



## QORTI CIVILI PRIM`AWLA

ONOR. IMHALLEF  
JOSEPH ZAMMIT MCKEON

Illum it-Tlieta 30 ta` Mejju 2017

Kawza Nru. 11  
Rikors Nru. 865/16 JZM

Wyatt Agri Products Enterprise LLc,  
socjeta` estera rregistrata fl-Istati Uniti  
ta` l-Amerika kif rapprezentata  
mill-mandatarju specjali taghha l-Avukat  
Dottor Tonio Grech (KI 260360M)

*kontra*

European 2000 Airlines Limited  
C 28885

Il-Qorti :

### I. Preliminari

Rat ir-rikors ipprezentat fid-29 ta` Settembru 2016 li jaqra hekk :-

1. *Illi dan ir-rikors qed isir a tenur tal-Artikolu 214(2)(a)(i)(ii) u 214 (b)(iii) tal-Att dwar il-Kumpanniji (Kapitolu 386 tal-Ligijiet ta` Malta).*

2. *Illi s-socjeta` rikorrenti hija registrata fl-Istati Uniti tal-Amerika b`file number 802083046 fl-indirizz 4202, East Richardson, Edinburgh, Texas.*

3. *Illi s-socjeta` rikorrenti fit-30 ta` Ottubru 2014 immergjat mas-socjeta` Alameda Corporation registrata fl-Istati Uniti tal-Amerika u b`file number 0016766000 u bl-indirizz 3355 W. Alabama, Suite 1020, Houston hekk kif jidher mis-Certificate of Merger datat 30 ta` Ottubru 2014 u rilaxxat mill-Office of the Secretary State tal-Istat ta` Texas (kopja hawn annessa bhala Dok. SP1). Konsegwentement ghal tali merger is-socjeta` rikorrenti assumiet id-drittijiet u l-obbligi appartenenti lis-socjeta` Alameda Corporation kif spjegat fil-paragrafu 3 tal-Plan of Merger hawn annessa u mmarkata Dok. SP2.*

4. *Illi s-socjeta` intimata hija registrata Malta u kienet topera ghal xi zmien servizz ta` trasport bl-ajru u ghal dan il-ghan kienet taghmel uzu minn zewg ajruplani Fairchild Metro 23, u cioe` Serial Number DC-902B u Serial Number DC-805B, li hija xtrat permezz ta` finanzjament moghti mis-socjeta` Alameda Corporation liema socjeta` sellfet lis-socjeta` intimata l-ammont ta` erba` miljuni hames mija u sebghin elf dollaru amerikan – USD4,570,000 (ara kuntratti ta` self Dok. SP3 u SP4).*

5. *Illi ghar-rigward ta` dawn l-ammonti registrati ipoteki (mortgages) fir-registru tal-avvjazzjoni civili skont l-anness Transcript Dok. SP5.*

6. *Illi barra minn hekk is-socjeta` Alameda Corporation kienet sellfet lis-socjeta` intimata l-ammont ta` seba` mija u tnejn u sittin elf mitejn u hamsa u erbghin dollaru amerikan u sebgha u hamsin centezmu (USD762,245.57). Ma saret l-ebda ipoteka dwar dan is-self (Dok. SP6).*

7. *Illi s-socjeta` intimata naqset milli thallas lura s-somma li ssellfet minghand Alameda Corporation skont it-termini ta` hlas ta` l fuq imsemmija kuntratti ta` self.*

8. *Illi dawn id-debiti huma riflessi fl-ahhar audited accounts illi s-socjeta` intimata ghamlet, u cioe` dawk ghas-sena bazi 2005 (Dok. SP7).*

9. *Illi meta nbiegh l-ewwel ajruplan ghall-ammont ta` USD675,000 lis-socjeta` tedeska Binair GmbH, is-socjeta` intimata zammet il-flus kollha*

*filwaqt li meta nbiegh it-tieni ajruplan għall-ammont ta` USD850,000 lis-socjeta` Amerikana Bay Aeroservices Inc. il-flus inghataw lis-socjeta` rikorrenti izda l-istess socjeta` rikorrenti tat minn dan l-ammont lis-socjeta` intimata l-ammont ta` USD457,205 sabiex is-socjeta` intimata setgħet thallas dak li kien dovut minnha lil terzi.*

*10. Illi għalhekk il-kreditu tas-socjeta` rikorrenti li għadu dovut huwa ta` USD762,245.57 + USD1,000,000 + USD3,570,000 + USD457,205 – USD850,000 = USD4,939,450.57, u dana bhala ammont kapitali biss minghajr ma wiehed jiehu in konsiderazzjoni l-imghaxxijiet legali.*

*11. Illi għal snin shah is-socjeta` intimata la operat u lanqas hallset id-djun tagħha u għalhekk illum lanqas hija fi stat li thallashom.*

*12. Illi għalhekk fid-dawl tas-suespost huwa car illi jezistu l-estremi li jiggustifikaw ix-xoljiment u konsegwenti stralc tas-socjeta` intimata a tenur tal-Artikolu 214(2)(a)(i) u (ii) u 214(b)(iii) tal-Att dwar il-Kumpanniji.*

*Għaldaqstant ir-rikorrenti jitolbu bir-rispett illi dina l-Onorabbli Qorti jogħgobha :*

*1. Tiddikjara illi għar-ragunijiet esposti f`dan ir-rikors jezistu ragunijiet gravi bizzejjed għax-xoljiment u stralc konsegwenzjali tas-socjeta` intimata ai termini tal-Artikolu 214(2)(b)(iii) tal-Att dwar il-Kumpanniji kif ukoll a bazi tal-Artikolu 214(2)(a)(i) u (ii).*

*2. Tordna x-xoljiment u l-istralc konsegwenzjali tas-socjeta` intimata a tenur tal-Artikolu 214(2)(a)(i) u (ii) u l-Artikolu 214(2)(b)(iii) tal-Att dwar il-Kumpanniji taht dawk il-kundizzjonijiet kollha illi jidhrilha xierqa fic-cirkostanzi; u*

*3. Tappunta stralcjarju tal-kumpannija sabiex jgħaddi għax-xoljiment u stralc konsegwenzjali tal-kumpannija intimata.*

Rat il-lista tax-xhieda u l-elenku ta` dokumenti.

Semgħet ix-xiehda u rat il-provi l-ohra li tressqu fil-kors tal-kawza.

Rat illi l-kawza thalliet ghal provvedimenti ghal-lum.

Rat l-atti l-oħra tal-kawza.

## II. Provi

### 1. Dokumenti

Kienu esebiti bhala prova dawn id-dokumenti li kienu kollha kkonfermati bil-gurament :-

Dok SP1 :  
Certifikat ta' *merger* (fol 7).

Dok SP2 :  
*Plan of merger* (fol 8 u 9) mnejn jirrizulta li b'effett mill-1 ta' Jannar 2015, sar ftehim ta' *merger* bejn Alameda Corporation u Wyatt Agri Products Corporation LLC li permezz tieghu "*all the properties, rights, privileges, powers, and franchises of Target Entity shall vest in Acquiror, and all debts, liabilities and duties of Target Entity shall become the debts, liabilities, and duties of Acquiror.*"

Dok SP3 :  
Kuntratt ta' self datat 7 ta' Marzu 2005 favur is-socjeta' ntimata ghas-somma ta' US\$1.000.000 (fol 10 sa fol 37).

Dok SP4 :  
Kuntratt ta' self datat 7 ta' Marzu 2005 favur is-socjeta' ntimata ghas-somma ta' US\$ 3,570,000 (fol 38 sa 65).

Dok SP5 :  
*Transcript of Registry* mahrug mid-Dipartiment ta' l-Avjazzjoni Civili (fol 66 – 67) mnejn jirrizulta li saru *first priority mortgage* u *second priority mortgage* in konnessjoni mas-self li sar lis-socjeta' ntimata.

Dok SP6 :  
*Inter office memorandum* (fol 68).

Dok SP7 / Dok MFSA2 / Dok CS1 :  
*Audited accounts* ghas-sena 2005.

Dok MFSA2 :

Form K datat 15 ta` Mejju 2009 mnejn jirrizulta illi Av. Kevin F Dingli baghat javza illi ma kienx ghadu r-rapprezentant gudizzjarju u legali tal-kumpanija intimata ;

Form K datat 20 ta` Marzu 2009 mnejn jirrizulta li Joseph Micallef baghat javza li kien irrizenja minn direttur tal-kumpanija intimata b`effett mis-16 ta` Marzu 2009.

Form K datat 29 ta` Jannar 2009 li permezz taghha Av. Kevin F Dingli baghat javza li kien irrizenja minn direttur u *company secretary* tal-kumpanija intimata.

## 2. Xiehda

Trey Wyatt – rapprezentant tas-socjeta` rikorrenti (“Wyatt”) – xehed illi Alameda Corporation (“Alameda”) kienet giet amalgamata ma` Wyatt. Alameda kienet kreditrici tas-socjeta` ntimata (“European”). Il-kreditu ta` Alameda sar ta` Wyatt izda baqa` ma thallasx fl-intier tieghu. Wyatt assumiet kull ma kien ta` Alameda nkluz il-krediti li kellha kontra European. Fil-fatt European kienet issellfet minghand Alameda *inter alia* sabiex takkwista ajruplani ghall-garr tal-passiggieri. Fil-fatt kienu akkwistati zewg ajruplani direttament mill-fabbrika, u kienu registrati Malta biex jibdew joperaw minn Malta. Alameda silfet *ukoll* flus lil European (US\$762,245.57) sabiex tkun tista` taghmel il-hlasijiet li kien hemm bzonn biex thaddem in-negozju.

Xehed illi n-negozju pero` ma rnexxiex ghaliex min kien qed imexxi European ma kienx serju. Fil-fatt iz-zewg ajruplani nbieghu. Parti mill-flus intuzaw biex jithallsu kredituri ohra f`Malta. Min-naha taghhom huma thallsu biss US\$500,000 mill-bejgh tat-tieni ajruplan.

Kompla jghid li huma qatt ma harrku lil European izda kemm-il darba kellmu lir-rapprezentanti taghha ghall-hlas, izda d-diretturi kienet dejjem iwiegbuom li ma kellhomx flus. Il-kreditu mhux imhallas ta` Wyatt ghamel hafna hsara lil Wyatt.

Il-P.L. Quentin Tanti (rapprezentant tar-Registratur tal-Kumpanniji) ipprezenta l-ahhar dokumenti li waslu ghand ir-Registratur minghand European, u li ghalihom saret riferenmza aktar kmieni. Is-socjeta` ntimata kienet giet registrata fis-7 ta` Novembru 2001 bin-numru ta` registrazzjoni C 28885.

L-Awditur Charles Sciriha xehed illi huwa kien l-awditur ta` European. Ipprezenta l-ahhar *audit* li ghamel u cioe` dak ghas-sena 2005. Wara dak l-audit huwa ma ta ebda *handover* lil xi awditur iehor. European kienet xtrat zewg ajruplani mill-Istati Uniti, u kien prospettat li tibda taghmel titjiriet. Il-kumpannija waqfet topera.

### III. L-azzjoni

Ir-rikorrenti qeghda tibbaza t-talba taghha fuq :-

l-Art 214(2)(a)(i) tal-Kap 386 ;

l-Art 214(2)(a)(ii) tal-Kap 386 [li jirreferi ghall-Art 214(5)] ; u

l-Art 214(2)(b)(iii) tal-Kap 386.

### IV. Locus standi

Huwa l-Art 218(1) tal-Kap 386 li jirregola l-mod kif issir talba ghax-xoljiment u l-istralc ta` kumpannija.

Id-disposizzjoni tghid 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-laqgha generali jew mill-bord tad-diretturi taghha jew minn xi detentur ta` obligazzjoni, 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, irrizulta li Wyatt hija kreditrici ta` European fl-ammont ta` US\$4,939,450.57, u ghalhekk ghandha *locus standi* sabiex tippromwovi l-azzjoni.

## V. L-Art 214(2)(a)(i) tal-Kap 386

### 1. Dritt

Id-disposizzjoni tghid illi kumpannija tista` xxolji u tkun stralcjata mill-qorti “... *jekk in-negozju tal-kumpannija jkun sospiz ghal perjodu bla waqfien ta` erbgha u ghoxrin xahar.*”

Ir-rekwiziti ta` azzjoni skont din id-disposizzjoni huma :-

- a) is-sospensjoni tan-negozju ;
- b) ghal erbgha u ghoxrin (24) xahar ;
- c) bla waqfien.

It-tliet rekwiziti huma kumulattivi mhux alternattivi.

Is-sussistenza tar-rekwiziti hija fattwali ; ghalhekk trid tirrizulta mill-provi.

Jidher illi d-disposizzjoni kellha l-origini taghha fl-Art12(1)(d) tal-UK Insolvency Act 1986, liema disposizzjoni Ingliza m`ghadhiex taghmel parti mill-Act, ghax kienet superata b`legislazzjoni aktar ricenti.

### 2. Risultanzi

**Fil-kaz tal-lum, il-Qorti tghid illi r-rekwiziti ta` l-Art 214(2)(a)(i) ma gewx ippruvati.**

Huwa minnu li fir-rikors promotur, hemm premess li l-kumpannija intimata kienet ilha ma topera ghal snin shah. L-awditur Charles Sciriha ukoll xehed li din il-kumpannija ma ghadhiex topera. Izda apparti dawn id-dikjarazzjonijiet, ma tressqux provi sufficjenti relattivi ghaz-zmien ta` kemm ilha European illi waqfet l-operat taghha.

Tajjeb jinghad illi skont l-*annual report* ghas-sena li ghalqet fil-31 ta` Dicmebru 2005, il-kumpanija ma kenitx operat ghal dik is-sena. Skont ix-xiehda ta` l-awditur Charles Sciriha, dak iz-zmien European kienet xtrat zewg ajruplani mill-Amerika, u kien hemm il-prospett illi jibda x-xoghol u jkun hemm it-titjiriet. It-taghrif li johrog mill-*annual report* mhux bizzejjed peress li jidher li l-prospett kien ta` socjeta` li kienet ser tibda topera.

Il-Qorti m`ghandhiex il-prova tat-tliet rekwiziti sal-grad rikjest mil-ligi. Tajjeb jinghad illi Trey Wyatt kien mistoqsi dwar jekk ghandux informazzjoni ta` jekk European ghandhiex topera, huwa sempliciment irrefera ghall-fatt illi l-avukat tieghu kien infurmah li kien hemm bzonn il-procedura ta` l-affissjoni sabiex il-kumpanija intimata tigi notifikata b` dawn il-proceduri.

Ghal din il-Qorti, hemm bzonn ta` **provi cari u inekwivoci** sabiex tkun applikata d-disposizzjoni, li fil-kaz tal-lum ma rrizultawx sal-grad rikjest mil-ligi.

## VI. L-Art 214(2)(a)(ii) u l-Art 214(5) tal-Kap 386

Fil-kaz tal-Art 214(2)(a)(ii), il-Kap 386 jaghti lill-Qorti d-diskrezzjoni li xxolji u tistralcja kumpanija jekk din ma tkunx tista` thallas id-djun taghha.

Id-disposizzjoni trid tinqara flimkien ma` l-Art 214(5) li jistabilixxi meta kumpanija skont il-ligi taghna ghandha titqies li ma tkunx tista` thallas id-djun taghha.

Tnejn huma c-cirkostanzi definiti mil-ligi –

(a) jekk id-dejn dovut mill-kumpanija jkun baqa` ma thallasx ghal kollox jew f`parti wara erbgha u ghoxrin gimgha mill-ezekuzzjoni ta` titolu ekekuttiv kontra l-kumpanija 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-kumpanija ma tkunx tista` thallas id-djun taghha, meta din tqis ukoll il-passiv kontingenti u prospettiv tal-kumpanija.



Ir-rikorrenti ma ndikatx fuq liema minn dawn ic-cirkostanzi qed tinkwadra t-talba taghha. Per konsegwenza, sejra taghrbel iz-zewg sitwazzjonijiet.

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 f`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 tal-1995.

Fil-ligi taghna, li kumpannija ma tkunx tista` thallas id-djun taghha ghandu sinjifikat preciz u definit mil-ligi stess fl-Art 214(5).

Fil-ligi Ingliza, il-posizzjoni hija aktar wiesgha.

Il-koncett ta` insolvenza fil-ligi taghna huwa aktar ristrett minn dak tal-ligi Ingliza ghalkemm hemm overlaps.

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”) ...*

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

a) **Dritt**

Dwar din id-disposizzjoni, tajjeb jinghad illi titkellem dwar l-ezekuzzjoni ta` *atti ezequttivi*.

Ghalhekk kumpannija ma tistax titqies illi ma tistax thallas id-djun taghha abbazi ta` mandat kawtelatorju, anke jekk dak il-mandat ikun gie ezegwit kontra d-debitur.

Tajjeb jinghad ukoll illi l-fattur rilevanti sabiex jiskattaw l-erbgha u ghoxrin (24) gimgha huwa l-ezekuzzjoni tal-att ezeukkattiv.

Fil-kaz ta` mandat ta` sekwestru, l-ezekuzzjoni tal-mandat tiskatta bin-notifika tal-att lis-sekwestratarji minghajr il-htiega tan-notifika tad-debitur.

B`mod aktar strett, fil-ligi taghna dak previst mill-Art 214(5)(a) jixbah il-koncett ta` *cash flow insolvency* fil-ligi Ingliza.

Fil-kaz ta` *cash flow insolvency* din il-Qorti tghid illi filwaqt illi fil-ligi taghna huwa specifikat bil-preciz x`m`ghandhiex taghmel kumpannija debitrici sabiex ma tkunx meqjusa li ma tistax thallas id-djun taghha, fil-ligi Ingliza il-kriterju huwa aktar generiku ghax ikun hemm dik it-tip ta` insolvenza *if it is unable to pay its debts as they fall due*.

Din il-Qorti sejra taghmel riferenza ghad-dottrina dwar il-ligi Ingliza, ghax tiswa biex tkun tista` tasal, abbazi tal-fatti ta` kull kaz, inkluz dak tal-lum, mhux daqstant biex tghid jekk jirrizultax ppruvat dak stipulat fl-Art 214(5)(a), izda biex tasal ghal decizjoni dwar jekk ghandhiex tghaddi ghax-xoljiment u l-istralc ta` l-kumpannija debitrici.

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-pag 17 tal-ktieb **Insolvency Law – Corporate and Personal** ta' Andrew Keay u Peter Walton (pubblikat minn Pearson Longman – 2003) 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 ...*

b) **Risultanzi**

Fil-kaz tal-lum, ma tressqu l-ebda provi li l-kumpanija rikorrenti hadet proceduri gudizzjarji kontra l-kumpanija intimata dwar id-debiti mertu tal-azzjoni tal-lum.

Lanqas ma jirrizulta li saru atti eżekuttivi.

Ghalhekk il-Qorti ssib illi m`ghandhiex il-prova tar-rekwiziti tal-Art 214(5)(a) tal-Kap 386.

(ii) L-Art 214(5)(b)

a) Dritt

Fit-test bl-Ingiliz id-disposizzjoni taqra 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 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.*

Id-divergenza bejn il-legislazzjoni Ingliza u dik Maltija hija fis-sens illi filwaqt li fil-kaz ta` dik Maltija, il-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 hija ta` sostanza mhux ta` *drafting*. 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 Ingliza 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** (op. cit.) jinghad hekk :-

*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-Khudhairy (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.*

Dwar l-Art 214(5)(b) din il-Qorti diversament presjeduta (PA/GV) fis-sentenza taghha tat-28 ta` Mejju 2003 fil-kawza “Axel John International AB vs Aluminium Extrusions Limited” qalet hekk –

*Din il-kondizzjoni tista` tigi verifikata permezz tal-balance sheets wara li jigi kunsidrat jekk l-assets are less than its liabilities. Izda ... 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 over a lengthy period (Re : European Life Assurance Society 1869 LR 9 Eq 122).*

*Ghalhekk ma hemmx raguni ghaliex il-kredituri ghandhom joqghodu jistennew sakemm il-kumpannija tbiegh l-assets taghha biex forsi xi darba jithallsu.*

## b) Risultanzi

L-assjem tal-provi juri bic-car illi s-socjeta` intimata ghandha problemi kbar ta` likwidita`.

L-ahhar *financial statements* kienu dawk ghas-sena li ghalqet fil-31 ta` Dicembru 2005.

Minn dan id-dokument jirrizulta mill-*auditor`s report* illi :

*“As shown in the accompanying financial statements, the company incurred net losses during the year ended 31 December 2005 of Lm 401,949 and as of that date the company`s total liabilities exceeded its total assets by Lm 955,472. Due to these*

*factors, among other, as discussed in note 1, there is a substantial doubt that the company will be able to continue as a going concern. The financial statements do not include any adjustments that might result from the outcome of this uncertainty.”*

Fin-notes to the financial statements, jinghad :-

*“1. Going concern*

*As indicated in the profit and loss account, during the period ended 31 December 2005, the company incurred losses of Lm 401,949 and as at that date the company’s total liabilities exceeded its total assets by Lm 955,472. Moreover, the company is heavily dependant on the financing of one of its shareholders. The financial statements have been prepared on a going concern basis which assumes that the company will continue in operational existence for the foreseeable future. The validity of this assumption depends on the continued support of the company’s shareholders.”*

Skont il-lista ta` kredituri tas-socjeta` intimata, jidher illi :-

*“Creditors : amounts due within one year*

	<i>Lm</i>
<i>Trade creditors</i>	<i>19,302</i>
<i>Accruals</i>	<i>189,019</i>
<i>Other Creditors</i>	<i>33,572</i>
<i>Deferred Taxation</i>	<i>76,736</i>
<i>Bank Overdraft</i>	<i>18,381</i>
	<i><u>337,011</u></i>

*Creditors : amounts due within one year*

<i>Shareholders` Loans</i>	<i>655,197</i>
<i>Loan- Aircraft</i>	<i><u>1,289,693</u></i>

Skont il-profit and loss account ta` dik is-sena, l-accumulated losses at the beginning of the year kienu jammontaw ghal Lm 482,296.

It-total liabilities jammontaw ghal Lm 2,281,901 mentri t-total assets jammontaw ghal Lm 1,326,429.



Abbazi ta` dawn il-provi, jirrizulta li s-socjeta` intimata ma ghandhiex bizzejjed mnejn taghmel tajjeb ghad-djun.

Jidher illi European m`ghandhiex assi li bihom tista` taghmel tajjeb ghad-djun li ghandha.

Huwa fatt stabbilit illi European mhijiex topera.

U allura m`ghandhiex dhul illi bih tkun tista` thallas id-djun taghha.

Fil-fehma ta` din il-Qorti, tirrizulta l-prova rikjesta mill-Art 214(5)(b) tal-Kap 386.

iii) **Id-diskrezzjoni tal-Qorti**

Accertat illi jirrizultaw ippruvati r-rekwiziti tal-Art 214(2)(a)(ii) u tal-Art 214(5)(b), il-Qorti trid tara jekk fuq il-provi akkwiziti, ghandhiex hi tezercita d-diskrezzjoni taghha li tordna x-xoljiment u l-istralc ta` European.

Il-Qorti taghmel riferenza ghal **Palmer`s Company Law** (Edition 25 - Sweet & Maxwell) fejn jinghad :-

*The court`s jurisdiction is discretionary and the fact that the petitioner can establish this ground does not give him an automatic right to an order (re. Metropolitan Railway Warehousing Co. Ltd 1887.36.LJCh 827). The court has refused to make an order where there are good reasons for the delay and where the great majority of members desire that the company shall continue. An order may however be made in appropriate circumstances against the majority`s wishes. Where the business has merely been suspended the court must be satisfied of an abandonment or inability to carry on. In ascertaining such intention the court will have regard to the opinion and wishes of the majority of shareholders whose names appear on the register. Merely abandoning one of several objects is insufficient (re. Norwegian Titanic Iron Co. (1866) 35 Beav.223).*

Dan premiss, il-Qorti kkonduciet ezami akkurat kemm tad-dokumenti esebiti u kif ukoll ta` dak mistqarr mix-xhieda.

Hija l-fehma konsiderata taghha illi European waslet *at the point of no return*.

In-negozju taghha waqaf.

Ghax gara hekk m`ghandhiex *revenue*.

Bla *revenue* ma tistax thalla l-pendenzi kollha li ghandha – li huma hafna.

Kumpannija li ma taghmilx negozju hija entita` bla ruh, ghaliex ma tkunx qeghda taqdi l-ghanijiet taghha.

Kumpannija li ma tiggenerax attivita` ekonomika ma jistax ikollha dhul.

Ghal din il-Qorti, ix-xoljiment u l-istralc tal-kumpannija intimata huwa inevitabbli.

**Ghalhekk il-Qorti sejra tezercita d-diskrezzjoni taghha u sejra tordna x-xoljiment u l-istralc tal-kumpanija European 2000 Airlines Limited.**

## VII. L-Art 214(2)(b)(iii)

Din id-disposizzjoni tghid illi : *“kumpannija ghandha tkun xolta bil-qorti jekk ... il-qorti tkun tal-fehma li hemm ragunijiet gravi bizzzejjed li jiggustifikaw ix-xoljiment u konsegwentement l-istralc tal-kumpannija”*.

Il-ligi thalli lill-Qorti diskrezzjoni wiesa` sabiex tistabilixxi hi jekk fil-fehma taghha jirrizultawx fatti u cirkostanzi **“gravi bizzzejjed”**.

Jekk tistabilixxi l-gravita`, allura minn hemm `il quddiem il-Qorti ma jkollhiex aktar diskrezzjoni u **tkun obbligata** taghmel id-dikjarazzjoni ta` xoljiment u konsegwenti stralc tal-kumpannija.

Il-ligi ma taghti l-ebda tifsira ta` x`inhuma “*ragunijiet gravi bizzejjed*”.

Ghalhekk il-Qorti m`ghandha tiskarta xejn.

Sabiex tistabilixxi jekk fatti jew cirkostanzi humiex gravi bizzejjed, il-Qorti m`ghandhiex toqghod fuq grajjiet li jkun sehew sad-data tal-presentata tar-rikors promotur tal-azzjoni, izda ghandha taghti piz ukoll ghal kull ma jigri anke wara, sa ma tigi biex taghti d-decizjoni taghha.

Fl-Art 122 tal-Insolvency Act 1986 Ingliza, wiehed isib lista ta` cirkostanzi li jwasslu ghax-xoljiment u ghall-istralc ta` kumpannija.

**Fl-Insolvency Act 1986 ma hemmx disposizzjoni identika ghal dik li tirrizulta fl-Art 214(2)(b)(iii) tal-Kap 386.**

Il-wahda li tqarreb l-aktar lejha hija l-Art 122(1)(g) li tghid : *the court is of the opinion that it is just and equitable that the company should be wound up.*

Huwa evidenti anke mad-daqqa t`ghajn li d-disposizzjoni taghna hija aktar stretta fis-sens illi fil-kaz taghna l-Qorti ghandha xxolji u tistralcja meta fil-fehma taghha ikunu jirrizultaw ragunijiet gravi bizzejjed.

Fil-ligi Ingliza, il-kriterju li fuqu l-Qorti trid tibni l-fehma taghha huwa dak tal-gustizzja u l-ekwita`.

L-istrettezza tad-disposizzjoni taghna taghmel hafna sens anke ghaliex jekk il-Qorti tesprimi l-fehma li hemm ragunijiet gravi bizzejjed, allura minn hemm tkun obbligata tordna x-xoljiment u l-istralc tal-kumpannija.

Il-Qorti tghid li r-riferenza ghall-Art 122(1)(g) tal-Insolvency Act 1986 hija utili ghaliex il-linja li hadu l-Qrati Inglizi biex ighidu x`inhu *just and equitable* ghall-fini ta` *winding up* tghin biex tiftah tieqa lill-Qrati taghna ghall-interpretazzjoni ta` x`jistghu jkunu ragunijiet gravi bizzejjed.

Kull kaz ghandu l-istorja tieghu u ghalhekk il-Qorti trid tibni l-fehma taghha fuq il-fatti u cirkostanzi ta` kull kaz.

Dan premiss, u meqjusa l-provi li tressqu fl-assjem tagghom, jirrizulta illi European kienet topera servizz ta` trasport bl-ajru u kienet taghmel uzu minn zewg ajruplani Fairchild Metro 23 bis-serial nos. DC-902B u DC-805B. Alameda (illum amalgamata) ma` Wyatt kienet tat b`self lil European is-somma komplessiva ta` US\$4,570,000, u rregistrat ipoteki fir-registu ta` l-avjazzjoni civili. European issellfet ukoll US\$762,245.57 ghall-operat tan-negozju taghha.

Mill-ammonti li hadet b`self, European hallset biss parti.

Addirittura irrizulta li ajruplan mit-tnejn li kellha s-socjeta` intimata inbiegh izda r-rikavat tal-bejgh inzamm mis-socjeta` intimata mentri t-tieni ajruplan ukoll gie mibjugh u parti biss mir-rikavat thallas lis-socjeta` rikorrenti sabiex b`hekk il-kreditu ta` Wyatt lahaq l-ammont ta` US\$4,939,450.57, eskluzi l-imghaxijiet legali.

Ghal din il-Qorti, ma jaghmel l-ebda sens minn kull aspett illi kumpannija li suppost qeghda titmexxa tajjeb, jew li hija finanzjarjament affidabbli, tigi notifikata bi procediment hekk serju bhal dan tal-lum, b`konsegwenzi daqstant gravi, u mqar taghmel l-icken sforz biex tiddefendi ruhha.

Fil-kaz tal-lum, il-Qorti m`ghandhiex prova ta` x`assi ghandha llum il-kumpannija ntimata u dwar jekk hemmx prospetti li thallas lill-kredituri taghha.

Billi hija gravi hafna l-qaghda ta` European, din il-Qorti - minghajr l-icken esitazzjoni - tghid illi c-cirkostanzi kontemplati bl-Art 214(2)(b)(iii) huma wkoll ampjament ippruvati, u anke ghalhekk sejra tordna x-xoljiment u l-istralc taghha.

### Provvediment

Ghar-ragunijiet kollha premissi, il-Qorti qeghda tippovdi dwar it-talbiet tar-rikorrenti billi :-

Tiddikjara illi fil-konfront ta` l-kumpannija intimata European 2000 Airlines Limited (C28885) kienu ppruvati ghas-sodisfazzjon taghha, u sal-grad rikjest mil-ligi, ir-rekwiziti tal-Art 214(2)(a)(ii), tal-Art 214(5)(b) u tal-Art 214(2)(b)(iii) tal-Kap 386 tal-Ligijiet ta` Malta.

Tordna x-xoljiment tal-kumpannija intimata European 2000 Airlines Limited (C28885) b`effett mil-lum, kif previst mill-ewwel proviso ta` l-Art 223(1) tal-Kap 386 tal-Ligijiet ta` Malta.

Tordna wkoll l-istralc ta` l-kumpannija intimata European 2000 Airlines Limited (C28885).

Tahtar lir-Ricevitur Ufficjali bhala stralcjarju ta` l-kumpannija intimata European 2000 Airlines Limited (C28885), bis-setghat u bid-dmirijiet kollha li huma stabbiliti fil-Kap 386 tal-Ligijiet ta` Malta.

Tordna li l-ispejjez ta` dan il-procediment, inkluzi d-drittijiet u l-ispejjez tal-istralcjarju, ghandhom jithallsu mill-partijiet *in solidum* bejniethom, u dan bl-applikazzjoni tal-Art 236(2) tal-Kap 386 tal-Ligijiet ta` Malta.

Thalli l-istralc ghal nhar it-Tlieta 3 ta` Ottubru 2017 fid-9.00a.m.

Onor. Joseph Zammit McKeon  
Imhallef

Amanda Cassar  
Deputat Registratur