



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

**ONOR. IMHALLEF  
JOSEPH ZAMMIT McKEON**

**Illum it-Tlieta 1 ta` Settembru 2020**

**Kawza Nru. 4  
Rikors Nru. 24/2019 JZM**

**Ruth Magro (ID 264670M)**

***kontra***

**Ir-Registratur tal-Kumpanniji**

**Il-Qorti :**

**I. Preliminari**

Rat ir-rikors prezentat fit-12 ta` Settembru 2019 li jaqra hekk :-

*Illu permezz ta` kuntratt datat 15 ta` Mejju 1995, fl-atti tan-Nutar Dottor John Patrick Hayman, l-esponenti akkwistat minghand il-kumpannija*

*D.A.G. Company Limited (C-9715) l-appartament internament numerat tmienja (8) fit-tielet sular (second floor), formanti parti minn blokk ta' appartamenti minghajr numru ufficjali bl-isem ta' "Brooklyn Court" fi Triq Patri Felic Sammut, San Pawl il-Bahar, kif ahjar deskritt fl-istess kuntratt - anness Dokument `A`.*

*Illi ai termini tal-istess kuntratt, il-kumpannija venditrici D.A.G. Company Limited kienet iggarantiet a favur l-esponenti, inter alia, il-pacifiku pussess tal-immobbli in vendita ai termini tal-ligi permezz ta' ipoteka generali fuq il-beni kollha taghha prezenti u futuri.*

*Illi permezz ta' rizzoluzzjoni straordinarja datata 25 ta' Ottubru 2013 (anness Dok. `B`) l-azzjonisti tal-imsemmija kumpannija iddecidew unanimament li l-istess kumpannija kellha tigi stralcjata u xjolta ai termini tal-Artikolu 265(1) tal-Att dwar il-Kumpanniji.*

*Illi effettivament l-istralc tal-imsemmija kumpannija sar taht is-supervizzjoni tal-Onorabli Prim` Awla tal-Qorti Civili.*

*Illi b`sentenza datata 11 ta' Frur 2014 tal-Prim` Awla tal-Qorti Civili, fl-ismijiet D.A.G. Company Limited v. X (Rikors Numru 1051/2013 - anness Dok. `C`) l-imsemmija Qorti ordnat ix-xoljiment u l-istralc ta' D.A.G. Company Limited.*

*Illi b`sentenza ulterjuri datata 12 ta' Mejju 2016 fl-atti tal-istess proceduri (ara anness Dok. `D`), l-Onorabli Prim` Awla tal-Qorti Civili ordnat it-thassir tal-isem tal-imsemmija D.A.G. Company Limited minn fuq ir-Registru tal-Kumpanniji b`effett mid-data tal-istess sentenza.*

*Illi kif jirrizulta mill-anness Dok. `E`, l-isem tal-imsemmija kumpannija gie fil-fatt imhassar mir-Registru tal-Kumpanniji b`effett mit-12 ta' Mejju 2016.*

*Illi, kif ser jigi pruvat ahjar waqt it-trattazzjoni ta' dan ir-Rikors, meta kienet qed issir il-likwidazzjoni u l-istralc tal-kumpannija D.A.G. Company Limited, ma ttiehedx kont tal-garanzija tal-pacifiku pussess li l-istess*

*kumpannija kienet tat lill-esponenti permezz tal-precitat kuntratt datat 15 ta`Mejju 1995, liema garanzija kienet ghadha vigenti.*

*Illi tali ommissjoni tikser diversi dispozizzjonijiet tal-Att dwar il-Kumpanniji, inter alia l-Artikoli 301 u/jew 302 tal-imsemmi Att, billi tali garanzija, in kwantu tohloq contingent liability fil-konfront ta` D.A.G. Company Limited, kellha necessarjament titqies ghall-finijiet tal-istralc tal-istess kumpannija.*

*Illi l-ezistenza ta` tali garanzija u l-obbligi relattivi a karigu tal-kumpannija D.A.G. Company Limited huma ta` natura pubblika u kienu facilment accertabbli fil-kors tal-istralc taghha in kwantu l-kuntratt datat 15 ta` Mejju 1995 huwa dokument pubbliku u insinwat.*

*Illi dana juri li, fil-kors tal-istralc ta` D.A.G. Company Limited, jew ma saritx ricerka fir-Registru Pubbliku sabiex jigu verifikati l-attivi u l-passivi insinwati tal-istess kumpannija jew altrimenti l-istess ricerka ma saritx sew.*

*Illi ghalhekk l-istralc u t-thassir tal-kumpannija D.A.G. Company Limited kien vizzjat b`illegalita` ta` natura materjali, senjatament billi gew vjolati diversi dispozizzjonijiet tal-Att dwar il-Kumpanniji, inter alia, l-Artikoli 301 u/jew 302, hekk kif premess.*

*Illi l-esponenti ghandha interess f`tali reintegrazzjoni sabiex il-garanzija tal-pacifiku pussess lilha moghtija bil-precitat kuntratt fl-atti tan-Nutar Hayman ma tigix fix-xejn.*

*Illi dan hu l-uniku rimedju disponibbli lill-esponenti ghal dan il-ghan.*

*Illi ghadhom ma ghaddewx hames (5) snin minn meta l-kumpannija D.A.G. Company Limited thassret minn fuq ir-Registru tal-Kumpanniji.*

*Illi ghalhekk jezistu l-estremi sabiex din l-Onorabbli Qorti tordna li l-isem tal-kumpannija D.A.G. Company Limited jerga` jitqieghed fuq ir-Registru tal-Kumpanniji u l-istralc jerga` jinfetah ai termini tal-Artikolu 3008 tal-Att dwar il-Kumpanniji sabiex jittiehed kont tal-obbligi li l-istess D.A.G.*

*Company Limited ghandha fil-konfront tal-esponenti u sabiex jittiehed kont tal-contingent liability naxxenti mill-garanzija tal-pacifiku pussess moghtija mill-imsemmija kumpannija a favur tal-esponenti u b`hekk id-drittijiet tal-esponenti jigu mharsa.*

*Ghaldaqstant ir-rikorrenti titlob bir-rispett lil din l-Onorabbli Qorti sabiex, prevja li jinghataw id-dikjarazzjonijiet u l-provvedimenti kollha opportuni :*

*1. Tordna illi l-isem tal-kumpannija D.A.G. Company Limited jerga` jitqieghed fuq ir-Registru tal-Kumpanniji u l-istralc taghha jerga` jinfetah ghal dawk ir-ragunijiet u ghal dak iz-zmien li l-Qorti tista` tispecifika fid-decizjoni taghha taht dawk id-direttivi u dawk il-kondizzjonijiet li jistghu jidhrulha xierqa.*

*Bl-ispejjez.*

*Rat dokumenti li kienu prezentati mar-rikors.*

*Rat ir-risposta li pprezenta l-intimat fit-18 ta` Ottubru 2019.*

*Taqra hekk :-*

*Illi in kwantu ghall-meriti fattwali tal-kawza peress illi l-konvenut Registratur mhux edott mill-fatti kollha huwa jirrimetti ruhu ghall-provi u ghall-gudizzju la` dina l-Onorabbli Qorti ;*

*Illi fil-28 ta` Ottubru 2013 l-azzjonisti tal-kumpannija DAG Company Limited (C 9715) ikkonsenjaw lir-registratur rizoluzzjoni mehuda ghax-xoljiment u l-istralc konsegwenzjali taghha taht is-supervizjoni ta` dina l-Onorabbli Qorti ;*

*Illi fl-istess gurnata l-azzjonisti baghtu ukoll l-avviz rilevanti taht l-Att dwar il-Kumpanniji 1995 fejn giet riflessa l-intenzjoni tal-azzjonisti fuq imsemmija ;*

*Illi fl-11 ta` Dicembru 2013 l-esponent gie notifikat illi fil-5 ta` Novembru 2013 il-kumpanija in kwistjoni kienet prezentat rikors quddiem dina l-Onorabbli Qorti fejn is-socjeta` talbet illi tigi xolta u stralcjata ai termini tal-artikolu 214 (1) (a) tal-Att minn dina l-istess Onorabbli Qorti ;*

*Illi l-Qorti accettat t-talba tal-azzjonisti tal-kumpanija wara li ghamlet il-verifiki taghha a bazi ta` dokumentazzjoni u provi illi il-kumpanija giet ordnat illi tipprezenta quddiem l-awtorita` tal-Qorti ;*

*Illi f`sentenza illi tat dina l-Onorabbli Qorti fl-11 ta` Frar 2014, gie awtorizzat u ordnat ix-xoljiment u l-istralc tal-kumpanija in kwistjoni ;*

*Illi fl-istess sentenza il-Qorti appuntat ukoll lir-Ricevitur Ufficjali bhala stralcjarju bis-setghat u d-dmirijiet kollha kif huma definiti u previsti fil-Att dwar il-Kumpaniji ;*

*Illi fl-14 ta` Frar 2014 ir-Ricevitur Ufficjali baghat l-avviz formali illi gie mahtur bhala stralcjarju mill-Qorti b`effett mil-11 ta` Frar 2014*

*Illi fit-12 ta` Mejju 2016 il-Qorti hadet konjizzjoni tal-istat ta` affarijiet tal-kumpanija u wara li helset l-istralcjarju mill-effetti legali tal-hatra tieghu hija mexxiet billi tat l-ordni illi l-isem tal-kumpanija in kwistjoni kellu jigi mhassar minn fuq ir-registru minn dik id-data ta` l-ordni ;*

*Illi talli data u tali striking off order gew riflessi fil-pubblikazzjoni illi hareg l-esponent fit-12 ta` Ottubru 2016 fuq website mizmuma minnu ;*

*Illi t-talbiet ta` din il-kawza partikolari qed issir a termini tal-Artikolu 300B, liema artikolu jispecifica illi l-Qorti trid tkun soddisfatta illi l-istralc u t-thassir tal-isem tal-kumpanija kien ivvizjat minn frodi jew illegalita materjali. F` dan ir-rigward, partikolarment jezistix xi wiehed mill-elementi rikjesti mil-ligi, ir-Registratur jirimetti ruhhu ghall-provi u ghad-decizjoni ta` dina l-onorabbli Qorti.*

*Illi f`dan il-kaz l-esponent registratur m`huwiex jikkontesta l-possibilita` illi l-process ta` stralc tal-kumpanija in kwistjoni jerga` jinfetah*

*jekk dina l-Onorabbli Qorti thoss illi ghandha taghti tali rimedju fic-cirkostanzi ta` dan il-kaz. Madanakollu dan ir-rimedju huwa wiehed ta` natura eccezzjonali u ghaldaqstant ghandu jigi akkordat ghar-ragunijiet u esigenzi ta` gustizzja u ekwita` ;*

*Illi skont l-Artikolu 300B, kemm-il darba l-Qorti tilqa` t-talba sabiex l-istem ta` kumpannija jerga` jitpogga fuq ir-Registru u l-istralc tal-kumpannija jerga` jinfetah allura l-esponent umilment jissollewa illi l-Qorti ghandha tispecifica l-iskop u l-perjodu li ghalih ghandu jinfetah l-process ta` stralc u ghandha taghti dawk id-direttivi u timponi dawk il-kundizzjonijiet li jkunu xierqa. L-istess Artikolu 300B jipprovdi illi l-Qorti ghandha tiddetermina jekk l-ordni u d-direttivi taghha ghandhomx ikunu effettivi fir-rigward ta` kulhadd jew inkella ghandhomx japplikaw limitament ghal-persuni specifici li jkunu indikati fis-sentenza.*

*Bl-ispejjez.*

Rat in-nota b` dokument li pprezentat ir-rikorrenti fl-14 ta` Frar 2020.

Semghet ix-xiehda tar-Ricevitur Ufficjali fl-udjenza tat-12 ta` Marzu 2020.

Rat id-digriet li tat fl-istess udjenza fejn ordnat l-allegazzjoni tal-atti tax-xoljiment u stralc tal-kumpannija D.A.G. Company Limited (Rik. Nru. 1051/2013 JZM).

Rat l-atti tax-xoljiment u stralc tal-kumpannija D.A.G. Company Limited (Rik. Nru. 1051/2013 JZM).

Semghet is-sottomissjonijiet bil-fomm tad-difensuri fl-udjenza tat-13 ta` Lulju 2020 wara li z-zewg nahat iddikjaraw l-gheluq tal-provi.

Rat illi l-kawza thalliet ghal provvediment ghal-lum.

Rat l-atti l-ohra.

## **II. Provi**

Il-qorti sejra tirreferi ghal dawk mill-provi li ghandhom rilevanza ghall-mertu tal-procediment odjern. Tajjeb jinghad li kienet ir-rikorrenti li pprezentat provi. L-intimat ma ressaqx provi ghaliex qaghad fuq il-provi akkwiziti.

### **1. Il-kuntratt tal-15 ta` Meju 1995**

Bis-sahha ta` dan il-kuntratt (fol 47 et seq) jirrizulta li r-rikorrenti xtrat u akkwistat minghand il-kumpannija D.A.G. Company Limited :

*the flat internally numbered eight (8) in second floor, forming part of the block without official number named Brookside Court, also known as Block B, having an entrance from Triq Patri Felic Sammut, formerly a new street off Mosta Road, St. Paul`s Bay, as bounded said block north-east by Triq il-Lampuki, south-east by said street Triq Felic Sammut and north west by property of the successors in title of the Kurja.*

Fost il-pattijiet u kondizzjonijiet tal-kuntratt, kien patwit illi :

2. *Vendor nomine guarantees peaceful possession according to law by virtue of a general hypothec over all the company`s property in general present and future, in favour of purchaser who accepts.*

### **2. Ix-xiehda tal-istralcjarju**

Fil-kaz tal-lum, l-istralcjarju kien ir-Ricevitur Ufficjali Av. Kevan Azzopardi li kien mahtur bi provvediment tal-Prim`Awla tal-Qorti Civili tal-11 ta` Frar 2014 (fol 22 et seq).

L-istralcjarju xehed illi fil-kaz in kwistjoni ma tantx kien hemm lok li jsiru *liquidation accounts* kif isir meta l-process ta` stralc ikun ikkomplikat ghaliex il-process tal-*winding up* kien *straight forward* fis-sens illi dahlu fil-kumpannija zewg ammonti : u cioe` flus li kienu depozitati fil-qorti ; u flus li thallsu minn kreditur. Huwa hejja skema ta` distribuzzjoni li kienet

approvata mill-qorti. In segwitu harget l-ordni tat-thassir tal-kumpannija mir-registru.

Kompla jixhed illi huwa ma ghamilx ricerki fir-Registru Pubbliku u fir-Registru tal-Artijiet dwar proprjeta` li seta` kellha l-kumpannija u dwar garanziji ipotekarji. Huwa sab koperazzjoni mill-persuni li qabel id-dikjarazzjoni ta` xoljiment kienu diretturi tal-kumpannija u hadd minnhom ma semma xejn dwar proprjeta` jew garanziji ipotekarji.

Stqarr illi x-xoghol tal-kumpannija meta kienet topera kien il-*finishing* ta` appartamenti. Ma dahalx fil-kwistjoni ta` jekk kenitx kumpannija li tizviluppa l-propjeta` b` mod generali jew jekk kenitx kumpannija li kienet kostitwita sabiex tizviluppa progett wiehed.

Qal illi ma kienx jaf bil-kuntratt tal-akkwist tar-rikorrenti.

Fisser li waqt l-istralc ma ttehidx kont ta` garanziji li setghu nghataw mill-kumpannija fiz-zmien meta kienet ghadha topera.

### **3. L-atti tal-procediment quddiem il-Prim` Awla tal-Qorti Civili bin-nru. 1051/2013 JZM**

Il-qorti akkordat talba tar-rikorrenti sabiex jigu allegati l-atti tal-procediment illi bih kienet xjolta, stralcjata u mhassra mir-registru l-kumpannija de qua. Il-qorti sejra tirreferi ghal dawk l-atti li tqis rilevanti ghall-fini tal-procediment odjern.

#### **a) Ir-rikors promotur**

It-talba sabiex il-kumpannija tkun xjolta u stralcjata mill-qorti saret abbazi tal-**Art 214(1)(a) tal-Kap 386.**

#### **b) Il-memorandum tal-kumpannija**



Issir referenza ghall-*objects clause* (art 3) fejn *inter alia* jinghad hekk :

*The objects for which the company shall be established are :-*

*(i) The following main activity shall be the main trading activity of the Company and the business of the Company shall consist principally of this activity :-*

*(a) To purchase, take on lease, exchange, lease or acquire by any title including emphyteusis and sub-emphyteusis or otherwise deal in and hold for the purpose of development or resale and traffic in freehold, leasehold or other property for any estate or interest whatsoever.*

*(ii) Further to the above the Company shall be authorised to carry on the following ancillary activities :-*

...

*(k) to sell, lease, hypothecate, mortgage, charge or otherwise dispose of the whole or any party of the property, movable or immovable, present and future, assets or undertaking.*

(sottolinear ta` din il-qorti)

**c) Il-verbali tal-udjenzi**

Mill-verbali tal-udjenzi, kemm tal-proceduri ta` xoljiment, kif ukoll dawk tal-istralc, ma jirrizultax illi r-rikorrenti qatt dehret sabiex turi l-interess taghha fl-esitu tal-proceduri.

**d) L-ewwel rapport tal-istralcjarju**

L-ewwel rapport tal-istralcjarju kien datat 28 ta` Ottubru 2014 u kien prezentat b` nota tas-27 ta` Jannar 2015 (fol 86 et seq). Fir-rapport huma indikati erba` kredituri. Ir-rikorrenti odjerni mhijiex wahda minnhom.

**e) Laggha tal-kredituri**

Ma jirrizultax illi r-rikorrenti kienet prezenti ghal-laqgħat tal-kredituri li sejjah l-istralcjarju fl-2015.

**f) Skema ta` distribuzzjoni**

L-iskema ta` distribuzzjoni proposta mill-istralcjarju kienet approvata mill-qorti fl-14 ta` Jannar 2016 (fol 104).

**g) L-ordni tat-thassir**

Il-kumpannija thassret mir-registru b`digriet mogħti mill-Prim`Awla tal-Qorti Civili fit-12 ta` Mejju 2016 (fol 108-109)

**III. L-Art 300B tal-Kap 386**

Ir-rikorrenti mexxiet bl-istanza odjerna abbazi tal-**Art 300B tal-Kap 386** li kien dahal fl-Att dwar il-Kumpanniji bis-sahha tal-Att IV tal-2003.

**1. Dritt**

Id-disposizzjoni taqra hekk :-

*(1) Meta kumpannija tkun thassret minn fuq ir-registru, kull persuna interessata tista` b`rikors, titlob lill-Qorti biex tordna hi li l-isem tal-kumpannija jkun restitwit fuq ir-registru u li l-istralc jerga` jinfetah.*

*(2) Meta, fuq rikors magħmul taht is-subartikolu (1), il-Qorti tkun sodisfatta li l-istralc u t-thassir tal-kumpannija jkun vizzjat bi frodi jew b`illegalità ta` natura materjali, il-Qorti tista` tordna li l-isem tal-kumpannija jkun restitwit fuq ir-registru u li l-istralc jerga` jinfetah għal dawk ir-ragunijiet u għal dak iz-zmien li l-Qorti tispecifica fid-decizjoni tagħha, u l-Qorti għandha tagħti dawk id-direttivi u timponi dawk il-kondizzjonijiet li jidhrilha xieraq.*

*(3) Il-Qorti għandha tilqa` t-talba biss jekk tkun sodisfatta li dak ikun l-uniku rimedju li jkun hemm.*

(4) *Fid-decizjoni taghha l-Qorti ghandha wkoll tiddeciedi jekk l-ordnijiet u d-direttivi taghha jkunux effettivi favur il-persuni kollha jew jekk ghandhomx japplikaw limitament ghal persuni specifiki indikati fid-decizjoni.*

(5) *Ma jista` jsir ebda rikors taht dan l-artikolu wara li jghaddu hames snin mid-data li fiha l-isem tal-kumpannija jkun thassar mir-registru.*

## **2. Ir-rekwiziti**

Minn qari ta` din id-disposizzjoni, jirrizultaw dawn ir-rekwiziti :

a) Meta kumpannija tkun thassret minn fuq ir-registru, il-persuna li b` rikors taghmel talba lill-qorti sabiex tordna li l-isem ta` l-kumpannija jkun restitwit fuq ir-registru u li l-istralc jerga` jinfetah trid tkun **persuna interessata**. [subartikolu 1 tal-Art 300B]

b) Il-qorti taghmel l-ordni li l-isem tal-kumpannija jkun restitwit fuq ir-registru u l-istralc jerga` jinfetah jekk tkun sodisfatta li l-istralc u t-thassir tal-kumpannija kien **vizzjat** :

i) **bi frodi ; jew**

ii) **b` illegalita` ta` natura materjali** [subartikolu 2 tal-Art 300B]

c) Il-qorti ghandha tilqa` t-talba biss jekk tkun sodisfatta li dak ikun **l-uniku rimedju** li jkun hemm [subartikolu 3 tal-Art 300B]

d) Ir-rikors irid ikun prezentat sa zmien **hames snin** mid-data li fiha l-isem tal-kumpannija jkun thassar mir-registru [subartikolu 5 tal-Art 300B].

## **3. Dottrina**

a) **Maltija**

Fil-Pag. 46-47 tal-Ewwel Volum ta' **Principles of Maltese Company Law** (Tieni Edizzjoni – MUP – 2019) **Andrew Muscat** jagħmel dawn l-osservazzjonijiet dwar l-Art 300B :-

*Prior to the introduction of article 300B, the Maltese Courts had in a number of cases tackled situations where a claim against a company was not taken into account by the liquidator who proceeded to finalise the winding up and have the company's name struck off the register. In these cases, the courts applied a remedy involving the effective revival of the company.*

*It should be remarked that the courts have been willing to provide such a remedy even where the omission by the liquidator to take into account a pending claim against the company was purely inadvertent. Article 300B, however, empowers the court to grant a remedy where it is satisfied that 'the winding up and striking off of the company has been vitiated by fraud or illegality of a material nature'. Would an inadvertent omission constitute 'illegality'? A wide interpretation ought to be afforded to the term 'illegality'. A liquidator who, whether negligently or fraudulently, fails to take into account a pending claim will, it is submitted, have acted unlawfully. After all, in terms of general principles of law, a person who does not use the prudence, diligence and attention of a bonus paterfamilias and causes damage as a result is deemed to have acted unlawfully. Moreover a liquidator is clearly bound by law to take into account all pending claims against a company and if he fails to do so through negligence, imprudence or want of attention he should also be deemed to have acted unlawfully.*

## **b) Ingliza**

**Fil-Ligi Ingliza, il-procedura bhal dik tentata mir-rikorrenti hija magħrufa bhal *restoration of dissolved companies to the register.***

**Fl-Ingilterra l-procedura tahseb għal *administrative restoration* u għal *restoration by the court.***

**Il-materja kienet regolata bil-Companies Act 1985. Wara li saret il-Companies Act 2006, tnehew id-disposizzjonijiet li kienu jirregolaw il-materja fil-Companies Act 1985, u gew trasposti għall-Companies Act 2006.**

**Il-ligi taghna ma jidhirx li tahseb ghal *administrative restoration*.**

**Ghalhekk bhala gwida, tajjeb jekk inharsu lejn id-disposizzjonijiet li minn Sec 1029 et seq tal-Companies Act 2006 jittrattaw *restoration to the register by the court*.**

Guristi awtorevoli tad-dritt socjetarju Ingliz kellhom okkazjoni jaghmlu analizi mirquma tal-ligi li tirregola l-procediment, l-iskop tieghu, kif jithaddem u fejn ghandu jwassal.

Bhala introduzzjoni, il-Qorti sejra tirreferi ghal pag. 778 ta' **Sealy`s Cases and Materials in Company Law** (9th Edition – OUP – 2010) fejn jinghad hekk –

*Restoration of dissolved companies to the register may be necessary if, for example, further assets are discovered, or someone wishes to bring a damages claim for which the former company was insured.*

*There are two procedures available for restoring companies to the register :*

*An administrative procedure available when companies have been incorrectly struck off as defunct under CA 2006 s 1000 or 1001 (see ii and vii above) requiring application to the registrar by the company`s former directors or former members within six years of the date of dissolution (CA 2006 s 1024)*

*and*

*A judicial procedure, requiring application to court (CA 2006 s 1029) in all other cases. The application may be made by a wide class of people [s 1029(2)] and must generally be made within six years of the dissolution of the company although there are various exceptions. For example there is no time limit where the application is for the purpose of bringing proceedings against the company for damages for personal injury (s 1030 1). The court has wide powers to make restoration including any case in which the court thinks it is just to do so (s 1031 1 c)*

CA 2006 ss 1024-1034 provide detailed rules on the pre-conditions and consequences of the procedures, including special supplementary rules dealing with company names and with restoration of property that had vested in the Crown.

(sottolinear ta` din il-qorti)

**Gower and Davies** fil-**Principles of Modern Company Law** (Eighth Edition – Sweet & Maxwell – 2008), wara li jirreferu ghall-Companies Act 1985 u ghall-Companies Act 2006, jaghmlu analizi aktar dettaljata tal-procedura fil-pag. 1232 et seq.

Ighidu hekk :-

*A contrast between the death of an individual and that of a company is that without divine intervention a dissolved company can be resurrected.*

*Following the CLR, the Act made two innovations in this area. First it introduced a limited form of administrative restoration to the register a result which had previously required a court order. Secondly a single method of court restoration replaced the formerly existing two methods which the courts had found some difficulty in making sense of and which overlapped to a considerable extent.*

#### Administrative restoration

*The new form of administrative restoration applies only where the company was dissolved by the Registrar under the provisions relating to defunct companies. Thus it does not apply to either voluntary striking off or to dissolution after winding up. The conditions for administrative restoration to the register confine it to situations where the company was carrying on business or in operation at the time it was struck. Thus the main purpose of administrative restoration is to deal more cheaply with reversing a striking off, which, ideally, should not have occurred in the first place. For probably the same reason, the application for restoration may be made only by a former director or former member of the company, but no application for restoration may be made more than six years after its dissolution. If any of the company`s property is vested in the Crown as bona vacantia, the Crown`s representative must consent and the applicant must offer to pay any costs of the Crown in relation to the application and more importantly dealing with the property during the period of dissolution. Finally the*

*applicant must deliver to the Registrar such documents as are necessary to bring the company`s public records up-to-date and to pay any penalties outstanding at the time the company was dissolved.*

*If these conditions are met the Registrar is under a duty to restore the company to the register. Notice of the decision must be given to the applicant and the restoration takes effect when that notice is sent. Public notice must be given of the restoration. The effect of restoration is that the company is deemed to have continued in existence as if it had not been struck off. However any consequential directions, if necessary, for placing the company and all other persons in the position (as nearly as possible) as they would have been in, had the company not been struck off, are to be given, not by the Registrar, but by a court, to which application may be made within three years of restoration.*

#### *Restoration by the court*

*The two court-based restoration methods previously provided were contained sections 651 and 653 of the 1985 Act. The current provisions are based on those of section 653, the somewhat simpler procedure. The court-based procedure applies to all forms of dissolution and a much wider range of persons may apply for restoration. These include not just former directors or members but any creditor of the company at the time of dissolution, anyone who but for the dissolution would have been in a contractual relationship with it, any person with a potential legal claim against the company, any manager or trustee of an employee pension fund, and the Secretary of State. This caters for a much wider range of reasons for wanting to have the company restored to the register, a common one being in order to sue or assert a right against it. Normally such persons must act within six years of the date of dissolution, but a claim for restoration in order to bring a claim for damages for personal injury against the company may be made at any time.*

*The court has power to order restoration if (a) in the case of striking off of a defunct company, it was carrying on business or in operation at the time ; (b) in the case of voluntary striking off, the conditions for such a striking off were not complied with ; and (c) in any other case the court thinks it just to do so. Restoration, if ordered, takes effect from the time the court`s order is delivered to the Registrar and the Registrar must give publicity to the order in the usual way. The effect of restoration by the court is the same as with administrative restoration and the court may give the necessary directions to effect the principle that the company should be treated as if never dissolved. (sottolinear ta` din il-qorti)*

#### **4. Gurisprudenza tal-Qrati Maltin**

Wara l-2009 il-pronunzjamenti tal-qrati taghna dwar rikorsi li kienu ntavolati abbazi tal-Art 300B tal-Kap 386 kienu dawn :-

##### **a) Mill-Prim`Awla tal-Qorti Civili**

- 7 ta` Lulju 2011  
Rik. Nru. 715/2010  
Lay Lay Co. Limited vs Paul Darmanin et
- 23 ta` April 2013  
Rik. Nru. 650/2011  
Joseph Aquilina et vs Dr Edward Woods et
- 24 ta` Marzu 2015  
Rik. Nru. 780/2014  
A.X. Holdings Limited et vs Registratur tal-Kumpanniji
- 31 ta` Jannar 2017  
Rik. Nru. 541/2016  
Charles Borg Barthet vs Registratur tal-Kumpanniji

##### **b) Mill-Qorti Civili (Sezzjoni tal-Kummerc)**

- 28 ta` Marzu 2019  
Rik. Nru. 28/2018  
Av. Jean-Pie Gauci Maistre noe vs Registratur tal-Kumpanniji
- 28 ta` Marzu 2019  
Rik. Nru. 29/2018  
Av. Jean-Pie Gauci Maistre noe vs Registratur tal-Kumpanniji
- Rik. Nru. 6/2019  
Edward Micallef et vs X  
30 ta` Mejju 2019



L-Art 300B huwa fost dawk id-disposizzjonijiet tal-Kap 386 li huma nkluzi fis-Sub-Titolu III taht l-isem : "Disposizzjonijiet applikabbli ghal Kull Xorta ta` Stralc`". Dan premiss, tajjeb jinghad illi f`kull wahda mid-decizzjonijiet appena citati, si trattava ta` xoljiment u stralc volontarju ta` kumpannija. Din tal-lum hija l-ewwel kawza fejn persuna talbet l-intervent tal-qorti, wara li thassar l-isem ta` kumpannija mir-registru, bhala konsegwenza ta` l-gheluq tal-procediment tal-istralc tal-kumpannija, li mill-bidu sal-ahhar kien taht il-kontroll tal-qorti.

## **5. Persuna interessata [subartikolu 1 tal-Art 300B]**

Mill-elementi li jsawwru d-disposizzjoni, il-qorti sejra tqis *in primis* il-kwalifika li trid il-ligi sabiex rikorrent ikollu *locus standi* fil-kawza.

Skont is-subartikolu 1 tal-Art 300B, meta kumpannija tkun thassret minn fuq ir-registru, **kull persuna interessata** tista` taghmel talba lill-qorti sabiex tordna li l-isem ta` l-kumpannija jkun restitwit fuq ir-registru u li l-istralc jerga` jinfetah.

F` **Sec 1029(2) tal-Companies Act 2006**, il-legislatur Ingliz haseb ghal lista ta` persuni li jistghu jintavolaw azzjoni ghal *restoration by the court*, fosthom : (d) *any person having an interest in land or other property (i) that was subject to rights vested in the company, or (ii) that was benefited by obligations owed by the company u any other person appearing to the court to have an interest in the matter.*

Fil-kaz tal-Kap 386, il-legislatur Malti mar mill-ewwel ghal *kull persuna interessata*.

Jekk jirrizulta li r-rikorrenti odjerna ma tikkwalifikax bhala *persuna interessata* ma jkollhiex *locus standi*. Il-kaz jieqaf hemm u ma jkunx hemm htiega li l-qorti tghaddi ghall-konsiderazzjoni tar-rekwiziti l-ohra.

Tikkwalifikax ir-rikorrenti odjerna bhala *persuna interessata* hija kwistjoni li trid titqies skont il-fatti u cirkostanzi partikolari ta` l-kaz.

Fir-rikors promotur, ir-rikorrenti fissret dak li fil-fehma taghha kien l-*interest* taghha sabiex tippromwovi l-azzjoni odjerna.

**Fis-sostanza**, ir-rikorrenti tghid tliet affarijiet :

- Tikkontendi li meta xtrat u akkwistat l-fond de quo minghand il-kumpannija, din tatha garanzija ta` pacifiku pussess tal-fond b` ipoteka generali. Tghid illi jekk il-kumpannija tibqa` mhassra, sejra tibqa` sprovvista minn dik il-garanzija li kienet kostitwita favur taghha.
- Kemm fir-rikors promotur, kif ukoll waqt it-trattazzjoni tar-rikors, ir-rikorrenti tishaq li l-ipoteka generali li qeghda tiggarrantixxi l-pacifiku pussess tikkostitwixxi *a contingent liability* favur taghha li waqt l-istralc ma nghatatx konsiderazzjoni mill-istralcjarju.
- Tghid illi b` dik l-omissjoni l-istralcjarju kiser l-Art 301 u/jew l-Art 302 tal-Kap 386.

Il-frazi *persuna interessata* mhijiex definita fil-Kap 386.

Il-qorti ssib li fil-kaz tal-lum ir-rikorrenti tikkwalifika bhala *persuna interessata* fuq l-iskorta tal-ipoteka generali li kienet kostitwita fil-kuntratt ta` kompravendita sabiex tiggarrantixxi l-pacifiku pussess taghha ghall-fond de quo.

Tikkwalifikax din l-ipoteka generali bhala *a contingent liability* kif issostni r-rikorrenti hija materja li sejra tkun trattata `l quddiem.

**Ir-rekwizit tal-interess huwa sodisfatt.**

## **6. It-terminu [subartikolu 5]**

L-azzjoni skont l-Art 300B trid tkun istitwita b`rikors li ghandu jkun prezentat sa zmien (**perentorju**) ta` hames snin mid-data li fiha l-isem tal-kumpanija jkun thassar mir-registru. Fil-kaz tar-rikorrenti odjerna, it-terminu tal-hames snin kien osservat.

**Ir-rekwizit taz-zmien huwa sodisfatt ukoll.**

## **7. L-uniku rimedju [subartikolu 3]**

Skont is-subartikolu 3 tal-Art 300B, il-qorti ghandha tilqa` t-talba biss jekk tkun sodisfatta li dak li jahseb ghalih is-subartikolu 2 tal-Art 300B kien l-uniku rimedju ghad-disposizzjoni tar-rikorrenti.

L-ordni tat-thassir tal-isem tal-kumpanija mir-registru sar b`digriet li kien moghti mill-Prim`Awla tal-Qorti Civili fit-12 ta` Mejju 2016.

Kien **digriet definitiv** li bih mhux biss kien konkluz l-istralc izda fejn kien ordnat it-thassir tal-isem tal-kumpanija.

Saru fil-qorti kemm il-proceduri li wasslu ghax-xoljiment tal-kumpanija, kif ukoll il-procedura tal-istralc li segwiet ix-xoljiment. Ir-rikors ghax-xoljiment u stralc tal-kumpanija kien promoss mill-kumpanija stess u kien notifikat lir-Registatur tal-Kumpaniji. L-att ghalhekk dahal fil-*company file* tal-kumpanija u l-pubbliku `seta` jkollu vizjoni tieghu, inkluza r-rikorrenti. Il-process li ppreceda d-dikjarazzjoni ta` xoljiment u l-ordni tal-istralc kien pubbliku.

**Ma jirrizultax li r-rikorrenti qatt dehret jew talbet li taghmel sottomissjonijiet fil-procediment tax-xoljiment tal-kumpanija. L-istess ighodd ghall-istralc fejn ma jirrizultax li r-rikorrenti qatt kienet prezenti ghall-udjenzi pubblici li saru fil-qorti. Lanqas ma jirrizulta li marret ghal-laqghat tal-kredituri li nieda l-istralcjarju. Dan kollu jfisser li mill-bidu tal-procediment li wassal ghax-xoljiment tal-kumpanija, matul l-istralc kollu, u anke meta nghata d-digriet tat-12 ta` Mejju 2016, il-qorti ma kenitx taf bir-rikorrenti.**

Din il-qorti diga` kellha okkazjonijiet ohra li tghid li l-Kap 386 huwa *lex specialis* li jidderoga mil-*lex generalis*.

Fi proceduri fejn tipprevali l-ligi generali u fejn ghandek partijiet kontrapposti, il-legislatur haseb ghal kif ghandhom jigu kontestati digrieti nkluzi digrieti definittivi.

Fis-sentenza li tat il-Qorti tal-Appell Kummercjali fl-10 ta` Awissu 1953 fil-kawza "**Baldacchino vs Bellizzi**" (Kollez. Vol. XXXVII.I.519) inghad illi hemm tliet xorta ta` digrieti, cioe` dawk definittivi, dawk interlokutorji, u dawk li la huma definittivi u lanqas interlokutorji. Filwaqt li ghall-ewwel u ghat-tieni kategorija hemm appell kif kontemplat fil-Kap 12, ghat-tielet kategorija ma hemmx.

Jekk ir-rikorrenti hassitha aggravata bid-digriet definittiv tat-12 ta` Mejju 2016, kienet prekluzja milli tirrikorri ghall-procedura kontemplata fil-Kap 12, anke ghaliex l-istralc mhuwiex "kawza" regolata bil-Kap 12, izda huwa procediment regolat b` *lex specialis* li huwa ben distint mill-"kawza" li twassal ghax-xoljiment ta` kumpannija.

**Billi jidher li dan kien l-uniku procediment ghad-disposizzjoni tar-rikorrenti, il-qorti tghid li anke dan ir-rekwizit jissussisti.**

## **8. Vizzju [subartikolu 2]**

**Dan huwa l-qofol sostanzjali tal-Art 300B.**

Tajjeb jinghad illi filwaqt li fil-ligi Ingliz il-kriterji li ghandhom jigu applikati mill-qorti huma wiesgha, fil-kaz tal-Art 300B il-legislatur mar ghal ragunijiet ristretti fin-natura taghhom, li twessghu biss bl-intervent interpretattiv tal-qorti, li hadu in konsiderazzjoni fid-decizjoni taghhom il-fatti u cirkostanzi ta` kull kaz partikolari.

Fil-ligi taghna, il-qorti taghmel l-ordni sabiex l-isem tal-kumpannija jkun restitwit fuq ir-registru u l-istralc jerga` jinfetah jekk tkun sodisfatta li

L-istralc u t-thassir tal-kumpannija kien **vizzjat** : bi frodi ; **jew** b` illegalita` ta` natura materjali.

**a) Frodi**

Fir-rikors promotur, ir-rikorrenti stess **eskludiet** il-vizzju dovut ghal frodi.

**b) Illegalita` ta` natura materjali**

Ir-rikorrenti qeghda toqghod fuq dan l-element.

Qabel ma tidhol fil-mertu tal-kwistjoni, il-qorti tosserva li kumpannija tibqa` tezisti, u tibqa` tgawdi l-personalita` guridika taghha sal-mument li isimha jithassar mir-Registru tal-Kumpanniji. Meta jithassar l-isem, il-kumpannija legalment titqies illi bhala persuna tkun "*mietet*". Bil-procedura skont l-Art 300B il-kumpannija tkun "*irxuxtata*" jekk il-qorti tkun sodisfatta li jissussistu r-rekwiziti li ssemmi l-ligi. Fl-essenza taghha, l-"*irxuxstar*" ta` kumpannija tibqa` mizura specjali u eccezzjonali. Ghalhekk f`kull kaz il-qorti trid turi kawtela u toqghod attenta ferm li l-kaz ikun genwin sabiex jigi skansat l-abbuz.

Il-Kap 386 ma jaghti l-ebda tifsira ta` x` tikkostitwixxi *illegalita`* ghall-fini tas-subinciz 2 tal-Art 300B. L-interpretazzjoni ta` l-frazi *illegalita`* mhijiex ristretta ghal fergha jew ohra tad-dritt. B` *illegalita`* il-qorti qeghda tifhem att li jmur kontra l-ligi. Mhux kull *illegalita`* tiskatta l-jedd ghal rimedju skont is-subinciz 2 tal-Art 300B, proprju ghaliex l-*illegalita`* lamentata trid tkun *materjali*. X` hinu *materjali* jiddependi mill-fattispeci ta` kull kaz. Fi kwalunkwe kaz, il-materjalita` tal-*illegalita`* trid tkun tali li tivvizzja l-istralc.

Fis-sentenza li tat il-Qorti tal-Kummerc fis-7 ta` Lulju 1960 fil-kawza "**Antonio Caruana et vs Joseph Tabone et**" inghad hekk :-

*L-istralc huwa dak il-perijodu transitorju mehtieg appuntu ghad-determinazzjoni tal-attiv b`serje ta` operazzjonijiet intizi biex jillikwidaw l-affarijiet u biex jigu rizzoluti l-vertenzi pendenti. L-istralcjarju hu l-*

*mandatarju maghjul mis-soci jew mill-Qorti biex igib ghat-terminu l-operazzjonijiet in corso, jezigi l-krediti u jestingwi l-passivitajiet u hekk jikkjarixxi l-affarijiet tas-socjeta` biex jasal ghal rizultat cert li juri jekk hemmx attiv x` jitqassam jew passiv li ghandu jigi sopportat. Huwa ma jistax jaghti hajja ghal operazzjonijiet godda ghaliex appuntu l-funzjoni tieghu hija dik li jillikwida l-affarijiet ga mibdijin u ghaldaqstant ghal hekk biss ghyandu jigi limitat l-inkariku tieghu.*

Fis-sentenza li tat il-Qorti tal-Kummerc fl-10 ta` Mejju 1993 fil-kawza "**Salvatore Bondin vs Paul Vella noe**" inghad hekk :-

*Wara r-risoluzzjoni tax-xoljiment ta` socjeta` kummercjali, l-iskop ta` dik is-socjeta` jinbidel u jittrasforma ruhu minn dak ta` prosegwiment ta` attivitajiet normali kummercjali ghal dak ta` realizzazzjoni ta` l-assi u hlas ta` djun, u distribuzzjoni bejn is-soci ta` dak li jkun baqa`.*

Ir-rikorrenti **talleqa** li l-istralcjarju kkommetta "*illegalita` ta` natura materjali*" ghaliex :

- ghalkemm kien jaf, jew messu kien jaf, li n-negozju tal-kumpannija kien fil-proprjeta`, kif irrizulta mill-*objects clause* inserita fil-*memorandum*, qaghad ghal kollox fuq id-dikjarazzjoni li ghamlu mieghu l-persuni, li qabel id-dikjarazzjoni ta` xoljiment kienu diretturi, minflok ghamel ricerki fir-Registru Pubbliku.
- li kieku saru dawk ir-ricerki kienet tirrizulta l-ipoteka generali li kienet registrata favur taghha kontra l-kumpannija, u ma kienx jipprocedi sabiex jirrakkomanda lill-qorti li taghlaq l-istralc u tordna t-thassir tal-isem.
- l-ipoteka generali li kienet qeghda tiggarrantixxi l-pacifiku pussess taghha ghall-fond de quo kienet tikkostitwixxi *a contingent liability* li ma setghetx tkun injorata mill-istralcjarju.
- Bl-omissjoni tieghu l-istralcjarju kiser l-Art 301 u/jew l-Art 302 tal-Kap 386.

Ir-rikorrenti tghid li l-kumpannija ghandha *a contingent liability* fil-konfront taghha.

Il-qorti hija sprovvista minn dottrina legali u giurisprudenza nostrana li tfisser in-natura ta' *contingent liabilities*. Ghalhekk sejra tirreferi ghad-dottrina u giurisprudenza Ingliza.

L-**Oxford Dictionary of Accounting** (Fifth Edition – 2016 – OUP) ifisser a *contingent liability* b' dan il-mod :

*Either (i) a possible obligation that arises from past events whose existence will be confirmed only by the occurrence of one or more uncertain future events nor wholly within an entity's control ;*

*or (ii) a present obligation that arises from past events where the amount of the obligation cannot be measured reliably or it is not probable that a transfer of economic benefits will be required to settle the obligation.*

*Under the Financial Reporting Standard Applicable in the UK and the Republic of Ireland (Section 21) an entity should not recognize a contingent liability except in certain circumstances arising during business combinations. However it should disclose information about contingent liabilities unless the possibility of economic loss is considered very remote.*

*The relevant International Accounting Standard is IAS 37.*

Fil-Pag. 214 ta' **Insolvency Law : Corporate and Personal** (Pearson Longman – 2003) **Andrew R. Keay** u **Peter Walton** jirreferu ghall-gurisprudenza Ingliza dwar *contingent liabilities*. Ighidu hekk :

*A contingent creditor is someone towards whom, under an existing obligation, the company may or will become subject to a present liability on the happening of some future event or at some future date [Re William Hockley Ltd at 558].*

*A contingent liability exists if there is a doubt whether there will be a debt owing at all [Re Dummelow (1873) LR 8 Ch 997 at 1001].*

*There must be an existing obligation and the obligation must be able to be valued or estimated.*

Fil-Pag 134 et seq ta' **Principles of Corporate Insolvency Law** (Fourth Edition – 2011 - Sweet & Maxwell) **Roy Goode** jittratta l-koncett ta' *contingent liability* billi jghid hekk –

*A contingent event is one which may or may not occur. But to say that a contingent liability is a liability which may or may not be incurred is to spread the net too far, for the number of contingencies as thus definite is infinite. Is it to be said, for example, that because I may decide at some future date to buy goods and incur a liability for the price I have a contingent liability? Clearly not. No one can tell what transactions I may decide to enter into in the future or on what terms. To give the phrase 'contingent liability' any meaning we must restrict it to a liability or other loss which arises out of an existing legal obligation or state of affairs but which is dependent on the happening of an event that may or may not occur. Many of the cases have stressed the need for the liability to arise out of an existing obligation [New Cap Reinsurance Ltd v. Grant (2008) 68 A.C.S.R. 176; Winter v. I.R.C. (1961) 3 All E.R. 855, per Lord Hodson at 864; Re William Hockley Ltd. (1962) 2 All E.R. 111, per Pennycuik J. at 113; and Stonegate Securities Ltd. V. Gregory (1980) 1 Ch. 576, per Buckley L.J. at 579]. Examples are: the liability of a surety, which is created by the guarantee, but arises only on default by the principal debtor; or a drawer or endorser of a bill of exchange, which is created by signature of the bill, but comes into existence only if the acceptor as the party primarily liable fails to pay; of an insurer under a policy, but depends on the occurrence of the event against which cover is given; and of a defendant or prospective defendant in a claim for negligence which may or may not succeed. However it is not every contingent liability that springs from an existing legal obligation. In Re Sutherland deceased [Re Sutherland deceased, Winter v. I.R.C. (1963) A.C. 235] a majority of the house of Lords considered that to require an existing legal obligation was to take too narrow a view of what constitutes a contingent liability. It is true that this was a tax case, not a decision on insolvency legislation, but what it does show is that in considering whether there is a contingent liability the court has regard to the existing commercial situation, not merely an existing legal obligation. In this regard, assistance can be derived from Financial Reporting Standard 12 which defines a contingent liability in the following terms:*

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

*or*

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

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



or

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

*It will be seen in this definition the reference is to “past events” rather than legal obligations. Of course, accounting definitions do not necessarily correspond to legal definitions. But as has been rightly pointed out, the terms “contingent liabilities” is ultimately not a term of art and its precise meaning will depend on its context [County Bookshops Ltd v. Grove (2003) 1 B.C.L.C. 479] The court is thus entitled to have regard to commercial realities. In Re Sutherland (op. cit.) the factual situation was the near-certainty that ships would be sold, producing balancing charges for tax purposes. An example in terms of an exiting commercial situation is the projected expenditure of goodwill defects for which the company has no legal liability, past experience having shown that such a recall is likely needed at least once during the course of a year. By contrast, the potential liability of a litigant to have an order for costs made against him is too uncertain and too much in the discretion of the court to rank as a contingent liability.*

Imbaghad fil-Pag 145 et seq ta' **Principles of Corporate Insolvency Law,**) **Roy Goode** jkompli jaghmel dawn l-osservazzjonijiet :-

*Just as problems may arise in the valuation of assets, so also there may be difficulties in the estimation of liabilities. This is particularly likely to be the case as regards unqualified existing liabilities, contingent liabilities and the expenses of liquidation.*

...

*In the case of a contingent liability the difficulty is greater still, since the prospects of the contingency occurring may range from almost zero to a near-certainty. Accountancy standards are of limited value in this context, because contingent liabilities are not “recognised” (i.e. included as an item in the accounts) but are merely required to be disclosed by a note to the accounts unless the possibility of a transfer of economic benefits to settle the obligation is remote, while the critical question of measurement of a contingent liability remains largely unaddressed.*

*Where a contingent liability is capable of valuation, it should presumably be valued on the same basis as if it were being admitted to proof by the liquidator as a claim by the creditor. This does not carry us*

*much further, since the amount for which contingent claims are admitted to proof in a winding up is usually settled by negotiation. The assessment of contingent claims and liabilities is, of course, the particular province of the actuary, but again actuarial practice is of limited relevance because actuaries base their assessments not on individual cases, but on the total of the relevant population, whereas the question with which we are concerned in the valuation of a particular contingent liability incurred by a particular company.*

*There is no great difficulty in valuing many contingent liabilities. For example, if at the relevant date the company is drawer or endorser of a bill of exchange, or a surety under a guarantee, and the party liable has convened a meeting for the purpose of going into insolvent voluntary winding up with no prospect of paying a dividend, the contingent liability will be little less than the face value of the bill or debt. At the other end of the scale, where the party primarily liable is financially strong or the creditor already holds massive security from the debtor, the contingent liability can be treated as so remote that it need not be given any value. The problem case is the contingency which is not so remote that it can be ignored nor so imminent that it is almost bound to happen. Different approaches are possible. One is to say that if there is a more than even chance of the contingency occurring, the liability should be taken as the present value of the contingent liability, for example, the amount of a guaranteed debt discounted to take account of its futurity. On this approach, a contingent liability with an 80 per cent chance of accrual, although discounted for futurity would not be discounted for the 20 per cent chance that it would not accrue, whilst a liability with a 50 per cent chance of accrual would be disregarded altogether. An alternative approach is to value the contingent liability at the percentage of likelihood of its occurrence, so that if the likelihood were 80 per cent of the full liability, whilst a contingent liability with a 10 per cent chance of accrual would be estimated at the present value of 10 per cent of the full liability. Neither of these approaches seems fully satisfactory. The first seems to set the threshold of likelihood too high, while the second is contrary to prevailing practice, which is to value the contingency in full (less any discount for futurity) if it will probably occur and is capable of valuation and disregard it altogether in other cases. It is thought that the question to be asked is whether there is a real prospect that the contingency will occur, in which case it should be brought in at its present value without further discount for the possibility that it may occur.*

Fl-isfond ta` din id-dottrina u giurisprudenza, il-qorti sejra tqis cioe` jekk il-garanzija tal-pacifiku pussess koperta b` ipoteka generali kenitx

tikkostitwixxi *a contingent liability* li kellha tinghata konsiderazzjoni mill-istralcjarju.

Il-qorti hasbet fit-tul.

**Ma ssibx li l-ipoteka generali, li kienet kostitwita favur ir-rikorrenti meta xtrat u akkwistat il-fond de quo minghand il-kumpannija, tista` titqies fil-kaz tal-lum bhala li tikkostitwixxi *a contingent liability*.**

In sostenn tal-pretensjoni taghha, ir-rikorrenti tirreferi ghall-Art. 301 u/jew l-Art. 302 tal-Kap. 386 bhala disposizzjonijiet li kienu vjolati mill-istralcjarju.

**L-Art 301 tal-Kap 386** jaqra :-

*F`kull stralc ta` kumpannija fejn l-attiv ikun bizzejjed biex jissodisfa l-passiv, kull djun li jkollhom jithallas b`kontingenza, u kull talbiet kontra l-kumpannija, prezenti jew futuri, certi jew kontingenti, accertati jew li jistghu jkunu dovuti bhala danni, ikunu accettati bhala prova kontra l-kumpannija, fejn issir stima gusta, kemm jista` jkun tal-valur ta` dawk id-djun jew talbiet li jistghu jkunu suggetti ghal xi kontingenza jew li huma dovuti bhala danni izda mhux accertati, jew li ghal xi raguni ohra ma jkollhomx valur cert. Applikazzjoni tarregoli dwar precedenza.*

**L-Art. 302 tal-Kap. 386** ighid :-

*Fl-istralc ta` kumpannija li l-attiv taghha ma jkunx bizzejjed biex jissodisfa l-passiv, il-jeddijiet ta` kredituri assicurati jew mhux assicurati u l-priorità u l-precedenza tad-dejn taghhom, ikunu regolati bil-ligi fis-sehh ghal dak iz-zmien.*

Fil-kaz tal-lum, irrizulta li fil-kors tal-istralc, l-istralcjarju rrelata lill-qorti li l-kumpannija kellha attiv konsistenti fi flus fl-ammont ta` €6,905 u ghalhekk ippropona skema ta` distribuzzjoni li kienet approvata mill-qorti.

Dan ifisser li l-Art 302 mhuwix applikabbli.

Ghalkemm il-kumpanija kienet in attiv, il-qorti tghid li lanqas l-Art. 301 ma huwa applikabbli.

Tghid hekk ghaliex l-ipoteka generali li saret sabiex tiggarrantixxi l-pacifiku pussess mhijiex *dejn li jkollu jithallas b`kontingenza* (fit-test bl-Ingiliz tal-ligi taghna : *debts payable on a contingency*).

Tkompli tghid li waqt il-procedura tax-xoljiment tal-kumpanija, u kemm dam ghaddej l-istralc sakemm intemm bid-digriet tat-thassir tal-isem mir-registru, ma rrizultax li saret ebda *talba* (fit-test bl-Ingiliz : *claim*) relatata mat-twettieq ta` l-obbligazzjoni naxxenti mill-garanzija tal-pacifiku fuq riferita.

Lanqas ma jista` l-Art. 301 ikun imfisser jew jigi nterpretat sabiex ikopri *talba futura* ghar-raguni li tibqa` ma tikkwalifikax bhala *kontingenza* ghaliex fl-istralc in-natura tal-garanzija ma tistax tigi realment jew gustament kwantifikata, lanqas ghal fini ta` *discounting*.

Bhala fatt irrizulta li l-istralcjarju ma ghamilx ricerki fir-registru pubbliku. Kien ikun ahjar li kieku saru r-ricerki tenut kont li l-istralcjarju kellu flus mnejn ihallas ghalihom. Fl-istess waqt, il-fatt illi ma sarux ricerki, u allura l-ipoteka generali ma kenitx a konoxxenza tal-istralcjarju, ma jissodisfax ir-rekwizit tal-*illegalita` ta` natura materjali* ghaliex dik l-ipoteka generali ma kienet sejra tbiddel xejn mid-direzzjoni li kellu jiehu l-istralcjarju.

**Li kieku l-qorti kellha taccetta l-interpretazzjoni kwazi kwazi bla tarf tad-disposizzjonijiet tal-ligi, li abbazi taghhom ir-rikorrenti qeghda ssejjes it-talba taghha, ikun tfisser li, ghaliex fil-kors tal-operat taghha kumpanija tkun bieghet u ttrasferiet propjeta` mmobbli minn taghha lil terzi fejn tkun tat garanzija tal-pacifiku pussess, dik il-kumpanija f`termini reali u pratici la qatt tista` tigi xjolta (la volontarjament u lanqas mill-qorti) u wisq anqas stralcjata sakemm jghaddi kull terminu ghal garanzija tal-pacifiku pussess. Ikun ifisser li l-process kollu tal-istralc jaqa` f`paralizi.**

**Il-qorti tinsab moralment certa li dak pretiz mir-rikorrenti ma kienx jinkwadra fil-hsieb tal-legislatur meta nkiteb (u sar ligi) l-Art.**

**300B tal-Kap. 386 li qed jigi nvokat mir-rikorrenti sabiex issostni t-talba taghha.**

**Mhuwiex sodisfatt ir-rekwizit tas-subartikolu 2.**

**Decide**

**Ghar-ragunijiet kollha premessi, il-qorti qeghda taqta` u tiddeciedi billi tichad it-talba tar-rikorrenti, spejjez ghar-rikorrenti.**

**Onor. Joseph Zammit McKeon  
Imhallef**

**Amanda Cassar  
Deputat Registratur**