



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

**ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON**

Illum il-Hamis 25 ta` Frar 2021

**Kawza Nru. 7
Rikors Nru. 26/2019 JZM**

**Ruben John Bajada karta tal-
identita` numru (500275M)**

u

**Luca Spaccini passport Numru
(YA0022250)**

u

**Deborah Spaccini passport
Numru (YA2887541)**

kontra

Grifo Malta Limited (C56733)

u

Joseph u Josephine Seychell dawn tal-ahhar għall-interess li jista` jkollhom bhala kredituri tas-socjeta` Grifo Malta Limited

Il-Qorti :

I. Preliminari

Rat ir-rikors li kien ipprezentat fil-25 ta' Settembru 2019 li jaqra hekk :-

1. *Illi r-rikorrenti huma socji fis-socjeta` għar-responsabilita limitata numru C56733 maghrufa bhala Grifo Malta Limited (kopja tal-memorandum u artikoli tal-istess socjeta` hawn annessi u mmarkati Dok A).*

2. *Illi dina s-socjeta` kienet originarjament kostitwita minn erba` (4) socji billi kien hemm ukoll bhala socja mar-rikorrenti Sharon Seychell, bint l-intimati Joseph u Josephine Seychell. Sharon Seychell bieghet is-sehem tagħha fl-istess socjeta` fis-16 ta` April 2014 lir-rikorrenti u oht r-rikorrenti Luca Spaccini, Deborah Spaccini (Il-formula li biha s-socjeta` surreferita tat n-notifika tat-trasferiment magħmula minn Sharon Seychell qieghda tigi hawn esibita u markata bhala Dok B).*

3. *Illi biex tkun tista` tinnegozja, l-erba` (4) socji originali kienu silfu flus lis-socjeta` f`sommom ugwali, u bint l-intimati Seychell harget sehemha billi dawn, il-genituri tagħha, ikkostitwew ruhhom garanti għall-ammont prestabilit mal-bank biex il-bank jkun jista` javanza flus lis-socjeta` kif fil-fatt il-bank għamel kontra rahan tas-sinjuri Seychell.*

4. *Illi eventwalment in-negozju tas-socjeta` mar hazin u s-socjeta` kellha tieqaf tinnegozju f` Dicembru 2015.*

5. *Illi l-initmati Seychell fittxew lis-socjeta` intimata Grifo Malta Limited u fl-24 ta` Frar 2019 ottjenew sentenza kontra l-istess socjeta` ghall-ammont kapitali ta` tmintax-il elf u mitt ewro (€18,100).*

6. *Illi s-socjeta` ma kinitx f` qaghda li thallas u fil-5 ta` Settembru 2019 l-intimati Seychell ottjenew il-hrug kontra s-socjeta` ta` sekwestru ghall-ammont ta` tlieta u ghoxrin elf mija u tmiena u erbghin ewro u sebgha u tletin centezmu (€23,148.37) li jirrapprezenta kapital, sorte, u imghax.*

7. *Illi s-socjeta` illum ghad ma ghandhiex minn fejn thallas dan l-ammont u ilha iktar minn erbgha u ghoxrin xahar ma topera.*

8. *Illi ghalhekk jezistu c-cirkostanzi mehtiega ghat-tenur tal-Artikolu 214(2)(a)(i) u (ii) biex is-socjeta` tigi stralcjata.*

Ghaldaqstant ir-rikorrenti jitolbu bir-rispett li dina l-Onorabbli Qorti joghgobha, fil-waqt li taghti dawk il-provvedimenti kollha opportuni u mehtiega, tordna l-istralc tas-socjeta` konvenuta Grifo Malta Limited C 56733 billi din is-socjeta` ma ghadhiex izjed topera fin-negozju u mhix f` qaghda li thallas id-djun taghha ai termini tal-Artikolu 214(2)(a)(i) u (ii) tal Kap 386 tal-Ligijiet ta` Malta.

Bl-ispejjez u bl-ingunzjoni tal-intimati ghas-subizzjoni.

Rat id-dokumenti li kienu prezentati mar-rikors.

Rat ir-risposta li pprezentaw l-intimati Joseph u Josephine Seychell fl-4 ta' Novembru 2019 li taqra hekk :-

1. *Illi kif indikat korrettament mir-rikorrenti, fis-sentenza fl-ismijiet "Joseph Seychell et vs Ruben John Bajada u Luca Spaccini f' isimhom proprio u bhala Diretturi ghan-nom u in rappresentanza ta' Grifo Malta Ltd (C56733)" deciza minn din l-Onorabbli Qorti nhar il-11 ta' Gunju 2019 (Rik. Gur 691/2018JZM) liema kawza llum ghaddiet in gudikat, is-socjeta` intimata giet kanonizzata debitrice tal-esponenti fis-somma ta' tmintax-il elf u mitt ewro (€18,100) oltre l-imghax u l-ispejjez.*

2. *Illi in ezekuzzjoni tas-sentenza surreferita, l-esponenti pprezentaw mandat ta' sekwestru bin-numru 1200/2019 nhar l-4 ta' Settembru 2019 fil-konfront tas-socjeta` intimata, fl-ammont totali ta' tlieta u ghoxrin elf u mija u tmienja u erbghin ewro u sebgha u tletin centezmu (€23,148.37) rapprezentanti sorte, imghax u spejjez.*

3. *Illi l-esponenti ghandhom kull interess illi jigi rkuprat dan id-dejn li s-socjeta` ghandha fil-konfront taghhom stante li l-kreditu taghhom huwa kanonizzat permezz tas-sentenza fuq imsemmija.*

4. *Illi mhuwiex kontestat li l-kumpanija intimata mhux tinnegozja.*

5. *Illi in vista ta' dan, l-esponenti ma jopponux ghat-talba ghall-istralc tas-socjeta` intimata purche tigi segwita l-procedura li trid il-ligi ghal stralc ordnat minn din l-Onorabbli Qorti.*

6. *Illi cio nonostante, jigi rilevat li l-esponenti huma tal-fehma li r-rikorrenti, jew min minnhom, jahtu ghall-insolvenza tal-kumpanija kif se jigi ppruvat fil-mori tal-proceduri u kwindi din l-Onorabbli Qorti ghandha tuza l-poteri li ghandha a tenur tal-Att dwar il-Kumpaniji*

(Kap. 386) sabiex isir l-istharrig mehtieg u jinghataw l-opportuni provvedimenti.

7. Illi fic-cirkostanzi, l-esponenti certament m`ghandhomx ibatu spejjez.

8. Salvi risposti ulterjuri kif u meta permess.

Rat illi ghalkemm debitament notifikata, l-intimata Grifo Malta Ltd ma pprezentatx risposta.

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

Semghet is-sottomissjonijiet tal-ahhar li saru bil-fomm mid-difensuri tal-partijiet fl-udjenza tas-16 ta` Novembru 2020.

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

Rat l-atti l-ohra tal-kawza.

II. Il-kumpannija ntimata

Grifo Malta Ltd ("**Grifo Malta**") kienet registrata fl-20 ta' Gunju 2012 bin-nru. C 56733.

Jirrizulta illi kien hemm bdil fl-azzjonisti tal-bidu ghal dawk li kienu meta bdew il-proceduri odjerni. Infatti meta kienet kostitwita s-socjeta' intimata l-azzjonisti kienu :

Sharon Seychell

495 Class A Ordinary Shares of €1 each 20% paid up.

Reuben John Bajada

495 Class B Ordinary Shares of €1 each 20% paid up.

Luca Spaccini

255 Class C Ordinary Shares of €1 each 20% paid up.

Deborah Spaccini

255 Class C Ordinary Shares of €1 each 20% paid up.

Fit-13 ta` Marzu 2014, kif jirrizulta mill-Form T, Sharon Seychell, li tigi bint l-intimati Seychell, ittrasferiet l-ishma taghha lil :

Reuben John Bajada

285 Class A Ordinary Shares

Luca Spaccini

105 Class A Ordinary Shares.

Deborah Spaccini

105 Class A Ordinary Shares

Inoltre Sharon Seychell irrizenjat minn direttur, *company secretary* u *legal and judicial representative* b'effett mill-24 ta' Marzu 2014.

III. Provi

Tenut kont tan-natura tal-procediment, il-qorti sejra tillimita ruhha ghal dawk il-provi li jittrattaw id-disposizzjonijiet tal-ligi li abbazi taghhom qieghed jintalab ix-xoljiment u l-istralc ta` Grifo Malta.

Luca Spaccini xehed illi n-negozju beda fl-2012. Ghall-ewwel in-negozju kien miexi bil-mod hafna.

Fl-2014, meta Sharon Seychell ittrasferiet l-ishma taghha, is-socjeta' intimata kienet diga` qiegħda tirregistra t-telf.

Spjega illi għall-azzjonat ta' Sharon Seychell hallsu s-somma ta' €100 kull wieħed. Ighid illi ma kellhomx mnejn ihallsu aktar għaliex is-socjeta' kienet insolventi tant li kien deciz li jjeqaf l-operat u n-negozju taghha.

Fil-fatt Grifo Malta waqfet tinneozja fl-aħhar tal-2014. U m`ghamlet ebda negozju iehor. Il-makkinarju u l-mahzen minn fejn kienet topera inbieghu u mir-rikavat thallsu l-fornituri.

Illum il-kumpannija m`għandhiex assi u d-dejn taghha jammonta għal €50,000.

In kontroezami xehed illi l-kumpannija intimata bieghet il-makkinarju kollu li kellha lil Aluwood Ltd, li hija kumpannija li l-*beneficial owner* taghha huwa r-rikorrenti Reuben John Bajada.

Spjega illi sakemm Sharon Seychell kienet għadha azzjonista ta' Grifo Malta, il-kumpannija kienet taħdem billi tixtri l-materjal mingħand Grifo Italia imbagħad tipproduci *insect screens* għall-bejgh fis-suq Malti. Meta s-socjeta' intimata falliet, Bajada ra kif kompli fin-negozju u kien għalhekk illi Aluwood Ltd akkwistat il-makkinarju kollu li kellha s-socjeta' intimata.

Reuben John Bajada xehed illi fil-bidu tal-2014 l-intimat Seychell gibed l-attenzjoni tal-azzjonisti għall-fatt illi l-kumpannija kienet qiegħda tirregistra telf li kien ser ikompli jikber. Sharon Seychell bieghet l-azzjonat taghha fil-mument meta l-kumpannija

bdiet tirregistra t-telf. Hu u Spaccini ppruvaw jiffinanzjaw in-negozju bit-tama li jaghtuh spinta. Pero` l-impenn tagghom ma halliex ir-rizultat mixtieq.

It-telf tal-kumpannija kien hekk :

• 2012	€ 3427
• 2013	€ 4515
• 2014	€ 5694
• 2015	€ 34522
• 2016	€ 4523
• 2017	€ 1320
• 2018	€ 856
• 2019	€ 941

Xehed illi Grifo Malta waqfet topera f` Dicembru 2015. It-telf registrat mill-2016 `il quddiem huwa marbut ma` spejjez relattivi ghall-*audit* ghaliex ladarba l-kumpannija baqghet attiva kellha l-obbligu illi tipprezenta r-rendikont finanzjarju taghha. Sa Mejju tal-2016, il-kumpannija kienet dahhlet il-flus kollha dovuti lilha, bieghet l-istokk li kellha u hallset lill-kredituri. Fit-8 ta` Ottubru 2016 hu u l-ahwa Spaccini ffirmaw ir-rinunzja ghall-*cash gurantees* li kellhom ma` Banif Bank peress illi l-kumpannija intimata kienet nizlet taht il-limitu tal-*overdraft facility*.

Stqarr illi l-intimat Joseph Seychell dam sal-10 ta` Marzu 2017 sabiex issalda d-debitu tieghu ma` Banif Bank fir-rigward tal-*cash guarantee* fuq l-*overdraft facility*.

Fil-kontroezami xehed illi Aluwood kienet l-ikbar klijent tas-socjeta` intimata. Aluwood tispecializza fil-bejgh ta` twieqi u bibien tal-*aluminium* u kienet ghalhekk tuza hafna *roller nets*.

Spjega illi meta kienet kostitwita s-socjeta` intimata, kull wiehed mit-tlett azzjonisti kien hareg is-somma ta` €17,000 bhala kapital. Fl-2016 sar l-ezercizzju tal-bejgh tal-istokk u makkinarju fost l-ohrajn u

mir-rikavat thallsu l-kredituri. L-uniku kreditur li kien fadal kien Banif Bank. Ghalhekk sar ftehim mal-bank fejn l-azzjonisti cedew l-ammont tal-garanzija personali ; b`hekk kull wiehed mit-tliet azzjonisti tilef is-somma ta' €17,000 li kull wiehed kien investa originarjament.

L-**Awditur Joseph Gauci** ikkonferma illi l-kumpannija waqfet topera fl-2015. Dik s-sena kellha telf ta' €34,522.

Av. Dr. Claudette Fenech ghar-Registratur tal-Kumpanniji xehdet illi l-kumpannija intimata dejjem bghatet l-*annual returns* u l-*accounts* taghha.

Joseph Seychell xehed illi d-dejn tas-socjeta' intimata huwa abbinat mal-garanzija bankarja. Spjega illi meta bintu Sharon Seychell ittrasferiet l-azzjonat taghha favur Bajada u Spaccini dan sar minghajr hlas. Huwa pero' talab lil Bajada u Spaccini sabiex jirrilaxxjaw il-garanzija bankarja fl-ammont ta' €17,000 li hu personalment kien ghamel meta bdew in-negozju. Minkejja li dam sena u nofs jigri wara Bajada u Spaccini ghar-rilaxx tal-garanzija bankarja, baqa' ma' sar xejn. Bajada beda jwahhal fi Spaccini li ma riedx jirrilaxxja l-garanzija.

Kompla jixhed illi f`mument minnhom sar jaf illi ma kienx minnu li l-kumpannija intimata kienet falliet izda fil-verita' kienet bdiet topera taht l-isem ta' Aluwood. Peress li bintu ma kenitx baqghet involuta fil-kumpannija, ma kienx jaf sewwa sew x`qieghed jigri. Lanqas ma kien jaf xi djun kellha l-kumpannija. Sar jaf aktar meta kien avzat mill-bank sabiex ihallas il-garanzija bankarja billi kien inqabez il-limitu tal-fuq l-*overdraft facility* kien inqabez.

Ighid li huwa hareg mis-socjeta intimata fl-2013. Dak iz-zmien kienet ghadha topera. Skont l-accounts, waqfet topera fl-2015 wara li kien dikjarat telf ta' €50,000. Sostna li mill-ghada bdiet topera taht isem iehor fl-istess settur u bl-istess prodott.

B`sentenza moghtija mill-Prim`Awla tal-Qorti Civili fil-11 ta` Gunju 2019 fil-kawza fl-ismijiet *John Seychell et vs Reuben John Bajada et*, hu u martu kienu kanonizzati kredituri ta` Grifo Malta fis-somma ta` €18,100

Fil-kontrozami xehed illi huwa ried johrog mill-kumpannija ghaliex din kienet qeghda tirregistra t-telf u ma riedx jiehu aktar sogru.

IV. Dritt/Dottrina/Gurisprudenza

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

Din id-disposizzjoni tirregola kif jibda procediment ghax-xoljiment u stralc ta` kumpannija. Tghid 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` obbligazzjoni, kreditur jew kredituri, jew minn xi kontributorju jew kontributorji :

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

Fil-kaz tal-lum, ir-rikorrenti mexxew bl-istanza odjerna ghaliex huma diretturi u azzjonisti ta` Grifo Malta.

Ghandhom *locus standi* biex jippromwovu l-azzjoni.

2) L-Art 214(2)(a)(i) tal-Kap 386

Skont din id-disposizzjoni, *kumpanija **tista'** xxolji u tkun stralcjata mill-qorti ... jekk in-negozju tal-kumpanija jkun sospiz ghal perjodu bla waqfien ta' erbgha u ghoxrin xahar.*

Ir-rekwizit tad-disposizzjoni huwa s-**sospensjoni tan-negozju** tal-kumpanija ghal perjodu **bla waqfien** ta` erbgha u ghoxrin **(24) xahar**. Ir-rekwizit huwa materja ta` fatt. Jidher illi d-disposizzjoni kellha l-origini taghha fl-**Art 12(1)(d) tal-UK Insolvency Act 1986**, liema disposizzjoni Ingliza m`ghadhiex taghmel parti mill-Act, ghax kienet superata b`legislazzjoni aktar ricenti.

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

Id-disposizzjoni taghti lill-qorti diskrezzjoni li xxolji u tistralcja kumpanija *jekk il-kumpanija ma tkunx tista' thallas id-djun taghha.*

Meta tfassal il-mudell ghal-ligi taghna l-gdida dwar il-kumpaniji, dik li llum hija Kap 386, 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` kumpaniji kien trattat b`legislazzjoni *ad hoc* u cioe` l-Insolvency Act 1986. Meta sar l-Att XXV tal-1995 dwar il-Kumpaniji, id-disposizzjonijiet li jirregolaw ix-xoljiment u l-istralc kienu integrati fil-ligi l-gdida, mhux kif sar fl-Ingilterra.

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

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

jew

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

Fil-kaz tal-lum, ma kienx specifikat fuq liema miz-zewg sitwazzjonijiet qiegħed jingħad li Grifo Malta ma tistax thallas id-djun taghha.

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

Fil-ligi taghna li *kumpannija ma tkunx tista' thallas id-djun taghha* għandu sinjifikat preciz u definit.

Fil-ligi Ingliza, il-posizzjoni hija aktar wiesgha. Fil-Pag 859 ta' **Boyle & Birds` Company Law** (Eighth Edition – Jordans – 2012) jingħad illi :-

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

insolvent if its liabilities exceed its assets ("balance sheet insolvency") ...

B` mod aktar ristrett, fil-ligi taghna dak previst mill-Art 214(5)(a) jixbah dak maghruf bhala *cash flow insolvency* fil-ligi Ingliza. Filwaqt illi fil-ligi taghna huwa specifikat bil-preciz x` m` ghandhiex taghmel kumpannija debitruci sabiex ma tkunx meqjusa li ma tistax thallas id-djun taghha, fil-ligi Ingliza il-kriterju huwa aktar generali, ghaliex issehh dik l-ghamla ta` insolvenza meta kumpannija tkun *unable to pay its debts as they fall due*.

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

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

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

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

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

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

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

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

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

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

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

For the purposes of subarticle (2)(a)(ii), a company shall be deemed to be unable to pay its debts ... if it is proved to the satisfaction of the court that the company is unable to pay its debts, account being taken also of contingent and prospective liabilities of the company.

Fl-Insolvency Act 1986 Ingliza, insibu disposizzjoni li **tixbah** dik tal-ligi taghna, **ghalkemm mhijiex l-istess**. Il-qorti qeghda tirreferi ghall-**Art 123(2)** tal-Insolvency Act 1986 li jaqra hekk –

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

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

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

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

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 ta 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.

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

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

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

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

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

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

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

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

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

ii) The cash-flow test looks to the future as well as to the present : para 25. The future in question is the reasonably near future ; and what is the reasonably near future will depend on all the circumstances, especially the nature of

the company`s business: para 37. The test is flexible and fact-sensitive : para 34.

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

iv) But it is very far from an exact test: para 37. Whether the balance sheet test is satisfied depends on the available evidence as to the circumstances of the particular case: para 38. It requires the court to make a judgment whether it has been established that, looking at the company`s assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to meet those liabilities. If so, it will be deemed insolvent even though it is currently able to pay its debts as they fall due: para 42.

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

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

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

Fil-kawza **BNY Corporate Trustee Services Ltd & Ors v Neuberger** li kienet deciza fid-9 ta` Mejju 2013 mis-Supreme Court Ingliza, saret analizi fid-dettall tal-izviluppi illi 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)

V. Risultanzi

1) L-Art 214(2)(a)(i)

Mill-kumpless tal-provi, jirrizulta li fid-data tal-prezentata tal-azzjoni odjerna (25/09/19) Grifo Malta mhux biss issospendiet in-negozju taghha izda waqfet ghal kollox milli topera b`effett mill-1 ta` Jannar 2016. Hekk baqghet is-sitwazzjoni sal-lum. Il-makkinarju u l-materja prima inbiegh kollu u ma kienx sostitwi propju ghaliex il-kumpanija waqfet l-operat taghha.

Ma hemmx l-icken dubju li jirrizultaw ippruvati r-rekwiziti tal-Art 214(2)(a)(i) tal-Kap 386.

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

a) L-Art 214(5)(a)

Ir-rekwiziti tad-disposizzjoni mhumiex ippruvati.

Ghalkemm jirrizulta li intimati hadu sentenza favur taghhom kontra Grifo Malta li ghaddiet in-gudikat, ma tirrizultax il-prova tal-ezekuzzjoni tat-titolu ezequttiv kostitwit minn dik is-sentenza.

b) L-Art 214(5)(b)

Diversa hija l-kwistjoni fejn jirrigwarda l-Art 214(5)(b) ghaliex f`dan il-kaz jirrizultaw ippruvati r-rekwiziti tad-disposizzjoni.

Il-qorti taghmel referenza ghall-kontijiet awditjati ta' Grifo Malta ghas-snin finanzjarji li ghalqu fil-31 ta` Dicembru 2012, 2013 u 2014. Minn ezami komparattiv ta` dawn il-kontijiet, jirrizulta li Grifo Malta

dejjem kellha zbilanc bejn l-assi u d-djun fis-sens illi d-dejn kien jeccedi l-valur tal-assi. Mill-kontijiet awditjati ghas-sena finanzjarja li ghalqet fil-31 ta' Dicembru 2014, jirrizulta illi kellha *total liabilities* ta' €125,873 u *total assets* ta' €78,015. Abbazi tal-provi, jirrizulta li Grifo Malta fid-data tal-prezentata tar-rikors promotur tal-azzjoni u llum ma kellhiex assi. Kull asset li kellha inbiegh sabiex jaghmel tajjeb ghad-dejn.

VI. Id-diskrezzjoni tal-Qorti

Accertat illi jirrizultaw ippruvati r-rekwiziti tal-Art 214(2)(a)(i) u tal-Art 214(2)(a)(ii) limitatament fejn si tratta tal-Art 214(5)(b), il-qorti sejra tara jekk fuq il-provi akkwiziti, ghandhiex hi tezercita d-diskrezzjoni taghha li tordna x-xoljiment u l-istralc tal-kumpannija ntimata.

Il-qorti taghmel referenza ghall-ktieb **Company Law** (Lexis Nexis - Butterworths 2003), fejn l-awtrici **Brenda Hannigan** tghid hekk :

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

Brenda Hannigan taghmel referenza ghall-Cork Committee Report (Cmnd 8558, Ch 4) dwar l-ghanijiet ta' *good modern insolvency law*.

Fost ohrajn, inghad li l-ghanijiet huma :

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

Fil-**Palmer's Company Law** (Edition 25 - Sweet & Maxwell)
jinghamd hekk –

The court's jurisdiction is discretionary and the fact that the petitioner can establish this ground does not give him an automatic right to an order (re. Metropolitan Railway Warehousing Co. Ltd 1887.36.LJCh 827). The court has refused to make an order where there are good reasons for the delay and where the great majority of members desire that the company shall continue. An order may however be made in appropriate circumstances against the majority's wishes. Where the business has merely been suspended the court must be satisfied of an abandonment or inability to carry on. In

ascertaining such intention the court will have regard to the opinion and wishes of the majority of shareholders whose names appear on the register. Merely abandoning one of several objects is insufficient (re. Norwegian Titanic Iron Co. (1866) 35 Beav.223).

Dan premiss, hija l-fehma konsiderata tal-qorti illi Grifo Malta issa ilha aktar minn hames snin li waqfet ghal kollox in-negozju taghha. Jirrizulta ppruvat li ghandha d-dejn mal-intimat Seychell. M`ghandhiex mnejn thallas dak id-dejn ghaliex mhux waqfet ghal kollox min-negozju taghha izda ghaliex bieghet il-makkinarju u l-materja prima kollu biex thallas lill-kredituri taghha. L-istampa li tohrog mill-*financial statements* hija negattiva. Minn mindu waqaf l-operat, l-azzjonisti ma ghamlu l-ebda tentattiv ta` *fresh capital injection* fil-kumpanija sabiex terga` tiehu r-ruh. Minflok ghazlu *to call it a day*. Kumpanija li ma taghmilx negozju hija entita` bla ruh. Ma tkunx qeghda taqdi l-ghanijiet taghha. Kumpanija li ma tiggenerax attivita` ekonomika ma jistax ikollha dhul, u minghajr dhul, ma tista` qatt thallas id-dejn taghha. Ghal din il-qorti, ix-xoljiment u l-istralc tal-intimata huwa inevitabli.

Provvediment

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

Tiddikjara li fir-rigward tal-kumpanija intimata Grifo Malta Ltd (C56733) jirrizultaw pruvati sal-grad rikjest mil-ligi r-rekwiziti tal-Art 214(2)(a)(i) u (ii) u tal-Art 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta.

A tenur tal-Art 214(2)(a)(i) u (ii) u tal-Art 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta, tordna x-xoljiment tal-kumpanija ntimata Grifo Malta Ltd (C56733) b`effett mill-25 ta` Settembru 2019 skont l-Art 223(1) tal-Kap 386. Tordna wkoll l-istralc taghha.

Tahtar lir-Ricevitur Ufficjali bhala stralcjarju bis-setghat u d-dmirijiet kollha skont l-Art 228 et seq tal-Kap 386 tal-Ligijiet ta` Malta.

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

Bl-applikazzjoni tal-Art 236(2) tal-Kap 386 tal-Ligijiet ta` Malta, tordna lir-rikorrenti u lill-kumpannija intimata Grifo Malta Ltd (C56733) sabiex *in solidum* bejniethom ihallsu l-ispejjez kollha ta` dan il-procediment, kif ukoll l-ispejjez kollha tal-istralc, inkluzi d-drittijiet u l-ispejjez tal-istralcjarju.

Thalli l-istralc ghall-udjenza ta` nhar it-Tlieta 4 ta` Mejju 2021, fl-10.15 a.m.

**Onor. Joseph Zammit McKeon
Imhallef**

**Amanda Cassar
Deputat Registratur**