



QORTI CIVILI PRIM`AWLA

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum it-Tnejn 31 ta` Ottubru 2016

Kawza Nru. 20
Rik. Nru. 146/16 JZM

**Adinotec AG kumpannija registrata
gewwa l-Germanja bin-numru ta`
registrazzjoni (HRB9447)**

u

**Alexander Papenberg detentur tal-
passaport Germaniz bin-numru
(CGJM8L026)**

kontra

X

Il-Qorti :

I. Preliminari

Rat ir-rikors ipprezentat fl-24 ta` Frar 2016 li jaqra hekk :-

Illi l-kumpannija rikorrenti Adinotec AG, li hija kumpannija registrata gewwa l-Germanja, hija azzjonista tal-kumpannija registrata Malta Poligate Limited li ghandha n-numru ta` registrazzjoni C43533, u ghandha erbgħa u ghoxrin elf disa` mija disgha u disghin (24,999) sehem ordinarju minn hamsa u ghoxrin elf (25,000) sehem fl-imsemmija kumpannija Poligate Limited. Ir-rikorrenti l-iehor Alexander Papenberg huwa l-uniku direttur tal-kumpannija Poligate Limited u dana kollu jirrizulta minn estratt mehud mis-sit elettroniku tal-Awtorita` ta` Malta dwar Servizzi Finanzjarji (MFSA) li qiegħed jigi hawn anness u mmarkat bhala "Dokument AAG1";

Illi l-kumpannija Poligate Limited ghandha problemi finanzjarji kbar, ghandha djun ma` diversi kredituri u ma hijiex fpozizzjoni li thallas id-djun tagħha, kif ser jigi ppruvat ampjament matul is-smigh ta` dan ir-rikors ;

Għaldaqstant l-esponenti umilment jitolbu illi dina l-Onorabbli Qorti jogħgħobha tordna x-xoljiment u l-istralc tal-kumpannija Poligate Limited (C43533) fost l-ohrajn ai termini tal-artikolu 214(2)(a)(ii) tal-Kap 386 tal-Ligijiet ta` Malta u dana taht dawħ il-provedimenti kollha illi dina l-Onorabbli Qorti jidhrilha xierqa u opportuni.

Rat id-dokument li kien ipprezentat mar-rikors promotur.

Rat illi r-Registratur tal-Kumpanniji kien notifikat bir-rikors promotur u bl-avviz tas-smigh tal-kawza fid-9 ta` Marzu 2016.

Rat il-verbal tal-udjenja tas-17 ta` Mejju 2016 fejn *inter alia* l-Qorti laqgħet it-talba tar-rikorrenti sabiex l-provi kollha li nstemghu fil-kawza fl-ismijiet *Adinotec AG (HRB 9447) vs X (Rik Nru 145/16 JZM)* ikunu jghoddu u jikkostitwixxu prova għall-fini ta` din il-kawza.

Rat il-provi li nstemghu fil-kawza fl-ismijiet *Adinotec AG (HRB 9447) vs X (Rik Nru 145/16 JZM)*.

Rat id-dokumenti li pprezentaw r-rikorrenti fl-istess udjenza, kif ukoll dawk li kienu pprezentati fl-udjenza tal-11 ta` Lulju 2016.

Rat id-digriet li tat fl-udjenza tal-ahhar fejn halliet il-kawza ghall-provvediment ghal-lum.

Rat l-atti l-ohra.

II. Xhieda

Charles Pearsall - ghal Malta Industrial Parks Limited – xehed illi huwa ghandu l-inkariku ta` *debtors executive*. Fl-4 ta` Marzu 2009 Malta Industrial Parks Limited ghamlet zewg kuntratti ma` Poligate Limited. L-ewwel kuntratt kien ta` kera ghal hames snin tal-propjeta` nru HHF 001A, b`area ta` madwar 1,075 m.k. fil-Qasam Industrijali ta` Hal-Far. Il-kera kienet ta` €11,023 fix-xahar eskluza l-VAT, u maghha *service charge* ta` €505 eskluza l-VAT. It-tieni kuntratt kien ta` *encroachment*, rinovabbli kull xahar, fuq il-fond HHF 01B, li kellu *area* ta` 877 m.k. ukoll sitwat fil-Qasam Industrijali ta` Hal-Far. Il-kera mensili kienet ta` €704.52 eskluza l-VAT, u maghha *service charge* ta` €34.35 eskluza l-VAT. Iz-zewg fondi jmissu ma` xulxin. Kienu koncessi lil Poligate Limited ghall-fini ta` *research development and production of ground jew road surface stabilisation solutions*.

Qal illi ghall-habta tal-ahhar tal-2015 u l-bidu tat-2016, kienu infurmati li kien hemm sgass fis-sit ghaliex il-fabbrika kienet abbandunata. Ghamlu kuntatt fl-ahhar indirizz li kellhom, ossija l-indirizz ta` l-awdituri tal-kumpanija, Cohort Accountants, li qeghdin Birkirkara Bypass. Sar hekk ghaliex il-persuni responsabbli mill-fabbrika ma setghux jigu rintraccjati. L-awdituri avzawhom li l-persuni li kienu jiehdu hsieb il-fabbrika kienu harbu minn Malta. Ghalhekk fil-11 ta` Marzu 2016 hareg *eviction order* u z-zewg proprjetajiet gew lura ghand Malta Industrial Parks Limited.

Kompla jixhed illi ttiehdet ittra bl-idejn fl-ufficcju registrat tal-kumpanija fejn din intalbet thallas l-ispejjez relatati mal-procedura ta' evizzjoni, kif ukoll intalbet tara x'sejra taghmel bil-mobbli li kienu thallew fil-postijiet. Ir-reazzjoni ghall-ittra kienet illi l-awdituri sostnew li huma wkoll kellhom kreditu favur taghhom kontra l-kumpanija, izda tilfu kull kuntatt mad-dirigenti tal-kumpanija billi tilqu minn Malta bla ma gew lura.

Qal illi l-inkwiet ghall-kumpanija jidher li nqala' ghal habta ta' Ottubru 2015 billi sa dak iz-zmien il-hlasijiet kienu jkunu regolari. Ipprezenta prospett ta' x'ghandha taghti Poligate Limited lil Malta Industrial Parks Limited.

Joanna Bartolo – ghal Bank of Valletta plc - xehdet illi Poligate Limited kellha tlett kontijiet maghhom u cioe' kont kurrenti, kont *savings* fl-Ewro u kont *savings* f'*US Dollars*. Il-kont kurrenti kien ghadu miftuh u kellu bilanc ta' €1,268.97. Is-*savings account* kellu bilanc ta' €1.90 waqt li l-*US Dollar account* kellu bilanc zero.

Paul Costa, *Terminations Officer* fit-*Terminations Section* tad-Dipartiment tax-Xoghol u Relazzjonijiet Industrijali xehed illi kienu saru mad-Dipartiment diversi talbiet minn impjegati ta' Poligate Limited ghal hlasijiet, fosthom *claim* minn George Muscat. Dan George Muscat kellu jiehu €2,358.80c. Impjegat iehor Matthew Muscat kien qed jitlob hlas ta' €2,476.88. Impjegata ohra, Charlotte Gauci, kienet qeghda titlob €2,402.83. Persuna ohra, Matthew Farrugia, talab hlas ta' €2,490.83. Ippreciza illi fil-kaz ta' dawn il-persuni kien involut hu direttament. Pero' kollega tieghu, Jonathan Caruana, kien involut fi *claims* ohra : Clayton Mizzi (€2,486.82), Steve Spiteri (€2,574.82), Sabin Janet Cnawmer (€7,389.45) u Brian Bianco (€2,551.88). Imbaghad l-ispettrici Av. Maria Anthea Bonnici kienet qeghda tiehu hsieb il-*claim* ta' Marcus Bull (€22,684.34).

Kompla jixhed illi dawn il-*claims* saru mad-Dipartiment f'it wara li dawn l-impjegati spiccaw mix-xoghol f'Novembru 2015. Spiccaw ghaliex kienu gew infurmati li l-kumpanija kienet ghalqet u tat is-sensja lill-impjegati kollha. Fil-bidu l-*claims* kienu izjed mill-ammonti li semma. Dak li qed jintalab llum kien il-hlas tal-*vacation leave*, parti mill-*bonus* ta' Dicembru tal-2015, parti mill-*weekly allowance* li hafna jsibuh bhala l-*bonus* ta' Marzu, kif ukoll qed in-*notice*. Fil-kaz ta' Marcus Bull jidher li hemm il-pagi wkoll ta' Settembru 2015 sa Novembru 2015.

Qal illi l-impjegati baqghu ma thallsux.

Alexander Papenberg xehed li fix-xahar ta` Dicembru 2015, huwa inhatar CEO u direttur ta` Poligate Limited, u ta` Poligate Russia Limited, wara li z-zewg diretturi ta` qabel kienu rrizenjaw. Qal illi dawn iz-zewg socjetajiet huma sussidjarji ta` l-kumpannija Adinotec AG, li hija *German technology provider for road construction listed on the Frankfurt Stock Exchange*. Intalab jiehu post id-diretturi ta` qabel hlief ghal Marcus Buhl. Qal illi l-azzjonista ta` maggoranza sab irregolaritajiet fit-tmexxija ta` Adinotec AG. Infatti kienu rrizenjaw id-diretturi ta` Poligate Limited u ta` Poligate Russia Limited. Dak l-azzjonista talab lilu biex jintervjeni u jsir direttur.

Xehed illi z-zewg kumpanniji kienu ffurmati b`ghanijiet precizi. Poligate Limited kellha tipproduci *road bed stabilisation products* go Malta. Hekk kien qed isir sa l-2014. Poligate Russia Limited kellha tbiegh il-licenzji ta` dak il-process. Kien difficli ghalih li jsir jaf x`kien qed isir peress li l-informazzjoni li nghata kienet skarsa, u l-*laptops* li nghata bl-informazzjoni lanqas ma kienet accessibbli billi ma kellux il-*passwords*.

Fisser illi Poligate Limited kienet topera mill-Qasam Industrijali ta` Hal-Far. Pero` meta huwa sar direttur, sab illi l-operazzjoni kienet wieqfa ghal kollox ghal sentejn shah. Sab ukoll li kien hemm impjegati li kienu qed jithallsu kull xahar bla ma jahdmu. Mill-*accounts* sab illi illi kien hemm aktar minn tletin kreditur li kellhom jiehd u aktar minn €2,700,000 bejniethom. Din l-informazzjoni kienet tirmigwarda l-ewwel nofs tal-2015. Qal li ma jafx jekk id-djun thallsux jew zdiedux. Kellem lill-awdituri izda kien infurmat li billi huma kellhom jiehd u l-flus ghall-prestazzjonijiet taghhom ma kienux sejr in jaghlqu l-kontijiet qabel jithallsu.

Qal illi jaf bis-sentenza tas-27 ta` Marzu 2014 fil-kawza fl-ismijiet "*Brointermed Lines Limited vs Poligate Limited*". Infatti sar kuntatt mieghu minn rapprezentanti tal-kumpannija attrici f`dik il-kawza li topera minn Genoa fl-Italja. Kien infurmat illi kienet konsenjata merkanzija lil Poligate Limited izda din baqghet ma hallsitx l-ispejjez tat-trasport. Ghalhekk saret kawza kontra Poligate Limited li kienet deciza kontra taghha.

Sostna illi Poligate Limited kellha materja prima li kienet ghadha mahzuna fis-sit li kellha go Hal-Far kif ukoll taghmir tal-produzzjoni. Il-

materja prima ma setax jintuza. Dwar it-tagħmir, qal li ma jafx x`kien l-istat attwali tieghu. Il-valur tat-tnejn kien minimu. L-istess ighodd għall-iskrivani tal-ufficini u l-kompjuters.

Qal illi l-process ta` l-produzzjoni ta` *road stabilisation products* kien ikkreat minn Axel Siegner, cittadin Germaniz, li qatt ma kien impjegat ta` Poligate jew Adinotec. Fil-fatt qatt ma thallas tax-xogħol tieghu, tant illi kiteb bl-avukat tieghu biex jithallas (DOK AP3). Min-naha tieghu sostna li Siegner għandu raġun u kellu jithallas.

Ikkonferma l-kontenut tal-*memorandum* u ta` *l-articles of association* ta` Poligate Limited (Dok AP4). L-azzjonisti huma Adinotec AG li fiz-zmien tal-kostituzzjoni tas-socjeta` kienet rappreżentata minn Edmund Krix, li m`ghadux direttur. Bruno Wuethrich irrizenja ukoll f`Dicembru 2015. L-istess għamel Marcus Buhl.

Stqarr li ma jistax jifhem kif id-diretturi hallew debitu hekk kbir jakkumula meta kienu jafu li fl-aħħar sentejn ma kienet qed issir l-ebda attivita` ta` negozju u ta` produzzjoni. Poligate Limited ma għandhiex flejjes bizzejjed biex thallas id-debiti tagħha. M`għandhiex assi izda dejn biss. Qal hekk anke jekk qatt ma ra l-*accounts* tal-kumpannija.

Dwar Poligate Russia Ltd, xehed illi l-ghan tagħha kien li jinbieghu licenzji sabiex tigi prodotta t-teknologija tagħha fir-Russja. Ghalkemm kienet kumpannija registrata Malta, in-negozju tagħha kien ser isir fir-Russja. Huwa spjega li ma rcieva l-ebda informazzjoni dwar din il-kumpannija u n-negozju li għamlet, ghalkemm qal illi jaf li din il-kumpannija kienet ilha ma topera għal perijodu ta` sentejn shah skont tagħrif li għaddewlu d-diretturi ta` qabel.

III. Locus stanti

Qabel tqis il-mertu tal-istanza odjerna, il-Qorti trid taccerta ruhha li r-rikorrenti għandhom *locus standi* skont il-ligi.

Persuna li tkun trid titlob ix-xoljiment u l-istralc ta` kumpannija, trid toqgħod għal dak li jipprovdli l-**Art 218(1) tal-Kap 386** li jaqra hekk –

Talba lill-qorti (aktar `il quddiem imsejha "rikors ghal stralc") ghal -

(a) stralc ta` kumpannija mill-qorti skont l-artikolu 214(1)(a) ;

(b) xoljiment u stralc ta` kumpannija mill-qorti skont l-artikolu 214(2)(a) ; jew

(c) xoljiment u stralc ta` kumpannija skont l-artikolu 214(2)(b),

ghandha ssir b`rikors li jista` jsir jew mill-kumpannija wara decizjoni tal-laqgħa generali jew mill-bord tad-diretturi tagħha jew minn xi detentur ta` obbligazzjoni, kreditur jew kredituri, jew minn xi kontributorju jew kontributorji :

Izda rikors skont il-paragrafi (b) jew (c) jista` wkoll isir minn xi azzjonist jew direttur tal-kumpannija.

Fil-kaz tal-lum, ir-rikorrenti qegħdin jitolbu x-xoljiment u l-istralc ta` Poligate Limited abbazi tal-Art 214(2)(a)(ii) tal-Kap 386.

Il-Qorti sejra tqis il-posizzjoni ta` kull rikorrent.

a) Adinotec AG

Skont l-Art 218(1), xoljiment u stralc ta` kumpannija mill-qorti skont l-Art 214(2)(a) jista` jintalab :-

- i) mill-kumpannija wara decizjoni tal-laqgħa generali ; jew
- ii) mill-bord tad-diretturi ; jew
- iii) minn xi detentur ta` obbligazzjoni ; jew
- iv) minn kredituri jew kredituri ; jew
- v) minn xi kontributorju jew kontributorji.

Fil-kaz tal-lum, ir-rikorrenti Adinotec AD ma jirrizultax li taqa` fl-ebda wahda mill-(i) sal-(v) ghalkemm hija l-azzjonista bil-maggoranza tal-ishma ta` Poligate Limited.

Setghet tkun rikorrenti li kieku t-talba ghax-xoljiment u l-istralc saret abbazi tal-Art 214(2)(b) jew (c) li mhuwiex il-kaz tal-lum.

Ghalkemm hija azzjonista, Adinotec AD ma tikkwalifikax bhala *kontributorju* peress illi l-25,000 *Ordinary Shares* li jaghmlu l-*issued share capital* ta` Poligate Limited huma kollha *fully paid up* (ara d-dokumenti ; ara ukoll id-definizzjoni ta` *kontributorju* skont l-Art 215 sa 217 tal-Kap 386).

Mela l-Qorti tghid mill-ewwel illi r-rikorrenti Adinotec Limited m`ghandhiex *locus standi* biex titlob ix-xoljiment u l-istralc ta` Poligate Limited skont l-Art 218(1) tal-Kap 386 abbazi tal-Art 214(2)(a)(ii) tal-Kap 386.

b) Alexander Papenberg

Skont il-*memorandum* ta` Poligate Limited (ara fol 388 et seq tal-process bin-nru 145/2016 JZM), *the management of the company shall be entrusted to a board of directors of not more than three*. Jirrizulta illi fid-data tal-presentata tar-rikors odjern (ara fol 3 et seq tal-process ta` din il-kawza) is-socjeta` Poligate Limited kellha direttur wiehed biss u cioe` ir-rikorrent Alexander Papenberg - detentur tal-passaport Germaniz bin-numru (CGJM8L026). Dan ifisser li kien jikkostitwixxi wahdu l-bord tad-diretturi.

Ghalhekk Alexander Papenberg ghandu locus standi biex jitlob ix-xoljiment u l-istralc ta` Poligate Limited skont l-Art 218(1) tal-Kap 386 abbazi tal-Art 214(2)(a)(ii) tal-Kap 386.

IV. L-Art 214(2)(a)(ii) tal-Kap 386

Skont l-**Art 214(2)(a)(ii) tal-Kap 386**, *kumpannija tista` xxolji u tkun stralcjata mill-qorti ... jekk ... il-kumpannija ma tkunx tista` thallas id-djun taghha.*

Il-Qorti tirrileva illi meta tfassal il-mudell ghal-ligi taghna l-gdida dwar il-kumpanniji, il-qafas maghzul kien dak tal-Companies Act Ingliza 1985. Fil-ligi Ingliza, ix-xoljiment u l-istralc ta` kumpanniji kien trattat

permezz ta` legislazzjoni *ad hoc* u cioe` l-Insolvency Act 1986. Meta fl-1995 saret il-ligi taghna l-gdida dwar il-kumpanniji li hadet post il-Commercial Partnerships Ordinance 1962, id-disposizzjonijiet li jolqtu x-xoljiment u l-istralc kienu integrati fl-Att XXV tal-1995, illum Kap 386.

Fil-ligi taghna, li *kumpannija ma tkunx tista` thallas id-djun taghha* ghandu **sinjifikat preciz u definit** mil-ligi stess. Infatti fl-Art 214(5) il-ligi tistabilixxi liema huma c-cirkostanzi fejn kumpannija titqies li ma tkunx tista` thallas id-djun taghha ghall-finijiet tal-Art 214(2)(a)(ii). Ghalhekk l-Art 214(2)(a)(ii) ma jistax jinqara minghajr ma ssir riferenza ghall-Art 214(5).

V. **L-Art 214(5) tal-Kap 386**

Tnejn huma c-cirkostanzi definiti mil-ligi meta kumpannija ghandha titqies li ma tista` thallas id-djun taghha –

(a) *jekk id-dejn dovut mill-kumpannija jkun baqa` ma thallasx ghal kollox jew f`parti wara erbgħa u ghoxrin gimgha mill-ezekuzzjoni ta` titolu ekekuttiv kontra l-kumpannija b`xi wiehed mill-atti ekekuttivi msemmijin fl-artikolu 273 tal-Kodici ta` Organizzazzjoni u Procedura Civili ; jew*

(b) *jekk ikun ippruvat ghas-sodisfazzjon tal-qorti li l-kumpannija ma tkunx tista` thallas id-djun taghha, meta din tqis ukoll il-passiv kontingenti u prospettiv tal-kumpannija.*

Jidher illi l-azzjoni qegħda titmexxa kemm abbazi tal-paragrafu (a) kif ukoll abbazi tal-paragrafu (b).

a) **L-Art 214(5)(a) tal-Kap 386**

Fil-ligi Ingliza, l-insolvenza (jew li kumpannija ma tistax thallas id-djun taghha) hija trattata b`mod aktar wiesgha milli kif titqies fil-ligi taghna fejn l-istat ta` insolvenza ghandu tifsira aktar ristretta.

Dwar il-posizzjoni fil-ligi Ingliza, fit-Tmien Edizzjoni (2012) ta` l-ktieb **Boyle & Birds` Company Law** (pubblikat minn Jordans) pg 859 jinghad hekk –

There are two principal, although not exclusive or exhaustive, tests of insolvency : a company is insolvent if it unable to pay its debts as they fall due (“cash flow insolvency”) ; it is also insolvent if its liabilities exceed its assets (“balance sheet insolvency”) ...

Ghalkemm kif rajna fil-ligi taghna l-Art 214(5)(a) ighid xi haga diversa minn *inability to pay debts as they fall due* li nsibu fil-ligi Ingliza, din il-Qorti tiset xebh bejn dak previst fl-Art 214(5)(a) u *cash flow insolvency* fil-ligi Ingliza.

Fil-Boyle & Birds` Company Law (op. cit.) ikompli jinghad hekk –

Failure to pay a debt which is due and not disputed amounts to evidence of cash flow insolvency. Thus a company which has a policy of late payment of bills could find itself the subject of a petition for a winding-up order or administration order. Such a petition will not be struck out at an early stage as a form of improper pressure and an abuse of the process of the court, because, as Staughton LJ explained in Taylor’s Industrial Flooring (1990. BBC 44 at 51) creditors, not late payers, are more worthy of insolvency law’s protection.

“Many people today seem to think that they are lawfully entitled to delay paying their debts when they fall due or beyond the agreed period of credit, if there is one ... This can cause great hardship to honest traders, particularly those engaged in small businesses recently started. Anything which the law can do to discourage such behaviour in my view should be done.”

Fil-ktieb **Insolvency Law – Corporate and Personal** ta` Andrew Key u Peter Walton (pubblikat minn Pearson Longman – 2003) pg 17 jinghad hekk dwar *cash flow insolvency* kif mifhuma fil-kuntest tal-Insolvency Act 1986 –

The court, in examining whether a company is suffering cash flow insolvency, will consider whether the company is actually paying its debtors. Courts must take into account what current revenue the company has as well as what the company can procure by realising assets within a relatively short time ... A company can rely upon money which might be obtained from the sale

of assets or upon money which might be obtained on the strength of its assets ... It is possible that sometimes a debtor might be able to establish solvency by demonstrating that funds can be obtained through an unsecured loan. In considering whether a person or a company is insolvent, the debtor's whole financial position must be studied ... and a temporary lack of liquidity does not necessarily mean that the company is insolvent ...

At one time courts were rather strict on what they required to be established before they were willing to deem a person or a company insolvent, but in more recent times they have become more liberal as far as creditors are concerned and have held that a debtor is insolvent if a creditor is able to prove that he or she has not paid an undisputed debt after a demand has been made ... and this is the case even if there is other evidence which suggests that the value of the assets outweighs liabilities ...

Whether a company is cash flow insolvent is principally a question of fact and one which may be established in any number of ways, such as the existence of a large number of outstanding debts and unsatisfied judgments ... or there is lack of assets on which execution can be levied ...

It has been said that a debtor is not regarded as solvent just because if sufficient time were granted the debts could be paid off ...

Lura ghal-ligi taghna, riferibbilment ghall-Art 214(5)(a), hija gurisprudenza ta` din il-Qorti illi fejn si tratta ta` **atti ezekuttivi** ndikati fl-Art 273 tal-Kap 12, il-fattur rilevanti sabiex jiskatta l-perijodu ta` erbgha u ghoxrin (24) gimgha ghall-fini tal-Art 214(5)(a) tal-Kap 386 huwa l-**ezekuzzjoni** tal-Mandat.

Kienu prezentati bhala prova :-

a) kopja tal-mandat ta` sekwestru **kawtelatorju** nru 130/2014 fl-ismijiet *Brointermed Lines Limited vs Poligate Limited* ipprezentat fit-23 ta` Jannar 2014 u akkordat fl-istess data ghall-ammont ta` €187,742.32c bhala sorte ;

b) kopja tal-mandat ta` qbid **ezekuttiv** nru 859/2014 fl-ismijiet *Brointermed Lines Limited vs Poligate Limited* ipprezentat fis-6 ta` Gunju 2014 in kwantu ghal €187,742.32c bhala sorte, in kwantu ghal €6,258.08 bhala imghax sad-data tal-presentata tar-rikors ghall-hrug tal-mandat, u in kwantu ghal €2,040.26 bhala spejjez, u in kwantu ghal €218.74 bhala VAT. Il-hrug tal-mandat kien akkordat fid-9 ta` Gunju 2014 ;

c) kopja tal-mandat ta` qbid **kawtelatorju** bin-nru 415/2014 fl-ismijiet *Brointermed Lines Limited vs Poligate Limited* ipprezentat u akkordat fl-14 ta` Marzu 2014 ghall-ammont ta` €187,742.32 bhala sorte.

Din il-Qorti tghid illi l-prova tal-mandati kawtelatorji mhijiex rilevanti ghall-fini tal-Art 214(5)(a). Ghalhekk il-Qorti sejra tissofferma fuq il-mandat ta` qbid ezekuttiv nru 859/2014 (Dok AVC3 a fol 14 et seq ta` l-process ta` din il-kawza). Mill-att jidher illi l-mandat kien ezegwit fl-10 ta` Gunju 2016 (fol 29 sa 31). Kemm qabel u kif ukoll wara l-ezekuzzjoni tal-mandat, il-hlas dovut lill-kreditur u cioe` Brointermed Lines Limited baqa` ma sarx. Infatti kienet prezentata bhala prova **mir-rikorrenti stess** lista ta` kredituri ta` Poligate Limited. Fost il-kredituri, ir-rikorrenti jinkludu lis-socjeta` Brointermed Lines Limited u **jaccettaw** li Brointermed Lines Limited ghandha tiehu l-ammont ta` €162,783.48 minghand Poligate Limited.

Il-Qorti taghmel riferenza ghas-sentenza li tat il-Qorti tal-Appell fit-18 ta` Settembru 2009 fil-kawza "**Avukat John Refalo noe vs Garden of Eden Limited**" fejn inghad hekk :-

L-Artikolu 214 tal-Att dwar il-Kumpaniji jiddetermina kif u meta kumpanija ghandha "titqies" ("shall be deemed" fit-test Ingliz) li ma tkunx tista` thallas id-djun taghha. Ir-regoli huma cari u ma jhallu ebda lok ghall-provi in kuntrarju. Jekk il-kumpanija ma thallasx fi zmien 24 gimgha, hija titqies li ma tistax thallas id-djun taghha, u jekk tirrizulta din ic-cirkostanza, il-Qorti tista` tipprocedi ghall-istralc taghha. F'dan il-kaz, gie kkonstatat li wara s-sentenza ta` din il-Qorti, il-kredituri talbu u ottjenew il-hrug ta` mandat ezekuttiv, izda l-kumpanija Garden of Eden Limited ma hallsetx id-dejn, avolja ilhom li skadew l-24 gimgha mill-hrug tal-mandat.

Din il-Qorti tirrileva illi anke li kieku jkun sar hlas parzjali tal-ammont reklammat fil-Mandat, il-vot tal-ligi jkun sodisfatt ghaliex l-Art 214(5)(a) jitkellem dwar meta *id-dejn dovut mill-kumpanija jkun baqa` ma thallasx **ghal kollox jew fparti*** (enfasi u sottolinear tal-qorti).

Tenut kont tad-data tal-ezekuzzjoni tal-Mandat, tad-data tal-prezentata tar-rikors tal-lum, u tal-fatt illi l-kreditu kanonizzat baqa` ma thallasx, il-Qorti tghid illi l-vot tal-Art 214(5)(a) tal-Kap 386 huwa sodisfatt.

b) L-Art 214(5)(a) tal-Kap 386

Fit-test bl-Ingiliz l-Art 214(5)(b) tal-Kap 386 jaqra hekk :-

For the purposes of subarticle (2)(a)(ii), a company shall be deemed to be unable to pay its debts ... if it is proved to the satisfaction of the court that the company is unable to pay its debts, account being taken also of contingent and prospective liabilities of the company.

Fl-Insolvency Act Ingliza 1986, insibu disposizzjoni li TIXBAH dik tal-ligi taghna, ghalkemm mhijiex l-istess.

Il-Qorti qeghda tirreferi ghall-Art 123(2) tal-Insolvency Act 1986 li jaqra hekk –

A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.

Il-Qorti diga` rrilevat illi d-disposizzjoni fil-ligi taghna TIXBAH PERO` MHIJIEK IDENTIKA ghal dik tal-ligi Ingliza.

Id-divergenza bejn iz-zewg ligijiet hija li filwaqt li fil-kaz taghna l-mizura hija semplici : u cioe` *the company is unable to pay its debts account being taken also of contingent and prospective liabilities of the company*, fil-kaz tal-ligi Ingliza, il-kriterju huwa divers ghaliex il-Qorti tkun trid tqis illi *the value of the company's assets is less than the amount of its liabilities ... billi tiehu kont tal- ... contingent and prospective liabilities.*

Ghal din il-Qorti, id-differenza mhijiex ta` *drafting* izda ta` sostanza.

Fl-istess waqt, il-Qorti hija tal-fehma li xorta wahda ghandha tfittex sintesi bejn id-disposizzjoni tal-ligi taghna u dik tal-ligi Ingliza. U s-sintesi hija kostitwita mill-koncett ta` *contingent and prospective liabilities.*

Il-Qorti sejra tirreferi ghal dak li tghid id-dottrina fl-Ingilterra dwar il-materja li tikkostitwixxi l-mertu tal-istanza tal-lum.

Bid-debiti riservi, u tenut kont tad-**disparita`** fid-disposizzjonijiet ta` bejn il-ligi Ingliza u dik taghna, il-Qorti sejra tirreferi ghal dak li tghid id-dottrina Ingliza dwar dak li huwa maghruf bhala ***balance sheet insolvency*** meta abbinat mal-**Art 123(2)** tal-Insolvency Act 1986 tar-Renju Unit.

Fil-Pag 19 tal-ktieb **Insolvency Law – Corporate and Personal** (2003 – Pearson Longman) Andrew R Keay u Peter Walton ighidu dwar *balance sheet insolvency* kif mifhuma fil-kuntest tal-Insolvency Act 1986 –

In determining whether the assets are outweighed by the liabilities a court is able to take into account contingent and prospective liabilities, but not contingent and prospective assets [Byblos Bank SAL v. Al-Khudhairi (1986) 2 BCC99, 549 (CA)] It has been said that “liabilities” is a broadened term compared with “debts” [Re A debtor (No 17 of 1966) (1967) Ch 590 ; (1967) 1 All ER 668]. “Liabilities” is defined for the purposes of winding up in rule 13.12 (4) to mean “a liability to pay money or money`s worth, including any liability under an enactment, any liability for breach of trust, any liability in contract, tort or bailment and any liability arising out of an obligation to make restitution”. Then rule 13.12 (3) states that it is immaterial whether the liability is present or future, whether it is certain or contingent, or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion.

Clearly with this test it is only possible to take into account the assets owned by the company including the uncalled capital of the company [Re National Livestock Insurance Co (1858) 26 Beav 153 ; 53 ER 855 ...

Fil-Pag 114 tar-Raba` Edizzjoni (2011) ta` **Principles of Corporate Insolvency Law** (Sweet & Maxwell) Roy Goode ighid hekk –

The idea underlying this test ... is that it is not sufficient for the company to be able to meet its current obligations if its total liabilities can ultimately be met only by the realisation of its assets and these are insufficient for the purpose ...

Fil-Pag 130 ikompli hekk –

The mere excess of liabilities over assets is not in itself determinative. What has to be shown is that by reason of the deficiency of its assets the company has reached the point of no return.

Fil-Pag 134 sa 136, l-awtur jittratta n-nozzjoni ta' **contingent liability** u jghid hekk –

To give the phrase “contingent liability” any meaning we must restrict it to a liability or other loss which arises out of an existing legal obligation or state of affairs but which is dependent on the happening of an event which may or may not occur. Many of the cases have stressed the need for the liability to arise out of an existing obligation.

... in considering whether there is a contingent liability the court has regard to the existing commercial situation, not merely an existing legal obligation. In this regard, assistance can be derived from Financial Reporting Standard 12 which defines a contingent liability in the following terms :

(a) “A possible obligation that arises from past events and whose existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the entity’s control ; or

(b) a present obligation that arises from past events but is not recognised because :

(i) it is not probable that a transfer of economic benefits will be required to settle the obligation ; or

(ii) the amount of the obligation cannot be measured with sufficient reliability.”

... the term “contingent liabilities” is ultimately not a term of art and its precise meaning will depend on its context. The court is thus entitled to have regard to commercial realities ...

Fil-Pag 136 u 137, l-awtur jittratta n-nozzjoni ta' **prospective liability** u jghid hekk –

... The phrase “prospective liability” is neither a legal nor an accounting term of art. It has been judicially defined as : “ ... a debt which will certainly

become due in the future, either on some date which has already been determined or some date determinable by reference to future events.”

... it has been described ... as unmatured liability which will inevitably ripen into a debt with the passage of time. Such a definition encompasses all forms of debitum in praesenti, solvendum in futuro including an indisputable claim for unliquidated damages which remains only to be quantified and will result in a debt far more than a nominal amount. “Prospective liability” thus embraces both future debts, the sense of liquidated sums due, and unliquidated claims.

Fil-kaz tal-lum, jirrizulta mill-*Annual Report and Financial Statements* ghas-sena li ghalqet fil-31 ta` Dicembru 2014 illi Poligate Limited kienet spiccat f'sitwazzjoni prekarja hafna minhabba t-telf kbir li kienet qed taghmel.

Fid-*Directors` Report* (fol 54 ta` l-process ta` din il-kawza) jinghad :-

Performance review

No revenue was generated during the year under review (2013: EUR 539,272). As a result the Company incurred a gross loss for the year under review of EUR 680,366 (2013 EUR 764,622). However, the Company generated other income of EUR 507,331 which is mainly made up of EUR 500,000 in the form of royalties. The loss before taxation amounted to EUR 2,172,001 (2013 loss EUR 1,385,505). After accounting for taxation, the loss for the year amounted to EUR 1,428,152 (2013 : EUR 911,137). This significant loss that has been incurred during the current year is brought about by the write off of receivables based in Libya, amounting to EUR 1,517,130 due to the unstable political scenario in this country which makes the recoverability of these receivables very problematic.

Minkejja dan ix-xenarju negattiv, id-diretturi tas-socjeta` ta` dak iz-zmien, ossija Edmund Krix, Bruno Wuethrich u Marcus Buhl, komplew jirrapportaw li l-kumpannija kienety taghmel parti mill-Adinotec AG Group u li kellha l-appogg finanzjarju tal-Group biex tkun tista` tlahhaq ma` l-passiv taghha. Dawk id-diretturi kienu qeghdin jipprevedu illi *“the present level of activity to improve in the foreseeable future.”*

Fir-rapport taghhom (fol 56 et seq tal-process ta` din il-kawza) l-awdituri gibdu l-attenzjoni ghat-telf tal-kumpannija u wrew it-thassib taghhom dwar il-prospettivi futuri taghha. Ighidu hekk :-

Emphasis of Matter

We draw attention to note 2 in the financial statements which indicates that the Company incurred a net loss of EUR 1,428,052 during the year ended 31 December 2014, and as at that date, the Company's total liabilities exceeded its total assets by EUR 2,148,591. These conditions indicate the existence of a material uncertainty that may cast significant doubt about the Company's ability to continue as a going concern. Our opinion is not qualified in respect of this matter.

Il-kontenut tar-rapport tal-awdituri huwa rifless fl-*Statement of Comprehensive Income* fejn huwa rimarkat illi ghas-sena li ghalqet fil-31 ta` Dicembru 2014 it-telf kien jammonta ghal €1,428,052.

Fl-istess sens huwa rimarkat fin-*Notes to the Financial Statements* ghall-istess sena :-

The company incurred a net loss of EUR 1,428,052 during the year ended 31 December 2014 and as at that date, the Company's total liabilities exceeded its total assets by EUR 2,148,591.

Fuq nota pozittiva ghal dak iz-zmien issir rimarka li :-

In accordance with IFRSs there may be a material uncertainty that may cast significant doubt upon the Company's ability to continue as a going concern and therefore, the Company may be unable to realise its assets and discharge its liabilities in the normal course of business. The Company is actively promoting the technology in Romania, Turkey, United Arab Emirate, Guinea, Ghana, Namibia, Ecuador and Paraguay. Towards mid 2015 the Company will be able to close a contract in one of these countries, which in turn will trigger a constant demand for Polymer and therefore the plant in Malta will be in a position to run the operation on a profitable level. Also, the Company has the financial support of its parent to meet its liabilities as they fall due. In view of these facts, the financial statements have been prepared on a going concern basis.

Skont dokument li hareg fl-20 ta` Mejju 2016, Poligate Limited taccetta li ghandha dawn il-kredituri :-

Amola GmbH	€1,535,760.12
Biophotonics	€ 158,005.00
Brointermed Lines Ltd	€ 162,783.48
Edmund Krix	€ 207,043.48
Go Plc	€ 115.57
Horwath Malta	€ 2,747.04
Hen AG	€ 39,989.68
HEWA GmbH	€ 96,739.70
JS Car Hire	€ 1,245.03
Malta Industrial Parks Ltd	€ 4,837.45
Malta Chamber of Commerce	€ 50.00
Muhtar El Bakush	€ 27,725.11
Melita plc	€ 326.33
RCV Handling Machinery Ltd	€ 1,150.50
Simextra GmbH	€ 34,840.00
SAMAWAT Shipping Service	€ 8,967.44
Schuhbeck`s Check Inn	€ 40.60
MJC Management srl	€ 8,000.00
TEKNO Airconditioning Ltd	€ 42.00
Wuethrich International Consulting	€ 124,000.00
ARMS Ltd	€ 271.39
Green Skip Services Ltd	€ 43.48
MC Media Consult Malta Ltd	€ 14.16
Vodafone Malta	€ 281.33
<u>TOTAL</u>	<u>€2,410,018.89</u>

Irrizulta wkoll mix-xiehda tar-rapprezentant tad-Dipartiment tax-Xoghol u Relazzjonijiet Industrijali li mad-Dipartiment hemm diversi talbiet ta` persuni li kienu mpjegati tas-socjeta` de qua li baqghu ma thallsux ghal dak li rreklamaw bhala dovut lilhom.

Il-Qorti tirrimarka illi s-sitwazzjoni tal-kumpannija **ma jidhirx** illi tgiebet wara l-31 ta` Dicembru 2014. L-ghajjnuna finanzjarja li saret referenza ghalha fl-*Annual Report and Financial Statements* u li kellha tasal minghand Adinotec AG baqghet ma gietx. Mhux talli hekk, talli rrizulta mix-xiehda tar-rapprezentant ta` Malta Industrial Parks Limited u tad-Dipartiment tax-Xogholijiet u Relazzjonijiet Industrijali illi l-postijiet li minnhom kienet topera Poligate Limited gew abbandunati u n-negozju

ghalaq ghal kollox bil-konsegwenza li l-impjegati kollha nghataw is-sensja. Irrizulta wkoll li d-dirigenti tas-socjeta` hallew Malta definittivament u hallew dejn warajhom tant li lanqas l-awdituri ma thallsu.

Il-Qorti tghid illi l-vot tal-Art 214(5)(b) tal-Kap 386 huwa sodisfatt.

VI. Id-diskrezzjoni tal-Qorti

Accertat illi Poligate Limited mhijiex fqaghda li thallas id-djun taghha, il-Qorti sejra tara jekk ghandhiex tezercita d-diskrezzjoni taghha li tordna x-xoljiment u l-istralc taghha.

Hija l-fehma konsiderata tal-Qorti illi ma hu qed isir xejn mill-azzjonisti ghall-fini tar-risanament tas-socjeta`. Is-socjeta` waqfet ghal kollox mill-esercizzju tan-negozju li ghalih kienet kostitwita. Il-qaghda finanzjarja taghha hija prekarja ghall-ahhar ; sahsitra ghalqet in-negozju taghha Malta, tat is-sensja lill-impjegati taghha u d-dirigenti taghha telqu minn Malta. Kif diga` kellha okkazjoni tghid fi provvedimenti precedenti taghha, din il-Qorti terga` ssostni li kumpannija li ma taghmilx negozju hija entita` bla ruh. Kumpannija li ma tiggerax attivita` ekonomika ma jistax ikollha dhul, u minghajr dhul, ma tista` qatt thallas id-dejn taghha. Per konsegwenza, din il-Qorti sejra wkoll tezercita d-diskrezzjoni taghha u sejra tordna x-xoljiment u l-istralc ta` Poligate Limited abbazi tal-Art 214(2)(a)(ii), u tal-Art 214(5)(a) u (b) tal-Kap 386.

Provvediment

Ghar-ragunijiet kollha premissi, il-Qorti qeghda tippovdi billi:

Riferibbilment ghar-rikorrenti Adinotec AG, tiddikjara illi din ir-rikorrenti m`ghandhiex *locus standi* sabiex tippromwovi l-azzjoni tal-lum skont l-Art 218(1) tal-Kap 386 tal-Ligijiet ta` Malta.

Riferibbilment ghar-rikorrent l-iehor Alexander Papenberg, tiddikjara li ghandu *locus standi* sabiex jippromwovi l-azzjoni tal-lum skont l-Art 218(1) tal-Kap 386 tal-Ligijiet ta` Malta.

Tiddikjara li l-kumpanija Poligate Limited (C43533) mhijiex fqaghda li thallas id-djun taghha skont l-Art 214(2)(a)(ii), l-Art 214(5)(a) u l-Art 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta.

Tordna x-xoljiment u l-istralc tal-kumpanija Poligate Limited (C43533) b`effett mill-24 ta` Frar 2016, skont l-Art 223(1) tal-Kap 386 tal-Ligijiet ta` Malta.

Tahtar lir-Ricevitur Ufficjali bhala stralcjarju tal-kumpanija Poligate Limited (C43533) bis-setghat u bid-dmirijiet kollha stabbiliti fil-Kap 386 tal-Ligijiet ta` Malta.

Tordna lill-istralcjarju sabiex jipprezenta rapport sa zmien xahrejn mil-lum.

Bl-applikazzjoni tal-Art 236(2) tal-Kap 386, tordna liz-zewg rikorrenti sabiex *in solidum* bejniethom ihallsu l-ispejjez kollha ta` dan il-procediment, kif ukoll l-ispejjez kollha tal-istralc, inkluzi d-drittijiet u l-ispejjez tal-istralcjarju.

Thalli l-istralc ghall-udjenza ta nhar il-Hamis 26 ta` Jannar 2017 fid-9.00 a.m.

Onor. Joseph Zammit McKeon
Imhalled

Amanda Cassar
Deputat Registratur