CORPORATE RE-ORGANISATION & LIQUIDATION ESSAYS

CML5036

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When a company is in financial distress, it is usually wound up and dissolved, resulting in a very long process in which not all the creditors may be paid off. Insolvency shifts the aim of the company, as when a company is solvent the main interest is that of the company and the shareholders' whilst when a company is insolvent, this all shifts to safeguard the creditors' interest and aims to protect and ensure that their debts are paid off. Instead of liquidation proceedings, the company may opt for recovery procedures which try to retrieve the company back into a viable concern, and hence avoiding the company from being wound up and dissolved. Article 329B cis the Article providing for the corporate recovery procedure. Article 329A of Cap. 386 establishes that if the directors of a company believe that it is unable to pay its debts or imminently likely to become unable to pay its debts, then the directors should take action and decide whether to opt for the Corporate Recovery Procedure in Article 329B.

Judge Joseph Zammit Mc Keon divides this procedure in 6 parts. Part 1, composed of sub-Article s 1, 2 and 3 states the conditions in which such a procedure is applied, and when the Court should accede to such application. Part 2 is composed of sub-Article 3 which lays down the effects of such a procedure. Part 3 is composed of sub-Article s 5, 6, 7, 10 & 11 which feature the method of appointment, removal and powers and duties of the special controller. Part 4 is composed of sub-Article s 8 and 9 which feature fraudulent and wrongful trading in the corporate recovery procedure. Part 5 features Article s 12 and 13, which list down when the application is acceded to and when it is not. Part 6 made up of sub-Article 14 which speaks about the liquidation process of the company when the application is not acceded to.

The company recovery procedure is initiated by a creditor, the company after passing an extraordinary resolution or by the director of a company by making a corporate recovery application, when the company is unable to pay its debts or imminently likely to become unable to pay its debts. In this case, the Court appoints a special controller who takes care of the company's management and administration for 4 months, which may be extended by permission of the Court. In the application, the facts and circumstances of the financial position of the company must be given, as well as the proposed plan for restricting. These details must all be given, and this is to ensure that due to the urgency of the matter, one must provide everything for the Court to decide and one would avoid the unnecessary length of time for all documents to be gathered.

The Court shall accede to the application or reject such. In the case whereby it accepts such an application, it must make sure that the company is unable to or imminently likely to become unable to pay its debts, as according to Article 214(5) of the Companies Act (cash flow test and balance sheet test). Additionally, it must also ensure that the procedure would help the company reach a viable position whether in whole or in part and that this procedure should be done for the best interest of the creditors, company itself and also its employees. This procedure can not take effect if there is a winding up order in place.

The Corporate Recovery Procedure does not allow, once the application is made or once it is in due course, the landlord of a commercial premise to the terminate the company's lease and any precautionary or executive acts or warrants are stayed. The special controller is the person appointed by the Court after the official receiver hands out a list of persons competent to act as such, and the Court must chose the person whose experience aligns with the matters of the case.

The special controller is paid from the assets of the company, depending on the financial position of the company. Also, the special controller has the power to remove a director, after consulting with the Court, but may not terminate the employment of any employee or else engage the company into any commitment longer than six months. Once the special controller is appointed, he replaces the role of the director of the company and any other official. The special controller may have this term extended by the Court and must act fairly and in the best interest of the creditors, company and employees.

The special controller must also convene creditors and members meetings, separately or together whereby the financial position of the company must be discussed as well as the prospective plan for recovery. The law in this procedure also envisages instances whereby there could be fraud during this procedure and any director who defrauds or acts with the intent to defraud is liable to a fine (multa) or up to 5 years imprisonment or both, as the Court deeds fit for the case. Wrongful trading is also envisaged whereby if a director acts with the knowledge that the company will not be able to pay its debts, then the director would have to make payments to the assets of the company. There is no liability if the director does everything in his stride to take action and safeguard the creditors interests.

The special controller than has the role to terminate the company recovery procedure, whereby two possible outcomes can exist. The law provides for an instance whereby upon the termination of the company recovery procedure, the company is still unable to pay its debts, and hence it is then would up by the Court. However, another outcome would be that upon the termination of the company recovery procedure the company is a viable concern and hence is able to pay its debts, making this procedure a successful one, whereby the very music desired aim is indeed reached.

The DQR case, a company dealing in crypto currencies dealt with the shareholder and director Kristian Haendel, whose company was in financial distress. The Court stated how this procedure is *"Twila u komplessa"*. The case concerned an application for Article 329B, whereby the Court was asked for the company to be placed under the company recovery procedure since the company is in financial distress. The Court noted how Kristian Haendel himself invested 2 million euros of his own money and also saw that the application was a very realistic plan on the way forward for the company and the procedure with which the creditors would be paid, and the route that the company was about to take to avoid liquidation proceedings.

The Court said that the financial situation *"m'hi xejn felici"* but noted how Haendel sought to not take the easy way out, and instead dissolve and wind up the company, whcih the Court said was very possible and realistic for him to do so. Instead, Haendel believed that it was only fair to not dissolve all of his hard earned work and also to "izomm il-kredibilta' mal-krediturі". The Court noted various jurists which stated that the Court has a difficult job in deciding whether the company should opt for this procedure or not.

The Court believed that the creditors of the company should want the company to opt for this procedure rather than witness the *"mewta tal-kumpanija"*, and risk not getting paid at all or risk not getting paid the full amount. The Court believed that Haendel's plan to recover was not a "fairytale" and indeed gave a realistic approach of the prospective plan was about to take. For this reason, the Court acceded to the Corporate Recovery Procedure, whereby it placed the company under this recovery procedure, and appointed auditor Tonio Fenech as a special controller of the company and

allocated a time limit for him to render account of the company, and allocated 4 months until which the company recovers.

Sakaras Holdings Limited vs. X is another case whereby the Company Recovery Procedure was not acceded to by the Courts as the company, which was in financial distress sought recourse in this procedure. However, the Court felt that the plan for this company was merely *"pjan reattiv u mhux prospettiv"* and hence the recovery plan was only made for the purpose of these procedures and not because the company actually wanted to or had reasonable prospects to actually recover. The Court also believed that the plan was not realistic and baseless and hence the Court rejected the application for such action.

Essays related to Fraudulent and Wrongful trading

Upon a company facing insolvency, the aims of the company shift and whereas before, the members of the company's interest were a priority, the creditors interest become the main focus. Brady vs. Brady stated this, accompanied by the case of Russell Kinsela vs. Kinsela, who stated that when the company is insolvent or doubtfully solvent, the main aims of the company shift into protecting the creditors interest. It may be the case that there is wrongful or fraudulent trading going on, and action must be taken immediately in order not to increase the creditors's risk. Article 329A of the Companies Act obliges the directors of a company to hold a meeting within 30 days of knowing that the company is or. might become unlikely to pay its debts. This is to ensure that the directors duties are honoured and the creditors' interests are duly safeguarded.

Article 315(1) of the Companies Act establishes fraudulent trading that when during the winding up of a company, there is the intent to defraud credits or there is any other fraudulent purpose going on, the creditors, official receiver or the liquidator may file an application and if the person concerned is found liable, the said person is personally liable without any limitation. This is similarly drafted in UK law in section 213 of the Insolvency Act of 1986, and is referred to as the civil sanction. In Malta, there is no separate section for the criminal action which in fact is in sub-2 of Article 315, which states that anyone who is found liable ini sub-1 is to either get a fine *multa* of not more than 232,937.34 euros or an imprisonment term of not more than 5 years, or both, as the Court deems fit. This section in UK law is section 458 of the Companies Act 2006 and is referred to as the criminal action.

When it comes to fraudulent trading Article 307 of the Companies Act which states that if 12 months before the date of dissolution the official of the company has concealed any assets of the company is liable for the same penalty as mentioned prior in Article 315(2) of the Companies Act. The same applies in Article 308 of the Companies Act, whereby the same penalty is to be applied when during the winding up, any official of the company conceals any assets of the company or any debts to or from the company. This further safeguards the creditors interests.

Farrar holds that there is the defrauding of creditors when there is actual dishonesty and real moral blame. In fact in R v. Grantham, decided by the Maltese Courts, the Court stated that there is fraud when one is knowingly putting another's economic state at peril, knowingly doing it to defraud the said creditor. Interestingly in G. Molton Ltd vs Dr. Raymond Borg, the plaintiff wanted the Court to establish that the defendant is guilty for fraudulent trading and hence pierce the corporate veil. The Court in this case stated that since there was no winding up of the company and since it had not been dissolved and the Plaintiff also did not demand such from the Court, the defendant could not be liable for fraudulent trading.

A Landmark case is the Priceclub case, Dr. Andrew Borg Cardona vs. Wallace Fino, Victor Zammit et. whereby the directors of the company defrauded the creditors and were personally liable for fraudulent trading. In this case the Court found that the mismanagement and the undercapitalisation were the two main elements which led for the company to become insolvent. Principally because the directors were using the creditors' money instead of investing their own as they knew that the company was not in a good financial position. They acted fraudulently and knowingly put the creditors' economic interest at great risk. In this case, the Court pierced the corporate veil to establish them as personally liable. The Court also quoted *"il-krediturі bla ma jafu saru l-finanzjaturi tal-kumpanija"*.

In Maria Elena Perici Calascione's thesis, she stated that the company structure was not illegal but what was constituted after certainly was illegal with the complete mismanagement and the undercapitalisation. Butterworth stated that the corporate veil should be pierced when the company is a mere facade. The Court declared the directors as guilty for fraudulent trading and they were liable without any limitation, as per Article 315 of the Companies Act.

In wrongful trading, Article 316 of the Companies Act, the directors only can be found liable, as opposed to fraudulent trading whereby anyone can be found liable. An application for wrongful trading can also only be submitted by the liquidator of the company. As Article 316 provides, there is wrongful trading where the directors knew or ought to have known that the company would not have any reasonable prospect of avoiding insolvency.

If such is liable they may have to reimburse back and make payments to the assets of the company. The sub-Article s of Article 316 continue on to state that the directors however are not liable if they took every step in their stride to avoid the risk for the company itself and for the interest of creditors, but the company still suffered insolvency. Also, the law defined in sub Article 5 of Article 316 that anyone can be deemed a director if the same director gave out instructions and such were followed by the others.

The Hydrodam Corby Ltd. case established the 4 main principles of when a shadow director can be found liable for wrongful trading, and these are that one must establish who the *de jure* and who the de factor directors are, the shadow director must have given instructions to the other directors, the other directors acted upon and followed such instructions, and this must have been done habitually. In the New South Wales, Apple Computers case, Apple was not found to be a shadow director, unlike what the liquidators accused Apple of.

The Court said that Apple did not have control over the directors and was only a mere supplier, and not a shadow director, and hence was not found liable for wrongful trading. In Andrea Micallef's thesis, he stated that even an omission, meaning that the director did not do anything to safeguard his company's interest is to be constituted as an omission. Cork stated that upon the directors having an idea that the company is not in a good financial position, professional advice should be referred to as to what the next move should be.

It is important to note that if one is found guilty of fraudulent trading, one is automatically also guilty of wrongful trading as the onus of proof is lower. Hence, the directors in the Priceclub case were indeed also found guilty of wrongful trading. The wrongful and fraudulent trading principles are important in having the directors always weary of their moves and to always remember to act in good faith, as if not, hefty repercussion ensue.

Essays related to Pari Passu

When a company is facing insolvency, its creditors would be somewhat hesitant to make sure that they are paid what they are owed. At law, secured and unsecured creditors exist. Secured creditors are lawful causes of preferences whereby Dr. Tiziana Filletti in her Thesis featured lawful causes of preferences which arise from the civil code, two of which are privileges and hypotechs, whilst special lawful causes of preferences arise from various laws which include the Employment and Industrial Relations Act, Social Security Act, Value Added Tax Act and the Income Tax Act.

Insolvency proceedings are irreversible with the main consequence being the end of the company's life. That is why a robust legal system is needed in order to ensure that companies are wound up and dissolved in a manner whereby everyone's interest is duly safeguarded. The liquidators role in insolvency proceedings is to rank creditors accordingly after realising the company's assets and any remaining assets should be given back to the members of the company.

The law creates the 'pari passu' notion, whereby unsecured creditors are safeguarded as after credit is paid to the secured creditors, the remaining assets are distributed to the unsecured creditors pro rata, according to their credit due. Professor Vanessa Finch, quoted by Dr. Tiziana Filletti in her thesis, states that the pari passu notion is disrupted by lawful causes of preference which rank before. However she believes that the notion is a fair, transparent and efficient one. Judge Paolo Debono also considers that this pari passu notion gives an equal right to every creditor who is unsecured, as he describes as an *"un uguale diritto"*.

Roy Goode also believes that this notion is fundamental and all pervasive in character. Colin Gwyer and Associates Limited vs. London Wharf stated that *"no one creditor should steal on his competitors"*, by that evoking the judicial shielding principle which is outlined in Article s 220, 222 and 224 of our Companies Act, which enables anyone to bring Court cases relating to the company whilst winding up proceedings are in force, and this is only allowed by leave of Court. The case of Salvatore Bondin vs. Paul Vella also enforces this notion that no creditors should be preferred as this would be unfair on the other creditors and winding up proceedings take a mandatory collective nature whereby the action of one creditor is done for the benefit of the other creditors.

Fidelis Oditah stated the notion of *"par condition creditorum"* translating from Latin that all creditors stand on an equal footing. The anti-depravation rule, duly outlined in Dr. Tiziana Filletti's thesis states that no one person can agree before insolvency proceedings start that an asset of the company is to be taken away and given to one certain creditor. In fact, Dr. Filletti compares it as a pie which should not be reduced in size for the sake of one creditor, whilst the pari passu principle ensures that no one person gets more than his fair share of the pie.

Despite many favouring the notion, many are not so fond of this pari passu principle and have expressed their dissatisfaction. Mokal, who expressed great dissatisfaction with this notion, stated that the pari passu notion is in fact a myth and instead of being a fundamental asset distribution system, it is the antithesis of this. In fact, he said that it is a low expensive way of going round a problem whereby creditors get little to nothing from what they are originally owed. Lawyer LoPucki stated that creditors are uniformed, putting them in a disadvantaged position as had they known the true financial position of the company, they would have acted differently. Ho also states that creditors are "imprisoned by the pari passu myth" expressing great dissatisfaction. Dalhusein also stated his criticism as this notion only kicks in once the preferential debts are paid.

Essay Layout

Insolvency proceedings - no way back, irreversible and brig the end of the company
Robust sound legal system
Liquidators role is to rank creditors accordingly and distribute assets fairly

Thesis by Dr. Tiziana Filletti
Vanessa finch - pro rata, disrupted by preferential debts - fair, efficient and transparent
Judge Paolo Debono - "un uguale diritto" + unfairly prejudiced
Roy Goode - fundamental and all pervasive in character
Keay and Walton - pro rata unless preferntial debts which are ranked before
Colin Gwyer Associates Limited vs London Wharf - steal a march on his competitors
Salvatore Bondin vs Paul Vella - no creditos should be preferred
Fidelis Otah - par condicio creditorum
Anti-depravation rule - freedom to contract

Criticism - set off
MoKal - myth - not the pillar of asset distribution but the antithesis to it
Lawyer LoPucki - uninformed
Ho - imprisoned by the pari passu myth
Dalhusein - only kicks in one the preferred debts are paid

Article 287
Price club case ranking
Dr Edward Gatt vs. TRM limited no ground reason
Emanuel Azzopardi vs MV Maltese Falcon - privilege
Panta Contracting limited vs DA Holdings Limited
NIBC bank

Essays related to Article 214

When a company is facing financial problems, as per Article 329A, the directors of the company must take the necessary action within 30 days of becoming aware of such matter and may decide upon the next step whether to proceed with winding up of the company. If they do so, the company can be dissolved and wound up either voluntarily or by the Court, just as Article 214 of the Companies Act provides. In a voluntary winding up, the company can be dissolved either through a members voluntary winding up, or by a creditors voluntary winding up.

The company can be dissolved by a creditors winding up if it is a state of insolvency and therefore does not have a declaration of solvency. If it does have a declaration of solvency, then it is dissolved and wound up through a members voluntary winding up, as provided in Article 268 sub-Article 5 which provides the difference between the two modes of winding up. In a compulsory winding up, or as Professor Muscat prefers, a winding up by the Court, the Court upon the application of any creditor, director or the company itself can be wound up.

Creditors Voluntary Winding Up

In a creditors voluntary winning up, although the name implies 'creditors' they do not dissolve and wound up the company by themselves. Instead this action can be brought by two instances. Either by an extraordinary resolution by the company after the creditors meeting has been convened after the general meeting after the dissolution and winding up notion has been passed, and hence the action is brought about by an organ of the company, as per Article 279 of the Companies Act.

Additionally, the action can also be brought about through Article 272 of the Companies Act whereby the members voluntary winning up turns into a creditors voluntary winding up upon the realisation by the liquidator that the company will not be able to pay its debts within 1 year, as stated in the declaration of solvency.

Upon having a creditors winding up, established and in place, it is then important to note that the creditors may form a liquidation committee as established in Article 280 of the Companies Act, known as a liquidation committee whereby in this committee there may be up to 5 creditors and 5 contributories of the company. In this committee meetings are held if the majority is present and they help the liquidator in managing the affairs of the company in the winding up process.

The committee is made up of not only creditors of the company in order to ensure fairness, as it would create an imbalance with regards to the contributories' interest. It is important to note that during a creditors voluntary winding up, Article 292 of the Companies Act established that any question during the winding up may be referred to the Court, in order to establish such a question and this can be made by the liquidator, member or creditor of the company.

Important to note that the liquidator is chosen by the creditors and the directors may have already chose the liquidator when passing the resolution to dissolve and wind up the company. If both have chosen a different liquidator, then the one chosen by the creditors prevails, in obviously securing their interests at law. If the creditors have not chosen, then the one chosen by the company and if both the company and the creditors have not chosen, then the director shall make an application in Court and the liquidators appointment is made by the Court.

The liquidator's fees are taken out of the assets of the company in priority to the other rankings at law, as provided for in Article 293 of the Companies Act. Article 294 establishes that if the creditors feel that they would be disadvantaged by a creditors voluntary winding up, they may apply to the Court to turn this into a winding up by the Court. However the creditors interest must be prejudiced or likely to be prejudiced for such to arise, as provided for in the case of Re Dawson.

Members Voluntary Winding Up

In a members voluntary winding up a declaration of solvency is made, as per Article 268 sub-Article 5. In this declaration of solvency, the directors of the company must state that the company is solvent, so much so that it will pay all debts within 12 months from the date of dissolution. In this declaration of solvency there must be a statement of the assets and liabilities not earlier than 3 months from the date of declaration.

Article 268 of the Companies Act provides for this declaration which must be made in good faith, if not, as Article 4 establishes, there are repercussions. Sub-Article 4 states that if a director draws up the declaration of solvency, declaring that the company will pay off all debts within 12 months, but knows that this will not be possible is liable to a fine *multa* of around 40,000 euros as well as a term of imprisonment for not more than 3 years. This ensures that directors act truthfully and honestly in such a declaration. Article 267 of the Companies Act states that the company ceases its business from date of dissolution.

Article 270 of the Companies Act provides that the liquidator shall be appointed by an extraordinary resolution of the company who shall nominate a liquidator themselves. The liquidator is to be paid from the assets of the company, in priority to all other claims, as per Article 293 of the Companies Act. If the liquidator suspects that the company will not be able to pay all of its debts within the 12 months as stated in the declaration of solvency, the procedure shall transform itself to a creditors winding up, to safeguard the interest of creditors who run the risk to not receive what they are owed.

Article 273 of the Companies Act states that if the liquidator takes more than 12 months to wind up and dissolve the company, he should give a statement of his work and financial position of the company, as well as what has been done so far in the winding up of the company. The liquidator has the powers and functions as set out in Article 288, which is primarily to lay out all assets and liabilities, tank the creditors and pay them what they are owed, with any remainder going to the members of the company.

Once the company is all wound up, there is period of around 3 months where anyone can rebut the company being struck off the Reigstrar. If no actions of rebuttal exist, then the company is struck off the Registrar and ceases from existing, as per Article 275 of the Companies Act .

Case: Voluntary Winding Up

A case whereby a voluntary winding up was in place was the case of Dr. George Said Nomine vs. Registratur tal-Kumpaniji. In this case, the plaintiff was a creditor of Profit Shipping Limited, which was struck off the registrar even though there were pending claims.

The plaintiff through Article 300B of the Companies Act wants to have the company exist once again in order for the plaintiff to be paid what it is owed. The Court stated that this action concerns *"ir-ravvivament tal-kumpanija"* and ordered that the name of the company exist once again and also quoted Profs Muscat who stated that the liquidator's role is to distribute to the creditors what they are owed and if the liquidator through gross negligence or imprudence leaves someone unpaid, as was the case in this case, he is deemed to have acted unlawfully.

In fact in this case, another liquidator was appointed as the last one had died, and also noted out how the plaintiff could have rebutted the striking off of the company when this was in force, which would have avoided this Court case in the first place had he done that.

Court Winding Up

In a Court winding up the creditor, director or company itself can apply to the Court to have the company dissolved and wound up by such Court. This is whereby most litigation arises as it is considered as the most hostile form of winding up. It is the most expensive and lengthy with a provisional administrator which may be appointed and the liquidator who acts under the power of the Court.

Of course over here, no declaration of solvency is made and there are more protection measures to the creditors concerned. Here no organ of the company agreed to come to dissolve and wind up, hence why many call it a 'compulsory winding up' which is not very much favoured by Profs. Muscat. Article 214 of the Companies Act provides a long list of instances whereby the company may be dissolved (Article 214(2a)) and another set of instances whereby the company shall be dissolved (Article 214(2b)).

Causes for dissolution

Article 214(2) provides instances which create lawful causes for a company to be wound up. Article 214(2a) provides that the company may be dissolved if (i) its business is suspended for an uninterrupted period of 24 months or if in (ii) the company is unable to pay its debts. The Court on the other hand should dissolve a company if; its members are reduced below 2 and have been so for more than 6 months, if the number of directors is reduced below the minim for which the law prescribes for a period of 6 months or more, if there are grounds of sufficient gravity to warrant the company's dissolution and if the term for the company's duration expires from the M&A or if on the occurrence of an event the company is to be dissolved and such event occurred.

Grounds of sufficient gravity

Farrar categorises five main grounds of sufficient gravity to warrant dissolution and consequential winding up. These are when there is Deadlock, Loss of substratum, Lack of probity, fraud and mismanagement, Partnership analogy and Minority Oppression. These are the main types for which any member, director, or creditor of the company may apply to the Court to have the company dissolved and wound up.

In a deadlock scenario, the members and directors of the company are not agreeing to the extent that the company's affairs can not continue to be managed, as if the voting powers in the board level and the general meetings is divided between two opposing parties who are constantly not agreeing among themselves, it is always the best route forward to have the company dissolved and wound up. A case whereby deadlock was in effect was the case of Coleiro vs. Mifsud, whereby in this case, the parties were two equal shareholders and also directors of the company Tower Court Limited. In this case the parties were not agreeing and Coleiro wanted to have the company dissolved and wound up whilst Mifsud did not. The Court decided that the best way forward was to dissolve and wind up due to grounds of sufficient gravity.

Another case was the case of Emanuel Bezzina vs. Walter Bezzina. In this case, the business was run by two brothers and when one of them got sick, his son replaced him. The parties in this case were not agreeing to the extent that the employees wages were not being given out and there was a total disagreement regarding the affairs of the company. The Court, just like in Coleiro vs. Mifsud decided to dissolve and wind up the company as there were indeed grounds of sufficient gravity to warrant dissolution.

Another ground of sufficient gravity is loss of substratum. In this case there is the option to have the company dissolved if the company's main object clause, as to why the company was created can not be configured or else it has been extinguished. Nowadays, it rarely occurs that the company's object clause is extinguished or can not be recognise due to a wide interpretation being drafted in the M & A. In Zammit Tabona vs. Zammit Tabone, the shareholders could not decide what the object of the company was and there was total disagreement and chaos as to the main object of the company. Due to this the Court decided to have the company wound up.

Similarly, in Maurice Camilleri vs. Fredrick Frendo the Court also decided to wind up the company after the object of the company was to buy a ship and sell it. Once this was done, the plaintiff wanted his share, but the others wanted to instead re-invest the money. However, the Court quoting

the Gower principle said that since the object of the company was exhausted, now the company shall be dissolved and wound up.

Third ground listed by Farrar is Lack of Probity, Fraud and Mismanagement. In this ground, one can file an action where there is lack of transperacy with the management of the business or else there are complete mismanagement of the business' affairs or even fraud. In the case of Maurice Camilleri vs. Fredrick Frendo, the Court said that since the plaintiff was asking for a rendering of account of the money of the company, and the others were not providing them to him, there was a ground of sufficient gravity to indeed warrant a dissolution.

The fourth ground is partnership analogy, or as Profs Muscat referred to it as 'exclusion from management'. This is perfectly evidently in the case of Ibrahimi vs. Westbourne Galleries. In this case, Mr. Ibrahimi and Mr. Nazar were equal shareholders as well as directors of a rug company. Business was going great until Mr.Nazar's son joined the company with a shareholding of his own, and him and his father voted out Mr.Ibrahimi, excluding him from the business which he owned himself. The House of Lords in this judgement stated that it would be unfair if the company would not be dissolved and it is a severe enough reason to warrant such dissolution.

In the fifth ground, minority oppression can be instituted by a minority member of the company who feels that the business of the company, or an act or omission of the same has caused great prejudice or is likely to cause such that the company should be dissolved and wound up. In the Salvino Testaferrata Moroni Viani case, the Court decided that there was no minority oppression to grant the dissolution and winding up of the company.

Whilst Farrar identified five grounds of sufficient gravity, Profs Muscat identifies six grounds; five of which are exactly identical to Farrar, and an additional ground which is an umbrella provision for any other case which may fall within this ground. Additionally, Profs Muscat noted how these grounds, one can institute an action under two or more different grounds and is not limited to choose a specific ground only. It is noted how there is no definition as to what constitutes a ground of sufficient gravity, and this might be done in order to let the Court give a wide interpretation of such a case and not be so restricted and rigid in its approach. Gower expressed how upon having a list of what constitutes a ground of sufficient gravity in the law might aid in having better identification of these principles, however this was all done so as to give a wide interpretation of such a serious ground, as stated in Emanuel Bezzina vs. Walter Bezzina.

Inability to pay debts

One of the grounds whereby a company may be dissolved and wound up is where the company is unable to pay its debts. In this scenario, the Court links this ground for dissolution with tests of insolvency which are provided for in Article 214(5) of the Companies Act. In this sub-Article the law mentions two tests which the Court considered as to whether the company is indeed deemed to be declared as unable to pay its debts and hence it can move forward with its dissolution and consequential winding up. The two tests are the cash flow test in Article 214(5a) and the balance sheet test in Article 214 (5b).

The cash flow test is taken into consideration by reviewing whether the company has not paid within 24 weeks of an executive title coming into force against such company. The law allows the 24 weeks as a breathing space for the company to have sufficient time to make payments. However, if upon the passing of such 24 weeks the company still has not paid, then it is deemed to be unable to pay its debts according to the cash flow test. The balance sheet test is provided for in Article 214(5b) and it provides that if the company, by looking at its balance sheet and seeing the contingent and prospective liabilities that it has. If these are not likely to be paid up, the company is deemed to be unable to pay its debts.

If the Court manages to prove both tests, then it is even clearer for the Court to establish that the company is indeed insolvent. In the case of Panta Contracting Limited vs DA Holdings limited, the plaintiff wanted to establish that the company is unable to pay its debts as per Article 214(2)(a)(ii), referring to Article 214(5), in order to establish whether the company is solvent or not. In this case, the cash flow text was excluded as there were no executive titles present. However, upon the balance sheet test, there was sufficient grounds to prove this.

Quoting Boyle and Bird's Law, which also mentions these two tests, with direct reference as to the balance sheet test, which is similar to, but not identical to section 130(2) of their Insolvency Act, of 1986. The Court quoted Roy Goode, who established that the mere fact that there are more liabilities than assets does not automatically mean that the company is unable to pay its debts, but what must be established upon looking at the balance sheet of the company is that there is an element of a point of no return, and the company's financial position will not get better. Goode continued by defining what prospective liabilities are, and defined them as being an unmatured liability which will definitely ripen into a debt with time, and hence it is inevitable and must be considered as a debt.

The Court in this case noted that the income coming in is being used to pay off the rent and utility bills, and it said that this is only *"qatra fl-ocejan"* when considering the substantial amount of debts which the company has amassed. The Court therefore established that the company is unable to pay its debts as per Article 214(2)(a)(ii) and as according to 214(5b). The Court also ordered its dissolution and winding up. The Court appointed a liquidator Dr. Richard Galea Debono to take care of the liquidation of the company.

Similarly, in Kenneth Xuereb vs. Webster Company Limited, the plaintiff instituted an action to dissolve and wind up the company through Article 214(1)(a) and 214(2)(a)(ii). The Court said that the plaintiff does not have *locus standi* under 214(1)(a), whereby an extraordinary resolution of the company must be passed in order for the company to be wound up, and this certainly was not present.

However, the Court said that the plaintiff did have *locus standi* for 214(2)(a)(ii), which must be accompanied by Article 214(5) in order to establish whether the company is insolvent. The Court had to do both tests, and the company which did not have executive orders against it, failed the cash flow test, but succeeded in the balance sheet test.

The Court, quoting Roy Goode to prove that the company is indeed unable to pay its debts through the balance sheet tests, states the same as for the above mentioned case. It came to the conclusion to have the company dissolved and wound up through 214(2)(a)(ii), having proved Article 214(5b). The Court in this case said that the financial position of the company is not a healthy one and is *"sprovvista mill-assi"* and that the company *"illum giet fix-xejn"*.