



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

Seduta tas-17 ta' Marzu, 2014

Rikors Numru. 888/2013

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

*kontra*

**X**

*u*

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

*u*

b`digriet tat-28 ta` Novembru 2013 Anthony Spiteri u Miriam Spiteri, Jeffrey Vella u Romina Vella, Carmen Spiteri u Vincent Spiteri, Joseph Borg u Doris Borg, Joseph Borg u Deborah Carrie Borg, Gino Cremona u Marthese Cremona, John Galea u Maryanne Galea, John Galea u Loredana Galea, Alexander Farrugia u Mansueta Farrugia, Maria Gabriella Farrugia, Angela Incorvaja, John Aquilina u Maria Lourdes Aquilina, Saviour Cutajar, Mario Baldacchino u Mary Anne Baldacchino, Romeo Borg u Carmen Borg, Rose Borg, Carmel Cachia u Nazzarena Cachia, Gennaro Camilleri, J M Camilleri u M D Camilleri, Robert Camilleri, Saviour Darmanin, Emanuel Galea u Margaret Galea, Emanuel Gravina, Anthony u Teresa Mangion, Joseph Said u Lucia Said, Polyanne Schembri, Ray Sciberras u Lucienne Sciberras, Mario Xuereb u Dolores Xuereb, Andrew Zammit u Josephine Zammit kienu ammessi jintervjenu fil-procediment *in statu et terminis*

*u*

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

*u*

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

*u*

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

**Il-Qorti :**

Dan tal-lum huwa provvediment dwar talba li resset il-kumpannija rikorrenti fir-rikors promotorju taghha ghall-hatra ta` amministratur provvizorju sabiex jiehu hsieb l-amministrazzjoni taghha sakemm tinghata decizjoni finali dwar it-talba taghha ghax-xoljiment u stralc taghha skond l-Art 214(1)(a) u/jew l-Art 214(2)(a)(ii) u l-Art 218(1) tal-Kap 386 tal-Ligijiet ta` Malta, liema talba li kienet riaffermata fl-udjenza tal-kawza tas-6 ta` Frar 2014.

#### **I. Ir-ragunijiet tar-rikorrenti**

**In succinct**, ir-ragunijiet li gabet ir-rikorrenti biex issostni t-talba taghha kienu dawn –

1) Ghamlet riferenza ghax-xiehda ta` Dr Michelle Mizzi Buontempo, Deputy Director tas-Securities Unit tal-Awtorita` intervenuta fil-kawza fl-udjenza tas-6 ta` Frar 2014. Partikolarment fejn ix-xhud irreferiet ghal zviluppi

## Kopja Informali ta' Sentenza

imminenti li jikkoncernaw il-possibilita` ta` hlas ta` kumpens mill-Investor Compensation Scheme tal-Ingilterra.

2) Il-kwistjoni tal-kumpens, kemm-il darba dan jithallas, hija kwistjoni amministrattiva li ma tinvolvix parir u fi kwalsiasi kaz is-socjeta` rikorrenti la hija f`pozizzjoni llum li taghti parir ghaliex mhijiex a going concern u m`ghandhiex impjegati, u lanqas tista` bhala service provider tigi obbligata li taghti parir.

3) Wallace Falzon de proprio jobbliga ruhu illi jaghti lill-amministratur provvizorju kwalsiasi informazzjoni li jkun jehtieg u li tkun tinsab fil-pussess tieghu jew li jkun jaf fejn tista` tinstab.

4) Il-Qorti ghandha kontroll shih fuq dak li jaghmel l-amministratur provvizorju. Fil-fatt irid jirrapporta lill-Qorti.

5) Anke meta tqis l-allegazzjoni li saru fil-procediment *in corso* huwa fl-interess ta` kulhadd li jinhatar amministratur provvizorju.

6) Il-biza` li ghandha l-parti l-ohra bil-hatra ta` amministratur provvizorju ssib rimedju effettiv fis-setghat li ghandha l-Qorti li tirrimedja ghal kull nuqqas li jiltaqa` mieghu l-amministratur.

7) Il-hatra ta` amministratur provvizorju bl-ebda mod ma jfixkel l-istralc anzi jagevola l-istess procediment.

8) L-amministratur provvizorju ghandu access ghal kull ma jehtieg minghand id-diretturi tas-socjeta` u fejn jiltaqa` ma` ntoppi ta` natura teknika jista` dejjem jitlob il-hatra ta` *special manager*.

9) Il-garanziji ghal kulhadd qeghdin dejjem hemm ghaliex huma inseriti fil-poteri wiesgha li ghandha l-Qorti.

## **II. L-opposizzjoni tal-intervenuta fil-kawza l-Awtorita` Ghas-Servizzi Finanzjarji ta` Malta**

**In succint**, ir-ragunijiet li gabet l-Awtorita` biex topponi t-talba tar-rikorrenti kienu dawn –

## Kopja Informali ta' Sentenza

1) Ghamlet riferenza ghar-ragunijiet kollha li l-Awtorita` gabet meta talbet illi tintervjeni fil-kawza *in statu et terminis*. In partikolari, irreferiet ghad-direttivi li kienet tat lil All Invest Company Limited sabiex tittardja "the winding up of its business until such time as the transfer of clients` holdings is completed in an orderly manner". Id-direttiva nghatat skond l-Art. 15 tal-Investment Services Act tal-1994.

2) Huwa biss Wallace Falzon li jaf lill-klijenti tieghu u huwa biss illi kien licenzjat sabiex jaghti investment advice. Bil-hatra tal-amministratur provvizorju, il-pozizzjoni tad-diversi nvestituri li nvestew gidhom ma` All Invest Company Limited tigi pregudikata b`mod irrimedjabbli peress illi l-amministratur provvizorju ma jafx in-negozju in kwistjoni. Lanqas jaf min huma l-klijenti partikolari u xi jsarrfu. Inoltre l-amministratur provvizorju mhux ser ikun f`pozizzjoni illi jaghti parir finanzjarju fl-eventwalita` possibbli jekk mhux ukoll probabbli li tali parir irid jinghata dwar offerta ta` kumpens potenzjali li jista` jsir mill-awtorita` finanzjarja barranija.

3) L-ghan normali bil-hatra ta` amministratur provvizorju dejjem kien meqjus li jkun is-salvagwardja ta` l-assi tal-kumpannija, partikolarment meta tkun qieghda fi stat ta` insolvenza, sabiex jigu protetti l-interessi tal-kredituri. Meta jkun hemm proceduri tal-istralc, l-interess tal-azzjonisti jrid icedi ghall-interess u ghall-protezzjoni tal-kredituri.

4) Fil-kaz tal-lum hija r-rikorrenti li qeghda taghmel it-talba. Il-maqlub isir solitament.

5) Huwa car li l-interess tad-direttur ta` All Invest huwa li jahrab mir-responsabbilta` tal-agir tieghu sabiex ma jkunx kostrett jiffaccja hu l-konsegwenzi.

6) Il-kwesiti tal-Awtorita` kienu dawn : jekk issir il-hatra ta` provisional administrator, kif ser isir it-transfer of business ? Jekk tigi xi awtorita` biex tiddiskuti *on a case by case basis* kif ghandu jigi trasferit il-business, min se jaghti l-informazzjoni ? L-amministratur provvizorju mhux mhux licenzjat mill-MFSA biex jaghti investment advice.

### **III. L-opposizzjoni tal-intervenuti l-ohra fil-kawza**

## Kopja Informali ta' Sentenza

**In succinct**, ir-ragunijiet li gabu l-intervenuti l-oħra fil-kawza sabiex jopponu t-talba tar-rikorrenti kienu dawn –

1) Fuq ammissjoni ta' Wallace Falzon stess, il-kumpannija mhijiex a going concern, u għajr l-irkupru ta' flus li ser jagħmluh l-amministraturi esteri u mhux hu, ma hemm xejn x'tamministra.

2) Mill-banda l-oħra il-pregudizzju kbir li jista' jinholq huwa manifest fis-sens illi kull ilment u kawza pendenti illi l-intervenuti llum għandhom kontra s-socjeta', ma hijiex ser tkun trattata effettivament peress illi ebda amministratur ma jista' jwiegeb għall-għemil tal-kumpannija.

3) Fil-kaz ta' dawn l-intervenuti fil-kawza, Wallace Falzon għamel kuntatt personali magħhom u tahom parir. Falzon ma kienx semplici mandatarju izda a service provider li għandu jibqa' jwiegeb sal-aħhar għall-agir tiegħu, inkluż għall-pariri li jkun taha, mhux jittenta jiskarikah fuq haddiehor inkluż fuq amministratur provvizorju.

4) Ighid x'ighid Wallace Falzon, l-interventui l-oħra fil-kawza m'għandhomx is-serhan tal-mohh li sejjer jikkopera mal-amministratur provvizorju.

## IV. **Dritt**

### (a) **Kap 386 tal-Ligijiet ta' Malta**

Il-Qorti sejra tirreferi għat-test Ingliz tal-ligi mhux daqstant għaliex fil-kaz tal-Att dwar il-Kumpanniji, it-test bl-ilsien Ingliz jipprevali fuq it-test bl-ilsien Malti, izda għall-fini tal-eżami komparattiv li sejra tagħmel aktar il quddiem mal-istat tal-ligi Ingliza.

#### **L-Art 228 tal-Kap 386** jaqra hekk –

(1) *The court may by order appoint a provisional administrator at any time after the presentation of a winding up application and before the making of a winding up order, and either the official receiver or any other competent person may be so appointed.*

(2) *The provisional administrator shall carry out such functions and powers in relation to the administration of the estate or business of the company as the court may specify in the order appointing him.*

(3) *The provisional administrator holds office until such time as the winding up order is made or the winding up application is dismissed unless before such time he resigns.*

**(b) L-Insolvency Act 1985 tar-Renju Unit**

**L-Art 135** jaqra hekk —

(1) *Subject to the provisions of this section, the court may, at any time after the presentation of a winding-up petition, appoint a liquidator provisionally.*

(2) *In England and Wales, the appointment of a provisional liquidator may be made at any time before the making of a winding-up order ; and either the official receiver or any other fit person may be appointed.*

(3) *In Scotland, such an appointment may be made at any time before the first appointment of liquidators.*

(4) *The provisional liquidator shall carry out such functions as the court may confer on him.*

(5) *When a liquidator is provisionally appointed by the court, his powers may be limited by the order appointing him.*

**Prattikament il-posizzjoni tal-ligi Ingliza hija l-istess bhal-ligi taghna.**

**c) Dottrina Ingliza**

Fil-ktieb “**Insolvency Law : Corporate and Personal**” ta` Andrew Keay and Peter Walton ( Pearson Longman – 2003 – pg 181 et seq) insibu hekk -

*The effect of the appointment of a provisional liquidator is to grant interim control of the company to a liquidator – control until the final determination of the liquidation proceedings.*

*The most prevalent reason for applying for the appointment of a provisional liquidator is that there is a perception that the assets and affairs of the company are in jeopardy, primarily because the directors and/or shareholders may dissipate the assets while the liquidation proceedings are pending and that,*

*if the assets are left in the hands of the company, the creditors might be disadvantaged if the company is eventually liquidated.*

***The power to appoint a provisional liquidator is a draconian power (Re Forrester & Lamego Ltd – 1997 – 2BCLC 155 at 158] as it involves a serious intrusion on the company ; the management of the company is effectively under the control of the person appointed. Practically speaking the appointment is likely to paralyse the company commercially (Re London, Hamburg & Continental Exchange Bank, Emmerson`s Case 1866 LR2 Eq 231). Therefore courts have said that if other measures would be adequate to preserve the status quo, they should be implemented instead (Constantinidis v JGL Trading ?Pty Ltd 1995 17 ACSR 625 at 635, 647)***

*Courts must consider when hearing applications the degree of urgency, the need established by the applicant and the balance of convenience (Re WF Fearman 1987 4 BCC 139). The Courts must balance the interests of the creditors against that of the company as well as considering the public interest (Re Pinstripe Farming Co Ltd 1996 2 BCLC 295 at 300 ; 1996 BCC 913 at 917). The Court has a wide and unfettered discretion whether or not to make an appointment (Re Union Accident Insurance Co Ltd (1972) 1 All ER 1105 at 1109)*

*Effective liquidation proceedings must be in existence and they must disclose a good ground for a winding up. While not a rule of law, a provisional liquidator is not usually appointed unless it is likely, given the material before the court, that a liquidation order will be made (ASC v Solomon 1995 19 ACSR 73 at 80). Appointment of a provisional liquidator is sometimes so critical that an application for it is lodged contemporaneously with the liquidation proceedings.*

*Although often the precursor to liquidation, the appointment of a provisional liquidator is not regarded as the beginning of a liquidation (Poject Design Inc vs Object Design Australia Pty Ltd 1997 24 ACSR 678).*

Fis-sentenza Ingliza ***In re Highfield Commodities Ltd*** (CHD 1985)  
inghad hekk –

*The court`s discretion in appointing provisional liquidators is unfettered provided it is exercised in a “proper judicial manner”. Sir Robert Megarry V-C said: `I would respectfully express my complete agreement with the view taken by [the judge]. I do not think that the old authorities, properly read, had the effect of laying down any rule that the power to appoint a provisional liquidator is to be restricted in the way for which Mr Burke-Gaffney contends. No doubt a provisional liquidator can properly be appointed if the company is obviously insolvent or the assets are in jeopardy; but I do not think that the cases show that in no other case can a provisional liquidator be appointed over a company`s objection . . section 238. . is in quite general terms. I can see no hint in it that it is to be restricted to certain categories of cases. The section confers on the court a*

*discretionary power, and that power must obviously be exercised in a proper judicial manner. The exercise of that power may have serious consequences for the company, and so a need for the exercise of the power must overtop those consequences” . . . but in the case of a public interest petition, “the public interest must be given fullweight”. The general practice is for an undertaking as to damages to be given upon an ex parte application for provisional liquidators, but such an undertaking would not be required on an inter partes application. A cross-undertaking as to damages might not be required where “The Secretary of State was seeking to enforce the law, or was acting selflessly in the performance of a public duty directly or impliedly imposed by statute . . .”*

## V. Konsiderazzjonijiet

Il-ligi taghna lill-Qorti d-diskrezzjoni (*may appoint*) li tahtar amministratur provvizorju f'kull zmien wara li jkun gie pprezentat ir-rikors ghax-xoljiment u stralc, u qabel ma tippovdi definittivament jekk tordnax inkella le x-xoljiment u stralc.

In linea generali, jekk il-Qorti ma tispecificax il-poteri tal-amministratur provvizorju, allura r-rwol tieghu jkun biss dak ta' semplici amministratur b'funzjoni li jiehu hsieb l-amministrazzjoni ta' kuljum tal-kumpanija. Sakemm il-Qorti ma tippovdix xort'ohra il-hatra tal-amministratur provvizorju, ma jtemmx ir-rwol tad-diretturi.

In linea generali l-amministratur provvizorju jassumi l-gestjoni tal-amministrazzjoni **ordinarja** tal-kumpanija pero` ma jiehu fuq spallejh il-funzjonijiet tad-diretturi, salv jekk ikun dirett xort'ohra mill-Qorti. Dment illi ma tkunx iprovdi diversament, id-diretturi jibqghu jezercitaw il-funzjonijiet taghhom. Jispetta lill-amministratur provvizorju illi jekk jara li d-diretturi qed jagixxu bi pregudizzju ghall-kumpanija, jitlob direzzjoni mill-Qorti. Meta jigi appuntat amministratur provvizorju, u jkun hekk ordnat, huwa jiehu taht il-kontroll tieghu l-proprijeta` u l-jeddijiet kollha tal-kumpanija, u jmexxi hu n-negozju u l-hwejjeg tal-kumpanija, bl-awtorizzazzjoni u taht il-kontroll tal-Qorti li tkun qed tisma` l-proceduri ta` l-istralc (ara l-Art. 237 tal-Kap.386).

Wara li jinghata l-hatra, l-amministratur provvizorju huwa obligat (*shall carry out*) jaqdi l-funzjonijiet u setghat li taghtih il-Qorti fl-ordni tal-hatra. Sakemm ma jirrizenjax, jew sakemm ma jitnehhiex mill-Qorti ghal raguni tajba, l-amministratur provvizorju jibqa` jzomm l-inkariku saz-zmien li jsir l-ordni ghax-xoljiment u stralc jew sakemm ir-rikors ma jkunx michud.



## Kopja Informali ta' Sentenza

Ghall-fini specifiku tal-provvediment tal-lum, il-konsiderazzjoni mhijiex jekk ir-rikorrent huwiex inkella le fi stat ta` insolvenza ghall-finijiet u effetti kollha tal-ligi. Dik hija konsiderazzjoni li din il-Qorti ghad trid taghmel meta tigi biex tiddeciedi dwar it-talba ghax-xoljiment u stralc.

Determinanti ghall-fini tal-provvediment tal-lum hija jekk it-talba ghall-hatra ta` amministratur provvizorju ghar-ragunijiet indikati mir-rikorrenti ghandhom jinghataw konsiderazzjoni.

Ir-rwol tal-amministratur provvizorju mhuwiex definit fil-Kap 386. Il-ligi thalli **kollox** f'idejn il-Qorti kemm il-hatra kif ukoll is-setghat li taghtih jekk tghaddi ghall-hatra tenut kont tal-fatti u cirkostanzi ta` kull kaz. Dan taghmlu sabiex il-Qorti jkollha kontroll fuq il-gestjoni ta` l-operat tal-kumpannija ghaliex finalment trid tkun propju l-Qorti li tiddeciedi jekk id-debitur huwiex tassew insolventi inkella le u allura tkun tista` tipprocedi boix-xoljiment u stralc kif ir-rikorrenti qeghda tippretendi li ghandha taghmel fiul-kaz tal-lum. Taghmlu wkoll sabiex ma thallix lill-kumpannija tiggestixxi l-affarijiet taghha b`detriment ghall-kredituri taghha.

Fl-isfond tal-premess, u wara li tat il-konsiderazzjoni dovuta lill-posizzjoni ta` kull parti interessata fil-procediment tal-lum, il-Qorti hija tal-fehma konsiderata li l-hatra ta` amministratur provvizorju fic-cirkostanzi **partikolari** tal-kaz tal-lum tmur kontra l-istituzzjoni nnfisha kif kontemplata mil-ligi taghna.

Jekk it-thassib tar-rikorrenti li hija kostitwita minn Wallace Falzon bhala uniku azzjonista u uniku direttur illi tassikura li tkun *above board* meta tigi biex tespleta l-obbligi kollha taghha nkluzi dawk fiducjarji allura l-istess Wallace m`ghandux jirrikorri ghall-hatra ta` amministratur provvizorju ghall-kumpannija izda li jiffaccja lil kulhadd *di prima persona*.

B`kulhadd il-Qorti qeghda tfisser mhux biss l-awtorita` regolaritrici izda u fuq kollox lill-investituri.

**Meta jkun tentat procediment ta` xoljiment u stralc speċjalment mill-kumpannija de qua, il-Qorti ghandha tezercita kawtela kbira. Meta mbaghad tkun il-kumpannija li titlob il-hatra ta` amministratur provvizorju – b`mod speċjalment fil-kaz tal-lum meta hemm qbil li All Invest Company Limited – mhijiex a going concern, allura l-interess tal-kredituri u/jew l-investituri jassumi rilevanza massima.**

Fil-kawza “**Colin Gwyer & Associates Ltd vs London Wharf (Limehouse) Ltd**” [2003] BCC 885 inghad li d-diretturi ghandhom dmirijiet fiducjarji fil-konfront tal-kredituri meta l-kumpannija tkun waslet fl-ghatba tal-insolvenza. Fis-sentenza kien specificat illi –

*In relation to an insolvent company, the directors when considering the company's interests must have regards to the interests of the creditors.*

Dawn l-insenjamenti ghandhom rilevanza hafna ghall-fini tal-provvediment tal-lum ghaliex, ghalkemm l-insolvenza tar-rikorrenti ghad trid tirrizulta, huwa ppruvat illi l-operazzjonijiet kummercjali tar-rikorrenti huma weqfien.

Il-Qorti tifhem it-thassib serju tal-intervenuti fil-kawza u tistqarr minghajr l-icken esitazzjoni illi l-assikurazzjoni li Wallace Falzon qieghed jittenta jaghti lill-Qorti illi sejjer jikopera mal-amministratur provvizorju mhijiex bizzejjed biex isserrah mohh il-Qorti, twessa` kemm twessa` l-obbligi tal-kumpannija u tad-direttur taghha. Il-kontabilita` hija l-pern tad-dritt socjetarju ta` pajjizna. Dan id-dritt qed jaspira li jkun il-mera ta` sistemi ohra u hekk ghandu jkun. Pero` sabiex ikun hekk irid jassikura li l-mizuri ta` kontabilita` jkunu taht l-iskrutinju strett mhux biss tal-awtoritajiet regolatorji izda tac-cittadin in generali.

Fil-kaz tal-lum, il-kredituri u/jew l-investituri ta` All Invest qeghdin ighidu le ghall-hatra ta` amministratur provvizorju. Il-Qorti ma tistax tinjora l-fehma taghhom f`sitwazzjoni singolari ghall-ahhar bhal ma hija dik tal-lum.

Jekk ir-rikorrenti trid tassikura lill-Qorti kemm hija affidabbli ma ghandhiex tirrikorri ghall-hatra ta` amministratur provvizorju izda ghandha tespleta kull dmir illi ghandha fi zmien ragonevoli fl-interess mhux taghha izda fl-interess ta` kull persuna li wera fiducja fil-pariri u fl-operat taghha.

Il-Qorti hija tal-fehma illi fil-kaz tal-lum m`ghandhiex tezercita d-diskrezzjoni taghha u tghaddi ghall-hatra ta` amministratur provvizorju ta` kumpannija li lllum mhijiex a going concern. Mhuwiex dan kaz fejn l-assi tal-kumpannija jinsabu *in jeopardy*. Mhuwiex dan kaz ta` paralizi provokata minn titwim bejn id-diretturi u l-azzjonisti ; bil-maqlub fil-kaz tal-lum, il-kumpannija, id-direttur u l-azzjonist huma kollha *rolled in one*. Mhuwiex dan kaz ta` *dissipation of assets* ghaliex fil-kamp taghha u cioe` servizzi finanzjarji, il-kumpannija ma tistax tmur ghal *new business*.

Hija l-fehma konsiderata ta` din il-Qorti li ghandha tippreserva l-*istatus quo* fl-interess ta` kulhadd inkluz tal-persuni nvoluti fil-procediment tal-lum.

Provvediment

Ghar-ragunijiet kollha premissi, il-Qorti qeghda tichad it-tieni talba tar-rikorrenti kif dedotta fir-rikors promotorju taghha, u riaffermata fl-udjenza tal-kawza tas-6 ta` Frar 2014. L-ispejjez ta` dan il-provvediment jibqghu rizervati ghall-gudizzju finali.

**< Sentenza In Parte >**

-----TMIEM-----