



**QORTI CIVILI
PRIM' AWLA**

**ONOR. IMHALLEF
JOSEPH ZAMMIT MC KEON**

Seduta tas-6 ta' Mejju, 2013

Rikors Numru. 642/2012

**Suzanne Busuttil, karta tal-identita` numru 19076(M) u
Brian Busuttil, karta tal-identita` numru 525373(M)
f` ismu proprju u bhala Direttur f` isem u in
rapprezentanza ta` Stealth Holdings Limited, C26763**

kontra

**1) Francis Busuttil & Sons Limited, C334; 2) B&S
Contractors Limited, C552; 3) Franco Busuttil
ID11461(M); 4) Michael Busuttil ID51261(M); 5) Joseph
Busuttil ID90968M; 6) Christian Busuttil ID199278M; u
7) Jean Paul Busuttil ID102172M; ilkoll fil-kwalita`
taghom kollha bhala diretturi f` isem Francis Busuttil
& Sons Limited u B&S Contractors Limited, hliet
Franco Busuttil li ma huwiex Direttur ta` B&S
Contractors Limited u Jean Paul Busuttil li ma huwiex
direttur ta` Francis Busuttil & Sons Limited u ghal kull
interess li jista` jkollhom; 8) Foster Clark Products
Limited (C803); 9) Francis Busuttil & Sons (Marketing)
Limited (C24137); 10) B&S Exports Limited (C16946);**

11) B&S Manufacturing Limited (C16941); u 12) Chris Degiorgio ID70456(M) bhala direttur ta` Foster Clark Products Limited u ta` Francis Busuttil & Sons (Marketing) Limited

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentat fit-22 ta` Gunju 2012 li jaqra hekk –

1. *ILLI dan huwa Rikors a tenur tal-art 402 tal-Companies Act (Kap 386) ; l-esponenti qed jillanjaw illi “the affairs of the company” ilhom zmien twil jitmexxew u qed jitmexxu fil-mument u minghajr ebda prospett illi dan jinbidel fil-futur, b`mod illi huwa oppressive, unfairly discriminatory against, or unfairly prejudicial magghom bhala membri u / jew kontra l-interessi tal-membri kollha. L-esponenti jillanjaw ukoll illi minkejja kull apparenza kontrarja, spiss maskerata f`kumitati u minuti, hemm nuqqasijiet serji ta` corporate governance u trasperenza, u rispett lejn il-minoranzi ;*

2. *ILLI l-interess u locus standi tal-esponenti huwa ta` azzjonisti diretti jew ultimate u beneficial owners fl-azzjonijiet fil-kumpanniji msemmija. L-esponenti sejrjn jergghu jirrepetu formalment u ghal finijiet u effetti kollha tal-ligi l-lanjanzi tagghom. Dawn gew trasmessi lill-Bord tad-Diretturi u azzjonisti ohra ghal diversi drabi, zejzed drabi u qatt ma nghataw twegiba jew reazzjoni ;*

3. *ILLI l-esponenti jesponu illi t-tmexxija tal-kumpannija hija bi vjolazzjoni tad-doveri tad-diretturi kif illum parzjalment kodifikati fl-art 136A tal-Companies Act :*

Kopja Informali ta' Sentenza

(i) *vjolazzjoni tad-doveri bazici ta` direttur ta` self-dealing u conflict of interest ;*

(ii) *vjolazzjoni tad-dover baziku ta` direttur li jagixxu fl-ahjar interess tal-kumpannija ;*

(iii) *vjolazzjoni tal-corporate opportunity doctrine, fejn xi diretturi jiehdu a vantagg personali taghhom, opportunitajiet kummercjali li jigu f`kuntatt maghhom minhabba l-kariga ;*

(iv) *nuqqas serju ta` trasparenza minhabba nuqqas ta` trasmissjoni ta` informazzjoni kompleta, b`mod illi l-membri jew xi membri tal-Bord ma humiex f`pozizzjoni li jaraw il-kwadru shih tas-sitwazzjoni ;*

(v) *tmexxija "oligarkika" tal-kumpannija, fejn numru zghir jaghmel decizionijiet wahdu u fl-interess ta` ftit, mhux fl-interess aktar wiesgha tal-kumpanniji ;*

(vi) *nuqqas ta` access ghall-informazzjoni ;*

(vii) *beneficcju mhux awtorizzati jew mohbija minn xi membri.*

Dawn in-nuqqasijiet huma ezempji ghaliex fil-kors tal-provi jirrizultaw izjed. In-nuqqas fil-corporate governance hija sistematika u sistematika fit-tmexxija ; l-esponenti jghidu illi hemm concert and collusion bejn diversi interessi biex jostakolaw corporate governance proprja fit-tmexxija tal-kumpannija ;

4. *ILLI l-lanjanzi, gia` ripetutament trasmessi à outrance u injorati sistematikament huwa hekk sintetizzati :*

Kopja Informali ta' Sentenza

(i) *nuqqas minkejja talbiet kostanti u ripetuti li tigi provduta*

informazzjoni fuq l-istatus tal-kumpannija : dan jinkludi dokumenti, records u minuti ta` meetings u laqghat, informazzjoni finanzjarja. Intalbu inutility management accounts ta` kull xahar ghal kull kumpannija sussidjarja li topera u hija attiva ;

(ii) *meta inghataw management reports, dawn inghataw minghajr*

analizi, spjegazzjoni jew reconciliations ta` figuri ; ghandu jigi spjegat hawnhekk illi figuri minghajr analizi dettaljata u spjegazzjoni li tqieghed il-figuri fil-kuntest huma fl-ahjar ipotesi inutli u fl-aghar ipotesi misleading u fuorvianti ; fil-fatt il-ftit analizi jew spjegazzjonijiet li nghataw kienu aktarx inkompjuti, insufficienti jew misleading u f`istanzi ohra addirittura ma nghatat xejn ;

(iii) *ma nghatawx pjanijiet kummercjali ta` kull sena u ghal kull hames*

snin tal-kumpanniji sussidjarji u rapporti aggornati u attwali ghall-mument dwar il-progett ta` fabbrica u mhazen godda ta` Foster Clark Products Limited u ta` ufficini godda ta` Francis Busuttil & Sons (Marketing) Limited ;

(iv) *istanzi fejn xi membri tal-Bord tad-Diretturi hbew lill-Bord tad-*

Diretturi informazzjoni jew ipprovdeu rapporti jew informazzjoni li hija nkompleta jew falza, bhal per ezempju dwar progetti godda li dahlet fihom il-kumpannija jew is-sussidjarji taghha ;

(v) *nuqqas ta` xi membri tal-Bord tad-Diretturi, in vjolazzjoni tal-basic*

fiduciary duties taghhom u kif kodifikati fil-Companies Act li jevitaw li jitqieghdu jew jagixxi f`sitwazzjoni ta` konflitt ta` interess, jew self-dealing mal-kumpannija jew li josservaw il-corporate opportunity doctrine li ma jehdux huma opportunitajiet kummercjali li gew ghandhom fil-vesti ta` Diretturi tal-kumpannija ;

(vi) nuqqas kollektiv tad-dirigenza li ghandha f'idejha t-tmexxija li jipprezentaw lill-Bord tad-Diretturi pjanijiet maqbula u strategija ghal xi kumpannija parti mill-Busuttil Group ;

(vii) nuqqas tal-Bord li jwiegeb mistoqsijiet legittimi dwar kwistjonijiet u mplikazzjonijiet legali li jolqtu l-kumpanniji ; fil-fatt l-esponent Brian Busuttil ghamel mistoqsijiet rilevanti u attwali lill-Bord li ma twegbux, u meta l-esponent Suzanne Busuttil talbet li jittiehed parir legali indipendenti, il-maggoranza fil-Bord, b`konflitt car ta` interess, giet rifjutata mill-Bord ;

5. ILLI l-esponenti huma konxji tal-entita` tal-kuntest u ma hijjex l-intenzjoni tagghom li jagixxu b`mod li jikkawzaw hsara u danni, izda jidhrilhom illi huma ntitolati illi l-kumpanniji jitmexxew b`mod serju u konsistenti man-negozju tagghom, kif ukoll b`mod car, trasparenti u li jirrifletti z-zminijiet u l-generazzjonijiet differenti ta` azzjonisti. Kienu kostretti jiehdu dawn il-mizuri proprju minhabba n-nuqqas sistematiku tal-Bordijiet ta` Diretturi rispettivi illi sistematikament injoraw talbiet biex it-tmexxija ma tibqax diskriminatorja u kontra l-interessi tal-azzjonisti jew xi whud minnhom ;

6. ILLI ghalhekk filwaqt illi huma bhal dejjem ser jagixxu b`mod ghaqli u responsabbli, jintimaw minn issa illi behsiebhom jiehdu kull misura legali u prudenti biex jipprotegu l-interessi tagghom u sabiex tieqaf il-hsara li qed issir lill-kumpanniji u lill-interessi tagghom.

GHALDAQSTANT L-ESPONENTI, jitolbu bl-akbar rispettt l-intervent u l-azzjoni ta` din l-Onorabbli Qorti sabiex taghti dawk id-direttivi li jidhrilha xierqa u opportun, fl-interess tar-rikorrenti fid-dawl ta` dak kollu preambulat u premess, imma tenut kont tal-interessi tal-kumpannija u l-azzjonisti taghha, sabiex jieqfu l-abbuzi fuq indikati u sabiex ikun hemm tmexxija skond regolai u principji

accettati ta` corporate governance, kif rikjest mill-Companies Act, inkluz l-art 136A(2)(A) u taht il-provvedimenti li din il-Qorti joghgobha taghti.

Rat ir-risposta ta` Foster Clark Products Limited (C803), Francis Busuttil & Sons (Marketing) Limited (C24137), B&S Exports Limited (C16946), B&S Manufacturing Limited (C16941) u Chris Degiorgio ID70456(M) bhala direttur ta` Foster Clark Products Limited u ta` Francis Busuttil & Sons (Marketing) Limited, prezentata fis-7 ta` Settembru 2012 li taqra hekk –

Illi fl-ewwel lok u preliminarjament l-esponenti mhumiex il-legittimi kontraditturi stante li r-rikorrenti mhumiex azzjonisti (membri) fis-socjetajiet intimati Foster Clark Products Limited, Francis Busuttil & Sons (Marketing) Limited, B&S Exports Limited u B&S Manufacturing Limited, filwaqt li l-intimat Chris Degiorgio “ex admissis” mill-istess rikorrenti hu biss direttur ta` Foster Clark Products Limited u ta` Francis Busuttil & Sons (Marketing) Limited u ghalhekk ghandhom jigu liberati mill-osservanza tal-gudizzju.

Illi fit-tieni lok u preliminarjament u minghajr pregudizzju ghal fuq espost, ghandu jigi rilevat in-nuqqas ta` integrita` tal-gudizzju stante li l-azzjonisti tas-socjetajiet intimati Francis Busuttil & Sons Limited u B&S Contractors Limited mhumiex partijiet f`dawn il-proceduri u ghalhekk l-esponenti jitolbu l-kjamata in kawza tal-istess.

Illi fit-tielet lok u wkoll preliminarjament u minghajr pregudizzju ghal fuq espost, wiehed jirrileva li ma jirrizultax b`mod car liema rimedju qed jigi verament invokat mir-rikorrenti. Waqt illi l-premessa hi li r-rikors qiegħed isir a tenur tal-artikolu 402 tal-Kap 386, l-ilmenti u l-lanjanzi huma kollha diretti kontra d-diretturi u fir-rigward gie nvokat l-artikolu 136A tal-istess Kap. L-istess talba

mbaghad hija ghat-“tmexxija skond regoli u principji accettati ta` corporate governance, kif rikjest mill-Companies Act (m`hemm xejn dwar corporate governance fil-Companies Act) inkluz l-artikolu 136A(2)(A)” illi fl-isfond ta` dan kollu r-rimedju hu dak previst fl-artikolu 140 tal-Kap 386 u mhux l-istanza odjerna u ghalhekk ukoll it-talbiet tar-rikorrenti ghandhom jigu respinti.

Illi fil-mertu l-allegazzjonijiet kollha migjuba fir-rikors promotur dwar agir mhux korrett tad-diretturi intimati u ta` tmexxija rregolari u allegazzjonijiet ohra huma kollha michuda bhala ghal kollox infondati fil-fatt u fid-dritt. Kif ser jigi ppruvat ahjar waqt it-trattazzjoni tal-kawza, il-kumpanniji intimati kollha, inkluz ukoll dawk li fihom ir-rikorrenti huma azzjonisti, jitmexxew skond il-ligi, fl-ahjar interess tal-azzjonisti kollha u b`rizultati ottimi. Ghalhekk it-talba tar-rikorrenti hi kompletament minghajr bazi u ghandha tigi michuda bl-ispejjez kontra taghhom stante li ma tezisti l-ebda raguni ghaliex l-Artikolu 402 tal-Kap 386 kif invokat mir-rikorrenti ghandu jigi applikat.

Rat ir-risposta guramentata ta` Francis Busuttil & Sons Limited (C334), B&S Contractors Limited (C552), Franco Busuttil (ID11461M), Michael Busuttil (ID51261M), Joseph Busuttil (ID90968M), Christian Busuttil (ID199278M), u Jean Paul Busuttil (ID102172M) il-koll fil-kwalita` taghhom kollha bhala diretturi f`isem Francis Busuttil & Sons Limited u B&S Contractors Limited, hliet Franco Busuttil li ma huwiex Direttur ta` B&S Contractors Limited u Jean Paul Busuttil li ma huwiex direttur ta` Francis Busuttil & Sons Limited, prezentata fis-7 ta` Settembru 2012 li taqra hekk –

Illi fl-ewwel lok u preliminarjament ghandu jigi rilevat in-nuqqas ta` integrita` tal-gudizzju stante li l-azzjonisti tas-socjetajiet intimati Francis Busuttil & Sons Limited u B&S Contractors Limited mhumieq partijiet f`dawn il-

proceduri u ghalhekk l-esponenti jitolbu l-kjamata in kawza tal-istess.

Illi fit-tieni lok u wkoll preliminarjament u minghajr pregudizzju ghal fuq espost, wiehed jirrileva li ma jirrizultax b`mod car liema rimedju qed jigi verament invokat mir-rikorrenti. Waqt illi l-premessa hi li r-rikors qiegħed isir a tenur tal-artikolu 402 tal-Kap 386, l-ilmenti u l-lanjanzi huma kollha diretti kontra d-diretturi u fir-rigward gie nvokat l-artikolu 136A tal-istess Kap. L-istess talba mbagħad hija għat-“tmexxija skond regoli u principji accettati ta` corporate governance, kif rikjest mill-Companies Act (m`hemm xejn dwar corporate governance fil-Companies Act) inkluz l-artikolu 136A(2)(A)” illi fl-isfond ta` dan kollu r-rimedju hu dak previst fl-artikolu 140 tal-Kap 386 u mhux l-istanza odjerna u għalhekk ukoll it-talbiet tar-rikorrenti għandhom jigu respinti.

Illi fil-mertu l-allegazzjonijiet kollha migjuba fir-rikors promotur dwar agir mhux korrett tad-diretturi intimati u ta` tmexxija rregolari u allegazzjonijiet ohra huma kollha michuda bhala għal kollox infondati fil-fatt u fid-dritt. Kif ser jigi ppruvat ahjar waqt it-trattazzjoni tal-kawza, il-kumpanniji intimati kollha, inkluz ukoll dawk li fihom ir-rikorrenti huma azzjonisti, jitmexxew skond il-ligi, fl-ahjar interess tal-azzjonisti kollha u b`rizultati ottimi. Għalhekk it-talba tar-rikorrenti hi kompletament minghajr bazi u għandha tigi michuda bl-ispejjez kontra tagħhom stante li ma tezisti l-ebda raguni għaliex l-Artikolu 402 tal-Kap 386 kif invokat mir-rikorrenti għandu jigi applikat.

Rat il-verbal tal-udjenza tal-11 ta` Ottubru 2012 fejn din il-Qorti, wara li rriskontrat qbil bejn id-difensuri tal-partijiet, tat direzzjoni lill-kawza fis-sens illi kellha tigi trattata u deciza l-ewwel eccezzjoni tal-intimati Foster Clark Products Limited, Francis Busuttil & Sons (Marketing) Limited, B & S Exports Limited, B & S Manufacturing Limited u Chris Degiorgio noe.

Kopja Informali ta' Sentenza

Rat id-dokumenti li kienu prezentati mill-partijiet fl-udjenza tal-5 ta` Novembru 2012.

Semghet ix-xiehda taz-zewg rikorrenti fl-istess udjenza.

Rat in-noti ta` osservazzjonijiet tal-partijiet.

Rat il-verbal tal-udjenza tat-18 ta` Frar 2013.

Rat id-digriet taghha moghti f`dik l-udjenza fejn halliet il-kawza ghas-sentenza ghal-lum deciza dwar l-ewwel eccezzjoni tal-intimati Foster Clark Products Limited, Francis Busuttil & Sons (Marketing) Limited, B & S Exports Limited, B & S Manufacturing Limited u Chris Degiorgio noe.

Rat l-atti tal-kawza.

Ikkunsidrat :

II. Generali

L-eccezzjoni preliminari li qeghda tkun deciza llum kienet intavolata minn dawn l-intimati –

- 1) Foster Clark Products Limited (C803) ;
- 2) Id-direttur taghha Chris Degiorgio ;
- 3) Francis Busuttil & Sons (Marketing) Limited (C24137) ;
- 4) Id-direttur taghha Chris Degiorgio ;
- 5) B&S Exports Limited (C16946) ;

Kopja Informali ta' Sentenza

6) B&S Manufacturing Limited (C16941) ;

L-eccezzjoni taqra hekk –

Illi fl-ewwel lok u preliminarjament l-esponenti mhumix il-legittimi kontraditturi stante li r-rikorrenti mhumix azzjonisti (membri) fis-socjetajiet intimati Foster Clark Products Limited, Francis Busuttil & Sons (Marketing) Limited, B&S Exports Limited u B&S Manufacturing Limited, filwaqt li l-intimat Chris Degiorgio "ex admissis" mill-istess rikorrenti hu biss direttur ta` Foster Clark Products Limited u ta` Francis Busuttil & Sons (Marketing) Limited u ghalhekk ghandhom jigu liberati mill-osservanza tal-gudizzju.

Ikkunsidrat :

III. Provi

Kienu prezentati l-Memoranda u l-Articles of Association ta` –

- 1) Foster Clark Products Limited (C803) (DOK X1) ;
- 2) Francis Busuttil & Sons (Marketing) Limited (C24137) (DOK X2) ;
- 3) B&S Exports Limited (C16946) (DOK X3) ;
- 4) B&S Manufacturing Limited (C16941) (DOK X4).

Qed isir ezami ta` kull statut fil-kuntest tal-eccezzjoni li qeghda tkun deciza llum –

1) Foster Clark Products Limited (C803)

A fol 44 (DOK X1) jirrizulta li *l-issued share capital of the Company is nine hundred and sixty thousand Maltese Liri (Lm 960,000) made up of five hundred thousand (500,000) Ordinary Shares of one Maltese Lira (Lm 1)*

Kopja Informali ta' Sentenza

each and four hundred and sixty thousand (460,000) Preference Shares of one Maltese Lira (Lm 1) each, which are being subscribed and allotted as fully paid up shares as follows :

Francis Busuttil & Sons Limited (enfasi u sottolinear ta` l-qorti)

*Busuttil Buildings,
Santa Venera Square,
Santa Venera*

- 499,999 Ordinary Shares
- 460,000 Preference Shares

B & S Contractors Limited (enfasi u sottolinear ta` l-qorti)

*UB41A Industrial Estate,
San Gwann*

- 1 Ordinary Share

2) Francis Busuttil & Sons (Marketing) Limited (C24137)

A fol 70 (DOK X2) jirrizulta li The Issued Capital of the Company shall be of four hundred thousand Maltese Lira (Lm 400,000) divided into four hundred thousand (400,000) Ordinary Shares of one Maltese Lira (Lm 1) each, fully paid up. Is-Subscribers huma –

Francis Busuttil & Sons Limited (enfasi u sottolinear ta` l-qorti)

*Busuttil Buildings,
Santa Venera Square,
Santa Venera*

Three hundred and nine thousand nine hundred and ninety nine (399,999) Ordinary Shares of one Maltese Lira (Lm 1) each, fully paid up.

Kopja Informali ta' Sentenza

B & S Contractors Limited (enfasi u sottolinear ta' l-qorti)

*UB41A Industrial Estate,
San Gwann*

*One (1) Ordinary Share of one Maltese Lira (Lm 1) each,
fully paid up*

3) B&S Exports Limited (C16946)

A fol 80 (DOK X3) jirrizulta li The Issued Share Capital of the Company is ten thousand Maltese Lira (Lm 10,000) divided into ten thousand (10,000) Ordinary Shares of one Maltese Lira (Lm 1) each, which are being subscribed by the shareholders in the following manner, each share being fully paid up.

B & S Contractors Limited (enfasi u sottolinear ta' l-qorti)

*UB41A Industrial Estate,
San Gwann*

Nine thousand, nine hundred and ninety (9,990) Ordinary Shares of one Maltese Lira (Lm 1) each.

Francis Busuttil & Sons Limited (enfasi u sottolinear ta' l-qorti)

*Busuttil Buildings,
Santa Venera Square,
Santa Venera*

Ten (10) Ordinary Shares of one Maltese Lira (Lm 1) each.

4) B&S Manufacturing Limited (C16941)

A fol 103 (DOK X4) jirrizulta li The Issued Share Capital of the Company is fifty thousand Maltese Lira (Lm

Kopja Informali ta' Sentenza

50,000) divided into fifty thousand (50,000) Ordinary Shares of one Maltese Lira (Lm 1) each, which are being subscribed by the shareholders in the following manner, each share being fully paid up.

B & S Contractors Limited (enfasi u sottolinear ta` l-qorti)
*UB41A Industrial Estate,
San Gwann*

Forty nine thousand, nine hundred and ninety (49,990) Ordinary Shares of one Maltese Lira (Lm 1) each.

Francis Busuttil & Sons Limited (enfasi u sottolinear ta` l-qorti)
*Busuttil Buildings,
Santa Venera Square,
Santa Venera*

Ten (10) Ordinary Shares of one Maltese Lira (Lm 1) each.

Ir-rikorrenti Suzanne Busuttil xehdet illi huwa r-rikorrent Brian Busuttil huwa s-sid tal-ishma kollha tal-kumpannija rikorrenti Stealth Holdings Limited li ghandha 2000 sehem fil-kumpannija intimata B & S Contractors. Personalment huwa wkoll is-sid ta` 1000 sehem fi B & S Contractors Limited. Hi personalment hija azzjonista fil-kumpanniji intimati Francis Busuttil & Sons Limited (40 sehem) u B & S Contractors Limited (3000 sehem). Permezz tad-Dok SB1 li pprezentat u d-dokumenti hemm annessi, ix-xhud tghid illi hemm spjegat illi hemm zewg gruppi ta` kumpanniji li jaghmlu l-Busuttil Group : dawn huma Francis Busuttil & Sons u B & S. It-tliet kumpanniji li jaghmlu l-B & S u cioe` Contractors, Exports u Manufacturing *are really and truly one manufacturing company they are just split up it was originally done for tax purposes.* Tkompli tghid illi l-kumpanniji kollha flimkien jaghmlu parti minn negozju tal-familja *owned and controlled by the same five legacy families today before it was the five brothers. All the companies are all highly*

intertwined, the directors are also common the majority of them are common on all the boards. Tinsisti x-xhud illi it would actually be relevant for these companies to be included in the case because the whole entire group should all be looked at as quasi partnership because that is how it is run. It is owned and controlled by the same five legacy companies and also the memorandum and articles of association so when basically these companies were incorporated the intentions were that the families involved all along down the line and everything is. Ikkonfermat illi hi personalment, huha Brian personalment u Stealth Holdings Limited mhumiex azzjonisti diretti ta` Foster Clark Products Limited, Francis Busuttil & Sons (Marketing) Limited, B&S Exports Limited u ta` B&S Manufacturing Limited.

Ir-rikorrent Brian Busuttil ikkonferma fl-intier taghha d-deposizzjoni ta` Suzanne Busuttil.

Ikkunsidrat :

IV. Sottomissjonijiet

Dak illi qeghdin **fis-sostanza** jghidu l-intimati li taw l-ecezzjoni preliminari li qeghda tkun deciz llum huwa illi l-azzjoni skond l-Art 402 tal-Kap 386 ghandha parametri stretti : tista` tkun tentata biss minn min il-ligi tghid illi jikkwalifika biex jipprezenta l-istanza. Billi r-rikorrenti ma jikkwalifikawx, ma jistghux jittentaw l-istanza kontra dawk l-intimati partikolari u kwindi ghandhom jigu liberati mill-osservanza tal-gudizzju ghaliex mhumiex il-legittimi kontraditturi taghhom.

It-twegiba tar-rikorrenti **fis-sostanza** hija fis-sens illi fil-kuntest ta` azzjoni skond l-Art 402 tal-Kap 386, il-Qorti ghandha fl-interpretazzjoni tad-disposizzjoni tinkludi mhux biss *first tier shareholding* izda anke *second tier*

shareholding. Jirrikonoxxu li huwa jikkwalifikaw bhala *second tier shareholding*. Jaghmlu riferenza ghas-sentenzi tal-Qorti tal-Appell fil-kawzi *Perit Raymond Vassallo vs Anthony Parlato Trigona et* deciza fl-24 ta` Gunju 2011, *Jean Karl Soler et vs Raymond Vassallo pero et noe* deciza fit-3 ta` Frar 2012 u ta` din il-Qorti diversament presjeduta (PA/JRM) tat-8 ta` Lulju 2004 fil-kawza *Joseph Calleja pro et noe vs Vincent Calleja*.

Ikkunsidrat :

V. Risultanzi

Din il-Qorti sejra taghmel riferenza fit-test bl-Ingiliz ghal dawk id-disposizzjonijiet tal-Kap.386 illi fil-fehma taghha huma rilevanti ghall-fini tal-provvediment tal-lum. Sejra ticcita t-test tal-ligi bl-Ingiliz unikament ghall-fini komparattiv propju ghaliex `il quddiem sejra tirreferi ghal-ligi u l-gurisprudenza tar-Renju Unit.

Ir-rikorrenti Suzanne Busuttil de proprio, Brian Busuttil de proprio u Stealth Holdings Limited intavolaw l-azzjoni taghhom abbazi tal-Art.402 tal-Kap.386. Fl-ewwel paragrafu tar-rikors taghhom, ighidu *illi dan huwa rikors a tenur tal-art 402 tal-Companies Act (Kap 386)* u jghidu bil-**preciz** x`iridu jiksbu bl-istanza taghhom – *l-esponenti qed jillanjaw illi “the affairs of the company” ilhom zmien twil jitmexxew u qed jitmexxu fil-mument u minghajr ebda prospett illi dan jinbidel fil-futur, b`mod illi huwa oppressive, unfairly discriminatory against, or unfairly prejudicial maghhom bhala membri u / jew kontra l-interessi tal-membri kollha. L-esponenti jillanjaw ukoll illi minkejja kull apparenza kontrarja, spiss maskerata f`kumitati u minuti, hemm nuqqasijiet serji ta` corporate governance u trasperenza, u rispettt lejn il-minoranzi.*

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Indirizzaw l-azzjoni tagħhom kontra numru ta' persuni – kemm fisici kif ukoll kumpanniji.

Mhux l-intimati kollha taw eccezzjoni bhal dik li qeghda tkun deciza llum. Fil-fatt mill-intimati huma erba' biss li qeghdin jilmentaw illi r-rikorrenti ma setghux iressqu azzjoni kontra tagħhom skond l-Art 402 tal-Kap 386 ghaliex mhumiex il-legittimi kontraditturi tagħhom. Dawn huma –

- 1) Foster Clark Products Limited (C803) ;
- 2) Francis Busutil & Sons (Marketing) Limited (C24137) ;
- 3) B&S Exports Limited (C16946) ; u
- 6) B&S Manufacturing Limited (C16941).

L-ewwel subinciz tal-Art 402 jibda bil-kliem *any member of the company who complains ...*(enfasi u sottolinear tal-qorti).

“Member” huwa definit fl-ewwel subinciz tal-Art.2 tal-Kap.386 fis-sens illi “except where otherwise specifically defined, means a shareholder of a company and a partner in any other commercial partnership.”

Fl-istess subinciz, *“shareholder”* huwa definit bhala *“a person entered in the register of members of a company pursuant to article 123 or the bona fide holder of a share warrant referred to in article 121”*

Specifikament għall-fini tal-Art.402, il-legislatur ried iwessa' t-tifsira ta' *“member”* għall-fini ta' dik id-disposizzjoni billi fis-subinciz (6) ighid illi –

“member” includes a person entitled at law to represent the interests of a deceased member, a person to whom shares in the company have lawfully devolved by

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way of testate or intestate succession, and a trustee, as defined in article 127, who holds shares in the company.

L-erba` intimati fuq riferiti qeghdin jikkontendu illi t-tliet rikorrenti ma jikkwalifikawx bhala “*member*” kwindi ma setghux jintavolaw azzjoni skond tagghom abbazi ta` l-Art.402 kwindi mhumiex il-legittimi kontraditturi tagghom.

Hija l-fehma ta` din il-Qorti illi ghall-ahjar interpretazzjoni tal-ligi taghna ghandha ssir riferenza ghas-*sources* tal-ligi taghna.

Fis-sentenza taghha tad-9 ta` Marzu 2007 fil-kawza “**Vella vs Vella Brothers Limited et**”, il-Qorti tal-Appell qalet espressament u *senza mezzi termini* illi l-Art.402 kien infassal fuq l-Art.459 tal-UK Companies Act 1985.

L-Art.459 kien imhassar bl-Art.994 tal-UK Companies Act 2006. Pero` id-disposizzjoni baqghet l-istess.

Din il-Qorti sejra tirriproduci l-Art.402 taghna u l-Art.994 tar-Renju Unit ghal finijiet komparattivi.

L-Art.402 shih jaqra hekk –

(1) Any member of a company who complains that the affairs of the company have been or are being or are likely to be conducted in a manner that is, or that any act or omission of the company have been or are or are likely to be, oppressive, unfairly discriminatory against, or unfairly prejudicial, to a member or members or in a manner that is contrary to the interests of the members as a whole, may make an application to the court for an order under this article.

(2) *Where the Registrar has received a report on a company under article 410 and it appears to him that the company's affairs are being or have been conducted in a manner falling within the meaning of subarticle (1), he may make an application to the court for the issue of an order under this article.*

(3) *If on an application made in terms of subarticle (1) or (2), the court is of the opinion that the complaint is well-founded and that it is just and equitable to do so, the court may make such order under such terms as it thinks fit–*

(a) *regulating the conduct of the company's affairs in the future ; or*

(b) *restricting or forbidding the carrying out of any proposed act ; or*

(c) *requiring the company to do an act which the applicant has complained it has omitted to do ; or*

(d) *providing for the purchase of the shares of any members of the company by other members of the company or by the company itself and, in the case of a purchase by the company, for the reduction accordingly of the company's issued share capital ; or*

(e) *directing the company to institute, defend, continue or discontinue court proceedings, or authorising a member or members of the company to institute, defend, continue or discontinue court proceedings in the name and on behalf of the company ; or*

(f) *providing for the payment of compensation by such person as may have been found by the court responsible for loss or damage suffered as a result of the act or omission complained of, to the person suffering the said loss or damage ; or*

(g) dissolving the company and providing for its consequential winding up.

(4) When an order is made for the dissolution of a company in terms of subarticle (3)(g), the company shall be deemed to have been dissolved on the date when the order is made and the provisions of Sub-Titles I and III of Title II of Part V of this Act regulating the winding up of companies shall apply.

(5) An order made under this article may require a company not to make any amendment, or to make such amendment as may be required, in its memorandum or articles.

(6) In this article, the term "member" includes a person entitled at law to represent the interests of a deceased member, a person to whom shares in the company have lawfully devolved by way of testate or intestate succession, and a trustee, as defined in article 127, who holds shares in the company.

(enfasi u sottolinear ta` din il-qorti).

**L-Art.994 tal-UK Companies Act 2006 shih jaqra
hekk –**

1) A member of a company may apply to the court by petition for an order under this Part on the ground—

(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

(2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company.

(3) In this section, and so far as applicable for the purposes of this section in the other provisions of this Part, “company” means—

(a) a company within the meaning of this Act, or

(b) a company that is not such a company but is a statutory water company within the meaning of the Statutory Water Companies Act 1991.

(enfasi ta` din il-qorti)

Ghall-fini ta` kompletzza ta` analizi, trid issir riferenza ukoll ghall-**Art.112 tal-UK Companies Act 2006** li jaghti tifsira ta` “*member*”. Id-disposizzjoni taqra hekk –

(1) The subscribers of a company’s memorandum are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members.

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company.

Fin-nota ta` osservazzjonijiet taghhom, ir-rikorrenti jaghmlu riferenza ghal tliet sentenzi – tnejn tal-Qorti tal-Appell u wahda ta` din il-Qorti. Din il-Qorti qieset b`reqqa dak li nghad f`dawn it-tliet sentenzi u taghmel dawn il-konsiderazzjonijiet :

i) “Perit Raymond Vassallo vs Anthony Parlato Trigona et”

Deciza fl-24 ta` Gunju 2011 mill-Qorti tal-Appell

F`dik il-kawza, inghatat eccezzjoni simili ghal dik tal-lum. Il-Qorti tal-Appell qalet hekk –

“Jirrizulta li Parade Ltd u Dryad Ltd huma azzjonisti f`Windsor Holdings Ltd izda r-rikorrenti mhumiex direttament azzjonisti fl-istess. Huma pero` qed jippretendu li ghandhom dritt li jagixxu kontra Windsor Holdings bhala two tier shareholders.

Illi skont il-ligi l-azzjoni taht l-Artikolu 402 tal-Kap 386 tista` tigi mressqa minn “kull membru ta` kumpanija” u l-Artikolu 2(1) jiddefinixxi ‘membru’ bhala “azzjonista ta` kumpanija u socju f`kull socjeta` kummercjali ohra”.

Illi r-rikorrenti ma humiex azzjonisti jew membri fis-socjeta` Windsor Holding Ltd ghalhekk ma setghux jintavolaw il-kawza u jfittxu rimedju taht l-Artikolu 402 kontra din il-kumpanija.

Fil-ligi ma jezisti ebda kuncett ta` ‘second tier shareholding’. Il-membri f`socjeta` kummercjali huma dawk l-azzjonisti li huma registrati fis-socjeta` u dan kif, bhala regola, jirrizulta mid-dokumenti tas-socjeta`.

Fil-kaz in ezami r-rikorrenti mhumiex azzjonisti fis-socjeta` Windsor Holdings Limited. Ghalhekk membru f`socjeta` partikolari ma jistax jarroga ghalih innifsu drittijiet spettanti lil membru f`socjeta` ohra, u jinjora l-principju tal-personalita` guridika separata tas-socjetajiet kummercjali. Ir-relazzjonijiet interni tal-kumpanija, bhalma huma l-ezistenza ta` subsidiary u parent company mhumiex rilevanti f`dan il-kaz.”

ii) Jean Karl Soler et vs Raymond Vassallo pro et noe

Deciza fit-3 ta` Frar 2012 mill-Qorti tal-Appell

Kuntrarjament ghal dak illi qalu r-rikorrenti fin-nota ta` osservazzjonijiet taghhom, il-Qorti tal-Appell f`din is-sentenza ma ghamlet l-ebda ripensament fuq dak li kienet ipprovdiet fis-sentenza taghha fil-kawza “*Perit Raymond Vassallo vs Anthony Parlato Trigona et*” (op. cit.). L-eccezzjoni nghatat ghaliex istitwixxa l-azzjoni ir-ragel ta` azzjonista. Din il-Qorti qrat mill-bidu sal-ahhar is-sentenza u fir-rigward tal-eccezzjoni li qeghda tkun deciza lllum kull ma qalet kien hekk –

*“Illi fit-termini tal-Artikolu 2 tal-istess ligi, membru hu dak l-azzjonist registrat fir-registru tal-kumpanija li, f`dan il-kaz, hi biss l-attrici Joyce Soler. Mara mizzewwga lllum ghandha jedd indipendenti minn zewgha li tistitwixxi kawzi biex tikkawtela l-interessi taghha. Il-kumpanija JM Vassallo Vibro Blocks Ltd inbniet minn missier l-attrici, is-Sur John Mary Vassallo, u kien dan li ghadha parti mill-ishima tal-kumpanija fuq bintu. Fejn imorru d-dividends tal-kumpanija mhix materja rilevanti ghal din il-kawza ; id-dividends huma dovuti lil Joyce Soler, u jekk jidhlux jew le biex jiformaw parti mill-assi formanti parti l-komunjoni tal-akkwisti bejn il-konjugi Soler, hu irrilevanti ghax jibqa` fl-interess esklussiv taghha li jigi ddeterminat l-ammont ta` dividends u li dawn jithallsu mill-kumpanija. Kif qalet din il-Qorti fil-kawza **Vella et v. Vella Brothers Ltd. et** deciza fid-9 ta` Marzu, 2007, dawn huma rimedji moghtija lill-azzjonista li jara li jkun qed jigi pprejudikat bl-agir tad-diretturi, u ghandhom l-ghan li jissalvagwardjaw u jipprotegu lill-azzjonisti ta` socjeta` kummercjali. Ma jidhirx li hemm bzonn li l-konjugi tal-azzjonista jintervejni hu wkoll f`kawza li ma tinteressax lilu jew lilha direttament.”*

Huwa evidenti li ma sar l-ebda kapovolgiment tattifsira ta` *membru* u kwindi jregi dak deciz fi “*Perit Raymond Vassallo vs Anthony Parlato Trigona et*” (op. cit.).

iii) **“Joseph Calleja pro et noe vs Vincent Calleja”
Deciza minn din il-Qorti (PA/JRM) fit-8 ta` Lulju
2004**

Hemm il-kwistjoni ma kenitx daqstant dwar min kellu jedd jipproponi l-azzjoni izda l-kwistjoni kienet kontra min setghet tkun proposta. Il-bran citat mir-rikorrenti fin-nota taghhom ma jolqotx il-kwistjoni li qeghda tkun deciza llum. Dak li qieghed jigi deciz illum huwa min ghandu jedd jipproponi l-azzjoni skond l-Art 402. Dwar din il-materja il-Qorti qalet hekk –

“ ...irid jinghad li l-artikolu 402 tal-Kap 386 jitkellem dwar liema huma c-cirkostanzi li fihom huwa moghti lil xi membru ta' kumpannija l-jedd li jressaq azzjoni bhal din. L-imsemmi artikolu jispecifica li l-proponent irid ikun membru ta' kumpannija, u jispecifica li l-procedura tinbeda b'rikors. Illi l-ligi ma tippreskrivi l-ebda regola ohra ta' forma tal-att gudizzjarju mehtieg. Il-kelma “membru” hija mfissra bhala li tghodd fiha persuna li tista' legalment tirrapprezenta l-interessi ta' membru mejjet, persuna li tkun legittimament wirtet (b'testament jew ab intestato) ishma fil-kumpannija u wkoll nominee licenzjat li jkollu f'ismu ishma fil-kumpannija f'isem u fl-interessi ta' persuna ohra ... _

Din l-azzjoni tfissret bhala strument flessibbli ghall-azzjonist li, milqut bi pregudizzju attwali jew potenzjali, joffrilu rimedji ekwitattivi li jhallu 'l-Qorti tifli l-imgieba ta' dak li jsehh f'kumpannija.”

Minn analizi meqjusa tad-disposizzjonijiet tal-Kap 386, din il-Qorti hija ta` l-fehma konsiderata illi ghax ir-rikorrenti Suzanne Busutil de proprio, ir-rikorrent Brian Busutil de proprio u r-rikorrenti Stealth Holdings Limited ma jikkwalifikawx bhala “*membru*” tal-kumpanniji Foster Clark Products Limited (C803), Francis Busutil & Sons (Marketing) Limited (C24137), B&S Exports Limited (C16946) u B&S Manufacturing Limited (C16941) huma prekluzi milli jintavolaw azzjoni skond l-Art 402 tal-Kap

386 kontra dawk l-erba` kumpanniji. Din il-Qorti tikkondividi l-fehma tal-Qorti tal-Appell fis-sentenza taghha fil-kawza “**Perit Raymond Vassallo vs Anthony Parlato Trigona et**” (op. cit.) illi fil-ligi taghna ma hemmx il-kuncett ta` *second tier shareholding* u kwindi ghandu jedd jistitwixxi l-azzjoni skond l-Art 402 dik il-persuna li tikkwalifika bhala “*membru*”. (ara wkoll **Andrew Muscat** fil-“**Principles of Company Law**” (MUP) Pg 961-62 et seq).

Dan accertat, din il-Qorti zzid tirrileva illi fis-subinciz (6) tal-Art 402 il-frazi “*includes*” minflok il-frazi “*means*” mhijjex intiza sabiex tiftah il-bieb berah ghal kulhadd illi jittenta l-azzjoni fuq il-pretest illi l-frazi “*includes*” ma taghtix l-idea ta` “*an exhaustive provision of law*”. Hija pero` intiza sabiex ma teskludi lil hadd minn dawk il-persuni li ghandhom jedd jiprocedu izda li b`interpretazzjoni stretta u distakkata ta` *member* u *shareholder* fis-subinciz (1) tal-Art.2 kienu jibqghu barra. Certament ma kienx dak ir-*ratio legis* fejn si tratta tal-Art.402.

Finalment din il-Qorti, anke in vista ta` dak rilevat mir-rikorrenti, taghmel riferenza ghal dak li nghad fil-Pag.711 et seq tat-Tmien Edizzjoni (2011) ta` **Boyle & Birds` Company Law** (pubblikat minn Jordans) dwar il-kwistjoni li qeghda tkun deciza llum –

... *Section 994(1) allows a member to apply to the court by petition for an order under the section*

[Dwar *member* hemm din il-footnote – *This may theoretically include a passive majority – it is not necessarily restricted to a minority member ...*]

In a number of cases, it has been held that in the case of a small private ‘quasi-partnership’ type of company, the court may take account of the ‘legitimate expectations’ of members. However in a more substantial company such a ‘concept’ has no place. More recently,

the Court of Appeal has emphasised that in general members have no legitimate expectations beyond the legal rights conferred on them by the constitution of the company. This applies unless it can be shown that a 'legitimate expectation' arises out of a fundamental understanding between shareholders, which formed the basis of the association. This may confer a right to participate in management ...

Even in the case of a 'quasi-partnership' type of company, dismissal from employment and a position on the board will not necessarily establish unfair prejudice ...

*Although a petitioner for relief under s.994 **must** be a shareholder before he can petition, he is entitled after he becomes a shareholder to support his petition by relying on conduct that took place before he became a shareholder ...*

(enfasi u sottolinear tal-qorti)

Ghar-ragunijiet kollha premessi, din il-Qorti qeghda tilqa` l-ewwel eccezzjoni preliminari tal-intimati Foster Clark Products Limited (C803), Francis Busuttil & Sons (Marketing) Limited (C24137), B&S Exports Limited (C16946), B&S Manufacturing Limited (C16941) u ta` Chris Degiorgio bhala direttur ta` Foster Clark Products Limited (C803) u ta` Francis Busuttil & Sons (Marketing) Limited (C24137), tiddikjara illi dawn l-intimati msemija mhumiex il-legittimi kontradditturi tar-rikorrenti, u kwindi tillibera lill-istess intimati msemija mill-osservanza tal-gudizzju.

Tordna lir-rikorrenti sabiex ihallsu l-ispejjez kollha relattivi ghal dan il-provvediment.

< Sentenza In Parte >

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