QORTI CIVILI PRIM'AWLA

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum it-Tnejn 31 ta` Ottubru 2016

Kawza Nru. 15
Rik. Nru. 607/13 JZM

Mark Hogg (ID No. 632557M) bhala mandatarju specjali tal-kumpannija estera Colusa Enterprises Corporation (kumpannija registrata Belize bin-numru ta` registrazzjoni 61322)

kontra

Terra Sana Ltd (C-41825), Mario Camilleri (ID No. 737254M) u Mark Anthony Camilleri (ID No. 310292M)

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors prezentat fil-<u>21 ta` Gunju 2013</u> li jaqra hekk :–

1. Illi dan ir-rikors qed isir mill-kumpannija rikorrenti bhala azzjonista minoritarja fil-kumpannija Terra Sana Ltd (C-41825) ghat-tenur tal-artikolu 402 tal-Att dwar il-Kumpanniji (Kap 386 tal-Ligijiet ta` Malta) stante li l-affarijiet tal-kumpannija qed jitmexxew b`mod oppressiv, ingustament diskriminatorju u ngustament pregudizzjali ghall-kumpannija rikorrenti u kif ukoll kontra l-interessi tal-membri in generali ;

2. Illi l-elementi rikjesti mill-imsemmi artikolu 402 huma sodisfatti kif se jinghad ;

3. Kif jirrizulta mic-certifikat mahrug mir-Registru tal-Kumpanniji fuq il-kumpannija intimata ("Certificate of Good Standing") hawnhekk anness u mmarkat bhala 'DOK 2', ir-rikorrenti ghandha erba` mija u hamsa u erbghin (445) sehem klassi C, liema ishma jammontaw ghal ghaxra fil-mija (10%) tat-total ;

4. Illi l-azzjonisti l-ohra huma Ronald Patrick Garret (detentur ta` passaport tal-Istati Uniti numru 423500567) illi ghandu elfejn (2000) sehem klassi A, is-socjeta` Jamco Limited (C-9934) illi ghandha elf, disa` mija, disgha u disghin (1,999) sehem klassi B, u Mario Camilleri (detentur tal-karta ta` identita` numru 737254M) li ghandu sehem wiehed (1) klassi B. L-istatut tal-kumpannija intimata jinsab hawnhekk anness u mmarkat 'Dok 3' ;

5. Illi l-imsemmi Mario Camilleri hu wkoll id-direttur tal-kumpannija intimata, kif ukoll direttur u azzjonist fil-kumpannija Jamco Limited, filwaqt illi Mark Anthony Camilleri (detentur tal-karta ta` identita` numru 310292M) li hu s-segretarju tal-kumpannija intimata, kien ukoll direttur tal-istess kumpannija sar-rizenja tieghu fl-erbatax (14) ta` Novembru tas-sena elfejn u hdax (2011) (kif jirrizulta mill-'Form K' registrata fl-atti tar-Registru tal-Kumpanniji, kopja hawnhekk annessa u mmarkata bhala 'Dok 4'

6. Illi fl-ewwel lok, id-diretturi tal-kumpannija intimata, kemm prezenti u dawk precedenti, naqsu milli jaghtu rendikont sodisfacenti u komplet dwar kif gew utilizzati l-ammonti sostanzjali tal-fondi li kellha l-istess kumpannija, b`mod partikolari tlett miljun dollar Amerikan (US$ 3,000,000) li gew investiti mill-kumpannija rikorrenti fil-kumpannija intimata, u dan minkejja illi gew interpellati jaghmlu dan diversi drabi, fosthom bl-ittri legali tal-hamsa (5) ta` April 2011, l-ghoxrin (20) ta` Gunju 2011 u s-sittax (16) ta` Marzu 2012 (kopji hawn annessi u mmarkati 'DOK 5', 'DOK 6' u 'DOK 7' rispettivament). Jirrizulta illi l-imsemmija diretturi

b`nuqqas ta` kura, diligenza, prudenza jew ta` hsieb naqsu milli jipprotegu l-interessi tal-kumpannija intimata meta nvestew il-fondi u assi taghha. Inoltre, jidher li parti minn dawn il-fondi gew uzati ghall-skopijiet ta` xi kumpanniji ohra jew assi ohra li d-diretturi u l-azzjonisti maggoritarji kellhom interess fihom ;

7. Illi d-diretturi tal-kumpannija intimata, kemm prezenti u kemm precedenti, naqsu milli jsejjhu laqghat generali annwali, kif ukoll milli jhejju u/jew jibghatu lil kull membru tal-kumpannija u jqieghdu quddiem il-laqgha generali tal-kumpannija ghall-approvazzjoni taghha l-kontijiet annwali (annual accounts) tal-kumpannija. Konsegwentement naqsu wkoll milli jipprezentaw l-istess annual accounts fir-Registru tal-Kumpanniji, u fil-fatt jirrizulta mir-Registru tal-Kumpanniji (ara estratt hawn anness u mmarkat bhala 'DOK 8') illi l-ahhar kontijiet illi gew imhejjija kienu l-kontijiet ghas-sena li ntemmet fil-wiehed u tletin (31) ta` Dicembru tas-sena elfejn u tmienja (2008) (li gew sottomessi lir-Registru fil-hamsa (5) ta` Marzu tas-sena elfejn u ghaxra (2010). Jirrizulta allura illi hemm ksur lampanti tal-artikoli 128, 190, 181 u 183 tal-Kap. 386, apparti minn ksur tal-ligijiet fiskali peress illi d-diretturi ma setghux ihejju, minghajr l-annual accounts, il-prospetti tat-taxxa necessarji. Dan ifisser illi r-rikorrenti bhala azzjonist minoritarju lanqas ma ghandu il-minimu tal-protezzjoni u cioe` dak li jkollu accounts li huma audited biex b`hekk l-agir tad-diretturi u l-utilizz tal-fondi tal-kumpanniji jigu taht il-lenti ta` awditur indipendenti. Inoltre, il-kumpannija b`dan in-nuqqas tad-diretturi qed issofri danni anke ghaliex qed tinkorri penali li jistghu jigu mposti mir-Registratur tal-Kumpanniji u l-awtoritajiet tat-taxxi rilevanti, liema penali dejjem qed jakkumulaw ;

8. Jirrizulta ghalhekk li d-diretturi ma qdewx id-dmirijiet taghhom inkluz dawk li "jagixxu dejjem b`onesta` u bona fide fl-ahjar interessi tal-kumpannija", li "jassiguraw li l-interessi personali taghhom ma jkunux f`konflitt mal-interessi tal-kumpannija", li "jezercitaw kura, diligenza u hila li jkunu ezercitati minn persuna ragonevolment diligenti", li "ma ghandhomx jaghmlu profitti (…) personali mill-pozizzjoni taghhom" u li "ma ghandhomx juzaw xi proprjeta` (…) tal-kumpannija ghall-beneficcju taghhom stess jew ta` xi hadd iehor" ghat-tenur tal-artikolu 136A tal-Kap. 386 ;

9. Illi l-kumpannija rikorrenti gabet dan kollu a konjizzjoni tal-intimati kemm-il darba, u permezz ta` ittra legali datata l-erbgha u ghoxrin (24) ta` Ottubru tas-sena elfejn u tnax (2012) (kopja annessa u mmarkata 'DOK 8') interpellat lill-kumpannija intimata sabiex tiehu passi kontra d-diretturi prezenti u/jew precedenti tal-imsemmija kumpannija intimata ;

10. Illi dan nonostante, ma ttiehdet ebda azzjoni sabiex tigi rregolarizzata l-pozizzjoni tal-kumpannija u lanqas ma ttiehdu xi passi kontra d-diretturi, u dan ghaliex huma l-istess persuni li ghandhom kontroll tal-kumpannija intimata li qeghdin jikkawzaw din il-hsara (dak li bl-Ingliz jissejjah 'wrongdoer control') ;

11. Illi ghaldaqstant minhabba dan l-agir tad-diretturi, prezenti u precedenti, u tal-ufficjali u l-membri tal-kumpannija intimata, l-affarijiet tal-kumpannija intimata tmexxew u ghadhom jitmexxew b`mod li, u/jew l-atti u/jew ommissjonijiet tal-kumpannija li kienu u ghadhom ikunu, oppressivi, ingustament diskriminatorji kontra, u ingustament ta` pregudizzju ghall-interessi tal-kumpannija rikorrenti kif ukoll kontra l-interessi tal-membri in generali ;

Ghaldaqstant ghar-ragunijiet suesposti, ai termini tal-artikolu 402 tal-Att dwar il-Kumpanniji (Kap. 386 tal-Ligijiet ta` Malta), is-socjeta` rikorrenti bhala azzjonista minoritarja fil-kumpannija intimata bir-rispett titlob lil dina l-Onorabbli Qorti joghgobha :-

(a) Taghti ordni taht l-artikolu 402(3)(e) billi tawtorizza lill-kumpannija rikorrenti sabiex tibda procedimenti tal-Qorti f`isem u ghan-nom tal-kumpannija intimata kontra d-Diretturi u ex-Diretturi tal-kumpannija intimata sabiex dik il-Qorti :

i. tiddikjara li d-Diretturi u ex-Diretturi tal-kumpannija intimata huma responsabbli ghad-danni kkawzati lill-istess kumpannija minhabba (i) illi giet utilizzata proprjeta` tal-kumpannija ghall-uzu personali u/jew a favur ta` assi tad-diretturi u/jew l-ex-diretturi, kif ukoll tal-azzjonisti maggoritarji ; (ii) illi d-diretturi u/jew ex-diretturi b`nuqqas ta` kura, diligenza, prudenza jew ta` hsieb naqsu milli jipprotegu sufficjentement l-interessi tal-kumpannija fl-investimenti li ghamlu ghan-nom tal-kumpannija u (iii) amministrazzjoni hazina tal-kumpannija daparti tad-diretturi u/jew ex-diretturi, inkluz in-nuqqas li jissejhu laqghat generali tal-kumpannija, in-nuqqas li jigu ppreparati l-annual accounts u n-nuqqas li jsiru audits, li wassal ghal u ghadu qed jirrizulta f`effetti negattivi fuq il-benessere tal-kumpannija ;

ii. Tillikwida d-danni hekk sofferti mill-kumpannija intimata ;

iii. Tikkundanna lill-istess diretturi u/jew ex-diretturi jhallsu lill-kumpannija intimata d-danni hekk likwidati ; u/jew

Taghti kwalunkwe ordni ohra li jidhrilha xierqa u opportun.

Bl-ispejjez kontra l-intimati.

Rat id-dokumenti li kienu esebiti mar-rikors promotur.

Rat ir-risposta li pprezentaw il-konvenuti kollha fid-9 ta` Lulju 2013 li taqra hekk :–

1. Illi fl-ewwel lok, il-kawza kif maghmula mill-attur nomine huwa irritu, null u monk billi l-kawza kif prezentata mhuwiex intitolat bhala rikors kif il-ligi stess tezigi skont l-artikolu 402(1) tal-Kap. 386 u l-artikolu 789(1) tal-Kap. 12 ;

2. Illi t-talbiet atturi huma nfondati fil-fatt u fid-dritt stante l-fatt li Colusa Enterprises Limited u senjatament Jaimi Cremona li huwa sid din il-kumpannija kien a konoxxenza kontinwu tan-negozji li kienu qeghdin isiru mill-kumpannija Terra Sana Limited, liema Colusa Enterprises Limited u Jaimi Cremona taw il-kunsens taghhom ghad-decizjonijiet li ttiehdu (business decisions) fil-kumpannija Terra Sana Limited mill-kostituzzjoni tieghu sas-sena 2013, u ghalhekk bla ebda mod u manjiera gie utilizzat proprjeta` tal-kumpannija ghall-uzu personali u/jew a favur ta` assi tad-diretturi u/jew ex-diretturi, imma d-decizjonijiet li kienu ttiehdu, kienu ttiehdu ghas-socjeta` Terra Sana Limited bhala business decisions bejn il-membri kollha tas-socjeta` Terra Sana Limited ;

3. Illi l-konvenuti agixxew b`onesta` u agixxew bil-kura u diligenza mehtiega, pero` kien hemm avvenimenti, li iva kellhom effett negattiv fuq il-business tas-socjeta` Terra Sana Limited, liema diretturi ta` Terra Sana Limited ghamlu dak kollu li setghu jaghmlu sabiex jiehdu hsieb l-assi tal-istess socjeta` Terra Sana Limited, liema decizjonijiet tad-diretturi kienu jigu diskussi fuq bazi regolari mal-azzjonisti kollha tal-kumpannija Terra Sana Limited. Illi hawnhekk qeghdin jigu esebiti tlett dokumenti ta` trasferimenti ta` interessi li Jaimi Cremona kien jaf ben tajjeb x`kien qieghed isir bhala

negozju u anki ha decizjonijiet fuqhom liema decizjonijiet qeghdin jigu hawn annessi bhala dokument TSL 1 sa TSL 3 inkluzi ;

4. Illi ghalhekk la hemm negligenza da parti tad-diretturi tal-kumpannija, u certament u b`mod inekwivoku l-konvenuti ma agixxewx bi frodi. Id-diretturi tal-kumpannija agixxew b`mod regolari b`konsultazzjonijiet mal-azzjonisti kollha inkluz Jaimi Cremona u Mark Hogg nomine, fejn anki ttiehdu in konsiderazzjoni decizjonijiet li fuqhom ukoll qablu l-istess Jaimi Cremona u Colusa Enterprises Limited. Imma anzi kien hemm avvenimenti fejn Jaimi Cremona u Colusa Enterprises Limited ma kkontribwew xejn ghall-kumpannija, imma anzi hadu certu kuntatti u klijenti ta` Terra Sana Limited, sabiex poggew kumpannija ohra f`sitwazzjoni ahjar fejn Jaimi Cremona ghandu interess akbar ;

5. Illi l-accounts huma lesti fil-forma ta` management accounts u l-problema hi li llum-il gurnata l-kumpannija Terra Sana Limited ma ghandhiex aktar flejjes sabiex thallas ghall-audited accounts jekk kemm- il darba ma jkunx hemm qbil bejn l-azzjonisti kollha inkluz Colusa Enterprises Limited sabiex tinvesti aktar flejjes f`Terra Sana Limited. Illi l-elenku tal-hlasijiet kienu anki ntbaghtu lil Jaimi Cremona kif jdher mid-dokument TSL 4 ;

6. Anzi d-direttur Mario Camilleri hadha fuqu nnifsu li l-loan/self li kellha l-kumpannija Terra Sana Limited mal-BAWAG Bank Malta Limited, ta` United State Dollars 1.38 million oltre imghaxijiet, hadha fuqu nnifsu l-istess Mario Camilleri liema self gie trasferit ma` bank iehor cioe` mal-Bank of Valletta p.l.c., sabiex il-hlasijiet jibqghu hekk onorati u sabiex il-Bank of Valletta jkollu l-garanziji necessarji li riedet l-istess Bank of Valletta p.l.c., wara li BAWAG Bank Malta Limited ghamlet call-in fuq il-ftehim l Terra Sana Limited kellha mal-istess socjeta` bankarja BAWAG Malta Bank Limited li qieghed jigi hawn anness bhala dok TSL 5. Anzi, dan juri kemm il-konvenuti agixxew b`onesta`, b`fedelta` u b`lealta` mal-kumpannija Terra Sana Limited u mal-azzjonisti tal-istess socjeta` kummercjali, fejn kwindi ma hemm ebda diskriminazzjoni u/jew pregudizzju ngust fil-konfront tal-attur nomine. Anzi ta` min jghid ukoll li d-direttur Mario Camilleri hallas ukoll f`ismu personali u anke tramite kumpanniji li ghandu, l-imghaxijiet tal-istess Terra Sana Limited ghas-self li l-kumpannija Terra Sana Limited kellha ma` BAWAG Bank u issa mal-Bank of Valletta p.l.c. ;

7. Illi l-atturi nomine qatt ma talbu lanqas darba kemm verbalment u/jew b`mod formali, li jitbiddlu d-diretturi tal-kumpannija fejn

kwindi din l-azzjoni hija certament ingusta, inopportuna u barra minn lokha, fid-dawl tac-cirkostanzi kollha tal-kaz, kif jista` jintalab b`rizoluzzjoni straordinarja jew f`laqgha generali skont l-artikoli 19 u 12(a)(iv) tal-Articles of Association tal-kumpannija Terra Sana Limited ;

8. Illi inoltre, l-ittri u l-korrispondenza ta` Colusa Enterprises Limited kienu mwiegba mis-socjeta` Terra Sana Limited fejn juri ghalhekk kemm id-diretturi ta` Terra Sana Limited kienu qeghdin jimxu b`mod korrett mal-azzjonisti tal-istess socjeta` ;

9. Illi fl-ahharnett u bla pregudizzju ghas-suespost, l-artikolu 23 tal-Articles of Association taghmilha tassattiva li l-ufficjali tal-kumpannija Terra Sana Limited inkluz id-diretturi tal-kumpannija " … shall be indemnified out of the assets of the company against any liability incurred by him in defending any proceedings in which judgement is given in his favour or in which he is acquitted".

10. Salvi eccezzjonijiet ulterjuri;

Bl-ispejjez ta` dawn il-proceduri kontra l-istess Mark Hogg nomine.

Rat id-dokumenti li kienu prezentati mar-risposta.

Rat id-digriet li tat fl-udjenza tal-10 ta` Ottubru 2013 fejn laqghet it-talba tar-rikorrent ghal korrezzjoni fl-att promotur tal-azzjoni billi minflok il-kelma "*dikjarazzjoni"* tidhol il-kelma "*rikors"*.

Rat illi fl-istess udjenza, il-konvenuti rtiraw l-ewwel eccezzjoni.

Semghet ix-xhieda u rat il-provi l-ohra kollha li tressqu fil-kors tal-kawza.

Rat in-noti ta` osservazzjonijiet tal-partijiet.

Semghet is-sottomissjonijiet tal-ahhar illi ghamlu d-difensuri fl-udjenza tat-2 ta` Frar 2016.

Rat id-digriet li tat fl-istess udjenza fejn halliet il-kawza ghal provvediment.

Rat l-atti l-ohra tal-kawza.

II. Xiehda

Mark Hogg xehed illi huwa domiciljat u residenti Malta. Huwa Chairman u CEO ta` Hogg Capital Investments Limited.

Xehed illi ghandu relazzjoni ta` negozju ma` Dr u Mrs Jaime Cremona ("**Cremona**") li tinkludi s-socjeta` Colusa Enterprises Corporation ("**Colusa**").

Qal illi wara talba ta` Cremona, kienet saret laqgha fit-28 ta` April 2007 fejn sar jaf bi proposta ta` investiment li giet minghand Mario Camilleri relatata ma` s-socjeta` Cobit Limited ("**Cobit**"), li wara bidlet l-isem ghal Terra Sana Limited ("**Terra Sana**"). Saret laqgha ohra fejn Mario Camilleri ("**Camilleri**") tahom x` jifhmu li Cobit, li n-negozju taghha kien relatat ma` *remediation of oil drilling waste* u prodotti relatati, kellha operat fil-Libja. Qalilhom illi huwa ried jittermina relazzjoni li kellu ma` sieheb Malti u kellu bzonn finanzjament biex l-operat mil-Libja jigi trasferit lejn il-Kazakhstan bil-ghan li jigi onorat kuntratt li Cobit kienet ser tinghata minn Remtech, li hija kumpannija Amerikana.

Stqarr illi Camilleri kien indika li kienu ser imorru fil-kumpannija l-assi kapitali li kien bbazati fil-Libja. Aktar tard irrizulta illi huwa kien ukoll dawwar self bankarju (dak iz-zmien minghand Bawag Bank Malta) fil-kumpannija liema self kien garantit b`dawk l-assi kapitali. Bhala fatt dan ma kienx konformi ma` li kienu ftehmu.

Qal illi Colusa kienet mehtiega bhala azzjonista gdida sabiex seta` jista` t-trasferiment mil-Libja ghall-Kazakhstan.

Fisser illi Cremona sab interessanti l-proposta.

Xehed illi in segwitu, mill-mod kif Terra Sana spiccat ma toperax, kien jidher illi Cobit ma kelliex operat sufficjenti. Terra Sana spiccat *a shell company*. Dik kienet manuvra da parti ta` Camilleri u ta` ibnu Mark Camilleri sabiex jiksbu l-investiment minghand Cremona.

Qal illi fis-7 ta` Gunju 2007, Cremona tah struzzjonijiet sabiex jaghmel l-ewwel pagament billi Cremona kien sodisfatt li dak l-investiment kien ser irendi anke ghaliex Camilleri kien qal il Cremona li kien hemm potenzjal ta` kuntratt iehor fl-Oman.

Stqarr illi fit-23 ta` Novembru 2007 saru l-proceduri li kien hemm bzonn mar-Registru tal-Kumpanniji sabiex jigi notifikat bl-awment fil-kapital ta` Terra Sana.

Ighid illi saru dawn il-pagamenti :-

(i) US$ 500,000 fis-7 ta` Gunju 2007 lil Cobit ;
(ii) US$ 500,000 fit-13 ta` Lulju 2007 lil Terra Sana ;
(iii) US$ 500,000 fit-3 ta` Ottubru 2007 lil Cobit ;
(iv) US$ 500,000 fl-24 ta` Ottubru 2007 lil Terra Sana;
(v) US$ 500,000 fis-27 ta` Novembru 2007 lil Terra Sana ;
(vi) US$ 500,000 fis-7 ta` Jannar 2008 lil Terra Sana.

Qal illi qabel sar il-hlas ta` t-13 ta` Lulju 2007, Mark Camilleri kien cempillu u insista mieghu li jsir it-trasferiment. Qal lil Mark Camilleri li abazi ta` struzzjonijiet li kien tah Cremona, kellu jieqaf darba ghal dejjem milli jgib ruhu b`mod agressiv. Fakkru li Cremona kien qed jaghmel pagamenti in bona fede u bla ma ra ebda dokumenti.

Xehed illi huwa kien prezenti ma` Cremona ghal diversi laqghat fl-ufficcju ta` Camilleri. Dawn kienu l-inkrontri li saru fit-28 ta` Mejju 2007, fid-9 ta` Lulju 2007, fit-8 ta` Ottubru 2007, fil-11 ta` Ottubru 2007 u fit-13 ta` Novembru 2007. Fit-tielet laqgha kien iltaqa` ma` Ronald Patrick Garrett ("**Garrett**") li kien jirraprezenta Remtech Limited. Dan ghamel *presentation* fejn spjega r-ragunijiet ghalfejn l-assi li kienu l-Libja ma gewx trasferiti l-Kazakhstan izda marru minflok l-Istati Uniti. Huwa baghat email fis-16 ta`

Ottubru 2007 lil Camilleri bi struzzjonijiet ta` Cremona wara li saret laqgha tal-bord fil-11 ta` Ottubru 2007. Ma jafx li rcieva risposta ghal din l-email. Nonostante dan huwa kellu struzzjonijiet minghand Cremona biex ikompli jaghmel il-pagamenti.

Stqarr illi kien hemm thassib dwar kif kienet qed titmexxa Terra Sana. Infatti fil-5 ta` Marzu 2010 kienu prezentati biss sett wiehed ta` *audited financials* li kien ikopri iz-zmien sal-31 ta` Dicembru 2008. Terra Sana kienet ilha bla awditur ghal diversi snin. Saru diversi telefonati lid-diretturi sabiex jaghtu rendikont tal-fondi trasferiti lil Terra Sana kif ukoll ittri legali.

Qal illi Dok TSL4 kien wiehed mill-okkazjonijiet fejn intalbet informazzjoni izda ma hemmx spjegazzjoni ta` kif kienu qed jintuzaw il-flus. Kien hemm diversi trasferimenti lil Remtech US u lil Cobit USA. Ghalih kien stramb il-fatt illi kienu saru diversi pagamenti f`ammonti zghar meta kkomparat man-natura tan-negozju. Dok TSL4 kien juri li d-diretturi kienu qed jagixxu fl-interess taghhom u mhux fl-interess tal-kumpannija.

Kompla jghid illi Camilleri thallas US$83,002 bhala *directors` remuneration* ghaz-zmien ta` bejn il-11 ta` Gunju 2007 u t-28 ta` Frar 2008 li kien jinkludi *bonus* ta` US$20,975 fit-28 ta` Dicembru 2007. Mark Camilleri thallas US$66,138 bejn il-11 ta` Gunju 2007 u t-28 ta` Frar 2008. Anke kera dovuta lil Vassallo Builders Limited fl-amont ta` US$24,000 ghal bejn Awissu 2007 u Mejju 2008 kienet assenjata lil Terra Sana, minkejja li Camilleri kienu qed jinqdew bil-kirja ghal negozji ohra. Minkejja l-insistenzi ta` Colusa, baqghet bla risposta dwar kif kienu wzati it-US$ 3,000,000 li hallset. Colusa sejhet extraordinary general meeting fis-6 ta` Lulju 2012 sabiex tkun infurmata dwar l-investiment taghha, u dwar in-nuqqas li jigu pprezentati *audited accounts*. Ghad illi l-laqgha saret, baqghet bla risposta.

Fil-**<u>kontroezami</u>**, huwa xehed illi ma kienx direttur ta` Colusa. Dejjem agixxa fuq struzzjonijiet tal-beneficial owner ta` Colusa. Ir-rwol tieghu kien ta` *investment advisor*. Meta kien jattendi ghal laqghat, huwa kien jattendi bhala osservatur.

Xehed illi Terra Sana hija rizultat ta` amalgamazzjoni ta` interessi differenti, ossija dik ta` Cobit u Remtec Africa li kienet ta` Garrett. Camilleri u ibnu Mark ma ghamlu l-ebda referenza ghal xi pendenzi ta` self.

Stqarr illi qatt ma ssemma xejn li l-investiment ta` Colusa kien ser isir sabiex jiffinanzja xi djun ezistenti. Il-problema ta` Camilleri kienet u baqghet li ma kienx iwiegeb ghall-kwesiti li kienu jsirulu.

Ikkonferma li kienu saru laqghat fl-Istati Uniti fejn Terra Sana giet amalgamata ma` kumpannija Amerikana bl-isem ta` MECO Environmental LLC ("**MECO**").

Qal illi l-ewwel pagament ta` US$ 500,000 ma ntuzawx ghat-trasport tal-apparat mil-Libja. Infatti qabel sar it-tieni pagament, ircieva telefonata minghand Camilleri fejn dan talab il-flus sabiex ikun jista` jsir it-trasport ta` l-apparat.

Spjega li mill-Kazakhstan l-apparat kellu jmur l-Istati Uniti.

Qal illi kien anke staqsa lil Camilleri x` kien ser jigri meta jispiccaw il-flus peress li l-flus li kienu qeghdin jintefqu kienu esorbitanti. Il-mistoqsija tieghu baqghet bla risposta.

Kompla jghid illi huwa ma kienx jattendi ghal kull laqgha li kienet issir. Huwa kien jiddiskuti mal-klijenti tieghu u l-emails li kien jibghat kienu jsiru fuq struzzjonijiet ta` l-klijenti tieghu.

Stqarr illi fl-azzjoni tal-lum ma kenitx inkluza MECO peress illi l-azzjoni tirrigwarda fatti li sehhew qabel sari l-merger ma` MECO.

Insista illi huwa l-*investment advisor* ta` Cremona u mhux ta` Colusa.

Sahaq ukoll illi l-kawza tal-lum tittratta dwar it-US$ 3,000,000 li kienu investiti go Terra Sana.

Ighid illi r-riferenza fir-rikors promotur ghal kumpanniji ohra saret ghaliex minn ezami tal-ispejjez li saru xi flus kienu ntuzaw ghal skopjijiet diversi mill-ghanijiet li ghalihom kienu nvestiti.

Spjega illi fl-2007, Cremona kien ghadu fil-process li jinvesti fil-*venture* de qua.

Qal illi certa hlasijiet saru direttament lil Cobit, bil-kunsens ta` Cremona, peress li Terra Sana kienet ghadha ma gietx registrata. Kien hemm pero` l-intiza li l-flus jigu utilizzati ghat-trasport tar-*remediation unit.* Dan it-trasport sehh wara li kien diga` sar l-ewwel pagament. It-trasportat ta` l-apparat kien jirrikjedi logistika.

Qal illi fiz-zmien meta kienu qed isiru l-pagamenti, kienu qed jinzammu laqghat ghall-formazzjoni ta` Terra Sana. Pero` l-kumpannija spiccat ma ghamlet xejn.

Ighid illi l-kritika tieghu lejn Camilleri kienet gejja mill-fatt illi meta rikjest ma tax informazzjoni dwar kif il-flus investiti minn Cremona gew uzati.

Dwar l-involviment ta` Cremona fis-socjeta` La Vallette Corporation Limited, xehed illi dak l-involviment gie hames snin wara dak li huwa mertu ta` din il-kawza.

Xehed illi Cremona qatt ma talab *due diligence* fir-rigward ta` Camilleri u Cobit.

Ikkonferma li Cremona kien habib ta` Camilleri. It-tnejn kienu Kavallieri fl-Ordni ta` San Gwann.

Ighid illi Cremona ma kienx ikkonsultah fl-investiment agguntiv illi ried jaghmel fil-MECO.

Qal illi MECO ma ghandhiex sehem f`Terra Sana.

Qal illi Terra Sana ghandha sehem f`MECO.

Ippreciza li MECO ma akkwistatx parti minn Terra Sana. Kien hemm trasferiment ta` assi li kienu ta` Terra Sana izda ma kienx hemm trasferiment ta` *shares*.

Dr Jaime H Cremona xehed illi huwa l-*beneficial owner* ta` Colusa, li hija azzjonista ta` Terra Sana.

Xehed illi f`April 2007 Camilleri pproponielu negozju konsistenti mill--amalgamazzjoni ta` l-kumpannija Cobit ma` l-kumpannija Amerikana Remtech ta` Garrett, bil-ghan li ssir kumpannija Malta bl-isem ta` Terra Sana.

Qal illi nghata xi taghrif u muri xi ritratti ta` apparat li kien proprjeta` ta` Cobit u Remtech. Terra Sana kellha tkun involuta fi *environmental remediation* fejn permezz ta` l-uzu ta` dak l-apparat, kien ser jigi reciklat zejt u *oil derivative waste* fbiex isir compost ghall-uzu fl-agrikoltura u setturi ohra. Wara li tkellem mal-konsulent tieghu Mark Hogg fit-28 ta` April 2007, kellu laqgha ma` Camilleri u ibnu Mark fit-2 ta` Mejju 2007 sabiex il-proposta tkun diskussa fid-dettall.

Qal illi l-kontribuzzjoni ta` Camilleri fi kwota ta` 45% tal-ishma ta` Terra Sana kellu jkun Thermal Desorption Union (TDU) li huwa apparat li jintuza ghar-*remediation* liema apparat kien jinsab il-Libja u kien proprjeta` ta` Cobit. Wara sar jaf li Cobit kellha dejn ma` Bawag Bank - Malta ta` madwar US$ 1,388,000 li kien garantit b` dak l-apparat. Il-kumpannija Amerikana bi kwota ta` 45% tal-ishma ta` Terra Sana kellha tikkontribwixxi TDU iehor li kien in-Nigerja, kif ukoll xi interessi ta` negozju fl-Istati Uniti. Lilu kienu offruti 10% tal-ishma ta` Terra Sana b`investment da parti tieghu ta` US$ 3,000,000. Thajjar jinvesti peress li dak iz-zmien, kienu qeghdin jigu negozjati numru ta` kuntratti godda ghal Terra Sana in partikolari kuntratt ta` US$ 20 miljun fl-Oman u iehor fil-Kazakhstan.

Ighid illi accetta li jinvesti it-US$ 3 miljun. L-investiment sar permezz ta` sitt pagamenti ta` US$ 500,000 kull wiehed. Kien assikurat illi dawk il-flus kienu ser jigu utilizzati strettament u esklussivament sabiex jinxtara apparat gdid ghal dawk il-kuntratti, izda accetta li l-fondi jaghmlu tajjeb ukoll ghall-ispejjez ta` t-trasport sabiex l-apparat li kien il-Libja jittiehed il-Kazakhstan. Il-fondi ma kellhomx jintuzaw sabiex Terra Sana tixtri l-apparat li kien il-Libja jew in-Nigerja ghaliex dak l-apparat kellu jmur ghand

Terra Sana mill-azzjonisti l-ohra bhala kapital. Lanqas ma kellhom il-fondi jintuzaw biex jithallas id-dejn li Cobit kellha ma` Bawag Bank.

Stqarr illi t-TDU ta` Cobit qatt ma gie trasportat lejn il-Kazakhstan u minflok intbaghat l-Istati Uniti ghal tiswijiet u modifiki. It-TDU li kien in-Nigerja ma kienx jahdem, u eventwalment kien issekwestrat meta Remtech kellha titlaq mill-pajjiz. Il-kuntratti li kienu qed jigu negozjati fl-Oman u fil-Kazakhstan qatt ma gew konkluzi izda t-US$ 3 miljun nvestiti minn Colusa gew utilizatti ghal skopijiet li dwarhom ma kienx hemm qbil. Hu, martu, Mark Hogg u l-konsulent legali ta` Colusa kemm-il darba talbu spjegazzjoni ghall-uzu tal-fondi izda baqghu ma nghatawx risposta sodisfacjenti. Colusa sahansitra sejhet extraordinary general meeting ta` Terra Sana fis-6 ta` Lulju 2012 sabiex jigi diskuss l-uzu tal-fondi izda, kif jirrizulta mill-minuti, baqghet bla risposta sodisfacjenti. Anke l-pozizzjoni finanzjarja tal-kumpannija ma gietx iccarata minkejja li din kienet fuq l-agenda tal-laqgha.

Xehed illi huwa rcieva Dok TSL4 fl-2009 u jkopri biss l-ewwel sena ta` l-ezistenza tal-kumpanija. Fid-dokument, hemm numru ta` *entries* li mhux gustifikati u ma jaghtux stampa sodisfacjenti ta` kif intefqu l-flus. Fost ohrajn, kien hemm imnizzel il-kirja mhallsa lil Vassallo Builders Limited ghall-ufficcju, meta dak l-ufficcju kien jintuza minn kumpanniji ohra u ghalhekk l-ammont kellu semmai jinqasam bejn dawk il-kumpanniji. L-istess dokument juri li saru xi *repayments* lil Bawag mill-kont ta` Terra Sana fir-rigward is-self li hadet Cobit minn dak il-bank. Insista li ma kien hemm l-ebda ftehim li dak is-self iggorru Terra Sana. Wera wkoll it-thassib tieghu dwar infieq stravaganti b`email tieghu tad-29 ta` Mejju 2009.

Qal illi l-unici accounts ta` Terra Sana li kienu audited huma dawk ghas-sena li ghalqet fil-31 ta` Dicembru 2008. Ghalhekk Terra Sana kienet qeghda tinkorri penali mir-Registru tal-Kumpanniji filwaqt li d-diretturi mhux jissodisfaw l-obbligi taghhom. Colusa talbet li l-accounts jigi awditjati izda kien kollu ta` xejn. Fl-extraordinary general meeting, id-diretturi sostnew li l-kumpannija ma kellhiex bizzejjed fondi sabiex thallas l-audit. Terra Sana kien ilha s-snin bla awditur ; inoltre baqghu ma ssejhux general meetings ohra.

Fil-**<u>kontroezami</u>**, xehed l-ispejjez li jidhru fid-Dok TSL4 sar jaf bihom zmien wara. Saru *board meetings* fl-2007 u fl-2008 izda cahad li fihom ittiehdu decizjonijiet li li kellu jkun hemm trasferiment ta` flus lil Remtech, lil Cobit u lil Vassallo Builders Limited. Ma jikkontestax illi l-ewwel pagament ta` US$ 500,000 marru ghand Cobit. Cahad li l-ufficcju kien ta`

Terra Sana biss ; infatti l-manager ta` Café Premier kien jahdem minn dak l-istess ufficcju. Saret skrittura fejn ghall-investiment tieghu ta` US$ 3 miljun kien ser jakkwista 10% tal-ishma ta` Terra Sana.

Qal illi Mark Hogg kien il-*business advisor* tieghu anke qabel il-kwistjoni de qua. Fil-ftehim ma kienx hemm indikat bil-preciz kif kellu jintuza l-investiment tieghu, izda kien hemm intendiment li ser jintuzaw biex jaghmlu magni godda ghall-kuntratt tal-Kazkhastan. Ikkonferma l-minuti tal-laqgha tal-25 ta` Lulju 2007, ghalkemm sostna li ma jiftakarx li kien gie diskuss li l-flus li jibqa` mit-US$ 3 miljun jithallew fil-genb ghal li jista` jinqala`.

Qal illi Terra Sana saret parti minn MECO. Huwa ma inkludiex lil MECO fil-kawza tal-lum peress li l-ewwel ried ikun jaf x`sar mill-flus li hallas. Kien accetta li Cobit u Remtech jinghaqdu u jiffurmaw Terra Sana. Accetta wkoll illi Terra Sana tinghaqad ma` MECO. Huwa kien investa madwar US$ 7 miljun go MECO, peress li ra l-apparat kif jahdem u kien cert li kien ser ikun hemm profitti kbar. Huwa mar kontra Terra Sana ghax l-investiment tieghu kien go Terra Sana.

Kompla stqarr illi 50% ta` l-ishma ta` MECO huma ta` Terra Sana. Huwa nvesta go MECO peress li din kienet ha tkun kumpannija internazzjoni li kien ser ikollha kuntratti ohrajn mad-dinja kollha mhux biss fil-Kazkhastan u fl-Oman. Huwa spjega li l-10% li kellu fi Terra Sana saru 5% go MECO. Qal illi MECO ghandha apparat li thalla mahzun u mhux qed jigi utilizzat peress li ma gabux il-permessi necessarji. Fl-Awstralja, MECO ghamlet kuntratt li halla profitt ta` US$ 1.5 miljun izda ma jafx fejn marru l-flus.

Qal illi t-US$ 3 miljun thallsu qabel saret l-amalgamazzjoni ma` MECO.

Elizabeth Cremona xehdet illi hija tigi l-mara ta` Dr Jaime Cremona u hija l-*beneficial owner* mieghu ta` Colusa. Taf bl-investiment ta` US$ 3 miljun go Terra Sant li ghamel ir-ragel taghha. Dak l-investiment kellu jservi biex jinxtara makkinarju gdid li kellu jintuza ghal kuntratt ta` US$ 20 miljun fl-Oman, kif ukoll ghat-trasport ta` l-apparat ta` Cobit lejn il-Kazakhstan. Spjegat li gie miftiehem li kellhom isiru hlasijiet ta` $500,000 fix-xahar. Skont il-ftehim, Cobit kellha tittrasferixxi l-apparat taghha lil Terra Sana versu kwota ta` 45% tal-ishma mentri Remtech kellha taghmel l-

istess bl-apparat taghha li kien in-Nigerja ghal kwota ohra ta` 45%. Kienet biss wara li hi u zewgha saru jafu li Cobit kienet hadet self minghand Bawag Bank li poggiet l-apparat taghha bhala garanzija ghal dak is-self.

Xehdet illi kienet preokkupata dwar kif kienu qed jigu utilizzati l-flus taghha. Skopriet illi l-ishma taghhom fi Terra Sana kienu ghadhom ma gewx registrati. Taf illi Mark Hogg talab *financial breakdown* flimkien ma` dokumentazzjoni dwar fejn marru l-flus pero` ma rcieva xejn. Camilleri ltaqa` maghhom u obbliga ruhu li kull gimghatejn kienu sejrin jinghataw *update* flimkien ma` informazzjoni ohra. Waqt laqgha li saret fid-19 ta` Ottubru 2007, Camilleri assikuraha illi hi u zewgha ma kinux ser ikunu nvoluti fid-djun ta` Cobit jew ghal xi djun personali tieghu.

Stqarret illi sett wiehed biss ta` accounts ta` Terra Sana gew ippreparati u awditjati. Wara dak l-audit, ma kienx mahtur awditur iehor. Ma kienux qed isiru laqghat generali tal-kumpannija. Ftit li xejn inghataw taghrif dwar l-operat ta` Terra Sana minkejja li hekk talbu diversi drabi nkluz waqt extraordinary general meeting.

Mario Camilleri xehed illi Terra Sana kienet kostitwita minnu, minn Garrett u minn Cremona. Hu u Garrett kellhom 45% tal-ishma kull wiehed waqt li Cremona kellu 10%. Garrett kien jirrapprezenta tliet persuni ohra : Keith Chapman (xjenzjat li zviluppa t-teknologija) ; Alan Adams (Chief Financial Officer) u Fred Schmidt (Head of Operations). Kien hemm kumpannija fiducjarja li kienet qeghda tiehu hsieb l-interessi ta` Garrett u l-ohrajn.

Ighid illi nkarika lil Remtech li kienet is-socjeta` ta` Garrett sabiex thaddem impjant ta` *remediation* taz-zejt. Dan huwa process li bih jitnaddafzejt kontaminat. It-teknologija u l-process kellu x` jaqsam maghhom Chapman. Remtech giet inkarigata taghmel modifikazzjoni fl-appart li kien qieghed il-Libja. L-apparat kien ta` Cobit li kellhom sehem fiha hu u Ronnie Bonello. Kienet ittiehdet decizjoni illi Bonello jiehu ix-xoghol li kien hemm fil-Libja, u huwa jiehu l-apparat u r-responsabilita` tal-bank go Malta – kemm attiv u kif ukoll passiv. L-apparat ghadda bhala l-partecipazzjoni tieghu fi Terra Sana.

Kompla jghid illi hu u Garrett qablu li jaghmlu xoghol flimkien go postijiet bhall-Kazakhstan, l-Awstralja u l-Ingilterra. Kien jaf lil Cremona fl-Ordni tal-Kavallieri ta` Malta. Meta Cremona sar jaf bil-progett taghhom,

ried ikun involut. Ftehmu mieghu illi jsir azzjonista fil-kumpannija taghhom. Cahad li qatt avvicina hu lil Cremona sabiex jidhol fil-kumpannija jew fix-xoghol taghhom. Kien hemm okkazjonijiet qabel fejn Cremona u martu talbu li jkunu nvoluti fin-negozju tieghu izda huwa qatt ma dahlu. Fil-kaz in kwistjoni, Garrett ma kellux oggezzjoni li Cremona jsir parti minn Terra Sana.

Qal illi Cremona ghandu C shares. M`ghandux drit tal-vot imma kien dejjem prezenti fil-laqghat u kien ukoll inhatar bhala Acting Chairman mill-bord tad-diretturi. Cremona kellu x`jaqsam ma` l-assi ossija l-apparat stante li dawn dahlu bhala propjeta` ta` Terra Sana izda ma kellux x` jaqsam mad-dejn ma` Bawag Bank Malta.

Stqarr illi oltre l-makkinarju, huwa ta lil Terra Sana l-expertise tieghu kollu, kif ukoll kuntatti u xoghol relatat ma` dak il-qasam.

Fisser illi Terra Sana kienet kostitwita sabiex il-makkinarju li kien hemm il-Libja jigi esportat lejn l-Istati Uniti sabiex jintuza ghal progetti li setghu jsiru hemm. L-ispejjez tat-trasport gew jiswew US$ 250,000. Terra Sana bdiet kuntatti ma` diversi kumpanniji inkluza wahda Ingliza bl-isem Aegean sabiex isir tindif ta` *soil contamination* minn zjut fit-tramuntana ta` l-Ingilterra.

Spjega illi saru laqghat li ghalihom kien prezenti Cremona fejn kien deciz illi Terra Sana tinghaqad ma` Cutler Brothers bl-isem ta` Mobile Environmental Technological Incorporation. Kien inkarikat avukat Amerikan u sar ftehim fejn Terra Sana saret azzjonista` ta` MECO Environmental LLC. Il-kumpannija kienet iffurmata fl-Istati Uniti. In-negozjati bejn Terra Sana u Cutler, il-kuntratti u l-obbligi ta` Terra Sana (eskluz d-dejn ma` Bawag Bank) kienu lkoll trasferiti ghall-kumpannija l-gdida fuq bazi ta` 50% ghal ahwa Cutler u l-kumpanniji taghhom, u 50% ghal Terra Sana. Insista li Cremona kien jaf kollox x`kien ghaddej. Cremona silef flus lil MECO Environmental LLC, kif jirrizulta minn promissory note li ghamel Cremona ma` MECO. Cremona ffirma wkoll il-ftehim ta` amalgamazzjoni.

Kompla jghid illi Terra Sana ghadha registrata mal-MFSA. Bil-kunsens tal-azzjonisti kollha, Terra Sana *ceased operations* u saret socjeta` bla assi. Id-dejn baqa` dovut minn Terra Sana mhux minn Cremona ghaliex dak id-dejn refghuh hu u Garrett wahedhom.

Sahaq illi Cremona kien il-hin kollu nfurmat u prezenti fl-ufficcju u fil-laqghat li saru kemm Malta kif ukoll barra.

Qal illi hu tilef hafna flus minn Terra Sana ghax meta nghaqdet ma` MECO huwa tilef il-kontroll tal-kumpannija billi dahlu azzjonisti ohra. Minnaha tieghu, ta` ibnu u tal-kumpannija ma kienx hemm negligenza. Id-decizjonmijiet dejjem ittiehdu flimkien inkluz Cremona. Sar jaf li Cremona kien qed jitkellem ma` Garrett, u mal-ahwa Cutler dwar self iehor MECO. Hu u ibnu ma kinux jafu bil-laqgha li saret u saru jafu bil-ftehim wara li kienet ittiehdet id-decizjoni. Qal illi kien zball da parti ta` Cremona illi ma silifx flus lil Terra Sana, u mbaghad tkun din li tislef lil MECO ; b`hekk kien ikun hemm kontroll tal-flus. Aktar ma beda jghaddi z-zmien, beda jinduna li Cremona kien jaghmel vjaggi u jasal ghal ftehim ma` Cutler Brothers u ma` Garrett minn wara dahru.

Xehed illi Terra Sana setghet marret tajjeb izda bl-amalgamazzjoni kif ukoll bl-azzjonijiet bla sens ta` Cremona, in-negozju kien rovinat, minkejja li kellu l-potenzjal ta` uccess. Minn wara dahru Cremona beda juza l-kuntatti tieghu ghall-beneficcju ta` kumpannija ohra bl-isem La Valette Corporation Limited li Cremona ghandu interess dirett fiha billi huwa beneficjarju fl-Alliance Trust Company Limited li huma azzjonisti ta` La Valette Corporation Limited. F`dik il-kumpannija, kellhom interess, kemm Cremona kif ukoll certu Shiv Preyan Shanker, li huwa negozjant tal-armi u taz-zejt. L-azzjonijiet ta` Cremona kienu r-rovina ta` Terra Sana, u ta` MECO ghax meta timmina r-relazzjoni tad-diretturi u ta` l-azzjonisti, u ma jkunx hemm trasparenza, is-sitwazzjoni ma tkunx tista` tkompli.

Sostna li mhux minnu illi Cremona nvesta fil-kumpanniji tieghu jew ta` ibnu l-ammont ta` US$ 3 miljun. Dak l-ammont kien investit fil-MECO minn Terra Sana bhala parti mill-amalgamazzjoni.

Ighid illi anke hu garrab danni kbar u hareg flejjes personali tieghu ghal Terra Sana sabiex hallas il-krediturі taghha. Huwa ma setax ikompli johrog flus minn tieghu sabiex isiru laqghat generali tal-kumpannija. Nehha s-self bankarju minn fuq isem Terra Sana, u hadu hu fuq spallejh personalment, kif ukoll hallas il-kera tal-ufficcju lil Vassallo Builders. Hallas l-ispejjez ta` l-avukati minn tieghu sabiex sar it-trasferiment tas-self ghal fuq ismu personalment. Kellu d-dokumenti lesti ma` l-accountant, u mal-awditur Louis Padovani sabiex meta jkun hemm il-fondi, jirregolarizza s-sitwazzjoni.

Sahaq illi qatt ma ghamel xejn minn wara dahar hadd. Mexxa n-negozju b`mod onest. Hu u ibnu mexxew dejjem fl-ahjar interess tal-kumpannija. Li gara kien illi n-negozju mar hazin, specjalment wara l-ghaqda ma` MECO.

Fil-**kontroezami**, ikkonferma li hu u ibnu Mark kellhom paga ta` US$ 7,000 fix-xahar. Dik il-paga kienet approvata mill-bord tad-diretturi ta` Terra Sana. Kien prezenti Cremona li kien l-Onor Chairman ta` Terra Sana.

Mistoqsi jekk kienx iqis esagerata s-somma ta` US$ 150,000 li thallset mehudin bhala *directors` remuneration,* huwa sostna li din kienet salarju.

Qal illi l-ispejjez ta` vjaggar li kienu jaqbzu l-US$ 100,000. Din ma kenitx spiza esagerata, peress li l-ivvjaggar kien isir kwazi kull gimgha. Anke Cremona kien jivvjagga bejn Awissu 2007 u Mejju 2008.

Qal illi fejn a fol 47 tnizzel CMP Services Ltd, dan kienu l-ispejjez ta` l-accountant Paul Camilleri. L-ispejjez ta` Dr Siegfried Borg Cole kienu ghal xoghol fil-kaz tat-trasferiment ta` l-apparat. Il-mizata ta` Camilleri u Borg Cole kienet ta` madwar Lm 12,000.

Xehed illi qabel kienet kostitwita Terra Sana, sar hafna xoghol.

Cahad illi mill-ufficcju li kien mikri minghand Vassallo Builders kienu joperaw kumpanniji ohra. Il-kumpanniji CC Gaming Services Limited, 18 Gaming Limited, u Key Game Limited kienu joperaw minn appartament iehor fl-istess binja, mentri Marchem Limited kienet tuza dak l-indirizz izda kienet kumpanija li ma taghmel xejn.

Stqarr illi huwa assuma r-responsabilita` tas-self bankarju minn BAWAG Bank, liema self kien ta` Terra Sana. Saru xi pagamenti lill-bank minn Terra Sana izda dawn kienu parti min-negozju. Hu u Garrett hadu s-self izda Cremona kien jaf dwar dan. Hu u Garrett hadu r-responsabilita` tas-self. Is-self kien fuq MECO li mbaghad mar ghand Terra Sana. Fil-bidu s-self ta` Cobit. Is-self mar fuq Terra Sana bl-approvazzjoni ta` d-diretturi.

Mistoqsi kif dak is-self hareg fl-4 ta` Novembru 2008 u l-pagamenti kollha saru sa April 2008, ferm qabel mkien iffirmat firmat is-self ta` Terra Sana, huwa sostna li l-ftehim kien li ladarba Terra Sana ser tiehu dak is-self, hi kellha tibda thallas lil BAWAG Bank.

Cahad illi l-US$ 3 miljun intuzaw biex jithallsu d-djun tieghu.

Qal illi bdew isiru pagamenti lil BAWAG qabel ma` Cremona sar shareholder.

Spjega illi mid-19 ta` Lulju 2007 sat-12 ta` Marzu 2008 kien hemm total ta` US$ 1,622,200 utilizzati ghall-makinnarju ta` Cobit peress li Terra Sana kienet ghadha ma gietx iffurmata. Il-makkinarju kien iehor kbir li kien qed jinbena ghall-Inglizi ma` makkinarju iehor. Il-pagamenti li saru lil Remtech ammontanti ghal US$ 351,371 kien jaf bihom Cremona u dawn kienu djun li Remtech kellha mal-bank. Go Terra Sana, huwa dahhal apparat jiswa US$ 4.5 miljun.

Kompla jghid illi kien hemm qbil li s-self ta` Cobit jidhol ghand Terra Sana izda jekk din tfalli, Cremona ma accettax li jkun responsabbli.

Cahad li l-ftehim kien fis-sens illi qatt ma jigu nkluzi d-djun ta` haddiehor.

Cahad li ghabba lil Terra Sana bl-ispejjez kollha ta` Cobit.

Irrimarka li Cremona spicca kisser il-kumpannija billi bil-vjaggi tieghu u billi ghamel negozji ohra barra minn Terra Sana.

Qal illi l-valutazzjoni ta` US$ 4.6 miljun ghall-apparat saret minn Remtech. Il-valutazzjoni mbaghad saret US$ 1.9 miljun meta MECO giet iffurmata. Meta ttiehdet din id-decizjoni, Cremona kien prezenti wkoll. Il-makkinarju kien ghadu l-Istati Uniti. Huwa ha mizuri legali biex jipprotegi l-assi u kien anke ghamel kawza barra. Meta marad ghal xi zmien u ma kompliex ikun involut, kollox beda jisfaxxa.

Mistoqsi kif jibqa` jsostni li s-self l-iehor li Cremona ghadda lil MECO sar bil-kunsens tieghu tant li fil-minuti hemm imnizzel li sar qbil li US$ 3,000,000 investiti f`Terra Sana kellhom jigu konvertiti f`dejn u mhux f` *shareholding*, huwa sostna li huwa kien kontra dan izda hekk sehh.

Mistoqsi jekk m`ghandhiex mis-sewwa l-istqarrija tieghu li Cremona huwa beneficjarju ta` Alliance Trust Company Limited ghaliex fil-fatt huwa biss *honorary chairman*, stqarr li dak li xehed kien fuq informazzjoni li waslet ghandu mill-partners tieghu fl-Istati Uniti.

Qal illi l-isem MECO huwa kompost minn MET li kienet il-kumpanija Amerikana u CO minn Cobit.

Ikkonferma li meta il-ftehim dwar l-investiment ta` Cremona, l-intenzjoni kienet li jsir il-kuntratt ma` l-Kazakhstan u kien hemm ukoll il-kuntratt ma` l-Aegean. L-ewwel kuntratt ma giex konkluz peress li dawn riedu jzommu aktar *shares* u ghalhekk kien deciz anke bl-adezjoni ta` Cremona li ma tkunx accettata l-proposta. Il-pjan inizjali kien illi l-apparat imur il-Kazakhstan.

Qal illi wara li saret MECO, il-funzjoni ta` Terra Sana hija li tiehu hsieb is-self taghha. Terra Sana waqfet kompletament u hadet kollox over MECO. Terra Sana hadet il-beneficcju ta` 50% fil-MECO. In segwitu sar ftehim biex dan il-50% jinzamm minn Terra Sana USA.

Patrick Ronald Garrett xehed li huwa ghandu 45% tal-ishma ta` Terra Sana. L-ishma qed jinzammu pemezz ta` *trust* ma` Ganado Trustees and Fiduciaries Limited, izda llum dawn huma f`isimhom. Bhala CEO ta` Terra Sana u MECO LLC, huwa cahad li Camilleri u ibnu kienu negligenti fin-negozju ta` Terra Sana jew utilizzaw fondi hazin. Ikkonferma li ma gewx prezentati l-accounts wara l-1 ta` Jannar 2009 izda gara hekk ghaliex ma kienx hemm flus biex jithallas l-audit. Terra Sana Limited ghandha *updated statement of accounts* li gew moghtija lilu minn Allan Adams li huwa *certified public accountant*. Dawn id-dokumenti ntbaghtu kemm lil BAWAG Bank minhabba s-self u kif ukoll lil Cremona. Allan Adams kien ta` spiss prezenti fl-ufficcju ta` Malta fejn iltaqa` ma` Paul Camilleri li huwa l-*accountant* ta` Malta. Cremona qat ma lmenta dwar l-*accounts,* u Allan Adams kien ukoll prezenti kemm bi skype kif ukoll personalment ghal numru ta` *board*

meetings. L-unici lmenti li rcieva kienu minghand Hogg u Liz Cremona ; l-ilmenti taghhom pero` kienu nutli u mhux ta` importanza.

Qal illi huma rcevew US$ 3 miljun minghand Cremona u kkrejaw *Thermal Desorption Unit* li kien jiswa US$ 4.5 miljun. Il-flus marru ghand Terra Sana, li wzathom, u ggenerat US$ 1,500,000. L-azzjonisti kollha ta` Terra Sana marru Oregon biex isir amalgamazzjoni ma` MET ossija Mobile Environmental Technologies LLC sabiex b`hekk kienet iffurmata MECO LLC. Il-kontibuzzjoni ta` Terra Sana kienet ivvalutata fl-ammont ta` US$ 4,500,000. Sostna li huwa wkoll tilef flus f`Terra Sana izda t-telf ma kienx dovut ghal tmexxija hazina. Lanqas kien hemm frodi jew imgieba hazina kontra Colusa jew Cremona.

Sostna li kienu Liz Cremona u Mark Hogg li holqu ambjent li ma kienx kongenjali ghan-negozju. Fil-fatt kien hemm nuqqas ta` informazzjoni da parti ta` Cremona. Sakemm ma dahlux fix-xena martu u Hogg, Cremona kien kuntent b`kull ma kien qed isir. L-atteggjament ta` Hogg kien distruttiv u kien biss intenzjonat biex jigu rkuprati fondi minn investiment li ma kienx irnexxa u sabiex jitfa` responsabbilita` fuq id-diretturi tal-kumpannija. Meta kkomunika ma` Liz Cremona u ma` Hogg, dawn kienu jinjoraw l-informazzjoni li kienet moghtija kontra l-*agenda* taghhom u jiffokaw biss fuq dak li kienu jidher importanti ghalihom.

Mark Camilleri xehed illi huwa kien direttur ta` Terra Sana sal-14 ta` Novembru 2011.

Qal illi Cremona u Colusa kienu involuti f`kull decizjoni ta` importanza li ttiehdet u Cremona kien jattendi l-ufficcju diversi drabi. Kellu xufier ghad-disposizzjoni tieghi li kien jithallas minn Terra Sana. Ix-xufier kien jigbru mid-dar u jiehdu lura.

Stqarr illi l-*accounts* ta` Terra Sana kienu jinzammu mill-*accountant* Paul Camilleri. L-ahhar audit prezentat lill-MFSA kien dak ghas-sena li ghalqet fil-31 ta` Dicembru 2016.

Kompla jghid li Terra Sana hadet id-decizjoni illi tinghaqad ma` MET u tifforma kumpannija gdida bl-isem ta` MECO Environmental LLC fl-1 ta` Dicembru 2007. Dr Cremona kien prezenti ghal-laqgha li sar Oregon. Bil-amalgamazzjoni kienet se tinholoq opportunita ta` negozju ma` r-raffinerija

taz-zejt MOTIVA. Il-*corporate reorganization* ghall-amalgamazzjoni kienet komplikata ferm u tqabbdu diversi avukati u *tax experts* kemm Malta kif ukoll l-Istati Uniti. L-istruttura kienet tinvolvi l-formazzjoni ta` *holding company* fl-Istati Uniti bl-isem TerraSana USA LLC. Is-*shareholders` interest* f`MECO Environmental Technologies gew trasferiti lil Terra Sana USA LLC. Illum Terra Sana Limited saret kumpannija li mhijiex topera, m`ghandhiex assi, u ghandha dejn ma` Bawag Bank ta` madwar US$ 1.9 miljun. Kienu saru kuntatti ma` BAWAG Bank biex is-self imur fuq il-kumpannija tal-Istati Uniti izda l-bank irrifjuta. Ghalhekk Terra Sana Limited ma setghetx tigi xjolta u stralcjata minkejja li kienu trasferiti s-*shareholding interests* lil TerraSana USA LLC.

Qal illi l-pagamenti tas-self bdew jaqghu lura peress li l-progetti fl-USA kienu ghadhom ma gewx konkretizzati u kien hemm ukoll problemi relatati mal-*economic downturn* fl-ekonomija ta` l-IStati Uniti fl-2008. Id-diretturi Maltin kellhom ikomplu bil-pagamenti lil BAWAG. Infatti l-kumpannija ta` missieru JAMCO Limited li kellha l-ishma f` Terra Sana ma kinitx fil-pozizzjoni li tkompli taghmel il-hlasijiet. B`dan kollu Cremona kien infurmat f`diversi okkazjonijiet. Gara li la Cremona u lanqas JAMCO Limited ma komplew jaghtu flus lil Terra Sana Limited, partikolarment minhabba li l-interess kummercjali kien kollu fil-kumpanija TerraSana USA LLC. Dan kien ribadit fl-*extraordinary general meeting* ta` Terra Sana Limited li sar fis-6 ta` Lulju 2012.

Sostna li d-diretturi ta` Terra Sana kienu dejjem trasparenti u dejjem ddiskutew kollox ma` l-azzjonisti kollha sabiex hadd ma jhossu pregudikat. Cremona siefer diversi drabi, spejjez ta` Terra Sana Limited jew ta` MECO Environmental LLC, fosthom Sydney, Newcastle, Londra, Hartlepool, Aberdeen, Amsterdam, The Hague, Barcellona, Louisiana, Texas, Kansas, Missouri u Oregon.

Qal illi Cremona kien azzjonist attiv hafna u kien jaf id-day-to-day running tal-kumpannija. L-involviment ta` Mark Hogg kien minimu u attenda ftit laqghat. Hogg kien talab rendikont ta` fejn kienu gew utilizzati l-flejjes investiti minn Cremona u din l-informazzjoni kienet giet moghtija lil Cremona fil-21 ta` Mejju 2009 u lil Mark Hogg fid-29 ta` Mejju 2009.

Sahaq li mhux minnu li Terra Sana giet amministrata hazin mid-diretturi. Cremona kien tant jemmen fil-progett li baqa` jinvesti flus f` MECO.

Fil-**kontroezami**, ikkonferma li l-extraordinary general meeting li tas-6 ta` Lulju 2012 sar wara talba ta` Cremona. L-*accounts* ta` MECO kienu prezentati u accessibbli. L-assi ta` Terra Sana kollha kienu trasferiti ghal MECO Environmental b`valur ta` madwar US$ 4.5 miljun. Il-prezz li thallas ghall-apparat kien fil-forma ta` *shares* fl-entita` l-gdida. L-apparat kien jikkonsisti minn *units* li 80% taghhom marru l-Istati Uniti. Kien hemm *units* li gew mibnija mill-gdid, u ohrajn li zdiedu ma` *units* ohra.

Qal illi mid-dokumenti ezebiti jidher illi l-valur ta` l-apparat kien stmat US$ 4.6 miljun, izda mbaghad il-valur kien ridott ghal US$ 2.6 miljun.

Fisser illi kienu jinzammu *management accounts* u Cremona. L-audits mill-2009 `il quddiem baqghu ma sarux minhabba nuqqas ta` flus.

III. L-Art 402(1) u (3)(e) tal-Kap 386

Bhala bazi fid-dritt ghall-azzjoni odjerna, ir-rikorrent jitlaq mill-**Art 402(1) tal-Kap 386** li jaqra hekk :-

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 ommissjoni 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.

Ir-rikorrent imur imbaghad ghall-**Art 402(3).**

U abbazi tal-**paragrafu (e)** jitlob lil din il-Qorti sabiex taghti ordni li bih tawtorizzah jibda procediment gudizzjarju iehor fl-isem u ghan-nom tal-kumpannija Terra Sana Limited kontra d-diretturi prezenti u ta` qabel taghha, u hemm iressaq it-talbiet li huma markati (i) (ii) u (iii) fir-rikors.

Testwalment l-**Art 402(3)(e)** jaqra hekk :-

Jekk dwar rikors magħmul skont is-subartikolu (1) jew (2), il-qorti tkun tal-fehma li l-ilment ikun bażat sewwa u li jkun ġust u ekwu li hekk tagħmel, il-qorti tista` tagħmel ordni taħt dawk il-kondizzjonijiet li jidhrilha xierqa …

tordna lill-kumpannija li tibda, tiddefendi, tkompli jew ma tkomplix proċedimenti tal-qorti, jew jawtorizza lil membru jew membri tal-kumpannija li jibdew, jiddefendu, ikomplu jew ma jkomplux proċedimenti tal-qorti f`isem u għan-nom tal-kumpannija …

In vista tal-mod kif kienet impostata l-azzjoni tal-lum, il-Qorti sejra taghmel analizi tan-natura tad-*derivative action* kif kienet trattata fl-Ingilterra, u dwar l-posizzjoni fil-kuntest Malti.

IV. Id-"*derivative action*" fil-ligi tal-Ingilterra

1. Skont il-"*Common Law*"

Fil-Pag 692-693 tat-Tmien Edizzjoni ta` **Boyle & Birds` Company Law** pubblikata minn Jordans fl-2012 jinghad hekk –

There is a general principle of company law that minority shareholders cannot sue for wrongs done to their company or complain of irregularities in the conduct of its internal affairs. This principle came to be known as the rule in "Foss v Harbottle" from the decision in which it was first clearly established. The cases show that this rule rests upon two related propositions: (a) the right of the majority to bar a minority action whenever they might lawfully ratify alleged misconduct ; and (b) the normally exclusive right of the company to sue upon a corporate cause of action. In "Edwards v Halliwell" Jenkins L.J. elucidated the relationship between the two propositions by contending that the will of the majority, vis-a-vis the minority is to be identified with that of the company. Consequently to say that the company is "prima facie" the proper plaintiff (claimant) in actions concerning its affairs is only another way of saying that the majority, within the limits of their power to ratify, have the sole rights to determine whether or not a dispute shall be brought before the courts.

The courts have justified the policy expressed by the rule by certain practical arguments of convenience. In "Gray v Lewis", James L.J. justified the principle that any body corporate is the proper plaintiff in proceedings to recover its property by pointing to the obvious danger of a multiplicity of shareholders` suits in the absence of a rule such as "Foss v Harbottle" …

The rule did not extend to a case where the act complained of is either illegal or is a fraud upon the minority, and there is also an exception in cases where the act done, although regular in form, is unfair and oppressive as against the minority. This will include acts by directors which are an abuse of powers contained in the company`s constitution and may only be approved by the unanimous consent of the shareholders …

A single shareholder may sue in his own name to restrain an act which is an infringement of his individual rights, for example a wrongful refusal to accept his vote at a general meeting of the company or a wrongful exclusion of him from the board of directors. The rule of "Foss v Harbottle" has of course no application to any statutory right conferred by the Companies Act 2006 on individual shareholders or a minimum of them. There is also judicial authority for the view that the rule has no application to any individual right conferred by the articles or memorandum. However whether such rights are an exception to the rule or are beyond its scope is largely a matter of language.

2. <u>Skont l-"*Statutory Law*"</u>

Il-ligi statutorja in kwistjoni hija l-Companies Act 2006.

Fil-Pag 698-699 tat-Tmien Edizzjoni ta` **<u>Boyle & Birds` Company Law</u>** pubblikata minn Jordans fl-2012 jinghad hekk –

The Companies Act 2006 sets out a statutory replacement for the old common law derivative procedure. This has replaced those aspects of the "Foss v Harbottle" that used to apply to such claims …

Section 260 of the Companies Act 2006 defines a derivative claim in traditional terms : proceedings by a member in respect of a cause of action on behalf of the company seeking relief on behalf of the company. Such claims can be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of a company. "Director" is widely defined as a former director or a "shadow director". Moreover the cause of action may be against "the director or another person or both". This would appear to allow derivative claims where the controlling or dominant shareholders (or possibly senior managers) are involved in a director`s breach of duty to the company.

The procedure for making an application to court for permission to continue a derivative claim is contained in s 261. Section 261(1) provides that

if it appears to the court that the application, and the evidence filed by the applicant in support of it, do not disclose a "prima facie" case for giving permission, then the court must dismiss the application and may make any consequential order if it thinks appropriate. Under s 261(3) where the application is not dismissed the court may give directions as to the evidence to be provided by the company, and may adjourn the proceedings to enable the evidence to be obtained. On hearing the petition the court may : (1) give permission to continue the claim on such terms as it thinks fit ; (2) refuse permission and dismiss the claim ; or (3) adjourn the proceedings on the application and give such directions as it thinks fit.

Section 262 of the Companies Act 2006 follows the Law Commission`s Report, in allowing a member to continue a claim (brought originally by the company) as a derivative where it is founded on an appropriate cause of action. The member may apply to the court for permission to continue the claim where the company has failed to prosecute the claim diligently or the manner in which the company commenced the claim amounts to an abuse of the rpocess of the court and it is appropriate for the member to continue the claim as a derivative claim. The procedure set out in s 262 (as to applications to continue a claim as a derivative claim) follows the same pattern as that set out in respect of applications for permission to continue a dervative claim in s 261. There is a similar provision (in s 264) allowing an application to court to continue a derivative claim brought by another member. The court may give its permission on the same grounds as a company claim which the court permits a member to bring as a derivative claim.

V. <u>Il-posizzjoni fil-ligi Maltija</u>

Hija l-fehma konsiderata ta` din il-Qorti illi meta l-legislatur Malti ghadda l-Att dwar il-Kumpanniji fl-1995, illum il-Kap 386 tal-Ligijiet ta` Malta, huwa ried jindirizza d-dritt ta` azzjoni ta` *membru* ta` kumpannija fuq il-binarji tal-Art 402. Meta ghadda l-Att dwar il-Kumpanniji fl-1995, biex jiehu post l-Commercial Partnerships Ordinance tal-1962, il-legislatur Malti kien jaf bl-esistenza tad-"*derivative action*" kif kienet applikata fil-*common law* fl-Ingilterra. Eppure ma holoq l-ebda "*derivative action*" fuq il-binarji kif thaddmet l-Ingilterra bhala eccezzjoni ghall-principji stabbiliti fis-sentenza ta` "*Foss v Harbottle*". **<u>Anzi l-legislatur ried li kollox idur mal-Art 402</u>**. Tant dan huwa hekk illi l-legislatur ma kienx kuntent illi jfassal il-mudell tal-Art 402 fuq il-ligi tal-Ingilterra. Infatti filwaqt illi l-ewwel subinciz ta` l-Art 402 huwa mibni fuq disposizzjoni identika li tinsab fin-New Zealand Companies Act 1993 (ara wkoll – Andrew Muscat : "**<u>Principles of Maltese Company Law</u>**" : pag. 959 et seq), it-tielet subinciz fejn huma nkorporati r-rimedji huwa intervent legislattiv prettament Malti.

Din il-Qorti **tikkondividi** l-fehma ta` Andrew Muscat (op. cit.) illi "*article 402(3)(e) of the Companies Act contemplates a* ***statutory form*** *of derivative action. The court is in fact empowered by the provisions to authorise "a member or members of the company to institute, defend, continue or discontinue court proceedings in the name and on behalf of the company."*

Hekk ukoll sostnew dawn il-Qrati.

Fis-sentenza taghha tad-29 ta` April 2008 fil-kawza **"Gordon Mizzi et v. Dr. John C. Grech et"** il-Qorti tal-Appell qalet hekk –

27. Ghalhekk din il-Qorti taqbel ma` dak li rriteniet l-ewwel Qorti li l-Artikolu 402(3)(e) ta' l-Att dwar il-Kumpaniji huwa l-verzjoni Maltija ta' l-azzjoni derivattiva. Ladarba llum il-gurnata l-legislatur Malti irregola b'mod statutorju l-azzjoni derivattiva, huma d-disposizzjonijiet tal-ligi Maltija rilevanti li ghandhom jigu applikati. L-Artikolu 402(1) jipprovdi li r-rimedji kontemplati fl-Artikolu 402(3) – li jinkludi anki l-versjoni Maltija ta' l-azzjoni derivattiva – jistghu jigu esercitati biss minn kull membru tal-kumpannija …

Il-Qorti tal-Appell qalet dan wara li aktar kmieni fl-istess sentenza (ara para. 24) kienet irrilevat b`riferenza ghal dak illi kiteb Andrew Muscat fil-pag 901 footnote 105 ta` "**Principles of Maltese Company Law**" (op. cit.) illi *xi awturi esprimew id-dubji taghhom jekk ir-rikonoxximent tal-kuncett ta' l-azzjoni derivattiva mill-Qrati Maltin huwiex kompatibbli mal-ligi tal-procedura Maltija.*

Din il-Qorti tifhem li forsi raguni ghala l-legislatur Malti dahhal l-*statutory form of the derivative action* fl-ambitu tal-Art 402 setghet kienet dik moghtija minn Lord Justice James fi "*Gray v Lewis*" diga` citata minn **Boyle & Birds Company Law** (op. cit.) u cioe` li jirriafferma l-principju illi *any body corporate is the proper plaintiff in proceedings to recover its property* sabiex ma jkunx hemm *the obvious danger of a multiplicity of shareholders` suits in the absence of a rule such as "Foss v Harbottle".*

VI. Il-kwalita` tal-prova

Diga` kien osservat illi l-Art 402(3)(e) hija l-verzjoni Maltija tal-azzjoni derivattiva. Fil-kawza tal-lum, ir-rikorrent kien **preciz** fit-talba li ressaq quddiem din il-Qorti. Infatti t-talba mhijiex semplici talba dikjaratorja izda qed jitlob li jkun awtorizzat mill-Qorti sabiex jipprocedi b`azzjoni *ad hoc* fl-interess tal-kumpannija kontra d-diretturi prezenti u ta` qabel tal-kumpannija u hemm iressaq kontrihom it-talbiet li ndika fir-rikors promotur.

Waqt li kien qed jittratta l-applikazzjoni tal-Art 402(3)(e), Andrew Muscat (op. cit.) jaccenna ghall-"izvantagg" (*disadvantage* fi kliem Muscat) li *a member would have to institute two actions : one to obtain authorization and then the one in the name and on behalf of the company.*

L-effett tal-applikazzjoni tal-Art 402(3)(e) kienet il-kwistjoni vera tal-kawza tal-lum.

Infatti fil-kors ta` din il-kawza qam l-argument min-naha tar-rikorrent illi tenut kont li dak li qed jitlob hija biss awtorizzazzjoni mill-qorti sabiex jaghmel azzjoni fl-interess tal-kumpannija kontra d-diretturi prezenti u dawk ta` qabel taghha skont l-Art 402(3)(e), il-prova li ghandu jaghmel ghall-fini tal-Art 402(1) ghandha tkun biss prova *prima facie*. Il-prova tat-talbiet fil-mertu taghhom tkun trid issir fil-kawza li tkun trid tigi promossa, wara li jkun kiseb l-awtorizzazzjoni tal-qorti.

Diversa hija l-posizzjoni tal-intimati. Dawn isostnu li sabiex ir-rikorrent jikseb l-awtorizzazzjoni tal-qorti skont l-Art 402(3)(e), ir-rikorrent irid jaghmel il-prova shiha u konklussiva tac-cirkostanzi kontemplati bl-Art 402(1).

Hija l-fehma konsiderata ta` din il-Qorti illi ladarba l-uniku skop tal-kawza tal-lum kien illi tintalab l-awtorizzazzjoni tal-qorti ghall-fini ta` l-Art 402(3)(e) il-livell tal-prova tac-cirkostanzi msemmija fl-Art 402(1) ghandu jkun dak ta` *prima facie*.

Ir-rikorrent ghamilha cara mill-bidu x`irid jikseb bl-awtorizzazzjoni tal-qorti u cioe` li jippromwovi azzjoni kontra d-diretturi prezenti u dawk ta` qabel b`talbiet precizi mhux generici.

Ma jaghmel l-ebda sens li l-kwalita` tal-prova li jrid jilhaq ir-rikorrent fil-kawza tal-lum trid tkun l-istess bhal dik tal-kawza fil-mertu. Altrimenti jkunu qed isir procediment doppju, u jkun qed jingieb fix-xejn l-integrazzjoni fl-Art 402(3)(e) tal-azzjoni derivattiva fil-kuntest Malti.

Ghalkemm it-tieni kawza tigi promossa mill-membru fl-isem u fl-interess tal-kumpannija ghax hekk ikun awtorizzat jaghmel mill-qorti skont l-Art 402(3)(e), jekk il-grad tal-prova fiz-zewg kawzi ikun tal-istess livell, allura jinholoq riskju bla bzonn ta` konflitt li mhuwiex desiderabbli fil-qasam kummercjali fejn ic-certezza tad-dritt huwa vitali u ta` primarja importanza.

Divers huwa l-apprezzament u l-esami tal-fatti u cirkostanzi li trid taghmel il-qorti li tintalab l-awtorizzazzjoni mal-esami li trid taghmel dik il-qorti li tkun qed tqis il-mertu tal-azzjoni promossa mill-membru fl-interess tal-kumpannija. Ghalhekk il-legislatur ghamel l-ghazla tal-Art 402(3)(e). Jekk l-ghazla tal-legislatur tkun stultifikata b`ezami u apprezzament doppju ta` provi, allura l-azzjoni derivattiva Maltija kif dedotta sal-lum ma tkun adoperata qatt u tkun resa inutili ghaliex jinholoq zbilanc bejn id-diversi interessi li jaghmlu kumpannija kostitwita skont il-ligi taghna.

Fil-harga tan-*New Law Journal* tal-5 ta` Ottubru 2007 deher artikolu li kiteb <u>Dov Ohrenstein</u> minn Radcliffe Chambers bl-isem *Derivative Action : Shareholders now have a statutory right to sue directors in derivative actions. Will they use it ?*

<u>Ohrenstein</u> ighid kjarament li wara l-intrvent statutorju li sar fil-Companies Act 2006 tal-Ingilterra (*supra)* l-evalwazzjoni tal-ilment trid issir *prima facie* qabel isir esami fil-mertu.

Ighid hekk :-

CA 2006, Pt 11 therefore gives shareholders for the first time a statutory right to sue directors in a derivative action on behalf of the company for negligence, default, breach of duty or breach of trust, subject to the court allowing the action to proceed. This covers a broader range of conduct than exists under the present common law. For example, shareholders will be able to bring a derivative action against directors for negligence even if the

directors concerned have not benefited from their negligence. This is a significant change from the present law (see Pavlides v Jensen [1956] 2 All ER 518, [1956] 3 WLR 224). However, safeguards have been introduced to protect directors from ill-founded claims, the main one being that shareholders will need to obtain the court`s consent to continue a claim by showing that they have a prima facie case.

In cases where a member originally brings a derivative action, permission must be sought under s 261.

There is also the possibility under s 262 of an alternative scenario when a company has brought a claim and a member applies to the court so that the cause of action is then pursued as a derivative claim. An example of such a scenario would be if the company has failed to pursue a claim diligently, particularly if the company had only brought the claim in an attempt to stop a derivative action being commenced. Situations when s 262 will be relied upon are unlikely to arise frequently.

The Procedure

Under CA 2006, ss 261 and 262 the court has the same discretion. The member seeking the court`s permission to bring a derivative claim must follow a two-stage process before any substantive proceedings can be commenced. ***The member must file sufficient evidence to establish a prima face entitlement to bring a derivative claim.*** *At this stage the court the case needs only to consider the evidence filed on behalf of the claimant. If the court does not dismiss the application appropriate consequential directions will be ordered, eg for the company to file evidence. The merits of the application may then be reconsidered at an adjourned hearing. The member needs to persuade the court that a derivative action is appropriate at any adjourned hearing where the evidence of the both parties will be before the court.*

This process is designed to ensure that the claimant is serious about pursuing the claim and has sufficient grounds to do so. The front loading of costs on the claimant might deter some of the more frivolous or vexatious claims. Perhaps the most useful consequence is that it will minimise the initial expense that a company need incur if a potential derivative claim obviously lacks merit.

Jekk b`analogija kellu jsir xebh bejn is-sistema taghna u dik li hemm fil-ligi statutorja tal-Ingilterra, il-procedura promossa fil-kawza tal-lum hija propju l-ewwel fazi ta` dik prevalenti l-Ingilterra.

F`artikolu li nkiteb minn **Slaughter and May** li hija ditta ta` avukati ta` reputazzjoni internazzjonali f`Gunju 2007 bl-isem *Companies Act 2006 Directors` Duties, Derivative Actions and Other Miscellaneous Provisions* [https://www.slaughterandmay.com/media/39392/companies_act_2006_directors_duties_derivative_actions.pdf] jinghad hekk :-

Application for permission to continue a derivative claim - the first stage : …

The shareholder bringing the claim must apply to the court for permission to continue the claim and provide evidence to the court to make out a prima facie case for obtaining that permission. If the court determines that a prima facie case is not made, it must dismiss the application and may make any consequential order that it considers appropriate (such as a costs order or a civil restraint order against the shareholder). Neither the defendants nor the company itself are involved at this stage although the company will have received notice of the claim. The Government sees this as an opportunity for the courts to dismiss vexatious or unmeritorious claims as early as possible in the process.

Slaughter and May ikomplu jittrattaw x`jigri fit-tieni stadju ta` dak li jigri fil-ligi statutorja tal-Ingilterra, u li jirrelata mat-tieni azzjoni wara li tinkiseb l-awtorizzazzjoni skont l-Art 402(3)(e) tal-Kap 386 :-

Application for permission to continue a derivative claim - the second stage: If the application is not dismissed by the court at the first stage, the court may then direct the company to provide evidence and, on hearing the application, may grant permission for the shareholder to continue the claim on whatever terms the court thinks fit, may adjourn proceedings and make such directions as it thinks fit or may refuse permission and dismiss the claim.

In vista tal-premess, din il-Qorti hija tal-fehma illi **m`ghandhiex** taghmel ezami tal-fondatezza ommeno tat-talba li d-diretturi u ex-diretturi tal-kumpannija intimata humiex responsabbli ghad-danni kkawzati lill-kumpanija minhabba li (i) giet utilizzata propjeta tal-kumpannija ghall-uzu personali u/jew a favur ta` assi tad-diretturi u/jew l-ex-diretturi, kif ukoll tal-azzjonisti maggoritarji ; (ii) d-diretturi u/jew l-ex-diretturi b` nuqqas ta` kura, diligenza, prudenza jew ta` hsieb naqsu milli jipprotegu sufficjentement l-interessi tal-kumpanija fl-investimenti li ghamlu ghan-nom tal-kumpannija u (iii*)* amministrazzjoni hazina tal-kumpannija da parti tad-diretturi u/jew ex-diretturi, inkluz in-nuqqas li jissejhu laqghat generali tal-kumpannija, in-nuqqas li jigu ppreparati l-annual accounts u n-nuqqas li jsiru audits, li

wassal ghal u ghadu qed jirrizulta f`effetti negattivi fuq il-benessere tal-kumpannija.

Sal-lum dak li qed tintalab din il-Qorti li taghmel huwa li tawtorizza li ssir kawza ghad-danni kontra l-konvenuti in vista ta` l-allegat agir taghhom. Dak li jidher li wassal lir-rikorrent ghal din il-procedura huwa li minkejja li allegatament hemm evidenza biex issir tali kawza ghad-danni mill-kumpannija kontra d-diretturi, l-istess diretturi qeghdin jostakolaw lill-kumpannija milli tipprocedi kontra taghhom.

Ghaldaqstant dak li trid tara l-Qorti huwa jekk hemmx prova *prima facie* ta` l-ilmenti tar-rikorrent, u li minkejja l-fondatezza ta` dawn l-ilmenti l-kumpannija tramite l-bord ta` diretturi naqsitx li tiehu azzjoni kontra l-istess diretturi.

Ikun imbaghad dan in-nuqqas milli ssir il-kawza ghad-danni li jkun jikkostitwixxi agir oppressiv, mhux gust u diskriminatorju fil-kuntest tal-Art 402(1).

Stabbilit **il-livell** tal-prova fi procediment ta` din ix-xorta, tajjeb li tkun stabbilita l-aspettativa tal-Art 402(1).

Fis-sentenza li tat din il-Qorti (diversament presjeduta) [**PA/GV**] fit-30 ta` Jannar 2008 fil-kawza "**Cutajar pro et noe et vs S.C. & Company Limited et"** inghad hekk –

Illi l-prova biex tirnexxi dina l-azzjoni tispetta lir-rikorrenti li ressqu dina l-azzjoni. Huma jridu jippruvaw li (a) l-affarijiet tal-kumpanija jkunu tmexxew jew qed jitmexxew jew aktarx jitmexxew b'mod li… (b) jew li xi att jew ommissjoni 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.

Il-ligi taghna ma taghtix spjegazzjoni ta' x'inhu oppressiv b'mod mhux gust diskriminatorji kontra, jew b'mod mhux gust ta' pregudizzju. Kull kaz ghalhekk irid jigi trattat u deciz fuq il-mertu tieghu proprju, u dana kaz b'kaz. L-iskop tal-ligi hu biex il-Qorti tkun tista' tintervjeni f'dawk il-kazijiet fejn hemm bzonn li jinghata rimedju minhabba unfair dealing fejn jigi pruvat

li kien hemm azzjonijiet jew ommissjonijiet li ma kienux gusti u li kienu ta' pregudizzju jew li l-affarijiet tal-kumpanija mhux qed jitmexxew sew.

Fis-sentenza li tat il-Qorti ta` Ghawdex (Gurisdizzjoni Superjuri) **[AE]** fl-4 ta` Frar 2009 fil-kawza "**Ellis vs Ellis"** inghad hekk –

Jibda biex jinghad li dan il-provvediment jista' jigi nvokat mill-membri kollha, u mhux biss minn membri minoritarji u m'hemmx dubju li d-diskrezzjoni u l-poteri moghtija lill-qorti f'dan il-kuntest huma wesghin. Minn dan il-provvediment hu evidenti li :

(a) Dan il-provvediment japplika wkoll f'kaz ta' att jew ommissjoni izolata ;

(b) Ir-rimedju jista' jinghata kemm ghal dak li jkun gara fil-passat u wkoll xi att propost li jsir fil-futur ;

(c) L-ilment jrid ikun fuq it-tmexxija tal-affarijiet tal-kumpannija jew fuq att jew ommissjoni tal-kumpannija.

Fis-sentenza taghha tad-9 ta` Marzu 2007 fil-kawza "**Vella et vs Vella Brothers Ltd et**", il-Qorti tal-Appell qalet hekk –

… l-Artikolu 402 ta' l-Att dwar il-kumpaniji jaghti diskrezzjoni pjuttost wiesa' 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 …

… 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 sempliciment 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 generali 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 in 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 or the part of those who have the de facto control of the company, which has been unfair to the member concerned".*

… Fid-decizjoni ***O'Neill v Phillips*** *moghtija mill-House of Lords fl-20 ta' Mejju 1999, gie ritenut illi l-legislatur ried illi biex jinghata rimedju taht l-artikolu jigi kkunsidrat il-kriterju ta' dak li huwa 'fair'. Izda Lord Hoffman izid ighid li - "Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used … The requirement that prejudice must be suffered as a member should not be too narrowly or technically construed.*

Fis-sentenza ***Bovey Hotel Ventures Ltd*** (op. cit.) kien inghad hekk –

The test of 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 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.

Fis-sentenza "**Monreal et vs Delia noe**" (op. cit.) inghad hekk –

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 moghtija 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 necessarji 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 agir tas-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-subartikolu (3) tal-istess artikolu 402, il-Qorti tista' tipprocedi biex taghmel kull ordni necessarja 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.

Fis-sentenza taghha tal-31 ta` Jannar 2003 fil-kawza "**Ellul vs Ellul pro et noe",** il-Qorti tal-Appell qalet 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 stabbiliet 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-aspettattivi legittimi ("legitimate expectations") li r-rikorrent jista' jkollu u li sikwiet ikunu ferm aktar wiesgha mid-drittijiet strettament legali li johorgu mill-istatut ta-ssocjeta`. 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, sitwazzjonijiet dawn li x'aktarx jinstabu f' kumpaniji zghar privati li ta' sikwiet jissejhu "quasi partnerhsips", 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".

Fil-pagna 464 tat-Tielet Edizzjoni tal-***Ferrar's Company Law*** jinghad hekk –

... 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 daytoday operations and financially and personally committed to the company. Here the scope for legitimate expectations beyond their strict legal rights is obviously greatest.

However, as Lord Wilberforce stressed in Ebrahimi v Westbourne Galleries Ltd, the case for giving effect to equitable considerations must be made in each instance and it is not sufficient simply to assert that the company is small or private, for in many cases the basis of the relationship will be adequately and exhaustively laid down in the articles. If it is so defined by the articles or, for example, by the articles supplemented by a shareholders' agreement, then there is little room for finding further legitimate expectations beyond those outlined in the documents.

The interests of shareholders in larger private and public companies, on the other hand, are likely to be quite different from those of shareholders in quasi-partnerships and considerably more restricted. In these larger companies there is usually no underlying personal relationship, employment is rarely an issue and the shareholders are more interested in such matters as dividend yield and capital appreciation than involvement in the day-to-day running of the company. If they become dissatisfied, especially if it is a public company, they can sell their shares and withdraw from the company. Here the members rarely have expectations beyond their strict legal rights as provided by the articles.

"That is not to say that s.459 does not apply to larger private companies and public companies for the section is clearly not limited to quasi-partnerships. The point is that it may be harder to establish conduct which is unfairly prejudicial to the interests of the members in such companies.

Kif qalu Hicks u Goo fil-pagna 409 tal-Hames Edizzjoni ta` ***Cases and Materials on Company Law*** –

In the early days of S.459, it was thought that the petitioner must have unfairly suffered prejudice to an interest as a member only (and not eg. as a director). This requirement has never been relaxed in that the Court is prepared to recognise that members may have different interests having

regard to their rights, expectations and obligations (re a company (No 00477 of 1986 [1986 BCLC 376; O'Neill v Phillips. [1999] 1 WLR 1092). This is particularly so in quasi-partnership cases where a minority is excluded from management. But where the articles make detailed provision for any departing members to sell their shares at a fair price, the position may be different …Section 459 has proved to be a powerful weapon for minority shareholders, particularly in the case of quasi-partnerships. In such companies, minorities who are excluded from management participation or who unfairly suffer loss as a result of wrongdoing by directors or majority shareholders may get relief under the section.

Fil-kawza ***In Re Hotel Ventures Ltd.*** (1983) Slade J iddeskriva '*unfair prejudice*' hekk –

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.

Fil-pagna 449 tar-Raba` Edizzjoni tal-***Farrar's Company Law***, jinghad illi –

A member's interests are not necessarily limited, therefore, to his strict legal rights under the Articles and the Companies' Act but can extend also to legitimate expectations as to the conduct of the company's affairs arising from the nature of the company and the agreements and understandings between the parties.

Il-piz tal-prova *prima facie* tac-cirkostanzi kontemplati bl-Art 402(1) jispetta lir-rikorrent.

Dwar x`jammonta ghall-prova *prima facie* ghall-fini tal-ghoti tal-awtorizzazzjoni skont l-Art 402(3)(e), il-Qorti tirreferi ghall-artikolu ppubblikat fin-New Law Journal (op. cit.) fil-parti fejn inghad hekk :-

Section 263(2) sets out three situations in which permission for a derivative claim must be refused :

"(2) Permission (or leave) must be refused if the court is satisfied—

(a) that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim, or

(b) where the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorised by the company, or

(c) where the cause of action arises from an act or omission that has already occurred, that the act or omission -

(i) was authorised by the company before it occurred, or

(ii) has been ratified by the company since it occurred."

It should be noted that at common law a relevant question was whether or not the relevant act or omission was capable of being ratified, not whether or not it had been.If an application overcomes the hurdles in CA 2006, s 263(2) the court will then take into account the discretionary factors set out in s 263(3) which states :-

"(3) In considering whether to give permission (or leave) the court must take into account in particular –

(a) whether the member is acting in good faith in seeking to continue the claim;

(b) the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to continuing it;

(c) where the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be -

(i) authorised by the company before it occurs, or

(ii) ratified by the company after it occurs ;

(d) where the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company;

(e) whether the company has decided not to pursue the claim;

(f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company."

Ikompli jinghad illi :-

CA 2006, s 263(2)(b) reflects the recent decision in Airey v Cordell [2006] EWHC 2728 (Ch), [2006] All ER (D) 111 (Aug) where it was held that the appropriate test for permission to bring a derivative claim was the view of a hypothetical and independent board of directors. The court made clear in that case that its task was not to assert its own view but merely to be satisfied that such a board could take the decision that the minority shareholder applying for permission to proceed would like it to take.Another important provision is s 263(4) which states :

"(4) In considering whether to give permission (or leave) the court shall have particular regard to any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter."

Points to note include :-

The views that matter under s 263(4) are of independent members. This provision reflects the attitude of the courts in relation to common law claims (eg see Smith v Croft (No 2) [1987] 3 All ER 909, [1987] 3 WLR 405).

Particular regard is to be had to those views, they are not merely a factor to be "taken into account". This emphasis may have some marginal consequence if all factors are finely balanced.

The decision of a company to embark on litigation is usually a matter for the directors not for the shareholders yet it should be noted that the reference in s 263(4) is to the views of members without a personal interest rather than those of independent directors. This was an issue which was apparently the subject of some debate within the Law Commission."

David Kershaw – Professur tal-Ligi fil-London School of Economics specjalizzat fid-dritt socjetarju – ighid hekk fl-artikolu bl-isem *The Rule in Foss v Harbottle is Dead* mahrug fil-London School of Economics and Political Science Law Department - Law, Society and Economy Working Papers 5/2013 :-

Lord Glennie`s interpretation of the Act (Company`s Act 2006) in his Outer House ruling in Wishart v Castlecroft Securities provides for such a place. He holds that the Act makes provision for consideration of corporate

incapability through the two stage process. Stage 1 he holds should involve consideration of whether there is a prima facie case on the merits and whether there is `a prima facie case that those responsible those for that Act or omission are or remain in majority control, thus preventing institution of proceedings at the instanceof the company`. [2010] BCC 161, [27] On this reading the term `prima facie case for giving permission ` does not simply mean that there is prima facie case based on the permission criteria in section 263 rather it means that in order to move to Stage 2 there must be: (i) a prima facie case on the merits; (ii) a prima facie case of wrongdoer control or another form of corporate incapability; and (iii) a prima facie case that pursuant to the section 263 criteria permission would be granted. A slightly different reading, and one which Lord Glennie may well adhere to, is that the prima facie determination involves only (i) and (ii). This reading suggests that the phrase `prima facie case for giving permission` means that in the absence of (i) and (ii) the claim is not capable of being brought derivatively at all and therefore is not one in relation to which the court should consider whether it should `give permission` in stage 2 of the process.

This understanding of the meaning of `prima facie case` is derived from the pre-Act case law. The preliminary procedure introduced byPrudential Assurance v Newman ([1982] Ch 204.) used the term `prima facie case` to refer to both (1) a prima facie case on the merits and (2) a prima facie case that `the action falls within the proper boundaries of the exception to the Rule in Foss v Harbottle`.

In Airey v Cordell, a case which has been relied upon in post-Act cases tounderstand other provisions in Part 11, (See, for example, Iesini v Wetsrip Holdings [2011] 1 BCLC 498 relying on Airey v Cordell [2006] EWHC 2728 in interpreting section 263(2)(a) Companies Act 2006.) relying on this quote Warren J observed that: `I note that the reference to prima facie case is in relation to (1) and (2)`. [2006] EWHC 2728 [45] Under the pre-Act process the prima facie case determination applied to both the threshold proper plaintiff/corporate capability determination and the post-incapability considerations outlined in Part II above. Accordingly,if the term `prima facie case` is being used in the Act as it was used in the prior case law then what Stage 1 includes is a determination of whether there is a prima facie case that the general meeting is incapacitated."

Id-decizjoni ta` **<u>Airey v Cordell</u> (2006)** citata fl-artikolu appena citat qalet kjarament illi :-

The appropriate test for permission to bring a derivative claim was the view of a hypothetical and independent board of directors, and a court had not to assert its own view but merely be satisfied that such a board could take the

decision that the minority shareholder applying for permission to proceed would like it to take.

Fl-analizi li ghamel ta` din id-decizjoni, **Siward Atkins** ta` Maitland Chambers ighid hekk :-

It had to first be established that there was a prima facie case and that an exception to the principle in Foss v Harbottle 67 ER 189 applied, then the correct test to apply in deciding whether to allow permission for a derivative claim was that of the independent board. The availability of an alternative remedy for the minority shareholder would also be of some significance, Foss v Harbottle, Wallersteiner v Moir (No2) (1975) QB 373 and Prudential Assurance Co Ltd v Newman Industries Ltd (No2) (1982) Ch 204 considered. In the instant case, it was accepted that there was a prima facie case and an exception to the Foss v Harbottle principle applied. The dividing line between what majority shareholders could condone and ratify and what they could not was not easy to draw. The appropriate test was the view of a hypothetical and independent board of directors, and a court had not to assert its own view but merely be satisfied that such a board could take the decision that the minority shareholder applying for permission to proceed would like it to take. (ara http://www.maitlandchambers.com/barristers/case/siward-atkins/airey-v-cordell-2006)

Dan kollu premess, tajjeb jingha illi ghalkemm din il-Qorti hija konsapevoli li l-ligi statutorja Ingliza u l-emendi li saru ghaliha ma gewx riflessi fil-ligi nostrana, din il-Qorti tista` tiehu spunt minn dak li sehh barra sabiex tiddetermina l-vertenza ta` quddiemha.

Jidher illi dak li ghandha taghmel din il-Qorti huwa li tistabilixxi jekk l-att jew omissjoni tal-kumpannija jew tad-diretturi kienx ragjonevoli.

Riferibbilment ghal dak li inghad mill-intimati, dak li jrid jigi stabbilit mhuwiex prova li r-rikorrent ghandux bazi legali tajba u cara, u li dwar hemm probabilita` (*likelihood*) li l-azzjoni tirnexxi.

Li ghandu jigi stabbilit fl-istadju tal-lum huwa jekk hemmx bizzejjed elementi biex tinbeda kawza ohra fil-mertu.

Fl-isfond ta` dan kollu, jerga` jigi ribadit li fl-ahhar mill-ahhar, l-ghan li tintalab awtorizzazzjoni biex issir id-*derivative action* m`ghandux ikun li l-kumpannija tispicca nvoluta go kawza bla bzonn jew bla raguni jew li tippregudika l-azzjonisiti jew lid-diretturi.

L-ghan ta` tali azzjoni jibqa` l-ahjar interess tal-kumpannija.

VII. <u>Konsiderazzjonijiet</u>

Il-Qorti sejra tghaddi biex tevalwa r-ragunijiet li wasslu lir-rikorrent biex jittenta l-procedura tal-lum.

1) <u>Uzu ta` proprjeta` tal-kumpannija ghal ghanijiet personali jew ghal uzu lil hinn mill-interessi tal-kumpannija flimkien ma` nuqqas ta` harsien ta` l-interessi tal-kumpanija</u>

Mill-provi prodotti, irrizulta li Colusa nvestiet US $3,000,000 fil-kumpannija intimata u akkwistat 10% tal-ishma.

Irrizulta r-rikorrenti ma nghatawx informazzjoni **<u>dettaljata</u>** dwar fejn u kif kienu qed jigu utilizzati l-flejjes investiti. Dan in-nuqqas ta` informazzjoni wassal ghas-sejha ta` laqgha generali straordinarja , li xorta wahda ma servietx biex tali informazzjonimur ghand ir-rikorrenti.

Fil-mori ta` din il-kawza, il-konvenuti sostnew li tressaq rendikont dwar l-uzu ta` dawn il-flus investiti u dana hekk kif jidher fid-Dok TSL4.

Madanakollu, minn ezami *prima facie* tal-kontenut ta` dan id-dokument jidher li dan jirreferi ghal sena wahda biss u li l-investiment gie utilizzat ukoll fir-rigward ta` xi kumpanniji ohra li d-diretturi u/jew l-azzjonisti maggoritarji kellhom interess fihom.

F` dan ir-rigward, il-Qorti tinnota li minn dan id-dokument TSL4 irrizulta li minn dawn it-US$ 3,000,000 thallset :-

(i) is-somma ta` US $756,694 minn dejn li kellha l-kumpanija Cobit Limited ma` BAWAG Bank ;

(ii) is-somma ta` US$1,622,200 mill-flus tas-socjeta` Terra Sana lil Cobit Limited ghall-prezz tal-makkinarju li supposta kien tpogga bhala sehem Mario Camilleri tal-istess kumpanija Terra Sana ;

(iii) is-somma ta` US$351,461 lil RemtechUSA, li l-beneficial owner taghha kellu l-45% tal-kumpanija intimata.

Jidher ukoll minn dan id-dokument TSL 4 li thallsu ammonti konsiderevoli lil CMP Accountants u l-Avukat Borg Cole fi zmien meta l-kumpannija intimata kienet ghadha ma gietx kostitwita u ghalhekk iqum ukoll kwezit dwar il-veracita` ommeno ta` l-istess u jekk dawn l-ispejjez kienu verament jirrigwardaw ghal xoghol li sar fir-rigward tal-kumpanija konvenuta.

Dawn il-fatturi jindikaw li *prima facie* d-diretturi ma qdewx id-dmirijiet taghhom b` mod li jassiguraw li l-interessi personali taghhom ma jkunux in konflitt ma` l-interessi tal-kumpannija u li d-diretturi uzaw proprjeta` tal-kumpannija ghall-beneficcju taghhom stess jew ta` xi hadd iehor.

Dan imur kontra dak li jghid l-**Art 136A tal-Kap 386**.

Da parti taghhom, l-intimati sostnew illi Cremona kien jiehu sehem attiv, u kien konsapevoli ta` fejn kienu qed jintuzaw il-flejjes investiti, tant li qatt ma lmenta jew oppona izda addirittura baqa` jinvesti aktar fil-progett ta` Terra Sana Ltd mal-MECO.

Inghad illi mill-minuti tal-*board meetings* , kien diskuss li s-self bankarju minghand BAWAG jigi trasferit ghal Terra Sana Ltd u Cremona qatt ma oppona ghal dan. Percio` l-intimati jgibu l-argument illi l-agir ta` Cremona u Hogg jammonta ghal accettazzjoni u ratifika ta` l-pagamenti li saru, inkluzi l-pagamenti a favur ta` BAWAG Bank, u dawk a beneficcju ta` l-intimati jew kumpanniji ta` l-intimati jew ta` terzi.

Jinghad ukoll illi gew ipprezentati emails li ntbaghtu fl-2007 minn Mark Hogg kif ukoll xiehda ta` Elizabeth Cremona li lkoll juru d-dubbji u

thassib kbir li kellhom dwar il-fondi u dawn ilkoll gew indirizzati lil Mario Camilleri (Dok MH1 u MH2).

Mhux argument fondat li jinghad li Hogg kien qed jibghat dawk l-emails ghax Cremona ma kienx jinfurmah b` dak li qed jigri. Hogg kien il-konsulent ta` Cremona u xehed li huwa dejjem baghat l-emails fuq struzzjonijiet ta` Cremona. Dawn l-emails jindikaw li s-sitwazzjoni ma kinitx *plain sailing* ta` accettazzjoni u ratifika bhalma qed jallegaw l-intimati.

Sussegwentement intbaghtu anke ittri legali f`dan ir-rigward (Dok 5,6 u 7 ipprezentati mar-rikors promotur).

Ghal darb` ohra, jerga` jigi ribadit li din il-Qorti ma ghandhiex tidhol fil-mertu izda ghandha biss taghmel ezami *prima facie.*

Ghalhekk ma ghandhiex tezamina fid-dettal l-allegazzjoni u l-fatt li tressqu provi li jindikaw li jista` jkun li ma kienx hemm ratifika, huwa sufficjenti biex l-argument ta` l-allegata ratifika u accettazzjoni jigi skartat fl-istadju attwali, u jigi evalwat b` iktar dettal fil-kaz ta` ezitu favorevoli ta` din il-procedura u l-ftuh ta` kawza f` isem il-kumpanija.

2) <u>Nuqqas ta` laqghat tal-kumpannija u nuqqas ta` *financial statements*</u>

L-ahhar financial statements ta` Terra Sana kienu dawk ghas-sena li ghalqet fl-2008 u kienu prezentati matul l-2010.

Inoltre rrizulta li ma kienx hemm awditur appuntat ghas-snin ta` wara l-2008.

Bhala fatt, dak allegat, u fattwalment accertat fil-kors ta` din il-kawza imur kontra l-<u>Art 190, 181 u 183 tal-Kap 386</u>.

L-intimati Camilleri isostnu li qatt ma saru audited accounts peress li ma hemmx fondi.

Anke li kieku l-Qorti kellha taccetta bhala sostenibbli skuza ta` din ix-xorta jibqa` l-fatt li d-diretturi kienu obbligati ex lege mhux biss li jassikuraw li dawk l-accounts isiru izda li jipprezentawhom lir-Registratur tal-Kumpanniji fiz-zmien stabbilit mil-ligi.

B`zieda ma` dan tajjeb jinghad ukoll illi ghad illi l-intimati Camilleri semmew li kienu jsiru *management accounts*, prova ta` dan ma tressqet qatt.

Jirrizulta wkoll li ma kienx hemm zamma ta` laqghat generali kif jahseb l-**Art 128 tal-Kap 386**.

Fil-kuntest tal-premess, il-Qorti hija tal-fehma li r-rikorrent ghamel il-prova *prima facie*.

Provvediment

Ghar-ragunijiet kollha premessi, il-Qorti qeghda tilqa` dak li qieghed jitlob ir-rikorrent noe fil-paragrafu (a) (i) (ii) u (iii) tat-talba tieghu.

Tastjeni milli tiehu konjizzjoni ulterjuri ta` dak li qed jitlob ir-rikorrent fil-paragrafu (b) tat-talba tieghu.

Bl-applikazzjoni tal-Art 223(3) tal-Kap 12 tal-Ligijiet ta` Malta, tordna li kull parti tbati l-ispejjez taghha, billi fil-kaz kienu nvoluti kwistjonijiet difficli tal-ligi, kif ukoll minhabba n-novita` tal-kaz.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur