



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

**ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON**

Illum il-Hamis 18 ta` Marzu 2021

**Kawza Nru. 3
Rikors Nru. 16/2018 JZM**

Kenneth Xuereb [K.I. 14176M]

kontra

**Weber Construction Limited
(C80468)**

**Pasquale Petrullo
[K.I. 145346A]**

u

**b`digriet tal-20 ta` Novembru
2018 is-socjeta` MB
Distribution Limited (C-33398)
giet awtorizzata tintervjeni *in
statu et terminis***

u

**b`digriet tal-10 ta` Jannar
2019 is-socjeta` Vella Falzon
Building Supplies Limited (C**

II-Qorti :

I. Preliminari

Rat ir-rikors li kien prezentat fit-13 ta` Settembru 2018 li jaqra hekk :-

1. *Illi l-attur flimkien mal-konvenut Petrullo huma l-azzjonisti tal-kumpanija konvenuta kif jirrizulta mill-Memorandum and Articles of Association tas-socjeta` konvenuta annessa u mmarkata Dokument A.*

2. *Illi jirrizulta l-kumpanija konvenuta tinsab fi stat ta` insolvenza u ma hijiex f` pozizzjoni li thallas id-djun taghha u ghalhekk jissussistu ragunijiet ghax-xoljiment u l-istralc tal-istess socjeta` konvenuta u dan kif ser jigi ampjament pprovat tul it-tattazzjoni tal-kawza.*

3. *Illi l-azzjonisti jaqblu li l-kumpanija ghandha tigi xjolta izda meta l-intimat Petrullo gie interpellat sabiex jersaq sabiex dan isir, wara inkontru preliminari baqa` ma giex `il quddiem sabiex dan jigi attwat.*

4. *Illi giet approvata rizzoluzzjoni ghax-xoljiment tal-kumpanija u l-kumpanija avzat lir-Registratur tal-Kumpaniji kif jirrizulta mill-anness dokument mmarkat Dokument B.*

5. *Illi l-kumpanija konvenuta ma tistax thallas id-dejn taghha u dan meta wiehed iqis il-passiv kontingenti u l-prospettiv tal-kumpanija kif ser jirrizulta ampjament tul it-trattazzjoni ta` dawn il-proceduri.*

Ghaldaqstant, in vista tal-premess, l-esponenti umilment jitlobu lil din l-Onorabbi Qorti joghgobha :

1. *Tordna l-istralc tal-kumpanija konvenuta ai termini tal-Art 214(1)(a) tal-Kap. 386 tal-Ligijiet ta` Malta.*

2. *Konsegwentament taghti kull provvediment opportun sabiex jinhatar l-istralcjarju u jigi kondott l-istralc konsegwenzjali skont id-dispozizzjonijiet tal-Kap. 386 u tal-Ligijiet ta` Malta.*

3. *Alternattivament tiddikjara li s-socjeta` konvenuta ma hijiex f` pozizzjoni li thallas id-djun taghha.*

4. *Konsegwentament tuza d-diskrezzjoni taghha ai termini tal-Artikolu 214(2)(a)(ii) tal-Kap 386 tal-Ligijiet ta` Malta u tordna x-xoljiment u l-istralc tal-kumpanija intimata.*

5. *Taghti kull provvediment opportun sabiex jinhatar l-istralcjarju u jigi kondott l-istralc konsegwenzjali skont id-dispozizzjonijiet tal-Kap. 386 tal-Ligijiet ta` Malta.*

Bl-ispejjez kontra s-socjeta` konvenuta u l-konvenut li huwa minn issa ngunt ghas-subizzjoni.

B` rizerva ta` kull azzjoni ulterjuri spettanti lir-rikorrenti fil-ligi.

Rat il-lista tax-xhieda.

Rat id-dokumenti li kienu prezentati mar-rikors promotur.

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

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

Rat l-atti l-ohra.

II. Locus standi

Qabel tghaddi biex tqis il-mertu tal-istanza odjerna, il-qorti tghid illi 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.

Jirrizulta li r-rikorrent huwa azzjonista u direttur tal-kumpannija ntimata skont l-M&A a fol 6 et seq.

Ir-rikorrent qiegħed jitlob ix-xoljiment u l-istralc tal-kumpannija ntimata abbazi tal-Art 214(1)(a) u tal-Art 214(2)(a)(ii) tal-Kap 386. Il-qorti ssib li r-rikorrent wahdu m`ghandux *locus standi* sabiex jipromwovi l-azzjoni skont l-Art 214(1)(a) tal-Kap 386, ghaliex istanza abbazi ta` dik id-disposizzjoni ma tistax issir minn azzjonista u/jew direttur, izda tista` ssir 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. (Dok A a fol 5 mhux bizzejjed).

Fl-istess waqt, tghid ukoll illi, bhala azzjonista u direttur, ir-rikorrent ghandu locus standi sabiex jippromwovi l-azzjoni skont l-Art 214(2)(a)(ii).

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

1. Dritt

Id-disposizzjoni taghti lill-qorti diskrezzjoni li xxolji u tistralcja kumpannija jekk issib li *ma tkunx tista` thallas id-djun taghha*.

Id-disposizzjoni trid tingara flimkien ma` l-Art 214(5) li jistabilixxi meta, skont il-ligi taghna, kumpannija ghandha titqies li 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 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.

Ma kienx indikat mir-rikorrent fuq liema minn dawn i-zewg cirkostanzi qed jinkwadra t-talba. Ghalhekk il-qorti sejra tqis iz-zewg sitwazzjonijiet.

Meta tfassal il-mudell ghal-ligi taghna l-gdida dwar il-kumpanniji, il-qafas maghzul kien dak tal-Companies Act Ingliza 1985.

Fil-ligi Ingliza, ix-xoljiment u l-istralc ta` kumpanniji kien trattat f`legislazzjoni *ad hoc* u cioe` l-Insolvency Act 1986.

Meta fl-1995 saret il-ligi taghna l-gdida dwar il-kumpanniji li hadet post il-Commercial Partnerships Ordinance 1962 (Kap 168 tal-Ligijiet ta` Malta), id-disposizzjonijiet li jolqtu x-xoljiment u l-istralc kienu integrati fl-Att tal-1995.

Dan premess, fil-ligi taghna, li kumpannija ma tkunx tista` thallas id-djun taghha ghandu sinjifikat **preciz u definit** mil-ligi stess fl-Art 214(5).

Fil-ligi Ingliza, il-posizzjoni hija aktar wiesgha.

Il-koncett ta` insolvenza fil-ligi taghna huwa aktar ristrett minn dak tal-ligi Ingliza ghalkemm hemm *overlaps*.

Fit-Tmien Edizzjoni (2012) tal-ktieb **Boyle & Birds Company Law** (pubblikat minn Jordans) pg 859 jinghad hekk –

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") ...

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

Dwar din id-disposizzjoni, tajjeb jinghad illi titkellem dwar l-ezekuzzjoni ta` **atti ezeuttivi**.

Ghalhekk kumpannija ma tistax titqies illi mhijiex f`qaghda li thallas id-djun taghha abbazi ta` mandat kawtelatorju, anke jekk dak il-mandat ikun gie ezegwit kontra d-debitur.

Il-fattur rilevanti sabiex jiskattaw l-erbgha u ghoxrin (24) gimgha huwa **l-ezekuzzjoni tal-Mandat**.

Fil-kaz ta` mandat ta` sekwestru, l-ezekuzzjoni tal-mandat tiskatta bin-notifika tal-att lis-sekwestratarji minghajr il-htiega tan-notifika tad-debitur.

B` mod aktar strett, fil-ligi taghna dak previst mill-Art 214(5)(a) jixbah il-koncett ta` *cash flow insolvency* fil-ligi Ingliza.

Fil-kaz ta` *cash flow insolvency* din il-qorti tghid illi filwaqt illi fil-ligi taghna huwa specificat bil-preciz x`m`ghandhiex taghmel kumpannija debitrice sabiex ma tkunx meqjusa li ma tistax thallas id-djun taghha, fil-ligi Ingliza il-kriterju huwa aktar generiku ghax ikun hemm dik it-tip ta` *insolvenza if it is unable to pay its debts as they fall due*.

Fil-**Boyle & Birds Company Law** (op. cit.) ikompli jinghad :-

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** ta` **Andrew Keay u Peter Walton** (ippubblikat minn Pearson Longman – 2003) jinghad hekk dwar *cash flow insolvency* kif mifhuma 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 ...

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

Fit-test bl-Ingliz id-disposizzjoni tal-ligi taghna taqra hekk :-

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, 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.

Id-divergenza bejn il-legislazzjoni Ingliza u dik Maltija hija li filwaqt li fil-kaz tal-Maltija, il-mizura hija semplici : u cioe` *the company is unable to pay its debts account being taken also of contingent and prospective liabilities of the company*, fil-kaz tal-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 tal- ... contingent and prospective liabilities.*

Ghal din il-qorti, id-differenza hija ta` sostanza mhux ta` *drafting* ; fl-istess waqt, hija tal-fehma li xorta ghandha tfittex sintesi bejn id-disposizzjoni tal-ligi taghna u dik tal-ligi Ingliza. Din is-sintesi hija mehtiega sabiex tinghata tifsira aktar preciza ghal dawk li huma *contingent and prospective liabilities* li jsibu l-fonti taghhom fil-qasam tal-kontabilita` .

Bid-debiti riservi, u tenut kont tad-disparita` fid-disposizzjonijiet ta` bejn il-ligi Ingliza u dik taghna, il-qorti sejra tirreferi ghal dak li tghid id-dottrina Ingliza dwar dak li huwa maghruf bhala *balance sheet insolvency* meta abbinat mal-Art 123(2) tal-Insolvency Act 1986 tar-Renju Unit.

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

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-Khudhairi (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 :-

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 l-contingent liability billi 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 l-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.

Dwar l-Art 214(5)(b) il-Prim`Awla tal-Qorti Civili fis-sentenza taghha tat-28 ta` Mejju 2003 fil-kawza "**Axel John International AB vs Aluminium Extrusions Limited**" qalet hekk –

Din il-kondizzjoni tista` tigi verifikata permezz tal-balance sheets wara li jigi kunsidrat jekk l-assets are less than its liabilities. Izda ... 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 over a lengthy period (Re : European Life Assurance Society 1869 LR 9 Eq 122).

Ghalhekk ma hemmx raguni ghaliex il-kredituri ghandhom joqghodu jistennew sakemm il-kumpannija tbiegh l-assets taghha biex forsi xi darba jithallsu.

IV. Risultanzi

Fuq l-iskorta tal-provi li gab ir-rikorrent, il-qorti ma tistax tasal ghal sejbien ta` insolvenza specifikament skont l-Art 214(5)(a) tal-Kap 386, billi ma rrizultax li kien ezegwit mandat ezekuttiv kontra l-kumpannija Weber Construction Limited.

Fuq l-iskorta tal-provi li gab ir-rikorrent, inkluz dak li rrizulta mill-provi tal-intervenuti fil-kawza, u tenut kont tad-dottrina u gurisprudenza citata aktar kmieni, il-qorti tghid li ghandha provi sodisfacjenti u sal-grad rikjest mil-ligi ta` dak li huwa rikjest bl-Art 214(5)(b).

V. Id-diskrezzjoni tal-Qorti

Accertat illi jirrizultaw ippruvati r-rekwiziti tal-Art 214(2)(a)(ii) u tal-Art 214(5)(b), il-qorti trid tara jekk fuq il-provi akkwiziti, ghandhiex tezercita d-diskrezzjoni taghha li tordna x-xoljiment u l-istralc tal-kumpannija Weber Construction Limited.

Il-qorti ghamlet ezami akkurat kemm tad-dokumenti esebiti u kif ukoll ta` dak mistqarr mix-xhieda.

Tinsab rinfaccjata b` kumpannija li llum hija sprovvista minn assi. Skont ir-rikorrent, dawn qabad u hadhom bla dritt ta` xejn l-azzjonista ntimat Pasquale Petrullo. Mhux hekk biss imma dan ghamel uzu minnhom biex beda negozju simili ghal dak ta` Weber Construction Limited bi ksur tal-obbligi tieghu bhala direttur tal-kumpannija ntimata. Ir-rikorrent mhux kontradett f` li xehed.

L-intimata ghandha dejn cert ma` terzi (€10,404.77 mal-intervenuta Vella Falzon Building Supplies Limited a fol 25 et seq + €10,508 mal-intervenuta MD Distribution Limited a fol 30 seq). Dan id-dejn mhux kontradett. Mnejn thallas dak id-dejn ma jirrizultax illi hemm.

Il-kumpannija llum giet fix-xejn (ara d-deposizzjoni tar-rikorrent a fol 57 et seq).

Ma jidhirx li hemm rieda sabiex tinsorgi.

Ghalhekk il-qorti sejra wkoll tezercita d-diskrezzjoni taghha u sejra tordna x-xoljiment u l-istralc tal-kumpannija abbazi tal-Art 214(2)(a)(ii) u tal-Art 214(5)(b) tal-Kap 386.

Provvediment

Ghar-ragunijiet kollha premissi, il-qorti qeghda tipprovdi dwar it-talbiet tar-rikorrent billi :

Tichad l-ewwel (1) u t-tieni (2) talbiet.

Tilqa` t-tielet (3) talba.

Tilqa` r-raba` (4) talba billi tiddikjara li fir-rigward tal-kumpannija Weber Construction Limited (C80468) jirrizultaw ippruvati sal-grad rikjest mil-ligi r-rekwiziti tal-Art 214(2)(a)(ii) u tal-Art 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta. Tordna x-xoljiment tal-kumpannija Weber Construction Limited (C80468) b` effett mit-13 ta` Settembru 2018 skont it-

tieni proviso tal-Art 223(1) tal-Kap 386. Tordna wkoll l-istralc taghha.

Tipprovdi dwar il-hames (5) talba billi tahtar lir-Ricevitur Ufficjali bhala stralcjarju tal-kumpannija Weber Construction Limited (C80468) bis-setghat u bid-dmirijiet kollha li huma stabbiliti fil-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, tordna lir-rikorrent, lill-intimat Pasquale Petruzzo u lill-kumpannija ntimata Weber Construction Limited (C80468) 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 8 ta` Gunju 2021 fl-09.45 a.m.

**Onor. Joseph Zammit McKeon
Imhallef**

**Amanda Cassar
Deputat Registratur**