MALTA

QORTI CIVILI

PRIM' AWLA

ONOR. IMHALLEF

JOSEPH ZAMMIT MC KEON

Seduta tas-26 ta' Frar, 2015

Rikors Numru. 494/2014

Fl-atti tar-rikors numru 494/2014

fl-ismijiet :

Panta Contracting Limited (C15725)

kontra

D.A. Holdings Limited (C18064)

u

b`digriet tat-23 ta` Ottubru 2014 Mediterranean Corporate Bank Limited, gia` Volksbank Malta Limited, giet awtorizata tintervjeni fil-kawza *in statu et terminis*

Il-Qorti :

I. Preliminari

Fit-30 ta` Jannar 2015, Mediterranean Corporate Bank Limited gia` Volksbank Malta Limited ("l-intervenuta fil-kawza") pprezentat rikors (fol 219) fejn, a tenur tal-Art 224(2) tal-Kap 386 tal-Ligijiet ta` Malta, talbet lill-Qorti sabiex tawtorizzaha tipprocedi kontra s-socjeta` intimata flimkien mal-garanti solidali ghall-kanonizzazzjoni tal-kreditu dovut lilha tas-self maghmul lilha u ghall-imghaxijiet u spejjez.

Fit-3 ta` Frar 2015, il-Qorti tat digriet fejn ordnat in-notifika tar-rikors u tad-digriet lil Panta Contracting Limited ("ir-rikorrenti") u lil D.A. Holdings Limited ("l-intimata"), tathom erbat ijiem zmien biex iwiegbu bil-miktub u rriservat li tkompli tipprovdi `l quddiem.

Fis-6 ta` Frar 2015, Stephen Delicata u David Agius, diretturi tal-intimata, pprezentaw twegiba bil-miktub, waqt li fid-9 ta` Frar 2015, ir-rikorrenti pprezentat it-twegiba taghha bil-miktub.

Fl-udjenza tal-kawza tat-12 ta` Frar 2015, l-Amministratur Provvizorju tal-intimata wiegeb verbalment ghar-rikors tal-intervenuta fil-kawza.

Fl-istess udjenza, il-Qorti semghet lid-difensuri u halliet ir-rikors ghal provvediment ghal-lum.

Il-Qorti rat l-atti.

Dan huwa l-provvediment.

II. <u>Konsiderazzjonijiet</u>

Fil-procediment principali, u cioe` dak fl-ismijiet premessi, ir-rikorrenti talbet mill-Qorti hekk :-

1. Tahtar amministratur provvizorju sabiex jamministra l-affarijiet tas-socjeta` intimata u dan taht dawk id-disposizjonijiet kollha li din l-Onorabbli Qorti jidhrilha opportun li taghti ;

2. Tiddikjara illi s-socjeta` intimata ma tistax thallas id-djun taghha ai termini ta` l-artikolu 214(a)(ii) u l-artikolu 214(5) tal-Kap 386 tal-Ligijiet ta` Malta ; u

3. Tordna x-xoljiment u l-istralc tas-socjeta` intimata ai termini ta` l-artikolu 214(2)(a)(ii) tal-Kap 386 tal-Ligijiet ta` Malta u taghti kull provvediment opportun sabiex jinhatar stralcjarju ghall-istralc tas-socjeta` intimata ai termini tal-Kap 386 tal-Ligijiet ta` Malta.

Bl-ispejjez u b`rizerva ghal kwalsiasi azzjoni ulterjuri spettanti lis-socjeta` rikorrenti.

Fit-22 ta` Ottubru 2014, il-Qorti tat provvediment (fol 170 et seq) fejn *inter alia* hatret lill-Avukat Dottor Richard Galea Debono bhala Amministratur Provvizorju tal-intimata b`effett mid-data tal-provvediment skond l-Art 228 tal-Kap 386.

Wara l-hatra tal-Amministratur Provvizorju, il-kawza tinsab fl-istadju tal-gbir tal-provi.

Fit-test tal-ligi bil-Malti, l-**Art 224(2) tal-Kap 386** jaqra hekk :-

Meta jkun sar ordni għal stralċ jew ikun inħatar amministratur provviżorju, skont id-disposizzjonijiet tal-artikolu 228, ma tista' tittieħed ebda azzjoni jew jinbdew xi proċeduri kontra l-kumpannija jew il-proprjetà tagħha ħlief bil-permess tal-qorti u taħt dawk il-kondizzjonijiet li tista' timponi l-qorti.

Fit-test tal-ligi bl-Ingliz, l-istess disposizzjoni taqra hekk :-

Where a winding up order has been made or a provisional administrator has been appointed in accordance with the provisions of article 228, no action or proceeding shall be proceeded with or commenced against the company or its property except by the leave of the court and subject to such terms as the court may impose.

Il-mudell ta` din id-disposizzjoni hija **Sec 130(2) tal-Insolvency Act 1986** tal-Ingilterra li taqra hekk :-

When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court and subject to such terms as the court may impose.

Huwa evidenti illi t-test tad-disposizzjoni tal-ligi taghna huwa kwazi identiku ghad-disposizzjoni fil-ligi tal-Ingilterra.

Dwar l-interpretazzjoni ta` Sec 130(2) tal-Insolvency Act 1986, Andrew Keay u Peter Walton fil-pag 248 sa 251 tal-ktieb taghhom "**Insolvency Law**" (Pearson Education Limited – 2003) ighidu hekk :-

The rationale for this is that it is not appropriate for the liquidator to be harassed by litigants, which would diminish the estate of the company ; rather the liquidator is to preserve the limited assets of the company for distribution among all the persons who have claims upon them (In re David Lloyd & Co – 1877 – 6 Ch D 339 at 344). Later cases have also indicated that the provision is intended to oblige all claimants to submit to the procedural scheme established in winding up. It is less expensive and more orderly if any claims against the company can be dealt with in the usual way that is used for the proving of claims (Ogilvie Grant v East – 1983 – 7 ACLR 669 at 672). So the objects of Sec 130(2) are : to avoid the inconvenience and expense of litigation ; and to oblige all claimants to submit to the procedural scheme established in winding up ...

Whether leave to proceed will be granted will depend very muich on each case`s facts (In re Kentwood Constructions Ltd – 1960 0 1 WLR 646). It is certainly not granted readily. It is quite clear that the courts will not engage in a consideration of the merits of a claim against a company (Re BCCI No 4 – 1994 – 1 BCLC 419). If a party does proceed without securing leave, any claim or other

originating process initiated following the beginning of winding up and served on the company is a nullity (Roberts Petrolium Ltd vs Bernbard Kenny Ltd – 1983 – 1 All ER 564).

An applicant for leave must establish that there is a serious or substantial question to be tried (Vagrant Pty Ltd (in liq) v Fielding – 1993 – 11 ACLC 411 ; 1993 – 10 ACSRT 373) and it must be affirmatively established that the claim has a solid foundation. So leave is not granted where the applicant`s claim is futile.

In determining whether to grant leave the courts have an absolute discretion, and an appellate court will not readily interfere with the exercise of a discretion (Thomas Plate Glass Co v Land & Sea Telegraph Construction Co – 1871 – 6 Ch App 643 ; Re Pacaya Rubber & Produce Co – 1913 – 1 Ch 218 CA). There are not a lot of guidelines for courts in the exercise of the discretion. It has been said that courts are to do what is right and fair in all circumstances (Re Aro Co Ltd – 1980 – Ch 196 ; Re Exchange Securities & Commodities Ltd – 1983 – BCLC 186 at 195 ; Canon [Scotland] Business Machines Lts, Noter – 1992 – BCC 620 ; 1993 – BCLC 1194). Other factors which have said to be important in determining whether leave should be granted are "the amount and seriousness of the claim, the degree of complexity of the legal and factual issues involveds, and the stage to which the proceedings, if already commenced, may have progressed" (Ogilvie-Grant v East – 1983 – 7 ACLR 669, 672 per McPherson J).

In considering an application courts will examine whether there is good cause of action, whether the action will affect the orderly winding up of the company and whether any action would prejudice the other creditors (Re Gordon Grant and Grant Pty Ltd – 1982 – 1 ACLC 196 ; 1982 – 6 ACLR 727). The court may extend leave to a creditor to prosecute or initiate legal proceedings and impose conditions, such as the usual requirement that the creditor will not attempt to enforce against the company any judgement obtained without the leave of the court (Re Gordon Grant and Grant Pty Ltd – 1982 – 1 ACLC 1996 ; 1982 6 ACLR 727 ; Re Coastal Constructions Pty (in liq) – 1994 – 13 ACSR 329) ...

It appears that the cases where leave has been granted are able to be placed under two principal headings. First, where the nature of applicant`s claim demands leave ... Second, where the balance of convenience and the requirements

of justice demand that leave be given ... The question would have to be fundamentally one of expedience and convenience, and leave will not be granted where the proposed action raises issues which are able to be dealt with in the liquidation proceedings witn equal convenmience and less delay and expense (Re Exchange Securities & Commodies Ltd - 1983 – BCLC 186 at 196) ... any claims which are likely to be more difficult ... or more expensive ... to settle in winding up rather than by action at law are usually allowed to proceed ...

Waqt li kienu qeghdin is-sottomissjonijiet dwar ir-rikors, l-intervenuta fil-kawza kienet cara hafna meta sostniet illi l-ghan ewlieni wara r-rikors taghha huwa sabiex tkun tista` taghmel kawza halli tikseb il-kanonizzazzjoni tal-kreditu taghha b`sentenza tal-Qorti mhux biss kontra l-intimata izda kontra l-garanti taghha. Mhuwiex il-kompitu ta` din il-Qorti fl-ambitu tal-procediment tal-lum illi tghid jekk l-intervenuta fil-kawza tistax tipprocedi kontra l-garanti minghajr ma tipprocedi wkoll kontra l-intimata. Tirrimarka biss illi l-intervenuta fil-kawza qeghda tissottolinea fir-rikors taghha li tal-garanti hija obbligazzjoni *in solidum* mal-intimata. Barra minn hekk, l-intervenuta fil-kawza taf ben tajjeb ir-rimedji li ghandha kontra l-garanti jekk dawn jisvestu ruhhom mill-assi personali taghhom sabiex jeludu l-obbligazzjonijiet taghhom. Ghar-raguni esposta kjarament u minghajr mezzi termini mill-intervenuta fil-kawza, it-talba taghha ma tistax tkun akkolta.

Il-Qorti zzid tirrileva hekk - anke wara li qieset ir-ragunijiet li gabu l-partijiet fil-kawza sabiex ma tilqax it-talba tal-intervenuta fil-kawza :-

1) F`**F.Oditah "Winding Up Recalcitrant Debtors"** 1995 LMCLQ 107 (citat fil-pag 913 ta` **Boyle & Birds Company Law** – 8th Edition – 2011) jinghad hekk :- *winding up is a collective procedure for the benefit of creditors generally and it does not benefit specific creditors individually.* Jekk l-intervenuta fil-kawza trid *leave of court* sabiex bl-azzjoni futura taghha tolqot principalment lill-garanti, allura t-talba taghha qeghda tkun respinta. Jekk fl-azzjoni taghha, trid li tinvolvi wkoll lill-intimata, allura t-talba qeghda tkun respinta wkoll ghaliex bil-hatra tal-Amministratur Provvizorju, anke tenut kont tas-setghat wiesgha li taghtu din il-Qorti, illum hemm aktar kontroll fuq l-operat tal-intimata, u fuq kollox trasparenza u kontabilita` diretta mal-Qorti ta` dak

kollu li qieghed isir fil-kumpannija intimata llum. Jekk il-kredituri kellhom dubji dwar l-agir tad-diretturi fiz-zmien qabel il-hatra tal-Amministratur Provvizorju, dawn id-dubji llum jistghu jitwarrbu fil-genb ghaliex l-Amministratur Provvizorju nghata s-setghat tad-diretturi, is-setghat li kellhom id-diretturi huma sospizi, u l-istess Amministratur Provvizorju huwa obbligat jirrendi kont lill-Qorti minn zmien ghal zmien fil-presenza tal-kredituri.

2) Fost il-kompiti primarji li ghandu l-Amministratur Provvizorju hemm illi taht l-iskrutinju tal-Qorti jippreserva l-assi, jassikura d-dhul, jikkontrolla l-infieq u d-djun, sabiex jekk fuq l-assjem tal-provi li tkun gabret il-Qorti tasal ghax-xoljiment u l-istralc tal-intimata, allura l-istralcjarju li jigi mahtur mill-Qorti jsib l-assi preservati sabiex ikun jista` jghaddi ghat-tqassim skond il-prova tad-djun li jingiebu ghall-konjizzjoni tieghu mill-kredituri, u l-pregradwazzjoni taghhom. Mhuwiex indikat u lanqas ghaqli li l-Amministratur Provvizorju jithalla jigi mfixkel fit-twettieq tal-kompiti u responsabilitajiet wiesgha li taghtu l-Qorti billi jkollu joqghod jikkontesta proceduri gudizzjarji godda una volta l-procediment ghad-determinazzjoni gudizzjarja tat-talba tax-xoljiment u stralc tal-intimata qabad sewwa r-ritmu tieghu.

3) L-ghaqal u l-interess kollettiv tal-kredituri jitlob illi kull kreditur li ghandu *claim* kontra l-intimata isegwi attivament, u sahansitra jippartecipa, fil-procediment tal-lum – haga li l-ligi tippermetti – bla ma joqghod jinhela fi proceduri gudizzjarji individwali ghall-kanonizazzjoni tal-kreditu – sabiex jekk ikun hemm xoljiment u stralc jidhol fl-iskema ta` distribuzzjoni. B`dan il-mod il-verifika tal-krediti tkun anqas dispendjuza kemm f`hin kif ukoll fi spejjez u aktar ordinata u artikolata. Del resto litigazzjoni mhux biss tohloq inkonvenjent izda tkabbar l-ispejjez, specjalment jekk tkun l-intimata li tinkorrihom. Jista` jkun li jekk tkun l-intimata li tinkorri l-ispejjez, dan ikun piz iehor fuq l-assi tal-intimata.

4) Il-Qorti mhijiex sejra tidhol fil-mertu ta` jekk azzjoni mill-intervenuta fil-kawza kontra l-intimata hijiex sejra tirnexxi inkella le. Li certament tirrealizza l-Qorti hija l-ispiza qawwija hafna li sejra tinkorri l-parti sokkombenti tenut kont tal-entita` tas-sorte u imghax involut. Anke ghal dan, il-Qorti trid taghti kont meta tigi biex tizen u tesercita d-diskrezzjoni taghha.

5) Hija l-fehma konsiderata ta` din il-Qorti illi tenut kont tal-fatt illi l-kreditu tal-intervenuta fil-kawza kontra l-intimata huwa ben kawtelat *ex contractu* u *ex lege,* eventwali kawza u sentenza kontra l-intimata jkollhom effett negattiv fuq process ta` stralc u jgib pregudizzju ghal kredituri ohra. Il-Qorti trid li meta jkun pendenti procediment ta` xoljiment u stralc ta` socjeta` il-kredituri kollha jitilqu kollha mill-istess *starting line,* hu min hu dak il-kreditur li jaghti bidu ghall-procediment. Is-sahha tad-dritt tal-kredituri ghandu jigi meqjus u valutat fl-istadju tal-verifika tal-kreditu waqt l-istralc, mhux qabel.

6) Il-Qorti mhijiex sejra takkorda l-permess rikjest mill-intervenuta fil-kawza ghaliex il-bilanc bejn il-konvenjenza (fit-termini diga` spjegati) u l-htigijiet tal-gustizzja jiskonsilja li l-Qorti tesercita d-diskrezzjoni taghha kif mitlub mill-intervenuta fil-kawza.

Provvediment

Ghar-ragunijiet kollha premessi, il-Qorti qeghda tichad it-talba tal-intervenuta fil-kawza kif dedotta fir-rikors taghha tat-30 ta` Jannar 2015. L-ispejjez ta` dan il-provvediment jibqghu riservati ghall-gudizzju finali dwar il-mertu fil-kawza fl-ismijiet premessi.

< Sentenza In Parte >

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