

# A RECENT CASE EXPLORES THE NOTION OF FRAUDULENT TRADING

ANNUAL COMPANY LAW  
CONFERENCE 22-11-2023  
Dr. Antoine Naudi

NAUDI MIZZI  
& ASSOCIATES  
ADVOCATES

European Law Firm®  
★★★★★★★★★★★★



# GENERAL COMMENTS ON FRAUDULENT TRADING

- Fraudulent Trading introduced into Maltese law in 1995.
- Modelled on provisions of Sections 213 & 214 of the UK Insolvency Act, 1986 but with wider applicability.
- Aimed at safeguarding creditors in the course of a winding up of a company.
- It is one of the “statutory inroads” aimed at piercing the corporate veil of a company.





# DEFINITION OF FRAUDULENT TRADING

## ARTICLE 315 (1) - COMPANIES ACT, 1995

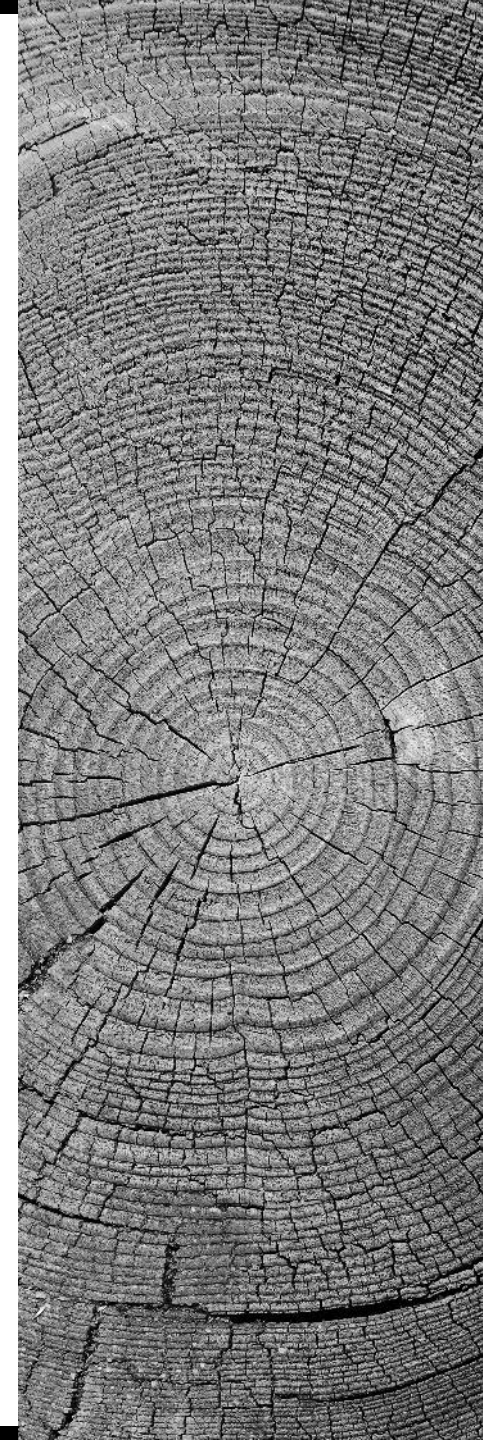
“If in the course of the winding up of a company, whether by the court or voluntarily, it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court on the application of the official receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid be personally responsible, without any limitation of liability for all or any of the debts or other liabilities of the company as the court may direct.”

ARTICLE 315 (2) - additionally adds criminal sanctions to any person who was knowingly a party to the fraudulent activity which sanctions can be a fine of up to €232,937, imprisonment up to five (5) years or both.



# SOME CONSIDERATIONS ON FRAUDULENT TRADING

- Can only be commenced once a company has commenced winding up.
- Action can be brought by the liquidator, official receiver, creditor or any contributory.
- The intention to defraud creditors or the carrying out business with a fraudulent purpose needs to be proved.
- Action is very wide in scope and can be brought against any person who was knowingly a party to the fraudulent transaction.
- There is personal liability without limitation at the court's discretion.





# LIMITATIONS WITH FRAUDULENT TRADING

- It can only be initiated once a company has already commenced winding up proceedings. A court will otherwise reject the claim. [Vide:- Michele Peresso Limited (C-6469) vs John Sammut et. - Court of Appeal: Application No: 23/20 decided on 31/08/2021]
- An action for fraudulent trading requires proof of the criminal intent and must thus be proven beyond reasonable doubt.
- This is often problematic and is what led the Cork Committee in the UK to introduce the notion of wrongful trading also found in our Companies Act in Section 316 wherein the standard of proof based on a balance of probability often suffices.



## LOCAL CASE LAW ON FRAUDULENT TRADING

- Dr. Andrew Borg Cardona noe. Vs Victor Zammit et. [Court of Appeal: Application No: 27/2003 decided on 14/05/2010];
- Albert Mizzi noe. Vs Noel Agius et. [1<sup>st</sup> Hall Civil Court: Application No: 140/2009 JZM decided on 07/04/2011];
- Electronic Products Limited vs Emanuel Micallef et. [Court of Appeal: Application No: 29/2002 decided on 25/10/2013];
- Bowood Constructions Limited vs Greta Bugeja et. [1<sup>st</sup> Hall Civil Court: Application No: 199/10 JZM decided on 31/01/2017];
- Catherine Buhagiar et. vs Claudio Caruana et. [Court of Appeal: Application No: 335/2017 decided on 12/07/2023].



**IMNARA LIMITED ET. VS  
RONALD BORG ET.**

**COURT OF APPEAL  
APPLICATION NO: 357/2012  
DECIDED ON 31/05/2023**



# IMNARA LIMITED ET. VS RONALD BORG ET.

## PARTIES INVOLVED:

1. Gelati Riviera Ltd – manufacturer of ice cream & related products
2. Imnara Limited – supplier of raw materials used in the production of ice-cream
3. J&A Bonnici (1923) Limited – supplier of packaging materials
4. J&A Bonnici Limited – supplier of packaging materials
5. Ronald Borg & Carmel Zammit – directors of Gelati Riviera Ltd
6. Raymond Zammit – shareholder of Gelati Riviera Ltd





# IMNARA LIMITED ET. VS RONALD BORG ET.

## WHAT LED TO THIS CASE:

### J&A Bonnici (1923) Ltd

- Owed €23,096.72
- Filed Judicial letter 166A – 16/02/2009
- Became Executive on 02/04/2009
- Followed by Garnishee Order on 11/05/2009

Gelati Riviera  
Limited

### Imnara Ltd

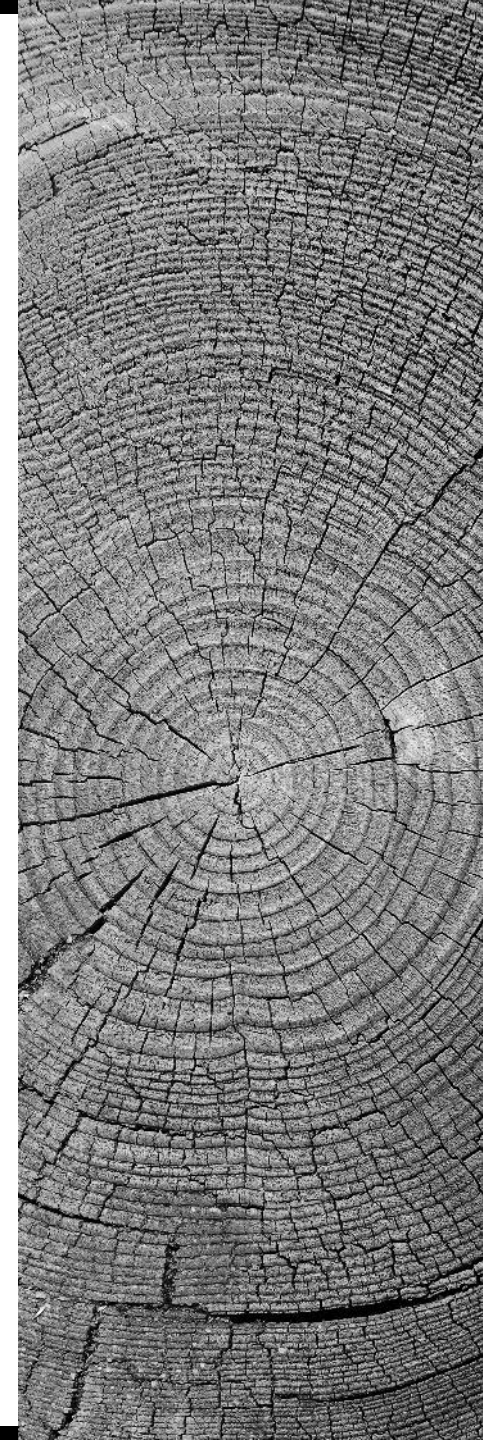
- Owed €37,225.93
- Court judgment on 21/10/2008
- Followed by Garnishee Order on 22/01/2009

### J&A Bonnici Ltd

- Owed €4,851.77
- Filed Judicial letter 166A – 16/02/2009
- Became Executive on 02/04/2009
- Followed by Garnishee Order on 11/05/2009

## IMNARA LIMITED ET. VS RONALD BORG ET.

1. Application no: 1022/10 JZM filed by the creditors on 11/10/2010 to place Gelati Riviera Ltd into liquidation. Decided on 14/07/2011.
2. Court noted that:
  - a. 24 weeks had elapsed from the enforcement of executive titles [Article 214 (5)(a) – Companies Act];
  - b. Company was insolvent and no attempt was made to repay these three creditors;
  - c. Company was not operating and there was a very remote possibility of repayment;
  - d. Ordered the liquidation of the company;
  - e. Appointed the Official Receiver as liquidator of Gelati Riviera Ltd.





# IMNARA LIMITED ET. VS RONALD BORG ET.

1. Application 357/2012 SM filed on 03/04/2012 against Ronald Borg, Carmel Zammit & Raymond Zammit
  
2. Claimed that:-
  - a. The company was in liquidation & insolvent;
  - b. The directors knew that the insolvency was inevitable when they ordered & bought products from the creditors;
  - c. The company failed to submit audited accounts and/or filed accounts late;
  - d. After stopping operations, all the machinery, equipment & assets in the factory were sold on 18/02/2008 to a third party to their detriment;
  - e. Defendants were knowingly parties to carrying on business in a fraudulent manner.



# IMNARA LIMITED ET. VS RONALD BORG ET.

Very simple defence was filed:-

- a. That one of the defendants Raymond Zammit was not a company director and not involved in the day to day business of the company;
- b. That there was no evidence of fraudulent trading in the actions undertaken by the defendants.

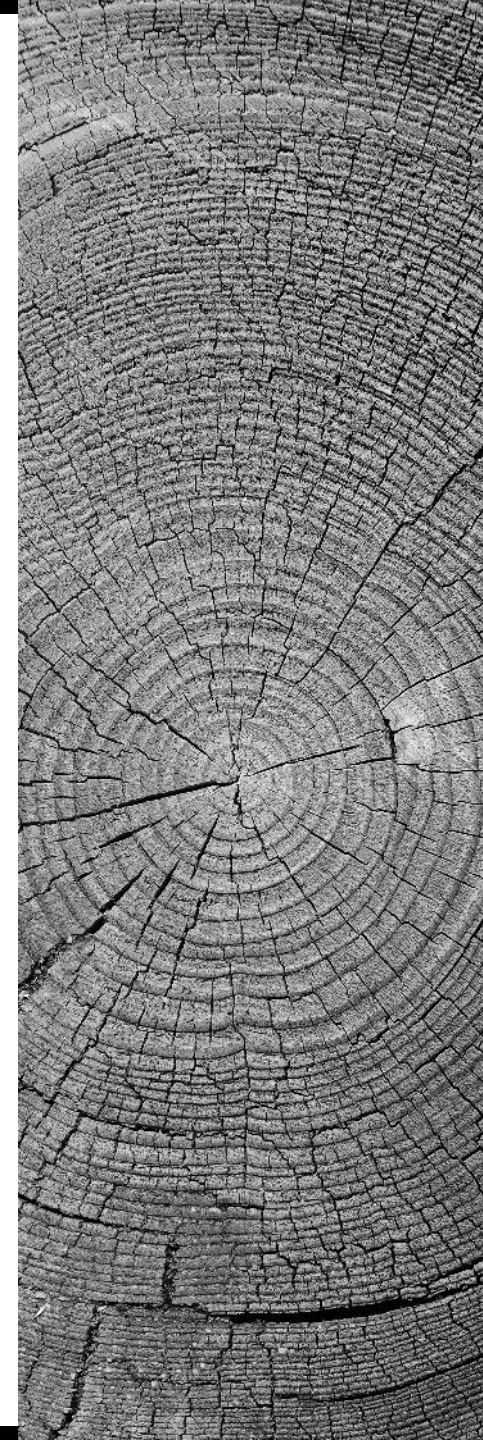




# IMNARA LIMITED ET. VS RONALD BORG ET.

## BRIEF FACTS WHICH EMERGED IN THE CASE (1):

1. Business operations were seasonal. Orders made in advance.
2. Directors used to meet at the end of the season with their auditor to assess performance.
3. In 2006, company experienced a small loss & negative cash flow but nothing alarming & proceeded to place an order for summer 2007.
4. End of summer 2007, auditor advised to stop trading & seek legal advice.
5. Engaged services of a well known lawyer specialising in company law.



# IMNARA LIMITED ET. VS RONALD BORG ET.

## BRIEF FACTS WHICH EMERGED IN THE CASE (2):

6. Stopped operating and all funds administered via lawyer's clients' account.
7. Found interested 3<sup>rd</sup> party ready to acquire machinery & assets at a very good market price – contract signed.
8. Creditors paid according to ranking.
9. Directors / shareholders of Gelati Riviera Ltd did not receive any income from the sale.





# IMNARA LIMITED ET. VS RONALD BORG ET.

JUDGEMENT BY 1<sup>ST</sup> HALL CIVIL COURT ON 15/03/2018

“21. Illi gialadarba jirrizulta li kien palezi li l-obbligu tal-pagament ghall-merkanzija ordnata u mixtrija mill-intimati ma kienx ser jigi onorat stante li l-finanzi tas-socjeta` Gelati Riviera Limited kienu fin-negattiv, allura ghandu jkun pacifiku li b’hekk is-socjeta` de quo kienet qed titmexxa b’mod li tiddefrawda l-kredituri taghha;

22. Illi mill-kumpless tal-provi prodotti in atti jirrizulta li l-agir tal-intimati kien tali li jerreka hsara lill-kredituri tas-socjeta` rikorrenti;

23. Illi l-fatt li l-intimati komplew jinnegozjaw f’sitwazzjoni li huma kienu jafu li ma setghux jonoraw l-obbligi minnhom assunti jammonta ghall-kummerc qarrieqi ghad-dannu tas-socjetajiet rikorrenti;

24. Illi di piu`, biex ikomplu jevadu l-possibilita` li jaghmlu tajjeb ghad-djun li akkumulaw bl-assi li kellhom, ittrasferew l-istess assi, komposti fl-impjant u makkinarju, lil socjeta` ohra u dan, anke minghajr ma informaw lill-kredituri taghhom; “

# IMNARA LIMITED ET. VS RONALD BORG ET.

JUDGEMENT BY 1<sup>ST</sup> HALL CIVIL COURT ON 15/03/2018

“27.1. Takkolji preliminarjament l-ewwel risposta tal-intimati, tiddikjara li ma tezisti l-ebda relazzjoni guridika bejn ir-rikorrenti u l-intimat Raymond Zammit, u konsegwentement, tillibera lill-istess intimat Raymond Zammit mill-osservanza tal-gudizzju;

27.2. Illi mill-bqija takkolji t-talbiet kollha tas-socjetajiet rikorrenti;

27.3. Tirrespingi r-risposti l-oħra tal-intimati;

27.4. Tiddikjara li l-intimati Ronald Borg u Carmel Zammit xjentement kienu parti mit-tmexxija tal-imsemmija socjeta` Gelati Riviera Limited u mexxew bil-hsieb ta' frodi tal-kredituri tal-istess socjeta`;

27.5. Tiddikjara lill-intimati indikati fil-paragrafu precedenti responsabbli personalment ghad-dejn li l-istess socjeta` Gelati Riviera Limited akkumulat fil-konfront tas-socjetajiet rikorrenti;”



# IMNARA LIMITED ET. VS RONALD BORG ET.

- A. Appeal filed on 03/04/2018
- B. According to evidence produced and according to law, the 1<sup>st</sup> Court should not, even remotely, have never arrived at its conclusion that the elements of fraudulent trading had been proved.
- C. Reference was made to UK & local case law & authors.
- D. Reference was made to the evidence produced.



# IMNARA LIMITED ET. VS RONALD BORG ET.

RELEVANT UK CASE LAW / AUTHORS REFERRED TO IN APPEAL (1)

“A finding that a person was knowingly party to the business of a company having been carried on with intent to defraud creditors may be made if the following two conditions are satisfied:

- 1) If that person realized, at the time the debts were incurred, that there was no good reason for thinking that funds would be available to pay the debt in question when it became due or shortly thereafter; and
- 2) There was actually dishonesty involving, according to current notions of fair trading among commercial men, real moral blame.”

**R. vs Grantham [1984] QB675**





# IMNARA LIMITED ET. VS RONALD BORG ET.

## RELEVANT UK CASE LAW / AUTHORS REFERRED TO IN APPEAL (2)

“Proving that the company continued to trade while insolvent is not enough. The person bringing the action must prove that the respondent has carried on business with intent to defraud creditors or for any fraudulent purpose ...For a person to be held knowingly party to carrying on a company’s business with intent to defraud creditors requires findings and inferences as to the facts known to that person at the relevant times. At those times the business might either have succeeded or failed.”

**Brenda Hannigan – Company Law (Butterworths, 2003) Fol. 843.9**



# IMNARA LIMITED ET. VS RONALD BORG ET.

RELEVANT UK CASE LAW / AUTHORS REFERRED TO IN APPEAL (3)

“The persons involved in the management of a company will not however be liable for fraudulent trading, even where the company continues to trade at a loss for a considerable period of time, as long as steps are taken to ensure that the claims of creditors will be satisfied, even is such steps do not legally guarantee payment”

**Re Augustus Barnett & Son Ltd [1986] BCLC 170** referred to by Profs. Andrew Muscat in “Principles of Maltese Company Law” (2007), pg. 260



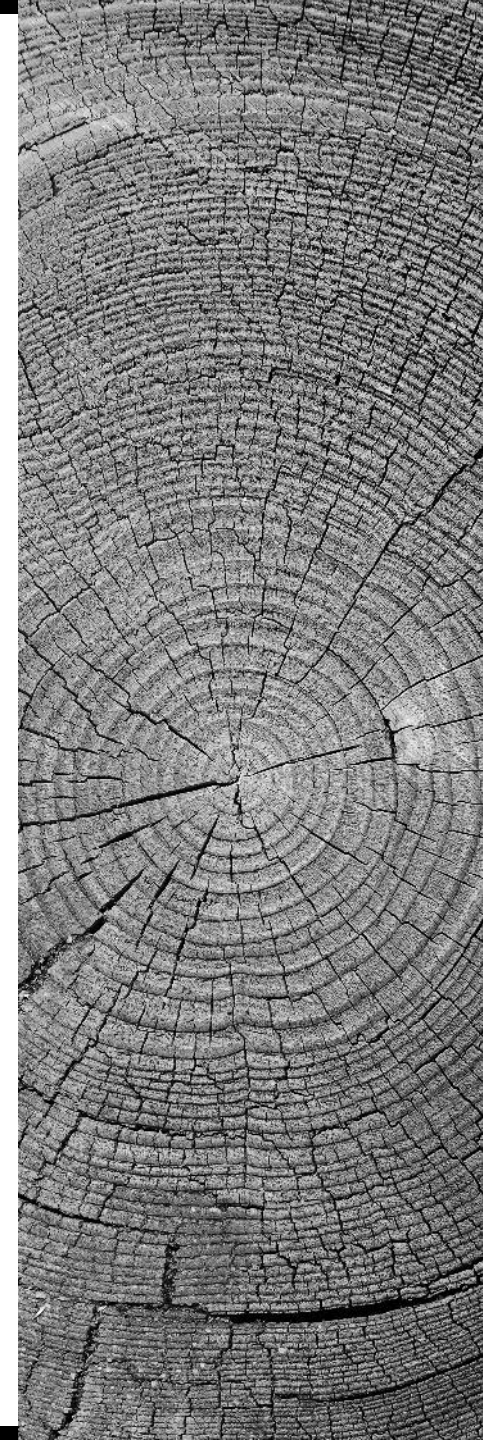


# IMNARA LIMITED ET. VS RONALD BORG ET.

RELEVANT UK CASE LAW / AUTHORS REFERRED TO IN APPEAL (4)

“Carrying on the business does not necessarily mean continuing to trade. The collection of assets for the purpose of paying existing creditors falls within the definition. However, paying some creditors in preference to others is not, of itself, fraudulent”

**Re: Sarflax Ltd [1979] Ch. 592, [1979] 1 All E.R. 529 – referred to in Galleria Management Limited vs Angele Calleja et. [Application No: 1109/15 JZM]**



# IMNARA LIMITED ET. VS RONALD BORG ET.

DECIDE OF THE COURT OF APPEAL RE: FRAUDULENT TRADING (1)

## Regarding the Loss in the Audited Accounts & the Negative Cash Flow

“.... u dan anke wara li mill-kontijiet awditjati għas-sena finanzjarja 2005 irrizulta li l-kumpanija ‘Ġelati Riviera Ltd’ kienet għamlet telf u l-‘working capital’ kien fin-negattiv, dan il-fatt waħdu ma seta’ qatt iwassal lill-Ewwel Qorti biex tikkonkludi li l-konvenuti kienu jafu li dik il-kumpanija ma kellhiex prospetti raġonevoli li tħares l-obbligi finanzjarji li kienet qed tidhol għalihom, jew inkella li l-konvenuti kienu qed imexxu l-kumpanija ‘Ġelati Riviera Ltd’ bil-għan li jiffrodaw lill-kredituri tagħha”.



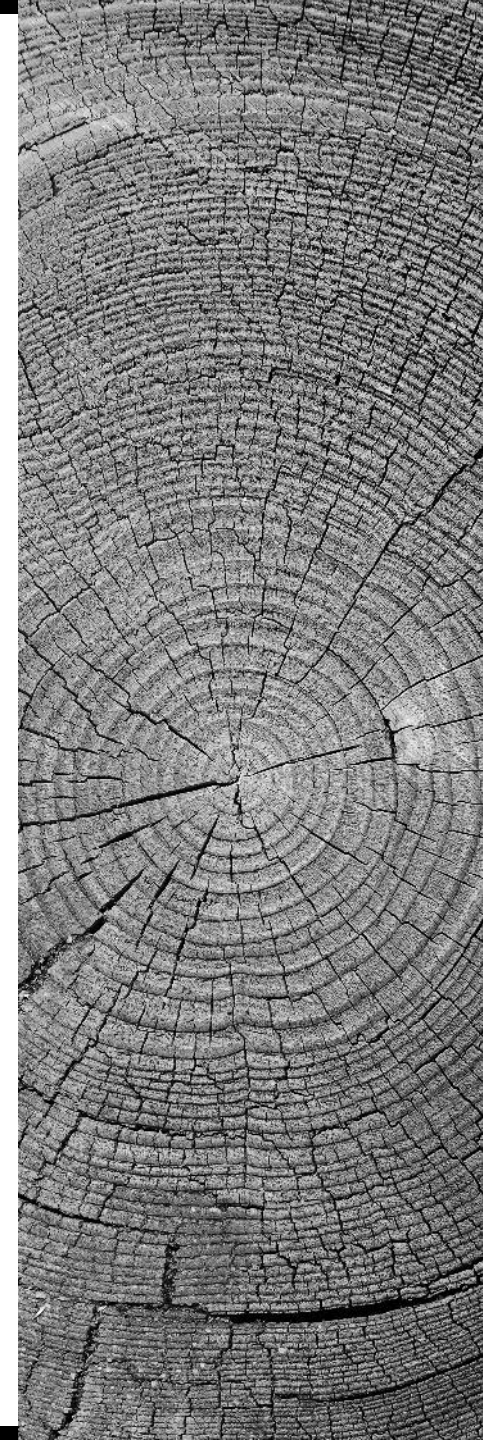


# IMNARA LIMITED ET. VS RONALD BORG ET.

DECIDE OF THE COURT OF APPEAL RE: FRAUDULENT TRADING (2)

## Regarding the decision to continue to trade after the end of summer 2006

“... fis-sena 2006, il-kumpanija tal-appellanti mhux biss irnexxielha tħallas ix-xogħol kollu li kienet ordnat mingħand dawk il-kumpaniji għal dik is-sena, iżda saħansitra rnexxielha taqta’ parti sostanzjali mill-bilanci pendenti li kellha tagħti lil dawk il-kumpaniji għas-snin ta’ qabel. Fil-fehma tal-Qorti, ċirkustanzi bħal dawn la juru li l-kumpanija tal-appellanti kienet fl-istat imwiegħra li qed ipinguha fih l-atturi appellati, u wisq anqas ma jippruvaw li sa wara l-istaġun tas-sajf 2006 il-konvenuti appellanti kellhom xi raġuni partikolari għalfejn jaħsbu li l-kumpanija ‘Ġelati Riviera Ltd’ ma kinitx f’qagħda li setgħet tibqa’ twettaq l-obbligi li kienet qed tidhol għalihom fil-kors ordinarju tan-negozju.”



# IMNARA LIMITED ET. VS RONALD BORG ET.

DECIDE OF THE COURT OF APPEAL RE: FRAUDULENT TRADING (3)

## Regarding the course of action to be taken by directors

“.... kif jgħidu sewwa l-appellanti, minn dik ix-xhieda jirrizulta sewwasew il-kontra, jgħifieri li huma wrew ċertu kawtela u għaqal billi mhux biss fittxew l-għajnuna professjonali ta’ awditur u ta’ avukat, iżda wkoll semgħu mill-pariri professjonali tagħhom tant li waqfu jinnegozjaw u ppruvaw jagħmlu dak li setgħu fl-interess assolut tal-kredituri. Fil-fehma ta’ din il-Qorti, din l-imgiba tixhed in-nuqqas ta’ hażen fl-appellanti li jiffrodaw jew iqarrqu bil-kredituri tal-kumpanija tagħhom u kif ukoll in-nuqqas ta’ dizonestà, li jitqiesu bħala l-kejl li bih wieħed isib l-element tan-negozju frawdolenti jew b’ingann.”





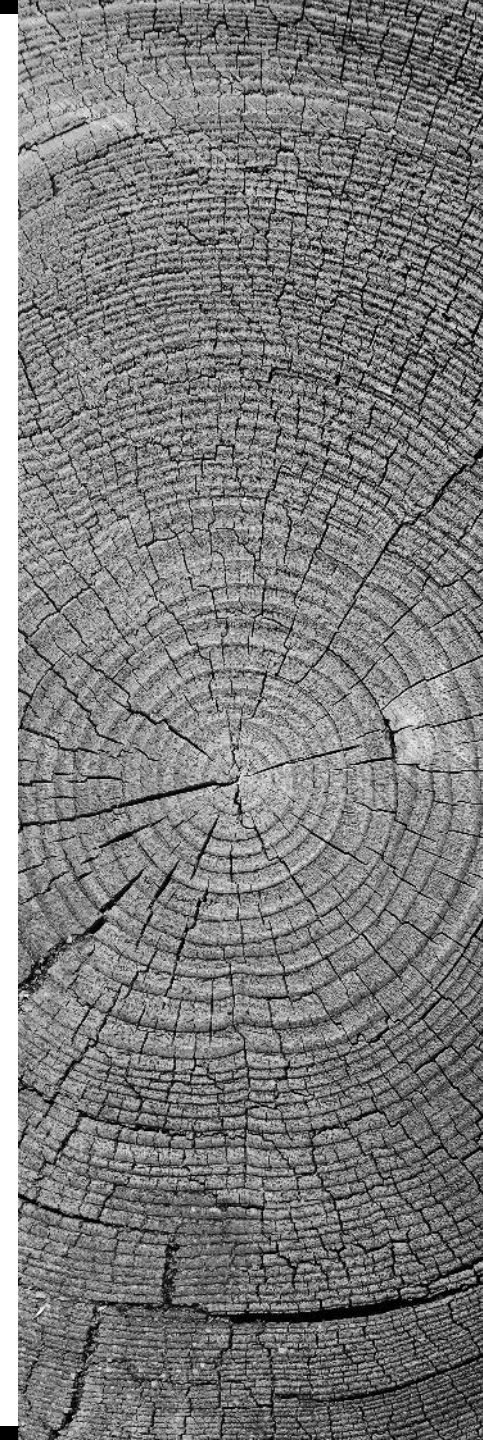
# IMNARA LIMITED ET. VS RONALD BORG ET.

DECIDE OF THE COURT OF APPEAL RE: FRAUDULENT TRADING (4)

## Regarding the sale of assets to a third party

“.... jirriżulta li din it-tranzazzjoni saret għall-benefiċċju waħdieni tal-kredituri, tant li l-appellanti ma ħadu xejn minn din it-tranzazzjoni, u d-dħul kollu mar biex jithallsu l-kredituri privileġġjati.”

“.... Hekk ukoll ma jistax jingħad li din it-tranzazzjoni ma saritx b’rieda tajba, għaliex ..... il-prezz li bih gie mibjugħ l-impjant kien wieħed “tajjeb ħafna”.



# IMNARA LIMITED ET. VS RONALD BORG ET.

DECIDE OF THE COURT OF APPEAL RE: FRAUDULENT TRADING (5)

## Regarding the essential element for a successful case on fraudulent trading

“...l-intenzjoni jew il-ħsieb tal-kummerċ bi frodi huwa element meħtieġ biex tabilhaqq jista’ jingħad li jkun sar kummerċ bħal dak għall-għanijiet tal-ligi. Ġaladarba li ma kellux jitqies li gie ppruvat dan l-ingredjent tant fundamentali għall-azzjoni bħal dik tal-lum, it-talbiet tal-atturi ma kellhomx jintlaqgħu u din il-Qorti ser tgħaddi biex tilqa’ għal kollox l-appell tal-konvenuti;”





# THANK YOU!

- 📞 • 00356 21336555/6
- ✉️ • [anaudi@naudimizzi.com](mailto:anaudi@naudimizzi.com)
- 🌐 • [www.naudimizzi.com](http://www.naudimizzi.com)

