

**QORTI CIVILI  
PRIM' AWLA**

**ONOR. MHALLEF  
JACQUELINE PADOVANI GRIMA LL.D. LL.M. (IMLI)**

**Seduta ta' nhar l-Gimgha 16 t'Ottubru 2015**

**Kawza Numru : 2**

**Rikors Numru : 651/2008/JPG**

**Avv. Jean C. Farrugia (Numru tal-  
Passaport Malti 694195)  
a nom u in rapprezentanza ta'  
l-assenti Soren Erland Tabur  
(numru tal-Passaport Daniz 102323077)**

**VS**

**Aqua Oasis Limited (C41157) u  
Dorte Rickert (ID No. 37119(A))  
fil-Kwalita' taghha ta' azzjonista  
u direttrici unika tal-istess kumpanija  
Aqua Oasis Limited**

Il-Qorti :

Rat ir-rikors guramentat tar-rikorrenti tal-25 ta' Gunju 2008, li jaqra' hekk:

**“1 Rikors a tenur tal-Artikolu 402 tal-Att ta’ l-1995 dwar il-Kumpaniji (Kapitolu 386 tal-Ligijiet ta’ Malta)**

1.1 Dan ir-rikors qed isir mir-rikorrenti nomine bhala azzjonista fil-kumpanija Aqua Oasis Limited (Numru ta' Registrazzjoni c 41157) (minn hawn ,l quddiem msejha "il-Kumpanija") a tenur ta' l-Artikolu 402 tal-Att ta, l-1995 dwar il-Kumpaniji (Kapitolu 386 tal-Ligijiet ta' Malta) (minn hawn ,il quddiem msejjah "l-Att") stante li l-affarijiet tal-Kumpanija u fil-Kumpanija qed jitmexxew mill-intimata Dorte Rickert fil-kwalita' taghha ta' direttrici unika tal-Kumpanija b'mod oppressiv u ngustament pregudizzjevoli fil-konfront tar-rikorrenti nominee. Inoltre certu atti u/jew ommissjonijiet tal-Kumpanija saru u qed isiru b,tali mod illi huma oppressivi b'mod mhux gust u ta' pregudizzju ghar-rikorrent nomine. Dan kollu qed isir partikolarment biex jigu stultifikati u ffrustrati l-pretensjonijiet, l-interessi, d-drittijiet u l-aspettativi legittimi tar-rikorrenti qua azzjonista fil-Kumpanija.

Fl-umli opinjoni tar-rikorrenti nomine l-elementi rikjesti mill-imsemmi Artikolu 402 huma sodisfatti kif ser jinghad.

**2. Locus Standi**

2.1 Ir-rikorrent nomine jipposjedi u huwa registrat bhala azzjonista ta' hamsin fil-mija ta'l-ishma tal-Kumpanija. Di fatti huwa ghandu elf (1000) sehem tal- valur nominali ta' Ewro (€1) -il wiehed minn kapital azzjonarju ta' elfejn (2000) sehem tal-valur nominali ta'Ewro (€1)-il wiehed, mentri l-intimata Dorte Rikert tipposjedi u hija registrata bhala azzjonista tal-hamsin fil-mija l-ohra ta' l-ishma tal-Kumpanija. Di fatti hija ghandha elf (1000) sehem tal-valur nominali ta'Ewro (€1) -il wiehed. (ara kopja tal-Memorandum u tal-Istatut tal-Kumpanija anness u mmarkat bhala Dok. JCF 1).

2.2 Il-Kumpanija giet ifformata u debitament registrata mar-Registatur tal-Kumpaniji fit-13 t'April2007. Mid-data tal-formazzjoni tal-Kumpanija sal-lum ma kien hemm ebda tibdil fil-Memorandum u l-lstatut tal-Kumpanija u ma kien hemm ebda trasferiment ta' ishma.

### **3 Il-Bazi tar-Rikors**

3.1 Kif jirrizulta mill-Memorandum u l-Istatut tal-Kumpannija anness (Dok. JCF1) l-intimata Dorte Rickert tagixxi bhala direttrici unika tal-Kumpannija, kif ukoll hija ir-rapprezentanta guridika u legali tal-Kumpannija. Rickert ilha tokkupa din il-kariga mill-gurnata tal-formazzjoni u registrazzjoni tal-Kumpannija. Dunque, oltre li hija azzjonista ta' hamsin fil-mija ta' l-ishma, Rickert ghandha vestiti fiha dawk il-poteri kollha ta' amministrazzjoni u rappreżentanza tal-Kumpannija kif mahsub fil-Memorandum u l-Istatut tal-Kumpannija u fl-Att. Dan ovvjament ad esklużjoni tar-rikorrent nomine qua azzjonista li mhu involut bl-ebda mod fl-amministrazzjoni tal-Kumpannija.

3.2 Il-Kumpannija giet formata mir-rikorrenti nomine u Dorte Rickert bil-ghan illi din tistabbilixxi u topera dive centre f'Malta. Di fatti, f'Marzu tas-sena 2007, ir-rikorrent nomine f'isem il-kumpannija tieghu Aqua Sports City aps (kumpannija registrata u inkorporata fid-Danimarka) dahal f'arrangement ma' certu Albert Caruana (ID 763346), li dak iz-zmien kien jopera dive centre bl-isem 'Divecare' mill-propjeta ta' St. Julians Aquatic Sports Club, f'George Borg Olivier Street, San Giljan, taht titolu ta' kera, u dan sabiex l-imsemmija kumpannija Aqua Sports City aps tassumi l-operazzjonijiet ta' l-istess dive centre bic-cessjoni tad-drittijiet tal-kirja ta' Caruana a favur tal-kumpannija Aqua Sports City aps kif ukoll bix-xiri ta' l-apparat, stock u mobbli ohra indikati fil-lista inventarju annessa ma' l-imsemmi kuntratt (kopja ta liema kuntratt annessa u mmarkata **Dok. JCF 2**).

3.3 Mal-formazzjoni tal-kumpannija Aqua Oasis Limited, il-Kumpannija kellha tiehu f'idejha l-amministrazzjoni u operazzjoni tad-dive centre cedut lill-kumpannija Aqua Sports City aps u il-Kumpannija kellha topera dan id-dive centre taht l-isem gdid ta' Aqua Oasis.

3.4 Di fatti, hekk gara u l-intimata Dorte Rickert qua direttrici unika kellha tiehu hsieb l-amministrazzjoni tan-negozju tal-Kumpannija. Originarjamant il- partijiet

*qablu li l-amministrazzjoni tkun fdata lil Dorte Rickert minhabba l-fatt illi, filwaqt li r-rikorrenti nomine jghix fid-Danimarka, Dorte Rickert tghix Malta.*

*3.5 Ir-rikonent nomine iffinanzja kompletament l-attivitajiet tal-Kumpannija direttament, jew tramite l-kumpannija Daniza tieghu Aqua Sports City aps, inkluz hlas ta' kirjiet u xiri ta' apparat kif ukoll xiri ta' xi vetturi ghall-uzu ghax-xoghol tal -Kumpannija.*

*3.6 Ghall-habta ta' Marzu ta' 2008, ir-rikorrent nomine issuspetta illi l-amministrazzjoni tal-Kumpannija minn Rickert ma kenitx qed issir a termini ta' l-obbligi ta' Rickert fil-Memorandum u l-Istatut tal-Kumpannija u tal-obbligi taghha bhala tali fil-ligi, tant illi tramite l-konsulent legali tieghu f'Malta talab lil Rickert tghajjat laqgha tal-Kumpannija sabiex fiha jigi rappurtat u diskuss l-andament tan-negozju tal-Kumpannija, l-amministrazzjoni ta' Rickert, kif ukoll jigu prezentati u diskussi il-Inancial statements tal-Kumpannija. Ir-rikorrent nomine talab dan kemm sabiex ikun informat dwar l-andament tan-negozju tal-Kumpannija u l-amministrazzjoni ta' Rickert kif ukoll sabiex jekk ikun il-kaz jittiehdu dawk il-mizuri necessarji fl-interess tal-Kumpannija. Minkejja dan, u minkejja l-promessi ta' Rickert f'dan is-sens fil-komunikazzjonijiet taghha lir-rikorrent nomine, tramite il-konsulent legali taghha, din il-laqgha qatt ma saret u l-informazzjoni mitluba mir-rikorrent nomine qatt ma nghatatlu.*

*3.7 Oltre dan, kif ser jigi pprovat waqt it-trattazzjoni ta' dan ir-rikors, l-intimata Rickert ma kenitx u mhiex qed izzomm il-kotba tal-Kumpannija in regola u kif hija obbligata li taghmel fil-ligi qua direttrici.*

*3.8 Dan kollu jindika li l-amministrazzjoni tal-Kumpannija mill-intimata Rickert hija negligenti u ta' pregudizzju ghan-negozju tal-Kumpannija u tar-rikorrent nomine.*

*3.09 Minkejja d-diversi tentattivi li ghamel ir-rikorrent nomine sabiex jikkomunika ma' l-intimata, l-intimata Rickert ghazlet li twaqqaf kwalsijasi kuntatt mar-rikorrenti nomine.*

3.10 Inoltre ricentement ir-rikorrent nomine skopra, tramite terzi, illi l-intimata Dorte Rickert qeda (weheda jew flimkien ma terzi) topera id-dive centre tal-Kumpannija Aqua Oasis taht l-isem gdid 'Delfini Dive Centre' u di fatti jirrizulta, kif ser jigi pprovat waqt it-trattazzjoni ta' dan ir-rikors, illi Dorte Rickert nehhiat it-tabelli u sinjali kollha li kienu juru l-isem ta' Aqua Oasis u d-dettalji tal-kumpannija Aqua Oasis Limited mid-dive centre f'George Borg Olivier Street San Giljan u ssostitwiethom b'dawk ta' Delfini Dive Centre. Jirrizulta wkoll lli Dorte Rickert irregistrat dan id-dive centre taht l-isem gdid li unilateralment iddecidiet ittieh mal-Professional Association of Diving Instructors (PADI) mentri jirrizulta li idderegistrat minn ma' l-istess PADI l-isem ta' Aqua Oasis u tal-Kumpannija bhala operatrici ta' l-istess dive centre. Apparti minn hekk Dorte Rickert ifformat sit eletroniku gdid ghal Delfini Dive Centre (<http://www.delfinidivecentre.com>) li carament juri li l-istess propjeta' originarjament intiza sabiex tintuza minn Aqua Oasis Limited qed tintuza minn Dorte Rickert taht dan l-isem gdid. Fil-fatt fuq dan is-sit elettroniku jidher ritratt ta' Rickert fuq il-pagna principali.

3.11 Kollox jindika, u kif ser jigi ppruvat waqt it-trattazzjoni ta' dan ir-rikors jirrizulta, illi Dorte qed topera mill-istess dive centre originarjament uzat mill-Kumpannija kif ukoll qed tuza l-apparat tal-Kumpannija ghall-interessi u qliegh personali u uniku taghha, u dan a skapitu u kontra l-interessi tal-Kumpannija u tar-rikorrent nomine qua azzjonista fl-istess Kumpannija.

3.12 Dan l-agir ta' l-intimata Dorte Rickert sar totalment in mala fede, huwa ghal kollox abbuзив, illegali u, apparti li jmur kontra l-obbligi taghha ta' direttrici, nkluz l-obbligi taghha taht l-Artikolu 136A ta' l-Att, huwa ghal kollox frawdolenti. Huwa car illi l-iskop principali ta' l-intimata Rickert huwa li tippromwovi l-interessi personali taghha a skapitu tal-Kumpannija u tar-rikorrent nomine.

3.13 Apparti minn hekk l-agir ta' l-intimata huwa ghal kollox konfliggenti mal-interessi tal-Kumpannija tant li Rickert issa qed, kif inghad, a dirittura, topera in kompetizzjoni mal-Kumpannija, u dan b'mod abbuзив u illegali billi ippussessat ruhha mid-dive centre operat mill-Kumpannija u billi immisapproprjat ruhha mill-assi tal-Kumpannija u qed tuha l-istess fl-interess personali taghha.

3.14 Minhabba dan kollu l-intimata Dorte Rickert gabet l-attivita' kummercjali tal-Kumpannija fix-xejn u prezentement l-operat tal-Kumpannija huwa ghal kollox wieqaf.

3.15 B'dan l-ghemil doluz u frawdolenti taghha l-intimata Dorte Rickert qed tilledi u tippregudika d-drittijiet u l-interessi tal-Kumpannija u tar-rikorrent nomine oltre li ikkawzat u qed tkompli tikkawza danni ingenti lill-Kumpannija u lir-rikorrenti nomine konsistenti ftelf ta' negozju u qliegħ li qed jaffetwa negattivament il-valur tal-Kumpannija u dunque il-valur ta' l-ishma tar-rikorrenti nomine fl -istess.

3.16 Fic-cirkostanzi r-rikorrenti nomine ma ghadx ghandu fiducja fl-intimata Dorte Rickert fil-kwalita taghha ta' unika direttrici tal-Kumpannija.

3.17 Stante li l-intimata Dorte Rickert hija l-unika direttrici responsabbli għall-amministrazzjoni tal-Kumpannija kif ukoll l-unika persuna vestita bil-poteri ta' rapprezentanza legali u ludizzjaja ta' l-istess Kumpannija, mhu qed tittiehed ebda azzjoni rimedjali mill-Kumpannija sabiex dan l-agir abuziv ta' l-intimata Dorte Rickert jigi imwaqqaf u l-hsara kawzata, u li qed tkompli tigi ikkawzata lill-Kumpannija, tigi rimedjata. Oltre minn hekk mhu qed isir xejn sabiex il-Kumpannija tirripossessa ruhha mid-dive centre u mill-assi taghha sabiex terga tibda topera regolament.

Għal dawn ir-ragunijiet ir-rikorrenti nomine umilment jitlob lil din l-Onorabbli Qorti sabiex tagħti dawk l-ordnijiet a tenur tal-Artikolu 402 tal-Att dwar il-Kumpanniji (Kap. 386), u taht dawk il-kundizzjonijiet li jidrulha xierqa, sabiex:

- (i) L-intimata Dorte Rickert titnehha mill-pozizzjoni taghha ta' direttrici;
- (ii) Ir-rikorrent nomine jingħata is-setgha li jappunta direttur ta' fiducja tiegħu fuq il-Bord tad-diretturi liema direttur ikun ukoll vestit bil-poteri ta' rapprezentanza guriidika u legali tal-Kumpannija;

- (iii) *Li jsiru l-emendi kollha necessarji fil-Memorandum u fl-Istatut tal-Kumpannija intimata sabiex jkun jista' jsir dak miltub taht (i) u (ii) kif ukoll jigu registrati mar-Registratur tal-Kumpanniji dawn it-tibdiliet;*
- (iv) *Il-Kumpannija intimata tigi ordnata tiehu dawk il-mizuri necessarji kollha (inkluz kwalsijasi azzjonijiet gudizzjarji li jkun jidrilha xierqa) sabiex (a) tiehu lura l-pussess tad-dive centre formanti parti minn St. Julians Aquatic Sports Club, f'George Borg Olivier Street, San Giljan, kif ukoll l-apparat, flejjes, makkinarju, vetturi u assi ohra appartenenti lill-Kumpannija intimata minghand l-intimata Dorte Rickert u/jew terzi f'idejn min din ghaddithom (b) kif ukoll tiehu dawk il-mizuri kollha necessarji sabiex terga tinda l-operazzjonijiet u attivitajiet ta' negozju taghha;*
- (v) *Tordna lill-Kumpannija sabiex tintavola proceduri gudizzjarji kemm ta' natura civili kif ukoll ta' natura kriminali kontra l-intimata Dorte Rickert u dan sabiex din tinzamm, u tinstab, responsabbli ghall-agir illegali, abbużiv, u frawdolenti, dannuz u pregudizzjevoli fil-konfront tal-Kumpannija, u sabiex l-intimata Rickert tigi kundannata thallas lill-Kumpannija intimata id-danni ingenti li l-intimata Rickert ikkawzatilha bl-eghmil taghha;*
- (vi) *Issib lill-intimata Dorte Rickert hada u responsabbli tad-danni ingenti sofferti mir-rikorrent nomine minhabba l-agir irresponsabbli, illegali, abbużiv u frawdolenti taghha, tillikwida d-danni hekk sofferti mir-rikorrenti u tordna lill-intimata thallas lir-rikorrent nomine kumpens ekwivalenti ghad-danni li din l-Onorabbli Qorti joghgoba hekk tillikwida favur ir-rikorrent nomine.”*

Rat illi l-atti tar-rikors promour, d-digriet u l-avviz tas-smiegh gew debitament notifikati skond il-ligi ;

Rat ir-risposta guramentata tal-intiamti kollha tal-31 t'Ottubru 2008 (a fol. 26 et seq.) li taqra hekk:

*“1. Illi Dorte Rickert ma tifhimx bl-ilsien Malti rzda tifhem bl-islien Ingliz. Ghalhekk ikun opportun li l-proceduri jitkomplew bl-ilsien Ingliz;*

*2. Illi Dorte Rickert pro et noe tichad bil-qawwa kollha taghha l-allegazzjonijiet li saru fir-rikors mahluf promotorju fil-konfront taghha;*

*3. Illi Dorte Rickert pro et noe m'ghandha l-ebda problema li taghti rendikont ta' l-operat tal-kumpanija hekk kif gja' bdiet taghmel f'laqghat li nzammu skond l-Att Dwar il-Kumpaniji;*

*4. Illi l-konvenuta pro et noe tirrileva li bhala fatt hi ghaddiet minn zmien difficli hekk kif jaf bejn tajjeb Soren Erland Tabur kemm finanzjarlament kif ukoll minhabba maltemp li kien sehh u li ddaneggta bil-kbir bosta proprjeta' mobbli tal-kumpanija intimata. L-istess konvenuta proprio informat b'dan lil Soren Erland Tabur b'dan izda bhala azzionista ta' nofs l-azzjonijiet ta' l-imsemmija kumpanija xorta wahda m'ghamel xejn meta gie informat b'dan u ghamilha cara lill-konvenuta proprio li hi ghandha iggorr dan il-piz wahedha. Ghalhekk il-konvenuta proprio hi surpriza kif issa l-attur noe qed javvanza din l-azzjoni meta qatt ma interessah minn tali kumpanija;*

*5. Illi ghal dak li jirrigwardja l-ewwel tlett talbiet attrici, m'hemm l-ebda raguni valida fil-ligi ghalfejn il-konvenuta ghandha titnehha minn direttrici. Fit-tieni lok kien l-istess Soren Erland Tabur li ried li Dorte Rickert tkun l-unika direttrici u dana hekk kif jirrizulta mill-Memorandum & Articles of Association ta' l-istess kumpanija konvenuta'*

*6. Illi in kwantu ghar-raba talba attrici, il-konvenuta pro et noe tikkonferma li billi l-kumpanija Aqua oasis Limited kellha problemi finanzjarji kbar li Soren Erland Tabur irrifjuta li jindirizza, il-keru tad-'dive centre' in kwistioni giet asseniata halli iigi accertat introjtu ghall-istess kumpanija u dana billi hi ma setghetx tibqa' topera. In kwantu ghall-oggetti mobbli l-pretensioni attrici hi wahda infondata fil-fatt u fid-dritt u dana billi l-konvenuta pro et noe tista' taghti rendikont ta' dawn l-oggetti kollha hekk kif hija lesta li tipprova waqt it-trattazzjoni ta' din il-kawza;*



7. Illi ghal dak li jirrigwardja l-hames talba attrici, il-konvenuta proprio m'ghandha twiegeb ghall-ebda azzjoni civili u wisq anqas kriminali. Ghalhekk m'hemm l-ebda lok li din it-talba tintlaqa' u m'hemm l-ebda lok li l-Qorti tordna li l-kumpannija tiehu xi tip ta' proceduri f'dan ir-rigward;

8. Illi ghal dak li jirrigwardja s-sitt talba attrici l-konvenuta proprio m'ghandha twiegeb ghall-ebda danni fil-konfront ta' l-attur noe u ghalhekk m'ghandha tigi ikkundannata thallas l-ebda danni lill-istess attur noe;

9. Illi finalment il-konvenuta pro et noe taghmel riferenza ghall-premessi bin-numri 3.2 u 3.3 rispettivament fir-rikors mahluf promotorju u ghall-allegat skrittura mehmuza ma' l-istess rikors u mmarkata bhala Dok. 'JCF2' u tirrileva li m'huwa minnu xejn li kien hemm tali ftehim u ghalhekk fi kwalunkwe kaz tistieden lill-attur noe halli jressaq din l-allegat a skrittura fil-forma originali taghha;

10. Salv difizi ulterjuri hekk kif permessi bil-ligi.”

Rat il-verbal tat-28 t'April 2009 fejn innominat il-Perit Legali Dr.Kris Balzan bl-assistenza tal-komputista Paul Bezzina;

Rat in-nota ta'sottomissjonijiet tar-rikorrenti tal-14 t'Ottubru 2011;

Rat in-nota ta' sottomissjonijiet finali u ta' twegiba tal-konvenuta tas-6 ta' Dicembru 2011;

Rat ir-relazzjoni tal-Perit Legali Dr. Kris Balzan (a fol. 429) prezentat fit-2 t'April 2012 u mahluf fil-15 ta' Novembru 2012;

Rat ir-relazzjoni tal-Perit Komputista Paul Bezzina (a fol. 510) prezentat fil-5 ta' Marzu 2012 u mahluf fil-15 ta' Novembru 2012;

Rat ir-riposti tal-Perit Legali Dr. Kris Balzan tas-6 ta' Dicembru 2013 ghad-domandi fin-nota tal-Avukat Jean C. Farrugia noe (a fol. 528 et seq.);

Rat in-nota t'osservazzjonijiet tal-Avukat Jean C. Farrugia noe tas-16 ta' Jannar 2014(a fol. 530 et seq.);

Rat id-dokumenti u l-atti kollha tal-kawza;

Semghet it-trattazzjoni tal-partijiet;

**Ikkonsidrat:**

Mill-provi prodotti fil-kaz in ezami jirrizulta illi r-rikorrenti Soren Erland Tabur u l-intimata Dorte Rickert iffurmaw, bejniethom kumpannija bl-isem ta' 'Aqua Oasis Limited' (registrata fit-13 t'April 2007), bil-ghan li topera d-*dive centre* formanti parti mis-St. Julians. Aquatic Sports Club, Triq G. Borg Olivier, San Giljan. L-ishma ta' din il-kumpannija nqasmu ugwalment bejniethom.

Illi l-ftehim inizjali kien li l-partijiet isellfu ghoxrin elf euro (€20,000) kull wiehed lill-kumpannija sabiex din tkun tista' tibda topera.

Ir-rikorrenti sostna illi peress li l-intimata dejjem tat x'jifhem lir-rikorrenti li kellha bizzejjed esperjenza u gharfien fis-settur tad-*diving* minhabba l-fatt li l-intimata kienet residenti f'Malta waqt li r-rikorrenti kien residenti fid-Danimarka, il-partijiet qablu li l-intimata kellha tigi appuntata bhala l-uniku Direttur tal-kumpannija. Ir-rikorrenti sostna li dejjem prova jghin u jaghti siewja lill-intimata Rickert, pero din kienet taghmel ta' rasha. Ghalhekk it-tmexxija il-kumpannija kienet fdata f'idejn l-intimata, ghal liema xoghol kellha tircievi salarju ta'seba' mitt lira Maltin (Lm 700) fix-xahar.

Illi l-kumpannija kriet id-*dive centre* f'San Giljan minghand is-San Giljan Aquatic Sports Club permezz ta' skrittura privata datata l-1 ta' Mejju 2007 (Vide Dok. JCF 3 - SET 1 a fol. 573), liema kirja kienet ghal perjodu ta'hames (5) snin, li kien jiskadi fl-1 ta' Mejju 2012, bil-kera ta' Lm 3,000 (€6,988 .12) ghall-ewwel sena u Lm 3,750 (€8,735.15) ghall-erba' snin l-ohra.

Ghal dan il-ghan l-kumpannija kienet hallset somma flus (rigal) lil certu Albert Caruana li kien jiggestixxi d-*dive centre* precedentement is-somma ta' €31,190.12,

liema somma thallset fl-24 t'April 2007, mir-rikorreni . (Vide Dok. BOV 1 u Dok. JCF3 – SET 22 a fol. 652).

Illi r-rikorreni fix-xhieda tieghu a fol. 384 et seq sostna illi huwa kien hareg dawn il-flus kollha hu peress li meta wasal il-zmien biex il-partijiet jikkontribwixxi l-investment inizjali ghall-kumpanija, l-intimata stqarret li ma kellhiex flus ghad-depositu taghha. Di fatti bejn April u Dicernbru 2007. ir-rikorreni zborza lill-kumpanija s-somma komplessiva ta' €70,748.21 – vide rendikont Skeda l. a fol. 566 Dawn il-flus intuzaw sabiex jithallas ir-rigal lil Albert Caruana; ghax-xiri tal-makkinarju mehtieg ghall-operat tal-kumpanija; u sabiex ikopri spejjez ohra relatati mal-operat tad-*dive centre*; inkluz il-paga ta' Lm 700 fix-xahar dovuta lill-intimata.

Minkejja li a fol. 411 et seq, Rickert ripetutament sahqet li r-rikorreni investa hamsin elf lira Maltin (Lm 50,000 circa €116.000) fil-kumpanija, ir-rikorreni jsostni illi dokumenti in atti juru li s-somma korretta hija dik indikata minnu tant li l-intimata kienet inkludietha bhala dejn dovut mill-kumpanija lir-rikorreni.

Ir-rikorreni jsostni li fil-5 ta' Lulju 2007 l-intimata kellha incident gravi waqt li kienet qieghda toghdos peress li kellha avvelenament tal-arja mic-cilindru li kienet qieghda tuza. Irrizulta li dan l-avvelinament kien kawza ta' difett fill-kupressur li kien gie akkwistat minghand Caruana u li kien jintuza sabiex jimtlew tali cilindri. Kawza ta'dan l-incident l-intimata kienet rekoverata l-isptar ghal zmien konsiderevoli.

In segwitu ta' dan l-incident ir-rikorreni ddecieda li jinvesti f'kumpressur gdid ta' valur konsiderevoli, liema decizjoni giet kkritikata mill-intimata. Eppure kienet l-intimata li eventwalment iffirmit id-dokumentazzjoni kollha mehtiega ghax-xiri ta' dan il-kumpressur.

Illi matul t-tieni parti tas-sena 2007 inqalghu diversi dizgwidi bejn il-partijiet, n-negozju ma kien sejjer tajjeb, bl-intimata tinsisti mar-rikorreni biex izid l-investment tieghu fil-kumpanija billi jghaddilha aktar flus, specjalment biex tkopri l-paga taghha ta' Lm 700 fix-xahar.

Illi lejn l-ahhar tas-sena 2001 r-rikorrenti sab investment ulterjuri fll-kumpannija minn certu Stig Paaske, li kien interessat jinvesti €20,000. kontra ishma fil-kumpannija, u b'dana li jinhatar Direttur tal-kumpannija. Dan ma sehhe minhabba l-oppozizzjoni tal-intimata li waqt li rrikonoxxiet l-bzonn ta' l-investment, fehmet li waqt li decizjonijiet amministrattivi kienu ser jittiehdu minn Paaske, hija kienet ser tibqa' l-persuna responsabbli f'ghajnejn l-MFSA.

Ir-rikorrenti lmentha li minkejja d-diversi talbiet tieghu, l-intimata baqghet ma pprovditlux kopja tal-accounts tal-kumpannija jew rendikont tal-operat taghha. Minn dan il-punt 'il quddiem ir-relazzjoni ta' xoghol bejn il-partijiet iddeterjorat b'mod drastiku.

Illi fl-24 ta' Jannar 2008 ir-rikorrenti gie mgharraf minn Rickert li kawza ta'maltempata kbira d-*dive centre* soffra hsarat kbar, b'konsegwenza li l-kontenut u l-apparat kollu, fl-ufficju tal-kumpannija intilef. Meta r-rikorrenti talab informazzjoni ulterjuri, l-intimata gharrfitu li kollox kien f'idejn l-assigurazzjoni li kellha tevalwa d-danni (Vide Dok. JCF 3 - SET 24 a fol. 713 u SET 25 a fol. 728).

Minkejja dak allegat mill-intimata, r-rikorrenti sab li ghall-habta ta' Frar 2008, xi ghoxrin cilindru tad-*diving* tal-kumpannija kienu ittiehdu ghas-*service* ghand M&A Limited (Vide xhieda ta' Shaun Upton a fol. 331 sa 334). Ir-rikorrenti sostna li dawn kienu cilindri li gew rekuperati mill-bahar minn Rickert wara t-tempesta u li kienu salvabbli- Vide xhieda Shaun Upton fl-affidavit a fol. 55.

Ir-rikorrenti jsostni illi jidher illi Rickert qarqet bir-rikorrenti kif ukoll bil-kumpannija tal-assigurazzjoni.

Ftit gimghat wara, il-kumpannija assiguratrici Allcare Insurance Agency Limited, hallset lill-intimata s-somma ta' €44,440.67 permezz ta' tliet cekkijiet datati l4 t'April 2008, 22 t' April 2008 u 28 ta' Lulju 2008, kif jirrizulta mid-dokumenti pprezentati mix-xhud Airell Costantino a fol. 342 u dokumenti minnu ezebiti sa fol. 356 .

Jirrizulta li s-somma ta' €44,440.67 ma ntuzatx ghal-beneficcju tal-kumpanija, izda ntuzat biex thallsu l-kredituri tal-istess, minkejja li dawn kienu qeghdin jithallsu permezz ta' skeda ta' pagamenti miftiehma.

F'dan z-zmien, ir-rikorrenti sostna li l-intimata ghamlet att gravi fl-amministrazzjoni taghha tal-kumpanija li juri bic-car li l-intimata kienet qed tagixxi fl-interess personali taghha u mhux fl-interessi tal-kumpanija. Infatti l-intimata sejhet '*meeting of the board of directors*' u iddecidiet arbitrarjament u minghajr kkonsutazzjoni li tassinja n-negozju kollu, l-assi, l-apparat u l-kirja tad-*dive centre* lilha personalment u bdiet topera n-negoziu bl-isem ta' 'Delfini Dive Centre' (ara. Dok. JCF 3 - SET 12 a fol. 602).

Din l-assenjazzjoni saret ghar-rimanenti erba' (4) snin tal-kirja ghas-somma ta' €5,000 fis-sena, li kellha tithallas mill-intimata personalment. B'rezultat ta' dan, l-introjtju massimu ghall-kumpanija mill-operat tad-*dive centre* kellu jkun ta' mhux aktar minn €20,000, li bi tnaqqis t-taxxa u l-ispejjez amministrattivi, kienu ser jonqsu bin-nofs. Ghalhekk, investiment ta' oltre' €70.000, kien ser ihalli biss qligh €5.000.

Ir-rikorrenti sostna li sar jaf b'din il-manuvra ftit tal-zmien wara mill-klijenti tieghu stess. Xhur wara, in segwitu proceduri legali bejn il-partijiet, r-rikorrenti ircieva konferma ufficcjali ta' dan mill-konsulent legali tal-intimata li sahsitra ghaddielu kopja ta' din il-minuta tal-bord.

Illi f'dan l-istess perjodu ir-rikorrent rega beda jinsisti mall-intimata sabiex tipproducilu l-accounts tal-kumpanija u rendikont tal-amministrazzjoni taghha. Din finalment ghaddietlu kopja ta' dak li jidher li kienu *accounts* inkompluti kif ukoll *is-sales ledger*.

Ir-rikorrenti sab li ma kienux imdahlha fil-kontijiet tal-kumpanija s-sommom ta' €44,440.67 imhallsa mill-kumpanija assiguratrici wara l-maltempata ta' Jannar 2008; is-somma ta' €8,385 mhallsa mill-assigurazzjoni ghall-vettura Mitsubishi bin-numru ta' registrazzjoni JBD-347; Ir-rikorrenti jsostni li dawn il-flus l-intimata uzathom sabiex thallas lilha n-nifisha l-paga, u dan minghajr rendikont. (ara xhieda in kontro -ezami ta' Dorte Rickert a fol. 411).

Illi apparti dan kollu, l-kera ghas-sena 2008 ma thallsitx mill-intimata personalment skond il-ftehim fejn asseniat l-operat ta d-*dive centre* lilha nnifisha, izda thallset mill-fondi tal-kumpannija, cioe' rikavat minghad l-assigurazzjoni.

B'hekk l-intimata bdiet topera d-dive centre f isimha. bla hlas ta kera. L-intimata sostniet fl-affidavit taghha u fil-kontro-ezami taghha a fol. 411 et seq., li hija hadet self bankarju sabiex issostni dan in-negozju li issa kien qieghed jigi gestit personalment.

Fl-ahharrett, skond ix-xhieda ta' Dr. Daniel Aquilina ghan-nom ta' San Giljan Aquatic Sports Club jirrizulta li fl-10 ta' Settembru 2009 (ara. 'Dok. JCF 12') l-intimata f isem il-kumpannija hassret il-kirja tad-*dive centre* f'nofs il-perjodu originali ta' hames snin, b'tali mod li r-rikorrenti gie ostakolat milli jirkupra l-investment tieghu fil-kumpannija.

Jidher ukoll illi Rickert poggiet l-apparat kollu tan-negozju ghall-bejgh (ara affidavit ta'Alan Mark Whitehead). Ghaldaqstant dan l-agir jaghti x'tifhem li l-intimata ghamlet gwadann bi hsara lill-kumpannija Aqua Oasis Limited, u /jew ghar-rikorrent.

Illi fit-8 t'Awwissu 2008, ir-rikorrenti rceviet is-somma ta' €8,385 minghand l-Allcare Insurance Agency Limited wara li l-vettura Mitsubishi JBD-347, proprjeta' tal-kumpannija giet meqjusa li ma setghetx tissewwa. Fil-kontro-ezami a fol. 411 Rickert xehdet li hija zammet tali somma personalment sabiex taghmel tajjeb ghal 'arretrati ta' pagi' li kienu ghadhom dovuti lilha mill-kumpannija.

F'Settembru 2009 l-intimata regghet lura lejn id-Danimarka. L-intimata rriżenjat minn Direttur tal-kumpannija kif jirrizulta li ghamlet fil-bidu tas-sena 2010. B'hekk ghal aktar minn sena l-kumpannija tinsab minghajr Direttur.

Minn naha taghha Dorte Rickert sstni li hija kellha esperjenza mehtiega fis-settur ta' *scuba diving*, ghaliex kienet hadmet fl-istess generu ta' xoghol kemm f'Copenhagen kif ukoll f'Malta, pero ma kellhiex esperjenza sabiex tmexxi *Diving Centre*.

Hija sostniet illi giet appuntata Direttur sempliciment ghaliex kienet tghix Malta waqt li r-rikorrenti kien Copenhagen. Iddikjarat illi l-ishma kienu nofs bin nofs. Soren kien l-finanzjatur waqt li hija wkoll kkontribwiet pero b'kemm ma kientx taf. Sostniet illi hija mhux dejjem rceviet s-salarju taghha u li Dok Set 18 u 19 fl-ammont ta' €20,586.29, fil-fatt kienu l-ammont ta' arretrati ta' paga u l-investimenti finanzjarji taghha.

Rickert xhedet illi meta r-rikorrent ried jbiegh l-ishma lil Paaska, hija bezghet, 'l ghaliex kienet taf illi n-negozju tar-rikorrenti fid-Danimarka kien falla.

Rickert sostniet illi ghalkemm r-rikorrenti ghamel depozitu fuq id-*dive truck* kien ghadd fadal bilanc li kellu jithallas mill-flus generati mill-kumpanija.

Rickert xhedet illi c-cilindri li kien xtara r-rikorrenti minghand Caruana ma kienux jiffunzjonaw sew u ghalhekk kellhom jixtru *diving equipment* gdid b'rati mensili. Ikkonfermat illi l-kawza ta' dan kellha incident ikrah ghaliex il-kumpressur antik kellu *malfunction* serju u ezebiet Dok PG1 u 2 u Dok. MA1 u 2.

Hija xhedet illi minkejja dan l-incident li haliha fizikament b'debilita', hija qatt ma pprocediet kontra Caruana ghaliex kienu xtraw l-apparat *tale quale*. Rickert ikkonfermat li hija kienet thallas lid-*diving instructors* b'cash u kellha wkoll l-ispiza gornaliera ta' *telephones*, ilma, dawl, *petrol*, gozo *ferry tickets*, padi *material* u *leaflets* etc.

Hija xhedet illi kienet ddahhal r-ricevuti fizkali kuljum, izda l-*accountant* kien qalilha li peress illi in segwitu tal-maltempata kienu intifu d-dokumentazzjoni, ma setghatx tipprezenta l-*accounts* tal-kumpanija. Hija kkonfermat Dok. Set 20 sa 22 li kienu *accounts* minnha mdahhla fuq il-programm tas-Sage.

Rickert ikkonfermat illi bil-flus li rceviet mill-*insurance* hija hallset lil kredituri tas-socjeta'.

Wara l-maltempata ma kienx hemm bizzjed apparat biex topera n-negozju. L-intimata sostniet li r-rikorrenti xtara kumpressur ghal €24,000 minn wara dahra meta hija kienet l-isptar.

Rickert xhedet illi kien veru li hija hadet d-decizjoni unilaterali biex tissulloka d-*dive centre* lilha nnifisha u bdiet topera Delfini Dive Centre minghajr ma qalet xejn lir-rikorrenti u dana stante li kien fetah proceduri kontra taghha. Hija sostniet li dan kien jfisser li Aqua Oasis kienet ser jkollha €5,000 profit kull sena. Di piu' hija hadet *loan* ta' €7,000 mill-BOV biex topera Delfini Dive Centre.

Hija xhedet illi ghalkemm r-nexxielha thallas ir-renta lil St Julians Aquatic Sports Club ma kienx hemm fondi biex thallas lil Aqua Oasis.

Hija xhedet illi Dr. Said kien ghamel arrangamenti biex jigi merfugh l-apparat ta' Aqua Oasis pero ma kienitx taf fejn.

Ikkonfermat ukoll illi All Care kienu hargu cheque ta' €8385 fuq karozza JBD347 u b'dawn il-flus kienet hallset l-arretrati tal-paga taghha Dok Set18 u 19, hija sostniet li dawn l-ammonti kienu ghal perjodu Mejju 2007 u Mejju 2005.

L-intimata sostniet illi r-rikorrenti qatt ma qedgha l-inkarigu tieghu ta' konsulent f'dan in-negozju u ma ta ebda raguni dwar dan waqt li ma kkomunikax maghha minn Novembru 2007 'l quddiem.

### **Ikkonsidrat:**

Illi il-kawza odjerna hija bbazata fuq Artikolu 402 ta' l-Att dwar il-Kumpanniji, li jipprovdi li:

*“402. (1) Kull membru ta' kumpannija li jilmenta li l-affarijiet tal-kumpannija jkunu tmexxew jew qed jitmexxew jew aktarx jitmexxew b'mod li, jew li xi att jew ommisjoni tal-kumpannija 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, jista' jaghmel rikors lill-qorti ghal ordni taht dan l-artikolu.*

*(2) Meta r-Registratur ikun ircieva rapport fuq kumpannija taht l-artikolu 410 u dan ikun jidhirli li l-affarijiet tal-kumpannija qed jitmexxew jew ikunu tmexxew b'mod li jaqghu taht it-tifsir tas-subartikolu (1), hu jista' jaghmel rikors lill-qorti ghall-hrug ta' ordni taht dan l-artikolu.*

*(3) Jekk dwar rikors maghmul skond is-subartikolu (1) jew (2), il-qorti tkun tal-fehma li l-ilment ikun bazat sewwa u li jkun gust u ekwu li hekk taghmel, il-qorti tista' taghmel ordni taht dawh il-kondizzjonijiet li jidhrilha xierqa –*

*(a) li jirregola t-tmexxija ta' l-affarijiet tal-kumpannija fil-futur; jew*

*(b) jirrestringi jew jipprojbixxi l-ghemil ta' xi att proposit; jew*

*(c) jehtieg lill-kumpannija li taghmel xi att li r-rikorrent ikun ilmenta li kienet naqset li taghmel; jew*

*(d) jipprovdi ghax-xiri ta' l-azzjonijiet ta' xi membri tal-kumpannija minn membri ohra tal-kumpannija jew mill-kumpannija nnifisha u, f'kaz ta' xiri mill-kumpannija, ghat-tnaqqis li jkun mehtieg fil-kapital azzjonarju mahrug tal-kumpannija; jew*

*(e) jordna lill-kumpannija li tibda, tiddefendi, tkompli jew ma tkomplix procedimenti tal-qorti, jew jawtorizza lil membru jew membri tal-kumpannija li jibdew, jiddefendu, ikomplu jew ma jkomplux procedimenti tal-qorti f'isem u ghan-nom tal-kumpannija; jew*

*(f) jipprovdi ghall-hlas ta' kumpens minn dik il-persuna li tista' tkun instabet responsabbli mill-qorti ghal telf jew danni li jkunu garrbu minhabba att jew nuqqas li*

*dwaru jkun sar ilment lill-persuna li tkun garrbet dak it-telf jew danni; jew*

*(g) ixolji l-kumpannija u jipprovdi għall-istralc konsegwenzjali tagħha.*

*(4) Meta jsir ordni għax-xoljiment ta' kumpannija skond is-subartikolu (3)(g), il-kumpannija għandha titqies li tkun xoljiet fid-data meta jkun sar l-ordni u d-disposizzjonijiet tas-Sub-Titoli I u III tat-Titolu II tat-Taqsima V ta' dan l-Att li jirregolaw l-istralc ta' kumpanniji għandhom japplikaw.*

*(5) Ordni magħmul taht dan l-artikolu jista' jehtieg lil kumpannija biex ma tagħmilx xi emenda, jew li tagħmel emenda mehtiega, fil-memorandum jew fl-istatut tagħha.*

*(6) F"dan l-artikolu, il-kelma "membru" tinkludi persuna li legalment tista' tirrapprezenta l-interessi ta' membru mejjet, persuna li għandha jkun għaddew legittimament azzjonijiet fil-kumpannija b'wirt testamentarju jew mhux testamentarju, u trustee kif imfisser fl-artikolu 127 li jkollu azzjonijiet fil-kumpannija."*

L-azzjoni mahsuba taht l-Artiklu 402 hija azzjoni għall-harsien ta' azzjonist ta' kumpanija kontra pregudizzju mhux gust.

Il-kuncett legali ta' "*unfairly prejudicial*" jitekllmu fuqu fost l-ohrajn l-awturi notevoli li jinnutaw li m'hemmx definizzjoni statutorja ta' x'jikkostitwixxi dik li huma jsejgħulha "*unfairly prejudicial conduct*". Għalhekk gie sostnut li jkun sufficjenti li:

*"a prejudicial act has been proposed or that there has been prejudicial conduct of the company in the past. Thus, the alleged conduct may be past, present or future. The test of unfair prejudice is objective and does not depend on the subjective intention of the respondent and, within certain constraints, the court is given a wide discretion to determine the matter. As the*

*judge put it in the New Zealand case of Thomas v H W Thomas Ltd:*

*“Fairness cannot be assessed in a vacuum or simply from one member’s point of view. It will often depend on weighing conflicting interests of different groups within the company. It is a matter of balancing all the interests involved in terms of the policies underlying the companies legislation in general and [s.994] in particular: thus to have regard to the principles governing the duties of a director in the conduct of the affairs of a company and the rights and duties of a majority shareholder in relation to the minority; but to recognize that [s.994] is a remedial provision designed to allow the Court to intervene where there is a visible departure from the standards of fair dealing; and in the light of the history and structure of the particular company and the reasonable expectations of the members to determine whether the detriment occasioned to the complaining member’s interests arising from the acts or conduct of the company in that way is justifiable.*

*As always, a balance has to be struck between the breadth of the discretion given to the court and the principle of legal certainty. For these reasons, therefore, it is also essential for allegations of unfairly prejudicial conduct to be clearly pleaded.”***Vide Stephen Girvin, Sandra Frisby and Alastair Hudson, Charlesworth’s Company Law, Eighteenth Edition, Sweet & Maxwell, 2010, p.536/537**

Illi l-Qrati Maltin abbraccaw dan il-kuncett ta’*unfair prejudice* u fis-sentenza fl-ismijiet **Emanuel sive Noel Magri v Magri & Zammit Holdings Ltd et tal-Prim’Awla tal-Qorti Civili datata 31 ta’ Mejju, 2007**, ticcita dak ritenut mill-Qorti ta’ l-Appell fl-ismijiet **“Joseph M. Vella et vs Vella Brothers Ltd et datata 9 ta’ Marzu, 2007:**

“... l-Artiklu 402 ta’ l-Att dwar il-Kumpanniji jghati diskrezzjoni pjuttost wiesgha” 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 ... - Omissis - ... din id-disposizzjoni, li hija bbazata 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 semplicement 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 general 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 fl-ismijiet *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 on the part of those who have the de facto control of the company, which has been unfair to the member concerned.*”

*The test of unfairness must, I think, be an objective, not as subjective one. In other words it is necessary for the petitioner to show that the persons who have had the de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith; the test, I think, is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner’s interests.”*

Di piu' fil-kawza fl-ismijiet **Emanuel sive Noel Magri v Magri & Zammit Holdings Ltd et al** deciza 1 ta' Frar, 2008, il-Qorti tal-Appell, li kienet strahet fuq l-insenjament tas-sentenza **Vella v Vella Brothers Ltd et**, deciza fid-9 ta' Marzu 2007, ziedet ma' l-interpretazzjoni u l-effett ta' l-artiklu 402 dak li nghad fid-decizjoni tal-House of Lords fl-Ingilterra fil-kaz **O'Neill v Philips**, deciza fl-1999 li m'ghadux "good practice" li ssir enfasi fuq il- "legitimate expectations" tal-membru li jkun qed jinvoqa dan ir-rimedju, billi ccitat il-ktieb ta' **Breda Hannigan, Company Law** (Butterworths, 203 Ed. pagna 416) fejn jinghad hekk fuq kondotta pregudizzjevoli ghall-membri tal-kumpanija:

*"In particular, the House of Lords took the opportunity in O'Neill to reject the reliance on „legitimate expectations” which had become a prominent element of the case law on CA 1985, s459 prior to this decision. Petitions were being brought effectively on the basis that a petitioner was aggrieved that (what he perceived to be) his legitimate expectations as to the conduct of the company”s affairs had not been met. For example, in O'Neill the petitioner (who held 25% of the shares) felt that he had „legitimate expectations” to 50% of the shares in the company and to 50% of the profits although he could establish no entitlement in law or equity to such equality. Lord Hoffmann in O'Neill noted that he himself had used the phrase „legitimate expectations” in Re Saul D Harrison & Sons plc, but he conceded that this use was probably a mistake.*

*The result is that it is not sufficient to found a petition under CA 1985, s459 simply to plead a denial of a “legitimate expectation” in this fashion. Instead, Lord Hoffmann (who gave the sole opinion in the case) concluded that a member will not ordinarily be entitled to complain of unfairness unless there has been:*

*i. Some breach of the terms on which he agreed that the affairs of the company should be conducted; or*

*ii. Some use of the rules in a manner which equity would regard as contrary to good faith – i.e. cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers.”*

It-tieni kriterju hu pjuttost wieghsa, u jinvolvi analizi ta' dak li huwa sewwa u tajjeb li kellu jsir, partikolarment meta si tratta ta' kumpanija, bhal dawk meritu ta' din il-kawza, bazata fuq relazzjoni personali ta' bejn id-diretturi li tkun tinvolvi fiducja reciproka. Kumpaniji ta' din ix-xorta huma msejsa fuq “understandings” reciproci, li, skond l-awtrici **Hannigan** (ibid., pagna 421) “*will relate to participation in the management of the company, financial returns, and as to the nature of the venture on which the parties have embarked and the petitioner’s complaint will be that the respondents have acted in respect of these matters in a manner which equity would regard as unfair.*” Kwindi dak li jkun irid jigi analizzat hija l-kondotta tad-direttur konvenut fil-kuntest **tal-maneggjar tal-kumpanija, tal-finanzi u ta' l-iskop ghal holqien taghha, bil-kriterju ta' dan l-ezami jkun wiehed oggettiv. Mhux mehtieg li ligi ppruvat li d-direttur agixxa in mala fede, jew b'intenzjoni diretta li l-membru l-iehor jigi trattat b'mod mhux sewwa, izda li jrid jintwera li bhala fatt l-agir kien wiehed mhux sewwa fic-cirkostanzi.**” (Enfasi ta' din il-Qorti)

Illi fis-sentenza fl-ismijiet **Philomena Ellul vs Charles Ellul proprio et nomine** datata **31 ta' Jannar, 2003**, l-Qorti ta' l-Appell citat dak ritenut fil-kawza fl-ismijiet “**Vincent Monreal et – vs – Lino Delia nomine**” deciza fit-**13 ta' Mejju, 1999** dwar l-artikolu 402:

*“Dawn il-provedimenti huma ta' salvagwardja u ta' protezzjoni ghall-azzjonisti ta' socjeta` kummercjali, b'mod partikolari ghal dawk li huma minoritarji. Ir-rimedji li johorgu minn dawn il-provedimenti huma mghotija lil kull azzjonist ta' socjeta` kummercjali. Kull azzjonist, anke jekk hu minoritarju, ta' socjeta` kummercjali, anke jekk hi pubblika, jista' jitlob li*

*jinghataw l-ordnijiet kollha ncessarji u opportuni, f'kaz li jirnexxielu jipprova illi minhabba l-gestjoni tal-istess socjeta` huwa qed isofri jew ukoll jista' jsofri xi pregudizzju ta' natura oppressiva, ingusta jew diskriminatorja. Tali gestjoni tista' tirreferi semplicement ghal xi att specifiku jew xi ommissjoni tal-kumpanija. Il-pregudizzju jista' jirreferi ghall-azzjonist li qed jippromuovi l-proceduri, ghal xi azzjonist iehor jew ghall-interessi in generali tal-azzjonisti. In vista ta' dan kollu jista' jinghad li hu bizzejjed li l-azzjonista jipprova li huwa qed isofri jew eventwalment jista' jsofri xi pregudizzju minhabba xi agiritas-socjeta` li taghha huwa jippossjedi xi ishma. Ma hemmx ghalfejn li huwa jipprova li huwa zgur li ser isofri xi pregudizzju fil-futur. Tali prova tista' ssir fuq bazi ragjonevoli ta' probabbilita`; Inoltre, skond dak li hemm provdut fis-sub-artikolu (3) tal-istess artikolu 402, il-Qorti tista' tipprocedi biex taghmel kull ordni ncessarja u opportuna skond dawn il-provedimenti, jekk jirrizulta li l-ilment tal-azzjonista hu sewwa bbazat u jekk il-Qorti thoss li huwa ekwu u gust li taghmel hekk;" Fil-Ligi Ingliza (ara Art 459 tal-Companies Act, 1985) jinstab rimedju simili li hu maghruf bhala "The Unfair Prejudice Remedy". Il-Qorti ta' l-Appell Ingliza stabbilit fil-kaz "in Re Saul D. Harrison & Sons plc ([1995]) 1BCLC 14)" il-linji ta' gwida dwar kif kellu jkun l-operat biex ikun jista' jigi kkwalifikat bhala, "unfairly prejudicial" (fit-test tal-Ligi Maltija din il-frazi hi tradotta "b'mod mhux gust ta' pregudizzju"). Wiehed kellu, fl-ewwel lok, jara jekk dak l-operat kienx jew le skond l-istatut tal-kumpanija. Izda fl-applikazzjoni tal-imsemmija dispozizzjoni – ispirata fuq principji ta' ekwita' aktar milli minn drittijiet strettament legali – il-Qorti tiehu in konsiderazzjoni l-aspettativi legittimi ("legitimate expectations") li r-rikorrent jista jkollu u li sikwiet ikunu ferm aktar wiesgha mid-drittijiet strettament legali li johorgu mill-istatut tas-socjeta`.*

*Dawn l-aspettativi legittimi jitwieldu minn xi relazzjonijiet personali partikolari bejn l-azzjonisti. Fil-kaz Ebrahimi vs Westbourne Galleries Ltd. ([1973] AC 360) Lord Wilberforce elenka numru ta' sitwazzjonijiet fejn dan ir-rimedju jista' jinghata (ara ibid proprio 379), sitwazzjonijiet dawn li x"aktarx jinstabu f"kompaniji zghar privati li ta' sikwiet jissejhu "quasi partnerships", fosthom is-segwenti:-*

*(i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company;*

*(ii) an agreement, or understanding, that all, or some (for there may be "sleeping members") of the shareholders shall participate in the conduct of the business;*

*(iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere".*

*Ikun utili li tigi riprodotta hawn silta mill-ktieb "Ferrar"s Company Law 3rd Edition P.464 fejn dan il-kuncett hu spjegat b'mod car hafna u fejn l-applikazzjoni tad-dispozzjoni relattiva hija maghmula kemm fil-konfront ta' dawn is-socjetajiet zghar privati (jew quasi partnerships) u kemm ukoll fil-konfront tas-socjetajiet akbar privati jew pubblici:*

*"The position will vary greatly from the small private companies, commonly called quasi-partnerships, to public companies of considerable size. As a quasi-partnership, the company will usually have been formed or continued on the basis of a personal relationship involving mutual confidence. There may be an agreement or understanding that all or some of the shareholders are to participate in the conduct of the*



*business. Restrictions on the transfer of shares will be the rule rather than the exception. The individuals involved may also have made relatively substantial capital contributions to the company. Shareholders in such companies will be a small close-knit group, actively involved in many instances in the day-to-day operations and financially and personally committed to the company. Here the scope for legitimate expectations beyond their strict legal rights is obviously greatest.*

*... Pero`, la darba dik il-fiducja originali li jkun hemm bejn il-kontendenti llum ghebet, is-soluzzjoni l-aktar li tidher opportuna x"aktarx li hija li l-appellanti tbiegh bonarjament sehemha mill-kumpannija lill-appellat versu kumpens adegwat u gust."*

Illi fis-sentenza ta' fl-ismijiet **“Joseph M. Vella et vs Vella Brothers Ltd., et** datata **9 ta' Marzu, 2007**, l-Qorti ta' l-Appell rriteniet li l-Artiklu 402:

*“jaghti diskrezzjoni pjuttost wiesgha lill-Qorti u dan ghaliex il-provedimenti li jinghataw ghandhom l-intiza li jipprotegu lill-azzjonisti ta' l-istess socjeta`, partikolarment dawk li jinsabu f"minoranza u b'hekk jinsabu f"impossibilita` li jirregolaw il-mod li tkun miexja l-istess socjeta ...”*

L-istess Qorti ta' l-Appell fis-sentenza fl-ismijiet **Saviour Ellis u Josephine Ellis v Rita Ellis, Tonio Ellis, Dr. Joseph Ellis, Dr. Nathalie Gatt Ellis**, datata **16 ta' Novembru, 2010**, tispjega li:

*“L-Att dwar il-Kumpanniji ma jaghtix definizzjoni tal-kriterji ta' “b'mod mhux gust”, “diskriminazzjoni” u “mod mhux gust ta' pregudizzju”. Ghalhekk il-Qorti trid tirreferi ghal awtoritajiet legali Inglizi sabiex ikun jista' jiftiehem ahjar xi trid tfisser il-ligi. Jekk xi wiehed jew izjed minn dawn il-kriterji jissussistu jkun jista' jinghad li membru jew membri ta' kumpannija jkunu sofrew „unfair prejudice” liema terminu jinkludi fih il-kriterji kollha stabbiliti f'Artikolu 402 tal-Att.*

*“F”Re Bovey Hotel Ventures Ltd. (1981) Slade J. iddeskriva „unfair prejudice” b’dan il-mod: “The test for unfairness must, I think, be an objective, not a subjective, one. In other words it is not necessary for the petitioner to show that the persons who have de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith; the test, I think is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner’s interests.” (ara wkoll Re R A Noble & Sons (Clothing) Ltd. [1983]).”*

Il-Prim’Awla tal-Qorti Civili fis-sentenza fl-ismijiet **Arkitett Raymond Vassallo et v Anthony Parlato Trigona u Ingrid Parlato Trigona et** datata **30 ta’ Settembru, 2010**, ittenni:

*“L-Art.402 mhux ispirat minn koncetti legalistici izda minn principji ta’ ekwita` u ta’ gustizzja li ghandhom iharsu interessi u aspettativi legittimi li jistghu jmorru oltre mill-ittra tal-istatut tas-socjeta` (“Ellul vs Ellul pro et noe) - Qorti tal-Appell – 31 ta’ Jannar, 2003). Id-disposizzjoni hija mahsuba sabiex tipprotegi lill-azzjonisti minn agir oppressiv u diskriminatorju, u/jew agir allegatament illegali fil-konfront tal-kumpannija mill-persuni li jkunu fil-kontroll taghha. Il-harsien ta’ din id-disposizzjoni jista’ jigi nvokat mill-membri kollha, u allura mhux biss minn membri minoritarji, u ma ghandux ikun hemm dubju li d-direzzjoni u l-poteri moghtija mill-Qorti huma wesghin. L-ilment irid ikun dwar it-tmexxija tal-affarijiet tal-kumpannija jew dwar xi att jew omissjoni taghha. It-tmexxija ta’ kumpannija tinkludi firxa wiesgha ta’ fatti, cirkostanzi jew sitwazzjonijiet li jolqtu l-hajja taghha ta’ kuljum. Eskluzi huma l-kwistjonijiet privati bejn il-membri ghax huma barra mill-hsieb ta’ din id-disposizzjoni.*

**Stephen Girvin, Sandra Frisby and Alastair Hudson, Charlesworth's Company Law, Eighteenth Edition, Sweet & Maxwell, 2010, p.533** filwaqt li jsostnu li taht il-ligi Ngliza d-dritt tal-petizzjoni hu moghti lill-membri kollha, izidu:

*“a member of the company can petition the court for an order on the ground (a) that the affairs of a company are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of the members (including at least himself) or (b) that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.”*

L-istess awturi jiccitaw il-kawza **R & H Electrical Ltd v Haden**, fejn:

*“a petition was allowed even though the petitioner was alleging that his interests as a creditor in relation to a loan he made to the company had been affected by his dismissal as a director. The fact that a creditor is also a member will not normally suffice, but here the petitioner had, in effect, provided all the venture capital for the business and so his right to remain in management of the company. while that capital was at risk could amount to an interest as a member. This view was upheld by the Privy Council case of Gamlestaden Fastigheter AB v Baltic Partners Ltd, allowing an appeal from the Court of Appeal of Jersey. In that case a 22 per cent shareholder in an insolvent joint-venture company had, in pursuance of the joint-venture agreement, invested not only in subscribing for shares but also in advancing loan capital to it. The Privy Council held that such the investor ought not to be precluded from the grant of relief under the Jersey equivalent of s.994 on the ground that the relief would benefit the investor only as loan creditor and not as member of the company.”*

Ibid a fol..536

**Ikkonsidrat:**

Illi r-rikorrenti lmentat li t-tmexxija tal-kumpanija intimata Acqua Oasis Ltd., ma' kienitx qed issir kif suppost tant li ma kienux qed isiru laqghat tad-diretturi u kolloxx kien qed jitmexxa unilateralmment mill-intimata Dorte Rickert bhal li kieku l-kumpanija kienet taghha biss minghajr konsultazzjoni mar-rikorrenti.

Illi minn naha taghha l-intimata, fin-Nota ta' Sottomissjonijiet finali, tghid li mhux minnu li hi ma kinitx izzomm lir-rikorrenti nformat, u li dan hu kontraddett mix-xhieda mressqa minnha, fis-sens li anke meta kienet tavzah anke fuq incident serju qatt ma wera interess anzi baqa' jinvesti flusu fil-kumpanija.

Ghar-rigward l-ewwel talba attrici u cioe' li **l-intimata Dorte Rickert titnehha mill-pożizzjoni taghha ta' direttrici** il-Qorti tqis minkejja li fir-risposta taghha ghar-rikors promotur l-intimata sahqet li ma kien hemm l-ebda raguni valida ghalieq kellha titnehha minn direttrici, **b'danakollu hija rrizenjat minn direttur tal-kumpanija Aqua Oasis Ltd.** Ghaldaqstant il-Qorti tastieni milli tiehu konjizzjoni ulterjuri tat-talba.

Il-Qorti ser tezamina t-tieni talba attrici u cioe' li **r-rikorrent nomine jinghata is-setgha li jappunta direttur ta' fiducja tieghu fuq il-Bord tad-diretturi liema direttur ikun ukoll vestit bil-poteri ta' rappreżentanza ġuridika u legali tal-Kumpanija**, u dana ai tenur tal-Artiklu 402(3)(a) ta' l-Att dwar il-Kumpaniji u cioe' li tordna l-attur li jinghata s-setgha li jappunta direttur tal-fiducja tieghu fuq il-Bord tad-diretturi.

Illi hija l-fehma tal-Qorti li la darba l-kumpanija hija zvestita minn direttur, din ma tistghax topera jekk ma jinhatarx direttur iehor.

Ghaldaqstant, il-Qorti hi tal-fehma li la darba l-ilment hu bbazat sewwa u li hu gust u ekwu li taghmel dan, l-istess Qorti qed tawtorizza lir-rikorrent jahtar direttur tal-fiducja tieghu kif mitlub fir-rikors promotur sabieq "*jirregola t-tmexxija ta' l-affarijiet*

*tal-kumpannija fil-futur*” kif provdut f’Artiklu 402(3)(a), liema direttur ikun ukoll vestit bil-poteri ta’ rappreżentanza ġuridika u legali tal-Kumpannija.

**Il-Qorti tghaddi biex tezamina t-tielet talba attrici fis-sens li **jsiru l-emendi neċessarji fil-Memorandum u fl-Istatut tal-Kumpannija intimata sabiex jsir dak mitlub fl-ewwel u t-tieni talba attrici sabiex t-tibdiliet jiġu reġistrati mar-Registatur tal-Kumpanniji.****

Huwa mifhum illi t-talba għall-ħatra tar-rikorrent bhala Direttur u l-emendi relattivi fil-Memorandum u l-Istatut tal-kumpannija a tenur tal-Artikolu 402 3(a) huma meħtieġa prinċiparjament sabiex jassiguraw li l-kumpannija jkollha tmexxija u rappreżentanza uffiċċjali sabiex jiġu eżegwiti l-ordnijiet ta’ din l-Onorabbli Qorti, kif ukoll biex tkun tista’ tittiehed kull deċiżjoni ohra meħtieġa għall-amministrazzjoni tal-kumpannija, apparti li huma rikjesti sabiex jiġu mharsa l-obbligi statutorji tal-kumpannija”.

**Professur Andrew Muscat Principles of Maltese Company Law, Malta University Press, 2007, p.1010** josserva li l-Qorti hi ntitolata li taghti ordni:

*“regulating the conduct of the company”s affairs in the future.”*  
*Such a power also pertains to courts in England, New Zealand and Australia. An order of this type was made in Re H.R. Harmer Ltd. In that case, the Court made detailed orders for the future regulation of the company”s affairs including a requirement that the company”s management structure be totally reorganized such that its eight year old founder would become president of the company without any rights or duties and that he would not be allowed to interfere in the management of the company other than as a member of the directors, the reduction of capital and the convening of meetings. In McGuinness vs Bremner plc, for example, the Court ordered the directors of a public company to convene an extraordinary general meeting on a particular date and to appoint accountants as scrutineers. And in Caroline Zammit Testaferrata Moroni*

*Viani et vs Testaferrata Moroni Viani (Holdings) Limited et the Court ordered a restructure of the composition of the board of directors: the two groups of shareholders each became entitled to appoint two directors and an independent chairman was appointed by the Court.”*

Ibid a fol.1000, 1010.

Ghaldaqstant, l-Qorti tilqa' t-talba u tawtorizza li jsiru l-emendi kollha necessarji fil-Memorandum u fl-Istatut tal-Kumpanija Aqua Oasis Ltd., li n-nomina ta' Direttur iehor u t-tibdil jigu registrati mar-Registratur tal-Kumpaniji skond il-ligi.

**Il-Qorti tghaddi biex tezamina r-raba talba, u cioe' li l-Kumpanija ntimata tigi ordnata tiehu dawk il-mizuri necessarji kollha (inkluż kwalsijasi azzjonijiet ġudizzjarji li jkun jidhrilha xierqa) sabiex (a) tiehu lura l-pussess tad-*dive centre* formanti parti minn St. Julians Aquatic Sports Club, f'George Borg Olivier Street, San Giljan, kif ukoll l-apparat, flejjes, makkinarju, vetturi u assi ohra appartenenti lill-Kumpanija ntimata minghand l-intimata Dorte Rikert u/jew terzi f'idejn min din ghaddithom (b) kif ukoll tiehu dawk il-mizuri kollha necessarji sabiex terġa' tibda l-operazzjonijiet u attivitajiet ta' negozju taghha;**

Illi fin-nota ta' sottomissjonijiet tieghu, sostna li r-raba talba m'ghadx ghandha siwi peress li din it-talba giet reza inutli bl-agir u l-azzjonijiet tal-intimata wara l-prezentata tar-rikors promotur, ghajr fejn qieghed jintalab lill-Onorabbli Qorti tordna li l-kumpanija tiehu proceduri legali kontra l-intimata ghall-irkupru ta' flejjes u apparat tal-kumpanija.

Il-Qorti tghaddi ghalhekk biex tezamina din il-parti tar-raba' talba flimkien l-hames talba tar-rikorrenti fis-sens li tawtorizza lill-Kumpanija sabiex tintavola proceduri ġudizzjarji kemm ta` natura ċivili kif ukoll ta` natura kriminali kontra l-intimata Dorte Rickert u dan sabiex din tinzamm u tinstab responsabbli ghall-aġir illegali, abbużiv, u frawdolenti, dannuż u pregudizzjevoli fil-konfront tal-Kumpanija, u sabiex l-intimata Rickert tigi kundannata thallas lill-

**Kumpannija intimata d-danni ingenti li l-intimata Rickert ikkawżatilha bl-ghemil taghha; u dan ai termini ta' Artikolu 402(3)(e) Att dwar il-Kumpanniji.**

Din-il-Qorti hi tal-fehma illi tali talba ghandha tigi trattata mas-sitt talba li hija wahda ta' risarciment tad-danni li l-Qorti tqis illi hija alternattiv ghat-talba numru hamsa, u dana sikkome dawn it-talbiet jirrikiedu analizi tal-agir tal-intimata u r-responsabilita' o meno taghha qua direttur.

Illi fl-istess Nota ta' Sottomissjonijiet datata 14 t'Ottubru 2011, ir-rikorrenti jghid li l-hames (5) talba a tenur tal-Artikolu 402(3)(e):

*“... huma intiżi sabiex il-kumpannija tigi ordnata tieġu dawk l-azzjonijiet kollha spettanti lilha kontra l-intimata, sabiex trodd lura l-flus u assi tal-kumpannija li approprjat ruġha minnhom indebitament waqt l-eżerċizzju tal-kariga tagħha ta' Direttur, u kif ukoll sabiex tagħmel tajjeb għad-danni (fosthom telf ta' qligħ) ikkawżati lill-istess kumpannija;*

*Illi l-Artikolu 143 tal-Kapitolu 386 tal-Liġijiet ta' Malta jippermetti azzjoni tal-kumpannija kontra Direttur li jkun ikkonkorra mal-kumpannija jew għamel qligħ a skapitu tagħha, kif proprju seħħ f'dan il-każ mill-intimata. B'hekk fil-każ li jirriżulta li hemm lok li l-intimata għandha tirrifondi xi flejjes jew assi lill-kumpannija, din l-Onorabbli Qorti għandha tagħti dawk l-ordnijiet meħtieġa sabiex jittieġdu l-proċeduri legali kollha kontra l-intimata għal dan il-għan.”*

L-Awturi Derek French, Stephen Mayson & Christopher Ryan, Mayson, French and Ryan on Company Law, 27th Edition 2010-2011, Oxford University Press, p.570

Illi f'din il-vena isostnu li

*“The interests of members which are claimed to be unfairly prejudiced in a petition under CA 2006, s 994, need not necessarily be interests in their capacity as members, though*

*they must be sufficiently connected with membership (Gamlestaden Fastigheter AB v Baltic Partners Ltd [2007] UKPC 26, [2007] Bus LR 1521). It has been held, for example, that a loan by a member of a company to the company, to provide it with working capital, is an interest of the member which may be the subject of an unfair prejudice petition (Gamlestaden Fastigheter AB v Baltic Partners Ltd)."*

Stephen Girvin, Sandra Frisby and Alastair Hudson, *jikkwotaw il-kaz Saul D. Harrison, Re fejn l-extent ta' mismanagement fil-kumpanija jista' jammonta ghal "unfairly prejudicial conduct"*:

*"In Elgindata Ltd, Re it was said that serious mismanagement causing economic harm to the business could be unfairly prejudicial conduct but that in most causes simply mismanagement would not suffice. The Court of Appeal in Saul D. Harrison, Re emphasized that there would have to be a breach of duty involving abuse of power by the directors or ulterior motives, but in Macro Ipswich Ltd, Re (No.1), Arden J. allowed a petition based on serious mismanagement which had caused economic loss to the company and would continue to do so into the foreseeable future. In BSB Holdings Ltd, Re (No. 2), the same judge said that what was needed was unfairly prejudicial conduct in a commercial context. She rejected the idea that only an abuse of power or an ulterior motive would suffice and suggested that acting otherwise than for the benefit of the company could suffice."*

Vide fol. 539 Charlesworth's Company Law, Eighteenth Edition, Sweet & Maxwell, 2010,

L-istess awturi ukoll jaghtu l-fehma taghhom rigward dak li huma jhossu li huma atti ta' *mismanagement, o meno*, u li allura jistghu jammontaw ghal "*unfair prejudice*":



*“In Blackwood Hodge plc, Re, Jonathan Parker J. said that not all breaches of fiduciary duty would suffice, finding no evidence of prejudice on the facts of the case. Harman J., however, has held that failure to implement a business plan was not just negligent mismanagement but abandonment of a structure which was the foundation of the petitioner’s involvement with the company, so that if it had not been done bona fide in the interests of the company it could amount to unfairly prejudicial conduct.”*

Illi hi l-fehma tal-Qorti li fit-tmexxija tal-kumpannija kien hemm istanzi fejn l-intimata wriet *mismanagement* fl-operat u fid-decizjonijiet billi fost l-ohrajn naqset li tipprezenta *audited accounts*. Fil-fatt Ramon Pace, accountant u awditur, a fol. 390 et seq, sostna li *“Qatt ma kont involut fl-accounts tal-kumpannija”*. Tant hu hekk, li hu jsostni li kien biss fis-sajf tat-2008, li kien gie avvicinat minn Dr. Jean Carl Farrugia, Dr George Said, Dr Edward Zammit Lewis, flimkien ma’ Dorothy Rickert *“sabiex niprova naghmel l-accounts tal-kumpannija izda kien impossibbli li jsiru l-accounts u dan peress illi kienu ntilfu r-records fisici kollha konsegwenza ta’ maltempata illi sehhet jidhirli fis-sena 2007.”* Ibid. Il-Qorti innotat ukoll li anke ghaz-zmien ta’ wara l-maltempata ma saru l-ebda *accounts* proprji u cari, hlief ghal *draft accounts*.

Huwa fatt stabbilit, kif jidher mill-kopja t’estratt mis-sit elettroniku tal-MFSA li mit-twaqqif tal-kumpannija Aqua Oasis Limited **qatt ma gew ipprezentati accounts ta’ l-istess kumpannija** (Dokument SET 14 vide fol. 604).

Ir-rikorrenti nnifsu taht kontro-ezami a fol. 384 et seq, jikkonferma li *“all operations and decisions with regards to all operations were taken by Dorote Rickert. This because she was appointed a sole director to take care of the operation in Malta. Moreover, she was present in Malta whilst I resided overseas in Denmark”*.

Ma jistghax ma jinghadx li r-rikorrenti kien accetta din s-sitwazzjoni ghaliex kien konvenjenti ghalih, li l-intimata tkun direttur uniku u wkoll tmexxi l-kumpannija. Fil-fatt, fl-affidavit tieghu r-rikorrenti jammetti li:

*“Rickert was already settled in Malta and I had my business to run in Denmark, it was not feasible for me to live in Denmark and be involved in the daily running of a business in Malta. So we agreed that Rickert would be sole Director and representative of the company.” Ibid*

L-intimata ssostni li hi ma kellha l-ebda esperjenza *“in the operation of Diving Centres before the setting up of Aqua Oasis. At the time of setting up Aqua Oasis I was residing in Malta, while Soren Tabur was residing in Copenhagen. The reason why I was appointed director is for me to be able to run the show in Malta since I was residing here and Soren abroad.”* – Vide fol. 411.

Jigi rrimarkat ukoll, li l-istess rikorrenti, fl-istess seduta, jghid li hu kien kuntent b'certa decizjonjiet li kienet tiehu l-intimata u bl-impjegati li kienet tqabbad: *“With regards to the decisions mentioned in the same paragraph eight of my abovementioned affidavit, I was satisfied with the decisions that Dorote Eckert took. And with the employees that she employed”.* Vide fol. 384.

Il-Qorti tosserva ukoll li l-intimata tghid li r-rikorrenti naqas minn dmiru li jaqdi l-obbligi tieghu versu l-kumpannija f'livell konsultattiv:

*“Soren Tabur did not fulfill his consultative role as an expert/advisor in diving operations from the commencement of the business of Aqua Oasis onwards. He gave me no reason for failing to fulfill this role.*

*Soren Tabur did not try contacting me in the period from November 2007 to date regarding anything to do with the operation of the company.”* Vide fol. 418

Ir-rikorrent sostna li meta pprova jinvolti investitur, certu Mr. Passke, l-intimata opponiet *“because she wanted full control of the company”* – a fol. 384. Izda l-intimata rrebadiet li Soren kien qed jinsisti li Paaske mhux biss jsir *shareholder* izda jkun *Managing Director* bis-setgha li jiehu d-decizjonijiet amministrattivi kollha waqt

li hija tibqa' d-Direttur responsabbli skond MFSA, apparti il-fatt li l-posizzjoni finanzjarja tar-rikorrenti ma kienitx soda.

Barra minn dan, ir-rikorrenti kemm -il darba staqsa lill-intimata sabiex taghtih l-accounts tal-kumpannija, kemm *via* email kif ukoll verbalment fuq it-telefon. Ir-rikorrenti jirrikonoxxi wkoll li bejniethom kien hemm dawk li hu jsejhillhom "*some communication problems*". Vide fol. 386

Illi mill-banda l-ohra, il-Qorti ma tistghax ma tosservax ukoll in-nuqqas ta' nteress u attivizmu da parti tar-rikorrent li fost l-ohrajn fix-xhieda tieghu ghamel osservazzjonijiet bhal "*it was Dorote Rickert's responsibility to take care of her own salary*":

*"I know Mr. Flemming who is a good customer of my Dive Shop in Copenhagen. Mr. Flemming and I speak regularly since we are both involved in business. I remember that Mr. Flemming had spoken to me in Malta regarding the critical situation (ie liquidity problems) in Aqua Oasis. I was surprised that Mr. Flemming went into all these details of Aqua Oasis. I remember telling Mr. Flemming that it was Dorote Rickert's responsibility to take care of her own salary. I confirm that Rickert was managing the Diving Centre – "after all she was the managing director." (Vide xhieda a fol. 385)*

Fil-fatt l-intimata ghad-domanda ta' Dr Farrugia tirrispondi li "*There is no written agreement that I had to receive a salary of LM700 monthly and there was no written agreement to the effect that Soren Tabur had to pay me such money when the company was out of funds. I had to take the managerial role whereas Soren had to take the consultative role. For Soren's consultative role, it was agreed that he had to receive no remuneration, whereas I had to receive LM700 salary for my managerial role.*" - Vide fol. 412

L-intimata tghid li r-rikorrent kien jaf dwar kif kienu jsiru l-hlasijiet lid-*diving instructors*. Hi kienet thallas lil “*free lance instructors on a cash basis. I used to show Soren these undisclosed payments and he approved of same.*” – Vide fol.415.

Barra minn hekk l-intimata ssostni li kien hemm ukoll *running expenses* ohra bhal “*phone bills, electricity and water bills, petrol, gozo ferry tickets, padi material such as books etc.*”- Ibid a fol. 415.

Il-Qorti tosserva ukoll li r-rikorrenti kien infurmat bil-problemi ta' likwidita` tal-kumpannija u li hu minn jeddu ghazel li jkompli jinvesti aktar flus fil-kumpannija:

*“With regards to paragraph fifteen (15) of my affidavit, I confirm that before the flooding incident, Rickert had already spoken to me regarding the liquidity problems in the company. I confirm that a couple of days after the flooding incident happened, Rickert informed me about this same incident. Rickert told me that she was sure that the premises were covered insurance wise with regards to the flooding incident.*

*I think I remember that we had a meeting at Dr. George Said's office (a general meeting) with regards to the liquidity problems around 10th July, 2008. From the moment Rickert informed me of the liquidity problems (that is November 2007), I did inject money into the company. I was in Malta around late November, 2007 till the 2nd December, 2007. It was at this time that I injected money into the company. I remember that I invested around 10,000 Danish Crowns (that is circa Euro 1,300). I gave this money personally to Dorte Rickert.” – Vide xhieda a fol. 386.*

L-intimata tistqarr ukoll li ma tafx kemm ezatt ir-rikorrent ikkontribwixxa finanzjament: “*I do know that he contributed LM50,000 as key-money (representing leasehold and goodwill). It was intended that this amount was not refundable, in the sense that it was an investment.*” – Vide fol. 412.

F'parti ohra tax-xhieda, ir-rikorrenti jghid ukoll li hu meta sar jaf bil-problemi ta' likwidita`, jgifieri minn Novembru, 2007, hu ghadha aktar fondi lill-kumpannija.

Il-Qorti tosserva ukoll li hu kuntrastanti l-fatt li r-rikorrenti kompla jinvesti fil-kumpannija imma fl-istess waqt beda jibghat klijenti li gab hu stess, ghand *diving centres* ohra. Dan hu kkonfermat mir-rikorrenti stess a fol. 386, li “*after the flooding I sent clients to both Aqua Oasis and also another diving Centre called Divewise. This was due to the fact that Acqua Oasis did not have the capacity to handle both groups at the same time.*” Dan hu konfermat ukoll minn David Borg Saydon, *sales manager* tas-socjeta` Allcare Insurance Agency Ltd, li a fol. 402, jghid li ra *emails* dwar klijenti ta' Soren go Danimarka li flok bghathom ghand l-Aqua Oasis, bghathom ghand kumpanniji ohrajn lokali. Izid ighid ukoll:

*“Jien naf li kien hemm problemi finanzjarji bejn Soren u Rickert. Naf li Soren kien wieghed hafna affarijiet, fosthom il-flus li hu fil-fatt baghat bhala investment u bhala kapital. Kien wieghed ukoll il-flus li ser jibghat lil Dorte bhala paga. Tkellem ukoll rigward flus ghall-paga tieghi u r-refurbishment tal-propjeta` li ghamiltu kollu jien. Nghid li eventwalment ma gie xejn minn dan minghand Soren hlief il-flus tal-kapital inizzjali. Jien kont nahdem fid-Diving School ghal sajj shih u qatt ma hadt sold. Kont qed nahdem bhala diving instructor. Dorte qaltli li Soren kien iwieghed hafna li ser jibghat il-flus ghalija pero` bqajt ma hadt xejn. Wara li nqala l-inkwiet bejn Soren u Dorte, jien qatt ma ergajt kellimt lil Soren personalment.*

*Nghid illi skond jien il-managment ta' Dorte Rickert kienet tajba. Hadmet hafna biex izzomm il-kumpannija ghaddejja. Jien tajt l-opinjoni tieghi rigward il-management tal-kumpannija. L-inkwiet fil-kumpannija beda” meta kien hemm l-inkwiet u problemi finanzjarji bejn Dorte u Soren. Il-problemi kienu li l-kumpannija ma' kelliex flus peress li l-flus li Soren weghed li kellu jibghat lil Dorte qatt ma waslu. Di piu` sirna*

*nafu li Soren beda jibghat in-nies lill-kumpannija ohra minflok lilna.” – Vide fol. 402 u 403.*

Allura l-Qorti tistaqsi: Jekk ir-rikorrenti verament kien jinteressah mill-kumpannija, ghaliex ma nteressax ruhu u ndaga kif il-kumpannija setghet topera ahjar u tilhaq id-domanda fl-ghoti tas-servizzi tad-*diving*, minflok ma baghat klijenti ghand kompetitur tal-kumpannija tieghu stess?

Rigward l-*accounts*, ir-rikorrenti jghid li dawn talabhom kemm -il darba lill-intimata u lill- *accountant* Ramon Pace imma dawn baqghu ma tawhx l-informazzjoni: “*I have asked Dorte on several occasions and Ramon Pace (the accountant of Aqua Oasis) for the book-keeping, bank statements etc. of the company in order for me to have a true picture of what was happening in the company. Both Dorte Rickert and Ramon Pace refused to give me this information. It was only on the 10th July, 2008, during the general meeting already referred to in yesterday's testimony that I received some accounting information from Dorte Rickert and Ramon Pace.*” – Vide fol. 387.

Ir-rikorrent isostni ukoll li l-intimata ma wzatx il-fondi ghad-dispozizzjoni taghha fl-ahjar interess tal-kumpannija. Hu jsostni wkoll li skopra bil-*mismanagement* u bil-*hidden agenda* ta’ l-intimata f’Lulju 2008 – Vide fol. 388.

F’istanza ohra, r-rikorrenti jghid ukoll li l-intimata ma kkontribwitx sehemha fil-kumpannija u *cioe`* Euro 20,000. Pero` mill-banda l-ohra r-rikorrent ma agixxiex u ma’ ha l-ebda azzjoni konkreta sabiex l-intimata tghaddi din it-tali somma lill-kumpannija.

Wiehed irid isemmi wkoll li kien hemm nuqqas ta’ *osservanza* ta’ proceduri tal-kumpannija (fosthom l-*assenza* ta’ laqghat formali bejn iz-zewg azzjonisti), nuqqas ta’ ppjanar tan-negozju u wkoll li l-kumpannija f’certa istanzi jidher li tmexxiet unilateralment mill-intimata bhallikieku l-kumpannija kienet taghha biss u minghajr konsultazzjoni mar-rikorrenti.

Interessanti ferm hu dak li jghidu l-awturi Mayson, French and Ryan on Company Law li jaghtu ezempji ta’ kondotta li fuqhom tista’ ssir petizzjoni. Fost l-ohrajn, huma

jinkludu l-*mismanagement* bhala wiehed mill-ezempji. Huma jsemmu l-kaz Elgindata Ltd (1991) fejn il-Qorti, minkejja li rrikonoxxiet li l-*mismanagement* serju jikkostitwixxi *unfair prejudice*, l-istess Qorti qalet hekk:

*“... The petitioners made numerous allegations of bad management by the company”s managing director and principal shareholder. Warner J said (at p 993) that although, in an appropriate case, serious mismanagement of a company”s affairs would constitute unfairly prejudicial conduct, the court would normally be very reluctant to accept that managerial decisions can amount to unfairly prejudicial conduct. It is not for the court to resolve differences of commercial judgment (see 18.3.3.1). It is not unfair for a member of a company to suffer the consequences of poor management of the company: it is one of the normal risks of investing in a company that its management may turn out not to be of the highest quality. The petitioners had no right to expect a reasonable standard of general management from the managing director. **However, the evidence showed that the managing director used assets of the company for his personal benefit and for the benefit of his family and friends. This was unfairly prejudicial conduct by its very nature rather than because it reduced the value of the petitioners” shares, and the managing director was ordered to buy the petitioners” shares. In Re Marco (Ipswich) Ltd [1994] 2 BCLC 354, though, it was found that mismanagement of the two companies involved had been so serious that the court should order the majority shareholder and sole director of the two companies to buy out the minority and that the value of the shares should be increased to take account of what the companies had lost through the mismanagement. The hearings in Re Marco (Ipswich) Ltd., occupied 25 days and ranged over 40 years of the companies” history. The difference between the mismanagement in Re Marco (Ipswich) Ltd (where the companies had shown a consistent growth in profits) and that in***

*Re Elgindata Ltd (which had declined into loss-making) is difficult to characterize and shows how difficult it is for legal advisers to predict the outcome of these lengthy and expensive proceedings.” (Enfasi ta’ din il-Qorti)*

Ibid a fol. 575.

Rigward il-*mismanagement* li jista’ jkun hemm fit-tmexxija ta’ kumpannija, **I-Professor Andrew Muscat fil-ktieb** Principles of Maltese Company Law, Malta University Press, 2007 **jghid li:**

*“An unfair prejudice claim based on commercial mismanagement can only succeed on the basis that the directors have acted in breach of their duties of care and skill. A court will usually refrain from interfering with the bona fide decisions of the directors, particularly where no conflict of interest has arisen.*

*In an appropriate case, it will however be open to the court to find that serious mismanagement of the company’s business constitutes conduct that is unfairly prejudicial to the interests of minority shareholders. But a court will normally be very reluctant to accept that managerial decisions can amount to unfairly prejudicial conduct. In Elgindata Ltd., The Court remarked that there were two considerations that were of relevance to the issue. First, there will be cases where there is disagreement between the claimant and the defendants as to whether a particular managerial decision was, as a matter of commercial judgment, the right one to make, or as to whether a particular proposal is commercially sound. The Court stated that it is not for the Court to resolve such disagreements in an unfair prejudice action: “[n]ot only is a judge ill-qualified to do so, but there can be no unfairness to the petitioners in those in control of the company’s affairs taking a different view from theirs on such matters.” Second, a shareholder acquires shares*



*in a company knowing that their value will depend in some measure on the competence of management and he takes the risk that the management may not prove to be of the highest quality. Short of a breach of the duty of care and skill, there is prima facie no unfairness to a shareholder if the quality of the management turns out to be poor. The Court remarked that one example “where the court might nonetheless find that there was unfair prejudice to minority shareholders would be where the majority shareholders, for reasons of their own, persisted in retaining in charge of the management of the company”’s business a member of their family who was demonstrably incompetent.” The evidence before the Court showed that the complainant had deliberately invested in the company controlled and managed by the respondent whom he had known for five years or so and had done so despite the respondent”’s reluctance to have him as a shareholder. The court disagreed with the complainant”’s submission that he had the right to expect a reasonable standard of general management from the respondent. On the facts, the Court observed that the complainant had taken the risk that the respondent”’s management of the company might not be up to the standard that he (the complainant) had hoped for and expected. The Court found that there had been mismanagement by the respondent and that this was prejudicial – but not unfairly so – to the complainant.”*

Ibid a fol.984-985

Hi l-fehma tal-Qorti li **kemm ir-rikorrenti, kif ukoll l-intimata, kienu responsabbli ghas-sitwazzjoni li qiegħda fiha l-kumpannija.** Pero` l-istess ma jistghax jingħad għal dak li jirrigwarda l-pozizzjoni ta’ l-intimata *qua* direttur tal-kumpannija mill-mument li bhala Direttur ta’ Aqua Oasis Ltd., **ghaddiet il-kirja tad-dive centre lid-Delfini Dive Centre.**

Ghaldaqstant, l-Qorti tqis li m'ghandiex tordna li l-kumpannija tiehu proceduri legali kontra l-intimata għall-irkupru ta' flejjes u apparat tal-kumpannija Aqua Oasis Ltd., b'dana li semmai, dan jghodd biss sal-mument li l-intimata bdiet l-involvement tagħha fid-Delfini Dive Centre, u cioe` fejn naqset minn dmirijitha ta' direttur u kkonkorriet mal-kumpannija Aqua Oasis, li ser tigi ezaminata aktar 'l quddiem fil-hames talba.

Ir-rikorrent jsostni illi permezz ta' "Meeting" tal-Bord tad-Diretturi hija iddecidiet arbitrarjament, u minghajr ma kkonsultat lir-rikorrenti, li l-kumpannija tassenja n-negozju kollu, inkluz l-assi, l-apparat u l-kirja tad-*dive centre* lilha personalment, u bdiet topera n-negozju bl-isem ta' Delfini Dive Centre (ara Dok. JCF 3 –SET 12)

Di piu din l-assenjazzjoni saret għar-rimamenti erba' (4) snin tal-kirja għas-somma mizera ta' €5,000 fis-sena, li kellha thallsu l-intimata. Dan kien ifisser li l-introjt massimu għall-kumpannija mill-operat tad-*dive centre* kellu jkun ta' mhux aktar minn € 20,000, mnaqssa t-taxxa u l-ispejjez amministrattivi, kienu ser jonqsu bin-nofs. Permezz ta'din il-manuvra, mill-investment ta' oltre €70,000, wara hames snin ta' operat, l-introjt massimu spettanti lir-rikorrent mill-qligh fil-kumpannija ma kienx ser jeccedi l-€5,000.

Di piu' jirrizulta li l-kera għas-sena 2008 ma thallsitx mill-intimata skond ftehim li bih assenjat l-operat tad-*dive centre* lilha nnifisha, **izda thallset mill-fondi tal-kumpannija**, u cioe' mill-flus rikavati mill-assigurazzjoni.

Apparti minn dana kollu jirrizulta mix-xhieda tal-avukat Dr. Daniel Aquilina, għannom ta' San Ġiljan Aquatic Sports Club, (Vide Dok. JCF 12 a fol. 602) li l-intimata f'isem il-kumpannija, ħassret il-kirja tad-*dive centre* f'nofs il-perjodu originali ta' hames snin. Permezz ta' din l-azzjoni, l-intimata irnexxielha tohnoq kull speranza li ir-rikorrenti jirkupra l-investment tiegħu fil-kumpannija. Ebda rendikont lill-intimat ma gie magħmul.(ara xhieda ta' Dorte Rickert a fol. 411 et seq)

Gie sodisfacentement ipprovat ukoll illi Rickert poġġiet l-apparat kollu tan-negozju għall-bejgħ (Vide affidavit ta` Alan Mark Whitehead). Sikkome Rickert baqghet ma tagħtx rendikont ta` tac-ċilindri tad-diving tal-kumpannijja rkuprati mil-baħar wara t-

tempesta, dan jaghti x'tifhem li trasferithom lill-terzi dejjem a gwadann uniku tagħha u minghajr ebda introjtu għas-socjeta` Aqua Oasis Limited jew għar-rikorrent.

**Ikkonsidrat:**

Illi jigi osservat li l-Artikolu 136A tal-Kapitolu 386 tal-Ligijiet ta' Malta jistipula li :

*“(1) Direttur ta' kumpannija jkun marbut li jagixxi b'onestà u bona fide fl-ahjar interessi tal-kumpannija.*

*(2) Id-diretturi ta' kumpannija għandhom jipromwovu il-benessere tal-kumpannija u jkunu responsabbli għal:*

*(a) it-tmexxija generali tal-kumpannija u l-amministrazzjoni u l-immanigjar tagħha; u*

*(b) s-sorveljanza generali ta' l-affarijiet tagħha.*

*(3) B'mod partikolari, izda bla hsara għal kull dmir iehor mogħti lid-diretturi ta' kumpannija, jew lil xi wiehed minnhom, bil-memorandum u l-Istatut ta' assocjazzjoni jew b'dan l-Att jew b'xi ligi ohra, id-diretturi ta' kumpannija:*

*(a) ikunu obbligati li jeżercitaw kura, diligenza u hila li jkunu eżercitati minn persuna ragonevolment diligenti li jkollha -*

*(i) kemm it-tagħrif, il-hila u l-esperjenza li jkunu ragonevolment mistennija minn persuna li tkun qed taqdi l-istess funzjonijiet li jkunu moqdiya jew fdati lil dak id-direttur dwar il-kumpannija;*

*(ii) kif ukoll it-tagħrif, il-hila u l-esperjenza li jkollu d-direttur;*

*(b) ma għandhomx jagħmlu profitti sigrieti jew personali mill-pozizzjoni tagħhom minghajr il-kunsens tal-kumpannija, lanqas ma jagħmlu gwadan personali minn informazzjoni konfidenzjali tal-kumpannija;*

*(c) għandhom jassiguraw li l-interessi personali tagħhom ma jkunux f'konflitt ma" l-interessi tal-kumpannija;*

*(d) ma għandhomx juzaw xi proprjetà, informazzjoni jew opportunità tal-kumpannija għall-beneficju tagħhom stess jew*

*ta' xi hadd iehor, jew jieħdu xi beneficcju b'xi mod iehor b'konnessjoni ma" l-ezercizzju tas-setghat tagħhom, hlief bil-kunsens tal-kumpannija f"laqgħa generali jew hlief kif permess mill-memorandum u l-istatut ta' assocjazzjoni tal-kumpannija; (e) għandhom jeżercitaw is-setghat li għandhom għall-finijiet li jkunu ngħataw is-setghat u m" għandhomx juzaw hazin daww is-setghat."*

Illi fil-fehma konsiderata ta' din il-Qorti huwa car, li l-intimata naqset mill-obbligi tagħha taht Artikolu 136A tal-Kapitolu 386 tal-Liġijiet ta' Malta mill-mument li għaddiet għaddiet il-kirja ta' Aqua Oasis Ltd. fuq id-Delfini Dive Centre u *cioe`* il-Bord *meeting* tal-Board of Directors tat-28 t'Awwissu, 2008 (Vide Dok SET 12 a fol. 602).

Barra minn hekk, fil-kapacita` tagħha ta' direttur, ikkonkorriet mal-kumpannija u dan bi vjolazzjoni ta' Artikolu 143 tal-Ligi dwar il-Kumpanniji li jghid:

*(1) Direttur ta' kumpannija ma jistax, b'konkorrenza mal-kumpannija u mingħajr l-approvazzjoni ta' l-istess kumpannija f"laqgħa generali, jinneozja għalih innifsu jew għal haddiehor, jew ikun soċju b'responsabbilta` illimitata f'soċjeta` oħra jew ikun direttur ta' kumpannija li tkun tagħmel konkorrenza ma" dik il-kumpannija.*

*(2) Meta direttur jagixxi bi ksur tal-projbizzjoni msemmija f'dan l-artikolu, il-kumpannija tista' tagħzel li tieħu azzjoni għad-danni u imghax kontrih jew titlob il-hlas ta' kull profitti li jkun għamel bi ksur ta' dan l-artikolu.*

*(3) Id-dispozizzjonijiet ta' dan l-artikolu jkunu bla hsara għal kull rimedju iehor li l-kumpannija jista' jkollha kontra direttur għal ksur tad-dmirijiet tiegħu".*

Il-Qorti rat u ezaminat il-provi dokumentarji li gew esebiti mir-rikorrent li jindikaw li l-intimata qua direttur agixxiet kontra l-obbligi taghha kif imposti minn Artikli 136A u 143 ta' l-Att dwar il-Kumpanniji, bl-iskop li tikkompeti mal-kumpannija li taghha kienet direttur.

Dawn il-provi dokumentari huma s-segwenti:

- Kopja ta' korrisondenza bl-email tal-11 ta' Gunju, 2008, ipprezentata mir-rikorrent bhala Dokument SET 4, fejn l-intimata, bl-email tal-kumpannija gharrafet lill-klijent prospettiv tal-kumpannija, illi d-*dive centre* m"ghadux jopera taht isem il-kumpannija, izda qieghed jopera bl-isem Delfini. F"din l-email, l-intimata tinforma lill-klijent li:

*"Firstly Aqua Oasis has changed its name to Delfini Divers. However the staff, location and services remain the same. We would love to see you guys out there and can offer you a great diving package."*

...

*... We are in the process of getting the web site for Delfini Divers up and running. Feel free to check it out at [www.delfinidivecentre.com](http://www.delfinidivecentre.com). If you have further questions or queries please do not hesitate to ask."*

- Kopja ta' email mill-PADI (Professional Association of Diving Instructors) (Dokument SET 5 a fol. 588) datata l-1 ta' Lulju, 2008, indirizzata lil Ms. Dorte Rickert fejn tindika li l-intimata Rickert lanqas biss geddet l-abbonament tal-kumpannija bhala operator fil-qasam tad-*diving*. L-email lil Ms. Rickert, fost l-ohrajn.
- Kopja ta' estratt mis-sit elettroniku tal-PADI (Dokument SET 6 a fol. 590), fejn juri li l-intimata Rickert irregistrat in-negozju personali taghha bl-isem ta' Delfini, minflok ma geddet l-abbonament tal-kumpannija. Fil-fatt l-isem u l-

indirizz indikati fis-sit elettroniku huma: Delfini Dive Centre S-35681, George Borg Olivier Street, St Julians, Malta.

- Kopja ta' zewg estratti mis-sit elettroniku ta' l-Awtorita` Maltija ghat-Turizmu "visitmalta.com" (Dokument SET 7), mehuda fi zminijiet differenti fejn jintwera li n-negozju personali ta' l-intimata Rickert bl-isem ta' Delfini, rimpjazza l-operat tal-kumpannija. Fil-fatt, filwaqt li l-indirizz hu l-istess wiehed, u *cioe`*, George Borg Olivier Street, St Julians, Malta, u l-istess jinghad ghan-numru tat-telefon 21369994, wiehed jinnota li l-isem inbidel ghal Delfini Dive Centre, l-email inbidel ghal info@delfinidivecentre.com u l-website saret www.delfinidivecentre.com.
- Kopji ta' estratti mis-siti elettronici tal-kumpannija u tan-negozju l-gdid ta' l-intimata Rickert (Dokument SET 8), u kif ukoll brochure ta' l-istess Rickert bl-isem ta' Delfini, fejn jidher bic-car li l-intimata Rickert uzat il-logos u l-layout u s-sinjali l-ohra distintivi tal-kumpannija, u rimpjazzat l-isem "Aquaaoasis" b'Delfini.
- Kopja ta' email indirizzata lir-rikorrenti li turi li s-sit elettroniku delfinidivecentre.com huwa proprjeta` personali ta' l-intimata Rickert (Dokument SET 9 a fol. 597), fejn ir-registrant hi Dorte Rickert (DORTERIC 78), 40 *Magro Flats*, Flat 5 Salina Road, Salina Naxxar, Salina. Id-*domain name* hu delfinidivecentre.com
- Kopja ta' stima mahruga ghan-nom ta' Delfini Dive Centre lill-klijent lokali fis-16 ta' Gunju, 2008, (Dokument SET 11 a fol. 601).
- Kopja ta' ricevuta datata 2 ta' Mejju, 2008, mahruga minn San Giljan Aquatic Sports Centre lill-intimata Rickert personalment ghall-kera ta' sena u *cioe`* dik ghas-sena 2008 tad-*divecentre* (Dokument SET 13 a fol. 603).
- Affidavit ta' Shaun Upton (ID 225768M), direttur tas-socjeta` M&A Limited, li jindika Dorte Rickert, f'isem Delfini Dive Centre, bdiet taghmel

tranzazzjonijiet ma' M&A Ltd u "dan mit-28 ta' April, 2008 sa 15 September, 2009. Dawn it-tranzazzjonijiet jidhru fl-hawn annessi dokumenti konsistenti f'numru ta' invoices, receipts u sales ledger mmarkati Dok JCF 9 u JCF 10"- a fol. 929 u 980.

Di piu' l-intimata, fl-affidavit taghha, **tammetti li hi hadet decizjoni unilaterali** li taghmel sub-letting tad-dive centre lilha personali **minghajr ma sejhet shareholders general meeting** u **minghajr ma kkonsultat** lix-shareholder:

*"In taking the decision to sublet the dive centre to myself personally under the trade name Delfini Dive Centre, I reiterate that I took this decision unilaterally without holding a shareholders general meeting or consulting any shareholder. I did not inform Soren about this decision because he had opened this court case against me.*

*I wanted to keep my word I had given to Soren of making this company a success. This could only be done by subletting the leasehold of Aquaoasis to myself under the trade name Delfini Dive Centre. The diving business of Aqua Oasis stopped at the moment of the subletting from Auqa Oasis to me operating under the trade name Delfini Dive Centre. The price of the subletting was Euro 13,735.15 per annum, out of which Euro 8,735.15 paid directly by Delfini Dice centre to St Julian"s Aquatic Sports Club and Euro 5,000 which were payable to Aqua Oasis Ltd. Hence the annual profit of Aqua Oaisis was meant to be Euro 5,000 and I believed that that was going to save the business. I took a loan of Euro 7,000 from BOV to be able to carry out the business of Delfini Dive Centre. I paid the rent to St. Julian"s Aquatic Sports Club with the money which I obtained from BOV. The money to St. Julian"s Aquatic Sports Club was paid. However the Euro 5,000 payable to Acqua Oasis Ltd., was never paid because I did not have enough income."*

Vide xhieda a fol. 411

In oltre l-affidavit ta' Alan Mark Whitehead, a fol. 262. jindika li hu kien involut fin-negozju tad-*diving* ghal dawn l-ahhar ghoxrin sena u li hu kien sar jaf lil Soren Tabur u Dorte Rickert tramite n-negozju tad-*diving* f'Malta. Hu jzid jafferma li kien jaf li xi zmien f'2008 inbidel l-isem tad-*dive centre* al Delfini Dive Centre u li f'nofs is-sena 2009 meta ghamel kuntatt maghha, ircieva informazzjoni permezz *t'email* kkupjata lil diversi operatori fl-istess generu ta' xoghol li "*all the equipment of the dive centre was for sale and this due to the closing down of the dive centre.*" Kien mhasseb ghal fatt li tali *email* ma kienitx komunikata lil Tabur u ghaldaqstant iddecieda li ma jintrigax u jidhol ghal tali xiri t'apparat. Wara dan huwa kkontattja lil Soren Tabur u widdbu b'kollox.

Giet ezebita ukoll prova konklussiva li tikkonsisti f'kopja ta' Rizoluzzjoni tal-kumpannija ntimata, fejn l-intimata, ghan-nom tal-istess kumpannija, qieghda tittrasferixxi n-negozju tal-kumpannija, u tissulloka l-kirja tad-*dive centre* lilha (Vide Dokument SET 12 a fol. 602):

*"During a meeting of the Board of Directors held on the 1 March, 2008 it was unanimously resolved that:*

*1. Due to the financial problems that the Company was currently facing, and due to the lack of interest in the affairs of the company and lack of communication on the part of major shareholder Soren Erland Tabur it was considered feasible to subcontract the entire operation of the dive-centre at St Julian's Aquatic Sports Club, George Borg Olivier Street, St Julian's.*

*2. The dive-centre is to be subcontracted to a third-party, namely Delfini Dive-Centre from 1 April 2008 until the 14 of April 2012.*

*3. The Company would receive from Delfini Dive-centre, the amount of thirteen thousand seven hundred and thirty five Euros and fifteen cents (EUR13,735.15) per annum of which*



*eight thousand seven hundred and thirty five Euros and fifteen cents (EUR 8735.15) would be paid by Delfini Dive-Centre directly to St. Julian's Aquatic Sports Club, in settlement of the rent of the dive-centre owed by Aquaoasis Limited to the same St Julian's Aquatic Sports Club annually."*

Il-Qorti taghraf li l-azzjoni tal-intimata meta ghaddiet il-kirja lid-Delfini Dive-centre taht **il-pretiza** li l-kirja tad-dive centre kienet giet assenjata sabiex jigi assigurat introjtu ghall-kumpannija Aqua Oasis Ltd., u l-azzjoni li permezz taghha rrinunzjat ghall-kirja tad-dive centre, kienu azzjonijiet serjissimi u ta' pregudizzju kbir ghas-socjeta' intimata u ghar-rikorrenti.

Ghaldaqstant, filwaqt li ma jirrizultax mill-provi li hemm lok ghall-intavolar ta' proceduri gudizzjarji ta' natura kriminali, jista' jkun hemm lok li l-kumpannija Aqua Oasis Ltd., tintavola proceduri gudizzjarji ta' natura civili kontra l-intimata Dorte Rickert personalment ghal perjodu li jibda mid-data tar-Rizoluzzjoni tal-Bord tad-Diretturi – d-data li biha formalment l-operazzjoni tad-dive centre St Julian's Aquatic Sports Club ghaddiet ghand Delfini Dive-Centre u **cioe` l-1 ta' Marzu, 2008** - sad-data effettiva li fiha kellu jaghlaq il-kuntratt, u dan ghar-raguni li kien hemm ksur lampanti tad-dmirijiet ta' direttur ai termini ta' Artiklu 136A tal-Ligi dwar il-Kumpanniji u wkoll ta' Artiklu 143(1) ta' l-istess ligi u li jirrigwarda d-diretturi li jikkonkorru mal-kumpannija, liema agir illegali, abbuziv u frawdolenti arreka hsara u danni lil *Aqua Oasis Ltd.* Dak li ghad jrid deciz huwa jekk fic-cirkostanzi jkun aktar ekwu li l-Qorti tghaddi biex tikkwantifika d-danni addirittura, mifhum li l-kawza odjerna ilha pendententi ghal zmien konsiderevoli.

Ghal fini ta' kjarezza jigi precizat li meta giet itterminata l-kirja tad-dive centre l-intimata kienet ghadha tokkupa l-kariga ta' direttur ta' Aqua Oasis Ltd.

Irrizenjat minn direttur nhar is-26 ta' Jannar, 2010; l-kirja tad-dive centre temmitha nhar it-3 ta' Novembru, 2009; l-kuntratt originali tal-kera tad-dive centre kien jiskadi f'April 2012.

Il-Qorti qieset li d-danni li kellhom jigu stabbiliti mill-Perit Komputista kienu mill-1 t'April 2008 meta bl-azzjoni unika tal-intimata Rickert, is-socjeta' Aqua Oasis Limited giet zvestita minn *dive centre* a favur Delfin *dive centre* operata mill-istess Rickert.

Il-Perit komputista nominat jidher li sab diffikultajiet konsidervoli biex jaqdi l-inkarigu tieghu. Infatti jghid:

*The figures were obtained from the accounts presented to the Court. (JCF'3'). The accounts were not audited. However, no auditor could report on the accounts since no documentation except bank payments were presented. However, although the company was only able to operate limited accounting and internal control procedures, there are no practical audit techniques that would enable the auditor to determine the effects of the limitations of the said procedures. As a result. the evidence available to determine the accuracy of the company's sales and purchases was limited but it not acceptable. The differences in Sales. Exact advances and exceptional expenditure would have been discovered during the Audit.*

Wara li ppremetta li Richert kienet amministrat il-kumpanija b'manjiera pesimma u negligent, il-Perit gharaf bhala stat ta' fatt, li l-istess Richert kienet ben konsapevoli tal-fatt li ma kienitx kapaci tmexxi s-socjeta' u li Tabor, minkejja li kien ben konxju ta' dan, ma hax passi fil-hin propizju biex jissalvagwardja investment tieghu.

Il-Perit komputista stabilixxa li l-attur hallas €€116500 u mhux €€31449 kif jidher fuq l-accounts informali ghall-ahhar.

Minkejja d-difikultatijiet li semma il-perit komputista, inkus illi s-socjeta kien inkorriet telf sostanzjali, jidher li hu wasal ghall-istima ta' *goodwill* fuq is-somma €116500 wara li kkonsidera il-lokazzjoni tan-negozju – St George's Bay – u stabilixxa li l-intimata ikkontribwiet 50% tal-*goodwill* imhallas li hija ghalhekk kellha ghandha thallas is-somma ta' €58,250.

Il-Qorti rat u ezaminat l-Iskeda I u II (a fol 566 sa 568) prezentata mir-rikorrenti fejn l-attur qieghed jipretendi €70,748.21 bhala somma li huwa nvesta f'dan in-negozju skond Skeda I oltre s-somma ta' €78,560.82 bhala somma li giet eskluza mill-kontijiet tal-kumpanija intimata, jew approprijata mill-intimata Skeda II.

Din il-Qorti fliet bir-reqqa dawn l-akkonti u hija tal-fehma li mis-somma ta' €78,560.82 irid jitnaqqas is-sommom sostanzjali li s-socjeta' jew ahjar l-intimata rceviet mis-socjetajiet assiguratrici wara l-maltempata u insegwitu ta' diversi incidenti. Illi dawn komplessivament huma s-somma ta' €44,440 mhallsa wara l-maltempata – Vide (i) fi skeda II u s-somma ta' €8,358 mhallsa mis-socjeta' assiguratrici fuq il-vettura JBD 347. Dan qieghed jinghad **ghaliex dawn l-ammonti jirraprezentaw oggetti li inxtraw bl-ewwel somma tal-investment u cioe' (€70,748.21) u ghaldaqstant jekk jigu inkluzi ikun hemm double computing**. Meta jitnaqqsu dawn l-ammonti, jidher li l-ammont stabbilit mill-Perit Komputista ta' €116,500, huwa l-ammont ta' investment u tad-danni realment sofferti mir-rikorrenti.

Ghar-rigward tas-sitt talba ghar-rizarciment tad-danni da parti ta'l-intimata Dorte Rickert minhabba l-agir irresponsabbli, illegali, abbużiv u frawdolenti tagħha jrid jsir referenza għall Artiklu 402(3)(e) tal-Att dwar il-Kumpanniji li jghid:

*“Illi l-Artikolu 402(3)(f) tal-Kapitolu 386 tal-Ligijiet ta' Malta jistipula li f'kaz fejn din l-Onorabbli Qorti ssib li min jagħmel rikors taht l-Artikolu 402 ikun gustifikat, il-Qorti tista' tagħmel ordni sabiex, tipprovdi għall-hlas ta' kumpens minn dik il-persuna li tista' tkun instabet responsabbli mill-qorti għal telf jew danni li jkunu ggarbu minhabba att jew nuqqas li dwaru jkun sar ilment, lill-persuna li tkun garrbet dak it-telf jew danni”;*

Ir-rikorrenti jagħmel referenza għas-sentenza tal-Onorabbli Qorti tal-Appell fl-ismijiet Martin Bonello Cole v. Kenneth Cole (Cit Nru 214/93) tal-5 t'Ottubru 2011 fejn a bażi tal-liġi vigenti qabel l-introduzzjoni tal-Att Dwar il-Kumpanniji fl-1995, il-Qorti għarfet id-dritt tal-“azzjonista li jfittex għad-danni personalment Direttur ta'

*kumpannija minhabba xi att jew ommissjoni magħmula fl-eżerċizzju tal-kariga tiegħu, anke” minhabba l-fatt li azzjonista jista’ jsofri telf distint minn dak tal-kumpannija”;*

Illi proprju fil-każ in diżamina, ir-rikorrenti għamel investment sostanzjali fil-kumpannija filwaqt li l-intimata m’għamlet ebda kontribut finanzjarju irrispettivament mill-fatt li l-ishma tal-kumpannija huma nofs bin-nofs bejniethom. Jidher biċ-ċar li l-akbar tellief mill-hafna manuvri tal-intimata kien r-rikorrenti direttament u mhux il-kumpannija. Di fatti bl-introduzzjoni tal-Artikolu 402(3)(f) l-leġislatur proprju ried li f’dawn il-każijiet il-Qorti tirrikonoxxi mal-ewwel li d-dannu jkun gie soffert mill-azzjonista u tevita proċeduri legali inutili tramite l-kumpannija.

L-abbli **Professur Andrew Muscat** josserva li:

*“Article 402(3)(f) is widely drafted. The order can be made against any person found by the court to be responsible for the loss or damage suffered – such person could, depending on the circumstances, include the company itself or the majority shareholder of the controlling directors. An order for compensation can of course only be made against a person who is a party to the proceedings. It may be thought that this provision was not really necessary as the right to claim damages would arise in any case under general principles of civil law. The provision does however serve a useful purpose in that it unequivocally gives the complainant the right, in proceedings in which he seeks some other applicable remedy (for example, a court order requiring the company to do an act which it had omitted to do).”* Muscat Andrew, Principles of Maltese Company Law, Malta University Press, 2007, p.1008

Fil-każ in ezami il-Qorti tqis illi r-rikorrenti kien il-persuna li sofra minn telf konsiderevoli minhabba l-agir fuq indikat tal-intimata. Għalhekk il-Qorti tqis li huwa gust u ekwu illi l-intimata tigi ordnata tikkumpensa lir-rikorrenti nofs is-somma ta’ mija u sittax –il elf u hames mitt Ewro (€116,500) cioe ta’ tmienja u hamsin elf mitejn u hamsin Ewro ( €58,250) .

Ghal dawn il-mottivi l-Qorti taqta' u tiddeciedi billi tiddikjara illi jirrizulta ampjament li r-rikorrent u l-intimata tilfu l-fiducja f'xulxin u ghaldaqstant irrizultaw diffikultajiet kbar li ma jippermettux li dawn ikomplu jiehd u d-decizjonjiet dwar il-kumpannija Aqua Oasis Ltd.;

Illi l-intimata, apparti li ma talbet l-ebda permess biex tiftah negozju ghal rasha fl-istess linja ta' negozju tal-kumpannija Aqua Oasis Ltd., ghamlet uzu mill-apparat u l-premises, fost ohrajn, u uzurpat il-*goodwill* tal-kumpannija Aqua Oasis Ltd., ghall-ghanijiet u ghall-finijiet personali taghha;

Illi m'hemmx dubju li r-rekwiziti ghall-applikazzjoni ta' l-artikolu 402 jezistu u dan peress li l-agir li sehh kien ta' pregudizzju ghar-rikorrent bhala azzjonista;

Illi r-rikorrent qua azzjonista fl-Aqua Oasis Ltd., sofra pregudizzju minhabba l-agir ta' l-intimata fil-kumpannija li hu ghandu nteress fiha.

Ghalhekk il-Qorti taqta' u tiddeciedi billi :

Tastieni milli tiehu konjizzjoni tal-ewwel talba stante li din hija superfluwa minhabba li l-intimata rriżenjat minn direttur ta' l-Aqua Oasis Ltd.;

Tilqa it-tieni u t-tielet talba, u tordna li jinhatar direttur tal-fiducja tar-rikorrenti kif mitlub sabiex "*jirregola t-tmexxija ta' l-affarijiet tal-kumpannija fil-futur*" ai termini tal-Artiklu 402(3)(a), liema direttur huwa vestit bil-poteri ta' rappreżentanza ġuridika u legali tal-kumpannija; u tawtorizza li jsiru l-emendi kollha neċessarji fil-Memorandum u fl-Istatut tal-Kumpannija Aqua Oasis Ltd., u sabiex tali emendi jigu debitament registrati mar-Registratur tal-Kumpanniji skond il-ligi;

Tichad ir-raba u l-hames talba stante dak li jinghad ghar-rigward is-sitt talba;

Tilqa' s-sitt talba kif fuq intqal, ssib lil Dorte Rickert hatja u responsabbli ghad-danni ingenti sofferti mir-rikkorent minhabba l-agir irresponsabbli, illegali, abbusiv u frawdolenti taghha u dan mid-data tal-1 t'April 2008 u tillikwida d-danni hekk sofferti

**Rik. Nru. : 651/2008/JPG**

fl-ammont ta' tmienja u hamsin elf mitejn u hamsin Ewro (€58,250) u tikkundanna l-istess intimata Dorte Rickert thallas lir-rikorrenti s-somma hemm likwidata cioe' ta' tmienja u hamsin elf mitejn u hamsin Ewro (€58,250);

Tichad l-eccezzjonijiet tal-intimata fejn applikabbli.

L-ispejjez ghandhom jithallsu mill-intimata Rickert personalment kwantu ghal tlett kwarti u kwantu ghall-kwart mir-rikorrenti nomine.

**Moqrija.**

**Mhallef Jacqueline Padovani Grima LL.D. LL.M. (IMLI)**

**Lorraine Dalli**

**Deputat Registratur**