena 2016 kien hafna aktgar estensiv mill-audit package request ghas-sena 2015, u l-audit ma tlestiex sal-ahhar ta` April 2017. Kien b`hekk u ghalhekk biss li l-listing gie sospiz.

Illi l-informazzjoni ulterjuri li ntalbet ghas-sena 2016 kienet sostanzjali hekk insibu li ntalbu reporting packs ghal zewg sussidjarji

zejda ; cash flow statements, P & L u cash flow forecasts ghal hames snin, u review tal-board minutes kollha. Minbarra minn hekk il-creditors confirmations gew mitluba biss f`nofs Mejj. Barra minn hekk l-audit ghas-sena 2016 sar bhal li kieku kien l-ewwel audit, u mhux follow on tas-sena ta` qabel u s-socjeta` esponenti ntabet terga` tintavola d-dokumentazzjoni kollha mill-gdid.

Illi dan id-dewmien gara wkoll minhabba l-fatt li l-core business tas-socjeta` esponenti huwa fl-Afrika tal-Punent fejn hemm diversi French speaking countries u Grant Thornton ma hijjex prezenti f`dawn il-pajjizi u dan kompla jikkomplika l-affarijiet stante li kien hemm problema ta` lingwa u problema li l-awditur kerllha a sua volta tingaggja terzi persuni ghan-nom taghha.

Illi din il-problema gia` giet indirizzata mis-socjeta` f`zewg board meetings u s-socjeta` esponenti b`responsabilita` qed timpenja ruhha li fl-iqsar zmien possibbli tlesti l-audit ghas-sena 2016.

Illi kien ghalhekk u ghalhekk biss li gie sospiz il-listing mill-Borza ta` Malta.

Nuqqas ta` hlas lil diversi kredituri tal-kumpannija

Illi dan il-fatt huwa kkontestat u s-socjeta` esponenti hadet il-passi sabiex thallas il-kredituri taghha.

Illi madankollu anke kieku ghall-grazzja tal-argument kien minnu li s-socjeta` esponenti mhux qed thallas il-kredituri taghha dan m`ghandu x`jaqsam xejn mal-artikolu 402 li abbazi tieghu qed jigi avvanzat dan irrikors kien ikollu semmai x`jaqsam mal-artikolu 214 et seq.

Nuqqas ta` laqgħat tad-diretturi

Illi din il-lanjanza gia` giet indirizzata iktar `il fuq. Irid pero` jinghad li bejn ir-rikorrenti, partikolarment Genesis PFC u GPSL hemm diskordja serja li anke wasslet sabiex hemm litigazzjoni pendenti bejn il-partijiet. Dan il-fatt jippreokkupa sew lis-socjeta` esponenti.

Illi anke recentement fl-ahhar ta` Lulju 2017 inzammiet laqgħa tad-diretturi pero` kien hemm diskordja dwar min kellu u ma kellux konflitt ta` nteress, u b`hekk il-laqgħa kellha tigi sospiza.

Nuggas ta` osservanza tal-Articles of Association tal-kumpannija ntimata u obbligi ohra nkluzi imma mhux limitati għal imgieba allegatament frawdolenti

Illi s-socjeta` ntimata tinnega li hija b`xi mod responsabbli għal xi agir frawdolenti.

Illi in kwantu jirrigwarda l-avvanz ta` €13.6 miljun mis-socjeta` esponenti lil GPSL dan gie ndirizzat mis-socjeta` esponenti. Is-socjeta` esponenti giet assigurata li dan l-avvanz sar stante li kien hemm opportunita` ta` kummerc li rrikjediet azzjoni mmedjata. Madankollu s-socjeta` esponenti nsistiet li dan is-self jigi regolarizzat u hija nfirmata li dan qiegħed fil-process li jsir.

Dwar il-konkluzjoni u t-talba

Illi l-esponenti ttenni l-posizzjoni tagħha li fl-ambitu ta` rikors ai termini tal-artikolu 402 tal-Kap 386 ma jistax jigi mahtur amministratur provvizorju għas-socjeta` esponenti.

Illi l-esponenti lanqas qatt ma tistax taqbel li hija għandha tigi xjolta. Dan imur kontra l-interess tas-socjeta` nnfisha għax ma tibqax tezisti.

Illi in kwantu jirrigwarda t-talbiet l-ohra l-esponenti tirrimetti ruhha ghas-savju gudizzju ta` din l-Onorabbli Qorti.

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

Rat id-digriet li tat fl-udjenza tat-30 ta` Novembru 2017 fejn ordnat l-allegazzjoni tal-atti tal-procediment bin-nru 572/17 JZM fl-ismijiet "*Calamatta Cuschieri Investment Services Limited noe et vs Pefaco International plc et*"

Rat l-atti ta` dak il-procediment.

Rat in-noti ta` osservazzjonijiet li kienu prezentati.

Semghet is-sottomissjonijiet tal-ahhar bil-fomm li ghamlu d-difensuri tal-partijiet fl-udjenza tas-17 ta` Jannar 2019.

Rat illi l-kawza thalliet ghal-lum ghal provvediment finali dwar il-mertu.

Rat l-atti l-ohra tal-kawza.

II. Fatti

Pefaco International plc ("**Pefaco**") kienet kostitwita minn Francis Perez ("**Perez**") u Olivier Cauro ("**Cauro**") fl-1995 biex issir *route gaming operation* principalment fl-Afrika u fl-Amerika Latina. Pefaco nghatat il-qafas ta` *holding company* b`negozji u/jew sussidjarji fl-Afrika. Grupo Pefaco S.L ("**GPSL**") hija l-azzjonista maggoritarja ta` Pefaco u hija registrata Spanja. L-azzjonisti ta` GPSL huwa Perez u Cauro.

Pefaco kienet registrata fir-Registru tal-Kumpanniji ta` Malta bin-numru C65718¹ fit-23 ta' Gunju 2014. Hija wkoll *listed company* ghax l-ishma taghha huma kwotati fil-Borza ta' Malta. Perez huwa l-Kap Eżekuttiv ta` Pefaco u huwa responsabbli mill-istrategija. Jiehu hsieb il-licenzji (inkluz il-ksib ta` licenzxji godda) u jissorvelja l-operat ta` Pefaco. Cauro huwa d-Direttur Manigerjali u jiehu hsieb l-aspetti finanzjarji tal-operat. Pefaco ghandha *authorised share capital* ta` €48,480,031.00. Ghandha *issued share capital* ta` €35,525,082. Hemm *ordinary "A" shares* b'valur nominali ta' €1.50 ghal kull sehem. Hemm ukoll *ordinary "B" shares* b'valur nominali ta' €1.00 ghal kull sehem.

Fl-2015, Genesis PFC ("**Genesis**"), soċjeta` registrata l-Mauritius, ittrattat ma` GPSL sabiex issir azzjonista ta` minoranza ta` Pefaco billi thallas €15 -il miljun. Wara li sar l-eżercizzju ta` *due diligence* ta` Pefaco u tas-sussidjarji taghha ghas-sodisfazzjon ta` Genesis kien konkluz in-negozju billi tramite Calamatta Cuschieri Investment Services Limited ("**Calamatta Cuschieri**") kien sottoskritt kapital azzjonarju konsistenti minn 6,705,115 *ordinary "A" shares* ghall-valur nominali ta' €1.50 kull sehem. Calamatta Cuschieri dehret bhala *nominee* ghal konsorzju formati minn numru ta` soċjetajiet mill-Afrika ta` Isfel fosthom Genesis ("**Genesis Consortium**").

Il-konsorzju kien compost mis-segwentanti :-

- i. Genesis PFC;
- ii. AMB Capital Ireland Limited;
- iii. Jamrae Capital Corp;
- iv. Refucan Limited;
- v. Warren Friedland;
- vi. Mondo Investments and Finance Ltd.;
- vii. Evan Gregory Hoff;
- viii. Andrew James Reader;
- ix. Shane Thompson; u
- x. Bellerive Capital (BCP) 13 Limited.

¹ Ara estratt tal-Involved Parties tas-soċjeta Pefaco esebit flimkien mar-rikors promotur bhala Dok. PFC1 a fol. 11 et seq. tal-process.

Wara li dahal il-Genesis Consortium fil-pakkett azzjonarju ta' Pefaco, l-ishma saru in kwantu ghal 67% ta' GPSL u in kwantu ghal 33% ta' Genesis Consortium.

Jidher illi Calamatta Cuschieri ssottoskriviet ishma wkoll fl-isem ta' s-socjeta' oħra bl-isem Azco izda din mhijiex rikorrenti fil-kawza odjerna.

Il-fondi li bihom kienu akkwistati l-ishma minn Genesis Consortium marru direttament f' Pefaco sabiex din tkattar in-negozju tagħha b' investment gdid.

Id-diretturi ta' Pefaco huma hdax (11) : sitta (6) huma diretturi eżekuttivi u hamsa (5) huma diretturi mhux eżekuttivi. Dawn tal-aħhar huma : Benjamin Muscat, Michael Grech, David Shimkins, Gregory Kinross u Robert Hursof. David Shimkins ("**Shimkins**") u Gregory Kinross ("**Kinross**") huma 'B Directors' li nhatru minn Genesis. Għandhom drittijiet speċjali, fosthom dritt ta' veto dwar transazzjonijiet straordinarji tas-socjeta' .

Wara li Genesis akkwistat l-ishma, twaqqaf *audit committee* li huwa mmexxi minn Benjamin Muscat.

Ir-rikorrenti bhala azzjonisti minoritarji m'għandhomx is-setgħa illi jappuntaw il-maggoranza tad-diretturi ta' Pefaco.

Il-klawsola numru 134 fit-taqsimha ntitolata *Proceedings of Directors* tal-Memorandum and Articles of Association ("**M&A**") ta' Pefaco, kif emendat, u registrat mar-Registratur tal-Kumpanniji fid-9 ta' Novembru 2015², tghid :-

"Board meetings shall be held at least four (4) times a year. The Directors shall otherwise meet together for the dispatch of business, adjourn and otherwise regulate their meetings,

² Ara Dok. PFC2 a fol. 24 et seq. tal-process.

as they deem fit. Questions arising at any meeting shall be decided by a majority of votes."

Ghall-fini ta` protezzjoni addizzjonali ghad-drittijiet tal-azzjonisti minoritarji, il-klawsola numru 140 tipprovdi illi :-

"Notwithstanding anything to the contrary contained in these Articles or the Memorandum of Association of the Company :

*(a) any decision or action relating to those matters that are listed in Schedule 1 to these Articles (the "**Bord Reserved Matters**") may be taken by the Bord only with prior consent of the Class B Director(s) shall be required only for as long as the holder of the Ordinary B Share also holds at least four percent (4%) of the issued ordinary share capital (of whatever class) of the Company ; and*

*(b) any action relating to those matters that are listed in Schedule 2 to these Articles (the "**Shareholder Reserved Matters**") may be taken by the Company in general meeting only with prior consent of the holder of the Ordinary B Share and the powers and authority of the Members in respect of the Shareholder Reserved Matters shall be limited accordingly; provided that the consent of the holder of the Ordinary B Share shall be required only for so long as the holder of the Ordinary B Share also holds at least four percent (4%) of the issued ordinary share capital (of whatever class) of the Company.*

III. L-ilmenti tar-rikorrenti

Fit-tmexxija tal-affarijiet ta` Pefaco, ir-rikorrenti jilmentaw minn :-

- a) Nuqqas ta' informazzjoni moghtija lid-diretturi.
- b) Nuqqas ta' informazzjoni moghtija lill-awdituri.
- c) Nuqqas ta' hlas lil diversi kredituri.
- d) Nuqqas ta' laqgħat tal-bord tad-diretturi.
- e) Nuqqas ta' osservanza tal-M&A u ta' obbligi ohra, inkluzi imma mhux biss, imgieba allegatament frawdolenti.

Fil-qosor, il-fatti u cirkostanzi (f` ordni kronologiku) li pprecedew l-azzjoni tal-lum huma :-

- E-mail datata 5 ta' April 2017 mibghuta minn David Shimkins lid-diretturi kollha fejn talab, specifkament minghand Cauro, informazzjoni finanzjarja u kopja tal-*statements* bankarji³ ;
- Minuti tal-laqgħa tal-bord li saret li nzamm fis-6 ta' April 2017⁴ : Cauro accerta lill-bord illi l-pagamenti lis-*service providers* inkluz dawk tad-diretturi u ta' Genesis ma kinux saru minhabba zball da parti tal-bank li kellu jigi rimedjat fi ftit granet. Kienet esplorata l-possibilita` illi l-fondi investiti minn Genesis jigu trasferiti f'kont mal-Bank of Valletta, izda Cauro ghamilha cara illi minhabba servizz inadegwat illi kien inghata mill-Bank of Valletta fil-passat, huwa ma kienx ser jaghti l-approvazzjoni tieghu għat-trasferiment tal-fondi qabel ikun sodisfatt illi certa kwistjonijiet ikunu rizolti. Fl-istess laqgħa wkoll Shimkins talab kopja tal-*statements* tal-kont mal-Millennium Bank tal-Portugal; talab ukoll illi d-diretturi magħzula mill-azzjonisti minoritarji jkollhom l-opportunita` jidhlu f'kontatt dirett mal-bank u jitolbu l-informazzjoni mehtiega. Cauro ma sab ebda oggezzjoni għal dan u obbliga ruhu illi jiccirkola kopja elettronika tal-*statements* u kif ukoll illi jiffacilita l-kontatt mal-

³ Ara Dok. DS1 a fol. 82 *et seq.* tal-process Rik. Nru. 572/17 JZM

⁴ Ara Dok. DS2 a fol. 86 *et seq.* tal-process Rik. Nru. 572/17 JZM

Millennium Bank. Il-bord accetta illi Shimkins u Kinross jaghmlu kuntatt mal-Millennium Bank sabiex jiksbu l-informazzjoni.

- 12 ta` April 2017⁵ : kien hemm skambju ta' emails bejn Benjamin Muscat qua Chairman tal-*Audit Committee*, Ghat-talba ta` Muscat ghal aktar informazzjoni, Cauro wiegeb : *"Unless this is stopping right now, I will block all information out of the company until the board of the 25th or 26th where we settle once and for all these issues!"*
- Ittra datata 2 ta` Mejju 2017⁶ : il-*Listing Authority* fi hdan l-MFSA baghtet tavza lil Pefaco illi l-*listing* tal-ishma taaghha fil-Borza ta' Malta kien qieghed jigi sospiz minhabba nuqqas da parti ta` Pefaco illi tippubblika l-*Annual Financial Report* taghha ghas-sena li ghalqet fil-31 ta' Dicembru 2016.
- Ittra datata 2 ta' Mejju 2017⁷ : id-diretturi mhux eżekuttivi ressqu t-thassib taghhom dwar it-tmexxija tal-kumpannija, partikolarment dwar in-nuqqas da parti tad-diretturi eżekuttivi illi jaghtu informazzjoni kemm lid-diretturi mhux eżekuttivi, kif ukoll lill-awdituri.
- 15 ta' Mejju 2017 : Il-*Listing Committee* talab informazzjoni dwar meta kien ser jiltaqa' l-bord sabiex japprova r-rapport finanzjarju ghas-sena 2016.
- Email tal-15 ta' Mejju 2017⁸ : Perez informa lid-diretturi illi ma kienx ser jattendi aktar laqghat tal-bord qabel ikunu ccarati numru ta' vertenzi. Gharraf ukoll illi kien qieghed jipprova jiffacilita l-akkwist tal-ishma ta' Genesis.

⁵ Ara Dok. DS16 a fol. 139 *et seq.* tal-process Rik. Nru. 572/17 JZM

⁶ Ara Dok. DS8 a fol. 110 *et seq.* tal-process Rik. Nru. 572/17 JZM

⁷ Ara Dok. DS9 a fol. 112 *et seq.* tal-process Rik. Nru. 572/17 JZM

⁸ Ara Dok. DS4 a fol. 102 *et seq.* tal-process Rik. Nru. 572/17 JZM

- Agenda tal-laqgħa tal-bord tas-17 ta` Mejju 2017⁹ : jirrizulta illi l-informazzjoni li talbu l-azzjonisti minoritarji baqgħet ma ngħatatx.
- 18 ta` Mejju 2017 : Id-diretturi mhux eżekuttivi għarrfu lil-*Listing Committee* illi kienu rifjutati access għall-informazzjoni u li d-diretturi eżekuttivi kienu qegħdin iħassru l-laqgħat tal-Bord fl-aħħar hinijiet.
- 19 ta` Mejju 2017¹⁰ : Cauro ikkomunika formalment mal-*Listing Committee* u filwaqt li accetta li kienu naqsu milli jippubblikaw il-*financial statements* fiz-zmien stipulat, dan kien il-konsegwenza ta` sitwazzjoni finanzjarja aktar komplessa. Cauro tenna illi kien hemm certa animosita` bejn iz-zewg gruppi ta` azzjonisti, u li għalhekk l-azzjonisti maggoritarji kienu qegħdin ifittxu kompratur sabiex jakkwista l-ishma ta` Genesis Consortium.
- 31 ta` Mejju 2017 : email ta` Charles Elazar lill-bord tad-diretturi ta` Pefaco b`informazzjoni dwar id-depoziti bankarji ta` Pefaco Portugal SA.
- 15 ta` Gunju 2017¹¹: email ta` Cauro fejn għarraf lid-diretturi kollha illi Pefaco silfet lil GPSL is-somma ta` €13.6 miljun.
- 15 ta` Gunju 2017¹² : email ta` Benjamin Muscat lil Cauro fejn qallu lid an is-self sar mingħajr l-approvazzjoni tal-bord u tal-azzjonisti.
- 16 ta` Gunju 2017¹³ : ittra tal-Av Dr Michael Psaila lil Cauro u Perez, fejn għan-nom tal-azzjonisti minoritarji tenna illi s-self kien jikkwalifika bhala *reserved matter* u għalhekk kien jehtieg l-approvazzjoni tal-*Class B Directors*. Din l-approvazzjoni ma kenitx ingħatat għaliex dawn id-diretturi ma kienux jafu x` kien qed jigri.

⁹ Ara Dok. DS3 a fol. 99 *et seq.* tal-process Rik. Nru. 572/17 JZM

¹⁰ Ara Dok. DS12 a fol. 116 *et seq.* tal-process Rik. Nru. 572/17 JZM

¹¹ Ara Dok. DS15 a fol. 137 u 138 tal-process Rik. Nru. 572/17 JZM

¹² Ara Dok. DS15 a fol. 136 *et seq.* tal-process Rik. Nru. 572/17 JZM

¹³ Ara Dok. DS15 a fol. 123 sa 125 tal-process Rik. Nru. 572/17 JZM

Il-kawza kienet intavolata fit-23 ta` Gunju 2017.

In segwitu :-

- Bejn is-27 u 28 ta` Gunju 2017¹⁴ kien hemm skambju ta' korrisondenza bejn Cauro u Kinross fejn Cauro gharraf lill-bord illi GPSL kienet qed tfittex l-akkwist tal-ishma tal-azzjonisti minoritarji. Kinross talab spjegazzjoni.
- 28 ta` Gunju 2017¹⁵ : ittra ta` l-Av Dr Michael Psaila lir-Registratur tal-Kumpanniji fejn talab il-hatra ta` spetturi sabiex jinvestigaw l-operat ta` Pefaco.
- 7 ta' Lulju 2017¹⁶ : email ta` Av. Dr. Michael Psaila lil Cauro fejn talab l-informazzjoni sabiex jinghalqu l-*audits* pendent.
- 13 ta` Lulju 2017¹⁷ : email ta` Charles Elazar lid-diretturi fejn kienu avzati illi in vista tal-proceduri pendent, ma kenitx ser tinghata aktar informazzjoni.
- Bejn l-24 ta` Lulju 2017 u t-2 ta` Awissu 2017 kien hemm skambju ta' emails b'informazzjoni li talbu l-awdituri Grant Thornton sabiex jithejjew il-*Financial Statements*¹⁸.
- 26 ta' Lulju 2017 : ittra ta` Cauro u Perez lil Shimkins u Kinross fejn fejn cahdu l-pretensjonijiet tar-rikorrenti fil-kawza odjerna.

¹⁴ Ara Dok. GPSL17 a fol. 359 sa 361 tal-process Rik. Nru. 572/17 JZM

¹⁵ Ara Dok. DS20 a fol. 154 *et seq.* tal-process Rik. Nru. 572/17 JZM

¹⁶ Ara Dok. DS19 a fol. 151 *et seq.* tal-process Rik. Nru. 572/17 JZM

¹⁷ Ara Dok. DS21 a fol. 176 tal-process Rik. Nru. 572/17 JZM

¹⁸ Ara Dok. GPSL 1 sa GPSL 6 a fol. 201 sa 286 tal-process Rik. Nru. 572/17 JZM

- 30 ta' Awissu 2017 : saret laqgħa tal-bord tad-diretturi fejn Cauro għadda informazzjoni dwar is-self ta` Pefaco lil GPSL, kif wkoll dwar l-uzu li kien ser isir bil-flus, u kif is-self kien ser jithallas lura.¹⁹
- Minuti tal-laqgħa tal-bord tas-17 ta' Novembru 2017 : il-laqgħa ma saritx għaliex ma kienx hemm quorum²⁰.

Jirrizulta illi laqgħat tal-bord tad-diretturi, kien hemm hamsa (5) fl-2016 ; sitta (6) fl-2017 ; u fl-ewwel hames xhur tal-2018, saru tlieta (3).

IV. Il-mizuri nterim

Kontestwalment mar-rikors odjern ir-rikorrenti ntavolaw rikors iehor bin-nru. 572/17 JZM fl-istess ismijiet fejn talbu lill-Qorti sabiex :-

- (i) *Tissospendi l-funzjonijiet eżekuttivi tal-bord tad-diretturi ta` Pefaco u tahtar amminisistratur provizorju sabiex jaqdi dawk il-funzjonijiet u setgħat dwar l-amministrazzjoni dwar l-estate jew in-negozju tal-istess Pefaco kif il-Qorti tista` tispecifica fl-ordni li jahtru;*
- (ii) *fin-nuqqas tordna lil Pefaco (tramite d-diretturi li għandhom access għal tali informazzjoni) sabiex immedjatement tghaddi l-informazzjoni kollha dwar l-istess Pefaco lid-diretturi kollha tagħha, inkluz izda mhux limitament għall-istatements of account tal-kontijiet bankarji kollha ta` Pefaco ;*
- (iii) *tagħti dawk l-ordnijiet kollha li jidhrilha xierqa ficcirkustanzi sabiex id-drittijiet tal-esponenti u tal-istess intimata jigu adekwatament protetti pendente lite.*

¹⁹ Ara Dok. GPSL 8 a fol. 201 sa 287 tal-process Rik. Nru. 572/17 JZM

²⁰ Ara Dok. DS5 a fol. 103 *et seq.* tal-process Rik. Nru. 572/17 JZM

Bi provvediment li nghata fl-1 ta` Awissu 2017, din il-Qorti cahdet l-ewwel talba.

Bi provvediment iehor tal-31 ta' Ottubru 2017, din il-Qorti, filwaqt li cahdet it-tieni (2) talba, ipprovdiet dwar it-tielet (3) talba billi :-

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

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

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

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

In segwitu r-rikorrenti b` rikors tal-10 ta` Lulju 2018 talbu lill-Qorti sabiex :-

- (i) *Testendi l-inkarigu moghti lil Dr Richard Galea Debono jew inkella, tahtar terza persuna kif il-Qorti jidhrilha*

xieraq, filwaqt li taghtihom is-setghat u l-funzjonijiet indikati fil-paragrafi 20 u 21 hawn fuq;

- (ii) Tassenja bagit ghal kull xahar ghal dan l-ezercizzju, pagabbli provizorjament minn Pefaco jew, jekk fin-nuqqas, minn kwalunkwe` parti interessata bi dritt ta` rivalsa kontra Pefaco jew terzi skont il-kaz ;*

u/jew

- (iii) Taghti dawk l-ordijiet kollha li jidhrilha xierqa fic-cirkostanzi sabiex id-drittijiet tar-rikorrenti u tal-istess intimati ikunu protetti b`mod adegwat matul il-proceduri.*

Din il-Qorti tat provvediment fil-11 ta` Settembru 2018 fejn inghad hekk :-

Tikkonferma bis-shih il-provvediment taghha tal-31 ta` Ottubru 2017.

Testendi s-setghat u d-dmirijiet li nghata l-Avukat Dottor Richard Galea Debono bil-provvediment taghha tal-31 ta` Ottubru 2017 :

billi taghtih is-setgha li jissorvelja t-tmexxija tal-kumpannija Pefaco International plc billi jkollu access shih u dirett ghad-dokumenti kollha tal-kumpannija, inkluz il-kotba tal-kontijiet u l-kontijiet bankarji taghha.

billi taghtih is-setgha li jitlob u li jinghata kull taghrif u dokument li jkun jehtieg sabiex iwettaq l-inkariku li nghata kemm bil-provvediment tal-31 ta` Ottubru 2017 kif ukoll dan tal-lum.

Tordna lid-diretturi ta` Pefaco International plc sabiex jaghtu lill-Avukat Dottor Richard Galea

Debono access shih u liberu ghal kwalsiasi taghrif u dokumenti tal-kumpannija sabiex ikun jista` jaqdi l-inkariku li nghata kemm bil-provvediment tal-31 ta` Ottubru 2017 kif ukoll dan tal-lum. Din l-ordni tghodd ukoll ghad-dirigenti tal-kumpannija. Min jonqos, kemm jekk ikun direttur, kif ukoll jekk ikun dirigent, ikun passibbli ghal proceduri ta` disprezz lejn l-awtorita` tal-Qorti.

Kull fejn l-Avukat Dottor Richard Galea Debono jkun jehtieg l-assistenza ta` esperti sabiex ikun jista` jaqdi b`mod shih u ahjar l-inkariku li nghata kemm bil-provvediment tal-31 ta` Ottubru 2017 kif ukoll dan tal-lum ghandu jirrikorri quddiemha ghal direzzjoni. L-istess ghandu jaghmel dwar kull haga ohra li jidhirlu li ghandha tingieb ghall-attenzjoni taghha sabiex taghti direzzjoni.

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

In segwitu, GPLS ipprezentat rikors fit-2 ta' Novembru 2018 fejn talbet li tinghata mizura *nterim* sabiex provvizorjament u sal-gudizzju finali fil-kaz odjern, ma jigux decizi hames (5) rizoluzzjonijiet li kienu proposti mir-rikorrenti u li jistghu ikunu ta` hsara ghal Pefaco.

Bi provvediment tat fis-6 ta' Novembru 2018, il-Qorti laqghet it-talba ta` GPLS.

V. Provi

Perez xehed illi meta bdew in-negozjati mal-MFSA sabiex Pefaco tkun *listed* fil-Borża ta' Malta, saret kondizzjoni illi Pefaco jrid ikollha tal-inqas tmien (8) shab fin-negozju. Hu u Cauro gew introdotti ma' Genesis. U minn hemm bdew it-trattattivi. Genesis investiet f' Pefaco l-ammont ta' €15-il miljun f' Novembru 2015. Effettivament dahal ghand Pefaco l-ammont ta' €13.5 miljun billi l-bilanc kienu spejjez. Il-fondi marru f' kont tal-Millennium Bank tal-Portugal. Biex topera, Pefaco ma kenitx qeghda tiddependi fuq il-flus li gew mit-trasferiment tal-ishma lil Genesis.

Cauro xehed illi sa mill-bidu nett tan-negozjati ma' Genesis, hu u Perez ghamluha cara illi kienu huma li bnew il-kumpannija u kienu huma illi kienu ser ikompli jmexxu. Ghalihom dak kien pre-rekwizit. Ghalkemm Genesis qatt ma kienet involuta fit-tmexxija ta' Pefaco, ittiehdu mizuri sabiex fl-M&A ta' Pefaco jigu nkorporati klawzoli li joffru protezzjoni lill-azzjonisti minoritarji. Kien iffirmit ukoll *Service Agreement* datat 23 ta' Novembru 2015, fejn kien miftiehem illi GPSL, qua azzjonista ta' Pefaco, kienet ser tkompli tmexxi l-kumpannija u tircievi korrissettiv kull xahar bhala hlas tas-servizzi taghha minghand Pefaco.

Milli xehdu **Shimkins**²¹ u **Kinross**²², jirrizulta illi l-inkwriet beda jixref ftit biss tax-xhur wara.

Skont **Shimkins**, ghall-habta ta' Gunju 2016, qamu dubji serji dwar il-likwidita' tal-kumpannija, billi minkejja l-investment ta' Genesis, Pefaco ma setghetx thallas kredituri zghar u lanqas setghet thallas il-*management fees*. Xehed illi l-ftehim kien li jsir hlas fl-ammont ta' €20,000 kull xahar. Dan fil-fatt ma sarx. Shimkins stess kellu jiehu €170,000 f'*management fees*. Effettivament ebda wiehed mid-diretturi mhux ezekuttivi ma thallas ; lanqas il-*company secretary*. Meta waqt il-laqgha tal-bord tas-6 ta' April 2017 qamet il-kwistjoni tal-hlasijiet, Cauro wahhal fil-Millennium Bank u li s-sitwazzjoni kienet ser titranga fi ftit granet.

²¹ Ara ix-xhieda ta' David Shimkins moghtija fit-13 ta' Lulju 2017 fl-atti tar-Rikors Numru 572/17JZM fl-ismijiet **Calamatta Cuschieri Investment Services Limited (C13729) et vs Pefaco International Plc (C65718)** a fol. 67 sa 81 ta' dak il-process.

²² Ara din ix-xhieda a fol. 164 sa 174 tal-process.

Perez ighid illi *l-management fees* ma kienux dovuti ghaliex waqt illi Genesis kellha l-obbligu tressaq proposti godda ta` negozju, il-proposti illi ghamlet ta` negozju fin-Nigerja u iehor fil-Mozambique ma kinux fattibbli ghaliex l-operatur ma kienx licenzjat. In-negozju li llum fin-Nigerja u fil-Mozambique gie ghaliex hu (i.e. Perez) personalment stinka u rnexxielu jikseb il-licenzji mehtiega biex joperaw.

Min-naha ta` **Shimkins** u **Kinross**, jinghad li l-MFSA baghtet tavza li *l-listing fees* ma kienux thallsu. L-istess ghamlu kredituri ; kwistjoni ta` miljuni ta` Ewro. Din il-qaghda holqot thassib serju fost id-diretturi mhux ezekuttivi. Fuq firxa ta` xhur Cauro u Perez intalbu jaghtu informazzjoni. Anke l-awdituri ghamlu l-istess. Issejhu anke laqghat tal-bord ghal dan l-iskop izda din l-informazzjoni baqghet ma waslitx bil-konsegwenza li *l-financial reports* u *l-audits* ma lestewx.

Billi deher illi kien hemm certa rezistenza illi tinghata l-informazzjoni, Shimkins u Kinross jistqarru li accettaw illi l-informazzjoni minflok tinghata lilhom tinghata direttament lill-awdituri. Cio` nonostante b`email tat-12 ta' April 2017 Cauro wissa lil Benjamin Muscat illi jekk it-talbiet ghal informazzjoni ma kienux ser jieqfu, huwa kien ser iwaqqaf kull tip ta' nformazzjoni milli tohrog.

Benjamin Muscat xehed illi Cauro kien sahsitra allega fil-konfront tieghu illi r-rikjesti tieghu kienu jmorru ben oltre mansjonijiet tieghu ghaliex huwa ma kellux jidhol fi kwistjonijiet ta` *management*.

Muscat stqarr illi meta talab informazzjoni mill-*head office* sabiex issir *reconciliation* tal-*internal audit* kien rinfaccjat b`hafna skuzi sakemm sar jaf illi Cauro kien ta struzzjonijiet sabiex l-informazzjoni ma tinghatax. Intant anke l-awtoritajiet Maltin bdew juru t-thassib dwar it-tmexxija tal-kumpanija wara li gewx prezentati r-rapporti finanzjarji ghall-2016. Il-konsegwenza ta` dan kienet illi twaqqaf il-*listing* u *trading* tal-ishma ta` Pefaco mill-Borza ta' Malta. Ghalkemm inghata zmien biex jigu prezentati *l-financial statements*, dan baqa ma sarx.

Perez xehed illi kien zball li Pefaco kienet kwotata fil-Borza ta` Malta. Ighid li hu u Cauro hasbu illi jekk tkun kwotata fil-Borza, kien ser ikun ehfef ghalhom illi jiksbu licenzji fl-Ewropa, fl-Amerika Latina u fl-Istati Uniti pero` dan ma kienx il-kaz.

Muscat fisser illi l-intendiment kien illi l-flus investiti minn Genesis kellhom jintuzaw sabiex jtkattar in-negozju ta` Pefaco.

Ghax ma nghatatx l-informazzjoni rikjesta gara li ma kienx hemm komunikazzjoni mal-Millennium Bank tal-Portugal.

Ghalkemm inghataw kopji ta` xi *statements*, id-diretturi mhux eżekuttivi dehrilhom illi dawk ma kinux jirriflettu s-sitwazzjoni reali u li saħansitra dawn id-dokumenti kienu falsifikati.

L-Awditur Mark Bugeja minn Grant Thornton Malta xehed li huma hadu hsieb l-audit ta` Pefaco gewwa Malta minn meta kienet kostitwita.

L-*audits* tas-sussidjarji ta` Pefaco sar minn haddiehor u cioe` mill-awdituri RSM.

Xehed illi l-komunikazzjoni ma` Pefaco ssir l-aktar bl-email billi din topera barra minn Malta.

Jaf li kellu kuntatti ma` Charles Elazar, Jeremy Elazar, Rene Henri u Monica Fuergalas.

Dwar l-*audit* illi kellu jsir ghas-sena 2016, xehed li dak li kien għadu mhux konkluz. Il-problema principali kienet illi meta talbu informazzjoni dwar depoziti ma' l-bank Portugiz, dan wegibhom illi kellu bżonn awtorizzazzjoni mill-klijent sabiex jagħti dik l-informazzjoni.

Xehed illi ghadda hafna zmien sakemm il-firmatarji, u cioe` Cauro u Perez, taw l-awtorizzazzjoni u Millennium Bank wiegeb. Minn kif wiegeb il-bank, irrizulta illi flus fl-ammont ta' circa €13 il-miljun ma kinux ghadhom depozitati fil-kont u kien fadal biss madwar €150. Dan gab thassib u meta ntabu kjarimenti, il-bank rega` wiegeb illi kellu bzonn l-awtorizzazzjoni tal-firmatarji sabiex jaghti aktar informazzjoni.

Minn email ta` Cauro tal-15 ta' Gunju 2017, irrizulta li ammont ta` €13.6 miljun illi support kienu depozitati mal-Millennium Bank kienu mislufa minn Pefaco lil GPSL minghajr ebda approvazzjoni jew awtorizzazzjoni tal-bord.

Shimkins u **Kinross** xehdu illi din l-email ta` Cauro holqot rabja fost id-diretturi mhux ezekuttivi ghaliex kwistjoni bhal self ta` ammont hekk sostanzjali kien *a reserved matter* u skont l-M&A tal-kumpanija il-*B shareholders* kellhom jaghtu l-approvazzjoni taghhom, fatt li mhux biss ma garax izda lanqas biss kienu konsultati.

Shimkins xehed ukoll illi lanqas ma nghataw ebda informazzjoni dwar dan is-self, ir-raguni ghalfejn inghata, u kif kien ser jithallas lura.

Fil-**kontroezami**, **Shimkins** fisser illi huma waslu ghall-figura ta' €13.6 miljun abbazi tal-*bank statement* li Cauro kien tahom.

Shimkins u **Kinross** ipprecizaw li l-*statement* kien qarrieqi ghaliex ghalkemm kien juri li l-bank kien hemm depozitati €13.6 miljun, fil-verita` fil-kont kien fadal biss €156.38.

Ghalkemm l-awdituri riedu jaghmlu l-accertamenti taghhom dwar it-trasferiment tal-flus favur GPSL, Cauro u Perez baqghu ma tawx l-awtorizzazzjoni taghhom lill-bank sabiex jirrilaxxa l-informazzjoni mehtiega.

Kinross xehed illi l-Av Dr Richard Galea Debono mar ghall-ewwel darba laqgħa tal-bord bhala direttur addizzjonali fl-1 ta` Dicembru 2017²³. Wara li talab spjegazzjoni ghaliex l-informazzjoni ma kinitx qed tingħata, il-bord għadda rizzoluzzjoni fejn ordna li l-informazzjoni kellha tingħata sal-31 ta` Dicembru 2017. Għaddiet ukoll rizzoluzzjoni illi sal-31 ta` Dicembru 2017, kellha tohrog *blanket authority* sabiex tinkiseb informazzjoni mill-bank.

Kinross xehed illi l-awtorizzazzjoni waslet biss għall-habta ta` nofs Jannar 2018 u kienet iffirmata biss minn Cauro.

L-awdituri kellhom għal darb'ohra jiksbu l-firma taz-zewg diretturi eżekuttivi illi baqgħet ma waslitx fost hafna skużi.

Muscat ikkonferma illi sat-22 ta` Frar 2018 l-informazzjoni mill-bank kienet għadha ma waslitx.

Jirrizulta bhala fatt illi l-*letter of authority* tad-9 ta` Jannar 2018 kienet iffirmata minn Cauro biss²⁴. Fid-29 ta` Jannar 2018 imbaggħad kienet iffimata minn Perez ukoll. Wara marret għand Millennium Bank. Hekk jixhed l-iskambju ta` emails bejn Miguel Alberto għall-bank u l-awditur Mark Bugeja²⁵.

Din is-sitwazzjoni wasslet lid-diretturi mhux eżekuttivi sal-punt illi jirrifjutaw illi jagħtu l-approvazzjoni tagħhom sabiex isiru transazzjonijiet fil-Mozambique sakemm tibqa` ma tingħatax stampa cara u preciza tal-qaqgħda finanzjarja tal-kumpannija. Ir-reazzjoni għal dan kienet illi Pefaco ma kinitx ser tghaddi aktar informazzjoni pendenti l-proceduri gudizzjarji.

Fil-**kontroezami**, **Shimkins** stqarr illi bhala *B Shareholders* hu u Kinross kellhom responsabilita` fiducjarja illi jiksbu l-informazzjoni u

²³ Ara Dok. GK4 a fol. 181 *et seq.*, Vol I tal-process Rik. Nru. 571/17 JZM

²⁴ Ara Dok. GPSL40 a fol. 439 *et seq.*, Vol II tal-process Rik. Nru. 571/17 JZM

²⁵ Ara Dok. GPSL41 a fol. 442 *et seq.*, Vol II tal-process Rik. Nru. 571/17 JZM

jghadduha lill-azzjonisti. L-informazzjoni li huma ghaddew lill-azzjonisti kienet dwar nuqqasijiet fit-tmexxija, dwar nuqqas ta' nformazzjoni u thassib dwar il-finanzi tal-kumpannija.

Dwar il-korrispondenza ma` Alan Azizolahoff²⁶, **Shimkins** stqarr illi Azizolahoff huwa wiehed mill-azzjonisti ta` Pefaco. Ghandu wkoll rwol strategiku fi hdan Pefaco. Ghalhekk inghata certa nformazzjoni.

Dwar dan **Cauro** xehed illi originarjament meta Genesis akkwistat l-ishma, Pefaco talbet espressament illi Azco ma tkunx membru tal-Genesis Consortium. Huma kellhom ir-ragunijiet taghhom. F` Settembru 2016 sar maghruf illi Azco kienet akkwistat xi ishma ta` Pefaco mis-suq.

Cauro spjega illi l-informazzjoni mitluba mill-azzjonisti minoritarji nghatat kollha bl-eccezzjoni ghal informazzjoni li huma qiesu li kienet strettament kunfidenzjali. Spjega wkoll illi wara li bdew il-proceduri gudizzjarji, saru diversi laqghat, u anke skambju ta` informazzjoni mal-awdituri. Zied ighid illi Grant Thornton huma l-awdituri ta` Pefaco. Dawn joperaw mill-Ingilterra. Billi s-sussidjarji ta` Pefaco qeghdin principalment l-Afrika, Grant Thornton tikseb l-informazzjoni tramite agenzija ohra tal-awdituri. Stqarr illi dan johloq dewmien fl-ghoti tal-informazzjoni anke ghaliex hemm problemi ta` lingwa, kif ukoll differenzi fis-sistemi ta` accounting fid-diversi pajjizi.

Cauro sahaq illi l-unika nformazzjoni illi ma nghatatx lid-diretturi l-ohra kienet il-*bank statement* tal-kont li Pefaco ghandha ma` Millennium Bank. Din l-informazzjoni ma nghatax ghaliex ir-rikorrenti qua azzjonisti m'ghandhomx id-dritt ghaliha. Pero` ir-raguni l-aktar impellenti ghaliex ma nghatax kien il-biza` taghhom li nformazzjoni tispicca ghand terzi, kompetituri taghhom, illi fil-passat kienu ppruvaw jiehdu l-kontroll ta` Pefaco. Ghalhekk ma kienx fl-interess tal-kumpannija illi tohrog informazzjoni sensittiva.

²⁶ Ara Dok. GPSL 21 a fol. 387 *et seq.* tal-process Rik. Nru. 572/17 JZM

B'referenza ghal-laqgħa tal-bord tas-6 ta' April 2017, **Kinross** ikkonferma li Genesis kienet irceviet offerta minghand Eric Frebault sabiex jixtri l-ishma ta' Genesis izda Genesis irrifjutat l-offerta.

Cauro fisser illi Frebault huwa r-rapprezentant tal-kumpanija tal-*gaming* Novomatic, li qegħda tipprova tikkompeti ma' Pefaco billi tidhol fis-suq tal-Afrika.

Cauro kkonferma illi hu u Perez zammew l-informazzjoni milli tghaddi għand l-awdituri, għaliex *una volta* l-awdituri jiksbu l-informazzjoni, kienu ser jghadduha lill-*Audit Committee*. Cauro ma kellu ebda garanzija illi l-informazzjoni ma kinitx ser tasal għand il-*B shareholders* u cioe' għand Shimkins u Kinross. Effettivament l-awdituri ma kellhomx bzonn dik l-informazzjoni. Kienet qegħda tintalab fuq insistenza ta' Shimkins u Kinross illi riedu jaraw fejn marru l-fondi illi hadet GPSL.

Cauro kkonferma illi kull informazzjoni oħra mehtiega sabiex jithejjew il-*financial statements* intbagħtu lill-awdituri. Fil-fatt l-abbozz tal-*financial statements* sar u kien cirkolat mad-diretturi għall-kummenti u għall-approvazzjoni tagħhom.

Perez xehed illi diversi drabi kellu okkazzjoni jispjega illi ma kienx faċli li tinkiseb informazzjoni minghand is-sussidjarji fl-Afrika għaliex is-servizzi hemm huma limitati u gieli jkun hemm qtugh fil-provvista tal-elettriku għal aktar minn (8) siegħat. L-azzjonisti minoritarji ma apprezzawx dan l-istat ta' fatt.

Dwar is-self koncess lil GPSL, **Cauro** spjega illi Pefaco u GPSL għandhom l-istess interess. Pefaco kienet qed tmexxi numru ta' progetti u l-flus intuzaw għal dak il-ghan.

In **kontroezami**, **Cauro** accetta li ma kienx qal il-verita' lill-bord meta kien stqarr illi l-fondi depozitati l-bank kienu jammontaw għal €13.6 miljun. Ma kienitx il-verita' għaliex it-trasferiment tal-flus minn Pefaco

ghal GPSL kien diga` sar. Fil-fatt ic-caqlieq tal-flus beda jsir sa minn Novembru 2015 meta sar l-investment. GPSL kellha fondi depozitati f` banek differenti. Cauro u Perez hasbu illi kien ser jirnexxilhom jirkupraw il-fondi u jiddepozitawhom lura fil-kont ta' Pefaco qabel ma kellhom ghalfejn javzaw lill-bord. Skont Cauro, il-bord kien jaf illi GPSL kellha problema sabiex tikseb lura l-fondi taghha pero` ma kienx jaf illi l-fondi ta` Pefaco ntuzaw minn GPSL b`investment fuq numru ta` progetti. Fisser illi s-suq kien wiehed volatili u allura kien jehtieg tittiehed azzjoni tempestiva sabiex ma tintilifx l-opportunita`. It-trasferiment sar fl-2016. Cauro kkonferma li qatt ma ntalbet l-approvazzjoni tal-bord ghal dak it-trasferiment bi ksur ta` dak li kienu jghidu l-M&A ta` Pefaco.

Perez ukoll ikkonferma illi dak kien zball min-naha tieghu u ta` Cauro.

Cauro stqarr illi kien biss waqt il-laqgha tal-bord tat-30 ta` Awissu 2017 li nghatat informazzjoni dwar l-uzu tal-flus ghall-progetti tal-Portugall u tar-Rumanija.

Shimkins xehed illi kien involut fil-progett tal-Portugall izda ma kienx jaf b`dak tar-Rumanija. L-informazzjoni ingabret *f`power point presentation* li nghatat lid-diretturi kollha²⁷. Fid-dokument kien spjegat illi Genesis hallset €15 il-miljun ghall-ishma ta` Pefaco. Minnhom Pefaco irceviet €13.5 miljun ; id-differenza kienu spejjez.

Skont **Cauro**, mill-flus li rceviet Pefaco, kien hemm €521,000 li ntuzaw direttament ghall-progett ta` Pefaco ; €1,900,000 intuzaw ghall-progett ta` Pefaco fin-Nigerja ; €5,500,000 marru ghall-progetti tal-Portugall u tar-Rumanija, waqt li l-bilanc intuza minn GPSL stess bil-ghan illi jinghata lura lil Pefaco. Intuzaw ukoll flus sabiex thallsu jithallsu djun ta` Pefaco ma` banek Afrikani.

Cauro xehed illi huwa ppropona lill-bord ta` Pefaco illi GPSL kienet ser tahtaf l-opportunitajiet illi nqalghu fis-suq Portugiz u dak Rumen, u meta dan in-negozju jimmatara jigi trasferit lil Pefaco *at cost*. L-ghan

²⁷ Ara Dok. GPSL7 a fol. 287 *et seq.* tal-process Rik. Nru. 572/17 JZM

tieghu u ta` Perez dejjem kien illi jmexxu kumpannija wahda u li dak li ghamlu f`GPSL jaghmluh ukoll ghall-interessi ta` Pefaco; ghalhekk in-negozji, ghalkemm kienu ghadhom ma gewx trasferiti favur Pefaco, kienu ser jigu trasferiti *at cost*.

Cauro qal ukoll illi fil-kaz tal-progett tal-Portugall, id-diretturi inghataw l-informazzjoni kollha, sahsitra marru fl-ufficcji ta` Pefaco fil-Portugall, u saru diskussjonijiet hemmhekk. Il-progett tal-Portugall ser ikun jiswa fortuna ladarba jibda jahdem. Dwar il-progett tar-Rumanija stqarr illi saru diskussjonijiet, pero` d-dokumentazzjoni relattiva ghadha m'ghaddietx.

Jirrizulta illi ammonti dovuti lill-avukati u l-awdituri, kif ukoll id-drittijiet tal-MFSA ma kienux thallsu minhabba diffikultajiet illi jingiebu l-flus minn depoziti f`banek barranin. F`Malta ma kienx hemm flus depozitati ghar-raguni li Cauro dejjem sahaq illi kien hemm diffikultajiet ma` banek Maltin li jintefu kontijiet maghhom billi n-negozju ta` Pefaco kien fis-settur tal-loghob tal-azzard.

Jirrizulta li wara Genesis saret azzjonista, saru 18-il laqgha tal-bord tad-diretturi. Hlief ghal darba kull wiehed, Perez u Cauro kienu prezenti dejjem jew *in persona* jew tramite *video conference*.

Av Dr Richard Galea Debono xehed dwar il-laqgha tal-bord tal-1 ta' Mejju 2018.

Stqarr illi d-diretturi mhux ezekuttivi gew infurmati illi kien hemm problema biex jghaddu l-flus. Hasbu mill-ewwel li dak gara ghaliex Perez kien gie arrestat u nterrogat mill-Pulizija Franciza b`rabta ma` kaz ta` hasil ta` flus. Ghalkemm in segwitu Perez kien rilaxxjat ghaliex ma kienx involut, l-incident xorta wahda allarma lill-finanzjatur ta` Perez illi meta ra dan, irtira lura.

Spjega illi qabel din il-laqgha d-diretturi kollha nghataw kopja ta` abbozz fejn kien propost illi ssir kostituzzjoni ta` debitu ghar-rigward tal-

€15 il miljun li ghaddeu ghand GPSL. Id-diretturi mhux eżekuttivi deherilhom li dak id-dokument kien ser iservi biex jirrendi legittimu l-passagg tal-flus, li legittimu qatt ma kien għaliex l-flus kienu għaddeu ad insaputa u mingħajr l-approvazzjoni tagħhom.

Fisser illi d-dokument kien diskuss fil-laqgħa. Id-diretturi mhux eżekuttivi esprimew il-fehma illi ma kinux kuntenti b'dak id-dokument għaliex ma kienet offruta ebda tip ta' sigurta'.

Qal li nħatar sotto-kumitat sabiex fil-kaz li tkun offruta sigurta' minn GPSL, is-sotto kumitat iqis l-adegwatezza o meno tas-sigurta' offruta.

Xehed illi l-laqgħa damet għaddejja madwar sitt siegħat. Minnha hareg kjarment illi ma kienx hemm fiducja fid-diretturi eżekuttivi, u allura fit-tmexxija ta' Cauro u Perez. Id-diretturi mhux eżekuttivi għamlu hafna mistoqsijiet dwar il-konteggi. Cauro u Perez talbu zmien sabiex iwiegħbu. Perez ikkummenta illi kienu sejrjn jergħhu jtkellmu dwar il-garanzija u li kellhom hsieb jakkwistaw l-ishma ta' Genesis.

Dr Galea Debono stqarr illi d-diretturi mhux eżekuttivi xtaqu illi *s-settlement agreement* jkun *backdated* għal Frar 2018. Perez ma qabilx għaliex b'dan l-arrangament kien ikollu johrog €8 miljun f'salt sabiex joneri l-pagamenti b'lura. Perez informa lill-bord illi ma kellux dak l-ammont ta' flus disponibbli. Il-laqgħa intemmet b'Perez jintalab jagħmel proposta dwar kemm flus u f'kemm zmien seta' jħallas. Il-proposta waslet u kien suggerit illi bhala garanzija jkun hemm rahan fuq l-ishma ta' kumpannija bbazata fl-Afrika. Dan ma kienx accettabbli u għalhekk id-diretturi mhux eżekuttivi ressqu kontro-proposta b'numru ta' kondizzjonijiet u b'rikjesta illi l-garanzija tingħata b'rahan fuq ishma ta' Pefaco. Intant ma waslet ebda proposta oħra u *s-settlement agreement* ma ssemma qatt aktar.

Cauro rega' xehed fit-12 ta' Gunju 2018.

Stqarr illi hu u Perez bnew il-kumpannija mix-xejn hamsa u ghoxrin (25) sena qabel. Illum ihaddmu erbat elef (4000) ruh fi hdax (11) –il pajjiz.

Qal illi kienet xi haga gdida ghalihom meta dahhlu investituri godda magghom. Jaccetta li forsi ma fehmux bizzjed li dan kien jinvolvi wkoll illi l-investituri jkunu nvoluti fit-tmexxija. Hu u Perez kienu mdorrijin jiehdu decizjonijiet fl-interess tal-kumpannija minghajr ma jikkonsultaw wiehed mal-iehor. Din tal-investituri barranin kienet tipprezenta ghalihom xenarju gidid. Bhala fatt huma ma xtaqux illi jkollhom investituri izda biss illi jiehdu self minghandhom. Fl-istess waqt l-investituri riedu jinvestu ghaliex raw potenzjal fis-suq.

Kompla jghid illi meta jharsu lura llum jirrealizzaw illi zbaljaw u xtaqu jsibu soluzzjoni.

Spjega illi ghalkemm originarjament kien hemm intiza illi jsir *debt agreement* li kellu jkun iffirmit sa Frar 2018, fil-frattemp inqalghu problemi mal-bank fi Spanja u l-kont kien iffirizat. Dan gara tort ta` zball tal-bank. In segwitu l-kont rega nfetah ghalhekk m'ghandux ikun hemm dewmien fil-pagamenti.

Fisser illi kien abbozzat *debt agreement* fejn il-partijiet kollha ftehmew dwar termini entru liema GPSL kellha tibda thallas lura l-flus investiti minn Genesis, bi qliegħ fuq dan l-investment, biex finalment il-Genesis Consortium jkun jista` johrog minn Pefaco. Genesis ghamlet car li ma kenitx lesta taccetta aktar dewmien. In vista ta` dan kollu, hu u Perez taw l-informazzjoni kollha mehtiega sabiex jithejjew ir-rapporti u jigu ffacilitati n-negozjati, inkluz l-awtorizzazzjoni sabiex anke Millennium Bank ikun jista` jirrilaxxa kull informazzjoni mitluba.

Kompla jghid illi saret ukoll offerta lill-bord sabiex ikun hemm trasferiment tas-sussidjarji ta` Pefaco, bazikament dawk tal-Portugall, il-Burundi u l-Paraguay pero` l-Bord talab illi l-ewwel issir valutazzjoni indipendenti tal-kumpannija.

Fil-**kontroezami** kkonferma illi s-sussidjarji li semma kienu diga` operattivi. Dak tar-Rumanija ma kienx ghadu attiv.

Qal illi thejja wkoll *Debt Agreement*²⁸, intiz illi jimxi flimkien mas-*Services Agreement*²⁹. Dan kien diskuss waqt il-laqgħa tal-bord tal-Bord tal-1 ta` Mejju 2018. Fih kien dikjarat illi GPSL kellha trodd lura lil Pefaco is-somma ta` €11,196,551.13. Il-hlas kellu jsir skont skema ta` rimbors mifruxa fuq medda ta` sitta u tletin (36) xahar, jithallsu l-interessi bir-rata ta` 4% u eventwalment id-dejn jithallas in kontanti jew bi trasferiment ta` ishma ta` kumpanniji illi l-partijiet kellhom jaqblu li ghandhom jigu trasferiti favur Pefaco. Perez u Cauro offrew anke garanzija personali.

Kompla jixhed illi peress illi l-bord talab garanzija aktar tangibli, Perez u Cauro offrew li jsir trasferiment favur Pefaco ta` ishma ta` kumpannija li kellhom fit-Togo³⁰. Din il-kumpanija kienet stmata illi tiswa qrib €20,000,000. Fiha Cauro u Perez kellhom 95% tal-ishma bir-ristanti 5% tal-ishma appartenenti lir-Repubblika ta` Togo.

Twaqqaf sottokumitat sabiex jistudja l-proposti u b`email tas-16 ta` Mejju 2018 is-sottokumitat ressaq il-kontro-proposti tieghu³¹. Kien propost li l-interessi ikunu bir-rata ta` 8%, li l-pagament isir kull xahar, fuq firxa ta` erbgħa u ghoxrin (24) xahar. Is-sottokumitat kien tal-fehma li l-kumpannija tat-Togo ma kinitx likwida bizzejjed u għalhekk talab illi bhala sigurta` jintrabtu l-ishma ta` Pefaco. Cauro u Perez wiegħbu b`email tat-12 ta` Gunju 2018³² fejn accettaw kemm ir-rata tal-interessi kif ukoll iz-zmien it-terminu tal-pagamenti. Ipproponew li l-pagamenti jsiru kull tlett xhur għaliex hemm diffikultajiet burokratici sabiex isir trasferiment tal-flus minn banek fl-Afrika.

Qal illi l-bord ried li l-hlasijiet isiru fil-kont mal-Bank of Valletta ("**BOV**"). Min-naha tagħhom huma ma riedux jaccettaw responsabilita` jekk il-BOV ma jaccettax pagamenti illi jkunu gejjin mill-Afrika.

²⁸ Ara Dok. GPSL35 a fol. 346 et seq., Vol II tal-process Rik. Nru. 571/17 JZM

²⁹ Ara Dok. GPSL43 a fol. 459 et seq., Vol II tal-process Rik. Nru. 571/17 JZM

³⁰ Ara Dok. GPSL36 a fol. 374 et seq., Vol II tal-process Rik. Nru. 571/17 JZM

³¹ Ara Dok. GPSL37 a fol. 411 et seq., Vol II tal-process Rik. Nru. 571/17 JZM

³² Ara Dok. GPSL38 a fol. 415 et seq., Vol II tal-process Rik. Nru. 571/17 JZM

Accettaw ukoll illi jaghmlu tajjeb b'percentagg tal-ishma tagghom f` Pefaco.

Xehed illi sar kull tentattiv possibbli sabiex tinstab soluzzjoni għall-kwistjonijiet kollha illi wasslu għal din il-vertenza. Min-naha tiegħu u ta` Cauro riedu jaslu għal ftehim.

Sahaq illi jekk Pefaco tigi xjolta kien ser ifisser illi erbat elef (4000) ruh jispicaw bis-sensja.

Insista wkoll illi jekk hu u Perez kellhom jitnehhew mit-tmexxija tal-kumpannija l-licenzji tal-logħob tal-azzard kienu jaqgħu magħhom, għaliex dawn inhargu wara li sar skrutinju qawwi fuqhom, u wara li akkwistaw fiducja fis-settur fuq medda ta` snin.

Xehed ukoll **Charles Elazar** ("**Elazar**") Chief Operating Officer ta` Pefaco.

Dan esprima d-dizappunt tiegħu għaliex minn meta fegg l-inkwriet bejn l-azzjonisti, il-laqgħat tal-bord tad-diretturi nbidlu *f'accounting process* u ma kienx qed jigi trattat l-operat ta` Pefaco.

Fil-**kontroezami**, jirrikonoxxi li ma kienx kuntent meta sar jaf bis-self ta` Pefaco lil GPSL waqt laqgħa tal-bord għax stenna li kellu jkun infurmat b` dan minn qabel.

Fisser illi għalkemm Cauro u Perez huma imprendituri bi tletin sena esperjenza, għandhom diffikulta` jifhmu illi hemm processi soċjetarji li għandhom jigu segwiti.

Spjega illi meta tinqala` sitwazzjoni li xxekkel l-operat tagħhom, jibqgħu għaddejnin. Dan kien il-mod ta` kif huma jmexxu n-negozju tagħhom u dejjem hekk imxew.

Fisser illi kull negozju huwa *self funded* b` mod u manjiera illi dak illi jiggenera mill-operat tieghu jintuza ghall-hlasijiet, bil-flus jibqghu fil-pajjiz fejn hemm in-negozju tant illi ma jkunx hemm trasferimenti ta` flejjes minn bank ghal iehor madwar id-dinja. Kull negozju fil-pajjizi differenti ghandu licenzja ghalih u ghal din il-licenzja taghmel tajjeb Pefaco bhala *mother company*.

Elazar esprima ruhu fis-sens illi Pefaco mhijiex insolventi.

Stqarr illi ma setax jimmagina kif seta` jkompli jsir negozju minn Pefaco jekk Perez kellu jitneha mill-amministrazzjoni taghha, ladarba l-licenzji tal-operat tas-sussidjarji kienu strettament marbuta mieghu.

Cauro xehed dwar l-intoppi li jsibu sabiex johorgu r-rikavat tal-operazzjonijiet fl-Afrika mid-diversi pajjizi koncernati.

Spjega illi meta jintalbu l-flus mill-bank, il-Gvern iwiegeb illi ghandu bzonn il-flus ghall-bzonnijiet tal-pajjiz u jghidilhom illi meta jkun hemm likwidita` fil-pajjiz, imbaghad ikunu jistghu johorgu l-flus. Ghalhekk ikun hemm dewmien fil-pagamenti.

Sahaq illi Pefaco sejra tajjeb u qed tiggenera bizzejjed qligh biex thallas ghalkemm baqa` jinsisti fuq id-diffikultajiet johorgu flus mill-Afrika.

Kompla jghid illi mhuwiex facli li jinfetah kont go bank tal-Ewropa bi flus provenjenti mill-Afrika minhabba r-riskju ta` hasil ta` flus.

Perez esprima l-perplexita` tieghu ghalfejn saret din il-kawza sabiex jintalab ix-xoljiment u l-istralc ta` Pefaco. Esprima ruhu fis-sens illi jekk isehh ix-xoljiment ta` Pefaco, il-licenzji kollha li ghandhom is-sussidjarji jintilfu fil-pront.

Stqarr illi huwa jrid jixtri l-ishma ta` Genesis pero` l-akkwist jinvolti l-esbors ta` ammont konsiderevoli ta` flus li jippresupponi negozjati estensivi mal-banek li sejrin jiffinanzjaw in-negozju.

Stqarr illi bhala finanzjament huwa ttratta ma` BBVA Banco Bilbao Vizcaya ta` Spanja. L-arrangament mal-bank kellu jkun konkluz sa f'Novembru 2018 bit-trasferiment tal-flus isir fi zmien sittin (60) jum wara.

VI. L-Art 402 tal-Kap 386

Ir-rikorrenti ressqu t-talbiet taghom abbazi tal-Art 402 tal-Kap 386.

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, tajjeb jinghad illi l-ligi ta` New Zealand segwiet l-izvilupp legislattiv tar-Renju Unit.

Fir-Renju Unit, id-disposizzjoni li kienet tirregola l-*unfair prejudice action* fil-Companies Act 1985 kienet Sec 459. Meta saret il-Companies Act 2006, l-azzjoni bdiet tigi regolata bl-Art 994(1) fis-sens illi Sec 459 thassret ghal kollox mill-Companies Act 1985 u dahlet ezatt kif inhi f` Sec 994(1) tal-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)]"

Sabiex tinghata ordni skont kif previst fis-subartikoli (3), (4) u (5) ta` l-Art 402, hija tassattiva l-prova tal-att li minnu jkun qed jilmenta r-rikorrent.

Dan ifisser illi jekk abbazi tal-provi, il-qorti tkun sodisfatta li jirrizulta dak previst fis-subartikolu (1), allura tghaddi mbaghad biex taghti l-ordni li jidhrilha opportuna 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 m`ghandhiex tapplika s-subartikoli l-ohra.

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

VII. Il-prova

Fil-Pag 970 ta` **Principles of Maltese Company Law** (MUP – 2007) **Andrew Muscat** ighid illi fuq ir-rikorrent jistrieħ il-piz tal-prova li l-att jew omissjoni lamentata jaqa` fl-ambitu tas-subartikolu (1).

Ighid –

"This wording (tal-subartikolu 1) clearly suggests that the member need only prove one effect 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)."

Fis-sentenza li tat din il-Qorti diversament presjeduta fit-30 ta' Jannar 2008 fil-kawza "**Cutajar pro et noe et vs S.C. & Company Limited et**" inghad hekk -

Illi l-prova biex tirnexxi dina l-azzjoni tispetta lir-rikorrenti li rressqu 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-kumpanija 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 general.

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' **Company Law** (op. cit.) **Brenda Hannigan** tghid illi :-

"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."

VIII. Il-legittimu kontradittur

Kien exceptit in linea preliminari mill-intervenuta fil-kawza illi l-azzjoni promossa mir-rikorrenti hija irrita u nulla in kwantu l-azzjoni kienet diretta kontra l-intimata.

Fin-nota ta` osservazzjonijiet, u anke waqt it-trattazzjoni finali bil-fomm, l-intervenuta svolgiet b` mod artikolat l-eccezzjoni taghha.

GPSL taghmel l-argument illi ghall-fini tal-prova tal-Art 402(1) tal-Kap 386 l-intimata m`ghandha tirispondi ghal ebda wahda mill-ilmenti ventilati mir-rikorrenti billi Pefaco ma tistax tkun meqjusa mhix responsabbli ghal agir kontemplat fl-Art 402(1) li kien jew allegat li kien imwettaq mid-diretturi u/jew mill-azzjonisti taghha.

Fil-kawza tal-lum, jirrizulta illi ghalkemm wiegbet ghall-azzjoni tar-rikorrenti, l-intimata bhala fatt baqghet passiva fis-sens illi halliet li l-kawza tkun kombattuta bejn l-azzjonisti u cioe` r-rikorrenti u l-intervenuta fil-kawza bla ma tiehu linja li tiffavorixxi naha jew ohra. Kwazi kwazi bidlet ir-rwol taghha ma` dak ta` GPSL fis-sens li l-intimat baqghet osservatur, u halliet il-kontestazzjoni ssir minn GPSL li ironikament bhala intervenuta fil-kawza kellha tkun hija l-osservatur.

Fil-"**Principles of Maltese Company Law**" (op. cit.) **Andrew Muscat** jittratta l-kwistjoni ta` kontra min tista` tkun promossa azzjoni ta` din ix-xorta.

Fil-pag. 995 tal-ktieb 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 Bord.

...

*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.

Fil-Pag 218 ta` l-Kap 6 ta` l-ktieb **Minority Shareholders : Law, Practice and Procedure, Victor Joffe** jikteb :-

The petitioner will be the member seeking relief, and the company of which he is a member and in relation to whose affairs he alleges unfairly prejudicial conduct will be made a respondent. Additionally, every member of the company (other than the petitioner) whose interests might be effected by the relief sought should be joined as a respondent, whether or not allegations of unfairly prejudicial conduct are made against him: in the case of a small private company, this will usually mean that every member ought to be joined as a respondent to the petition. The category of potential respondents (other than the company) is not, however, limited to members of the

*company. In an appropriate case, relief may be sought against a non- or former member. The width of the category of potential respondents is indicated by *Lowe vs Fahey* ((1996) 1 BCLC 262), where it was held that if the unfairly prejudicial conduct alleged was a diversion of corporate funds, a petitioner could seek relief not only against members and former members, but also against directors involved or third parties who knowingly received or improperly assisted in the diversion. Even a person who is not actively involved in the conduct of the affairs of the company complained of may be made a respondent, at least if he would be affected by the relief sought.*

Tenut kont tal-finalita` ta` l-azzjoni, fl-isfond tad-dottrina u tal-gurisprudenza appena citata, **mhijjex kondiviza** minn din il-Qorti l-eccezzjoni illi l-azzjoni odjerna odjerna kif promossa mir-rikorrenti kontra Pefaco **wahedha** hija – proceduralment u fis-sostanza – irrita u nulla.

Fil-Pag. 709 ta` **Boyle & Birds` Company Law** (Eighth Edition – Jordans – 2011) jinghad :-

In shareholders` actions against the company it is not necessary to join the directors as parties, unless some form of relief is sought against them in addition to the remedy against the company.

Hija ohra il-kwistjoni ta` jekk ir-rikorrenti jirnexxielhomx jissodisfaw sal-grad rikjest mil-ligi l-prova ta` xi wiehed jew aktar mir-rekwiziti tal-Art 402(1) bhala presuppost sabiex jinghataw rimedju skont xi wahda jew aktar mill-paragrafi tal-Art 402(3).

Huwa evidenti kemm mill-premessi tal-azzjoni kif ukoll mill-mod kif r-rikorrenti ndirizzaw il-provi li l-ilmenti taghhom dwar *unfair prejudice* huma diretti mhux daqstant kontra Perez u Cauro bhala rapprezentanti

ta` GPSL, u din bhala azzjonista ta` Pefaco, izda kontra l-istess Perez u Cauro bhala diretturi eżekuttivi ta` Pefaco u in rappreżentanza tagħha.

L-eċċezzjoni preliminari qegħda tkun respinta.

IX. L-Art 402(1) tal-Kap 386

1. Gurisprudenza

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

Jibda biex jingħad 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 mogħtija 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` jingħata kemm għal 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 ommissjoni tal-kumpannija.

Fis-sentenza tagħha 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 jagħti diskrezzjoni pjuttost wiesa` lill-Qrati u dan għaliex dawn il-provvedimenti għandhom l-għan li jissalvagwardjaw u jipprotegu lill-azzjonisti ta` socjeta` kummerċjali, partikolarment lil dawk li huma minoritarji u li għalhekk qegħdin 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 ommisjoni tal-kumpanija. Il-pregudizzju jista' jirreferi ghall-azzjonist li qed jippromwovi l-proceduri, ghal xi azzjonist iehor jew ghall-interest 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 **In Re Bovey Hotel Ventures Ltd.** (1983) Slade J
ighid hekk 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 "**Monreal et vs Delia noe**" (op. cit.) inghad –

Dawn il-provedimenti huma ta` salvagwardja u ta` protezzjoni għall-azzjonisti ta` socjeta` kummercjali, b`mod partikolari għal dawk li huma minoritarji. Ir-rimedji li johorgu minn dawn il-provedimenti huma mogħtija lil kull azzjonist ta` socjeta` kummercjali. Kull azzjonist, anke jekk hu minoritarju, ta` socjeta` kummercjali, anke jekk hi pubblika, jista` jitlob li jingħataw 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 għal xi att specifiku jew xi ommisjoni tal-kumpanija. Il-pregudizzju jista` jirreferi għall-azzjonist li qed jippromuovi l-proceduri, għal xi azzjonist iehor jew għall-interessi in generali tal-azzjonisti. In vista ta` dan kollu jista` jingħad li hu bizzejjed li l-azzjonista jipprova li huwa qed isofri jew eventwalment jista` jsofri xi pregudizzju minhabba xi agir tas-socjeta` li tagħha huwa jippossjedi xi ishma. Ma hemmx għalfejn 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 tagħmel 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 "**Ellul vs Ellul pro et noe**", 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 tassocjeta`. Dawn l-aspettattivi 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 irrimedju 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 ...”

(ara wkoll il-provvedimenti ta` din il-Qorti : **Paul Buhagiar Company Limited vs Paul & Rocco (Gzira) Limited** deciza fit-28 ta` Settembru 2017 ; **Haake Torsten pro et noe vs SOS It Business GmbH et** deciza fit-28 ta` Settembru 2017 ; **B.C Investments Limited vs Bag Investments Co Ltd et** deciza fit-30 ta` Marzu 2017 ; u **Joseph Busuttil et vs Suzanne Busuttil et** deciza fit-30 ta` Marzu 2017)

2. **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 quasipartnerships. 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) I-awturi **Hicks and Goo** jirrimarkaw illi :-

*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** tirrimarka li :-

"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."

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

"The term "unfair prejudice" whether analysed as a `standard` or a `concept` is a relatively 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 **Gower and Davies - Principles of Modern Company Law** (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 - għall-uzu tal-frazi "legitimate expectations" ; House of Lords - "**O`Neill vs Phillips**" - 1999 - għall-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 protection 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 **Company Law** (26th Edition - 2009/2010 - OUP) l-awturi **Mayson, French & Ryan** iġiddu hekk b`riferenza għad-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 prejudicial or prejudicial without being unfair, and it is not sufficient if the conduct satisfies only one of these tests."

Ikomplu billi jagħmlu riferenza għal "**O`Neill vs Phillips**" (op. cit.) in partikolari dwar l-għazla li għamel il-Parlament Ingliz -

"Parliament 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 concept 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 a notion which can be applied to all kinds of activities its content will depend upon the context in which it is being used."

3. Risultanzi

Il-Qorti sejra tqis jekk l-ilmenti tar-rikorrenti jissodisfawx il-vot ta` l-Art 402(1).

Tajjeb li jkun ribadit illi sabiex ikun sodisfatt il-vot tal-ligi huwa bizzejjed jekk tirrizulta mqar wahda mic-cirkostanzi ndikati fid-dispozizzjoni. Tant hu hekk illi l-legislatur ghazel il-konguntiv jew mhux l-konguntiv u fid-disposizzjoni. Ghalhekk ir-rekwiziti huma alternattivi mhux kumulattivi.

L-inkartament voluminuz illi jiffirma l-atti ta` din il-kawza joffri kwadru tar-relazzjonijiet ta` Pefaco u ta` GPSL mar-rikorrenti. Mill-atti tohrog stampa cara u preciza tal-kwistjonijiet u tad-dizgwid bejn id-diretturi ezekuttivi Cauro u Perez, u d-diretturi mhux ezekuttivi, partikolarment Shimkins u Kinross. Huwa evidenti li d-divergenzi, sahsitra ta` kultura azjendali, bejn iz-zewg nahat bdew ftit xhur biss wara li r-rikorrenti akkwistaw l-ishma ta` Pefaco.

a) L-ilmenti tar-rikorrenti

Ir-rikorrenti lmentaw minn :-

- i) Nuqqas ta` informazzjoni mid-diretturi ezekuttivi.
- ii) Nuqqas ta' informazzjoni lill-awdituri u relattivi konsegwenzi negattivi.
- iii) Nuqqas ta` hlas lill-kredituri.
- iv) Nuqqas ta` laqghat tal-bord tad-diretturi.

v) Inosservanza tal-M&A ta` Pefaco u obbligi ohra inkluz imma mhux biss imgieba allegatament frawdolenti.

b) L-obbligi tad-diretturi

Fil-Pag. 145-146 ta` **Critical Company Law** (Second Edition – Routledge – 2016) **Lorraine Talbot** tghid hekk :-

The rule that trustees must not profit from their position is reflected in the many cases on directors dealing with their company. The principles of trusteeship were transported into director`s duties, subject to later modifications ... and in the 2006 Act. The strict application of these principles were famously articulated by Lord Cranworth in the House of Lords case "Abderdeen Railway Company v. Blaikie Brothers". Here the company (Abderdeen Railway) avoided the contract with a firm in which one of the directors of the company was a partner, although the terms of the contract were otherwise fair. By being represented on both sides of the bargain, the director had put himself in a position entirely inimical to his duty to the company.

*"A corporate body can only act through agents, and it is of course the duty of those agents so to act as best to promote the interest of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is rule of universal application, that no one, having such duties to discharge, shall be allowed to menter into engagements, in whiche he nhas, or can have, a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect. So strictly is this princip-
Ole adhered to, that no question is allowed to be raised as to the fairness or unfairness of a confict so entered".*

Directors were fiduciaries who owed a duty of complete loyalty to the company, the principal. That duty would only be fulfilled if the director avoided all situations where he or she had a personal interest that might possibly conflict with that of the company. Failure to do so would be a breach of duty, which would allow the company to avoid the

contract or make the director accountable to the company for any personal gains. The fairness or otherwise of the contract entered into was an irrelevant consideration and might not be raised.

L-**Art 136A(1) tal-Kap. 386** jixhet fuq spallejn kull direttur ta` kumpannija l-obbligu *"li jagixxi b'onestà u bona fide fl-ahjar interessi tal-kumpannija"*.

Fid-decizjoni in re **Howard v Herrigel** [1991(2) SA 660(A)] inghad illi :

"At common law, once a person accepts appointment as a director, he becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf. That is the general rule and its application to any particular incumbent of the office of director must necessarily depend on the facts and circumstances of each."

L-**Art 136A(2) tal-Kap 386** jistipola illi d-diretturi ghandhom *"jippromwovu il-benessere tal-kumpannija u jkunu responsabbli ghal : (a) it-tmexxija generali tal-kumpannija u l-amministrazzjoni u l-immaniggjar taghha ; u (b) s-sorveljanza generali tal-affarijiet taghha."*

L-**Art 136A(3)(e) tal-Kap 386** jishaq illi d-diretturi f'kumpannija *"ghandhom jezercitaw is-setghat li ghandhom ghall-finijiet li jkunu nghataw is-setghat u m'ghandhomx juzaw hazin dawk is-setghat."* Id-disposizzjoni tipprospetta zewg sitwazzjonijiet :-

- i) xenarju fejn diretturi jagixxu *ultra vires* is-setghat konferiti lilhom bis-sahha tal-istatut tal-kumpannija jew tal-ligi ; u
- ii) xenarju fejn diretturi juzaw hazin dawk il-poteri.

Dwar l-ezercizzju tas-setghat *ultra vires*, issir referenza ghad-decizjoni li tat il-Qorti tal-Kummerc fl-14 ta` Gunju 1951 fil-kawza fl-ismijiet **Giovanni Anastasi noe vs Kaptan Serafino Xuereb et** fejn inghad :

"Issa, skond l-artikolu 1763 Kodici Civili, Kap 23, (applikabbli ghas-socjetajiet kkemercjali taht l-art 1741 idem u taht l-art 127 Kap 17 Ediz. Riv.), jekk ma jkunx hemm ftehim xort'ohra, il-jeddijiet setghat u obbligi ta` dawn l-amministraturi huma regolati bhal fil-kaz ta` mandtarju, u skond l-art 1965 Kap 23, fil-mandat jidhlu biss l-attijiet ta` amministrazzjoni. Issa, f'dan il-kaz ma kienx hemm ftehim xort'ohra, u ghalhekk ghandu jigi ritenut li d-directors kellhom biss poteri ta` amministrazzjoni. Lanqas jista` jigi estiz il-mandat taghhom in forza ta` dak li tissejjah "implied authority"; ghaliex kif josserva l-Bowstead "Law of Agency", p. 79 din l-"implied authority" ta` "general agent" qatt ma tista` tigi estiza "outside the ordinary scope of his employment and duties". Issa, ma jistax jigi negat li d-decizjoni li ttiehdet f'dan il-kaz, ... kienet toltrepassa ghal kollox il-limit ta` semplici amministrazzjoni. Decizjoni simili ma kienetx tmiss lid-"directors", imma evidentment kienet tmiss lix-"shareholders" f'general meeting (ara ghal dik li hi ligi Ingliza, sect. 278 (1) (b) Companies Act, 1948). Argument sussidjarju ghal din il-konkluzjoni, ghalkemm appena bzonn, huwa illi l-istess kontraenti, meta riedu jirregolaw il-"kontinwazzjoni" tas-socjeta`, fil-klawsola 4 tal-kuntratt issubordinaw id-decizjoni dwar dina l-kontinwazzjoni mhux lill-Bord of Directors, imma lix-"shareholders" f'"general meeting". Mela hu logiku li wiehed jargumenta li, fil-hsieb tal-kontraenti f'dak l-att, decizjoni simili ma ghandhiex tigi mehuda mill-Bord of Directors, imma mix-"shareholders" f'"general meeting". Ghalhekk, fil-fehma ta` l-Imhalled sedenti, dik id-decizjoni tal-Bord of Directors kienet invalida fiha nfisha, ghaliex "ultra vires".

Issir ukoll referenza ghall-principju li johrog mill-**Art 137(4) tal-Kap 386** fejn direttur ma jistax jagixxi *ultra vires* is-setghat li ghandu bis-sahha tal-istatut tal-kumpanija u ghalhekk ma jistax jaghmel atti jew transazzjonijiet minghajr l-approvazzjoni tal-laqgħa generali. Ghalhekk, fejn tinsorgi dik is-sitwazzjoni, l-azzjoni tad-direttur tkun tista` tigi mpunjata skont l-**Art 137(4),(5) u (6) tal-Kap 386**. Direttur illi jagixxi *ultra vires* jista` mhux biss isib ruhu rinfaccjat bis-sanzjonijiet kollha dettati mill-Kap 386 izda jista` jkun wkoll responsabbli għad-danni abbazi tal-**Art 147(1) tal-Kap 386**.

Fil-**Principles of Maltese Company Law** (op. cit.) **Andrew Muscat** ighid :

"The improper purpose will always be to feather the directors' own nests or to preserve their own control, in which case it will also be a breach of the duty to act honestly and in good faith in the best interest of the company. Yet even if the directors act honestly for what they believe to be in the best interest of the company, they may still be liable for breach of duty if they exercise their powers for a purpose different from that for which the powers would have been conferred upon them."

Issir ukoll referenza decizjoni in re **Treasure Trove Diamonds Ltd v Hyman** (1928 AD 464 at 479) fejn inghad :

... and the directors as occupying a fiduciary position towards the company must exercise those powers bona fide in the best interest of the company as a whole, and not for an ulterior motive
...

Fuq l-istess linja kien il-pronunzjament in **Re Smith and Fawcett Ltd** [1942] Ch 304, [1942] 1 All ER 542 fejn Lord Greene sahaq illi :-

"The principles to be applied in cases where the articles of a company confer a discretion on

directors ... are, for present purposes, free from doubt. They must exercise their discretion bona fide in what they consider – not what a court may consider – is in the interests of the company, and not for any collateral purpose. The question, therefore, simply is whether on the true construction of the particular article the directors are limited by anything except their bona fide view as to the interests of the company."

Imbaghad fid-decizjoni in re **Howard Smith Ltd v Ampol Petroleum Ltd** [1974] AC 821, [1974] UKPC 3, Lord Wilberforce osserva li :

"... to start with a consideration of the power whose exercise is in question ... Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls'.

... when a dispute arises whether directors of a company made a particular decision for one purpose or for another, or whether, there being more than one purpose, one or another purpose was the substantial or primary purpose, the court, in their Lordships' opinion, is entitled to look at the situation objectively in order to estimate how critical or pressing, or substantial or, per contra, insubstantial an alleged requirement may have

been. If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount, the assertions of individuals that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme.'

... it is correct to say that where the self-interest of the directors is involved, they will not be permitted to assert that their action was bona fide thought to be, or was, in the interest of the company' pleas to this effect have invariably been rejected just as trustees who buy trust property are not permitted to assert that they paid a good price. No more, in their Lordships' view, can this be done by the use of a phrase – such as 'bona fide in the interest of the company as a whole' or 'for some corporate purpose.

...

The question which arises is sometimes not a question of the interest of the company at all, but a question of what is fair as between different classes of shareholders.'

Fil-Pag 202-203 ta' **Company Law** (op. cit.) **Brenda Hannigan**
tosserva illi :-

"Having carried out this exercise and identified the actual purpose for which the power was exercised, that actual purpose then has to be measured against the range of permissible purposes for the exercise of that power, as indicated by the articles or ascertained by the court, in order to decide whether that actual exercise was proper. Provided that the substantial purpose for which the power was exercised is a proper purpose, the exercise of the power is not invalidated by the presence of

some other improper, but insubstantial, purpose. For example, some incidental benefit obtained by a director does not invalidate the exercise of the power unless his self-interest was the substantial purpose for the exercise of the power. Equally, if the substantial purpose was improper, a director's honest belief that he was acting in the interests of the company, is insufficient to validate the exercise of the power.

...

As is clear from Howard Smith Ltd v Ampol Petroleum Ltd the courts are alert to attempts by the directors to manipulate control of the company by the improper exercise of the power to allot shares."

Dan premiss, u riferibbilment ghall-kaz tal-lum, ir-rikorrenti jsostnu li l-agir ta` Cauro u ta` Perez kien *in malafede*, kien abbuзив, u kien imur kontra l-obbligi tad-diretturi skont l-Art 136A tal-Kap 386. Fuq kollox l-agir taghhom kien lesiv ghalihom skont l-Art 402(1) tal-Kap 386.

Jirrizulta li Cauro u Perez bnew in-negozju taghhom fl-Afrika. Tul iz-zmien, in-negozju kiber u beda jimpjega n-nies fid-diversi pajjizi fejn qabad l-gheruq u nfirex.

Perez xehed illi n-negozju kif infirex fl-afrika sal-lum huwa s-sors ta` ghejxien ta` ghadd ta` nies li jbeghdhom mill-faqar.

Il-Qorti tifhem ir-realta` geopolitika prevalenti fl-Afrika.

Madanakollu l-isforzi li ghamlu Cauro u Perez sabiex mhux biss joktor il-gid taghhom, izda anke dak tal-persuni li jahdmu maghhom, u ndirettament tal-pajjiz fejn ighixu, bl-ebda tigbid ta` l-mohh, ma jista` jkun pretest sabiex jitwarrbu, apparti ligijiet, pattijiet konkordati

liberament minn Perez u Cauro, bla konsiderazzjoni għall-principju : *pacta sunt servanda*.

Perez jaccetta li l-*listing* ta` Pefaco fil-Borża ta` Malta kien mezz sabiex jikbsu aktar licenzji fl-UE.

Anzi l-Qorti tasal biex tgħid li l-ftuh għal investment gdid da parti ta` Perez u Cauro kien intiz mill-bidu sal-ahhar intenzjonat sabiex jinkiseb negozju fl-UE.

Il-Qorti tistqarr illi l-posizzjoni ta` Cauro kif riflessa fix-xieħda tiegħu kienet skjetta u tixhed car daqs il-kristall għaliex Cauro u Perez fethu l-bieb għall-investituri terzi.

Cauro jgħid mingħajr l-icken esitazzjoni illi li kien għalihom sabiex ikabbru l-firxa tan-negozju ta` Pefaco kien bizzejjed li kieku kisbu self bhala alternattiva għal trasferiment ta` ishma go Pefaco għall-fini ta` investment, u allura b`injezzjoni diretta ta` kapital frisk fil-kumpanija mhux self.

Il-fatti juru li l-eventwalita` ta` self marret fil-ġenb bil-konsegwenza li sar l-investment ta` Genesis Consortium f`Pefaco li wassal għall-akkwist dirett ta` ishma min-naha tagħha.

Tant hija din *la propria chiave di lettura* tal-essenza tal-kwistjoni illi Perez u Cauro qegħdu bhala pregudizzjali sabiex isir l-investment minn terzi li t-tmexxija eżekuttiva u decizjonali tal-kumpanija kellha tibqa` għandhom it-tnejn u tagħhom biss bhala *rappresentanti ta` Pefaco a tutti gli effetti*.

U hekk sar.

Cauro u Perez baqghu jmexxu u jiddeciedu bla ma jikkonsultaw ma` hadd, anke wara t-trasferiment tal-ishma lil Genesis Consortium, daqs li kieku t-trasferiment tal-ishma ghalihom kien mera formalita`.

Cauro xehed hekk :-

"We built this company from scratch twenty five years ago. Today we have 4,000 people in 11 countries. Now for us when we took new investors in 2015 it was something completely new. We used to run the company as two entrepreneurs basically, and never have to deal with outside investors. And probably we did not, I guess, fully comprehend or understand, I think we've now with insight learnt the lesson and to improve our working with the Bord. I mean if I go to the bottom of this issue we invested money in projects for the benefit of the company. At the end of it that's what we did. I understand that the other party may see it differently and see it like foul play, but I think at the end of the day here is a business, my role and Francis' role, is to protect that business and the people working in that business, and find a solution to basically pay off the Genesis people, have their money back with a return on the investment, and leave the company, so all these matters can be put to rest and we can continue."
(fol. 296)

Fil-kontroezami xehed :-

"We thought we were acting in the best interest of the company and speed was of the essence. Now we made a mistake and we're learning to work with the Bord, and now we basically don't do anything without Bord approval." (fol. 320)

Charles Elazar ikkonferma li anke wara li r-rikorreni saru azzjonisti ta` Pefaco, l-*modus operandi* ta` Cauro u Perez baqa` dak li kien qabel u cioe` li jibqghu ghaddejjin daqs li kieku ma kienx hemm persuni ohra membri tal-bord tad-diretturi.

Huwa bil-wisq evidenti li attitudni ta` din ix-xorta mhijiex accettabbli f` kull sens.

Anke l-intervenuta fil-kawza stess tirrikonoxxi fin-nota ta` osservazzjonijiet taghha illi t-tmexxija tal-affarijiet ta` Pefaco minn Cauro u Perez setghet kienet ahjar.

c) Analizi tal-ilmenti tar-rikorreni

i) Nuqqas ta' informazzjoni lid-diretturi

L-atti tal-kawza huma mibnija fuq xiehda estensiva tal-problemi li sa mill-bidu nett tal-investment taghhom r-rikorreni sabu ruhhom rinfaccjati bihom. Jirrizulta mill-provi illi sa minn Ottubru 2016, id-diretturi mhux eżekuttivi bdew jitolbu informazzjoni dwar il-kontijiet tal-kumpannija, dwar *statements* tal-bank, dwar l-assi u l-obbligazzjonijiet tal-kumpannija, u dwar id-djun illi kien jidher li kienu bdew jakkumulaw. L-informazzjoni li bdiet gejja mid-diretturi eżekuttivi kienet frammentata u nkompleta, kienet nieqsa minn dettall jew addirittura *senza senso e senza nesso*. Addirittura l-istatements tal-bank kienu gew allegatament manipolati sabiex ma jurux is-sitwazzjoni reali tal-kumpannija. Sahansitra l-istatements prezentati kienu qed juru li Pefaco kellha ammonti sostanzjali ta` flus depozitati mal-Millennium Bank meta effettivament fil-bank kien hemm biss ftit ghaliex il-bicca l-kbira tal-flus kienu gew trasferit lil GPSL b`decizjoni unilaterali ta` Perez u Cauro, li ma hadux il-briga li javzaw lill-bord tad-diretturi u li allura c-caqlieq tal-flus mhux biss ma kienx awtorizzat mill-bord izda sar ad insaputa tal-bord.

Il-konkluzjoni mill-provi akkwiziti ma tistax tkun xejn aktar mill-konvinzjoni li l-informazzjoni ma marritx ghand il-bord sabiex ma jkunx

maghruf mid-diretturi kollha illi l-flus li kienu investiti f`Pefaco minn Genesis Consortium sabiex kienu akkwistati l-ishma spickaw ghand GPSL baxx baxx. Kienet propju l-indebita sottrazzjoni tal-flus li marru ghand GPSL il-fattur li gharraq il-fiducja li hija s-sostrat ta`l-attivita` kummercjali. Irrispettivament x`kienet il-motivazzjoni taghhom jibqa` l-fatt illi d-diretturi ezekuttivi tant kienu konxji illi gabu ruhhom hazin illi hbew l-informazzjoni. Dan in-nuqqas gravi huwa ammess minn Cauro u Perez fix-xiehda taghhom.

Cauro xehed hekk :-

"Dr Joseph Camilleri : I refer to the issue of the allegedly forged bank statement. If I can refresh your memory, am I correct to state that towards the end of 2016 you were specifically asked as to the position regarding the bank accounts at Millenium, at that stage you had stated that there were deposits there of about 13,600,000. Is this correct?"

Xhud : Yes.

Dr Joseph Camilleri : Am I correct to state that similar information was provided as late as January or February of this year?"

Xhud : Yes, management information.

Dr Joseph Camilleri : Am I correct to state that even during a Board meeting in April the funds were referred to at Millenium?"

Xhud : Yes.

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

Xhud: Yes.

Dr Joseph Camilleri: So isn't there a contradiction here?

Xhud: Clearly.

Dr Joseph Camilleri: So can you explain where this comes from?

Xhud: *It's very simple. We believed at the time that we would recuperate the funds GPSL, private funds, and therefore being in a position to correct basically the withdrawal of the funds, that's it, and we were convinced we would succeed. In fact I must state that the applicants were fully aware of the problems in getting back our funds. I'm talking GPSL funds. We had discussion with them, we in fact showed them documents to demonstrate that we had different funds in private bank accounts, and in fact one of the private advisors to the Chairman of Genesis came to see us in Barcelona to assist to recover those funds. So the fact that GPSL had difficulty in getting those funds is a well known fact. Also I should*

mention that we had an agreement to provide a 16,000,000 line to the company alongside the capital increase. We requested back I think in November 2016 that this obligation be postponed precisely because we had financial issues with recuperating our own capital, so it's, although I lied to the Bord, I agree.

Dr Joseph Camilleri: I hope I'm misunderstanding.

*Xhud: No, I'm saying the truth, **I lied to the Board**. I was convinced we would recuperate our funds and the applicants were fully aware that we had those problems.*

...

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

Xhud: Let me come back to you, number one the interests of PFC and GPSL are exactly the same, so I object. They may be two different companies but I'm sorry we founded and we created one and we founded and we created the other, and we have the majority, we have

67% of the company. So I object to the line of questioning. Now we acted in good faith to save projects which were going to be lost if we didn't have the recourse to do it, that's all. Now I'm not denying that I did not tell the truth to the Bord, that's true, end of the story."

Oltre din l-ammissjoni, jirrizulta b`mod car u inekwivoku mill-provi illi meta z-zejt beda tiela` f`wick l-ilma, Cauro u Perez waqqfu kull informazzjoni milli tohrog.

Ghal din il-Qorti hija nfondata, u allura mhux accettabbli, l-iskuza li gab Cauro sabiex jiggustifika ghaliex ma kenitx inghatat l-informazzjoni, u cioe` meta stqarr illi ma kellux fiducja f`Shimkins u f`Kinross ghax skont hu kienu qeghdin jghaddu informazzjoni lill-kompetituri tagghom. Anke jekk ghall-grazzja tal-argument dan kien minnu, dan xorta ma jiggustifikax li informazzjoni li ghandha tingieb ghall-konoxxenza tal-bord tigi deliberatament imwaqqfa. Hadd ma huwa `l fuq mil-ligi ; jekk Cauro deherlu li kien hemm agir mhux korrett da parti ta` Shimkins u Kinross xejn ma kien izommu milli jindirizza l-kwistjoni fil-miftuh fil-bord stess. Certament izda ma kellu ebda prerogattiva jew dritt li jzomm lill-bord *all` oscuro*. Id-decizjoni hazina ta` Cauro u Perez gabet maghha konsegwenzi serji mhux biss ghaliex gabet fix-xejn il-fiducja li hija basilari f`kumpannija, izda wkoll ghaliex il-karenza ta` informazzjoni vitali zammet milli jkunu konkluzi l-*financial statements*. Dan issarraff fis-suspensjoni mil-*listing* tal-Borza ta` Malta, u aghar minn hekk espona lid-diretturi kollha, hadd eskluż, minn riperkussjonijiet serji, addirittura proceduri legali minhabba tmexxija hazina u ksur tal-obbligi li ghandu kull direttur skont il-ligi.

Mill-provi kompla jirrizulta li l-informazzjoni li kellha tinghata baqghet ma nghatatx, ghalkemm Cauro u Perez allegaw li ghaddeu kull ma kellhom. Il-Qorti taghti affidament lix-xiehda ta` Benjamin Muscat, Kap tal-*Audit Committee*, meta stqarr illi l-informazzjoni mghoddija kienet fqira, nieqsa mid-dettal, u ghalhekk tehtieg kjarimenti u approfondiment.

Dak mistqarr minn Benjamin Muscat isib konferma fid-deposizzjoni ta` Mark Bugeja, Managing Partner tal-awdituri Grant Thornton Malta.

Il-Qorti diga` kellha l-opportunita` tesprimi t-thassib taghha dwar it-tmexxija ta` Cauro u Perez u tirriaferma l-osservazzjonijiet illi ghamlet fil-provvedimenti *interim*.

Il-Qorti ssib li l-ilment huwa ppruvat.

ii) Nuqqas ta' informazzjoni lill-awdituri

Ferm krucjali ghall-fini ta` dan l-ilment hija x-xiehda ta` Benjamin Muscat u ta` Mark Bugeja.

It-tnejn xehdu fit-tul dwar id-diffikultajiet oggettivi li kienu rinfaccjati bihom sabiex tingabar l-informazzjoni mehtiega sabiex isiru l-*financial statements* ta` Pefaco.

Benjamin Muscat jirreferi wkoll ghal skambju ta` emails fit-12 ta` April 2017 li kellu ma` Cauro fejn ghat-talba li ghamel ghal aktar informazzjoni, Cauro wiegeb kiesah u biered :

"Unless this is stopping right now, I will block all information out of the company until the Bord of the 25th or 26th where we settle once and for all these issues!"

L-atti jixhdu d-diffikultajiet kollha.

Perez jipprova jiggustifika l-karenza ta` informazzjoni lill-awdituri billi jixhet htija fuq is-sitwazzjoni generali ta` l-Afrika.

Perez saħansitra jaħal biex iwahhal fil-qtugh tal-provvista tal-elettriku bħala raġuni għaliex ma kenitx mghoddija l-informazzjoni.

Cauro jaħdebita d-diffikultajiet għal problem ta` lingwa għaliex Grant Thornton kienu bbażati l-Ingilterra u ma kellhomx ufficji l-Afrika.

Isemmi li s-sistemi tal-*accounting* huma differenti u skont hu minħabba dan kien hemm dewmien fit-trasmissjoni tal-informazzjoni.

Minkejja kull skuza li gaħbu Perez u Cauro biex ma jghaddux informazzjoni, il-Qorti toħserva li sal-2015 ma jidhrix li kien hemm problem tax-xorta li fiħssru propju għaliex sa dik is-sena l-*financial statements* tleħstew fil-hin.

Lanqas ma jidher li pprezentaw ruħhom id-diffikultajiet li ssemmeħw minn Perez u Cauro meta sar id-*due diligence* li ppreħeda l-investment tal-Genesis Consortium.

Huwa bil-wisq ovvju illi d-diffikultajiet kollha nqalghu wara li sar l-investment, u wara li Pefaco, fuq struzzjonijiet ta` Perez u Cauro, għaddiet il-flus investiti minn Genesis Consortium lil GPSL li nserat li tappartjeni lill-istess Cauro u Perez.

Dwar dan kollu, Cauro xehed hekk:

“Dr Joseph Camilleri: Am I correct to state that the issue is not really one related to problems with the language or problems related to logistic issues?”

Xhud: No, you’re incorrect because some of the delays are due exactly to the language, logistic, etcetera. Other delays are due to myself and Francis

Perez, as I said, refusing to release the information, yes.” (fol. 542)

Tajjeb li jkun osservat illi Cauro jixhed li peress li ma ki9enx qed jafda lil Shimkins u Kinross ma riedx ighaddi informazzjoni speċjalment l-istatements tal-bank.

Jirrizulta illi sabiex tigi sormontata din id-diffikulta` ntlahaq qbil illi l-informazzjoni tigi mghoddija direttament lill-awdituri.

Cio` nonostante Cauro lanqas b`hekk ma kien kuntent.

Xehed hekk :-

“Xhud: *Because the auditors to close the financial statement do not need that information. That information may be needed because the B shareholders want to verify where the funds basically appropriated by GPSL have gone, that’s two different issues.*

...

Dr Joseph Camilleri: Am I correct to sy that the auditors are requesting themselves directly from you agreements supporting the purported loan, evidence showing the transfer of funds from pefaco, and they need

further information regarding the recoverability of the loan?

Xhud: Yes.

Dr Joseph Camilleri: Has this information been provided?

Xhud: Not yet.

Dr Joseph Camilleri: And why is this?

*Xhud: I've told you, because that information, the bank statement containing that information, number one we believe it's not necessary, number two we believe there's a danger of leaks, and number three all it will show is that the funds have gone to GPSL. I cannot see how it serves the purpose of the auditors in that case."
(fol. 543 - 544)*

Fl-udjenza tat-22 ta` Frar 2018 Benjamin Muscat xehed hekk :-

"Mela sal-lum din l-informazzjoni ghadha ma waslitx jigifieri naf li wara pressjoni mill-awdituri jew anke minhabba l-fatt li l-illum il-gurnata ghandna direttur li huwa appuntat mill-Qorti u qiegħed ovvjament jghin biex jagħmel pressure fuq l-executive halli jagħmlu xogħolhom sal-lum is-sitwazzjoni hija illi dawn qalulna illi taw

instructions specifici lil Bank biex jaghtu l-informazzjoni li hemm bzonn lill-awdituri ... Sal-bierah kumbinazzjoni kien hemmexchange bejn id-diretturi u l-awdituri fejn staqsewni l-awdituri isma dak li kellek tircievi minghand il-Bank ircevejtu u dan irrisponda le jigifieri l-informazzjoni sa issa ghadha ma gietx allavolja apparentement suppost l-instruction formali skond l-arrangement li hemm mal-Banek, il-Bank jirceviha pero` sal-bierah skond l-exchange li kien hemm l-awdituri ghadhom ma rceviewx din l-informazzjoni.” (fol. 212)

Billi l-informazzjoni baqghet karenti, ir-rikorrenti talbu l-intervent tal-Qorti.

Bil-provvediment ta` din il-Qorti tal-11 ta` Settembru 2018, kienu estizi l-poteri tal-Av Dr Richard Galea bhala direttur addizzjonali sabiex jitlob u jottjeni kull informazzjoni necessarja.

Minkejja dan, l-informazzjoni baqghet ma gietx trasmessa u l-financial reports u l-audits ghas-snin 2016 u 2017 baqghu ma tlestewx.

Il-Qorti ssib li anke dan l-ilment huwa ppruvat.

iii) Nuqqas ta' hlas lill-kredituri

Minkejja illi Cauro u Perez xehdu li kien hemm flus bizzejjed mnejn ikun generat il-gid ta` Pefaco, u mnejn jithallsu dak kollu dovut lill-impjegati tas-sussidjarji, jibqa` l-fatt li rrizulta li kien hemm ghadd ta` kredituri li baqghu ma thallsux.

Isir referenza ghall-ittra tal-Borza ta` Malta.

Fl-udjenza tad-29 ta` Ottubru 2018 xehed Perez fejn stqarr illi d-dejn kien ser jithallas *"between today and tomorrow because in the meantime we received funds from Africa"*.

Eppure dak id-dejn baqa` ma thallasx.

Jidher illi baqghu ma thallsux id-*directors' fees* dovut lil Benjamin Muscat.

Muscat xehed hekk :

"Le ghax jigifieri jiena, jiena nhoss illi u filfatt il-bierah lil Olivier ergajt iccejsajtu fuq il-flus tieghi, iccejsajtu wkoll biex izomm il-kontijiet lokali up to date partikolarment ma` l-awdituri, ma` l-Avukati, ma` l-MFSA ghidtlu isma ghidtlu ahna dawn huma nies li nhabbtu wiccan magghom kuljum imbarazzanti ghalija illi jiena direttur fuq kumpaniji ohrajn u you know l-MFSA taf li qieghed direttur u audit committee Chiarman tal-kumpanija u lanqas biss qed ihallsu l-fees tagghom igifieri ghandna, kien hemm kont pendent ma` l-MFSA minhabba lfatt li ahna in breach ghidtlu jigifieri dawn ghallingas mizerjament are minn fejn ha ssib dawn il-mitt elf illi hemm bzonn u hallashom ghax din hija kumpanija li suppost ghandha allura minn hemm turn over ta` miljun jigifieri fhimt ghalija li joqghod jghidli illi ghandhom diffikulta` biex johorgu l-flus minn Benine jew Togo jew Ivory Coast halli jhallsu dawn il-kontijiet ma jregix ghax huma l-pagi tagghom u l-ispejjez tagghom li ghandhom go Barcellona fil-head office ihallsuhom jigifieri ftit iehor ghandhom bzonn biex ihallsu l-kontijiet taghna.

Mill-atti ma jirrizultax li thallsu d-djun.

Meta xehed, Kinross esprima t-thassib tieghu dwar il-fatt illi l-kumpannija ma kenitx qeghda thallas id-djun.

Il-Qorti tikkondividi dak espress minn Benjamin Muscat illi jekk tassew il-kumpannija kienet qeghda ddawwar qligh tajjeb, allura kiellhga tkun kapaci tonora l-obbligi taghha.

Abbazi tal-fatti accertati, ma jidhirx li kienet milhuqa din l-aspettativa.

Anke dan l-ilment kien ippruvat.

iv) Nuqqas ta' laqghat tal-bord tad-diretturi

Wara li Genesis Consortium akkwistat l-ishma ta' Pefaco, saru erbatax (14) –il laqgha tal-bord tad-diretturi. Jidher illi waqt dawn il-laqghat kien hemm hafna skossi fis-sens illi daqqa ma jattendix direttur u daqqa ma jattendix direttur iehor. Jidher illi dak trattat waqt il-laqghat kien dwar il-kisba ta' informazzjoni ; kif xehed Charles Elazar kienu sostanzjalment ezercizzju komputista. Kollox kien dovut ghall-fatt li d-diretturi mhux ezekuttivi kellhom bzonn jiksbu l-informazzjoni. Jidher ghalhekk illi ghalkemm effettivament saru numru mhux zghir ta' laqghat, ftit li xejn hargu decizjonijiet li jolqtu l-operat ta' Pefaco.

Din il-Qorti tfakkar li fil-bord tad-diretturi hija vestita t-tmexxija tal-affarijiet ta' kumpannija. Fil-kaz tal-lum tirrizulta sitwazzjoni fejn minflok fil-bord kienet trattata u diskussa strategija, investment u tkabbir tal-gid ta' Pefaco, kienu trattati kwistjonijiet ohra li nibtu minn diffidenza u nuqqas ta' fiducja dwar il-*modus operandi* tad-diretturi ezekuttivi. Bhala fatt, il-kwistjonijiet sollevati baqghu bla soluzzjoni sodisfacjenti.

Anke dan l-ilment huwa ppruvat.

v) Nuqqas ta' osservanza tal-M&A tal-kumpanija

Din il-Qorti tqis illi l-moviment ta' flus minn Pefaco lejn GPSL ad insaputa tal-bord tad-diretturi u allura minghajr l-awtorizzazzjoni tal-bord tikkostitwixxi l-aqwa prova li kien hemm ksur tad-disposizzjonijiet tal-M&A.

Il-klawsoli 134 u 140 tal-*Articles* huma cari u kienu ntizi ghall-protezzjoni tal-azzjonisti minoritarji.

Din il-Qorti m'ghandhiex l-icken dubju li d-diretturi ezekuttivi ma setghu qatt jaghmlu ftehim ghall-figura ta' €13.5 miljun mill-flus ta' Pefaco minghajr l-approvazzjoni jew konsultazzjoni tal-bord.

Din il-Qorti tithasseb u tinkwieta mill-qiegh tal-fehmiet taghha dwar il-fatt (ammess minn Cauro) illi l-bord tad-diretturi nghata informazzjoni hazina dwar il-bilanci fil-kont tal-bank ta' Pefaco.

Anke dan l-ilment huwa ppruvat.

vi) Riassunt

Din il-Qorti tqis illi saret il-prova li d-diretturi ezekuttivi gabu lill-intimata *in un vicolo cieco*.

Din il-Qorti tishaq dak li diga' kellha okkazzjoni tghid fi provvedimenti precedenti taghha u cioe' illi l-protezzjoni li jrid jaghti l-Art 402 huwa li min ikollu l-kontroll effettiv u ezekuttiv ta' kumpanija jikkonduci l-affarijiet taghha b' mod u manjiera li ma jkunx hemm atti jew

omissjonijiet li jopprimu ingustament jew b`mod diskriminatorju lil xi membru tal-kumpanija.

Fil-kaz ta` **Coroin Ltd** (op. cit.) David Richards J kien irrileva illi l-*unfair prejudice remedy* mhijiex diretta "to the activities of shareholders amongst themselves".

Fl-istess waqt, inghad ukoll illi : "unless those activities translate into acts or omissions of the company or the conduct of its affairs"

Fil-pag. 487 et seq ta` **Company Law** (op. cit.) **Brenda Hannigan** tghid hekk :-

... the courts do not adopt a technical or legalistic approach to what constitutes the affairs of the company but will look to the business realities. It is frequently stressed that the requirement for the conduct of "the affairs of the company" should be liberally construed ...

L-essenza ta` socjeta` kummercjali, inkluz kumpanija, hija l-fiducja fil-massimu livell taghha. Kif tisfaxxja l-fiducja, id-destin ta` socjeta` kummercjali jmur lejn in-negattiv, bosta drabi lejn negattiv irreversibbli.

Il-Qorti tishaq illi bord tad-diretturi ta` kumpanija ma jistax jimxi skont il-ligi tal-gungla u cioe` jirbah jew jipprevali min l-aktar huwa b`sahtu, jew jirbah dak li l-aktar jilhaqlu mohhu biex jasal ghall-miri tieghu, li mhux bilfors jwasslu ghall-kisba tal-ghanijiet li ghalihom kumpanija tkun kostitwita.

Fil-kaz tal-lum, abbazi tal-assjem tal-provi, il-Qorti ssib li da parti tal-intimata, tramite d-diretturi ezekuttivi taghha, kien hemm ksur tal-Art. 402(1) tal-Kap 386 ghad-dannu tar-rikorrenti.

X. L-Art 402(3) tal-Kap 386

Ladarba sabet vjolazzjoni tal-Art 402(1), il-Qorti sejra tghaddi għall-konsiderazzjoni tar-rimedji skont kif jipprovdi s-subartikolu (3) tal-Art 402.

L-ghazla tar-rimedju minn fost dawk indikati fis-subartikolu (3) timmerita analizi għaliha.

In primis, il-Qorti tirrileva illi d-disposizzjoni takkorda lill-Qorti diskrezzjoni wiesgħa sabiex tagħti dik l-ordni li tkun xierqa tenut kont tal-fatti u cirkostanzi tal-kaz (ara d-decizzjoni tal-Qorti tal-Appell tal-31 ta` Jannar 2003 fil-kawza "**Philomena Ellul vs Charles Ellul pro et noe et**").

Id-diskrezzjoni li għandha l-Qorti hija talment wiesgħa illi saħansitra tista` twarrab t-talbiet specifici li jkunu saru mill-membri li jkun garrab *unfair prejudice* skont is-subartikolu (1).

Fil-provvediment li tat f`din il-kawza fl-1 ta` Awissu 2017 din il-Qorti rrimarkat illi :-

" ... kull wahda mid-disposizzjonijiet tal-Art 402(3) hija sottoposta għad-diskrezzjoni tal-Qorti. Dan ikompli jfisser illi anke jekk issib li jissussisti dak li jgħid l-Art 402(1), xejn ma jzomm lill-Qorti milli tapplika rimedju minflok iehor..."

Fil-Pag. 285 ta` "**Company Law – Theory, Structure and Operation**" (OUP – 1998) **Brian Cheffins** iġid illi Sec 459 (illum Art 94 tal-Companies Act 2006) *provides a Judge with broad powers to grant to a successful applicant whatever remedy is appropriate.*

Fil-kaz tal-lum, permezz tar-raba` talba, ir-rikorrenti qegħda titlob lill-Qorti sabiex f`kaz li s-sitwazzjoni tal-kumpannija Pefaco hekk tiggustifika – ixxolji l-kumpannija u tipprovdi għall-istralc konsegwenzjali tagħha.

Fl-istadju tat-trattazzjoni finali tal-kawza, ir-rikorrenti sostnew il-fehma tagħhom illi Pefaco għandha tigi xjolta u stralcjata.

Huwa evidenti li r-rikorrenti qeghdin jaghmlu din it-talba ghaliex mhux qeghdin jafdaw d-diretturi ezekuttivi tal-kumpannija li ma jidhirx li jistghu jigu rimossi ghaliex il-hatra taghhom saret minn GPSL li ghandha l-maggoranza tal-ishma.

L-istampa li tohrog cara mill-assjem tal-provi hija dik ta` kumpannija li titmexxa minn diretturi ezekuttivi minghajr konsultazzjoni mad-diretturi l-ohra daqs li kieku l-kumpannija hija taghhom u allura jahsbu li jistghu jaghmlu li jridu.

Rinfaccjata b`atmosfera ta` sfiducja aperta u ta` diffidenza bejn iz-zewg nahat il-Qorti ma tarax illi tista` tidderiegi r-rimedju lejn riforma fit-tmexxija tal-affarijiet ta` Pefaco dment li l-azzjonisti jibqghu dawk li hemm illum b`GPSL izzomm il-maggoranza tal-ishma. Rimedju ta` din ix-xorta ma jwassal imkien.

Il-Qorti hasbet fit-tul.

Tenut kont ta` kollox, il-Qorti tghid illi ordni ghall-bejgh ta` l-ishma tar-rikorrenti fis-socjeta` ntimata tkun ir-rimedju l-aktar indikat.

Il-Qorti taghmel referenza ghall-Pag 702-703 ta` **Gower and Davies - Principles of Modern Company Law** :-

Section 996 gives the court a wide remedial discretion to "make such order as it thinks fit for giving relief in respect of the matters complained of". In addition to this general grant, five specific powers are given to the court by section 996(2) of which undoubtedly the most commonly used is an order that the petitioners` shares be purchased by the controllers or the company. The reason for the popularity of this remedy, with both petitioners and the courts, is linked to the fact that ... the notion of unfair prejudice is most firmly established in relation to quasi-partnership companies. Where businesses and, often, personal relationships between quasi-partners have broken down, they are incapable of reconstitution by a court, which can effectively operate only on the terms of the minority`s exit. A share purchase order gives the petitioner an opportunity to exit from the company with the fair value of his or her investment, something which, in the absence of a court order, is often not available to the shareholder of a small company, because often no potential purchasers of the shares would be willing or, even if

they were, the purchase price a third party would be willing to pay would reflect, rather than remedy, the harm inflicted on the seller by the unfairly prejudicial conduct.

Fil-Pag 727-728 ta' **Boyle & Birds' Company Law** (op. cit.)
jinghad hekk –

It is not surprising that in the case of most successful petitions the remedy sought by the petitioners, and granted by the court, is that of purchase of the minority's shares by the majority. As a solution to intra-corporate disputes in small private companies this is still the most attractive choice among the remedial solutions offered by s.996.

The Court of Appeal in "**Grace v. Biagola**" [2006. 2. BCLC 70, at 96-97] explained the policy considerations which guide the court in choosing an order for the purchase of the minority's shares :

"In most cases, the usual order to make will be the one requiring the respondents to buy out the petitioning shareholder at a price fixed by the court. This is normally the most appropriate order to deal with the inter-corporate disputes involving small private companies ... The reasons for making such an order are in most cases obvious. It will free the petitioner from the company and enable him to extract his share of the business and assets in return for foregoing any future right to dividends. The company and its business will be preserved for the benefit of the respondent shareholders, free from his claims and the possibility of future difficulties between shareholders. In most cases of serious prejudice and conflict between shareholders, it is unlikely that any regime of safeguards which the court can impose will be as effective to preserve the peace and safeguard the rights of the minority".

Fil-Pag 103 ta' **Principles of Maltese Company Law** (op. cit.)
Andrew Muscat ighid :-

This radical order has a number of advantages : (i) that the complainant can realise the value of his interest in the company without having the company wound up ; (ii) that the purchasers will receive full value for the price paid for the shares ; and (iii) that the complainant on the one hand, and the company and the majority shareholder on the other, can make a "clean break". This remedy should ideally be used sparingly and should be resorted to only when other remedies are inapplicable or bound to be ineffective to redress the wrongdoing.

Dan premiss, il-Qorti sejra tordna li l-ishma kollha li ghandhom ir-rikorrenti f` Pefaco jigu akkwistati minn Pefaco stess skont l-Art 402(3)(d) u l-Art 107(1)(f) tal-Kap 386 ghall-prezz ta` €15,000,000 li kien l-investment (komprizi l-ispejjez) li ghamlu r-rikorrenti f` Pefaco, b` liema investment sar l-akkwist ta` 30% tal-pakkett azzjonarju ta` Pefaco (*supra*).

Trid li l-akkwist isir minn Pefaco stess anke ghaliex Pefaco ghandha kreditu ta` €13,600,000 kontra GPSL ghal self li kienet inghatat, liema self m`ghandux ikun diffiċli li jithallas lura lil Pefaco, stante li Perez u Cauro mhux biss huma diretturi eżekuttivi ta` Pefaco izda huma s-sidien effettivi ta` GPSL.

M`ghandux ikun lanqas finanzjarjament problematiku li jsir il-hlas lir-rikorrenti ghaliex l-istampa li taw Perez u Cauro fix-xieħda tagħhom tal-valur li ghandhom il-kumpanniji sussidjarji, li jagħmlu l-assi ewlenin ta` Pefaco, hija posittiva tant li affermaw li s-sussidjarji jimpjegaw hafna nies f` diversi pajjizi.

Il-Qorti tishaq illi r-*raison d`etre* tal-*unfair prejudice action* hija l-ekwita`.

Bl-applikazzjoni ta` dan il-principju għall-fattispeċi tal-kaz tal-lum, il-Qorti jidhrilha li jkun gust u ekwu li r-rikorrenti jithallsu lura l-flus kollha li kienu nvestiti da parti tagħhom f` Pefaco (inkluzi l-ispejjez) kif fuq inghad bhala korrispettiv għall-akkwist minn Pefaco tal-ishma kollha tar-rikorrenti.

Il-Qorti sejra tagħti zmien perentorju ta` erba' xhur mil-lum sabiex isir dan il-hlas.

Fl-eventwalita` li l-hlas ma jsirx, tkun xi tkun ir-raguni, allura din il-Qorti tqis li jkun daqstant gust u ekwu li tmur għar-rimedju l-ieħor li huwa x-xoljiment u l-istralc ta` Pefaco.

Fil-Pag. 585 ta` Mayson, French & Ryan on Company Law (26th Edition – 2009/2010 – OUP) jinghad hekk :-

In several cases in which winding up has been ordered on the just and equitable ground, the courts have commented that one individual in de facto control of the company has treated it as his or her own, typically failing to give proper information to other members and withdrawing excessive remuneration or other benefits (Baird v Lees 1924 SC 83 ; Thomson v Drysdale 1925 SC 311 ; Loch v John Blackwood Ltd [1924] AC 783 at p 794). In Thomson v Drysdale, Lord President Clyde said at page 315 :

... in any case in which the shareholders hold a preponderating interest in a company make it manifest that they intend to set at naught the security provided by company procedure, and to treat the company and its affairs as if they were their own property, it is impossible that the minority should retain any confidence in the impartiality or probity of the company's administration and – according to the circumstances of each particular case – it becomes a question whether the minority are not entitled, as a matter of 'justice and equity' within the meaning of [the Insolvency Act 1986 s 122(1)(g)] to have the company wound up.

Provvediment

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

1. Tiddikjara illi kontra l-intimata jirrizultaw ppruvati u sodisfatti r-rekwiziti tal-Art 402(1) tal-Kap 386 tal-Ligijiet ta` Malta.

2. Bl-applikazzjoni tal-Art 402(3)(d) u tal-Art 107(1)(f) tal-Kap 386 :-

a) Tordna lill-intimata Pefaco International plc (C65718) sabiex tixtri u takkwista l-ishma kollha li ghandhom ir-rikorrenti fl-istess intimata u cioe` Pefaco International plc (C65718) ghall-prezz li qeghda tistabilixxi fl-ammont ta` hmistax-il miljun Ewro (€15,000,000).

b) Taghti lill-intimata Pefaco International plc (C65718) zmien perentorju ta` erba` (4) xhur mil-lum sabiex tixtri u takkwista l-ishma kollha li ghandhom ir-rikorrenti fl-istess intimata Pefaco International plc (C65718) ghall-prezz indikat fil-paragrafu precedenti.

3. Tordna li sakemm isir il-bejgh, akkwist u trasferiment ta` l-ishma kif fuq ordnat, ma jkun hemm ebda bdil fil-*memorandum* u fl-*articles of association* tal-intimata Pefaco International plc (C65718). Jekk isir bdil fil-*memorandum* u fl-*articles of association* tal-intimata Pefaco International plc (C65718) qabel ikun sar il-bejgh, akkwist u trasferiment ta` l-ishma, allura kull bidla li ssir tkun nulla u bla effett.

4. Tordna illi l-provvediment tal-lum fl-assjem tieghu ghandu jipprevali fuq kull disposizzjoni kontenuta fil-*memorandum* u fl-*articles of association* tal-intimata Pefaco International plc (C65718).

5. Fl-eventwalita` illi l-intimata Pefaco International plc (C65718) ma tkunx ottemperat ruhha mal-ordnijiet taghha fuq riferiti, allura f`dak il-kaz bl-applikazzjoni tal-Art 402(3)(g) tal-Kap 386 tordna ix-xoljiment u l-istralc tal-intimata Pefaco International plc (C65718) b`effett minn erba' (4) xhur mil-lum minghajr il-htiega ta` proceduri ulterjuri.

6. Fil-kaz illi javvera ruhu dak previst fil-paragrafu precedenti, tahtar lir-Ricevitur Ufficjali bhala stralcjarju tal-intimata Pefaco International plc (C65718) bis-setghat u d-dmirijiet previsti fil-Kap 386 tal-Ligijiet ta` Malta. F`dak il-kaz, l-ewwel udjenza tal-eventwali stralc issir nhar it-Tlieta 15 ta` Ottubru 2019 fid-9.00 a.m. L-ispejjez kollha tal-eventwali istralc, inkluz il-hlas tad-drittijiet u tal-ispejjez tal-istralcjarju, jithallsu mill-intimata Pefaco International plc (C65718).

7. Tordna lill-intervenuta fil-kawza sabiex thallas l-ispejjez taghha.

8. Tordna lill-intimata Pefaco International plc (C65718) sabiex thallas l-ispejjez l-ohra kollha ta` din il-kawza.

9. Tordna wkoll lill-intimata Pefaco International plc (C65718) sabiex thallas l-ispejjez kollha relatati mal-bejgh, akkwist u trasferiment favur taghha tal-ishma tar-rikorrenti fl-istess kumpannija ntimata.

Tordna n-notifika ta` dan il-provvediment lir-Registratur tal-Kumpanniji.

**Onor. Joseph Zammit McKeon
Imhallef**

**Amanda Cassar
Deputat Registratur**