



MALTA

QORTI CIVILI

PRIM' AWLA

ONOR. IMHALLEF

JOSEPH ZAMMIT MC KEON

Seduta tal-15 ta' Settembru, 2014

Rikors Numru. 159/2012

**Galleria Management
Limited (C19258)**

kontra

**Derby International
Limited (C12482)**

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentat fil-15 ta' Frar 2012 li jaqra hekk :-

1. *Illi permezz ta' sentenza tas-6 ta' Ottubru 2006, illum definitiva, dina l-Onorabli Qorti inter alia ordnat lis-socjeta` intimata thallas lis-socjeta` rikorrenti, is-somma ta` LM4,000.00, ekwivalenti ghal EUR9,317.49 rapprezentanti sorte, flimkien mal-imghax legali b`sehh mit-22 ta` Gunju 2000, li sat-13 ta` Frar 2012 jammonta ghal EUR8,685.43, kif ukoll l-ispejjez tal-kawza ammontanti ghal EUR4,667.11, inkluz il-VAT relattiv.*

2. *Illi permezz ta' sentenza ohra tat-3 ta' April 2009, l-Onorabli Qorti tal-Appell ordnat inter alia lis-socjeta` intimata thallas lis-socjeta` rikorrenti, is-somma ta` Lm29,315.81, ekwivalenti ghal EUR68,287, rapprezentanti sorte, flimkien mal-imghax legali b`sehh mill-1 ta` Mejju 2001, li sat-13 ta` Frar 2012 jammonta ghal EUR58,970.03, kif ukoll l-ispejjez tal-kawza ammontanti ghal EUR7,040.26, inkluz il-VAT relattiv.*

3. *Illi ghalhekk sallum is-socjeta` intimata hija debitrice versu s-socjeta` rikorrenti fl-ammont ta` mija u sitta u hamsin elf disa` mija u sebgha u sittin Euro u tnejn u tletin centezmu (EUR156,967.32), kif inghad hawn fuq.*

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4. *Illi huwa evidenti illi s-socjeta` intimata ma tistax thallas l-ammont dovut lis-socjeta` rikorrenti, u lanqas tista` thallas djun ohra, u dana kif ser jigi ppruvat waqt it-trattazzjoni tar-rikors odjern, u ghalhekk hemm lok li s-socjeta` intimata tigi likwidata u konsegwentement stralcjata.*

5. *Illi inoltre jidher li n-negozju tas-socjeta` intimata ilu sospiz ghal perjodu bla waqfien ta` erbgħa u ghoxrin xahar, u dana kif ser jigi ppruvat waqt it-trattazzjoni tar-rikors odjern, u ghalhekk hemm lok li s-socjeta` intimata tigi likwidata u konsegwentement stralcjata.*

6. *Illi inoltre s-socjeta` rikorrenti tissottometti illi hemm ragunijiet gravi bizzejjed li jiggustifikaw ix-xoljiment u konsegwentement l-istralc tas-socjeta` intimata, u dana kif ser jigi ppruvat waqt it-trattazzjoni tar-rikors odjern.*

7. *Illi fl-ahharnett, fl-umli tas-socjeta` rikorrenti hemm lok li dina l-Onorabbli Qorti tahtar amministratur provvizorju skont id-disposizzjonijiet tal-Artikolu 228 tal-Att dwar il-Kumpanniji (Kap. 386 tal-Ligijiet ta` Malta).*

Ghaldaqstant, għar-ragunijiet premissi s-socjeta` rikorrenti titlob umilment li dina l-Onorabbli Qorti sabiex :-

(1) tordna x-xoljiment u l-konsegwenzjali stralc tas-socjeta` intimata a tenur tas-subinciz (i) u/jew (ii) tal-paragrafu (a) tas-subartikolu (2) tal-artikolu 214 u/jew a tenur tas-subinciz (i) u/jew a tenur tas-subinciz (iii) tal-paragrafu (b) tas-subartikolu (2) tal-artikolu 214, tal-Kap. 386 ; u

(2) tahtar amministratur provvizorju skont id-disposizzjonijiet tal-artikolu 228 tal-Kap. 386,

U dana taht kull ordni ohra, maghduda ordnijiet interim kif jidhrilha xieraq dina l-Onorabli Qorti.

Bl-ispejjez kollha kontra s-socjeta` intimata, u bla pregudizzju ghal kull azzjoni li diga` ttiehdet in segwitu s-sentenzi surreferiti, u bla pregudizzju wkoll ghal kull azzjoni ohra li tista` tittiehed fil-konfront ta` terzi (inkluzi d-diretturi u l-azzjonisti tas-socjeta` intimata).

Rat ir-risposta prezentata fit-13 ta` Marzu 2012 li taqra hekk :-

1. *Illi fl-ewwel lok is-socjeta` rikorrenti ghandha tesebixxi vera kopja tas-sentenzi msemminjin fir-rikors promotur u dan kemm in vista tal-fatt li r-rikors lanqas jikkontjeni ndikazzjoni tal-okkju ta` tali sentenzi u kif ukoll peress li s-sentenza tal-Qorti tal-Appell datata 3 ta` April 2009 fl-ismijiet 'Galleria Management Limited v. Derby International Limited' hija proprju dik moghtija fl-appell mis-sentenza l-ohra datata 6 ta` Ottubru 2006.*

2. *Illi, fi kwalunkwe kaz, ir-rikorrenti ghandu jipprova l-ammont li skont hu huwa dovut skont is-sentenzi surreferiti. Ghandu jirrizulta li, prezentement, is-socjeta` rikorrenti qieghda fil-pussess ta` ghamara appartenenti lis-socjeta` rikorrenti pero` ma jidhirx li nghatat ebda konsiderazzjoni ghal dan fir-rikors prezentat mis-socjeta` Galleria Management Limited.*

3. *Illi, fi kwalunkwe kaz, ma jidhirx li r-rikorrenti ghadu sal-lum segwa xi procedura ghall-infurzar tas-sentenzi surreferiti jew hareg mandati ta` natura ezekuttiva fil-konfront tas-socjeta` esponenti.*

4. *Illi fir-rigward tal-allegazzjoni li s-socjeta` esponenti ma tistax thallas id-djun taghha ghandha ssir il-prova mehtiega mil-ligi a tenur tal-art. 214(5) tal-Att dwar il-Kumpanniji.*

5. *Illi anke f`kaz li jirrizulta li s-socjeta` esponenti ilha ma tinnegozja ghal dawn l-ahhar erbgha u ghoxrin xahar u/jew li ma tistax thallas id-dejn taghha, l-istralc taghha huwa biss fakoltattiv a tenur tal-art. 214(2)(a) tal-Att dwar il-Kumpanniji (Kap. 386 tal-Ligijiet ta` Malta). Dan ifisser li dina l-Onorabbli Qorti m`ghandhiex tasal ghal din il-konkluzjoni salv jekk ic-cirkostanzi tal-kaz huma tant gravi li jkunu jehtiegu dan.*

6. *Illi minghajr pregudizzju ghall-premess, kwalunkwe stralc tas-socjeta` esponenti ghandu jsir minghajr pregudizzju ghal dak provdut taht l-Art. 216 tal-Att dwar il-Kumpanniji (Kap. 386 tal-Ligijiet ta` Malta).*

7. *Illi lanqas ma taqbel is-socjeta` rikorrenti li hemm bazi ghax-xoljiment a bazi tal-Art. 214 (2)(b)(iii), u ghalhekk qed topponi l-ewwel talba in kwantu msejsa fuq daqshekk.*

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8. *Illi b`zieda ma` dan u minghajr pregudizzju għall-premess, jinghad ukoll li s-sitwazzjoni li tinsab fiha s-socjeta` esponenti hija rizultat dirett tan-negozju hazin li sar mis-socjeta` rikorrenti fil-konfront tas-socjeta` esponenti fir-rigward tal-kiri tal-hanut minghand is-socjeta` rikorrenti.*

Semghet ix-xiehda tal-Av. Claudette Fenech fl-udjenza tal-21 ta` Gunju 2012 u rat id-dokumenti li kienu prezentati waqt l-udjenza.

Semghet lid-difensur tar-rikorrenti jiddikjara fl-istess udjenza illi r-rikorrenti kienet qeghda tipprocedi ghax-xoljiment u tal-istralc tal-kumpannija ntimata abbazi tal-Art 214(2)(i), l-Art 214(2)(a)(ii), l-Art 214(5)(a)(b), u l-Art 214(2)(b)(iii) tal-Kap 386.

Rat ix-xiehda bl-affidavit ta` Kenneth Pullicino u d-dokumenti li kienu annessi.

Semghet ix-xiehda ta` Marvic Farrugia fl-udjenza tal-24 ta` Jannar 2013 u rat id-dokumenti li kienu prezentati waqt l-udjenza.

Semghet ix-xiehda ta` Calude Calleja fl-udjenza tal-5 ta` Marzu 2013 u rat id-dokument li kien esebit waqt l-udjenza.

Rat ix-xiehda bl-affidavit ta` Claude Calleja.

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Semghet ix-xiehda in kontroezami ta` Kenneth Pullicino fl-udjenza tal-11 ta` Gunju 2013.

Semghet ix-xiehda in kontroezami ta` Claude Calleja fl-udjenza tal-11 ta` Frar 2014 u rat id-dokument li kien esebit waqt l-udjenza.

Rat id-digriet taghha moghti fl-udjenza tal-11 ta` Frar 2014 fejn il-kawza thalliet ghas-sentenza bil-fakolta` li l-partijiet jipprezentaw noti ta` osservazzjonijiet.

Rat in-noti ta` osservazzjonijiet tal-partijiet.

Rat l-atti l-ohra tal-kawza.

Ikkunsidrat :

II. Id-dokumenti registrati tal-kumpannija ntimata

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Kien prezentat bhala **prova** *an Extract of the Registered Documents* tal-kumpannija ntimata ["Derby"]. Id-dokument igib id-data tal-21 ta` Gunju 2012 (**Dok CF1**).

Minn dan id-dokument, jirrizultaw dawn **il-fatti** :-

- 1) Derby kienet registrata fit-22 ta` Marzu 1991 bin-Nru C12482.
- 2) L-ahhar *annual return* presentata kienet dik veljanti sat-22 ta` Marzu 2012.
- 3) Sat-22 ta` Marzu 2012, *in-nominal share capital* tal-kumpannija kien ta` €195,667.332 diviz fi 80,000 Ordinary A Shares b`valur ta` €2.329373 kull sehem u 4,000 Ordinary B Shares b`valur ta` €2.329373 kull sehem.
- 4) Sa dik id-data, it-80,000 Ordinary A Shares u 3,999 mill-Ordinary B Shares kienu tal-kumpannija A.M. Holdings Limited, waqt li Ordinary B Share 1 kien ta` Claude Calleja.
- 5) Sa dik id-data, l-uniku direttur kien dejjem Claude Calleja.
- 6) Fid-*director's report* li jaghmel parti mill-*financial statements* presentati lir-Registratur tal-Kumpanniji ghas-sena li ghalqet fil-31 ta` Dicembru 2010, jirrizulta :- a) li matul is-sena 2010, Derby ma ghamlitx negozju ; u b) li sa dik is-sena, kien hemm *accumulated losses* ta` €240,217.
- 7) Skond l-*Statement of Financial Position* jirrizulta :- a) li matul is-sena 2010, Derby ma kellhiex *non-current assets* (i.e. *property, plant and equipment*) ; u b) li kellha *total assets* kellha €42,617.

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8) *Mid-director`s report* li jagħmel parti mill-*financial statements* li ntbagħtu lir-Registratur tal-Kumpanniji għas-sena li għalqet fil-31 ta` Dicembru 2009 jirrizulta : a) li matul is-sena 2009, Derby ma għamlitx negozju ; u b) li kellha *accumulated losses* ta` €216,182.

9) Abbazi tal-inkartament esebit, għajr għall-*annual report* fuq riferit, ma jirrizultax illi Derby pprezentat *annual reports* ohra.

10) Inltre mill-inkartament esebit, ma jirrizultax li Derby pprezentat lir-Registratur tal-Kumpanniji *financial statements* ohra fis-snin precedent għall-2009.

Mal-affidavit tieghu, ix-xhud **Kenneth Pullicino** – Segretarju ta` Galleria – l-*financial statements* ta` Derby presentati lir-Registratur tal-Kumpanniji għas-sena li għalqet fil-31 ta` Dicembru 2011. Fid-*director`s report* jirrizulta :- a) li matul is-sena 2011, Derby ma għamlitx negozju ; u b) li sa dik is-sena, kien hemm *accumulated losses* ta` €240,768.

Ikkunsidrat :

III. L-ewwel talba tar-rikorrenti

Il-kumpannija rikorrenti (“Galleria”) qeghda titlob ix-xoljiment u l-istralc ta` Derby abbazi :

- (a) tal-**Art 214(2)(a)(i) tal-Kap 386** ;
- (b) tal-**Art 214(2)(a)(ii) u l-Art 214(5)(a) u (b) tal-Kap 386** ;
- (c) tal-**Art 214(2)(b)(iii) tal-Kap 386**.

Billi Galleria hija *kreditur* ta' Derby ghandha *locus standi* biex tippromwovi dan il-procediment skond l-**Art 218(1)(b) u (c) tal-Kap 386**.

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

Skond l-**Art 214(2)(a)(i) tal-Kap 386**, kumpannija *tista'* xxolji u tkun *stralcjata mill-qorti ... jekk in-negozju tal-kumpannija jkun sospiz ghal perjodu bla waqfien ta' erbgha u ghoxrin xahar*.

(1) Provi

Skond il-*Memorandum of Association* ta' Derby (u d-deposizzjoni ta' Claude Calleja) il-*principal object* tal-kumpannija kien :- *to carry on the business of importers, exporters, manufactures, assemblers, wholesalers, distributors and retailers of all kinds of household goods including but not limited to kitchen utensils, domestic appliances, electrical apparatus, decorative goods, linens and all ancillary, related and similar goods*.

Il-procediment tal-lum kien istitwit fil-**15 ta' Frar 2012**. Fid-*director's report* li jaghmel parti mill-*financial statements* presentati lir-Registratur tal-Kumpanniji ghas-sena li ghalqet fil-31 ta' Dicembru 2011, id-direttur ta' Derby, Claude Calleja, iddikjara li matul **1-2011**, Derby ma ghamlitx negozju. Ghamel dikjarazzjoni identika ghar-rigward **tal-2010 u tal-2009**.

Sal-31 ta' Dicembru 2011, Derby kellha *accumulated losses* ta' €241,768.

Skond ir-ricerki ufficjali, Derby m`ghandhiex beni mmobbli.

Claude Calleja ssejjah bhala xhud mir-rikorrenti u ddepona fil-5 ta' Marzu 2013. Xehed illi Derby kellha hanut (Junction 66) fil-Galleria Shopping and Entertainment Centre tal-Fgura. Hemm kellha furnishings u fixtures ; u anke stock. Meta ghalqu l-hanut, hallew il-furnishings u fixtures hemmhekk waqt li l-stock kien written off u ntrema` ghaliex sar obsolete. Ikkonferma li Derby waqfet topera (*trading*) ghal kollox bejn wiehed u iehor fl-2001 jew l-2002 meta ghalqu l-hanut tal-Galleria (ara fol 254-255). Meta ghalqu l-hanut fil-Galleria, Derby riedet thalli l-istock hemm favur ir-rikorrenti bhala hlas akkont ta` dak li kien dovut lilha. Ir-rikorrenti rrifjutat anzi qalet lil Derby biex ma thallix stock minn taghha fil-hanut. L-stock tpogga fi store sakemm intrema` fl-2011. Muri Dok SC1 (fol 262), Calleja ddikjara li dak kien jirrigwarda stock li Derby kellha go hanut iehor Tas-Sliema ; ma kellu x`jaqsam xejn mal-stock li kien hemm fil-Galleria. Ikkonferma li Derby kien ghadha debitrici ta` Galleria. Qal li minkejja dak dikjarat fil-*financial statements* ma saret l-ebda *injection of fresh capital* mill-azzjonisti fil-kumpannija ; lanqas kien hemm zieda fis-*share capital*. Ghalkemm kien hemm rieda li jirriattivaw il-kumpannija, Calleja sostna li ma sabux bizzjed fondi biex jergghu jibdew joperaw (fol 261).

Fl-istadju tal-provi tal-intimata, Claude Calleja rega` xehed permezz ta` affidavit. Derby bdiet topera l-hanut fil-Galleria f'Dicembru 1997. In-negozju taghhom ma rnextiex ghax il-kumpless kien insuccess fis-sens illi l-hwienet li kien imhabbar li se jifthu hemm baqghu ma fethux, u dawk li fethu ghalqu wara xi zmien. Ma kienx generat bizzjed negozju li jhalli profitt li seta` jpatti ghall-ispejjez kbar li nkorrew biex fethu l-hanut. Ghalhekk kellha jaghlqu. Il-hanut Tas-Sliema ma kienx ta` Derby izda ta` A.M. Holdings Ltd. L-stock ukoll ta` go dak il-hanut kien ta` A.M. Holdings Ltd mhux ta` Derby. L-intimata m`ghandhiex kredituri ohra.

Il-**kontroezami** tieghu sa fil-11 ta' Frar 2014 u kkonferma li Derby baqghet ma taghmilx negozju.

(2) **Dritt**

Ir-rekwizit tal-**Art 214(2)(a)(i)** paragrafu (i) huwa s-**sospensjoni tan-negozju** tal-kumpanija ghal perijodu **bla waqfien** ta' erbgha u ghoxrin **(24 xahar)**. Ir-rekwizit huwa materja ta' fatt. Jidher illi d-disposizzjoni kellha l-origini taghha fl-**Art12(1)(d) tal-UK Insolvency Act 1986**, liema disposizzjoni Ingliza m'ghadhiex taghmel parti mill-Act, ghax kienet superata b'legislazzjoni aktar ricenti.

(3) **Risultanzi**

Mill-kumpless tal-provi, jirrizulta :- a) li l-intimata mhux biss issospendiet in-negozju taghha izda waqfet ghal kollox ; b) li l-intimata waqfet tinnegozja bejn wiehed u iehor fl-2001 jew l-2002 ; c) li wara li waqfet tinnegozja ma regghetx ghamlet negozju ; u d) li dik hija s-sitwazzjoni anke llum.

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

Il quddiem il-Qorti sejra tesprimi ruhha dwar jekk ghandhiex tiprocedi bix-xoljiment u l-istralc tal-intimata.

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

Bl-**Art 214(2)(a)(ii) tal-Kap 386** il-ligi taghti lill-Qorti diskrezzjoni li xxolji u tistralcja kumpannija *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 skond il-ligi taghna 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 erbgha u ghoxrin gimgha mill-ezekuzzjoni ta' titolu ezeuttiv kontra l-kumpannija b'xi wiehed mill-atti ezeuttivi 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 qeghda tinsisti fuq il-fondatezza tal-pretensjoni taghha kemm abbazi tal-paragrafu (a) kif ukoll abbazi tal-paragrafu (b).

1) **Provi**

Permezz ta` sentenza ta` din il-Qorti tas-**6 ta` Ottubru 2006** fil-kawza fl-ismijiet *Galleria Management Limited vs Derby International Limited* (Rik. Gur. Nru. 1809/2000/GV) [fol 71 et seq] riferibbilment ghall-hanut li kienet tiggstixxi fil-Galleria Shopping and Entertainment Centre tal-Fgura, l-intimata kienet ikkundannata thallas lir-rikorrenti s-somma ta` Lm 4,000 (ekwivalenti ghal **€9317.49**) bhala arretrati ta` kera u taxxa, maintenance ta` l-areas komuni tal-kumpless u kontribuzzjoni ghall-marketing, bl-ispejjez u bl-imghax kif mitluba.

Permezz ta` sentenza tal-Qorti tal-Appell tat-**3 ta` April 2009** fil-kawza fl-ismijiet *Galleria Management Limited vs Derby International Limited* (Rik. Gur. Nru. 1370/2001/GV) [fol 83 et seq] riferibbilment ghall-istess hanut, l-intimata kienet ikkundannata thallas lir-rikorrenti s-somma ta` Lm 29,315.81 (ekwivalenti ghal **€68,287.47**) bl-ispejjez u bl-imghax kif mitluba.

Fl-**24 ta` Lulju 2001**, ir-rikorrenti pprezentat rikors kontra l-intimata ghall-hrug ta` Mandat ta` Sekwestru Kawtelatorju **Nru 2206/01** ghal sorte ta` Lm 29,315.81. Il-Qorti akkordat it-talba ghall-hrug tal-Mandat dakinhar stess.

Fil-**25 ta` Lulju 2001**, il-Mandat kien notifikat lis-sekwestrarji kollha indikati fir-rikors, waqt li fis-**26 ta` Lulju 2001**, kien notifikat ukoll lill-intimata fl-ufficcju registrat taghha.

Permezz ta` nota presentata fit-**23 ta` April 2009** a tenur tal-Art 838B(2)(a) tal-Kap 12, ir-rikorrenti estendiet l-effetti tal-Mandat Nru 2206/01 skond is-sentenza tal-Qorti tal-Appell fuq riferita.

In-nota kienet notifikata lil erba` sekwestratarji fl-24 ta` April 2009, lil sekwestratarju iehor fis-27 ta` April 2009, kif ukoll lill-intimata fl-ufficcju registrat taghha fis-27 ta` April 2009 (fol 138).

Fl-**24 ta` Lulju 2001**, ir-rikorrenti pprezentat rikors kontra l-intimata ghall-hrug ta` Mandat ta` Qbid Kawtelatorju **Nru 2204/01** ghal sorte ta` Lm 29,315.81. Il-Qorti akkordat it-talba ghall-hrug tal-Mandat dakinhar stess (fol 141).

Il-Mandat kien esegwit fis-**17 ta` Dicembru 2001** bil-qbid ta` mobbli kif jirrizulta mir-referta a fol 217 u 218. L-intimata kienet notifikata bil-Mandat fil-**11 ta` Settembru 2001** (ara fol 224).

Permezz ta` nota presentata fit-**23 ta` April 2009** a tenur tal-Art 838B(2)(a) tal-Kap 12, ir-rikorrenti estendiet l-effetti tal-Mandat Nru 2204/01 skond is-sentenza tal-Qorti tal-Appell fuq riferita.

In-nota ma kenitx notifikata lill-intimata (ara r-referta a fol 220).

Claude Calleja ma jikkontestax li Derby baqghet ma hallset xejn lil Galleria skond is-sentenzi fuq citati.

Dwar il-qaghda finanzjarja tal-intimata, il-Qorti tirreferi ghas-sunt tal-provi fuq indikati.

2) **Dritt**

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 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 –

Kopja Informali ta' Sentenza

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”) ...

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

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

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

Din il-Qorti sejra taghmel riferenza ghad-dottrina dwar il-ligi Ngliza, ghax tiswa biex tkun tista` tasal, abbazi tal-fatti ta` kull kaz, inkluz dak tal-lum, mhux daqstant biex tghid jekk jirrizultax ppruvat dak stipulat fl-Art 214(5)(a), izda biex tasal ghal decizjoni dwar jekk ghandhiex tghaddi ghax-xoljiment u l-istralc ta` kumpannija.

Fil-**Boyle & Birds` Company Law** (op. cit.) ikompli jinghad hekk –

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-ktieb **Insolvency Law – Corporate and Personal** ta` Andrew Keay u Peter Walton (pubblikat minn Pearson Longman – 2003) pg 17 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 ...

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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 ...

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

Dak previst minn din id-disposizzjoni jabbina ruhu ma` *balance sheet insolvency*.

Dan 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 taqra 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 (op. cit.) 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-Khudhairy (1986) 2 BCC99, 549 (CA)] It has been said that “liabilities” is a broadened term compared

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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` Meju 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 –

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.

3) **Risultanzi**

Hija l-fehma konsiderata tal-Qorti illi abbazi tal-provi akkwisti mhuwiex ippruvat fil-konfront tal-intimata dak li l-ligi trid bl-Art 214(5)(a).

Irrizulta li Derby hija debitrici ta' Galleria. Irrizulta li Galleria hadet zewg sentenzi kontra Derby li ghadew in gudikat. Irrizulta li Galleria kienet ipprezentat Mandat Kawtelatorju ta' Qbid u Mandat Kawtelatorju ta' Sekwestru kontra Derby. Irrizulta li wara li kienet deciza wahda miz-zewg kawzi u cioe` dik tal-Qorti tal-Appell tat-3 ta' April 2009, Galleria pprezentat nota ghal kull wiehed miz-zewg Mandati fit-23 ta' April 2009. Dawk huma l-fatti saljenti.

Socjeta` kreditrici hija prekluzi milli tistitwixxi azzjoni ghax-xoljiment u stralc ta' kumpannija debitrici skond l-Art 214(5)(a) fuq l-iskorta ta' Mandat ta' Sekwestru **Kawtelatorju**, anke jekk debitament notifikat lis-sekwestratarji u lis-sekwestrat. Infatti l-Art 214(5)(a) jittellem dwar *l-ezekuzzjoni ta' **titolu ezekuttiv** kontra l-kumpannija b'xi wiehed mill-atti ezekuttivi msemmijin fl-artiklu 273 tal-Kodici ta' Organizzazzjoni u Procedura Civili*.

Ma jirrizultax li Galleria ttentat tikseb il-hrug ta' wiehed mill-atti esekuttivi li huma elenkati fl-Art 273 tal-Kap 12 bil-procedura prevista fl-Art 274 tal-Kap 12 wara li hadet is-sentenza tat-3 ta' April 2009 kontra Derby. Li kieku, per ezempju, ghazlet din it-triq, kienet tipprezenta rikors ghall-hrug ta' Mandat ta' Sekwestru Ezekuttiv, u wara li jkun milqugh mill-Qorti, kien jigi notifikat lis-sekwestratarji.

Hija l-gurisprudenza ta' din il-Qorti illi fejn si tratta ta' atti eżekuttivi ndikati fl-Art 273 tal-Kap 12, il-fattur rilevanti sabiex jiskatta l-perijodu ta' erbgħa u ghoxrin (24) gimgha għall-fini tal-Art 214(5)(a) tal-Kap 386 huwa l-eżekuzzjoni tal-Mandat. U fil-kaz ta' Mandat ta' Sekwestru, l-eżekuzzjoni tal-Mandat issehh bin-notifika tal-att lis-sekwestratarji.

Fil-kaz tal-lum, jirrizulta li l-kumpannija rikorrenti marret għall-procedura kontemplata bl-**Art 838B(1) u (2) tal-Kap 12**, li kien introdott bl-Att XII tal-2009.

Id-disposizzjoni taqra hekk –

(1) *Sakemm ma jiġix imħassar mill-Qorti jew irtirat mill-parti li toħroġ il-mandat, kull mandat kawtelatorju għandu jibqa' fis-seħħ sa ħmistax-il gurnata wara li l-kawża tghaddi f'gudikat.*

(2) *Minkejja d-disposizzjonijiet tas-subartikolu (1), mandati kawtelatorji maħruġin skont l-artikolu 830(1) isiru eżekuttivi wara li kawża tghaddi f'gudikat jew meta, skont l-artikolu 166B, dik l-ittra ufficjali ssir titolu eżekuttiv b'dan illi :*

(a) *fil-kaz ta' mandat maħruġ skont l-artikolu 830(1)(b), (c), (d) u (f), il-kreditur għandu jippreżenta nota fi żmien ħmistax-il gurnata minn meta l-kawża tkun għaddiet f'gudikat fl-atti tal-istess mandat u jitlob li jestendi jew inaqqas l-effetti tal-mandat għas-somma ekwivalenti għall-ispejjeż legali, l-imghaxijiet u d-differenza fis-sorti skont is-sentenza, liema nota għandha tiġi notifikata lid-debitur, u dawk kollha li għandhom interess;*

(b) fil-kaz ta' mandat mahruġ skont l-artikolu 830(1)(a) u (e), il-kreditur għandu jippreżenta rikors skont id-disposizzjonijiet tal-artikolu 388E fi żmien hmistax-il gurnata minn meta l-kawża tkun għaddiet f'gudikat.

Billi l-Mandat ta' Sekwestru Kawtelatorju huwa ndikat fl-**Art 830(1)(d)** il-procedura li kellha tigi segwita mill-kumpannija rikorrenti kellha tkun dik skond l-**Art 838B(2)(a)** sabiex il-Mandat minn Kawtelatorju jsir Ezekuttiv.

Fil-kaz tal-lum, jirrizulta li n-nota li tissemma fl-Art 838B(2)(a) ma kenitx prezentata fi zmien hmistax (15) –il gurnata mid-data tas-sentenza tal-Qorti tal-Appell. Infatti filwaqt li l-kawza kienet deciza fit-3 ta` April 2009, in-nota kienet prezentata fit-23 ta` April 2009. Dan ifisser li n-nota kienet prezentata tardivament ; dan kellu l-effett li ma jirrendix Esekuttiv il-Mandat ta` Sekwestru Kawtelatorju anke ghaliex skond l-Art 838B(1) il-Mandat Kawtelatorju ma kienx baqa` fis-sehh ladarba kienu għaddew il-hmistax (15) –il gurnata mis-sentenza tal-Qorti tal-Appell.

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

Irrizulta li Derby m'għandhiex assi mmobbli. Lanqas ma għandha stock. Infatti mix-xiehda ta` Claude Calleja nafu li l-stock kollu li Derby kellha fil-hanut tal-Fgura ntrema` kollu ghax mal-medda tas-snin ma gie jiswa xejn. L-istess Calleja għamel battalja shiha mar-rikorrenti sabiex stock iehor li kien hemm f'hanut iehor li Derby kellha go Tas-Sliema ma kellux ikun kolpit minn Mandat ta` Qbid ta` Galleria ghaliex dak l-stock kien jappartjeni lill-azzjonista ta` maggoranza ta` derby, u cioe` A.M. Holdings Limited, u mhux ta` Derby. Dan kollu jfisser li Derby m'għandha propju xejn xi sarraf biex thallas id-djun tagħha. Id-dottrina fuq citata toqghod bizzilla għall-kaz tal-lum ghaliex id-djun

ta' Derby mhux biss ma naqsux izda baqghu jizdiedu – kompriz dak accertat ta' Galleria – meta l-assi kienu nil ghal bosta snin li huma twal wisq fid-dinja tan-negozju.

4) **Id-diskrezzjoni tal-Qorti**

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

Il-Qorti taghmel riferenza ghal Pg 913-914 ta' **Boyle & Birds` Company Law** – 8th Edition – 2011 :

*Unpaid creditors of a company may consider commencing winding-up proceedings against the company as an alternative to suing for payment. As a debt collection mechanism, winding up proceedings may be swifter and, for the individual creditor, less expensive than a claim that may come to trial for some time ; **on the other hand, winding up is a collective procedure for the benefit of creditors generally and it does not benefit specific creditors individually (F. Odiah “Winding Up Recalcitrant Debtors” 1995 LMCLQ 107) ...***

Since winding up is a collective procedure for the benefit of creditors generally, one situation where the court may exercise its discretion against winding-up is where other creditors in the same class oppose the making of the order. In this regard the court will usually have regard to the majority of the creditors and will refuse the petition if its opposed by the majority.

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

The court's jurisdiction is discretionary and the fact that the petitioner can establish this ground does not give him an automatic right to an order (re. Metropolitan Railway Warehousing Co. Ltd 1887.36.LJCh 827). The court has refused to make an order where there are good reasons for the delay and where the great majority of members desire that the company shall continue. An order may however be made in appropriate circumstances against the majority's wishes. Where the business has merely been suspended the court must be satisfied of an abandonment or inability to carry on. In ascertaining such intention the court will have regard to the opinion and wishes of the majority of shareholders whose names appear on the register. Merely abandoning one of several objects is insufficient (re. Norwegian Titanic Iron Co. (1866) 35 Beav.223).

Dan premiss, hija l-fehma konsiderata tal-Qorti illi l-intimata ilha s-snin ma taghmel propju xejn biex tinsorgi. Kellha dejn sostanzjali nkluz mar-rikorrenti u m`ghamlet xejn matul is-snin biex tittenta thallas. Hija sprovvista ghal kollox minn assi. U l-aktar importanti huwa li ilha fic-cert sa mill-2001 wieqfa ghal kollox mill-esercizzju tan-negozju li ghalih kienet kostitwita. L-istampa li tohrog mill-*financial statements* taghha hija negattiva ferm. Tul is-snin l-azzjonisti ma ghamlu l-ebda tentattiv ta` *fresh capital injection* fil-kumpannija sabiex terga` tiehu r-ruh. Jekk l-esperjenza tal-hanut tal-Fgura ma kenitx felici, dak kien aktar minn tnax-il sena ilu. Fi tnax-il sena, l-azzjonisti setghu hadu l-inizjattiva biex jaghtu hajja lill-operat tal-kumpannija. Minflok ghazlu *to call it a day* u dan mhux illum izda ghal tnax-il sena shah minghajr interruzzjoni. Kumpannija li ma taghmilx negozju hija entita` bla ruh. Ma tkunx qeghda taqdi l-ghanijiet taghha. Kumpannija li ma tiggenerax attivita` ekonomika ma jistax ikollha dhul, u minghajr dhul, ma tista` qatt thallas id-dejn taghha, aktar u aktar meta fil-kaz tal-lum irrizulta bhala fatt illi l-azzjonisti wrew li m`ghandhom l-ebda hajra jew intenzjoni li jinvestu fil-kumpannija. Ghal din il-Qorti, ix-xoljiment u l-istralc tal-intimata huwa inevitabbli.

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

Billi l-Qorti qeghda tezercita d-diskrezzjoni taghha u qeghda tordna x-xoljiment u l-istralc tal-intimata abbazi tal-Art 214(2)(a)(i), tal-Art 214(2)(a)(ii) u tal-Art 214(5)(b) tal-Kap 386, il-Qorti ma tarax il-htiega li tmur ghal analizi ta` jekk l-Art 214(2)(b)(iii) tal-Kap 386 huwiex ippruvat ukoll fil-kaz tal-lum.

Provvediment

Ghar-ragunijiet kollha premessi, il-Qorti tipprovdi kif gej dwar it-talbiet tal-kumpannija rikorrenti u l-eccezzjonijiet tal-kumpannija intimata :-

1) Tiddikjara li fir-rigward tal-kumpannija Derby International Limited (C12482) jirrizultaw pruvati sal-grad rikjest mill-ligi r-rekwiziti tal-Art 214(2)(a)(i) u (ii) u tal-Art 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta.

2) A tenur tal-Art 214(2)(a)(i) u (ii) u tal-Art 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta, tordna x-xoljiment tal-kumpannija Derby International Limited (C12482) b`effett mill-15 ta` Frar 2012 skond l-Art 223(1) tal-Kap 386. Tordna wkoll l-istralc taghha.

3) Tassewenti mill-istess parti ta' dik il-parti tal-ewwel talba fejn kien rikjest ix-xoljiment u l-istralc tal-kumpannija intimata skond l-Art 214(2)(b)(iii) tal-Kap 386 tal-Ligijiet ta' Malta.

4) Tassewenti mill-istess parti ta' dik il-parti talba.

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

6) Dwar l-ispejjez, il-Qorti ttiprovdi hekk :-

a) Tordna li l-ispejjez ta' dan il-provvediment sal-lum jithallsu mill-kumpannija intimata.

b) Tordna li l-ispejjez kollha tal-istralc, inkluzi d-drittijiet u l-ispejjez tar-Ricevitur Ufficjali fil-vesti tieghu ta' stralcjarju, jithallsu mill-kumpannija rikorrenti u mill-kumpannija intimata *in solidum* bejniethom, u dan bl-applikazzjoni tal-Art. 236(2) tal-Kap 386.

7) Thalli l-istralc ghall-udjenza ta' nhar il-Hamis 8 ta' Jannar 2015 fid-9.00 a.m.

< Sentenza Finali >

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