



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

**ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON**

Illum it-Tnejn, 30 ta` Novembru 2020

**Kawza Nru. 7
Rikors Nru. 10/2020 ZM**

**Atlantica Gamma Limited
(C55939)**

kontra

X

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentat fit-**30 ta` April 2020** li jaqra hekk :-

1. Illi dan ir-rikors qiegħed isir a tenur tal-Artikolu 218(1)(c) tal-Att dwar il-Kumpanniji (Kap 386 tal-Ligijiet ta` Malta) permezz ta` liema qiegħed jintalab l-istralc tas-socjeta` esponenti għar-raguni mfissra fl-artikolu 214(2)(a)(ii) tal-istess Att.

2. Illi s-socjeta` esponenti Atlantica Gamma Limited (C55939) giet kkostitwita fil-11 ta` April 2012 bhala Limited Liability Company, senjatament bhala Special Purpose Vehicle ("SPV") sabiex takkwista u eventwalment topera tip ta` Oil Rig maghruf bhala heavy tender assist drilling barge with MEP, bl-isem ta "GAMMA" (il-"Gamma Rig").

3. Illi ghal dan il-ghan, s-socjeta` esponenti dahlet f` kuntratt ghall-kostruzzjoni tal-istess Gamma Rig mas-socjeta` navali Ciniza Dalian Shipbuilding Industry Company maghrufa bhala DSIC ("**DSIC**"). Is-socjeta` esponenti hallset depozitu ta` US\$18,599,625 akkont tal-prezz tar-rigg ordnat u nefqet ukoll somom ingenti ta` flus li jeccedu ghoxrin miljun Dollaru Amerikan (US\$20,000,000) ohra bhala pagamenti u spejjes relatati mal-istess progett ta` kostruzzjoni tar-rigg imsemmi.

4. Illi xi zmien wara li gie ffirmat il-kuntratt bejn s-socjeta` esponenti u DSIC u wara illi bdew ix-xoghlijiet ghall-kostruzzjoni tar-rigg tqajmu diversi problemi u differenzi bejn il-partijiet minhabba dewmien fit-twettieq tal-kuntratt u eventwalment, wara diversi tentattivi sabiex tinstab soluzzjoni li ma hallew ebda ezitu positiv, is-socjeta` esponenti, fuq pariri legali illi hadet, iddecidiet illi tittermina l-kuntratt u hejjiet proceduri ta` arbitragg internazzjonali gewwa Londra kontra DSIC sabiex tirkupra d-depozitu u spejjez mhallssa minnha.

5. Illi ghar-ragunijiet imfissra fil-lodo arbitrali parzjali fl-istess proceduri ta` arbitragg, it-Tribunal Arbitrali cahad it-talbiet tas-socjeta` esponenti u sahansitra ddikjara illi DSIC ghandha dritt ghar-rizarciment ta` danni kkawzati bit-terminazzjoni tal-kuntratt ta` kostruzzjoni tar-rigg (kopja tal-lodo arbitrali hija annessa u mmarkata Dok A). Fil-fatt, issa l-istess Tribunal Arbitrali qieghed jikkunsidra l-likwidazzjoni ta` l-istess danni dovuti lil DSIC, u jidher li s-socjeta` esponenti tista` tigi kkundannata thallas lis-socjeta` DSIC, sommom ngenti ta` flus f` danni illi hija qed tipprospetta illi jistghu ivarjaw bejn tnejn u ghoxrin miljun dollaru Amerikan, u tmienja u tmenin miljun dollaru Amerikan (USD 22,000,000 - USD 88,000,000.00).

6. Illi dan il-lodo arbitrali parzjali u l-lodo arbitrali eventwali dwar il-likwidazzjoni tad-danni ma humiex appellabbli.

7. Illi wara t-terminazzjoni tal-kuntratt ta` kostruzzjoni tar-rigg, l-iskop li ghalih giet inkorporata s-socjeta` esponenti m`ghadux jezisti u l-istess socjeta` esponenti ma ghandha ebda assi jew interessi kummercjali ohra u ma ghandha ebda attivita` jew operat kummercjali. Fil-fatt, l-unici assi tas-socjeta` esponenti huma depoziti bankarji minimi ta` circa hames mitt ewro (€500) u receivables ta` madwar tletin elf ewro (EUR 30,000) u ma ghandha l-ebda sors ta` qligh jew redditu iehor.

8. Illi barra minn hekk, is-socjeta` esponenti ghandha djun illi jeccedu s-somma ta` hamsa u erbghin miljun dollaru Amerikan elf (USD 45,000,000), li jikkonsistu fi flus mislufa lis-socjeta` esponenti mill-azzjonista taghha Atlantica Tender Drilling Ltd ghall-progett ta` kostruzzjoni tar-rigg hawn fuq imsemmi, liema progett huwa issa tterminat u mitluf. Barra minn hekk, kif hawn fuq imsemmi, is-socjeta` esponenti hija rinfaccjata wkoll bi prospective liabilities ngenti li ser jigu likwidati dalwaqt u illi huma prospettati illi jammontaw ghal bejn tnejn u ghoxrin miljun dollaru Amerika, u tmienja u tmenin miljun dollaru Amerikan (USD 22,000,000.00 - USD 88,000,000.00).

9. Illi ghalhekk is-socjeta` esponenti ghandha zbilanc car fil-balance sheet taghha u meta wiehed iqis ukoll il-passiv kontingenti u prospettiv tas-socjeta` esponenti huwa wisq evidenti illi din ma tistax thallas d-djun taghha (kemm dawk prezenti kif ukoll dawk futuri), kif ser jigi muri waqt it-trattazzjoni ta` dan ir-rikors.

10. Illi konxji tal-obbligi taghhom a tenur tal-artikolu 329A tal-Att dwar il-Kumpanniji, id-diretturi tas-socjeta` esponenti kkomunikaw ic-cirkostanzi hawn fuq edotti lill-azzjonisti tal-kumpannija sabiex jikkunsidraw jekk hemmx lok illi l-istess azzjonisti jkomplu jaghtu ghajnuna finanzarja lis-socjeta` esponenti.

11. Illi b`ittra datata 18 ta` Frar 2020 l-azzjonisti tas-socjeta` esponenti ddikjaraw illi ma ghandhomx intenzjoni illi jaghtu finanzjament ulterjuri lis-socjeta` esponenti (kopja tal-ittra hawn annessa u mmarkata Dok B).

12. Illi fid-dawl ta` dan kollu, id-diretturi huma tal-fehma illi diment illi s-socjeta` esponenti ma tistax thallas id-djun taghha u peress illi fic-cirkostanzi jirrizulta illi hemm ragunijiet gravi bizzejjed li jiggustifikaw ix-xoljimenti u konsegwentement l-istralc tas-

socjeta`esponenti, huwa ghaqli u fl-ahjar interess tas-socjeta` esponenti u tal-kredituri taghha illi l-istess socjeta` esponenti tigi stralcjata anke` sabiex din ma tkomplix tinkorri spejjez amministrattivi u legali bla bzonn.

13. Illi ghal dan il-ghan, fid-29 ta` April 2020 id-diretturi tas-socjeta` esponenti ghaddew risoluzzjoni unanima sabiex issir talba lil dina l-Onorabbli Qorti ghall-istralc tas-socjeta` esponenti mill-Qorti skont l-artikolu 218 ta` l-Att dwar il-Kumpanniji ghar-ragunijiet imfissra fl-artikoli 214(2)(a)(ii) u 214(2)(b)(iii) tal-istess Att (kopja tar-risoluzzjoni hawn annessa u mmarkata Dok C.

Ghaldaqstant, u in vista tas-suespost, is-socjeta` esponenti qieghda umilment titlob illi din l-Onorabbli Qorti joghgobha, a tenur tal-Artikolu 218(1) tal-Att dwar il-Kumpanniji, prevja kwalsiasi dikjarazzjoni necessarja u opportuna :

(i) Tordna illi s-socjeta` esponenti Atlantica Gamma Limited tigi xjolta u konsegwentement stralcjata minn dina l-Onorabbli Qorti abbazi tal-artikolu 214(2)(a)(ii) u/jew tal-artikolu 214(2)(b)(iii) tal-Att Dwar il-Kumpanniji (Kap 386 tal-Ligijiet ta` Malta).

(ii) Tahtar likwidatur sabiex jiehu fidejh il-process ta` stralc tas-socjeta` esponenti skont il-ligi.

(iii) Taghti kull provvediment iehor li jidrilha xieraq u opportun fic-cirkostanzi kollha tal-kaz.

Rat id-dokumenti li kienu prezentati mar-rikors.

Rat id-digriet taghha tal-5 ta` Mejju 2020 fejn ir-rikors kien appuntat ghas-smigh ghall-udjenza tat-30 ta` Gunju 2020, u fejn kienet ordnata n-notifika tar-rikors lir-Registratur tal-Kumpanniji ghall-finijiet u effetti kollha tal-ligi.

Ir-Registratur tal-Kumpanniji kien notifikat fit-8 ta` Mejju 2020 (ara tergo ta` fol 122).

Rat ix-xiehda bl-affidavit ta` Kerry Kunz.

Rat id-dokumenti li pprezentat ir-rikorrenti.

Rat illi fl-udjenza tal-15 ta` Settembru 2020 inghalaq il-gbir tal-provi u saret trattazzjoni.

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

Rat l-atti l-oħra tal-kawza.

II. L-Avviz Legali 373 tal-2020

Fil-15 ta` Settembru 2020 kien ippubblikat fil-Gazzetta tal-Gvern, u dahal fis-sehh, l-Avviz Legali 373 tal-2020.

Ir-regolamenti japplikaw ghal kawzi istitwiti fis-**16 ta` Marzu 2020 jew wara** minn **any debenture holder, creditor or creditors** dwar drittijiet li jirrizultaw fl-Art 214 u fl-218 tal-Kap 386.

Ighoddu wkoll ghal kawzi istitwiti fis-**16 ta` Marzu 2020 jew wara** għall-applikazzjoni tal-Art 316 tal-Kap 386.

Għalkemm jirrizulta li l-kawza odjerna tittratta dwar l-applikazzjoni tal-Art 214 u l-Art 218 tal-Kap 386, u kienet istitwita fit-30 ta` April 2020, ir-regolamenti mhumiex applikabbli għall-kaz tal-lum peress illi l-kawza ma kenitx prezentata minn debenture holder, creditor or creditors (ara Reg 3) izda mill-kumpanija stess wara risoluzzjoni tal-bord tad-diretturi tagħha (Dok C – fol 119 u 120) .

III. Fatti

Atlantica Gamma Limited ("**il-kumpannija**") tikkwalifika lilha nnfisha bhala *a special purpose vehicle*.

Il-qorti mhijiex sejra tidhol fl-aspetti teknici ta` din il-kwalifika izda sejra tillimita ruhha ghal x` tirrorapprezenta dik il-kwalifika fl-ambitu mhux biss tal-fattispeci tal-kaz odjern izda wkoll fl-aspetti tad-dritt.

Tghid biss illi **in linea generali**, *special purpose vehicle* tkun kumpannija kostitwita bhala sussidjarja ta` kumpannija ohra bl-iskop specifiku li tnaqqas jew tizola riskji finanzjarji. L-istatus legali taghha bhala kumpannija separata jharisha mill-eventwalita` li l-kumpannija l-ohra ma tkunx f` qaghda li thallas id-djun taghha. L-*special purpose vehicle* tkun kostitwita ghal ghan specifiku. Dan huwa l-aspett rilevanti ghall-kaz odjern.

Skont l-M&A tal-kumpannija (fol 161 et seq), l-ishma kienu maqsuma bejn zewg azzjonisti : 2475 -il sehem ordinarju ta` Atlantica (Malta) Holding Limited ; u 25 -il sehem ordinarju ta` Atlantica Tender Drilling Ltd.

Skont l-M&A, l-**ghan specifiku** tal-kumpannija huwa mfisser fl-ewwel tliet *objects* u cioe` :-

a) *To charter, lease, operate and commercially exploit oil and gas well drilling rigs and other offshore equipment, vessels and systems relating to oil and gas activities.*

b) *To service oil and gas wells as well as provide other services related to the wells and offer consultancy and other similar services.*

c) *To negotiate, import and export industrialized equipment and assets related to the oil and gas activity.*

Ghat-twertieq tal-iskop ghalfejn kienet kostitwita, jirrizulta li l-kumpannija ghamlet kuntratt ta` appalt mal-kumpannija DSIC tac-Cina ghall-konsenja ta` rig. Mal-ordni thallas depozitu ta` US\$ 18.6 miljun lil DSIC. Il-flus kienu mislufa lill-kumpannija minn Atlantica Tender Drilling Ltd (ara x-xiehda bl-affidavit ta` Kerry Kunz).

Skont l-M&A, l-*authorised share capital* u l-*issued share capital* kienu l-istess : *USD 2,500 (two thousand five hundred United States Dollars) divided into 2,500 (two thousand five hundred) Ordinary shares of USD 1 each, which have all be subscribed, allotted and taken up, 100% paid-up.*

Jirrizulta li waqt l-ezekuzzjoni tal-kuntratt, qamu kwistjonijiet bejn il-kontraenti li jidher li setghu jkun risolti biss billi jsir arbitragg Londra skont il-kuntratt ta` bejniethom.

Inghata lodo parzjali li kien jittratta x-xoljiment tal-appalt u r-rifuzjoni tad-depozitu (ara Dok A – minn fol 6 et seq). L-esitu kien sfavorevoli ghall-kumpannija ghaliex tilfet id-depozitu. Minn dan il-pronunzjament ma hemmx appell.

L-arbitragg ghadu pendent ghax ghad iridu jigu likwidati d-danni li DSIC qeghda tippretendi li tithallas minghand il-kumpannija.

Ghaliex l-esitu kien sfavorevoli ghall-kumpannija mhuwiex rilevanti ghal din il-kawza. L-essenzjal huwa li mhux biss il-kumpannija ma haditx dak li talbet u cioe` r-rifuzjoni tad-depozitu ta` US\$ 18-il miljun izda talli nstabet responsabbli ghad-danni lejn DSIC, bl-ispejjez ghaliha.

Anke mad-daqqa t` ghajn, huwa bil-wisq evidenti li l-kumpannija tinsab f` inkwiet finanzjarju serju hafna.

Kienu prezentati l-*audited financial statements* ghas-sena li ghalqet 31 ta` Dicembru 2018.

Kienu esebiti wkoll dokumenti li juru li l-azzjonisti ma accettawx li jaghmlu *cash injection of fresh funds* fil-kumpannija.

IV. Dritt/Ezami Komparattiv/Gurisprudenza

Tajjeb li ssir referenza ghad-disposizzjonijiet tal-Kap 386 li huma **rilevanti** ghall-vertenza tal-lum.

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

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

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

-

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

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

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

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

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

Fil-kaz tal-lum, l-azzjoni kienet istitwita mill-kumpannija wara rizzoluzzjoni tal-bord tad-diretturi (ara fl-atti d-dokument esebit u ffirmat mid-diretturi ; u x-xiehda ta` Kerry Kunz għall-fini tad-data meta saret ir-rizzoluzzjoni).

Billi jirrizulta li kienu osservati kemm l-M&A tal-kumpannija, kif ukoll id-dritt, il-kumpannija għandha *locus standi* sabiex tippromwovi l-azzjoni odjerna.

Dan premiss, ir-rikorrenti qegħda ssejjes it-talba tagħha abbazi : tal-Art 214(2)(a)(ii) tal-Kap 386 ; u tal-Art 214(2)(b)(iii) tal-Kap 386.

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

Meta tfassal il-mudell ghal-ligi taghna l-gdida dwar il-kumpanniji, dik li illum hija Kap 386 tal-Ligijiet ta` Malta, u li kellha tiehu post l-Ordinanza dwar Socjetajiet Kummercjali (Kap 168), il-qafas maghzul kien dak tal-Companies Act Ingliza 1985.

Fil-ligi Ingliza, ix-xoljiment u l-istralc ta` kumpanniji kien trattat b` legislazzjoni *ad hoc* u cioe` l-Insolvency Act 1986. Meta sar l-Att XXV tal-1995 dwar il-Kumpanniji, id-disposizzjonijiet li jirregolaw ix-xoljiment u l-istralc kienu integrati fil-ligi l-gdida, mhux kif sar fl-Ingilterra.

L-**Art 214(2)(a)(ii)** jaghti lill-qorti diskrezzjoni li xxolji u tistralcja kumpannija *jekk il-kumpannija ma tkunx tista` thallas id-djun taghha*.

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

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

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

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

Fil-ligi taghna, **tnejn** huma c-cirkostanzi definiti fejn kumpannija titqies li ma tistax thallas id-djun taghha :-

(a) *jekk id-dejn dovut mill-kumpannija jkun baqa` ma thallasx ghal kollox jew f`parti wara erbgha u ghoxrin gimgha mill-ezekuzzjoni ta` titolu ezekuttiv kontra l-kumpannija b`xi wiehed mill-atti ezekuttivi*

msemmijin fl-artikolu 273 tal-Kodici ta' Organizzazzjoni u Procedura Civili ; **jew**

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

Ir-rikorrenti qeghda tistrieħ fuq is-subinciz (b) tal-Art 214(5).

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

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

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

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

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

Il-qorti qeghda tirreferi ghal **Sec 123(2)** tal-Insolvency Act 1986 li tghid –

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

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

Id-divergenza tinsab fil-fatt illi waqt illi fil-ligi taghna, il-mizura hija semplici : *the company is unable to pay its debts account being taken also of contingent and prospective liabilities of the company*, fil-ligi Ingliza, il-kriterju huwa divers ghaliex il-qorti tkun trid tqis illi *the*

value of the company's assets is less than the amount of its liabilities ... billi tiehu kont ta` ... contingent and prospective liabilities.

Id-differenza bejn iz-zewg ligijiet mhijiex kosmetika jew ta` *drafting* izda ta` sostanza.

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

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

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

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

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

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

-

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

Fil-Pag 130 ikompli hekk –

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

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

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

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

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

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

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

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

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

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

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

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

d) Gurisprudenza

Il-qorti sejra tirreferi ghall-gurisprudenza tal-qrati Inglizi kif tghodd kemm ghall-cash flow test kif ukoll ghall-balance sheet test. Naturalment billi fil-kaz odjern ir-rikorrenti qeghda ssostni l-istanza taghha fuq l-Art 214(5)(b) tal-Kap 386 attenzjoni partikolari se tkun diretta lejn il-balance sheet test.

Fid-decizjoni li nghatat mill-Court of Appeal fil-kaz ta' **Byblos Bank SAL v. Al-Khudhairy** [1987] inghad hekk :-

"If a debt presently payable is not paid because of lack of means, that will normally be sufficient to prove that the company is unable to pay its debts. That will be so even if, on an assessment of all the assets and liabilities of the company, there is a surplus of assets over liabilities. That is trite law."

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

"A company`s non-compliance with a statutory demand, or non-satisfaction of execution of a judgment debt, is a matter that can be proved quite simply, usually by a single short witness statement. If proved, it establishes the court`s jurisdiction to make a winding up order, even if the company is in fact well able to pay its debts. If

however a debt which has been made the subject of a statutory demand is disputed on reasonable grounds, the petitioner is adopting what has been called a high-risk strategy, and the petition may be dismissed with indemnity costs."

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

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

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

i) The tests of insolvency in s 123(1)(e) and 123(2) were not intended to make a significant change in the law as it existed before the Insolvency Act 1986 : para 37.

ii) The cash-flow test looks to the future as well as to the present : para 25. The future in question is the reasonably near future ; and what is the reasonably near future will depend on all the circumstances, especially the nature of the company`s business: para 37. The test is flexible and fact-sensitive : para 34.

iii) The cash-flow test and the balance sheet test stand side by side: para 35. The balance sheet test, especially when applied to contingent and prospective liabilities is not a mechanical test: para 30. The express reference to assets and liabilities is a practical recognition that once the court has to move beyond the reasonably near future any attempt to apply a cash-flow test will become completely speculative and a comparison of present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test : para 37.

iv) But it is very far from an exact test: para 37. Whether the balance sheet test is satisfied depends on the available evidence as to the circumstances of the particular case: para 38. It requires the court

to make a judgment whether it has been established that, looking at the company`s assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to meet those liabilities. If so, it will be deemed insolvent even though it is currently able to pay its debts as they fall due: para 42.

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

i) Cash-flow solvency or insolvency is not to be ascertained by a blinkered focus on debts due at the relevant date. Such an approach will in some cases fail to see that a momentary inability to pay is only the result of temporary illiquidity. In other cases, it will fail to see that an endemic shortage of working capital means that a company is on any commercial view insolvent, even though it may continue to pay its debts for the next few days, weeks, or even months: para 51.

ii) Even if a company is not cash-flow insolvent, the alternative balance-sheet test will afford a petitioner for winding up a convenient alternative means of proof of a deemed insolvency: para 57."

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

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

*"The changes in form served, in my view, to underline that the "cash flow" test is concerned, not simply with the petitioner`s own presently-due debt, nor only with other presently-due debts owed by the company, but also with debts falling due from time to time in the reasonably near future. What is the reasonably near future, for this purpose, will depend on all the circumstances, but especially on the nature of the company`s business. That is consistent with **Bond Jewellers, Byblos Bank and Cheyne Finance**. The express reference to assets and liabilities in my view a practical recognition that once the court has to move beyond the reasonably near future (the length of which depends, again, on all the circumstances) any attempt to apply a cash-flow test will become completely speculative, and a comparison of*

present assets with present and future liabilities (discounted for contingencies and deferment) becomes the only sensible test. But it is still very far from an exact test, the burden of proof must be on the party which asserts balance-sheet insolvency."

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

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

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

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

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

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

Ghalhekk il-qorti m`ghandha tiskarta xejn.

Il-qorti m`ghandhiex toqghod fuq grajjiet li jkun sehew sad-data tal-presentata tar-rikors promotur tal-azzjoni, izda ghandha taghti piz ukoll ghal kull ma jigri anke wara sa meta tigi biex taghti d-decizjoni taghha.

F` **Sec 122 tal-Insolvency Act 1986 tal-Ingilterra**, tirrizulta lista ta` cirkostanzi li jwasslu ghax-xoljiment u ghall-istralc ta` kumpannija.

Tajjeb jinghad illi fl-Insolvency Act 1986 ma hemmx disposizzjoni bhall-Art 214(2)(b)(iii) tal-Kap 386.

Il-wahda li tqarreb l-aktar lejha hija **Sec. 122(1)(g)** li tghid illi :

*the court is of the opinion that it is **just and equitable** that the company should be wound up.*

Huwa evidenti anke mad-daqqa t`ghajn li d-disposizzjoni fil-ligi taghna hija **aktar stretta** fis-sens illi fil-kaz taghna l-qorti ghandha xxolji u tistralcja meta fil-fehma taghha ikunu jirrizultaw ragunijiet gravi bizzejjed, mentri fil-ligi Ingliza, il-kriterju li fuqu l-qorti trid tibni l-fehma taghha huwa dak tal-gustizzja u l-ekwita`. L-istrettezza tad-disposizzjoni fil-ligi taghna taghmel hafna sens anke ghaliex jekk il-qorti tesprimi l-fehma li hemm ragunijiet gravi bizzejjed, allura minn hemm tkun obligata tordna x-xoljiment u l-istralc tal-kumpannija.

Il-qorti tghid li r-riferenza ghal Sec 122(1)(g) tal-Insolvency Act 1986 hija utili ghaliex il-linja li hadu l-qrati Inglizi biex ighidu x`ghandhom ifissru *just and equitable* ghall-fini ta` *winding up* ta` kumpannija jghin sabiex jiftah tieqa ghall-qrati taghna fl-interpretazzjoni taghhom x`jistghu jkunu ragunijiet gravi bizzejjed.

Ghax kull kaz ghandu l-istorja tieghu, il-qorti trid tibni l-fehma taghha fuq il-fatti u cirkostanzi ta` kull kaz.

V. Risultanzi

a) Dwar l-Art 214(2)(a)(ii) u l-Art 214(5)(b)

Ladarba l-esitu tal-lodo arbitrali fuq riferit kien sfavorevoli ghall-kumpannija, sabiex din ma ggarrabx l-gharqa, jehtieg li tinzamm fil-wicc bl-intervent finanzjarju dirett tal-azzjonisti, propju ghaliex l-iskop li ghalih kienet kostitwita gie fix-xejn. Irrizulta li ma hemmx disponibilita` min-naha tal-azzjonisti li jaghmlu *injections of fresh capital*. Hargu bizzejjed u jidher li mhux lesti johorgu aktar.

Ghall-fini tal-Art 215(5)(b), nafu li l-kumpannija tilfet id-depożitu ta` US\$ 18.6 miljun li kien silifha wiehed mill-azzjonisti. Trid thallas spejjez ingenti b` zieda ma` spejjez li diga` nkorriet u li huma mfissra fl-atti. Ma` dawn hija esposta li tkun trid thallas danni lil DSIC.

Kontra dawn il-*liabilities* hemm biss assi li m` jaghmlu ebda paragun mal-*liabilities*.

Jirrizulta sodisfatt anke dak rikjest fl-Art 214(5)(b) tal-Kap 386.

b) Id-diskrezzjoni tal-gorti

Fil-pagna 216 tal-ktieb **Insolvency Law – Corporate and Personal** ta` **Andrew Keay u Peter Walton** [Pearson – Longman – 2003] jinghad hekk :-

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

Fil-kaz tal-lum, jirrizulta ppruvat li l-kumpannija kellha *shareholders loan* ta` US\$ 18.6 miljun sabiex setghet taghmel id-depożitu fuq l-appalt/akkwist tar-rig. Dak is-self kien mehtieg sabiex seta` jitwettaq l-ghan ghala kienet kostitwita l-kumpannija. Kien mehtieg ghaliex ma kellhiex assi taghha mnejn thallas. Illum dak id-depożitu ntilef bhala konsegwenza tal-lodo fuq riferit. Jidher li ntefqu **wkoll** ftit aktar minn dak l-ammont fi spejjez.

Il-lodo kixef il-vulnerabbilita` tal-kumpannija. Mhux biss m`ghandhiex mnejn thallas is-shareholders` loan u wisq anqas ghandha mnejn thallas danni lil DSIC jekk ikun jirritjeni hekk il-lodo finali.

Ma jistax jinghad li l-qaghda finanzjarja avversa ta` l-kumpannija hija sitwazzjoni tal-mument.

Mhuwiex il-kaz li l-qaghda attwali ghad tista` taqleb lejn il-posittiv fil-futur qarib.

Il-qorti sejra tezercita d-diskrezzjoni taghha favur ix-xoljiment u l-istralc ta` l-kumpannija.

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

Fil-kuntest ta` din id-disposizzjoni, il-qorti ssib gustifikazzjoni ta` xoljiment abbazi tal-fatt li l-kumpannija falliet ghal kollox fl-iskop ewlieni ghala kienet ikkostitwita.

Dan huwa fatt gravi bizzejjed li hwassal ghax-xoljiment.

Ighid hekk **Andrew Muscat** dwar *disappearance of the substratum* fil-pag 1395 ta` "**Principles of Maltese Company Law**" (MUP – Second Edition – Volume Three - 2019) :-

"A company`s substratum is the purpose or group of purposes which it is formed to achieve – in other words, its main objects. If the company has abandoned all its main objects (and not merely some of them) or if in practice it cannot achieve any of them, then its substratum has disappeared ..."

Kumpannija li ma taghmilx negozju hija entita` bla ruh anke meta ma tkunx qeghda taqdi l-ghanijiet taghha. Milli accertat, il-kumpannija waslet *at a point of no return*.

Tenut kont ta` l-assjem ta` fatti u cirkostanzi, il-qorti hija tal-fehma illi hemm ragunijiet gravi bizzejjed skont l-Art 214(2)(b)(iii) tal-Kap 386 sabiex tordna mhux biss ix-xolijiment izda wkoll l-istralc tal-kumpannija.

Provvediment

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

1. Tiddikjara li jirrizulta ppruvat ghas-sodisfazzjon taghha kull ma jiggustifika l-applikazzjoni tal-Art 214(2)(ii)(a), tal-Art 214(5)(b) u tal-Art 214(2)(b)(iii) tal-Kap 386 tal-Ligijiet ta` Malta fil-konfront tal-kumpannija rikorrenti.

2. Tordna x-xoljiment u l-konsegwenzjali stralc tal-kumpannija rikorrenti b`effett mil-lum.

3. Tahtar lir-Ricevitur Ufficjali bhala stralcjarju.

4. Taghti lill-istralcarju s-setghat u d-dmirijiet kollha li huma previsti fil-Kap 386 tal-Ligijiet ta` Malta.

5. Tordna lill-istralcjarju sabiex jipprezenta rapport tal-hidma tieghu sa zmien tliet (3) xhur mil-lum.

6. Tordna li l-ispejjez u drittijiet kollha naxxenti minn dan il-procediment, inkluzi l-ispejjez kollha tal-istralc komprizi l-ispejjez u d-drittijiet tal-istralcjarju, ghandhom jithallsu mill-kumpannija rikorrenti, mill-kumpannija Atlantica (Malta) Holding Ltd (C55269) u mill-kumpannija Atlantica Tender Drilling Ltd (Bermuda Co. Reg No. 42347) *in solidum* bejniethom.

**Thalli l-istralc għall-udjenza ta` nhar it-Tlieta 9 ta` Marzu
2021 fid-9.00 a.m.**

**Onor. Joseph Zammit McKeon
Imhallef**

**Amanda Cassar
Deputat Registratur**