



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

**ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON**

Illum il-Hamis 28 ta` Jannar 2021

**Kawza Nru. 2
Rik. Nru. 888/13JZM**

**All Invest Company Limited bin-numru ta`
registrazzjoni C22239 kif debitament
rapprezentata mid-direttur uniku Wallace Falzon
detentur tal-karta ta` l-identita` bin-numru
308986M**

kontra

X

u

**b` digriet tal-31 ta` Ottubru 2013 l-Awtorita`
ghas-Servizzi Finanzjarji ta` Malta kienet
ammessa tintervjeni fil-procediment *in statu et
terminis***

u

**b` digriet tat-28 ta` Novembru 2013 Anthony
Spiteri u Miriam Spiteri, Jeffrey Vella u Romina**

Vella, Carmen Spiteri u Vincent Spiteri, Joseph Borg u Doris Borg, Joseph Borg u Deborah Carrie Borg, Gino Cremona u Marthese Cremona, John Galea u Maryanne Galea, John Galea u Loredana Galea, Alexander Farrugia u Mansueta Farrugia, Maria Gabriella Farrugia, Angela Incorvaja, John Aquilina u Maria Lourdes Aquilina, Saviour Cutajar, Mario Baldacchino u Mary Anne Baldacchino, Romeo Borg u Carmen Borg, Rose Borg, Carmel Cachia u Nazzarena Cachia, Gennaro Camilleri, J M Camilleri u M D Camilleri, Robert Camilleri, Saviour Darmanin, Emanuel Galea u Margaret Galea, Emanuel Gravina, Anthony u Teresa Mangion, Joseph Said u Lucia Said, Polyanne Schembri, Ray Sciberras u Lucienne Sciberras, Mario Xuereb u Dolores Xuereb, Andrew Zammit u Josephine Zammit kienu ammessi j'intervjenu fil-procediment *in statu et terminis*

u

b`digriet tat-12 ta` Dicembru 2013 Paul Diacono u Susan Mary Diacono, Paul Debono, Michelina Debono u Joseph Debono, Daniel Grima u Nadia Grima, Carmelo Grima u Maria Dolores Grima, George Sammut u Maria Sammut, William Micallef u Maria Alfrida Micallef kienu ammessi j'intervjenu fil-procediment *in statu et terminis*

u

b`digriet tat-12 ta` Dicembru 2013 George Zammit u Yvonne Zammit, Jane Borg, Palma u Eugenio konjugi Borg, Carmel Borg, Joseph Mary Frendo u Mary Annunziata Frendo, David Frendo, Rupert Buttigieg u Nathalie Buttigieg, Frances Amaira, Ivan Bartolo u Ruth Bartolo, Mario Vassallo u Josette Joan Vassallo, James Cutajar u Graziella Cutajar, Rosina Fenech u Philip Fenech, Grezju Micallef u Antonia Micallef, Carmelo Camilleri u Dolores Camilleri, Carmel Preca u Maria Stella Preca, Anthony Busuttil u Mary Anne Busuttil

kienu ammessi jintervjenu fil-procediment *in statu et terminis*

u

b` digriet tat-12 ta` Dicembru 2013 Maria Camilleri u Maddalena Muscat kienu ammessi jintervjenu fil-procediment *in statu et terminis*

Il-Qorti :

I. Preliminari

1. Ir-rikors promotur

Rat ir-rikors li kien prezentat fil-Prim`Awla tal-Qorti Civili fit-13 ta` Settembru 2013 li jaqra :-

1. *Illi s-socjeta` rikorrenti giet kostitwita fid-9 ta` Dicembru 1997 bhala Kumpanija ta` Responsabbilta` Limitata.*

2. *Illi l-esponenti huwa direttur u l-uniku azzjonista fis-socjeta` kummercjali All Invest Company Limited kif muri fid-dokument hawn anness u mmarkat bhala Dok AI1.*

3. *Illi l-istatut tas-socjeta` rikorrenti qed jigi anness ma` dan ir-rikors u mmarkat bhala Dok AI2.*

4. *Illi s-socjeta` rikorrenti ghaddiet rizzoluzzjoni straordinarja hawn annessa u mmarkata bhala Dok AI3, fejn ghar-ragunijiet kollha premessi gie deciz li s-socjeta` rikorrenti tigi xolta u konsegwentement stralcjata minn dina l-Onorabli Qorti skont l-Art. 214(1)(a) u/jew l-Art. 214(2)(a)(ii) u dan a tenur tal-Art. 218(1) tal-Att Dwar il-Kumpaniji.*

5. *Illi jkun ghaqli wkoll illi pendenti d-decizjoni fiinali ta` din il-Qorti jigi appuntat amministratur provvizorju sabiex jamministra s-socjeta` rikorrenti.*

Ghaldaqstant, u in vista tas-suespost, ir-rikorrenti titlob illi dina l-Onorabbli Qorti joghgobha, prevja d-dikjarazzjonijiet u l-provvedimenti kollha necessarji u opportuni :-

1. *Tordna illi s-socjeta` All Invest Company Limited (C 22239) tigi xolta u konsegwentement stralcjata minn dina l-Onorabbli Qorti abbazi tal-Art. 214(1)(a) u/jew l-Art. 214(2)(a)(ii) u dan a tenur tal-Art. 218(1) tal-Att Dwar il-Kumpanniji, bl-ispejjez a karigu tal-istess socjeta` rikorrenti.*

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

Rat id-dokumenti li kienu esebiti mar-rikors promotur, kif ukoll id-dokumenti l-ohra li pprezentat ir-rikorrenti fil-kors tal-kawza.

**2. L-intervent fil-kawza in statu et terminis
mill-Awtorita` ghas-Servizzi Finanzjarji ta` Malta
u minn persuni ohra**

Rat ir-rikors li pprezentat l-Awtorita` ghas-Servizzi Finanzjarji ta` Malta fil-11 ta` Ottubru 2013 kif ukoll id-dokumenti li kienu prezentati mar-rikors fejn, ghar-ragunijiet li kienu spjegati, talbet li tintervjeni fil-kawza u talbet lill-qorti sabiex tichad it-talba ghax-xoljiment u stralc tal-kumpannija rikorrenti.

Rat ir-risposta u d-dokumenti li pprezentat ir-rikorrenti fl-24 ta` Ottubru 2013.

Rat id-digriet illi tat il-Prim` Awla tal-Qorti Civili fl-udjenza tal-31 ta` Ottubru 2013 fejn laqghet it-talba tal-Awtorita` sabiex tintervjeni fil-kawza *in statu et terminis*.

Rat rikorsi ohra li pprezentaw persuni ohra (li l-identita` tagghom tirrizulta kemm mill-atti kif ukoll mill-occhio tal-kawza) fejn ukoll talbu li jintervjenu *in statu et terminis* fil-procediment, kif ukoll id-digrieti fejn kienu milqugha dawn it-talbiet.

3. Il-provvediment tat-30 ta` Marzu 2017 moghti mill-Prim`Awla tal-Qorti Civili

Fit-30 ta` Marzu 2017, il-Prim`Awla tal-Qorti tat provvediment fejn fil-parti decizorja ngħad hekk :-

Għar-ragunijiet kollha premessi, il-Qorti mhijiex sejra tipprovdi dwar it-talbiet tar-rikorrenti kif dedotti - almenu f`dan l-istadju u sakemm ir-rikorrenti ma tkunx qagħdet bis-shih mad-Direttiva li tatha l-Awtorita` għas-Servizzi Finanzjarji ta` Malta fis-16 ta` Settembru 2013.

Għalhekk il-Qorti qegħda thalli sine die dan il-procediment, riappuntabbli skont il-ligi, fil-kaz biss illi fit-terminu stabbilit fil-ligi, isir rikors konguntiv mir-rikorrenti u mill-Awtorita` għas-Servizzi Finanzjarji li jghid illi r-rikorrenti ottemperat ruhha bis-shih mad-Direttiva li tatha l-Awtorita` għas-Servizzi Finanzjarji ta` Malta fis-16 ta` Settembru 2013.

L-ispejjez ta` dan il-procediment sal-lum jibqghu riservati.

4. L-udjenza ta` din il-qorti tas-26 ta` Novembru 2020

Wara rikors konguntiv prezentat mill-partijiet, saret udjenza minn din il-qorti fis-26 ta` Novembru 2020 fejn sar dan il-verbal :

Dr Sharon Pace Gouder u Dr James Scerri Worley għall-kumpannija rikorrenti min-naha wahda, u Dr Kris Borg għall-Awtorita' intervenuta fil-kawza ...

jiddikjaraw illi l-iskopijiet li wasslu lill-Awtorita' intervenuta biex topponi x-xoljiment u l-istralc tal-kumpannija sakemm l-istess

kumpannija ma tikkonformax ruhha mar-rekwisiti u l-htigijiet li kienet qeghda tistenna minnha l-Awtorita', illum m'ghadhomx hemm, u ghalhekk il-process tax-xoljiment u l-istralc tal-kumpannija jista' jipprocedi.

Dr Stefano Filletti jirrimetti ruhu.

Billi tqis illi din id-dikjarazzjoni tikkonforma ruhha mas-sostanza tal-provvediment tal-Prim'Awla tal-Qorti Civili moghti fit-30 ta' Marzu 2017, il-qorti tqis li tista' tkompli bis-smigh tat-talbiet li kienu prezentati fil-bidu quddiem il-Prim'Awla tal-Qorti Civili mis-socjeta' rikorrenti.

Peress illi wara d-9 ta' April 2018, b'effett tal-Avviz Legali 92 tal-2018 u tal-Att I tal-2018, il-Prim'Awla tal-Qorti Civili ma baqghetx aktar kompetenti sabiex tiddeciedi dwar it-talbiet tar-rikorrenti, il-kawza ser tghaddi biex tkompli tinstema' u tkun deciza kif trid il-ligi mill-Qorti Civili (Sezzjoni tal-Kummerc) kif presjeduta.

Dr Scerri Worley u Dr Pace Gouder jiddikjaraw illi fil-kors tal-procediment quddiem il-Prim'Awla tal-Qorti Civili, qabel ma l-qorti halliet il-kawza sine die, ir-rikorrenti kienet ipprezentat il-provi kollha taghha, u ghalhekk ma jidhrilhiex illi hemm ghalfejn tressaq provi ulterjuri. Jitolbu ghalhekk illi l-kawza tithalla ghall-provvediment.

Il-Qorti thalli l-kawza ghall-provvediment ghal nhar il-Hamis 28 ta' Jannar 2021 fid-09.00am.

II. Provi

F` din il-kawza l-provi nstemghu **kollha** mill-Prim`Awla tal-Qorti Civili **gabel** inghata l-provvediment tat-30 ta` Marzu 2017. Sintesi tax-xiehda diga` tirrizulta fil-provvediment. A skans ta` repetizzjoni, din il-qorti tirreferi ghal dik is-sintesi mhux daqstant ghac-cirkostanzi li wasslu ghal dak il-provvediment izda ghall-**mertu tat-talbiet tar-rikorrenti**.

III. Fatti mhux kontestati

Il-kumpannija rikorrenti ("**All Invest**") ghandha azzjonista wiehed u direttur wiehed, u cioe` Wallace Falzon [Dok AI1 u AI2].

All Invest adottat risoluzzjoni waqt laqgħa generalia tal-azzjonisti [Dok AI3] sabiex tkun xjolta u stralcjata mill-qorti.

IV. Dritt

Ir-rikorrenti ticcita bhala bazi għat-talba għax-xoljiment u l-istralc tagħha mill-qorti : l-Art 218(1), l-Art 214(1)(a) u l-Art 214(2)(a)(ii) tal-Kap 386.

1. Art 218(1)

Din id-disposizzjoni tistabilixxi **kif u minn min** għandha titressaq talba għax-xoljiment u l-istralc ta` kumpannija. Taqra hekk :-

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

(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),

għandha 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.

Ir-rikors odjern kien prezentat mill-kumpannija stess wara decizjoni tal-laqgħa generali. Billi qed issir referenza għall-Art

214(1)(a) u tal-Art 214(2)(a)(ii), il-kumpanija ghandha *locus standi* sabiex tmexxi bil-procediment odjern.

2. **L-Art 214(1)(a)**

Id-disposizzjoni taqra :-

Kumpanija xxolji u konsegwentement tigi stralcjata fil-kazijiet li gejjin ...

(a) il-kumpanija tirisolvi b`rizoluzzjoni straordinarja li l-kumpanija ghandha xxolji u tkun stralcjata mill-qorti.

L-**Art 214** jittratta r-ragunijiet li jsostnu talba ghal xoljiment u stralc ta` kumpanija.

Hemm kazi specifika fil-ligi stess fejn xoljiment u stralc **ghandhom** (*shall*) jigu ordnati.

Hemm ohrajn fejn xoljiment u stralc **jistghu** (*may*) jigu ordnati.

Fil-kaz tac-cirkostanzi previsti fil-paragrafi (a) u (b) tas-subinciz (1) tal-Art 214 topera s-shall.

Fil-kaz tal-lum, si tratta ta` xoljiment u stralc mill-qorti ghad-differenza ta` xoljiment u stralc volontarju li huwa regolat bil-paragrafu (b).

Il-kazi fejn topera l-may huma dawk indikati fis-subparagrafi (i) u (ii) tal-paragrafu (a) tas-subinciz (2) tal-Art. 214.

Ir-rikorrenti qeghda titlob ix-xoljiment u l-istralc taghha **anke** abbazi tal-Art 214(2)(a)(ii).

Ghalkemm mhuwiex il-kaz tal-lum, *is-shall* topera wkoll (din il-qorti tghid b`riserva) fil-kazi indikati fil-paragrafi (i) sa (iv) tal-paragrafu (b) tas-subinciz (2) tal-istess Art 214.

Taghmel riserva ghar-raguni li l-Art 214(2)(b) jitkellem biss dwar xoljiment mhux ukoll dwar l-stralc fl-erba` kazi hemm specifikati. Dan huwa hekk ghax b`effett tal-Art 214(3) l-istralc huwa diskrezzjoni tal-qorti f`dawk l-erba` kazi.

3. L-Art 214(2)(a)(ii)

Meta tfassal il-mudell ghall-Att XXV tal-1995 dwar il-Kumpanniji (Kap 386 tal-Ligijiet ta` Malta) li kellu jiehu 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 il-Kap 386, id-disposizzjonijiet li jirregolaw ix-xoljiment u l-istralc kienu ntegrati 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** (8th 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 fejn kumpannija titqies li ma tistax thallas id-djun taghha :-

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

jew

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

Billi fil-kaz tal-lum ma kienx indikat mir-rikorrenti fuq liema subinciz tal-Art 214(5) kienet qegħda tibbaza l-pretensjoni tal-insolvenza, il-qorti sejra tirreferi għaz-zewg sitwazzjonijiet.

i) Is-subinciz (a) tal-Art 214(5)

B`mod aktar ristrett, fil-ligi taghna dak previst mis-subinciz (a) tal-Art 214(5) **jixbah** dak magħruf bħala *cash flow insolvency* fil-ligi Ingliza.

Filwaqt illi fil-ligi taghna huwa specificat **bil-preciz** x` m`għandhiex tagħmel kumpannija debitrice sabiex ma tkunx meqjusa li ma tistax thallas id-djun taghha, fil-ligi Ingliza il-kriterju huwa aktar generiku, għaliex dik l-għamla ta` insolvenza ssehh meta kumpannija tkun *unable to pay its debts **as they fall due.***

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

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

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

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

The court, in examining whether a company is suffering cash flow insolvency, will consider whether the company is actually paying its debtors. Courts must take into account what current revenue the company has as well as what the company can procure by realising assets within a relatively short time ... A company can rely upon money which might be obtained from the sale of assets or upon money which might be obtained on the strength of its assets ... It is possible that sometimes a debtor might be able to establish solvency by demonstrating that funds can be obtained through an unsecured loan. In considering whether a person or a company is insolvent, the debtor`s whole financial position must be studied ... and a temporary lack of liquidity does not necessarily mean that the company is insolvent ...

At one time courts were rather strict on what they required to be established before they were willing to deem a person or a company insolvent, but in more recent times they have become more liberal as far as creditors are concerned and have held that a debtor is insolvent if a creditor is able to prove that he or she has not paid an undisputed

debt after a demand has been made ... and this is the case even if there is other evidence which suggests that the value of the assets outweighs liabilities ...

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

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

ii) Is-subinciz (b) tal-Art 214(5)

Fit-test bl-Ingliz il-paragrafu in kwistjoni 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 ghalix 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 broaded 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.

iii) **Gurisprudenza**

Il-qorti sejra tirreferi ghall-gurisprudenza tal-qrati Inglizi kif tghodd kemm ghall-*cash flow test* kif ukoll ghall-*balance sheet test*.

Fid-decizjoni li tat The 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 jkun 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 appena 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."

V. Risultanzi

Mill-atti tal-kawza huwa kkonfermat illi m`ghadx hemm opposizzjoni min-naha tal-intervenuti fil-kawza sabiex All Invest tmur ghax-xoljiment u l-istralc.

Ladarba aktar kmieni kien determinat li r-rikorrenti ghandha *locus standi* sabiex tippromwovi l-azzjoni skont l-Art 218(1), dak li l-qorti trid tara hemmx bazi ghat-talba ghax-xoljiment u l-istralc taghha skont l-Art 214(1)(a) u l-Art 214(2)(a)(ii) tal-Kap 386, li huma d-disposizzjonijiet citati mir-rikorrenti stess bhala l-bazi fil-mertu tal-azzjoni taghha.

i) Dwar l-Art 214(1)(a)

Jirrizulta ppruvat u dokumentat li r-rizoluzzjoni staordinarja kienet approvata minn Wallace Falzon li huwa kemm l-uniku azzjonista

kif ukoll l-uniku direttur tal-kumpannija. **Il-vot tal-ligi huwa sodisfatt.**

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

Tirreferi fil-qosor ghax-xiehda.

Dr Andre` Camilleri mill-Awtorita` ghas-Servizzi Finanzjarji ta` Malta xehed li All Invest ghalqet l-kontijiet tal-bank hlief ghal tnejn li kienu kolpiti b` mandat ta` sekwestru.

Fil-**kontroezami**, kien mistoqsi jekk l-Awtorita kenitx qeghda issegwi l-qagħda finanzjarja ta` All Invest. Huwa wiegeb illi Wallace Falzon kien qalilhom ill All Invest ma kellhiex aktar mezzi sabiex topera. Min-naha tagħha l-Awtorita ma setghetx tikkonferma kienx hekk il-kaz inkella le billi ma sarx *independent audit*. Ikkonferma illi l-quantum ta` *claims* li kien hemm fil-qراطي kontra ALL Invest kien jaqbez il-€150,000. Stqarr illi l-licenzja tar-rikorrenti fis-servizzi finanzjarji kienet sospiza. Ghalhekk ma tistax tagħmel negozju ta` dak ix-xorta. Ma jirrizultax li ghandha dhul minn operazzjonijiet ohra.

Av. Dr. Michelle Buontempo mill-istess Awtorita` xehdet illi wara t-30 ta` April 2013, kienu saru mandati ta` sekwestru ohra kontra r-rikorrenti. Skont dawn il-mandati, l-ammont pretiz minnha kien jeccedi l-€200,000.

Lorraine Falzon minn MFSP Financial Management Limited ipprezentat bhala Dok LF1 hija lista tal-kommissjonijiet kollha li thallsu lil All Invest Company Limited.

David Curmi minn MSV Life plc ikkonferma l-kontenut ta` Dok DM7 li hija lista tal-kommissjonijiet li thallsu lir-rikorrenti. Ir-relazzjoni tagħhom ma` All Invest kienet ta` *tied insurance intermediary* sa mill-1 ta` April 2007.

Dr. Andre` Imbroll minn Land Overseas Fund Sicav plc ikkonferma l-kontenut ta` Dok DM 6.

Karl Bonanno mid-ditta ta`awdituri Ecovis xehed li huma ghamlu l-audit tar-rikorrenti ghas-snin ta` bejn 2011 u l-2013. Fl-2011, All Invest hadet *dividends* li jammontaw ghal €156,632. Il-provenjenza kienet minn *trading normali* u minn bejgh ta` proprjeta. Il-proprjeta kienet tikkonsisti minn fond Marsaskala u art s-Swieqi. Wallace Falzon li huwa l-azzjonista tar-rikorrenti ha *r-retained earnings* kollha li kellha s-socjeta`. Stqarr illi dment li jkun profitti akkumulati gejjin mis-snin ta` qabel, *dividends* jistghu jigu distribwiti.

Daniel Camilleri xehed illi wara l-2009 kien l-accountant estern ta` All Invest. Muri l-*financial returns* Dok DM 2, Dok DM 4, Dok DM 8 u Dok DM 9, ikkonferma li hejja d-dokumenti hu.

Stqarr illi hu kien jipprepara biss il-kotba tal-kumpannija. Persuni ohra kienu jippreparawlu l-informazzjoni u jghaddulu l-bank statements, id-dokumenti relatati mad-depoziti tal-bank, u d-dokumentazzjoni kollha necessarja.

Fil-kontroezami, kien mistqosi dwar l-informazzjoni li kien jircievi. Qal illi din tkun dokumentazzjoni li - per ezempju - jippreparaw fuq d-dhul. L-informazzjoni ghalhekk kienet tinghata fil-forma ta` dokumentazzjoni. Kull xahar kien jinghata bank statement u ssir *reconciliation*. Ghar-rigward tal-kommissjonijiet, kien jinghata d-*deposit slip* jew jekk jidhlu direttament l-bank d-dokumentazzjoni rilevanti. Mistoqsi dwar dak li kienu jaghmlu l-awdituri, stqarr illi huwa qatt ma ra l-*audit file*. Lill-awdituri kien jaghtihom l-*management accounts* u l-kotba.

Fisser illi fl-ahhar zmien ta` bejn l-2011 u 2013, l-awditur kien talbu sabiex issir *reconciliation*. Din saret u qablu.

Mistoqsi mill-qorti x`kienet il-qaghda prezenti tar-rikorrenti, xehed illi bhala assi kellha ammont ta` €152,000, *liabilities* kellha ta` €1,500, u kien hemm ammont ta` €146,000 kolpiti b`mandati ta` sekwestru. Dwar l-*contingent liabilities* irrefera ghal nota 23 tal-*financial statements*. Jirrizulta li hemm *contingent liabilities* ta` aktar minn €500,000.

Wara li qieset ir-risultanzi fattwali ta` dan il-kaz, komprizi l-fatti li huma ndikati fir-risoluzzjoni straordinarja tat-12 ta` Settembru 2013 (Dok AI3) il-qorti ta'ferma illi :-

**Ghar-rigward tal-Art 214(1)(a),
Tirrizulta l-prova tar-rekwiziti.**

**Ghar-rigward tal-Art 214(5)(a),
Ma tirrizultax il-prova tar-rekwiziti.**

**Ghar-rigward tal-Art 214(5)(b),
Tirrizulta l-prova tar-rekwiziti.**

Provvediment

Ghar-ragunijiet kollha premessi, il-qorti qeghda tipprovdi kif ser jinghad :-

Bl-applikazzjoni tal-Art. 218(1)(a), tal-Art. 214(1)(a), tal-Art. 214(2)(a)(ii) u tal-Art. 214(5)(b) tal-Kap. 386, tordna x-xoljiment u l-istralc tal-kumpanija All Invest Company Limited (C22239), b`effett mit-12 ta` Settembru 2013 skont kif jipprovdi t-tieni proviso tal-Art. 223(1) tal-Kap. 386.

Tahtar lir-Ricevitur Ufficjali bhala stralcjarju tal-kumpanija All Invest Company Limited (C22239) bis-setghat u bid-dmirijiet kollha kif huma definiti fil-Kap. 386.

Tordna lill-istralcjarju sabiex jipprezenta rapport tal-hidma tieghu sa zmien xahrejn mil-lum.

Hliet ghall-ispejjez tal-intervenuti fil-kawza li ghandhom jigu sopportati minnhom, tordna lill-kumpanija All Invest Company Limited (C22239) u lil Wallace Falzon (I.D. Nru.

308986M) sabiex *in solidum* bejniethom ihallsu l-bqija tal-ispejjez tal-kawza, inkluzi l-ispejjez relatati mal-provvediment moghti mill-Prim`Awla tal-Qorti Civili fit-30 ta` Marzu 2017, kif ukoll l-ispejjez kollha tal-istralc, inkluzi d-drittijiet u l-ispejjez tal-istralcjarju.

Thalli l-istralc ghall-udjenza ta` nhar it-Tlieta 20 ta` April 2021 fid-9.00 a.m.

**Onor. Joseph Zammit McKeon
Imhallef**

**Amanda Cassar
Deputat Registratur**