



MALTA

**QORTI CIVILI  
PRIM' AWLA  
ONOR. IMHALLEF  
JOSEPH ZAMMIT MC KEON**

Seduta ta' l-4 ta' Marzu, 2014  
Rikors Numru. 746/2012

**Mitchell Allen Platt (Passaport  
Amerikan Nru. 465615088) u  
Clayton Douglass (Passaport  
Amerikan Nru. 11092664)**

*kontra*

**'Local Billing Solutions Ltd.'  
(C-36405)**

**Il-Qorti :**

**I. Preliminari**

Rat ir-rikors prezentat fis-26 ta` Lulju 2012 li jaqra hekk-

1. *ILLI r-rikorrenti huma diretturi u azzjonisti ta` kumpannija bl-isem 'Local Billing Solutions Ltd.', liema kumpannija giet irregistrata mal-Malta Financial Services Authority fl-14 ta` Gunju 2005, u liema kumpannija ggib in-Numru C-36405 u indirizz registrat 67/3, Triq id-Dejqa, Valletta ;*

2. *ILLI l-attivitja` kummercjali tal-Kumpannija kienet li tipprovdi servizzi teknologici ghal kumpanniji ohrajn li joperaw permezz tal-Internet, specifikament li tipprovdihom b`sistemi ghall-processar tal-pagamenti u hlas li*

*kumpanniji jiggeraw a bazi tal-website taghhom. Il-Kumpannija kienet mhux biss tipprovi l-platform, izda wkoll tamministra l-process tekniku ;*

3. *ILLi ghall-fatti u r-ragunijiet imsemmija iktar 'l isfel, il-Kumpannija tramite l-Bord tad-Diretturi waslet sabiex tipprezenta dan ir-rikors ghax-xoljiment u stralc tal-Kumpannija ai termini tal-Artiklu 218(1) tal-Kap. 386 tal-Ligijiet ta` Malta ;*

4. *ILLI l-koronologija tal-fatti li wasslu sabiex il-Bord approva u qieghda titlob ix-xoljiment u stralc hija s-segwenti :*

i) *il-Kumpannija bdiet topera f`Gunju 2005. Ghall-ewwel sena u nofs, u cioe` minn Gunju 2005 sa madwar l-ahhar tal-2006, il-Kumpannija ffukat fuq id-disinn u programmar tas-sistema li tipprocessa l-pagamenti. Dan iz-zmien kien wiehed ta` zvilupp, testing u l-eventwali launch fis-suq. Ghaldaqstant, dan kien zmien ta` investiment gholi bi dhul baxx hafna, u ghalhekk sal-ahhar tal-2006 il-Kumpannija kienet irregistrat telf ta` madwar €1,569,078 ;*

*Minkejja t-telf irregistrat, il-Kumpannija kienet konvinta mill-prospetti tan-negozju taghna, u ghalhekk l-azzjonisti ghamlu self (shareholders` loan) ta` €1,830,048 sabiex il-Kumpannija tkun tista` tibqa` topera ;*

ii) *Fis-sena 2007, is-sistema teknologika giet finalizzata u dahlet fis-suq definittivament. B`hekk, id-dhul tal-Kumpannija zdied b`rata ta` 850% fuq is-sena 2006. Minhabba din il-qabza fil-bejgh, u bhala konsegwenza xoghol, il-Kumpannija ddecidiet li taghmel outsourcing tal-fergha amministrattiva (running costs) taghha (li kien jinkludi customer support, moniteragg tal-process ecc.), bil-ghan li l-ispejjez interni tal-Kumpannija jitnaqqsu. Ir-rata gholja ta` bejgh fis-sena 2007 waslet sabiex l-ispejjez `esterni` tal-Kumpannija zdieđu, izda madankollu l-prospetti tal-Kumpannija baqghu tajbin, bil-prospett principali jkun li l-Kumpannija ma ddumx ma tibda tirregistra l-ewwel dhul taghha ;*

iii) *Is-sena 2008 ghal darb`ohra wriet zieda fil-bejgh (230% fuq is-sena 2007), izda l-ispejjez ukoll baqghu jizdieđu proporzjonalment. F`dan iz-zmien beda jidher car li sabiex il-Kumpannija tkun ta` success, kien ser ikollha tiffoka fuq progetti ta` natura kbira, u dan minhabba li l-profit margin kien zghir meta wiehed iqis l-ispejjez tal-progett mal-bejgh. Ghaldaqstant, il-progett kien ser jirnexxi biss jekk il-Kumpannija tiffoka fuq output gholi tal-prodott taghha ;*

iv) *Fis-sena 2009, il-Kumpannija ghal darb`ohra rregistrat zieda fil-bejgh taghha (300% fuq is-sena 2008). Kien f`dan iz-zmien li l-Kumpannija*

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*dahlet f'tahdidiet mal-kumpannija AVG (ditta internazzjonali tal-informatika) fuq kuntratt li potenzjalment kien ser ikun l-ikbar progett tal-Kumpannija. Madankollu, sabiex il-Kumpannija tilhaq ftehim ma` AVG, il-Kumpannija kien ser ikollha tinvesti sew fiha nnifisha sabiex tilhaq il-kriterji rikjesti mill-istess AVG. Il-Kumpannija ghazlet li taghmel dan l-investment mhux biss ghaliex AVG kienet wahda mill-ikbar kumpanniji fis-suq, izda wkoll ghaliex il-prospetti ta` negozju mal-istess AVG dehru konkreti ;*

*Effettivament, il-kuntratt ma` AVG ma dahalx fis-sehh hekk kif l-istess kumpannija ghazlet li ma tidholx fi ftehim finali mal-Kumpannija. Minhabba l-investment li ghamlet il-Kumpannija, li fl-ahhar mill-ahhar sewa ghalxejn, il-Kumpannija rregistrat telf ghas-sena 2009. Ta` min jinnota li, kieku l-investment tal-Kumpannija ghan-negozjati ma` AVG ma sarx, il-Kumpannija probabbli kienet ser tirregistra l-ewwel dhul taghha ;*

*v) It-telf li l-Kumpannija rregistrat minhabba l-investment ghall-progett tal-AVG wassal sabiex id-Diretturi u l-azzjonisti tal-Kumpannija bdew jitilfu l-kunfidenza fil-progett originali tal-Kumpannija, u dan minkejja li t-targets li originarjament kienet ipprogettat kien intlahqu ;*

*vi) It-telf irregistrat fl-2009 kompla ghas-sena 2010, u kien f`dan iz-zmien li l-Kumpannija ddecidiet li ccekken il-progetti taghha sostanzjalment. B`hekk, il-bejgh tal-Kumpannija naqas b`rata ta` 35% fuq is-sena 2009 (li madankollu xorta baqget l-oghla rata tal-bejgh tal-Kumpannija) ;*

*Minkejja li l-Kumpannija ghamlet li setghet sabiex tnaqqas l-ispejjez taghha, il-konsegwenzi tan-negozjati ma` AVG wasslu sabiex il-Kumpannija kellha bzonn investment ulterjuri minn terzi sabiex tkun tista` tibqa` miexja bil-progett taghha. Fl-ahhar mill-ahhar, il-Kumpannija xorta riedet tipprocedi bin-negozju ghaliex, jekk wiehed kien jinsa n-negozjati mal-AVG, il-bejgh tal-Kumpannija kien sejjer tajjeb ;*

*Fid-dawl tas-suespost, il-Kumpannija dahlet fi ftehim ma` socjeta` tal-investimenti sabiex tbiegh ammont ta` azzjonijiet minn taghha sabiex tkun tista` tircievi ammont ta` kapital. Fit-23 ta` Marzu 2009, il-Kumpannija dahlet fi ftehim finali sabiex tbiegh dawn l-azzjonijiet, bil-kundizzjoni li s-socjeta` investitrici taghti credit facility ta` €4,500,000 lill-Kumpannija ;*

*vii) Bhala fatt, minkejja li s-socjeta` investitrici dahlet fil-ftehim fuq imsemmi, il-credit facility fuq imsemmi qatt ma giet moghtija lill-Kumpannija. Dan in-nuqqas wassal sabiex id-Diretturi tal-Kumpannija fethu proceduri legali kontra s-socjeta` investitrici. Madankollu, internament dan kien ifisser li l-*

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*Kumpannija ma kellhiex bizejjet fondi sabiex tibqa` topera, u kien ghalhekk li fl-2011 il-Kumpannija temmet l-operazzjoni taghha. Id-decizjoni li l-Kumpannija twaqqaf il-progetti taghha ttiehdet ukoll sabiex l-istess Kumpannija ma tibqax tassumi obbligi legali ma` terzi persuni ;*

*viii) Fid-dawl tal-kronologija ta` fatti suesposta, id-Diretturi waslu sabiex ipprezentaw ir-rikors odjern ghax-xoljiment u stralc tal-Kumpannija ;*

*5. ILLI, mill-fatti suesposti, id-decizjoni tad-Diretturi li wasslet sabiex ipprezentaw dan ir-rikors hija bbazata fuq zewg elementi principali :*

*i) Fl-ewwel lok, id-decizjoni hija bbazata fuq l-istorja tal-Kumpannija, ossia li ghall-bidu l-Kumpannija kienet qiegghda timxi skond il-pjan generali li kienet ipprogettata. Madankollu, il-falliment ta` ftehim mal-kumpannija AVG wassal ghal telf ta` kunfidenza mid-Diretturi kif ukoll azzjonisti ;*

*ii) Fit-tieni lok, u bhala konsegwenza tal-ewwel element, il-Kumpannija kellha tfittex investiment minn terzi sabiex tipprocedi. L-investitur instab u l-ftehim intlahaq, izda minhabba ragunijiet mhux fil-kontroll tal-Kumpannija, l-investiment (il-credit facility) fl-ahhar mill-ahhar qatt ma gie moghti lill-Kumpannija. Kien proprju dan il-fatt li wassal sabiex il-Kumpannija ma setghetx tkompli bin-negozju taghha ;*

*6. ILLI, fid-dawl tas-suespost, ir-rikorrenti waslu sabiex ipprezentaw dan ir-rikors quddiem din l-Onorabbli Qorti sabiex joghgobha tordna x-xoljiment u stralc tal-Kumpannija 'Local Billing Solutions Ltd.' (C-36405) ai termini tal-Artiklu 214(2)(a)(ii) tal-Kap. 386 tal-Ligijiet ta` Malta ;*

*7. ILLI, minghajr pregudizzju ghas-suespost, ir-rikorrenti umilment u bir-rispett jesponu li huma tal-fehma li jezistu ragunijiet sufficjenti sabiex din l-Onorabbli Qorti joghgobha tordna x-xoljiment u stralc tal-Kumpannija ai termini tal-Artiklu 214(2)(b)(iii) kif ukoll a bazi tal-Artikolu 402(1) tal-Kap. 386 tal-Ligijiet ta` Malta ;*

*Ghaldaqstant, fid-dawl ta` dak kollu suespost, kif ukoll fid-dawl tax-xhieda u dokumenti li ser jigu pprezentati fil-mori ta` dawn il-proceduri, ir-rikorrenti umilment u bir-rispett jitolbu lil din l-Onorabbli Qorti sabiex :*

*1. Tahtar amministrazur provizorju ghall-Kumpannija 'Local Billing Solutions Ltd.' (C-36405) sabiex pendente lite jamministra l-beni tal-Kumpannija*

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*ai termini tal-Artiklu 218 tal-Kap. 386 tal-Ligijiet ta` Malta, u dan taht kull provediment iehor li din l-Onorabbli Qorti jidhrilha xieraq ;*

2. *Tordna x-xoljiment u stralc tal-Kumpannija ai termini tal-Artiklu 214(2)(a)(ii) tal-Kap. 386 tal-Ligijiet ta` Malta ;*

3. *Minghajr pregudizzju ghal dak li ntqal aktar `il fuq, tordna x-xoljiment u stralc tal-Kumpannija ai termini tal-Artiklu 214(2)(b)(iii) tal-Kap. 386 tal-Ligijiet ta` Malta ;*

4. *Minghajr pregudizzju ghal dak li ntqal aktar `il fuq, tordna x-xoljiment u stralc tal-Kumpannija ai termini tal-Artiklu 402(1) tal-Kap. 386 tal-Ligijiet ta` Malta;*

5. *Taghmel kwalunkwe provediment iehor li jidhrilha xieraq ai termini tal-Kap. 386 tal-Ligijiet ta` Malta;*

6. *Taghmel kwalunkwe provediment iehor sabiex tahtar stralcjarju ai termini tal-Kap. 386 tal-Ligijiet ta` Malta.*

Rat il-lista tax-xhieda ndikati mir-rikorrenti.

Rat id-digriet taghha tal-31 ta` Lulju 2012 fejn ordnat in-notifika tar-rikors lill-intimata, tatha zmien ghoxrin (20) jum min-notifika biex tippresenta risposta u appuntat il-kawza ghas-smigh ghall-udjenza ta` nhar il-Hamis 11 ta` Ottubru 2012 fid-9.00 a.m.

Rat illi ghalkemm l-intimata kienet notifikata skond il-ligi, ma pprezentatx risposta (ara fol 18).

Semghet ix-xiehda ta` Mitchell Allen Platt u ta` Clayton Douglass fl-udjenza tat-22 ta` April 2013.

Rat id-dikjarazzjoni li ghamel id-difensur tar-rikorrenti fl-istess udjenza fejn irrileva li fejn l-azzjoni tar-rikorrenti tirreferi ghall-Art 214(2)(a)(ii) il-parti rilevanti tal-Art 214(5) li ghalih dik id-disposizzjoni tirreferi huwa l-para.(b).

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Rat ix-xiehda bl-affidavit ta' Brian Spiteri flimkien mad-dokumenti.

Rat id-digriet taghha moghti fl-udjenza tat-13 ta' Jannar 2014 fejn halliet il-kawza ghas-sentenza ghal-lum.

### Ikkunsidrat :

#### II. Provi

Ir-rikorrenti **Mitchell Allen Platt** u **Clayton Douglass** xehdu t-tnejn fil-kawza. Huma azzjonisti u diretturi tal-kumpannija intimata. Huma xehdu bl-Ingiliz pero` prattikament ikkonfermaw il-kontenut tar-rikors u dak li wassalhom biex jipprezentaw il-kawza.

Ir-rikorrenti jsostnu illi l-progett taghhom, kien jinvolvi spejjez kbar f`sens ta` *running costs* u ghalkemm fl-2010 ghamlu li setghu biex inaqqsu l-ispejjez, gara li kienu jehtiegu investment ta` flus *friski* biex l-operazzjoni tkun sostenibbli u jkabbru l-*client base* taghhom. Ghamlu ftehim ma` kumpannija ta` investment ; skond il-ftehim, dik il-kumpannija kienet se tikseb ishma fil-kumpannija bil-korrispettiv ikun l-ghoti lill-kumpannija ta` *credit facility* fl-ammont ta` €4.5 miljun. Skond ir-rikorrenti, il-kumpannija ta` investment baqghet inadempjenti mal-pattijiet li ghamlet maghhom, ma pprovdietx il-*credit facility* bil-konsegwenza li l-kumpannija taghhom spiccat bla likwidita` u ghalhekk iddecidew li jmorru ghax-xoljiment ladarba l-bejgh beda niezze b`ritmu mgħaggel bl-ispejjez jizdiedu.

Ir-rikorrenti jipprecizaw illi l-ftehim li kienu qeghdin jirsistu li jottjenu mal-kumpannija AVG, ghalkemm kien massicc ghal dak li huwa *turnover* previst - u kwindi dhul potenzjali - kien jippresupponi aktar investment ta` flus min-naha taghhom. Billi l-*credit facility* ma wasalx, ma setghux ikomplu fuq il-progett tal-AVG u l-*liabilities* taghhom kienu saru nsostenibbli.

Qalu li safejn jafu huma ma kellhomx kredituri hawn Malta ghalkemm ircevw stima ta` hlas ta` VAT fl-ammont ta` €5,000.

Xehed ukoll l-**Awditur Brian Spiteri**. Ipprezenta u kkonferma l-audits ghat-tliet snin ta` bejn l-2008 u l-2010. Wara l-2010, il-kumpannija waqfet topera. Skond il-mizuri tal-Budget 2012, il-kumpannija dahlet fl-iskema maghrufa bhala l-*Scheme for Remittance of Interest and Administrative*

*Penalties* mad-Dipartiment tal-VAT. Skond dik l-iskema, kienet sejra tithallas is-somma ta' €5,437.91.

**Ikkunsidrat :**

**III. Risultanzi**

Ir-rikorrenti qeghdin jitolbu x-xoljiment u tal-istralc tal-kumpannija intimata abbazi :

- (a) tal-**Art 402(1) tal-Kap 386** ;  
(i.e. **ir-raba` talba**) ;
- (b) tal-**Art 214(2)(a) u l-Art 214(5)(b) tal-Kap 386**  
(i.e. **it-tieni talba**) ;
- (c) tal-**Art 214(2)(b)(iii) tal-Kap 386**.  
(i.e. **it-tielet talba**) ;

Il-Qorti sejra taghmel analizi ta' kull disposizzjoni u tqis dak li rrizulta fir-rigward skond il-provi akkwiziti.

**(a) L-Art 402(1) tal-Kap 386**

Din id-disposizzjoni taqra hekk –

*Kull membru ta' kumpannija li jilmenta li l-affarijiet tal-kumpannija jkun tmexxew jew qed jitmexxew jew aktarx jitmexxew b'mod li, jew li xi att jew omissjoni tal-kumpannija kienu jew huma jew x'aktarx se jkun, oppressivi b'mod mhux gust diskriminatorji kontra, jew b'mod mhux gust ta' pregudizzju, ghal membru jew membri jew b'mod li jkun kontra l-interessi tal-membri in general, jista' jaghmel rikors lill-qorti ghal ordni taht dan l-artikolu.*

Fil-Pag 970 ta' "**Principles of Maltese Company Law**" (MUP – 2007) Andrew Muscat jitfa' fuq ir-rikorrenti l-piz tal-prova li l-att jew omissjoni li ghalih jirreferi s-subartikolu (1). Ighid hekk –

*This wording clearly suggests that the member **need only prove one effect** of the conduct, act or omission, that is, that such conduct, act or omission, has been, is or is likely to be "oppressive" or "unfairly discriminatory" or "unfairly*

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*prejudicial” (to a member or members) or contrary to interests (of the members as a whole). (enfasi u sottolinear tal-qorti)*

Fis-sentenza ta` din il-Qorti (**PA/GV**) tat-30 ta` Jannar 2008 fil-kawza **“Cutajar pro et noe et vs S.C. & Company Limited et”** inghad hekk –

*Illi **l-prova biex tirnexxi dina l-azzjoni tispetta lir-rikorrenti** (enfasi u sottolinear ta` din il-qorti) li ressuq dina l-azzjoni. Huma jridu jippruvaw li (a) l-affarijiet tal-kumpanija jkunu tmexxew jew qed jitmexxew jew aktarx jitmexxew b`mod li... (b) jew li xi att jew ommissjoni tal-kumpanija kienu jew huma jew x`aktarx se jkunu, oppressivi b`mod mhux gust diskriminatorji kontra, jew b`mod mhux gust ta` pregudizzju, ghal membru jew membri jew b`mod li jkunu kontra l-interessi tal-membri in generali.*

*Il-ligi taghna ma taghtix spjegazzjoni ta` x`inhu oppressiv b`mod mhux gust diskriminatorji kontra, jew b`mod mhux gust ta` pregudizzju. Kull kaz ghalhekk irid jigi trattat u deciz fuq il-mertu tieghu proprju, u dana kaz b`kaz. L-iskop tal-ligi hu biex il-Qorti tkun tista` tinterujeni f`dawk il-kazijiet fejn hemm bżonn li jinghata rimedju minhabba unfair dealing fejn jigi pruvat li kien hemm azzjonijiet jew ommissjonijiet li ma kienux gusti u li kienu ta` pregudizzju jew li l-affarijiet tal-kumpanija mhux qed jitmexxew sew.*

Fis-sentenza taghha tad-9 ta` Marzu 2007 fil-kawza **“Vella et vs Vella Brothers Ltd et”**, il-Qorti tal-Appell qalet hekk –

*... l-Artikolu 402 ta' l-Att dwar il-Kumpaniji jaghti diskrezzjoni pjuttost wiesa' lill-Qrati u dan ghaliex dawn il-provvedimenti ghandhom l-ghan li jissalvagwardjaw u jipprotegu lill-azzjonisti ta' socjeta' kummercjali, partikolarment lil dawk li huma minoritarji u li ghalhekk qeghdin fl-impossibilita' li jirregolaw il-mod li bih tkun qed titmexxa s-socjeta' li fiha huma jkollhom interess ...*

*... din id-disposizzjoni, li hija bżazata fuq l-Art.459 tal-Companies Act (1985) Ingliza, hija ispirata fuq principji ta' ekwita' aktar milli minn drittijiet strettament legalistici biex ikun jista' jigi moghti rimedju. Dak li hu necessarju hu li l-azzjonista jipprova li minhabba l-gestjoni tas-socjeta' partikolari hu qed isofri, jew ukoll jista' jsofri, pregudizzju ta' natura oppressiva, ingusta jew diskriminatorja. Tali gestjoni tista' tirreferi sempliciment ghal xi att specifiku jew xi ommissjoni tal-kumpanija. Il-pregudizzju jista' jirreferi ghall-azzjonist li qed jippromwovi l-proceduri, ghal xi azzjonist iehor jew ghall-interess in generali ta' l-azzjonisti. Ma hemmx ghalfejn li huwa jipprova li huwa zgur ser isofri xi pregudizzju fil-futur. Tali prova tista' ssir fuq bazi ragjonevoli ta' possibilita' (**“Vincent Monreal et v. Lino Delia noe”** deciza mill-Prim'Awla tal-Qorti Civili fit-13 ta' Mejju, 1999). Infatti gie deciz mill-Qrati Inglizi fil-kawza in re **Bovey Hotel Ventures Ltd** [(1983) B.C.L.C. 290] li *“the Court will not give a list of situations when this remedy may be resorted to however one principle remains**



*clear. A shareholder may make use of this article when his shareholding in the company has been seriously diminished at least seriously jeopardized by reason of a course of conduct or the part of those who have the de facto control of the company, which has been unfair to the member concerned”.*

*... Fid-decizjoni O'Neill v Phillips moghtija mill-House of Lords fl-20 ta' Mejju 1999, gie ritenut illi l-legislatur ried illi biex jinghata rimedju taht l-artikolu jigi kkunsidrat il-kriterju ta' dak li huwa 'fair'. Izda Lord Hoffman izid ighid li - “Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used ... The requirement that prejudice must be suffered as a member should not be too narrowly or technically construed.*

Meta ressqu l-provi taghhom, ir-rikorrenti ma tawx hjiel ta` liema kien l-att jew omissjoni fit-tmexxija tal-kumpannija li gab “oppressjoni”, “diskriminazzjoni” jew “pregudizzju” fil-konfront taghhom. Fuq l-iskorta tal-provi akkwiziti, il-Qorti ma ssibx li r-rikorrenti ssoddisfaw il-vot tal-Art 402(1) u kwindi l-Qorti ma tistax tghaddi biex taghti xi wiehed jew aktar mir-rimedji previsti mill-Art 402(3) tal-Kap 386.

Il-Qorti qeghda ghalhekk tichad ir-raba` talba.

**(b) L-Art 214(2)(a) u l-Art 214(5)(b) tal-Kap 386**

Bl-Art.214(2)(a) tal-Kap 386 il-ligi taghti lill-Qorti diskrezzjoni li xxolji u tistralcja kumpannija f`zewg cirkostanzi.

Wahda minnhom hija dik li tisemma mill-kumpannija rikorrenti u cioe` **(ii) jekk il-kumpannija ma tkunx tista' thallas id-djun taghha.**

Dan is-subinciz (ii) irid jinqara flimkien ma` l-Art.214(5) li jistabilixxi meta kumpannija ghandha titqies li ma tkunx tista' thallas id-djun taghha. Tnejn huma c-cirkostanzi definiti mil-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 ekekuttiv kontra l-kumpannija b`xi wiehed mill-atti ekekuttivi msemmijin fl-artikolu 273 tal-Kodici ta' Organizzazzjoni u Procedura Civili ; jew*

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

Ir-rikorrenti qeghdin jindirizza l-lanjanza taghhom abbazi tal-paragrafu (b).

Il-Qorti tirrileva illi 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 (illum Kap.386) li hadet post il-Commercial Partnerships Ordinance 1962, id-disposizzjonijiet li jolqtu x-xoljiment u l-istralc kienu integrati fl-Att tal-1995.

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) ta` l-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”) ...*

Fil-Kap.386, *cash flow insolvency* tista` tigi abbinata mal-paragrafu (a) tal-Art.214(5) waqt li *balance sheet insolvency* tista` tigi abbinata mal-paragrafu (b) tal-istess Art.214(5).

Kif diga` rajna, ir-rikorrenti ndirizzaw l-istanza taghhom lejn it-tieni sitwazzjoni.

L-abbinament jista` jsir minhabba d-dicitura tad-disposizzjoni rilevanti tal-Insolvency Act 1986 (li hija kwazi identika ghal taghna) u cioe` l-**Art.123(2)** 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.*

Fil-ktieb **Insolvency Law – Corporate and Personal** ta' Andrew Keay u Peter Walton (pubblikat minn Pearson Longman – 2003) pg.19 jinghad hekk dwar *balance sheet insolvency* kif mifhuma fil-kuntest tal-Insolvency Act 1986 –

*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 ...*

Dwar l-Art.214(5)(b) din il-Qorti diversament presjeduta (**PA/GV**) 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.*

Fil-Pag.114 tar-Raba' Edizzjoni (2011) ta' **Principles of Corporate Insolvency Law** (ippubblikat minn Sweet & Maxwell) l-awtur 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 –

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*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 ighid –

*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.*

Fil-Pag.136 ighid –

*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 tikkoncentra fuq ir-report and financial statements ghas-sena li ghalqet 31 ta` Dicembru 2010.

Irrizulta –

1) Illi l-kumpannija stopped all trading activities as from 1<sup>st</sup> January 2011. (ara fol 41).

2) Illi sal-31 ta` Dicembru 2010, il-kumpannija kellha turnover ta` €12,129,401, direct expenses ta` €11,208,009 u kwindi gross profit ta` €921,392. Ghat-thaddim tal-operazzjoni, kien hemm spejjez ta` €703,035 li ghalhekk halla profitt ta` €218,357. Minkejja l-profitt, il-kumpannija kellha telf ta` €1,445,132 (ara fol 43).

3) Illi sal-31 ta` Dicembru 2010, il-kumpannija kellha total assets fl-ammont ta` €2,254,357 imqabbel mal-€5,919,112 ghall-2009. Ghalkemm kellha

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*capital and reserves* ta' €1,705,167, kellha dejn ta' €3,959,524. Hemm allura zbilanc ta' €2,254,357 (ara fol 44).

4) Illi sal-31 ta' Dicembru 2010, l-azzjonisti kienu ghamlu *advances* ta' €447,158.

5) Illi l-awditur ighid hekk (ara fol 51) –

*During the year under review, the company had accumulated losses of €2,306,509.*

*As at Balance Sheet date, the company had net assets deficiency of €1,705,167.*

*Further financing is required by the shareholders to enable the company to continue in business as a going concern.*

6) Illi *fin-notes to the accounts*, l-awditur jaghti dan is-*snapshot* tal-qaghda finanzjarja tal-kumpannija –

i) Bhala *tangible assets* hemm valur net ta' €1,924.

ii) Bhala *receivables* hemm ammont ta' €1,610,309

iii) Bhala *authorised share capital* hemm ammont ta' €10,000 waqt li bhala *issued and fully paid up* hemm total ta' €1,646.

iv) Bhala *creditors* hemm dovuta s-somma ta' €2,590.297.

v) Bhala *shareholders' loan* hemm ammont ta' €1,369,227. Hemm ukoll kumment li jghid : *these loans are unsecured, interest free and no fixed date has been set for their repayment.*

Hemm ukoll nota agguntiva dwar *contingent liability* li tghid hekk -

*The company has a dispute with EOS Payment Solutions GmbH, a German gateway supplier for an amount of charges payable of €97,307. The Directors are of the opinion that such charges are not due and consequently are not included in the financial statements.*

7) Illi l-awditur jaghmel ukoll dan il-kumment –

*... the financial statements have been prepared on a going concern basis because the shareholders of the Company have agreed to provide continuing financial support to the Company to enable it to pay its debts as and when they fall due. If the financial support is not forthcoming, and as a result, the Company is unable to continue in operational existence, adjustments would have to be made to reflect the situation that the assets may need to be realised other than in the normal course of business and at amounts which could differ significantly from the amounts stated in the balance sheet. In addition, the Company may have to provide for further liabilities which may arise, and to reclassify long term assets as current assets.*

Jirrizulta li n-negozju tal-kumpannija waqfet topera b'effett mill-1 ta' Jannar 2011. Ghax ma hemmx attivita' ekonomika, ma hemmx *revenue*. Azjenda kummercjali inattiva jew illi ma toperax ma tistax tiggenera dhul u kwindi ma tkunx tista' thallas id-djun taghha. Huwa evidenti li l-azzjonisti mhuwiex disposti jaghmlu *fresh injections of capital*. Kollox jindika li l-kumpannija waslet *at a point of no return* u l-bejgh tal-assi taghha ma jistax iwassal biex jigi saldat id-dejn.

**Fuq l-iskorta tal-provi li ngabu a konjizzjoni taghha, din il-Qorti hija sodisfatta illi l-kumpannija Local Billing Solutions Ltd mhijiex fqaghda li thallas id-djun taghha abbazi tal-Art.214(2)(a)(ii) u tal-Art.214(5)(b) tal-Kap.386.**

**Wara li hasbet fit-tul, u hadet kont ta' kollox, il-Qorti qeghda tezercita d-diskrezzjoni li taghtiha l-ligi, u qeghda tordna x-xoljiment u l-istralc tal-istess kumpannija.**

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

In vista tal-fehma taghha appena espressa, il-Qorti ma tarax illi hemm htiega illi taghti konsiderazzjoni ghat-tielet talba tar-rikorrenti.

**Provvediment**

**Ghar-ragunijiet kollha premessi, il-Qorti qeghda tipprovdi dwar it-talbiet tar-rikorrenti kif gej –**

- 1) Tastjeni milli tiehu konjizzjoni ulterjuri tal-ewwel talba.**

2) Tilqa` t-tieni talba. Tordna x-xoljiment tal-kumpannija intimata Local Billing Solutions Ltd (C36405) skond l-Art 214(2)(a) u l-Art 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta b`effett mis-26 ta` Lulju 2012 kif ighid l-Art 223(1) tal-Kap 386. Tordna wkoll l-istralc taghha.

3) Tastjeni milli tiehu konjizzjoni ulterjuri tat-tielet talba.

4) Tichad ir-raba` talba.

5) Tastjeni milli tiehu konjizzjoni ulterjuri tal-hames talba.

6) Tilqa` s-sitt talba. Tahtar lir-Ricevitur Ufficjali bhala stralcjarju tal-kumpannija intimata bis-setghat u bid-dmirijiet li huma stabbiliti fil-Kap 386 tal-Ligijiet ta` Malta. Bla hsara ghall-generalita` ta` dawk is-setghat u dmirijiet –

(a) wara li jikseb dikjarazzjoni dwar il-qaghda tal-kumpannija intimata, kif irid l-Art 226 tal-Kap.386 tal-Ligijiet ta` Malta, jaghmel rapport lill-Qorti, kif irid l-Art 227 tal-Kap.386 tal-Ligijiet ta` Malta.

(b) jaghmel verifika dwar l-assi u d-djun tal-kumpannija intimata u dwar il-gradwazzjoni tad-djun.

(c) jiehu taht il-kustodja jew kontroll tieghu l-assi kollha tal-kumpannija intimata, kif ighid u jrid l-Art 237 tal-Kap 386 tal-Ligijiet ta` Malta.

(d) jaghmel jew jiddefendi kull azzjoni jew procediment legali iehor fl-isem u fl-interess tal-kumpannija intimata.

(e) jirrelata dwar il-mizuri mehtiega ghall-harsien tal-assi tal-kumpannija intimata.

(f) jipprezenta r-rapport mhux aktar tard minn tliet (3) xhur mil-lum.

7) Tordna li l-ispejjez ta` l-provvediment tal-lum, kif ukoll l-ispejjez kollha tal-istralc inkluzi d-drittijiet u l-ispejjez tar-Ricevitur Ufficjali fil-vesti tieghu ta` stralcjarju, jithallsu miz-zewg rikorrenti “in solidum” bejniethom, u dan bl-applikazzjoni tal-Art. 236(2) tal-Kap 386.

**< Sentenza Finali >**

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