



QORTI CIVILI PRIM`AWLA

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum it-Tlieta 31 ta` Ottubru 2017

Kawza Nru.
Rik. Nru. 1109/15 JZM

Galleria Management Limited
(C19528)

kontra

Angele Calleja (ID No.407357M),
Claude Calleja (ID No. 715159M)
u A.M. Holdings Limited (C3936)

Il-Qorti :

I. Preliminari

Rat ir-rikors ipprezentat fit-23 ta` Novembru 2015 li jaqra hekk :-

1. *Illi l-intimat Claude Calleja huwa direttur uniku, segretarju u r-rapprezentant guridiku tas-socjeta` Derby International Limited (hawn `il quddiem imsejha “Derby”), kif ukoll azzjonista tal-istess, flimkien mas-socjeta`*

intimata A.M. Holdings Limited (hawn `il quddiem imsejha “is-socjeta` intimata”) (Ara l-“Involments List” mis-sit tal-Malta Financial Services Authority, kopja taghha hawn annessa u mmarkata Dok. “KP1”).

2. *Illi l-intimata Angele Calleja, li tigi mart l-intimat Claude Calleja, hija direttur (flimkien mal-intimat Claude Calleja), azzjonista unika, segretarja u r-rapprezentant guridiku (flimkien mal-intimat Claude Calleja) fis-socjeta` intimata. (Ara l-“Involments List” mis-sit tal-Malta Financial Services Authority, kopja taghha hawn annessa u mmarkata Dok. “KP2”).*

3. *Illi fl-ahhar nett, is-socjeta` intimata hija azzjonista maggoritarja ta` Derby (Ara l-Memorandum and Articles of Association ta` Derby, kopja tieghu hawn annessa u mmarkata Dok. “KP3”).*

4. *Illi mhemmx dubju li Derby u s-socjeta` intimata huma zewg entitajiet separati u distinti minn xulxin. **Madankollu mhemmx dubju wkoll li z-zewg socjetajiet in kwistjoni huma kkontrollati mill-istess persuni jew minn persuni li ma jistghux jitqiesu indipendenti minn xulxin ghaliex ghandhom l-istess interess.***

5. *Illi permezz ta` sentenza tas-6 ta` Ottubru, 2006, illum definitiva, din l-Onorabbli Qorti inter alia ordnat lil Derby thallas lis-socjeta` esponenti, is-somma ta` LM4,000.00, ekwivalenti ghal €9,317.49 rapprezentanti sorte, flimkien mal-imghax legali b`sehh mit-22 ta` Gunju, 2000, li sat-13 ta` Frar, 2012 kien jammonta ghal €8,685.43, kif ukoll l-ispejjez tal-kawza ammontanti ghal €4,667.11, inkluz il-VAT relattiv.*

6. *Illi permezz ta` sentenza ohra tat-3 ta` April, 2009, l-Onorabbli Qorti tal-Appell ordnat inter alia lil Derby thallas lis-socjeta` esponenti, is-somma ta` LM29,315.81, ekwivalenti ghal €68,287, rapprezentanti sorte, flimkien mal-imghax legali b`sehh mill-1 ta` Mejju, 2001, li sat-13 ta` Frar, 2012 kien jammonta ghal €58,597.03, kif ukoll l-ispejjez tal-kawza ammontanti ghal €7,040.26, inkluz il-VAT relattiv.*

7. *Illi s-socjeta` esponenti kienet ottjeniet il-hrug ta` zewg mandati ta`qbid kontra Derby li jgibu n-numri rispettivi ta` 3154/00 u 2204/01 u dan ghall-ammonti rispettivi ta` LM4,000 u LM29,315.81.*

8. Illi dawn il-mandati kienu gew esegwit mill-Marixxal tal-Qorti fis-sede registrata ta` Derby fil-hanut Junction 66, 66, Tower Road, Sliema u minn dak il-fond kienet saret l-elevazzjoni tal-oggetti li jinsabu elenkati mal-istess mandati, u li huwa l-istess indirizz li fl-iskrittura tal-ftehim bejn il-partijiet kien gie indikat bhala l-“principal place of business” tal-istess Derby.

9. Illi Derby ma kinitx f`qaghda li thallas l-ammont dovut lis-socjeta` esponenti, u lanqas thallas djun ohra, u dan kif gie ppruvat waqt it-trattazzjoni tar-rikors ghal stralc li sar quddiem din l-Onorabbli Qorti fl-ismijiet Galleria Management Limited vs Derby International Limited nhar il-25 ta` Frar, 2002, liema rikors ghadu pendenti u jmissu jinstema` nhar il-25 ta` Novembru, 2015.

10. Illi fil-fatt din l-Onorabbli Qorti permezz ta` sentenza tal-15 ta` Settembru, 2014 ordnat l-istralc ta` Derby u hatret lir-Ricevitur Ufficjali sabiex ixolji l-istess kumpanija.

11. Illi kif se jirrizulta fil-kors tat-trattazzjoni tar-rikors odjern, b`referenza ghall-oggetti li kienu l-mertu tal-mandati ta` qbid in kwistjoni, li kienu l-unici assi li kellha Derby sabiex taghmel tajjeb ghad-dejn taghha versu l-kredituri, fosthom is-socjeta` esponenti, l-intimati, senjatament l-intimata Angele Calleja kienet qieghda tikkontendi li dawn l-istess oggetti s-socjeta` intimata kienet tbieghhom lil Derby u din kienet tbieghhom bhala parti mill-istokk taghha, u li sussegwentement is-socjeta` intimata hadet il-gestjoni tal-hanut numru 66, Tower Road Sliema minghand Derby u dan ghaliex is-socjeta` intimata bhala azzjonista f`Derby kienet tat diversi ammonti fuq self lil Derby u din tal-ahhar ma kinitx hallset dan id-dejn lura.

12. F`dan il-kuntest ukoll, kif se jirrizulta fil-kors tat-trattazzjoni tar-rikors odjern, l-intimata Angele Calleja tikkontendi wkoll li meta Derby allegatament ma hallsitx lura x-shareholders` loans lis-socjeta` intimata, l-istess socjeta` intimata li kienet tikkontrolla l-intimata Angele Calleja kienet oggezzjonat ghal dan u Derby kienet ghaddiet rizzoluzzjoni fis-6 ta` Jannar 2000 fejn is-socjeta` intimata thallset ghas-saldu tal-flus li kienet harget u silfet lil Derby billi giet assenjata l-operazzjoni u l-istokk kollu li kien hemm fil-fond 66 Tower Road, Sliema. **Fil-fehma tas-socjeta` esponenti, din ir-rizzoluzzjoni saret bil-hsieb ta` frodi jew bil-ghan ta` frodi tal-kredituri ta` Derby, fosthom is-socjeta` esponenti u ghal dan l-estremi li jigi applikat l-artiklu 386 tal-Ligijiet ta` Malta sabiex din l-Onorabbli Qorti tiddikjara li l-intimati flimkien xjentement kienu**

partijiet fit-tmexxija tan-negozju bil-mod imsemmi u li l-istess intimati ghandhom jinstabu responsabbli personalment, minghajr ebda limitazzjoni ta` responsabbilta` ghal kull jew ghal xi dejn jew responsabbiltajiet ohra ta` Derby, u dan ghal diversi ragunijiet impellenti.

13. *Fl-ewwel lok ghandu jinghad li r-risoluzzjoni in kwistjoni allegatament tirrekordja biss it-transazzjoni li biha Derby allegatament ittrasferiet l-oggetti in mertu favur is-socjeta` intimata, ghaliex l-istess risoluzzjoni mhijiex ghajr dokument ta` kumpanija, li fih min allegatament kien qieghed jittrasferixxi, u cioe` s-socjeta` intimata, ma kienx parti.*

14. *Fit-tieni lok, u fuq kollox anke jekk dato ma non concesso r-risoluzzjoni msemmija hawn fuq tista` titqies bhala t-transazzjoni nnifisha, l-istess transazzjoni ma setghetx ikollha l-effett li titrasferixxi propjeta` ta` Derby favur terzi persuni. F`dan il-kuntest ghandu jinghad li r-risoluzzjoni in kwistjoni hija monka daqs kemm hi frawdolenti. Dan qieghed jinghad b`referenza ghall-paragrafu (d) tal-Artiklu 3 mill-Memorandum of Association ta` Derby, liema dispozizzjoni tghid testwalment:*

15. *“3 ... The objects for which the company is established are the following: ... (d) To purchase, develop, take on lease, emphyteusis, sub-emphyteutis, or otherwise acquire or deal in, under any title, whether real or personal, any property, whether movable or immovable, and any interests or rights therein, and to sell, grant on lease or emphyteutis or sub-emphyteutis or dispose of under any title whatsoever, whether real or personal, any property, whether movable or immovable, or any rights or privileges thereon.”*

16. *Illi l-Objects Clause ta` kumpannija huwa l-espressjoni tal-poteri li tgawdi dik il-kumpanija, liema poteri huma ezercitabbli mill-istess kumpannija fil-laqgha generali. Illi f`dan is-sens l-Artiklu 137(3) tal-Att dwar il-Kumpaniji (Kap. 386 tal-Ligijiet ta` Malta) jiddisponi li “n-negozju ta` kumpannijajitmexxa mid-diretturi li jistghu jezercitaw dawk is-setghat kollha tal-kumpannijamaghduda dawk specifikati fl-artiklu 136, li b`dan l-Att jew bil-memorandum jew bl-istatut tal-kumpanija, ma jkunux mehtiega li jigu ezercitati mill-kumpannijaf`laqghat generali”.*

17. *It-trasferiment tal-oggetti in mertu huwa poter riservat ghal-laqgha generali, u mhux fil-Bord tad-Diretturi direttament, jew*

ghall-inqas ezercitabbli mill-Bord tad-Diretturi wara s-sanzjoni tal-laqgħa generali, mhux biss għaliex jinkwadra fit-termini tal-Artiklu 3(d) tal-Memorandum of Association ta` Derby, hawn fuq citat, izda wkoll ir-risoluzzjoni msemmija li s-socjeta` intimata qiegħda tippretendi li ttrasferiet l-oġġetti in mertu favur tagħha, hija ffirmata (flimkien mad-direttur l-iehor, l-intimat Claude Calleja) minn hadd hlief l-intimata Angele Calleja stess, li kienet direttur fis-socjeta` Derby, kif ukoll azzjonista maggoritarja fis-socjeta` intimata. Barra minn hekk, fi proceduri ohra relatati l-intimata Angele Calleja stess tistqarr li kienet hija li ppromwoviet l-istess risoluzzjoni.

18. Illi fil-kuntest tal-ahhar sottomissjonijiet, għandu jingħad ukoll li l-Artiklu 137(3) mill-Kap. 386, hawn fuq citat, fil-fatt jagħmel referenza għall-Artiklu 136 tal-istess Att. Il-paragrafu (d) tas-sub-inciz (3) tal-istess Artiklu jiddisponi : “B`mod partikolari, izda bla hsara għal kull dmir iehor mogħti lid-diretturi ta` kumpanija, jew lil xi wiehed minnhom, bil-memorandum u l-Istatut ta` assocjazzjoni jew b`dan l-Att jew b`xi ligi ohra, id-diretturi ta` kumpanija... (d) mghandhomx juzaw xi propjeta`, informazzjoni jew opportunita` tal-kumpanijagħall-beneficcu tagħhom stess jew ta` xi hadd iehor, jew jieħdu xi beneficcu b`xi mod iehor b`konnessjoni mal-ezercizzju tas-setgħat tagħhom, hlief bil-kunsens tal-kumpanijaf`laqgħat generali jew hlief kif permess mill-memorandum u l-istatut ta` assocjazzjoni tal-kumpanija” (sottolinjar tas-socjeta` esponenti). Mhemmx dubju li bit-transazzjoni li kienet qed tippromwovi l-intimata Angele Calleja stess qua direttur tas-socjeta` Derby, li biha l-imsemmija socjeta` kellha tittrasferixxi l-propjeta` tagħha kollha favur is-socjeta` intimata, u li għaliha ffirmat risoluzzjoni, flimkien ma` zewgħa, direttur ukoll f`Derby, kienet se tibbenefika l-istess intimata Angele Calleja (u s-socjeta` intimata), a skapitu tas-socjeta` esponenti.

19. Effettivament bit-trasferiment tal-oġġetti in mertu, u dak kollu li kellha Derby, inkluzi drittijiet intangibbli bħal goodwill tal-fond li fuqu l-istess socjeta` kienet tgawdi titlu ta` kera mingħand terzi, estranji għall-kawzi odjerni, Derby giet imnezza` minn kull propjeta, li fl-umli fehma tas-socjeta` esponenti din l-Onorabbli Qorti ma tistax tissanzjona anzi għandha ticcensura.

20. Illi se jirrizulta wkoll li ftit iktar minn tmien xhur wara r-risoluzzjoni tas-6 ta` Jannar, 2000, permezz ta` “Form K” ipprezentata mill-intimat Claude Calleja mar-Registratur tal-Kumpaniji, id-direttur Angele Calleja rriżenjat minn direttur ta` Derby b`effett mill-1 ta` Settembru, 2000.

21. Illi se jirrizulta wkoll li kien biss fid-9 ta` Settembru, 2000 li s-socjeta` intimata ghaddiet rizzoluzzjoni straordinarja, li biha gew emendati il-memorandum u l-istatut tal-istess socjeta`, biz-zieda tas-segwenti: "To carry on the business of importers, manufacturers, assemblers, wholesalers, distributors and retailers of all kind of household goods including but not limited to kitchen utensils, domestic appliances, electrical apparatus, decorative goods, linen and all ancillary, related and similar goods". Dan l-object ma kienx jezisti qabel.

22. Illi b`referenza wkoll ghar-rizzoluzzjoni tas-6 ta` Jannar, 2000, minkejja li l-accounts ta` Derby jindikaw li s-socjeta` intimata kienet qieghda tassorbi d-debiti ta` Derby (mal-HSBC u kredituri ohrajn), ir-rizzoluzzjoni in kwistjoni tikkellem biss fuq "stock and all the Company`s fixtures & fittings", fatt li jkompli jikkonferma li l-intimata Angele Calleja (bil-komplicita` ta` zewgha, l-intimat Claude Calleja) kienet qieghda tagixxi b`qerq fl-interess taghha, u tas-socjeta` taghha, cioe` is-socjeta` intimata, a skapitu mhux biss ta` Derby, imma wkoll tas-socjeta` esponenti, u kredituri ohrajn.

23. Illi effettivament l-intimata Angele Calleja svestit lis-socjeta` Derby mill-assi kollha taghha, b`abbuz serju u lampanti mill-pozizzjoni taghha ta` direttur tal-istess socjeta`, u dan a skapitu tas-socjeta` esponenti, u ta` kredituri ohra, kif hawn fuq spjegat. Illi dan jinghad ukoll ghaliex filwaqt li l-accounts tas-sena precedenti, u cioe` tal-1999 (kopja taghhom hawn annessa u mmarkata Dok. "KP4"), kienu juru li Derby kienet f`pozizzjoni finanzjarja tajba, b`assi konsistenti primarjament, u kwazi esklussivament f`dak l-istokk li s-socjeta` intimata qed tippretendi li akkwistat, b`semplici daqqa ta` pinna ta` xi hadd li kien qieghed jagixxi f`isem l-istess socjeta` intimata, dan l-istokk kien gie ttrasferit jew ghall-inqas kien jidher li gie ttrasferit. L-awdituri dan isejhulu "window dressing" ghaliex fl-ahhar tas-sena giet impingija stampa tal-qagħda finanzjarja ta` Derby mod, biex imbagħad, sitt ijiem wara biss, meta l-istess socjeta` ma kinitx għadha bdiet topera wara x-shut-down ta` zmien il-Milied, l-istess socjeta` giet svestita minn dak li kellha!

24. Illi fil-fatt dan il-perjodu bejn is-sena 1999 u l-bidu tas-sena 2000, meta saret ir-rizzoluzzjoni in kwistjoni kien sewwa sew iz-zmien meta Derby kienet ilha sejra lura finanzjarjament fl-operat taghha minn gewwa l-kumpless "Galleria" gestit mis-socjeta` esponenti tort tal-istess Derby u ta` dan Derby kienet qieghda twahhal fis-socjeta` esponenti u nel frattemp bdiet

takkumula kirjiet u spejjez li kellha thallas lis-socjeta` esponenti u li qatt ma hallset mill-bidu nett ta` dik l-operazzjoni kummercjali.

25. Illi jinghad ukoll li mhuwiex minnu, kuntrarjament ghal dak li qalet l-intimata Angele Calleja, kontradetta minn Charles Scerri l-awditur ta` Derby, li s-socjeta` intimata kienet tat loans lil Derby, u dan kif se jirrizulta waqt it-trattazzjoni tar-rikors odjern. Illi din tal-loan ivvintat mill-intimata Angele Calleja kienet ukoll simulazzjoni.

26. Is-socjeta` esponenti tissottometti wkoll li r-risoluzzjoni inkriminata intiza kif kienet biex tqarraq bis-socjeta` esponenti (u kredituri ohrajn) kellha causa illecita u mhux biex jithallsu lura shareholders` loans li saru da parti s-socjeta` intimata, favur Derby, u dan ghaliex kif jirrizulta mill-pagna 8 tan-“Notes to the Financial Statements” u kienu qeghdin isiru hlasijiet akkont regolarment kif del resto jidher mill-istess financial statements.

27. Illi bla pregudizzju ghas-suespost, imma b`referenza ghall-istess, mill-fatti hawn fuq esposti ghandha jirrizulta li s-socjeta` intimata u l-intimata Angele Calleja, bil-komplicita` ta` zewgha l-intimat Claude Calleja, li bejniethom jikkontrollaw iz-zewg socjetajiet in kwistjoni, ipperpetraw simulazzjoni assoluta fit-termini ta` guri sprudenza ormai ben stabbilita, li f`dan il-kaz ghandu jwassal lil din l-Onorabbli Qorti timponi sanzjoni fit-termini tal-artiklu 315 tal-Kap. 386 tal-Ligijiet ta` Malta. Din is-simulazzjoni tkompli tikkonferma b`mod car li n-negozju ta` Derby tmexxa bi frodi jew bil-ghan ta` frodi.

28. Huwa principju ben maghruf li persuna taghmel tajjeb ghad-dejn taghha kollu bl-assi li ghandha prezentement u b`dawk li jista` jkollha fil-futur. Fil-kaz ta` Derby, jekk wiehed jimxi fuq l-iStatement of Financial Position (pagna 8) kif sottomess lill-MFSA ghas-sena li ghalqet 31/12/12, jidher car li l-kumpannijama kellhiex bizejjed rizorsi biex thallas dejnha inkluz dak li ghandha mas-socjeta` esponenti.

29. Fil-kaz ta` Derby madankollu hemm rizorsi ohra li skont l-intimat Claude Calleja setghu jaghmlu tajjeb ghad-dejn ta` Derby u li mhuwiex innizzla fl-iStatement of Financial Position. Jekk wiehed jirreferi ghal pagna 11 tar-rendikont ghall-2012 hemm innizzel li d-direttur ghazel li jipprepara r-rendikont fuq bazi ta` “going concern” (minkejja l-qagħda

finanzjarja mweghra ta` Derby) ghax fi kliemu "The director believes that the required support will be forthcoming from the company`s shareholders".

30. Illi f`dan il-kuntest l-istess intimat ghandu jindika jekk hux minnu li s-socjeta` intimata tat din il-garanzija lil Derby biex jekk inhu l-kaz, din il-garanzija tissarrafa favur tal-kredituri ta` Derby. Jekk din il-garanzija qatt ma nghatat, allura jrid jispjega ghaliex ta` indikazzjoni li Derby se ssib is-support tas-socjeta` intimata meta dan ma kienx minnu u jifhimx li terzi persuni (inkluz il-kredituri) jistghu jigu zvizzati bid-dikjarazzjoni tieghu.

31. Hija prattika fil-process ta` audit li fejn kumpannijatkun trid tipprepara r-rendikont finanzjarju fuq bazi ta` "going concern" minkejja li hi "insolvent", l-awditur jitlob dikjarazzjoni bil-miktub minghand ix-shareholders li huma lesti jaghtu s-support taghhom kif u meta mehtieg.

Ghaldaqstant, ghar-ragunijiet kollha premissi, is-socjeta` esponenti umilment titlob li din l-Onorabbli Qorti :-

1. Tiddikjara li n-negozju ta` Derby sar bil-hsieb ta` frodi jew bil-ghan ta` frodi tal-kredituri ta` Derby, fosthom is-socjeta` esponenti, u dan a tenur tal-artiklu 315(1) tal-Kap. 386 tal-Ligijiet ta` Malta.

2. Tiddikjara li l-intimati flimkien u in solidum bejniethom xjentement kienu partijiet fit-tmexxija tan-negozju bil-mod imsemmi.

3. Tiddikjara li l-istess intimati ghandhom flimkien u in solidum bejniethom jinstabu responsabbli presonalment, minghajr ebda limitazzjoni ta` responsabbilta` ghal kull dejn ta` Derby, inkluz dak versu s-socjeta` esponenti.

4. Tikkundanna lill-istess intimati flimkien u in solidum bejniethom ihallsu, minghajr ebda limitazzjoni ta` responsabbilta`, kull dejn ta` Derby, inkluz dak versu s-socjeta` esponenti.

Bl-ispejjez kontra l-intimati.

Rat ir-risposta pprezentata fis-16 ta` Dicembru 2015 li taqra hekk :-

1. Illi l-azzjoni odjerna kif intentata mis-socjeta` rikorrenti hija bbazata fuq l-art. 315 tal-**Att dwar il-Kumpaniji** (Kap. 386 tal-Ligijiet ta` Malta) li jipprovi li:

“Jekk waqt l-istralc ta` kumpanijasew jekk b`ordni tal-Qorti jew volontarjament ikun jidher li xi negozju tal-kumpanija jkun tmexxa bil-hsieb ta` frodi ta` kredituri tal-kumpanija jew ta` kredituri ta` xi persuna ohra jew bil-ghan ta` frodi, il-Qorti tista` fuq rikors tar-ricevitur ufficjali, jew tal-istralcarju jew ta` xi kreditur jew ta` xi kontributorju tal-kumpanijajekk jidhrilha xieraq li taghmel hekk, tiddikjara li xi persuni li xjentement kienu partijiet fit-tmexxija tan-negozju bil-mod qabel imsemmi tkun responabbli personalment, minghajr ebda limitazzjoni ta` responsabbilta` ghal kull jew ghal xi dejn jew responsabbiltajiet ohra tal-kumpanijakif il-Qorti tista` tordna.”

2. Illi ghaldaqstant fl-ewwel lok a tenur tal-art. 315 tal-**Att dwar il-Kumpaniji** (Kap. 386 tal-Ligijiet ta` Malta) is-socjeta` *A.M. Holdings Limited* ma tistax tigi ritenuta legittimu kuntradittur f`dan ir-rigward u dan ghaliex huwa car li, in kwantu tali, tali socjeta` intimata ma setghet qatt f`tali vesti tkun xjentement parti fit-tmexxija tan-negozju.

3. Illi fit-tieni lok ukoll a tenur tal-istess artiklu surreferit l-intimata *Angele Calleja* ma tista` qatt tigi ritenuta legittima kuntradittrici f`dawn il-proceduri u dan ghaliex kif jirrizulta car mir-rikors promotur l-intimata rrienzjat minn direttur tas-socjeta` *Derby International Limited* b`effett mill-ewwel ta` Settembru, 2000.

4. Illi fit-tielet lok u interament minghajr pregudizzju ghas-surreferit il-provediment tal-ligi jimponi zewg kundizzjonijiet ghall-applikazzjoni tal-istess. L-ewwel minn dawn il-kundizzjonijiet hi li s-socjeta` trid tkun fi stadju ta` stralc. Imbaghad, sabiex tkun, tista` tasal ghall-konkluzjoni ta` kummerc bi frodi, il-Qorti trid tkun sodisfatta li jezistu provi ta` intenzjoni li jigu frodati kredituri. F`dan il-kuntest, il-Professor *Andrew Muscat* fil-ktieb **“Principles of Maltese Company Law”** jghid:

“Another – and certainly more crucial – condition is that the applicant will have to discharge the burden of proving that the business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose”.

Il-Professur Andrew Muscat ikompli:

“The test will however be satisfied where directors allow a company to incur credit when they have no reason to think that the creditors will ever be paid. It can also be satisfied where the directors obtain credit at a time when they have no good reason to believe that funds will become available to pay the creditors when their debts become due or shortly thereafter”.

Skont Charlesworth`s “Company Law” (Stevens 13th Edit. 1987) jinghad li:

“In general it may be properly inferred that there is an intent to defraud creditors if a company carries on business and incurs debts when, to the knowledge of the directors, there is no reasonable prospect of the company being able to pay them. It is not necessary to show that there is no prospect of the creditors ever being paid. It is enough that there is no reason for thinking that they will be paid as the debts fall due or shortly thereafter”.

*Hekk ukoll fis-sentenza moghtija mill-Onor. Qorti tal-Appell fl-ismijiet: “**Electronic Products Limited v. Emanuel Micallef et.**” (Rik. Nru. 519/2005) datata 25 t`Ottubru, 2013 jinsab deciz li:*

*“F`kaz li jirrizulta kummerc bi frodi jew hazin, il-ligi tikkontempla t-tnehhija tar-responsabilita` limitata **tad-diretturi** bir-responsabilita` personali taghhom tkun kompluta u ampja f`kaz li jirrizulta kummerc bi frodi.” (enfazi mizjuda)*

5. *Illi ghaldaqstant anke minn qari tal-premessi tal-azzjoni odjerna jirrizulta car li ma jissussistux il-premessi ghas-success tal-azzjoni odjerna u*

dan ghaliex minn imkien ma jirrizulta li d-diretturi tal-kumpannijakomplew fin-negozju, “carrie(d) on business and incurre(d) debts when, to the knowledge of the directors, there is no reasonable prospect of the company being able to pay them”. Bil-kontra ta` dan jirrizulta car li, minnufih li gie determinat li l-prospetti tas-socjeta` intimata ma kinux tajbin hija waqfet topera u tinnegozja.

6. *Illi jirrizulta car li dak li jinsab lamentat mir-rikorrenti huwa biss li:*

a. *Is-socjeta` intimata hallset kreditu li kien dovut minnha*

b. *Permezz ta` rizoluzzjoni li, skont l-istess rikorrenti hija “monka (ghaliex) l-istess transazzjoni ma setghetx ikollha l-effett li titrasferixxi propjeta` ta` Derby favur terzi persuni”*

c. *Li tali transazzjoni setghet issir biss permezz ta` laqgħa generali u mhux tramite l-Bord tad-Diretturi*

d. *Li tali transazzjoni hija wahda simulata b`mod assolut u magħmula b`“causa illecita”.*

7. *Illi, “dato ma non concesso” s-surreferit, huwa car li dawn l-elementi mhumiex sufficjenti sabiex jikkostitwixxu l-elementi tal-azzjoni odjerna. Huwa car li s-surreferit jista` talvolta jservi bhala premissi fil-kuntest ta` azzjoni paolina u/jew ta` azzjoni li permezz tagħha tigi attakata il-validita` tat-transazzjoni msemmija. Imma cetament li l-azzjoni odjerna ma tistax isservi sabiex jigu evitati il-proceduri surreferiti – u dan kemm fir-rigward tal-elementi kostitutivi tal-istess imma wkoll fir-rigward ta` eccezzjonijiet li jistghu tal-volta jigu sollevati f`dan ir-rigward. Huwa car li, sakemm l-azzjoni odjerna hija bbazata fuq is-surreferit u sakemm din l-Onorabbli Qorti qed tigi mitluba tiddeciedi dwar dawn l-elementi elenkati hawn fuq, l-azzjoni odjerna ma tistax tissussisti fin-nuqqas ta` gudikat li effettivament jiddikjara u jikkonferma dak allegat mis-socjeta` rikorrenti. F`dan ir-rigward huwa car li tali gudikat jista` jigi ottenut biss fil-kuntest ta` rikors guramentat b`talbiet “ad hoc” f`dan sens. Sakemm dan ma jsirx l-allegazzjonijiet surreferiti jibqghu biss tali u ma jistghux iservu bhala premissi għall-azzjoni odjerna.*

8. Illi, minghajr pregudizzju ghas-surreferit, huwa car ukoll li l-azzjoni odjerna hija sempliciment intiza sabiex tvarja dak li jinsab diga` deciz fid-29 ta` Mejju, 2009 mill-Onorabbli Qorti tal-Appell fil-kawza fl-ismijiet **“AM Holdings Limited v. Gallarija Management Limited et”** (Rik. Nru. 6/2002/3) fejn inghad li t-transazzjoni mertu tal-kawza odjerna hija wahda valida tant li l-oggetti mobbli relattivi ma setghux jigu maqbudin mis-socjeta` rikorrenti in kawtela tal-pretensjonijiet taghha (kopja tad-decizjoni relattiva qed tigi hawn annessa u mmarkata Dok. “A”). F`dawk il-proceduri gie deciz b`mod konklussiv li:

“Is-socjeta` konvenuta Gallarija Management Ltd ma ressqet ebda prova konklusiva li dak li sar bejn is-socjetajiet Derby u A.M. Holdings sar b`qerq u strahet biss fuq suspetti u allegazzjonijiet minhabba d-detenturi tal-ishma taz-zewg socjetajiet” (enfazi mizjuda).

F`dawk il-proceduri wkoll intqal ukoll li, dato ma non concesso, ir-rimedju tas-socjeta` llum rikorrenti kien dak tal-azzjoni paoliana. Ovvjament din l-azzjoni baqghet qatt ma giet intavolata mis-socjeta` rikorrenti. Huwa car allura li, permezz tal-azzjoni odjerna, is-socjeta` rikorrenti qed sempliciment terga` tipprova tqajjem materja li giet definittivament deciza permezz tas-sentenza surreferita u kwindi in kwantu jirrigwarda s-socjeta` intimata AM Holdings Limited tissussisti l-eccezzjoni tar-“res judicata”.

9. Illi, aktar minn hekk, din l-azzjoni lanqas ma tista` tirnexxi u dan ghaliex kulma ghamlet is-socjeta` Derby International Limited kien li hallset kreditu dovut minnha lil terzi u dan ghamlitu mhux in kontanti, imma billi bieghet prodotti lil A.M. Holdings Limited, prodotti li kieku bighethom Derby International Limited kienet tinkorri aktar telf, biex b`hekk tkabbar ir-riskju ghall-kredituri. Ukoll dan fi zmien meta ma kien ghad hemm l-ebda decizjoni li tikkonferma li s-socjeta` esponenti hija kreditrici tas-socjeta` rikorrenti billi l-pretensjoni ta` Gallarija kienet ikkontestata (u mnizzla bhala tali fl-accounts), u meta l-kumpannijakienet ghadha solventi. Dan ghamlitu permezz ta` rizoluzzjoni li hija wahda ghal kollox valida skont il-ligi. Certament allura ma kien hemm ebda intenzjoni ta` frodi da parti tal-intimati, dan ukoll ghaliex l-azzjonijiet lamentati sehew biex Derby ma tibqax tinkorri telf; saret ghall-prezz tas-suq; saret meta Derby kienet ghadha solventi, u saret ukoll ferm qabel ma gie determinat li s-socjeta` intimata hija fil-fatt debitrici tas-socjeta` rikorrenti.

10. Illi l-esponenti jikkontendu wkoll li lanqas mhuwa minnu li s-socjeta` intimata “kienet ilha sejra lura finanzjarjament fl-operat taghha minn

gewwa l-kumpless “Gallaria” (...) tort tal-istess Derby” u dan kif se jirrizulta car matul il-mori ta` din il-kawza. Effettivament kienet l-istess socjeta` rikorrenti li dahqet u agixxiet b`mod frawdolenti fil-konfront tal-istess socjeta` intimata meta agixxiet fil-konfront taghha b`tali mod li tissollecita u tottjeni il-kunsens taghha ghall-konkluzjoni ta` negozju ta` kera fi hdan il-kumpless imsemmi u dan meta fil-fatt kienet taf ben tajjeb li dak minnha mwieghed ma seta` qatt jigi minnha stess attwat. F`dan ir-rigward l-esponenti qeghdin minn issa jirriservaw id-drittijiet taghhom skont il-ligi.

11. Illi fi kwalunkwe kaz assolutament ma jezistux l-estremi li jiggustifikaw l-azzjoni odjerna. Dan gie d'altronde kkonfermat diversi drabi mill-istralcjarju tas-socjeta` intimata stess fil-proceduri ta` stralc relattivi.

12. Illi l-ebda wiehed u/jew wahda mill-intimati ma rendew ruhhom responsabbli ta` kummerc frawdolenti u/jew ta` kwalunkwe agir iehor frawdolenti fil-konfront tar-rikorrenti.

13. Illi, minghajr pregudizzju ghas-surreferit, ir-raba` talba tas-socjeta` rikorrenti ma tistax tintlaqa` kif dedotta u dan ghaliex a tenur tal-art. 315 tal-Att dwar il-Kumpaniji (Kap. 386 tal-Ligijiet ta` Malta) din l-Onorabbli Qorti ma tistax tikkundanna lill-intimati “jhallsu (...) kull dejn”, u dan ghaliex l-interess guridiku tas-socjeta` rikorrenti huwa limitat ghal dak li jispetta lilha u mhux lil terzi mhux parti f`din l-azzjoni.

14. Illi t-talbiet tar-rikorrenti huma infondati fil-fatt u fid-dritt.

15. Salv eccezzjonijiet ulterjuri koncessi mil-ligi.

16. Bl-ispejjez kontra l-istess socjeta` rikorrenti.

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

Rat id-digriet illi tat fl-udjenza tat-8 ta` Mejju 2017 fejn halliet il-kawza ghas-sentenza ghal-lum bil-fakolta` li l-partijiet jipprezentaw noti ta` osservazzjonijiet.

Rat in-noti ta` osservazzjonijiet tal-partijiet.

Rat l-atti l-ohra tal-kawza.

II. Provi

Kenneth Pullicino xehed huwa *accountant* u awditur. Huwa wkoll il-*company secretary* tar-rikorrenti.

Qal illi r-rikorrenti kienet kostitwita meta l-Farsons Group akkwista l-bini tal-Fgura. L-idea kienet illi l-bini akkwistat ikun ikkonvertit ghal *shopping complex*, kif fil-fatt sar. Ir-rikorrenti hija kumpannija sussidjarja ta` Farsons. Fil-kumpless kien hemm numru ta` hwienet, li kienu mikrija lil terzi, fosthom Derby International Limited ("**Derby**"), illum xjolta u stralcjata.

Spjega li l-kawza tal-lum saret kontra t-tliet intimati ghaliex ir-rikorrenti tikkontendi illi dawn ghamlu kummerc bi frodi ghad-dannu taghha.

Stqarr illi Derby hija kumpannija sussidjarja tal-intimata AM Holdings Limited. L-intimati l-ohra konjugi Calleja kienu diretturi u azzjonisti kemm ta` Derby u kif ukoll AM Holdings Limited. Bhala assi tangibbli, Derby kellha *stock* u affarijiet ta` *retail*. L-*stock* kien affarijiet tad-dar. Mill-procedura ta` istralc, irrizulta li Derby ma kellhiex assi.

Kompla jghid illi r-rikorrenti kellha krediti kontra Derby ghal hlas ta` kera li kienet dovuta. Billi ma thallsitx, ir-rikorrenti kellha taghmel kawza kontra Derby. Il-kawza kienet deciza favur ir-rikorrenti b`ordni biex Derby thallas Lm 4000. Sar appell. Bid-decizjoni fl-appell, Derby marret aghar ghaliex spiccat kundannata thallas Lm 29,000.

Qal illi in segwitu saru zewg mandati pero` rrizulta li ma kien ghad fadal xejn mill-*istock*. L-ufficju registrat ta` Derby kien go Tower Road, Sliema. Meta giet biex issir l-ezekuzzjoni, kien hemm oggetti li jinqabad l-istock li kien hemm fil-post peress illi inghad li l-istock li nstab kien ta` AM Holdings Limited. Fil-post ma rrizultax li kien hemm assi ohra. Il-marixxal

ezegwixxa l-mandat xorta fuq dak l-istock izda mbaghad saret kawza biex jitwaqqa` l-mandat b`ordni tal-qorti.

Fisser illi kien sar trasferiment ta` stock minn Derby ghal AM Holdings Limited. Gara illi filli Derby kellha stock u filli spiccat minghajr l-stock ta` xejn. L-effett tat-trasferiment kien r-rikorrenti kellha sentenza favur taghha kontra Derby li ma setghetx tigi ezegwita billi Derby spiccat b`xejn ghaliex l-stock li kellha lahqet ittrasferietu lil AM Holdings Limited.

Kompla jixhed illi meta direttur jipprepara rapport annwali, huwa ghandu ghazla illi jew jipprezenta l-accounts bhala *going concern* jew inkella *on a breakup basis*. Derby ma kellhiex bizzejjed assi biex thallas id-djun taghha. F`dik is-sitwazzjoni, id-diretturi messhom ippreparaw rendikont finanzjarju *on a breakup basis*. Minflok sar hekk ghazlu li jmorru ghal rendikont *on a going concern basis*. Ghamlu hekk ghaliex id-diretturi ddikjaraw illi kienu lesti jieqfu ma` Derby kif u meta hemm jkun hemm bzonni sabiex thallas id-djun taghha.

Stqarr illi r-rendikont finanzjarju kien approvat mill-azzjonisti ta` Derby li huma t-tliet intimati. Meta jinqraw ir-rendikonti finanzjarji, kien hemm serhan fil-mohh tal-kredituri li fil-kaz li Derby ma tkunx tista` thallas id-djun taghha, kienu ser jidhlu responsabbli l-azzjonisti taghha.

Ikkonferma bil-gurament tieghu l-kontenut tar-rikors promotur.

Fil-**kontroezami** huwa xehed illi l-kostatazzjonijiet tieghu kienu fondati fuq id-dokumenti, u cioe` il-financial statements, il-Form K u l-bdil fl-articles of association. Huwa ma kienx partecipi fin-negozjati li saru bejn iz-zewg partijiet biex waslu ghal ftehim tal-kiri tal-hanut. Lanqas ma kien involut meta beda jinqala` dizgwid bejn il-partijiet.

Charles Scerri xehed li huwa awditur.

Ha hsieb l-audit ta` Derby fiz-zmien ta` bejn il-15 ta` Settembru 2002 u l-31 ta` Dicembru 2013.

Stqarr illi l-frazi li tghid “*on a going concern basis*” tfisser li l-kumpanija tista` tibqa` topera.

Spjega li l-*cash flows* kellhom jigu min-negozju u mill-investment gdid tal-azzjonisti. Normalment ikun hemm assigurazzjoni da parti ta` l-azzjonisti li sejr in jaghmlu *cash injection* fil-kumpanija. Din issir fil-*letter of representation*. Dikjarazzjoni bhal din hija mandatorja mil-ligi meta jkun hemm *negative equity*. Jekk ikun hemm *negative equity*, irid ikun hemm din il-kwalifika.

Spjega li huwa baqa` jaghmel *audits* sakemm Derby giet xjolta.

Fisser illi ikun hemm *negative equity* meta l-*capital base* ikun gie *eroded* u ghalhekk il-kumpanija tkun trid taghmel *reverse* fl-operat jew inkella l-azzjonisti jridu jikkontribwixxu flus huma. Sakemm kumpanija tkun qed topera u qed tlahhaq mal-*commitments* taghha, hija tkun qed topera *on a going concern basis*. Ma tibqax *a going concern*, meta ma tkunx tista` tonora l-*commitments* taghha. Meta jkun hemm *negative equity* issir il-kwalifika wkoll sabiex terzi jirregolaw ruhhom.

Qal ukoll illi jekk ikun hemm assenjazzjoni ta` assi tal-kumpanija, din tkun tirrizulta mill-*accounts*.

Ikkonferma illi fl-audit ghas-sena finanzjarja 2011 l-audit sar *on a going concern basis*.

Kompla jghid illi l-*balance sheet* ghall-2011 kienet qed turi *negative equity* ta` EUR 46101 (mentri fis-sena 2010 kien ta` EUR 44550).

Qal li l-assunzjoni li ser ikun hemm appogg finanzjarju mill-azzjonisti giet mill-fatt li l-ispejjez sabiex il-kumpanija tibqa` topera kienu qed jigu ffinanzjati mill-azzjonisti, ghalkemm ma kien hemm xejn miktub f` dan is-sens.

Xehed li l-kumpanija kienet ittrasferiet l-operat tal-hanut tas-Sliema u l-istock lil AM Holdings f` Jannar 2000 sabiex jithallas dejn li kellha Derby.

Kompla jghid illi minkejja dak it-trasferiment, Derby baqghet topera l-hanut tal-Fgura sa Ottubru 2000.

Stqarr illi l-passiv li jidher għall-2010 u l-2011 huwa passiv differenti mill-passiv ta` l-2000.

Fisser illi kien hemm passiv ta` EUR 68287 ma` Galleria Limited; ta` EUR 1228 mieghu; ta` EUR 705 bhala *accruals*; ta` EUR 4466 bhala *directors` accounts*; u dejn relatat ma` AM Holdings Limited ta` EUR 14118.

Qal li qabel ma nghatat is-sentenza tar-rikorrenti, il-passiv ma` Galleria Limited ma setax jidhol fl-accounts.

L-intimat Claude Calleja ssejjah biex jixhed *viva voce* mir-rikorrenti.

Xehed illi huwa kien Managing Director ta` Derby. L-azzjonista ta` Derby hija huwa AM Holdings Limited. Huwa Managing Director ta` AM Holdings Limited. Id-diretturi l-oħra huma Angele Calleja u Dr. Noel Arrigo.

Stqarr illi AM Holdings Limited kienet tbiegh prodotti bhal affarijiet tad-dar, *giftware* u oggetti tal-kristall lil Derby.

Spjega li fil-bidu Derby kellha azzjonist iehor Jean Mark Bianchi li kellu sehem ta` 45% filwaqt li l-bqija ta` l-ishma kienu ta` Angele Calleja. Derby kienet kostitwita sabiex topera bhala importatrici u *retailer*. Derby ghamlet zmien topera mill-Galleria Complex qabel bdiet topera minn Tower Road, Sliema.

Qal li l-*istock* li Derby kellha fil-hanut sitwat fil-Galleria Complex. Dan thalla b`li kien hemm go fih meta haditu lura r-rikorrenti.

Spjega li kien sar trasferiment ta` *stock* bejn Derby u AM Holdings Limited. Fl-2000 saret laqgħa tal-azzjonisti u diretturi ta` AM Holdings Limited għaliex din kellha tiehu ammont ta` flus mingħand Derby. Kien deciz illi l-operat tas-Sliema u l-*stock* li kien hemm tas-Sliema kellu jagħmel tajjeb

ghas-*shareholders` loan* li kien hemm. B` hekk l-*stock* go tas-Sliema ttiehed minn AM Holdings Limited.

Stqarr illi meta ttiehdet dik id-decizjoni, ir-relazzjoni ma` Galleria kienet diga` u Derby kellha diga` hanut fil-kumpless Galleria.

Spjega li l-hanut tas-Sliema beda mbaghad jitmexxa minn AM Holdings Limited. Iz-zewg hwienet kienu jbieghu bejn wiehed u iehor prodotti simili izda mhux identici. Sa Jannar 2000, il-kera kienet ghadha tithallas lil Galleria. Huwa cahad li fl-1999, kien hemm diga` kawzi istitwiti kontra Derby minhabba nuqqas ta` hlasijiet ta` kera. F`Settembru 2000, saret laqgħa mal-*management* ta` Galleria peress li kien hemm xi arretrati tal-kera izda kawzi ma kinux gew istitwiti kontra Derby sa dak iz-zmien.

Kompla jghid illi l-operat tal-hanut tas-Sliema seta` jkompli peress li ma kien hemm l-ebda obbligi lejn ir-rikorrenti dwar xi jsir b`dak il-hanut.

Sahaq illi dak illi sar kien sar bejgh ta` stock lil AM Holdings Limited. L-assi li kien hemm fil-hanut tal-Fgura thallew kollha fil-post u hadithom ir-rikorrenti. Thallew il-vetrini, l-ghamara u l-*premium*.

Sostna li s-sentenza tas-6 ta` Ottubru 2006 kienet tirrigwarda kirjiet fi zmien meta kien vakat il-hanut tal-Fgura u ma baqax jigi operat.

Kompla jixhed illi bhala direttur, huwa kien jiffirma l-*accounts*. Dwar id-dikjarazzjoni fejn hemm imnizzel li Derby kellha tibqa` *a going concern* peress li kellha l-ghajnuna ta` l-azzjonisti tagħha, gara li ma nstabux il-fondi biex tkun tista` tinghata ghajnuna lil Derby. Cahad li Derby baqghet topera minkejja nuqqas ta` fondi. Waqfet topera f` Settembru 2000. Qal li huwa kien gie mitlub jiehu lura l-hanut ghaliex Galleria riedet li Derby tibqa` hemmhekk u tibqa` thallas il-kera.

L-istess intimat imbaghad ipprezenta affidavit.

Xehed illi bhala azzjonista ta` Derby, AM Holdings Limited kienet silfet diversi ammonti lil Derby matul iz-zmien kollu tan-negozju ta` Derby li

kien imur ferm aktar lura fiz-zmien minn meta sar in-negozju ta` Derby mar-rikorrenti.

Stqarr illi meta Derby ma hallsitx id-dejn taghha lura lil AM Holdings Limited, din tal-ahhar hadet il-gestjoni tal-hanut 66, Tower Road, Sliema minghand Derby, wara li ghaddiet rizzoluzzjoni datata 6 ta` Jannar 2000. Bis-sahha ta` dik ir-rizzoluzzjoni AM Holdings Limited thallset ghas-saldu tal-flus li kienet harget u silfet lil Derby International Limited proprju billi giet assenjata l-operazzjoni u l-istock kollu li kien hemm fl-istess hanut.

Kompla jghid illi Derby kienet kriet minghand ir-rikorrenti l-hanut fil-Galleria Shopping Complex.

Riferibbilment ghall-mertu tal-kawza tal-lum, stqarr illi hadd mill-intimati ma ghamel kummerc bi frodi ghad-dannu ta` r-rikorrenti.

Qal illi jekk kien hemm min kellha ghalfejn tilmenta kienet Derby dwar ir-relazzjoni taghha mar-rikorrenti.

Stqarr illi jiftakar lil Philip Incorvaja, li kien qed jagixxi bhala *marketing manager* tar-rikorrenti jghaddilu informazzjoni dwar is-*shopping mall* li kellu jiftah qabel il-Milied tal-1997. Huwa attenda ghall-prezentazzjoni li saret fl-Axis fejn inghata *brochures* li fihom il-kumpless kien qed deskritt bhala "*The Gateway to the South*" u li kien jikkompreni 35 *retail stalls*, 3 *cinemas*, zewg *branches* ta` banek u wkoll *food chains* ta` ditti popolari.

Kompla jghid illi verbalment, huwa gie nformat li kien ser ikun hemm outlets bhal Kentucky Fried Chicken, Pizza Hut, Tower Accessories, Nicholson`s Supermarket, Eden Century Cinemas, Disney/Sony Play Station, Mitsubishi Electric, fergha tal-Bank of Valletta plc u fergha ta` Mid Med Bank plc li kellu jkun proprju quddiem is-sit li kien qed jigi propost lilhom.

Stqarr illi kemm Incorvaja kif ukoll Kevin Decesare kienu ressqu fuqhom sabiex huma jiehd u posthom fil-kumpless u li huma kienu l-ewwel ghazla taghhom bhala *gift shop*. Dawn kienu persistenti hafna maghhom. Ghal habta ta` Lulju 1997, bdew jidhru reklami fil-gazzetti fejn gew indikati kumpanniji ohra bhal Chicco, Konica, Country Style, Benetton, L` Altra

Moda, 012 u Qronfla. Meta huma raw li kien hemm kumpanniji bhal Benetton, L` Altra Moda u 012 li kienu diga` accettaw, huma thajjru aktar sabiex jidhlu ghal dan in-negozju. Sar jaf ukoll illi Body Shop u Stefanel kienu waslu biex jiffirmaw.

Kompla stqarr illi kien ghalhekk li huwa ffirmata l-ftehim tal-kera ghal Derby u hallas depozitu ta` Lm 2,500 flimkien ma` *premium* ta` Lm 25,000. Giet stipulata kera ta` Lm 11,900 kull sena.

Kompla jghid illi meta beda ix-xoghol fil-hanut, huwa beda jinduna li bosta mill-hwienet li kienu ssemew ma kinux qed jidhru. Ma nfethu l-ebda *branches* ta` banek imma gew biss stallati ATM`s. Qal li Qronfla, Benetton, L` Altra Moda, 012 u KFC lanqas ma nfethu u kwindi, minn dak kollu li r-rikorrenti tathom x`jahsbu ma twettaq xejn. Minn 35 hanut fethu biss 14 li minnhom ghalqu tlieta wara biss tlett xhur.

Insista li kienet Derby li garrbet frodi mhux il-maqlub, ghaliex ir-rikorrenti tat lil Derby x`tifhem illi ser tkun parti minn kumpless ta` hames stillel meta fil-fatt deher mill-ewwel zmien tal-operat li kienu sejrin jintilfu flus kbar.

Qal li huwa jaf li Derby assumiet obbligi u kellha thallas arretrati tal-kera izda kienet effettivamente kienet ir-rikorrenti li dahket b`Derby.

Sostna illi meta Derby waqghet lura fil-hlasijiet tal-kera, Galleria harget mandati kawtelatorji sabiex jinqabdu oggetti li kienu gew importati minn AM Holdings Limited jew trasferiti lilha minn Derby. AM Holdings Limited qatt ma kellha x` taqsam ma` Galleria tant li l-mandat hareg kontra Derby. AM Holdings Limited ikkontestat il-mandati fejn inqabdu oggetti propjeta` taghha b`kawza ad hoc li kienet deciza favur taghha.

Stqarr illi kienet Derby li tterminat il-kirja u halliet fis-sit miljoramenti li jammontaw ghal Lm 7000.

Huwa kkontesta bhala mhix mis-sewwa l-allegazzjoni tar-rikorrenti illi l-oggetti li kienu maqbuda minn Galleria bil-mandati kienu l-unici assi li kellha Derby sabiex taghmel tajjeb ghad-dejn taghha versu l-kredituri.

Qal illi dan mhuwiex hekk ghaliex kif gie deciz mill-Qorti ta` l-Appell, l-assi maqbuda ma kinux proprjeta` ta` Derby izda kienu proprjeta` ta` AM Holdings Limited. Dak iz-zmien Derby kien ghad kellha l-istock kollu taghha fil-hanut fil-Galleria Shopping Complex flimkien mal-fittings u fixtures. Minflok qabdet dak l-istock, ir-rikorrenti dehrilha li setghet taqbad stock li kien fil-hanut tas-Sliema li ma kienx ta` Derby. L-istock, fixtures u goodwill li Derby kellha l-Fgura kienu bizzzejjed biex jaghmlu tajjeb ghall-pretensjoni li kellha r-rikorrenti.

Fisser illi r-risoluzzjoni de qua saret fl-2000 waqt li s-sentenzi kontra Derby nghataw fl-2006 u fl-2009.

Kompla jixhed illi minkejja dak allegat mill-parti l-ohra, *l-objects clause* 3(d) tal-memorandum ta` Derby tistipola li Derby tista` tiddisponi bl-aktar mod wiesa` mill-proprjeta` taghha. Mhux minnu li kien tort ta` Derby li marret lura fin-negozju taghha. In-negozju taghha mar lura minhabba l-promessi mhux mizmuma ta` r-rikorrenti.

Stqarr illi Galleria qatt ma ghamlet xejn biex tattakka ir-risoluzzjoni.

Anke waqt l-istralc, ir-ricevitur ufficjali ma sab l-ebda hjiel ta` frodi.

Fil-**kontroezami** xehed illi s-self u transazzjonijiet li saru bejn AM Holdings Limited u Derby saru tramite ta` operazzjonijiet bankarji. Il-*bank transfers* li lkoll jidhru fl-*istatements* tal-bank. Ma jiftakarx li kien hemm xi rizoluzzjoni da parti ta` AM Holdings Limited sabiex isir self lil Derby.

Stqarr illi l-*stock* li kien hemm fiz-zmien li saret ir-risoluzzjoni ma kienx l-unika assi ta` Derby peress li din kellha zewg hwienet dak iz-zmien. Ir-risoluzzjoni kienet tirrigwarda biss il-hanut tas-Sliema. Derby harget mill-hanut tal-Fgura f` Settembru 2000.

Kompla jixhed illi s-sentenza tal-qorti tat ragun lil AM Holdings Limited mhux lir-rikorrenti. Fis-sentenza, l-*stock* inghata lura ghaliex irrizulta li kien propjeta` ta` AM Holdings Limited.

Stqarr illi wara li Derby ghalqet il-hanut tal-Fgura hija ma komplietx topera minn tas-Sliema. Dan il-hanut beda jigi operat minn AM Holdings Limited. Meta sar it-trasferiment ta` l-operat tal-hanut tas-Sliema, Derby ma kinitx qed tesperjenza diffikultajiet finanzjarji. Kienet thallas il-kera regolarment u kienet ukoll hallset id-debiti li kellha sa dak iz-zmien mar-rikorrenti. Sa Jannar 2000, Derby kienet ghadha topera regolarment. Waqghet lura fil-hlas tal-kera wara dak iz-zmien.

Mistoqsi r-raguni ghalfejn meta spicca l-operat ta` Derby l-accounts taghha baqghu jinhargu *on a going concern basis*, huwa ma gharafx iwiegeb ghalkemm ikkonferma li hekk sar.

Sostna li sa fejn jaf hu, qatt ma nghatat xi assigurazzjoni bil-miktub li l-azzjonisti ta` Derby kienu ser ikunu responsabbli ghal passiv li kellha l-kumpanija.

L-intimata Angele Calleja pprezentat affidavit.

Xehdet illi hija tigi mart l-intimat Clause Calleja u hija direttur ta` AM Holdings Limited. Hija wkoll l-unika azzjonista taghha. Fil-fatt hija kienet iffurmat AM Holdings Limited fi Frar 1978 qabel iz-zwieg taghha. Fl-1991, AM Holdings Limited bdiet timporta *giftware*. Bosta mill-oggetti, kienu jghaddu ghand Derby biex taghmel il-bejgh hi. AM Holdings Limited kienet ukoll azzjonista ta` Derby. Bhala azzjonista silfet flus lil Derby.

Kompliet tghid illi Derby ma hallsitx id-dejn taghha lura. Ghalhekk AM Holdings Limited hadet il-gestjoni tal-hanut 66, Tower Road, Sliema, minghand Derby wara li ghaddiet rizoluzzjoni fis-6 ta` Jannar 2000 fejn AM Holdings thallset ghas-saldu tal-flus li kienet silfet lil Derby bl-assenjazzjoni ta` l-operazzjoni ta` l-istokk kollu li kien hemm fl-istess hanut. AM Holdings bdiet thallas il-paga tas-*salesgirl* u l-ispejjez kollha relatati ma` dak il-hanut inkluzi l-licenzji u kontijeit tad-dawl u ilma.

Fissret illi fl-1 ta` Settembru 2000, hija rriżenjat minn direttur ta` Derby.

Stqarret illi permezz ta` l-mandat kawtelatorji ta` qbid nru 2204/2001 u 3154/2000, ir-rikorrenti qabdet numru ta`oggetti li kienu gew importati

minn AM Holdings Limited jew trasferiti lilha minn Derby. AM Holdings Limited ma kellha x`taqsam xejn mar-rikorrenti tant li l-mandat hareg fil-konfront ta` Derby ghal arretrati ta` kirja li din kellha fil-Galleria Shopping Complex. Propju ghaliex AM Holdings qatt ma kienet ghamlet negozju ma` Galleria, hija kkontestat fil-qorti l-mandati ghar-rigward ta` l-appartenenza tal-oggetti maqbuda.

Komplet tixhed illi b`sentenza li tat il-Qorti tal-Appell fid-29 ta` Mejju 2009, kien dikjarat illi t-transazzjoni li kienet saret bejn AM Holdings u Derby kienet valida u ghalhekk kien ordnat illi l-oggetti mobbli li kienu nqabdu ma setghux jibqghu maqbuda. Fil-kors ta` dik il-kawza, ir-rikorrenti pprovat taghmel l-argument illi kien sar att frawdolenti bejn AM Holdings Limited u Derby ghad-detriment taghha. Il-Qorti warrbet l-argument ghax sostniet illi ma kienx hemm provi konklussivi ta` qerq.

Komplet tghid li wara dik is-sentenza, ir-rikorrenti mexxiet biss bil-kawza tal-lum.

Stqarret illi fil-kors tal-istralc ta` Derby, ir-Ricevitur Ufficjali esprima ruhu fis-sens illi ma kien hemm xejn li min-naha tieghu li kien indikattiv ta` qerq perpeprat mid-diretturi ta` Derby a skapitu tal-kredituri.

Sostniet illi kienet ir-rikorrenti li mxiet bi frodi kontra Derby meta rnexxielha tikkonvinciha tidhol ghal kirja meta kienet taf ben tajjeb li dak li kienet wegghdet ma setax ikun imwettaq.

Fil-**kontroezami**, ikkonfermat li l-ammont misluf minn AM Holdings Limited lil Derby kien jammonta qawwi. AM Holdings Limited kienet debitrice ta` Derby qabel l-ezekuzzjoni tal-mandati ta` qbid minn Galleria. L-ghadd tad-dejn bejn AM Holdings u Derby kien jiggustifika li ssir ir-rizoluzzjoni in kwistjoni.

III. L-eccezzjoni ta` res judicata

Qed tinghata l-eccezzjoni ta` *res judicata* ghaliex skont l-intimati l-kwistjoni li qeghda titqajjem fil-kawza tal-lum kienet diga` deciza b`mod definittiv bis-sentenza li tat fil-Qorti tal-Appell fid-29 ta` Mejju 2009 fil-

kawza : *AM Holdings Limited vs Gallarija Management Limited et (Rik. Nru. 6/2002/3)*.

1. Ir-rekwiziti

Il-Qorti tirreferi ghas-sentenza li tat il-Qorti tal-Appell fl-10 ta` Ottubru 2003 fil-kawza "Crocefissa Sammut et vs Joseph Spiteri".

Sabiex ikun hemm *res judicata*, iridu jissussistu tliet rekwiziti li huma kumulattivi - mhux alternattivi ghal xulxin. Nieqes imqar wiehed minnhom, taqa` l-ecezzjoni. It-tliet elementi huma :-

- a) *eadem res*
- b) *eadem causa petendi*
- c) *eadem personae*.

a) Eadem res

Analizi ta` l-element *eadem res* saret fis-sentenza ta` din il-Qorti (PA/RCP) tad-9 ta` Jannar 2002 fil-kawza "Rabat Construction Ltd vs Cutajar Construction Company Ltd".

Hemm inghad illi dan l-element jirrigwarda l-fatt li l-oggett mertu tat-talba l-gdida jkun identiku ghat-talba precedenti li tkun giet determinata b`sentenza li tkun ghaddiet in gudikat. Ghalhekk sentenza li tikkostitwixxi gudikat ma tistax timpedixxi talba gdida milli tigi proposta quddiem il-Qorti, jekk din hi ntiza sabiex tottjeni xi haga differenti ghal dak li kien intalab b`talba precedenti li giet determinata b`sentenza ta` qabel. Minn dan isegwi li anke jekk l-oggett ta` t-talba l-gdida hu simili ghal dak ta` decizjoni precedenti, izda mhux identiku, is-similarita` mhijiex ostakolu ghat-talba l-gdida ghaliex l-effetti ta` sentenza li tkun ghaddiet in gudikat huma limitati ghal dak li jkunu ressuq l-partijiet u dak deciz mill-Qorti. Mill-interpretazzjoni li jaghtu d-diversi awturi ta` kif ghandha tigi determinata l-identita` ta` l-oggett jidher illi l-ahjar metodu huwa li l-Qorti tezamina jekk il-kwistjoni li titressaq fit-talbiet attrici tkunx giet jew le deciza fis-sentenza li tkun ghaddiet in gudikat. Ghalhekk, wiehed irid jara jekk il-punt imqajjem fl-istess talbiet gewx determinati fis-sentenza l-oħra jew jekk baqghu mhux decizi ; jekk il-kwistjoni tkun diga` giet trattata u deciza, allura jkun hemm l-identita` ta` l-oggett.

b) **Eadem causa petendi**

L-element **eadem causa petendi** jirrikjedi li "*the cause of the claim*" fit-talba l-gdida tkun l-istess bhat-talba precedenti u li giet deciza minn sentenza li ghaddiet in gudikat. Il-*causa petendi* hi "*the title on which the demand is based*".

Sabiex jirrizulta l-element, irid jigi ppruvat li l-kawzali tat-talba l-gdida tkun fondata fuq l-istess fatt guridiku li kien jiforma l-bazi tat-talba precedenti u li giet determinata b`sentenza li ghaddiet in gudikat. Il-gudikat ma jigix nieqes minhabba id-diversita` ta` motivi tal-*causa petendi*.

c) **Eadem personae**

Dan l-element kien trattat fis-sentenza li tat din il-Qorti (**PA/JRM**) fil-kawza "**Charles Cortis v. Francis X. Aquilina et**" fejn inghad :-

L-element tal-identita` tal-persuni, huwa wkoll fundamentali u ta` siwi daqs iz-zewg elementi l-ohrajn. In-nuqqas tieghu huwa bizzejjed biex jeskludi l-gudikat ghaliex min ma kienx prezenti fil-gudizzju, u lanqas kien fih rappresantat legittimament, ma jistax jitqies marbut b`sentenza moghtija u li ghaddiet in gudikat, ukoll jekk l-ezitu ta` dik is-sentenza ikun jiffavorih.

2. **Applikazzjoni restrittiva**

L-eccezzjoni ta` *res judicata* ghandha applikazzjoni restrittiva.

Fis-sentenza ta` din il-Qorti (**PA/PS**) tat-28 ta` Marzu 2003 fil-kawza "**Anthony Borg et v. Anthony Francis Willoughby**" kien rilevat illi :-

Il-fundament ta` l`actio` u ta` l`exceptio judicati` hija preskrizzjoni legali, u ghalhekk hija `strictissimae interpretationis`.Li jfisser li l-atturi ma jkunux jistghu permezz ta` kawza ohra jifthu t-trattazzjoni ta` l-istess punti fl-istess kwistjoni li gja gew diskussi f`kawza deciza b`sentenza li gja ghaddiet f`gudikat.

Sakemm ma jkunx hemm ebda decizjoni fuq il-vera kwistjoni kontroversa, u dik il-kwistjoni ma tkunx giet prekluzja minn ebda decizjoni

definitiva moghtija fil-gudizzju, l-istess kwistjoni tibqa` mhux deciza, u ma jistax mill-parti l-ohra jinghad li ghad-decizjoni josta l-gudikat.

L-eccezzjoni tal-gudikat ghandha tigi ammessa b`cirkospezzjoni kbira; u dan aktar u aktar meta dik l-eccezzjoni jkollha l-effett li teskludi xi dritt, bhal meta si tratta minn incident processwali li jqum fil-kors tal-gudizzju, fejn ma jistax ikun hemm dak li jissejjah gudikat implicitu. Biex ikun hemm lok ghall-eccezzjoni tal-gudikat, hemm bzonni li l-kwistjoni tkun giet `effettivament` deciza bis-sentenza ta` qabel ... Fid-dubju l-Imhalled m`ghandux jipproponi favur l-eccezzjoni tal-gudikat.”

Huwa pacifiku illi *“fejn dispositiv ta` sentenza jkun sempliciment jikkonsisti f` liberazzjoni `ab observantia` ma jistax jinghad li kien hemm gudikat vinkolanti bejn il-partijiet u allura l-kwestjoni tista` tigi riproposta`ex novo.”* (Qorti tal-Appell : 10 ta` Marzu 2004 : **“Joseph Aquilina et noe v. Charles Camilleri**) ghaliex kif kien ritenut fis-sentenza li tat il-Qorti tal-Kummerc fl-4 ta` Dicembru 1884 fil-kawza **“Negte. Nicola Mifsud ed altri v. Comte. Paolo Albanese”** *“è positivo che la sentenza liberatoria dell`osservanza del giudizio non sia definitiva in merito e nulla osta perche` le stesse domande siano riproposte.”*

Finalment u rilevanti ghall-fini ta` din il-kawza kien stabbilit illi *res judicata* tigi eccepita b`success jehtieg li c-cirkostanzi tal-kaz jibqghu l-istess bhal dawk tal-kaz ta` qabel. Jekk ikun hemm bdil fic-cirkostanzi jigi li s-sentenza ta` qabel ma titqiesx ta` ostakolu ghar-riproposizzjoni tat-talba (sentenza tal-Qorti ta` l-Appell (Inferjuri) tas-6 ta` April 2005 fil-kawza **“Joseph Difesa v. L-Awtortita` ta` Malta dwar l-Ambjent u l-Ippjanar”**)

Fl-istess sens kien deciz minn din il-Qorti (**PA/LSO**) fl-20 ta` Jannar 2016 fil-kawza **“Vella Estates Limited v. Raymond Azzopardi et”**. Infatti nghad :-

Fil-kaz fl-ismijiet “Joseph Portelli vs Joseph Stellini et deciza mill-Qorti tal-Appell fit-30 ta` Ottubru 2015) il-Qorti tal-Appell tirreferi ghal kaz Giuseppe Mizzi et vs Joseph Sacco deciza mill-Qorti tal-Appell fil-31 ta` Mejju 1996, li ssemmi li jekk cirkostanzi godda jkunu ssopravenew, leccezzjoni tal-gudikat ma tregix. Madanakollu biex din leccezzjoni treggi “Il-res tal-haga allura ma jibqax l-istess kif meta giet deciza l-ewwel kawza.” B`dik is-sentenza l-Qorti rrespingiet l-eccezzjoni ta` res judicata billi kkonsidrat li ittieni azzjoni kienet ibbazata fuq cirkostanzi godda li ma kienux jezistu qabel ma inghatat l-ewwel sentenza. Hekk ukoll kien gi deciz fil-kaz Angelo Bartolo vs Concetta Lautier, Appell deciz fid-29 ta` April 1966. Jekk ikun hemm tibdil fic-

*cirkostanzi jigi li s-sentenza ta` qabel ma titqiesx ta` ostakolu ghar-riproposizzjoni tat-talba. (Ara wkoll **Peter Paul Muscat vs Giuseppe Muscat** Appell deciz fit-30 ta` Gunju 1969).*

3. Risultanzi

Fil-kaz tal-lum, l-ecezzjoni kienet sollevata **biss** fir-rigward tal-intimata A.M. Holdings Limited.

L-element tal-*eadem personae* jirrizulta.

Dan qed jinghad ghaliex fil-kawza citata fl-ecezzjoni kienu involuti s-socjeta` rikorrenti u s-socjeta` intimata partecipanti. Huwa minnu li l-mod kif inkiteb l-isem tas-socjeta` rikorrenti fil-kawza tal-lum mhuwiex l-istess bhal dak tal-kawza l-ohra fl-istess waqt jidher li baqghet l-istess kumpannija, u cioe` l-istess kreditrici li kien hemm fil-kawza l-ohra hija l-istess wahda tal-kawza tal-lum.

L-element tal-*eadem res* ma jirrizultax.

Fil-kawza citata fl-ecezzjoni, il-mertu kien jittratta talba li ghamlet AM Holdings Limited sabiex il-Qorti tiddikjara illi l-oggetti li kienu maqbuda bl-ezekuzzjoni ta` l-mandati ta` qbid nru 3154/00 u 2204/01 kienu u ghadhom jappartjenu lis-socjeta` lilha, kif ukoll kien hemm talba ghar-rifuzjoni favur taghha tal-ammont ta` Lm 2000.

Huwa minnu li fit-tieni eccezzjoni taghha fl-istess kawza, is-socjeta` Galleria Management Limited eccepjet li kien jinkombi fuq is-socjeta` AM Holdings Limited li tipprova li l-oggetti milquta bil-mandati kienu taghha, u li s-sitwazzjoni minnha allegata ma saritx bil-ghan li tqarraq bis-socjeta` Galleria Management Limited sabiex din tigi mcahhda mill-jedd li tikkawtela l-pretensjonijiet taghha.

Huwa minnu wkoll li kemm l-Ewwel Qorti kif ukoll il-Qorti tal-Appell irrilevaw illi l-ecezzjoni ma kienx sufficjentement ippruvat li kien hemm kolluzjoni sabiex isir qerq ghad-detriment ta` Galleria Management Limited.

Madanakollu, l-oggett ta` dik il-kawza kien jirrigwarda l-oggetti elevati in segwitu ghaz-zewg mandati ta` qbid u min kien il-propjetarju taghhom.

Lanqas ma jirrizulta l-element ta` l-*eadem causa petendi*.

Fil-fatt it-talbiet fil-kawza tal-lum huma diversi fis-sostanza minn dawk tal-kawza l-oħra, mhux biss ghal dak li huwa mertu izda wkoll ghar-rigward tal-punti ta` dritt li fuqhom kienet imposta l-kawza tal-lum.

Il-Qorti qeghda tichad l-eccezzjoni.

**IV. L-Art 315(1) tal-Kap 386
u l-Art 213 tal-Insolvency Act 1986 tal-Ingilterra**

L-azzjoni attrici hija mpostata fuq erba` talbiet. It-talba principali hija d-dikjarazzjoni ta` responsabilita` tal-konvenuti flimkien u in solidum bejniethom ghal kummerc bi frodi tal-kredituri ta` Derby International Limited, inkluz ir-rikorrenti, skont l-Art 315 tal-Kap 386.

L-Art 315 tal-Kap 386 ghandu zewg subartikoli. L-ewwel (1) subartikolu jittratta l-aspetti civili, filwaqt li t-tieni (2) subartikolu iqis l-aspetti kriminali tal-kummerc bi frodi.

Ghall-fini tal-procediment tal-lum, dak rilevanti huwa l-ewwel (1) subartikolu.

Fit-test bl-Ingiliz, **l-Art 315(1)** jaqra hekk :-

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

Jidher illi l-mudell adottat ghat-tfassil tal-Art 315(1) kien l-Art 213 tal-Insolvency Act 1986 tal-Ingilterra.

L-Art 213 tal-Insolvency Act 1986 jaqra hekk :-

(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.

(2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper.

Ghalkemm l-Art 213 tal-Insolvency Act 1986 kien il-mudell, il-Qorti tghid illi l-legislatur taghna ma ghamilx trasposizzjoni tad-disposizzjoni Ingliza fl-intier taghha ghal-ligi taghna.

Id-differenzi principali huma illi filwaqt li fil-kaz tal-ligi Ingliza d-dritt ta` azzjoni jispetta biss lill-istralcjarju, fil-kaz tal-ligi taghna, il-legislatur wessa` l-ghadd tal-persuni li jistghu jittentaw l-azzjoni civili.

Inoltre fil-kaz ta` sejbien ta` kummerc bi frodi, il-legislatur taghna wessa` l-effetti tas-sejbien, meta mqabbel mal-effetti fil-ligi Ingliza.

Infatti waqt illi fil-kaz tal-Art 213 il-persuni responsabbli ghal kummerc bi frodi :

are to be liable to make such contributions (if any) to the company's assets as the court thinks proper ;

fil-kaz tal-Art 315(1), il-Qorti :

may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid be personally responsible, without any limitation of

liability for all or any of the debts or other liabilities of the company as the court may direct.

Fil-ktieb **“Insolvency Law : Corporate and Personal”**, l-awturi **Andrew Keay u Peter Walton** (2003 : Pearson) ighidu fil-pag 533 et seq :-

*Section 213(1) sets out the conduct that constitutes the action of fraudulent trading i.e. intent to defraud creditors or having a fraudulent purpose. Section 213(2) then states who is liable in civil action and for those who knowingly are parties to the carrying on of a business of a company with intent to defraud creditors. Such persons are liable to make such contributions to the company as the court thinks proper. Commonly the persons who will be the subject of such actions will be the company’s directors. But they are not the only ones who may, theoretically, be sued. In a recent decision *Re BCCI Banque Arabe Internationale D’Investissement SA v. Morris* [2002 – BCC – 407] Neuberger J. held that section 213(2) was not limited to those who managed or controlled the company that had failed. The learned judge said that a company that was involved in and assisted and benefited from the business of the failed company and did no knowingly could fall within section 213.*

... the notion of fraud is at the centre of section 213. The interpretation given to the meaning of ‘fraud’ has been of great importance. The meaning of the word has been the main issue that courts have had to address over the years, for fraud is difficult to define at the best of times, as it has different meaning in different contexts. The meaning of ‘carrying on business with intent to defraud’ a phrase found in section 213 has never been defined statutorily and certainly when one considers the case law, one can see that there has not been a consistent approach adopted as far as the test that should be applied.

*... the Court of Appeal in *R v. Grantham* [1984 – 2 WLR 815 ; 1984 – BCLC – 270] adopted a robust approach, either distinguishing or disapproving of earlier decisions and espousing the view that it was not necessary for the applicant to have established that there was no reasonable prospect of the creditors of the company ever receiving payment of what was owed to them for a claim to succeed. The court indicated that if persons have some hope or expectation that ultimately all debts would be paid, they may still be liable, if at the time of getting the credit they are aware that there is no reason for thinking that the debts will be able to be paid when they become due or shortly afterwards. Effectively the court was requiring some action that was close to recklessness. In *Re L. Todd (Swanscombe) Ltd* (1990 – BCC 125) the court said that there is a need for evidence of, in the words of Maughan J. “actual dishonesty involving, according to current notions of fair trading among*

commercial men, real moral blame” [Re Patrick and Lyon Ltd – 1933 – Ch 786 at 790].

We find in Bernasconi v. Nicholas Bennett & Co [2000 – BCC 921 ; 2000 – BPIR 8] an attempt at trying to reconcile things by saying that for fraudulent trading it was necessary to demonstrate that there was ‘intent to defraud or reckless indifference whether or not creditors were defrauded’ but after making that comment Laddie J. stated that dishonesty was a critical element in the action ...

The test for intent to defraud is subjective and not objective, in that the state of mind of the respondent at the time of the alleged fraudulent trading will be the deciding factor. But, having said that, objective considerations are not irrelevant. The circumstances surrounding alleged fraudulent trading must be taken into account and a respondent may have some difficulty extricating himself or herself from liability if the subjective view was not reasonable.

For a person to be liable there must be some positive action taken, so if an officer of, or adviser to, the company, such as the company secretary, neglects to inform the directors that the company is insolvent and what the consequences are in continuing to trade, that person is not liable criminally or civilly, as there is a need for some positive conduct for there to be fraud. A person is not liable merely because he or she nominated a person as a director who committed fraudulent trading, or because he or she had the opportunity of influencing the conduct of the affairs of the company. Company officers will not, necessarily, be liable for trading while the company is insolvent. In such a case there may well be no fraud involved against directors under the wrongful trading ground.

Carrying on business is critical to the action and this phrase is interpreted broadly by the courts ...

The phrase ‘any fraudulent purpose’ appears to provide a wide ambit for the provision ...

and it has been said that it covers frauds committed against prospective creditors as well as current ones ...

It has been suggested that those most likely to be protected by the phrase ‘any fraudulent purpose’ are customers of the company.

Fil-ktieb “**Company Law**”, l-awturi **Mayson, French & Ryan** (26th Edition : 2009-2010 : OUP) ighidu fil-pag 690 et seq :-

... The phrases “intent to defraud” and “fraudulent purpose” used in IA 1986, s 213, imply that a person should be made responsible only for “actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame” in the carrying on of a business ... that is only if there was conduct which was deliberately and actually dishonest according to the notions of ordinary decent business people ...

Whether there has been intent to defraud is a question of fact to be determined in every case and a person’s intent usually has to be inferred from what the person did. The courts have said that some behaviour will usually give rise to an inference that there has been an intent to defraud. An example is inducing people to give credit to a company knowing that they will not be paid when they expect to be paid ... Similarly it can usually be inferred that there is intent to defraud if liability to “involuntary creditors” such as HM Revenue and Customs is incurred when there is no honest belief that the liability will be discharged when due, or shortly thereafter ...

However there is no rule that behaviour of a particular kind inevitably leads to a finding of intent of defraud. For example, there is no rule that continuing to trade while insolvent is fraudulent.

... incurring a contingent liability, such as a warranty, knowing that it might not be possible to meet that liability is not necessarily fraudulent ... It is not necessarily fraudulent for a company to pay some of its creditors ahead of others, even if it is clear that this will mean that some creditors will not be paid in full ...

The term “parties to the carrying on of the business” includes both the directors and so on who actively carried on the company’s business for a fraudulent purpose and persons such as financiers who encouraged the carrying on of the business for the fraudulent purpose without carrying with the business themselves ... It is essential to show that a person who actively carried on the business did so with fraudulent intent before any other party can be made liable ...

What is required to prove that a defendant was a knowing party was examined by Patten J. in *Re Bank of Credit and Commerce International SA (No 14)* [2003] EWHC 1868 (Ch.) [2004] 2 BCLC 236 at 11 ... His Lordship concluded that :

(a) There must have been knowledge that the business to which the defendant was a party was carried on in the fraudulent manner which has been proved.

(b) *This must have been realized at the time the defendant was a party ; hindsight is not enough.*

(c) *A distinction must be drawn between a conscious appreciation of the true nature of the business being carried on and a failure, however, negligent, to appreciate that fraud was being perpetrated : the liability is for participating in fraud, not for negligently failing to recognize fraud.*

(d) *Knowledge includes so-called blind-eye knowledge, which exists when there is a deliberate decision to avoid obtaining confirmation of well-founded suspicions.*

Fil-gurisprudenza anqas ricenti, il-Qrati Inglizi rrilevaw illi *fraudulent trading could be inferred when it results that at the moment in which the debt was incurred the directors were knowledgeable that there was no reasonable prospect of the creditor being paid.* [**In Re William C Leitch Bros. Limited** (1932) 2 Ch. 71).

In segwitu fil-kaz ta` **In Re Patrick and Lyon Limited** (1933) CJ 786 inghad illi rekwiżit iehor għall-azzjoni ta` kummerċ bi frodi huwa illi l-attur għandu jipprova *“actual dishonesty involving ... real moral blame”*.

Għalhekk inholqot linja ta` demarkazzjoni bejn *“actual dishonesty”* u *“mere blameworthiness”* fejn huwa biss fil-kaz ta` *actual dishonesty* li għandha potenzjal li tissodisfa l-kriterju ta` *“dolo”* li huwa necessarju għal dan it-tip ta` procediment.

Fil-kaz **In Re London & Globe Finance Corporation Ltd** [1903] 1 Ch 728, frodi kien meqjus hekk :-

“To deceive is to apprehend, to induce a man to believe that a thing is true when it is false and which the person practicing the deceit knows to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.”

Fil-kaz ta` **R vs Cox & Hedges** (1982), il-Qorti ta` l-Appell Ingliża sostniet li :

“The reported cases make it clear that in both the civil and the criminal jurisdiction the allegation of an intent to defraud contains the ingredient of dishonesty without which no jury would be entitled to convict a defendant of the offence charged, and no judge in the civil jurisdiction would be entitled to find for a person who fails to prove dishonesty on the part of him by whom he alleges he has been defrauded.”

**V. L-elementi tal-Art 315(1) tal-Kap 386 :
Dottrina u gurisprudenza**

L-elementi kumulattivi (mhux alternattivi) tal-Art 315(1) tal-Kap 386 huma :-

1. fil-kors ta` stralc ;
2. negozju tal-kumpannija ;
3. atti li jkunu kommessi bil-hsieb ta` frodi ;
4. talba mill-istralcjajru jew minn kreditur permezz ta` rikors
5. kontra persuni li kienu fit-tmexxija tan-negozju ; u
6. ir-responsabilita` personali minghajr ebda limitazzjoni ta` responsabbilita` ta` dawn il-persuni ghal kull jew xi dejn tal-kumpannija.

1. Stat ta` stralc

L-applikazzjoni tad-disposizzjoni tiskatta meta kumpannija tkun fi stat ta` stralc.

Fil-kawza “**Victor Borg Barthet vs Carnik Construction Limited et**” li kienet deciza minn din il-Qorti fid-9 ta` Gunju 2011, il-kreditur tal-kumpannija Carnik Construction Limited talab ix-xoljiment u l-istralc taghha (l-ewwel u t-tieni talbiet), u talab l-applikazzjoni tal-Art 315 u 316 tal-Kap 386 fil-konfront tad-diretturi tal-istess soċjeta` (it-tielet u r-raba` talbiet). Il-Qorti kienet cara fis-sens illi setghet tghaddi biex tqis dawk it-talbiet li kienu msejsa fuq l-Art 315 u 316 tal-Kap 386 fil-kaz li tintlaqa` t-talba ghax-xoljiment u l-stralc tal-kumpannija.

Inghad -

“Jekk dawn iz-zewg talbiet jigu milqugha, allura din il-Qorti tkun tista` tqis it-tielet u r-raba` talbiet. Jekk l-ewwel talbiet jigu michuda, ma jkunx hemm lok li tghaddi ghall-konsiderazzjoni tat-tielet u tar-raba` talbiet tar-rikorrent ...

ma tistax tqis it-talbiet tar-rikorrent ghax-xoljiment u ghall-istralc tal-kumpannija intimata skond l-Art.214(2)(a)(ii) tal-Kap.386.

*L-ewwel u t-tieni talbiet tar-rikorrent qeghdin ghalhekk jigu michuda. Konsegwentement ikollhom jigu michuda wkoll it-tielet u r-raba` talbiet tar-rikorrent li - ghax huma bazati fuq l-Art.315 u 316 tal-Kap.386 - sabiex jinghataw konsiderazzjoni, kumpannija **mhux biss trid tkun xjolta, izda trid tkun giet stralcjata.**” (enfazi mizjud)*

Fis-sentenza ta` din il-Qorti (**PA/TM**) tat-12 ta` Ottubru 2007 fil-kawza **“Valle Del Miele Limited vs Wallace Fino et”** inghad illi sabiex jigu applikati l-Art 315 u 316 tal-Kap 386, socjeta` trid tkun fi process ta` stralc :-

“Il-ligi tal-kumpaniji, pero`, ma tipprovdix ghall-kaz ta` responsabbilita` illimitata tal-azjonisti jekk mhux fil-kaz ta` fraudulent jew wrongful trading. Fil-fatt dak li qed tallega s-socjeta` attrici jista` jinkwadra ruhu taht fraudulent jew wrongful trading, u dana peress li qed tallega li d-diretturi tal-kumpanija ghamlu zmien joperaw meta kellhom kumulu ta` debiti li kienu jafu li ma setghux ihallsu.

*Ghalkemm l-agir lamentat jista` jwassal ghal dikjarazzjoni ta` responsabilita` personali tad-diretturi, tali responsabilita` personali tista` tigi dikjarata biss waqt li l-kumpanija tkun fi process ta` stralc, u dana a tenur talartikolu 315 u 316 tal-imsemmi Kap. 386. Il-ligi tal-kumpaniji, li hi ligi specjali li tirregola l-kumpaniji u l-ufficcjali taghha, ma tipprovdix rimedji ohra kontra allegat abbuz tad-diretturi, u meta istitut hu regolat b`ligi specjali, mhux lecitu li ssir riferenza ghal xi principju generali tad-dritt. Hu minnu li, b`mod generali, minn jabbuza bid-drittijiet moghtija lilu jista` jkun passibbli ghal danni, izda meta istitut hu regolat b`ligi specjali, hi biss dik il-ligi li ghandha tigi kkunsidrata ghal-fini ta` responsabilita` tal-partijiet u tar-rimedji moghtija – “specialia generalibus derogant” (ara, fil-kaz tal-istitut tal-bejgh, l-applikazzjoni ta` dan l-istess principju fil-kawza **“Scifo Diamantino vs Meridian Enterprises Co. Ltd”**, deciza minn din il-Qorti fit-13 ta` Frar, 2003). F`dan il-kaz, il-ligi specjali rregolat kif u meta diretturi jistghu jinstabu responsabbli personalment ghad-djun tal-kumpanija taghhom, u hi biss fil-limiti ta` dak provdut f`dik il-ligi specjali li r-rimedji jridu jinstabu.*

Din il-Qorti gia ittrattat dan il-punt fil-kawzi “Theuma vs Cachia”, deciza fl-14 ta` Ottubru, 2004, u “Hi-Timber Co. Ltd vs Baldacchino et”, deciza fil-15 ta` Dicembru, 2005, u gie osservat li, fil-waqt li l-att tal-1995 Dwar il-Kumpaniji (Kap. 386) jaghti rimedju kontra agir abbuziv jew “hazin” tad-diretturi, dan irid jintalab fil-kuntest ta` proceduri ta` stralc kontra l-kumpanija. Fil-kawza deciza l-ahhar din il- Qorti kienet ghamlet dawn l-osservazzjonijiet :

“Fil-fatt l-artikolu 316 jiddisponi illi l-Qorti tista` taghmel dikjarazzjoni ta` responsabilita` personali, minghajr ebda limitazzjoni, “meta kumpanija tkun giet xolta u tkun insolventi u jkun jidher li persuna li kienet direttur tal-kumpanija kienet taf, jew kellha tkun taf qabel ix-xoljiment tal-kumpanija, li ma kienx hemm prospett xieraq li l-kumpanija setghet tevita x-xoljiment minhabba l-insolvenza taghha”. Hekk ukoll hija l-posizzjoni fl-Ingilterra minn fejn ahna adattajna l-ligi l-gdida dwar il-kumpaniji.

Fil-ktieb “Farrar`s Company Law” (Edit. 1998 pag. 739) jinghad li biex direttur jinsab responsabbli ta` “wrongful trading” :

“The conditions are that the company has gone into insolvent liquidation, and it appears that the company continued trading after a point in time before the commencement of the winding up when the director knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation” ;

...

Fin-nuqqas ta` talba ghal istralc, il-Qorti, pero`, ma tistax tipprocedib`dan il-mod mitlub. Dan kollu japplika wkoll ghal dan il-kaz. L-awtrici Brenda Hannigan fil-ktieb taghha “Company Law” (Butterworths Edit. 2003) tesprimi l-istess opinjoni. Hi tibda it-trattat taghha fuq ir-responsabilitajiet tad-diretturi billi tghid (f`pagna 837) li :

“In addition to the formal processes of dealing with the insolvent company, whether through liquidation, administration, etc, the collapse of the company is also the time when the conduct of the directors (and officers) of the company will be reviewed”.

Aktar `l quddiem, l-istess awtrici tindika l-kondizzjonijiet li jridu javveraw ruhhom qabel ma direttur ta` kumpanija jista` jinstab responsabbli ta` “wrongful trading”. L-istess bhal ma jinghad fil-ktieb “Farrar`s Company Law” aktar qabel kwotat, hi wkoll tinnota li l-ewwel kondizzjoni hi li “the company has gone into insolvent liquidation” (pagna 844). Dan hu hekk ghax qabel ma jigi dikjarat li kumpanija hija insolventi, mhux lecitu li wiehed imur

wara l-corporate veil u jitlob sodisfazzjon ghall-kreditu tieghu direttament minghand id-diretturi personalment.”

Fis-sentenza ta` din il-Qorti (**PA/TM**) tal-14 ta` Ottubru 2004 fil-kawza “**Theuma vs Cachia**” jinghad illi :-

“Ghalkemm l-agir lamentat jista` jwassal ghal dikjarazzjoni ta` responsabilita` personali ta` direttur, tali responsabilita` personali tista` tigi dikjarata biss waqt li kumpanija tkun fi process ta` stralc, u dana a tenur tal-artikolu 315 u 316 tal-Att tal-1995 Dwar il-Kumpaniji (Kap. 386).”

Fl-istess sens kien deciz fl-14 ta` Mejju 2010 mill-Qorti tal-Appell fil-kawza “**Dottor Andrew Borg Cardona noe vs Victor Zammit et**” (Rik. Gur. Nru. 27/2003). Inghad :-

...

*ikun hemm kummerc bi frodi jekk **waqt l-istralc ta` kumpanija** jkun jidher li xi negozju tal-kumpanija jkun tmexxa bil-hsieb ta` frodi ta` kredituri tal-kumpanija jew ta` kredituri ta` xi persuna ohra jew bil-ghan ta` frodi, waqt li jkun hemm kummerc hazing meta kumpanija tkun giet xolta u tkun insolventi u jkun jidher li persuna li kienet direttur tal-kumpanija kienet taf, jew kellha tkun taf qabel ix-xoljiment tal-kumpanija, li ma kienx hemm prospett xieraq li l-kumpanija setghat tevita x-xoljiment minhabba l-insolvenza taghha.”* (enfazi mizjud)

Fil-11 ta` Dicembru 2014 din il-Qorti tat decizjoni fil-kawza “**Charles Grech & Company Limited vs Firm Camilleri Bros. (Marketing) Company Limited**” fejn insistiet li l-ezami ta` dak li jahsbu ghalih l-Art 315 u 316 tal-Kap 386 jissussisti meta socjeta` tkun fi stralc. Meta jsir talbiet skont dawk id-disposizzjonijiet meta socjeta` ma tkunx ghadha giet xjolta, dawk it-talbiet ikunu ntempestivi.

Qalet :-

“Din il-Qorti tghid illi t-test tal-ligi huwa car u inekwivoku. It-tieni talba hija fil-fatt intempestiva ghaliex ma tistax tingieb quddiem il-qorti biex tippronunzja ruhha dwarha fi procediment bhal ma huwa dak tal-lum. Infatti huwa biss fil-provediment li sejra taghti llum illi l-Qorti sejra tiddikjara jekk il-kumpanija romoter ghandhiex tigi xjolta u stralcjata inkella le. Mela certament fid-data tal-presentata tar-rikors promotur, ma kienx ghad hemm

pronunzjament dwar xoljiment u stralc. Il-Qorti qeghda ghalhekk tilqa` t-tieni u t-tielet eccezzjonijiet.”

Dan premess, ghandu jinghad li l-istat ta` stralc ta` socjeta` kummercjali kien deskritt tajjeb ferm fis-sentenza li tat il-Qorti tal-Kummerc fis-sentenza taghha tas-7 ta` Lulju 1960 fil-kawza “**Caruana et vs Debono et**” fejn kien rimarkat hekk :-

“L-istralc hu dak il-perijodu transitorju mehtieg appuntu ghad-determinazzjoni tal-attiv b`serje ta` operazzjonijiet intizi biex jillikwidaw l-affarijiet u biex jigu rizzoluti l-vertenzi pendenti. L-istralcjarju hu l-mandatarju maghzul mis-soci, jew mill-Qorti, biex igib ghat-terminu l-operazzjonijiet in korso, jezigi l-krediti u jestingwi l-passivitajiet, u hekk jikkjarixxi l-affarijiet tas-socjeta`, biex jasal ghal rizzultat cert li juri jekk hemmx attiv x`jinqasam jew passiv li ghandu jigi sopportat. Hu ma jistghax jaghti hajja ghal operazzjonijiet godda; ghaliex appuntu l-funzjoni tieghu hi dik li jillikwida l-affarijiet ga mibdijin, u ghaldaqstant ghal hekk biss ghandu jigi limitat l-inkariku tieghu. Ghaldaqstant, fil-likwidazzjoni tas-socjeta` ghandhom jigu komprizi biss l-operazzjonijiet li kienu ga bdew u kienu ghadhom in corso fid-data tax-xoljiment tas-socjeta` u gew terminati wara.”

Fis-sentenza li tat il-Qorti tal-Kummerc fl-10 ta` Mejju 1993 fil-kawza “**Bondin vs Vella noe**” intqal illi :-

“ ... wara r-risoluzzjoni tax-xoljiment l-iskop tas-socjeta` jinbidel u jittrasforma ruhu minn dak ta` prosegwiment ta` attivitajiet normali kummercjali ghal dak ta` realizzazzjoni ta` l-assi u hlas tal-passivita` u distribuzzjoni bejn is-socji ta` dak li jkun baqa` biex is-socjeta` tigi estinta.

Tajjeb ukoll li jigi precizat illi l-funzjoni tal-likwidatur appuntat mis-socji ta` socjeta` dixxjolta` huwa dak li inter alia jikkustodixxi l-patrimonju tas-socjeta` (Vol XVI p.11 p. 69), jinvestiga l-pretizi kollha avvanzati kontra s-socjeta` mill-kredituri taghha, jiddeciedi l-kwistjonijiet ta` gradwazzjoni li jinqalghu, jaghmel pjan ta` distribuzzjoni ta` l-attiv u jahseb gaht-tqassim meta l-imsemmi pjan ikun approvat, ihallas dak li ghandhu jittiehed mis-socjeta` f`daqqa wahda jew b`rati skond kif l-attiv tas-socjet`a jippermetti.”

Fil-kaz tal-lum, minn esami tal-premessi tar-rikors promotur, jirrizulta illi bi provvedimenti tal-15 ta` Settembru 2014, din il-Qorti ordnat ix-xoljiment u l-istralc ta` Derby International Limited u hatret lir-Ricevitur Ufficjali bhala stralcjarju. Il-kawza tal-lum kienet intavolata fil-kors tal-istralc u cioe` fit-23 ta` Novembru 2015.

Jirrizulta wkoll illi l-istralc kien konkluz bi provvedimenti ta` din il-Qorti tal-14 ta` Jannar 2016 bis-sahha ta` liema provvedimento kien ordnat it-thassir tal-isem ta` Derby International Limited mir-Registru tal-Kumpanniji. Il-fatt tat-thassir tal-isem m`ghandu l-ebda relevanza ghall-fini tal-procediment odjern, in partikolari ghar-rigward tat-talbiet kif dedotti, ghaliex il-fatt li l-process ta` stralc ikun intemm fil-kors ta` l-procediment odjern ma jincidi bl-ebda mod fuq dan il-procediment. L-uniku fatt rilevanti huwa li sabiex ikun hemm procediment skont l-Art 315(1) tal-Kap 386 irid ikun hemm stralc kemm jekk dan ikun ordnat mill-qorti kemm jekk ikun stralc volontarju.

2. Negozju tal-kumpannija

Fit-test bl-Ingiliz tal-Art 315(1) dan l-element jittraduci ruhu fil-prova *any business of the company* ikun gie kondott bil-hsieb ta` frodi tal-kredituri.

Tajjeb jinghad illi *“the condition in the provision that “any business of the company as been carried on with intent to defraud creditors” can be satisfied by a single transaction designed to defraud a single creditor.* [**Gerald Cooper Chemicals Ltd** (1978) Ch 262, (1978) 2 All E.R. 49 citata minn Andrew Muscat fil-Pag 258 tal-ktieb tieghu : **“Principles of Maltese Company Law”** (UOMP – 2007)]

Jekk jissodisfa l-grad tax-xjenza tal-frodi, kreditur jista` jagixxi kontra l-amministraturi ta` kumpannija b` mod personali, u ghalhekk jitlaq mill-principju tal-personalita` guridika distinta tas-socjeta`.

Min-naha l-ohra, una volta li jkun stabbilit illi l-intimati agixxew bi frodi, l-Art 315 tal-Kap 386 (bhal fil-kaz tal-Art 213 tal-Insolvency Act 1986 tal-Ingilterra) ma jesigix il-prova ta` *a pattern of behaviour*. Lanqas ma jitlob l-amministrazzjoni frawdolenta ta` kumpannija tkun kondotta b`mod generalizzat jew ripetut matul iz-zmien.

Jekk il-kreditur jipprova l-intenzjoni frawdolenti tal-intimati, ikun bizzejjed li jipprova anke cirkostanza wahda biss fejn in-negozju jkun tmexxa b`mod frawdolenti u jinghata rimedju mill-Qrati sabiex jikseb kumpens direttament minghand l-intimati fir-rigward tal-krediti li originarjament kienu nkorsi mill-kumpannija.

Chadwick L.J. fil-kawza **Morphitis vs Bernasconi** ([2003] EWCA 289) ighid :-

“For my part I would accept that a business may be found to have been carried on with intent to defraud creditors notwithstanding that only one creditor is shown to have been defrauded, and by a single transaction. The Cooper Chemicals case is an example of such case.”

Il-frazi “*business of the company*” ma tinkludix biss in-negozju ta` kuljum li ghalih tkun giet imwaqqfa l-kumpannija jew dak li ghalih tkun maghrufa, izda wkoll dak in-negozju ancillari jew relatat li jwassalha biex tilhaq il-milja tal-operat taghha.

Fi kliem l-awturi : **Arlidge & Parry on Fraud** (Sweet & Maxwell, Third Edition, 2007, p 199) :

“A ‘business’ includes activities necessary or incidental to the carrying on of the business. In Philppou (1989 – 5 BCC, 665) the company was a tour operator. It was an integral part of the company’s business to provide air travel for its customers, and it could not do so without a licence. It was held to be part of the company’s business to apply for the licence. Fraud in the application for the licence could therefore be fraudulent trading.”

L-istess fil-kawza **Re Sarflax** (1979, Ch 592, (1979) 1 All E R 529) Oliver J. spjega illi anke l-gbir, id-distribuzzjoni u t-trasferiment ta` assi ta` kumpannija jammontaw ghal “*business of the company*”.

Ghalhekk it-trasferiment ta` proprjeta`, ix-xiri ta` assi, l-assenjazzjoni ta` krediti, in-nomina u l-ghazla ta` l-impjegati u ta` l-konsulenti li jsiru mill-kumpannija matul l-ezistenza taghha huma wkoll parti min-negozju taghha, anke ghall-fini tal-Art 315(1) tal-Kap 386.

In vista ta` dan kollu, ma tregix il-hames eccezzjoni ta` l-intimati fejn kien except illi d-diretturi ta` Derby International Limited ma komplewx fin-negozju.

3. Atti kommessi bil-hsieb ta` frodi

L-Art 351(1) tal-Kap 386 johloq zewg tipi ta` kummerc bi frodi (a) kummerc bil-hsieb ta` frodi ta` kredituri tal-kumpannija jew ta` kredituri ta` xi persuna ohra ; u (b) bil-ghan ta` frodi generalment.

Fir-rigward ta` l-intenzjoni specifika ta` *dolo*, issir riferenza ghas-sentenza li tat il-Qorti ta` l-Appell fil-31 ta` Marzu 1967 fil-kawza “**Rev. Sac. Don Francesco Zammit et vs Av. Dott. Anthony Farrugia et**” fejn inghad hekk :-

Illi ghal dik li hi definizzjoni ta` dolo ghadha tista` tigi utilment ripetuta anki lllum dik ta` Labcone (fr. 1 :D.4.3) :- « dolum malum esse omnes camditatem fallaciam marbinationem ad circumverendum fallendum decipiendum alterum adhibitam ». Fi kliem iehor, id-dolo jikkonsisti fir-rieda hazina ta` wiehed mill-kontraenti li topera permezz ta` qerq (« raggiri ») biex tiddevja r-rieda tal-iehor billi tipprovaha zball (« errore »).

Infatti, ikkunsiderat min-naha tad- « deceptor », id-dolo hu raggir waqt li, ikkunsiderat min-naha tad- “deceptus”, hu zball. Il-ligi li diga` tikkontempla li zball bhala vizzju tal-kunsens ghar-rasu, thares f`dan il-kaz aktar `il boghod lejn il-kawza tieghu u twassal ghall-annullamenti tal-kuntratt anki meta li zball ma jkunx guridikament sufficjenti biex wahdu jgib ghan-nullita`.

Illi l-gurisprudenza taghna bhal dik ta` legislazzjonijiet simili ghal taghna irrilevat illi mhux kwalunkwe skaltrezza hi dolo u li fl-iskambi ekonomici (ghalkemm anke l-lealta` kommercjali ghandha l-esigenzi taghha) certu ftahir tal-haga offerta da parti tal-bejjiegh mhux illecitu fil-kamp guridiku, apparti naturalment il-kamp purament morali, sakemm ma jilhaqx dak il-grad ta` malvagita` li hu propju tad-dolo ... Mid-diversi distinzjonijiet tad-dolo elaborati fid-dottrina wahda ghandha verament u partikolarment rilevanza in bazi ghal kodici taghna, jigifieri dik bejn id-dolo determinanti u dak li ma jkunx tali. Jekk fir-ragjuni

u l-logika iddistinzjoni hi cara, mhux dejjem tipprezenta ruha facli fl-applikazzjoni taghha.

Id-dottrina u l-gurisprudenza kontemporanei jidhru orjentati lejn apprezzament tad-dolo “in concreto” jigifieri b`referenza ghall”istato d`animo” tal-vittma specifika. Minn naha wahda l-gudikant irid jikkunsidera l-intenzjoni tal-vittma in relazzjoni ghar-ragjunijiet li ddeterminaw il-kunsens u minn naha l-ohra l-grad ta` inesperjenza jew inavvedutezza ta` l-istess vittma. (Marty et Renaut. Droit Civil, 1952, Tome II, 1er. Volume, p. 128).”

Fis-sentenza fil-kawza : **Electronic Products Limited vs Emanuel Micallef et** : l-Ewwel Qorti fis-sentenza li tat fl-4 ta` Marzu 2010 kellha dan xi tghid dwar l-Art 315 tal-Kap 386 :-

“Il-Qorti kkunsidrat illi l-Kap. 386 tal-Ligijiet ta` Malta jipprovdli ghall-kummerc bi frodi da parti ta` diretturi ta` socjeta` fl-Art. 315 “Il-provvediment tal-ligi jimponi zewg kundizzjonijiet ghall-applikazzjoni tal-istess. L-ewwel minn dawn il-kundizzjonijiet hi li s-socjeta` trid tkun fi stadju ta` stralc; sitwazzjoni li fil-kaz li ghandha quddiemha, il-Qorti llum tezisti.

“Imbaghad, sabiex tkun, tista` tasal ghall-konkluzjoni ta` kummerc bi frodi, il-Qorti trid tkun sodisfatta li jezistu provi ta` intenzjoni li jigu frodati kredituri.

“F`dan il-kuntest, il-Professur Andrew Muscat fil-ktieb “Principles of Maltese Company Law” jghid:

““Another – and certainly more crucial – condition is that the applicant will have to discharge the burden of proving that the “business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose”.

“Professur Andrew Muscat ikompli:

“The test will however be satisfied where directors allow a company to incur credit when they have no reason to think that the creditors will ever be paid. It can also be satisfied where the directors obtain credit at a time when they have no good reason to believe that funds will become available to pay the creditors when their debts become due or shortly thereafter”.

“Skond Charlesworth`s Company Law (Stevens 13th Edit. 1987) jinghad illi:

“In general it may be properly inferred that there is an intent to defraud creditors if a company carries on business and incurs debts when, to the knowledge of the directors, there is no reasonable prospect of the company being able to pay them. It is not necessary to show that there is no prospect of the creditors ever being paid. It is enough that there is no reason for thinking that they will be paid as the debts fall due or shortly thereafter”.

Fis-sentenza li tat il-Qorti tal-Appell fil-25 ta` Ottubru 2013 komplet ma` dak li kien inghad mill-Ewwel Qorti billi qalet hekk :-

“Trattat il-meritu, din il-Qorti tirrileva illi l-kuncett ta` kummerc bi frodi jinsab deskritt fl-Artikolu 315 tal-Kap. 386 tal-Ligijiet ta` Malta, cioe`, l-Att dwar il-Kumpaniji, waqt li l-kuncett ta` kummerc hazin huwa deskritt fl- Artikolu 316 tal-istess Kap. 386. Skont dawn l-artikoli, ikun hemm kummerc bi frodi meta jkun jirrizulta li xi negozju tal-kumpanijajkun tmexxa bil-hsieb ta` frodi ta` kredituri tal-kumpanijajew ta` kredituri ta` xi persuna ohra jew bil-ghan ta` frodi, filwaqt li jkun hemm kummerc hazin meta persuna li kienet direttur ta` kumpanijatkun agixxiet filwaqt li tkun taf, jew kellha tkun taf qabel ix-xoljiment tal-kumpanija, li ma kienx hemm prospett xieraq li l-kumpanijasetghet tevita x-xoljiment minhabba l-insolvenza taghha. Dawn l-artikoli tal-ligi Maltija gew mehuda kelma b`kelma mil-ligi Ingliza li tirregola xxoljiment tal-kumpaniji (The Insolvency Act, 1986), u l-artikoli ekwivalenti fil-ligi Ingliza

huma l-Artikolu 213 ('fraudulent trading'), u l-Artikolu 214 ('wrongful trading').

Iz-zewg kuncetti ta` kummerc bi frodi u kummerc hazin jixxiebh, bid-differenza tkun li f`kaz ta` kummerc bi frodi irid jirrizulta li kien hemm il-hsieb li jigu pprejudikati l-kredituri tal-kumpanija. F`kaz li jirrizulta kummerc bi frodi jew hazin, il-ligi tikkontempla it-tnehhija tar-responsabilita` limitata tad-diretturi, bir-responsabilita` personali taghhom tkun kompluta u ampia f`kaz li jirrizulta kummerc bi frodi.

Qabel l-introduzzjoni ta` dawn il-provedimenti, diretturi setghu dejjem jinstabu responsabbli ta` agir bi frodi, ghax il-principju ta` fraus omnia corrumpit ma kienx jippermetti li xi hadd jiehu vantagg mill-agir frawdolenti tieghu. L-awtur L.S.Sealy fil-ktieb "Cases and Materials in Company Law" (Butterworths, 7th Edit. 2004), jghid, f`pagna 616, li l-kuncett ta` `fraudulent trading` kif kien jigi enuncjat mill- Qrati inglizi jista` jigi adottat ghall-fini ta` interpretazzjoni tal-legislazzjoni l-gdida, "but the introduction of the concept of `wrongful trading`, which can lead to the same consequences with a much lighter burden of proof, will surely mean that s 213 will be very rarely invoked in the future".

Fil-kaz taghna, is-socjeta` attrici qed tinvoka l-kuncett ta` kummerc bi frodi.

Analizi taz-zewg kuncetti juru li, anke konsegwenza tal-izvilupp li sar fl-Ingilterra, id-differenza ta` bejnietom mhux dejjem kienet daqshekk netta. Kummerc bi frodi jehtieg, skont Sealy (ibid pagna 615) "actual dishonesty". L`istess jinghad fil-ktieb Farrar`s Company Law (Butterworths, 4th Edit. 2002) fejn jinghad, f`pagna 737, li "in cases of fraudulent trading, liability arises in respect of persons knowingly a party to the carrying on of any business of the company with intent to defraud creditors of the company, or creditors of any other person, or for any fraudulent purpose. It should be noted therefore that the section is wider than simply

defrauding creditors....The conduct must involve actual dishonesty, involving, according to current notions of fair trading among commercial man, real moral blame".

Din l-intenzjoni, pero`, tista` u ghandha tirrizulta mill-agir innifsu, u certu agir gie meqjus bhala kummerc bi frodi peress li, fih innifsu, juri hsieb li jigu frodati l-kredituri. Fil-fatt, fil-ktieb indikat, Farrar`s Company Law, jinghad li "this requirement can also be satisfied where the directors have no good reason to think funds will become available to pay the creditors when their debts become due or shortly thereafter". Dan il-principju huwa importanti ghall-fini ta` din il-kawza, ghax jekk jirrizulta li d-diretturi tal-kumpanija, fil-waqt li agixxew kif inhu allegat, kienu jafu li ma kienx hemm possibilita` li jsir il-hlas fiz-zmien miftiehem, allura dan l-agir jitqies bhala kummerc bi frodi.

L-istess veduta hija espressa fil-ktieb "Charlesworth`s Company Law" (Stevens, 13th Edit. 1987). Hu jaghti tifsira cara ta` kummerc bi frodi u, f`pagna 736, jghid :

"In general it may be properly inferred that there is an intent to defraud creditors if a company carries on business and incurs debts when, to the knowledge of the directors, there is no reasonable prospect of the company being able to pay them. It is not necessary to show that there is no prospect of the creditors ever being paid. It is enough that there is no reason for thinking that they will be paid as the debts fall due or shortly thereafter".

L-awturi Mayson, French & Ryan fil-ktieb "Company Law" (Oxford, 22nd Edit. 2006), jikkonfermaw li "a person`s intent usually has to be inferred from what the person did", u li, allura, "it is almost inevitable that finding a defendant knowingly participated in dishonest activity implies that the defendant was dishonest". (pagna 773).

Bhala ezempju ta` kummerc bi frodi, dawn l-awturi isemmu sitwazzjoni fejn d-diretturi ikunu

responsabbli ta` "inducing people to give credit to a company knowing that they will not be paid when they expect to be paid" (pagna 774).

Li d-disonesta` tista` u ghandha tigi desunta minn agir partikolari hu affermat ukoll minn ktieb ricenti ippubblikat mill-Professor Andrew Keay "Company Directors` Responsibilities to Creditors" (Cavendish, 2007), fejn, pagna 63 jghid hekk in konkluzzjoni tat-trattat tieghu fuq `fraudulent trading`:

"Whether, and if so when, Courts can infer intent to defraud with respect to to a respondent is not without some doubt, but it is submitted that Courts can do so either where respondents incur debts at a time when they know that there company will clearly not be able to make repayment, or where there is considerable risk in not being able to repay the creditor(s) when the debts are due or shortly thereafter".

...

F`artikolu fil-Modern Law Review, (Vol. 66 Settembru 2003, nru.5), bl-isem ta` "Directors` Duties to Creditors: Contractarian Concerns Relating to Efficiency and Over-Protection of Creditors", il-gia` msemmi Professor Andrew Keay janalizza l-bzonn tad-diretturi li jipprotegu l-interessi tal-kredituri, u jiddefendi kull akkuza li saret kontra min jilmenta fuq dan id-dover tad-diretturi.

Fil-konkluzzjoni tieghu, hu jghid dan fuq il-htiega tad-dover :

"The article has accepted that efficiency is an important value to be considered in evaluating any law, but it has suggested that fairness is a value that also needs to be taken into account and that that value dictates that directors should consider creditor interests when their companies are in financial difficulty. This is based on the following: many creditors are in vulnerable positions when negotiating ex ante and are really unable to protect

their interests; and creditors have legitimate expectations that their interests will be taken into account when the company is, or is potentially, in financial distress, as they have the residual claim over the company, and the company is trading with their money. An ex post adjustment, such as examining whether the directors acted in creditor interests at a time when the company was in financial difficulty, is fairer in that it eliminates the risks endemic in ex ante action, and it is based upon what actually occurred, not what everyone guesses might occur.”

Decizjoni ohra li dahlet fil-fond tal-materja kienet dik moghtija mill-Qorti tal-Appell fl-14 ta` Mejju 2010 fil-kawza : **Dr Andrew Borg Cardona noe vs Victor Zammit et** : fejn inghad hekk :-

Skond dawn l-artikoli ghalhekk ikun hemm kummerc bi frodi jekk waqt l-istralc ta` kumpannijakun jidher li xi negozju tal-kumpannijakun tmexxa bil-hsieb ta` frodi ta` kredituri tal-kumpannijajew ta` kredituri ta` xi persuna ohra jew bil-ghan ta` frodi, waqt li jkun hemm kummerc hazin meta kumpannijatkun giet xolta u tkun insolventi u jkun jidher li persuna li kienet direttur tal-kumpannijakienet taf, jew kellha tkun taf qabel ix-xoljiment tal-kumpanija, li ma kienx hemm prospett xieraq li l-kumpannijasetghat tevita x-xoljiment minhabba l-insolvenza taghha.

Dawn l-artikoli tal-Ligi Maltija gew mehuda mil-Ligi Ingliza. Ghalhekk il-kazijiet u awturi Inglizi huma ghajn importanti ta` interpretazzjonii ta` dawn iz-zewg artikoli.

Fir-rigward ta` fraudulent trading, qabel il-kaz ta` Grantham, is-sentenzi kienu jghidu li “a proper inference of intent to defraud could be made if a company continues to carry on business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment (Re William C. Leitch Brothers Ltd (1932).”

F`kaz sussegwenti (Re Patrick & Lyon, Limited (1933) gie deciz li l-intenzjoni to defraud u fraudulent purpose jikkompreni "actual dishonesty involving, according to the current notions of fair trading among commercial men, real moral blame".

Wara dawn il-kazijiet, fil-kaz ta` R. v. Grantham (1984) gew stabbiliti s-segwenti principji li:-

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

"(1) If that person realized at the time the debts were incurred that there was no good reason for thinking that funds would be available to pay the debt in question when it became due or shortly thereafter; and

"(2) There was actually dishonesty involving, according to current notions of fair trading among commercial men, real moral blame."

F`dak il-kaz il-Qorti Ingliza ghamlitha aktar facili biex wiehed jipprova l-intenzjoni frawdolenti billi "a proper inference of fraud could be made if there was no good reason to believe that payment would be made as aforesaid" u li "Dishonesty could be inferred from a reckless disregard of the interests of creditors."

F`dan ir-rigward, wiehed irid izomm quddiem ghajnejh li, kif tghid l-awtrici Hanningan ("Company Law" (Butterworths, 2003) fol. 843) "proving that the company continued to trade while insolvent is not enough. The person bringing the action must prove that the respondent has carried on business with intent to defraud creditors or for any fraudulent purpose," u inoltre "For a person to be held knowingly party to carrying on a company's business with intent to defraud creditors requires findings and inferences as to the facts known to that person at the relevant times. At those times the business might either have succeeded or failed."

Ghalhekk f'cirkostanzi simili l-ezami li trid taghmel il-Qorti huwa essenzjalment wiehed soggettiv izda fl-istess hin suggett ukoll ghal kunsiderazzjonijiet oggettivi u dan ghaliex ebda persuna m'hi ser tigi tghidlek bl-intenzjoni frawdolenti taghha, anzi taghmel kemm tista` biex izzomm kollox mistur. Huwa biss b`ezami akkurat ta` dawn iz-zewg elementi, fid-dawl tal-ligi, li l-Qorti tista` tasal ghal valutazzjoni u konkluzjoni korretta.

Il-ligi taghna, fl-Artikolu 315 tghid li jkun hemm kummerc bi frodi jekk waqt l-istralc ta` kumpannijajkun jidher li xi negozju tal-kumpannijajkun tmexxa bil-hsieb ta` frodi ta` kredituri tal-kumpannijajew ta` kredituri ta` xi persuna ohra jew bil-ghan ta` frodi, imma ma taghtix definizzjoni ta` xi tfisser il-kelma `frodi`. Fis-sentenza G. Dalli v. M. Attard deciza fis-26 ta` Gunju 1961 minn din il-Qorti, saret referenza ghal Laurent (Vol XV para 253) fejn jinghad li "La frode assume come Proteo, mille ed una forma. E` una questione di fatto." (The term `fraud` has different meanings depending in which context it is used. (Farrar J. Fraudulent Trading 1980 pag 336 at 339).

Ghalhekk il-Qorti trid tiddeciedi minn kaz ghall-iehor jekk imgieba partikolari, attiva jew passiva tad-diretturi, fic-cirkostanzi tal-kaz li jkun, kienitx frawdolenti. Il-Qorti trid tezamina mhux biss jekk kienx hemm hsieb frawdolenti, imma wkoll jekk ittiehdux mizuri attwalment dizonesti biex tkun tista` tasal ghall-konkluzjoni li kien qed jigi ezercitat kummerc frawdolenti."

Il-Qorti terga` taghmel riferenza ghal **Arlidge & Parry On Fraud** (op. cit.) fejn inghad :-

"Although it is not easy to describe comprehensively all the different tyoes of activity that will constitute the carrying on of business with intent to defraud creditors, three categories emerge from the authorities :

- *Putting the trader`s existing creditors at risk of not being paid;*
- *Causing people who are not his existing creditors to become his creditors at a time when he is, or is likely to become, insolvent;*
- *Doing things which give rise to causes of action sounding in damages against him in favour of people who are not his existing creditors*

...

A director is guilty of fraudulent trading if he deliberately trades in such a way as to dissipate the company`s assets for inadequate consideration, so that the company`s creditors cannot be paid

...

it is also clear that a person can be defrauded by being misled into taking a financial risk which he would not otherwise have taken and it is difficult to see how, in practice, inducing a commercial creditor to do x rather than y might not involve risks that which are inherent in x but not y

...

This tendency to equate fraudulent trading with insolvent trading has been extended so as to include creditors who have not even been deceived into becoming creditors.

The intent to defraud is to be judged by its effect on the person who is the object of the conduct in question

...

and there appears to me to be two types of such object-persons. There are those who choose to make the company their debtor, as ordinary trade suppliers, and those in whose favour liability from

the company arises by the choice of the company, not their own, e.g. the Inland Revenue as to PAYE and national insurance contributions and the Customs and Excise as to the value added tax. As to trade creditors,

...

(t)here is intent to defraud within the meaning of the section if the person responsible was intending to deceive or actually deceiving a supplier that he would be paid at the stipulated time or shortly thereafter when the person so intending or deceiving knew perfectly well that there was no hope of that coming about.

As to non-choice, creditors, there is no question of deceit. The intent to defraud in my view lies in continuing to incur the liability for tax or national insurance contributions or value added tax when there is no honest belief that those liabilities will be discharged when they become due or shortly thereafter. ”

Ezempju ta` agir frawdolenti kien dak trattat fil-kawza **Re Gerald Cooper Chemicals Limited (in Liquidation)** [1978] 1 Ch 262, fejn Templeman J. fisser :-

"In my judgment, a creditor is party to the carrying on of a business with intent to defraud creditors if he accepts money which he knows full well has in fact been procured by carrying on the business with intent to defraud creditors for the very purpose of making the payment. Mr. Evans-Loam(?) said truly that section 332 creates a criminal offence and should be strictly construed, but a man who warms himself with the fire of fraud cannot complain if he is singed."

Il-Qorti taghmel ukoll riferenza ghal artikolu li deher fil-**Butterworths Journal of International Banking and Financial Law** ta` Lulju-Awissu 2013 bl-isem : **Fraudulent Trading Update** : fejn l-awtur **Cameron Scott** ighid :-

However, things become less clear at the other end of the scale, when a company gets into financial difficulties. At what point does trying to keep the company going become fraudulent trading ?

First, there must be dishonesty involved. Dishonesty is an essential ingredient of the offence (R v Cox (1982) 75 Cr App R 291). So making bad, even disastrous, business decisions will not be enough, of itself, to constitute fraudulent trading. Absent fraudulent intent or recklessness, directors who, in good faith, try but fail to trade out of a difficult financial position, will not be guilty of fraudulent trading. However, the carrying on of a company's business and incurring debts at a time when the directors know that there is no reasonable prospect of the creditors being paid when the debt becomes due or shortly thereafter has been held to be fraudulent (R v Grantham [1984] 3 All ER 1669).

Carrying on the business does not necessarily mean continuing to trade. The collection of assets for the purpose of paying existing creditors falls within the definition. However, paying some creditors in preference to others is not, of itself, fraudulent (Re Sarflax Ltd [1979] Ch 592). Nor is keeping an existing creditor at bay with promises of future payment, even if those promises are misleading and cannot be honoured (Morphitis v Bernasconi [2003] Ch 552).

However, accepting payment or deposits for goods in circumstances where the directors know the goods cannot be supplied and the payments cannot be returned because the company is insolvent will constitute fraudulent trading, even if this involves only one customer (in re Gerald Cooper Chemicals [1978] Ch 262).

Secondly, the person must be "knowingly" a party to the carrying on of the business in a fraudulent manner. Knowledge includes "blind eye" knowledge (Bank of India v Morris).

Thirdly, he must also be shown to have played an active part in the carrying on of the business and exercising a controlling or management function. Mere knowledge of and concurrence in what was going on is not, of itself, enough (R v Grantham; Archbold Criminal Pleading Evidence and Practice 2013 edition 30.119). Thus, directors who were not actively involved in the management of that part of the company's business, were not liable for fraudulent trading even though they had concerns about certain transactions which the bank was entering into and expressed these concerns to the manager who was responsible and who gave misleading responses to the directors (Bank of India v Morris). Nor was a company secretary who was aware of the company's financial position but failed to advise the directors to cease trading (Re Maidstone Building Provisions Ltd [1971] 1 WLR 1085).

4. Talba mill-istralcjajru jew minn kreditur permezz ta` rikors

Dan id-dritt ta` azzjoni huwa disponibbli biss ghall-istralcarju **jew** ghall-kreditur.

Fil-kaz tal-lum jirrizulta li r-rikorrenti mexxiet bl-azzjoni bhala kreditur ta` Derby International Limited.

Jirrizulta li b`sentenza tas-6 ta` Ottubru 2006 fil-kawza 1809/2000/1 fl-ismijiet **Galleria Management Limited vs Derby International Limited**, Derby International Limited kienet ikkundannata thallas lis-socjeta` rikorrenti s-somma ta` Lm 4,000 ekwivalenti ghal EUR 9,317.49c rapprezentanti sorte flimkien ma` l-imghax legali b` sehh mit-22 ta` Gunju 2000 flimkien ma` l-ispejjez tal-kawza (ara fol 112 sa fol 123).

Inghatat ukoll sentenza ohra fit-3 ta` April 2009 fil-kawza 1370/2001/1 fl-ismijiet **Galleria Management Limited vs Derby International Limited**, fejn il-Qorti ta` l-Appell ordnat lil Derby International Limited sabiex thallas lis-socjeta` rikorrenti s-somma ta` LM 29,315.81 ekwivalenti

ghal EUR 68,287, rapprezentanti sorte, flimkien ma` l-imghax legali b` sehh mill-1 ta` Mejju 2001 u l-ispejjez tal-kawza.

B`dawn il-fatti m`ghandux ikun hemm l-icken dubju li r-rikorreni kienet kreditur ta` Derby.

Il-Qorti tinnota li fid-disa` eccezzjoni, l-intimati jeccepixxu li fiz-zmien meta sehh l-att li dwaru tittratta l-kawza tal-lum, ma kien ghad hemm l-ebda decizjoni li tikkonferma li s-socjeta` rikorreni hija kreditrici tas-socjeta` rikorreni.

Il-Qorti tghid illi l-eccezzjoni hija nfondata.

In sostenn tac-cahda l-Qorti terga` tirreferi ghal **Andrew Muscat** : **Principles of Maltese Company Law** : Pag 257 : fejn ighid hekk :-

“the wording of the provision appears wide enough to include fraud committed against potential creditors (Vide L.S. Sealy & D Milman, Annotated Guide to the Insolvency Legislation (5th ed. 1999 at pg 244). In Re Seillon (1982 Crim L.R. 676), the creditor was a bank which had brought an action against the defendant some nine years previously but had not pursued it. The jury was directed to interpret the term “creditor” so as to include “persons who the defendant feared would pursue him with legal claims in Court.” The Court of Appeal upheld his conviction even though the judges were willing to accept that the bank was not a creditor for the purposes of the bankruptcy legislation. They noted that the term “admitted of some flexibility”.

5. Il-persuni li jkunu fit-tmexxija tan-negozju

L-Art 315(1) tal-Kap 386 jitkellem dwar “*persuni li xjentement kienu partijiet fit-tmexxija tan-negozju*”.

Fil-kwistjoni tal-lum, qamu zewg punti *per via di eccezione* dwar jekk is-socjeta` intimata u Angele Calleja (li kienet direttur) jistghux jitqiesu bhala legittimi kontraditturi fl-azzjoni in ezami.

a) **L-azzjoni kontra AM Holdings Limited**

Kien excepti illi A.M. Holdings Limited ma tista` qatt tirrispondi ghal kummerc bi frodi skont l-Art 315(1) peress li din ma setghet qatt tkun xjentement parti fit-tmexxija tan-negozju.

Propju dan il-punt kien trattat fis-sentenza li tat din il-Qorti kif presjeduta fil-31 ta` Jannar 2017 fil-kawza: **Bowood Construction Limited vs Greta Bugeja et**".

Il-Qorti **tirriafferma** kull ma inghad fid-decizjoni appena citata billi tghid illi azzjoni ta` din ix-xorta tista` ssir *anke* korpi morali.

Il-Qorti terga` tirreferi ghal **Andrew Muscat** din id-darba b`riferenza ghall-ktieb tieghu : **The Liability of the Holding Company for the Debts of its Insolvent Subsidiaries** (1996 - Dartmouth Publishing Company – Pag 208 et seq) fejn inghad hekk :-

"Fraudulent Trading

Could a holding company qualify as a person who is knowingly a party to the carrying on of the business ?

This question should be answered in the affirmative. In the subservient subsidiary situation, the holding company (definitely "a person" in terms of the provisions would almost certainly – through its excised of dominating control over the activities of the subsidiary – be knowingly a party "to the carrying on of the business" of the subsidiary. Control is not merely latent. It is quite positively asserted. In the typical subservient subsidiary situation, the holding company would not be able to deny that it was "knowingly" a party to the carrying on of its subsidiary's business."

It-tieni eccezzjoni hija respinta.

b) L-azzjoni kontra ex direttur

L-Art 315(1) jittkellem dwar “*persuni li xjentement kienu partijiet fit-tmexxija tan-negozju*”.

Ghalhekk l-azzjoni tista` ssir kontra persuni li kienu fit-tmexxija tan-negozju ta` Derby International Limited.

Madanakollu **Andrew Muscat** din id-darba fil-**Principles of Maltese Company Law** (op. cit.) pag 257 ighid illi :

“The provision (b`referenza ghal Art 315) can be invoked against any person involved in the fraud. Liability may therefore be imposed on directors, managers, shareholders and on any other person as long as they are knowingly parties to the fraud.”

Skont **Andrew Muscat**, l-azzjoni tista` tigi tentata kontra **kull** persuna sakemm din kienet partecipi fil-frodi perpetwat.

Fil-ktieb : **Corporate Finance and Management Issues in Company law Section C : Corporate Management I**” (Revised Edition – 2008 - Pag 23), l-awturi **A.J Dignam u J. P Lowry** ighidu :-

“the term parties to the carrying on of the business containing in s 213 (of the 1986 Act) is expansive in effect so that any person who takes a positive step in the fraudulent trading can be liable. Contrast s. 214 ...the scope of which is limited to directors and shadow directors.”

Fil-kaz ta` **Re Augustus Barnett & Son Limited** (1986) BCLC 170, Hoffman J. spjega li :

“The words “personsparties to” may be wide enough to cover outsiders who could not be said to have carried on or even assisted the carrying on of the company`s business, but who nevertheless in some way participated in the fraudulent acts.”

Fil-kaz ta' **Morris vs Bank of India** (2004, EWHC 528(Ch) ; 2004, 2 BCLC 279), Neuberger J. ighid illi hija persuna li torganizza u li tippjana li taqa' fl-ambitu ta' l-Art 213(2) tal-Insolvency Act 1986 :

“In my judgement, just as an employee of the company who was merely carrying out orders does not fall within section 213(2) whereas somebody who orchestrates, organizes or can seize of the business concerned does not fall within the section, so a company or other entity which carries on (so far as it is concerned) a bona fide business with the company, does not fall within section 213(2) but a company which is involved in, and assists and benefits from, the offending business, or the business carried on in an offending way, and does so knowingly and therefore, dishonesty does fall or at least can fall within section 213(2).”

Accertat il-fatt illi persuna li teknikament tkun esterna għall-kumpannija izda jkollha ingagg mal-kumpannija u tkun involuta direttament fit-tmexxija tal-kumpannija taqa' taht il-kappa tal-Art 315(1), il-Qorti ma tarax li għandu jkun hemm xi dubju li l-azzjoni tista' tissussisti anke kontra persuna li kienet direttur tal-kumpannija jekk jigi ppruvat illi kienet direttur fiz-zmien meta kien perpetrat l-agir frawdolenti.

Anke it-tielet eccezzjoni hija michuda.

6. Responsabilita' personali bla limitu

Jekk l-azzjoni tirnexxi, l-intimati jew min minnhom ikunu responsabbli personalment, minghajr l-ebda limitazzjoni ta' kwalsiasi natura għal kull jew għal xi dejn tal-kumpannija.

Andrew Muscat fil-**Principles of Maltese Company Law** (op. cit.) jittellem dwar *“a wrongdoer’s liability under the provision is a direct liability to the company’s creditors.”*

Ikompli jghid :-

“the wrongdoer effectively becomes personally and directly bound towards such creditors...By contrast, when an order is made under the fraudulent trading provision in English law, the wrongdoer will be ordered “to make contributions (if any) to the company’s assets as the court thinks proper. In its practical application, the provision in Maltese law would probably favour the creditors who have been the victims of the wrongdoing rather than the other creditors of the company – as a court is more likely to direct the wrongdoers to be personally liable vis a vis the victims

...

In English law, the whole body of creditors, rather than the defrauded creditors alone, stands to gain by an order under the fraudulent trading provision.”

Skont il-ligi fl-Ingilterra, minn kawza li tkun deciza favorevolment abbazi ta` disposizzjoni analoga li tirrizulta fl-Insolvency Act 1986, jibbenefikaw il-kredituri kollha li jircievu l-ammont likwidat, u li mbaghad jitqassam skont ir-regoli applikabbli fil-kaz ta` konkors ta` kredituri.

L-Art 315(1) tal-Kap 386 jippermetti lill-qorti sabiex tordna rimedju partikolari direttament a favur ta` dak il-kreditur jew dawk il-kredituri li jirrizulta li jkunu gew defrawdati. Il-qorti mhijiex marbuta tordna kontribuzzjoni lejn il-gabra ta` l-assi tal-kumpanija sabiex jinqasmu bejn il-kredituri. Lanqas ma hemm distinzjoni fil-ligi taghna bejn kredituri privileggjati u dawk ordinarji. Ghalhekk kreditur ordinarju li jaghmel il-prova li kien defrawdatt ghandu rimedju **dirett** u jista` jigi rizarcit **direttament** mill-intimati li jirrizulta li jkunu ghamlu kummerc bi frodi.

Issir referenza ghat-tlettax-il eccezzjoni ta` l-intimati fejn kien eccepit illi skont l-Art 315 tal-Kap 386, il-qorti ma tistax tikkundanna lill-intimati jhallsu kull dejn, ghaliex l-interess guridiku tas-socjeta` rikorrenti huwa limitat ghal dak li jispetta lilha u mhux ukoll terzi li mhux parti fl-azzjoni.

Din il-Qorti ma taqbilx ma` din l-eccezzjoni.

Ghalkemm mhijiex marbuta li taghti rimedju li jmur favur il-massa shiha tal-kredituri, il-qorti mhux necessarjament li ghandha tordna biss rimedju li jolqot dawk il-kredituri li jkunu ntavolaw l-azzjoni skont l-Art 315(1). Il-qorti ghandha s-setgha li tordna li l-intimati jew min minnhom ghandhom ikunu responsabbli personalment, minghajr ebda limitazzjoni ta' responsabbilita' ghal kull jew ghal xi dejn jew responsabbilitajiet ohra tal-kumpannija.

Terga` ssir referenza ghal **Principles of Maltese Company Law** (op. cit.) fejn fil-kapitolu li jittratta l-azzjoni skont l-Art 315, **Andrew Muscat** ighid :-

“The provision imposes liability on the wrongdoer for “all or any of the debts or other liabilities of the company as the court may direct”. Clearly therefore, the wrongdoer may be held liable not only for contractual obligations undertaken by the company, but also for any other form of obligation, including liability in tort and statutory claims against the company

... Neither is liability necessarily restricted to debts and liabilities of the company incurred during the period of time when the wrongdoer committed the fraud – the wrongdoer could be saddled with liability even in respect of debts and liabilities incurred before or after the fraud

... Liability under the fraudulent trading provision can be unlimited. In other words, the court is not bound to cap the quantum of liability, by for example limiting it to the amount actually involved in the fraud. The court may however impose whatever limit it deems appropriate in the circumstances.”

L-eccezzjoni tlettax (13) qeghda tkun respinta.

VI. Risultanzi

Skont is-socjeta` rikorrenti, il-kummerc bi frodi kien perpetrat bir-risoluzzjoni tas-6 ta` Jannar 2000 li hadet Derby kif ukoll bil-mod kif kienu approvati l-financial statements taghha senjatament bhala *going concern*.

1. Ir-risoluzzjoni tas-6 ta` Jannar 2000

Bis-sahha ta` din ir-risoluzzjoni, A.M. Holdings Limited thallset ghas-saldu tal-flus li kienet harget b`self favur Derby billi din tal-ahhar assenjat lis-socjeta` intimata l-operazzjoni tan-negozju u l-*stock* kollu li kien hemm fil-fond 66, Tower Road, Sliema.

Ir-risoluzzjoni (fol 150) li hija ffirmata mill-intimati konjugi Calleja bhala diretturi ta` Derby taqra hekk :-

“At a meeting of the Board of Directors of Derby International Limited held at 66, Tower Road, Sliema on 6th January 2000

It was resolved that in view of the outstanding shareholders loan due to A.M. Holdings Ltd amounting to Lm 54,882.00 and in view of the fact that repayments of these loans is not being effected, it was decided to sell off the Sliema operation to A.M. Holdings Limited including stock and all Company`s fixtures & fittings.”

Is-socjeta` rikorrenti sostniet il-posizzjoni taghha li kien hemm kummerc bi frodi billi tat dawn ir-ragunijiet :-

a) Tghid illi r-risoluzzjoni tirregistra biss it-transazzjoni li biha Derby International Limited allegatament ittrasferiet l-*stock* in mertu favur is-socjeta` intimata. A.M. Holdings Limited ma kinitx parti fir-risoluzzjoni, u ghalhekk din ir-risoluzzjoni mhijiex ghajr dokument ta` kumpannija.

b) Tinsisti li r-risoluzzjoni de qua hija monka ghaliex it-trasferiment fit-titolu ta` oggetti ta` Derby huwa mansjoni riservata ghal-laqgha generali tal-azzjonisti ta` Derby u mhux tal-Bord ta` Diretturi direttament jew tal-inqas ezercitabbli mill-Bord tad-Diretturi wara s-sanzjoni tal-laqgha general ital-azzjonisti.

c) Tirrileva illi l-intimata Angele Calleja marret kontra dak li jipprovdi l-Art 136 tal-Kap 386 ghaliex bit-transazzjoni li Angele Calleja stess kienet qeghda tippromwovibhala direttur ta` Derby International Limited,

kienet ser tibbenifika hija stess u s-socjeta` intimata ghad-detriment tas-socjeta` rikorrenti.

Sabiex tirnexxi l-azzjoni promossa mis-socjeta` rikorrenti, trid issir il-prova ghas-sodisfazzjon tal-qorti illi l-imgieba attiva jew passiva tal-intimati kienet frawdolenti.

Mhuwiex il-kompitu ta` din il-Qorti li tezamina l-validita` ommeno tar-risoluzzjoni tas-6 ta` Jannar 2000. Ezami ta` din ix-xorta jrid isir f` azzjoni ad hoc (mhux din tal-lum) fejn tigi attakkata l-validita` tar-risoluzzjoni. Dak li huwa rilevanti ghall-fini tal-azzjoni tal-lum huwa li jkun determinat jekk fil-komporatament taghhom, l-intimati (jew min minnhom) imxewx bi frodi.

Is-socjeta` rikorrenti ghamlet enfasi fuq il-fatt illi Derby International Limited u AM Holdings Limited, ghalkemm huma kumpanniji separati u distinti minn xulxin, huma kontrollati mill-istess persuni. L-intimat Claude Calleja kien direttur uniku, segretarju u r-rapprezentant legali ta` Derby International Limited sakemm kienet xjolta bi provvedimenti ta` din il-qorti (ara Dok KP1). L-intimata Angele Calleja hija direttur ma` zewgha ta` A.M. Holdings Limited ; hija wkoll l-unika azzjonista tas-socjeta` intimata, apparti li hija wkoll is-segretarju u r-rapprezentant legali ma` zewgha tal-istess kumpannija (ara Dok KP2). Is-socjeta` intimata kienet wkoll l-azzjonista ta` maggoranza ta` Derby (ara Dok KP3).

Dan premiss, il-fatt li kien hemm dan l-assetta socjetarju, u l-fatt li saret ir-risoluzzjoni ma jfissirx illi dak li sar bejn iz-zewg socjetajiet kien intiz sabiex jiddefrawda lill-kredituri.

Is-socjeta` rikorrenti taghmel l-argument illi l-oggetti li kienu l-mertu tal-mandati ta` qbid kawtelatorjij 3154/00 u 2204/01 kienu l-unici assi li kellha Derby International Limited sabiex taghmel tajjeb ghad-dejn li kellha mal-kredituri.

L-intimati jikkontestaw illi hekk kienu realment il-fatti ghaliex jikkontendu illi Derby International Limited kellha aktar assi konsistenti fl-*stock* kollu li kien hemm fil-hanut li kien jinsab fil-Galleria Complex kif ukoll il-benefikati li kien hemm fil-hanut tal-Figura.

Is-socjeta` rikorrenti tikkontendi illi mhuwiex li s-socjeta` intimata avvanzat flus lil Derby International Limited u tallega illi li dan kien “self” simulat. Kompla jinghad mir-rikorrenti illi r-rizoluzzjoni de qua kellha bhala bazi taghha *causa illicita*. Tikkontesta li kien hemm *shareholders` loans* x`jithallsu lura ghaliex fin-notamenti tal-*financial statements* tas-sena li ghalqet fil-31 ta` Dicembru 1995, l-allegat self ma kellu “... *fixed date for repayment*” u tikkontesta li kienu qeghdin jsiru hlasijiet akkont regolarment ai termini tal-*financial statements*.

Minkejja dak li sostniet, is-socjeta` rikorrenti baqghet ma pprezentatx **prova dokumentarja** ta` dak li kienet qeghda tallega.

Inoltre abbazi ta` li xehed Charles Scerri li kien l-awditur ta` Derby, irrizulta li kien hemm passiv dovut minn Derby lil AM Holdings Limited liema passiv kien saldat bis-sahha tar-rizoluzzjoni de qua.

L-intimati konjugi Calleja kkonfermaw bil-gurament tagghom li l-fatti ma sehewx kif allegat mir-rikorrenti.

Is-socjeta` rikorrenti taghmel ukoll l-argument illi Derby kienet ilha fi stat ta` insolvenza sa minn tal-inqas l-1999 – jekk mhux ukoll fl-1998. Tghid illi fl-1999 u certament sal-bidu tal-2000, u cioe` meta saret ir-rizoluzzjoni in kwistjoni, kien sewwasew iz-zmien meta Derby kienet ilha sejra lura finanzjarjament fl-operat taghha tant li kienet bdiet takkumula arretrati ta` kera u spejjez.

Il-Qorti rat l-*abridged financial statements* ta` Derby International Limited ghas-sena li ghalqet fil-31 ta` Dicembru 1999. Fid-Dok KP4, a fol 22, jirrizulta illi :-

“The financial statements are prepared in accordance with the historical cost convention.

At 31st December 1999, the company`s accumulated losses exceeded the paid up share capital by Lm 15,605 (1998 – Lm 8,090).

The financial statements have been prepared on a going concern basis which assume that the company will continue in existence in the foreseeable future.

The validity of this assumption depends on the company being able to generate sufficient cash flows to absorb its net current liabilities. This may also require the continued support of the company's shareholders in helping the company to meet its liabilities as they arise. The directors believe that the required support will be forthcoming from the company's shareholders.

If the company were unable to continue in existence in the foreseeable future, adjustments would have to be made to reduce the balance sheet of assets to their recoverable amounts, to provide for further liabilities that might arise and to reclassify fixed assets and long term liabilities as current assets and liabilities.

These financial statements have been prepared in accordance with International Accounting Standards issued by the International Accounting Standards Committee..."

Skont is-socjeta` rikorrenti, meta Derby ma hallsitx lura s-*shareholders` loans* lil AM Holdings Limited, Angele Callega ghal AM Holdings Limited kienet oggezzjonat, u saret ir-rizoluzzjoni tas-6 ta` Jannar 2000 sabiex AM Holdings thallset dak li kien dovut lilha minn Derby billi sar it-trasferiment tal-operazzjoni tan-negozju u tal-*stock* tal-hanut 66, Tower Road, Sliema. Skont ir-rikorrenti, din hija prova li r-rizoluzzjoni saret bil-hsieb ta` frodi jew bil-ghan ta` frodi tal-kredituri ta` Derby International Limited.

Il-Qorti tghid illi jekk kellu jigi kkunsidrat li fl-1999, Derby kienet diga` tidher illi mhijiex f` qaghda li thallas id-djun taghha ma jistax isir l-argument mir-rikorrenti illi Derby wettqet frodi fil-konfront taghha ghaliex Derby kienet diga` insolventi qabel id-data tar-rizoluzzjoni. Seta` kien hemm hlas bi preferenza favur is-socjeta` rikorrenti izda certament mhux qerq. Dan qed jinghad ghaliex meta AM Holdings Limited silfet lil Derby dan kien fi zmien ir-rikorrenti ma kinitx ghadha kreditrici ta` Derby. Terga` taghmel riferenza ghad-decizjoni ta` **Re Sarflax Limited** (op. cit.) fejn inghad illi :- "*paying some creditors in preference to others is not, of itself, fraudulent*".

Argument iehor li gabet ir-rikorrenti kien illi tmien xhur wara r-risoluzzjoni tas-6 ta` Jannar 2000, permezz ta` Form K ipprezentata mill-intimat Claude Calleja, l-intimata Angele Calleja tat ir-rizenja taghha minn direttur ta` Derby b`effett mill-1 ta` Settembru 2000. Ghar-rikorrenti din hija prova ta` frodi perpetwata kontra taghha.

Din il-Qorti tirrespingi l-argument.

Ma hemm xejn straordinarju jew irregolari illi direttur jaghti r-rizenja tieghu minn dik il-kariga – tenut kont tal-obbligi ta` kull xorta li ggorr maghha - meta kumpannija tkun ghaddejja minn mument diffiċli bhal disgwid fit-tmexxija jew krizi finanzjarja, ghalkemm ir-rizenja tesonera mill-obbligi mid-data effettiva `il quddiem mhux lura.

Tenut kont tal-fatti u cirkostanzi ta` dan il-kaz, il-Qorti ma tqisx illi l-fatt tar-rizenja ta` Angele Calleja kien imtebba` bi frodi tar-rikorrenti meta tqis li l-interess ewlieni taghha kien AM Holdings Limited - li taghha kienet l-unika azzjonista u li kienet kostitwita qabel iz-zwieg taghha ma` l-intimat Claude Calleja. L-interess kien fis-sens illi AM Holdings Limited tithallas dak li kellha tiehu minghand Derby. Ghal din il-Qorti, fil-mument illi effett tar-risoluzzjoni de qua, thallas id-dejn kollu li Derby kellha taghti lil AM Holdings, Angele Calleja ma kellhiex aktar interess f` Derby. U probabilmnt ghalhekk tat ir-rizenja taghha minn direttur.

Anke ghal din il-Qorti l-frodi trid tkun ippruvata sal-grad rikjest mil-ligi u qatt prezunta. Abbazi tar-risoluzzjoni, din il-Qorti ma ssibx li l-frodi kienet ippruvata mir-rikorrenti kif trid il-ligi.

2. Il-financial statements fuq bazi ta` going concern

Qabel ma tidhol fil-mertu tal-lanjanza tar-rikorrenti, il-Qorti sejra tqis **fil-qosor** xi jfisser meta l-kontijiet isir fuq bazi ta` *going concern* u meta l-kontijiet isiru fuq bazi ta` *breakup*.

Going concern huwa negozju li jopera komdu u boghod mir-riskju ta` xoljiment ghal zmien fil-futur, generalment ta` tnax-il xahar. Dan jimplika dikjarazzjoni li hemm l-intenzjoni li n-negozju jibqa` ghaddej bil-hidma tieghu tal-inqas ghat-tnax-il xahar ta` wara. Bid-dikjarazzjoni jkun hemm impenn li

ma hemmx il-hsieb li s-socjeta` tigi xjolta u stralcjata ; lanqas li tnaqqas materjalment il-volum tal-operat taghha. Jekk il-qaghda finanzjarja ta` kumpannija tkun tant prekarja (skont numru ta` kriterji accettati fuq bazi internazzjonali) li ma tkunx tista` tkompli bil-hidma taghha, l-awditur huwa obbligat jaghmel nota fil-*financial statements*. Huwa normali ghall-fini ta` *a going concern* li l-azzjonisti jaghmlu dikjarazzjoni mal-awditur illi ghat-tnax-il xahar ta` wara jibqghu jaghtu appogg finanzjarju lill-kumpannija jekk tinqala` l-htiega. Socjeta` tibqa` titqies *a going concern* sakemm ma jirrizultawx cirkostanzi fattwali li juru l-maqlub. Dawn huma accertamenti li huma responsabilita` tal-awditur, ghalkemm mhux responsabilita` tal-awditur illi jipprevedi grajjiet jew kontingenzi futuri.

Il-koncett ta` *breakup* huwa ghal kollox divers. Negozju li jkun *a going concern* jigi stmat ta` li attwalment hu u cioe` negozju b`valur ta` assi ta` negozju. Fil-kaz ta` *breakup* l-assi jigu stmati b`mod individwali, bicca bicca, mhux bhala assi funzjonali li jaghmlu parti minn negozju u li ghandhom valur. *Breakup* hija valutazzjoni li ssir meta jigi ordnat xoljiment b`ordni tal-qorti.

Dan premiss, tajjeb jinghad illi s-socjeta` rikorrenti ibbazat it-talbiet taghha wkoll fuq allegazzjoni li l-intimati deliberatament u sistematikament ipprezentaw lil Derby bhala li kellha bzonn l-appogg finanzjarju ta` l-azzjonisti sabiex tkompli ghaddejja meta fil-fatt ma kellhiex biex joqghod wahedha fuq saqajha.

Ir-rikorrenti tikkontendi li ghad illi Derby International Limited waqfet topera f` Settembru 2000 [ara x-xiehda ta` l-intimat Claude Calleja] baqghu jigu pprezentati *financial statements* fuq bazi ta` *going concern*.

Tikkontendi li fl-*statement of director`s responsibilities* ghas-sena li ghalqet fil-31 ta` Dicembru 2011 (fol 98) kif ukoll fin-*notes to financial statements* ghal dak l-istess perijodu, inghad specifkament li l-*statements* kienu qed isiru *on a going concern basis*.

L-istess kien il-kaz fl-*statement of financial position* ghas-sena 2012 (Dok CS 1 a fol 95 et seq) fejn inghad :-

“The company did not trade during the year under review ...

... Accumulated losses amounting to EUR 241,768 are being carried forward to the next financial year.

... At 31st December 2011, the company's current liabilities exceeded its current assets by EUR 88,710 (2010: EUR 87,159). On the same date, the company's accumulated losses exceeded the paid up share capital by EUR 46,101 (2010 :EUR 44,500).

The financial statements have been prepared on a going concern basis, which assume that the company will continue in existence in the foreseeable future.

The validity of this assumption depends on the company being able to generate sufficient cash flows. This may also require the continued support of the company's shareholders in helping the company to meet its liabilities as they arise. The director believes that the required support will be forthcoming from the company's shareholders.

Should the company be unable to continue trading, adjustments would have to be made to reduce the value of assets to their recoverable amount, and to reclassify non-current assets and long-term liabilities as current assets and liabilities and to provide for further liabilities as they might arise."

Ir-rikorrenti tirrimarka illi minkejja dawk id-dikjarazzjonijiet, u minkejja l-istat ta` insolvenza ta` Derby International Limited, l-azzjonisti u/jew id-diretturi taghha, baqghu ma wiegbu bl-ebda mod ghall-interpellanzi li sarulhom biex ihallsu d-djun tal-kumpannija.

Il-Qorti kkunsidrat b`reqqa dak li xehed Kenneth Pullicino.

Kenneth Pullicino jikkontendi illi bil-fatt illi l-azzjonisti ghamlu dikjarazzjoni li kien hemm *a going concern* dak il-fatt kien jesponihom ghal responsabilita` personali li jhallsu d-dejn li Derby kellha fil-konfront tar-rikorrenti.

Mhuwiex dan l-istat tad-dritt.

Bil-fatt li ssir dik id-dikjarazzjoni fil-mod u manjiera kif hija formulata fil-financial statements ma jaghmilx lill-azzjonisti jew lid-diretturi responsabbli personalment biex ihallsu d-djun tal-kumpannija.

Propju xejn minn dan!

Id-dikjarazzjoni ssir ghall-fini ta` *audit of a going concern business*.

Punto e basta!

U ma ggorrx maghha responsabilita` personali ta` hlas dment illi ma jigux ppruvati fatti u cirkostanzi hekk kif prospettati bl-Art 315 tal-Kap 386.

Il-Qorti tkompli tishaq: id-dikjarazzjoni wahedha mhijiex bizzejjed biex tissoddisfa l-vot tal-Art 315(1).

Tghid dan ghaliex il-fatt li kumpannija tipprezenta l-*financial statements* taghha abbazi ta` *going concern* – kif fuq inghad – ma jammontax ghal sitwazzjoni fejn ikun hemm *lifting of the corporate veil*.

Hija l-prassi li *financial statements* ta` kumpannija jsiru *on a going concern*.

Ma jaghmel l-ebda sens – la fattwali u lanqas legali – illi bil-fatt **wahdu** – distakkat minn kull konsiderazzjoni ohra – li jkun hemm dikjarazzjoni – kif fuq spjegat – azzjonista jkun espost ghal responsabilita` personali ta` hlas ta` dejn tal-kumpannija versu terzi.

Id-dikjarazzjoni mhux korraborata minn provi ta` qerq mhijiex bizzejjed biex taghti ragun lir-rikorrenti.

Fil-fehma ta`din il-Qorti, ma tirrizultax il-prova ta` qerq fl-ambitu tal-Art 315(1) tal-Kap 386.

3. Konsiderazzjonijiet ohra

Il-Qorti jidhrilha li ghandha taghmel osservazzjonijiet ulterjuri.

Fid-decizjoni tad-29 ta` Mejju 2009 fil-kawza : **AM Holdings Limited vs Gallarija Management Limited u Derby International Limited** : il-Qorti ta` l-Appell tat decizjoni fis-sens illi Gallarija Management Limited ma ressqet ebda prova konkluziva li dak li sar bejn Derby International Limited u AM Holdings Limited kien dettat minn qerq. Inghad illi Gallarija Management Limited qaghdet fuq suspetti u allegazzjonijiet minhabba d-detenturi tal-ishma taz-zewg socjetajiet. Inghad illi b`dak in-nuqqas ta` prova, Gallarija Management Limited qatt ma setghet tipproponi l-*actio pauliana* intiza biex tannulla atti maghmulin mid-debitur taghha b` qerq bi hsara ghall-jeddijiet taghha permezz ta` eccezzjoni, peress li tali azzjoni tista` tittiehed b` citazzjoni ad hoc.

Kien propju ghalhekk li s-socjeta` rikorrenti mexxiet bil-kawza tal-lum, wara li rrizulta li Derby International Limited kienet fil-process ta` stralc.

Il-Qorti tirrileva – in linea ta` principju – li azzjoni skont l-Art 315(1) kienet taghmel aktar sens minn azzjoni pawljana.

Dan qed jinghad ghaliex fil-kaz ta` ezitu pozittiv, ir-rimedju li taghti l-azzjoni seta` jkun ta` aktar utilita` ghas-socjeta` rikorrenti u cioe` illi mhux li tirkupra l-*istock* li kien hemm fil-hanut ta` Tower Road, Sliema, izda li tithallas tal-kreditu li kellha kontra Derby.

Waqt il-proceduri ta` stralc, l-istralcjarju ma kienx tal-fehma li kellha tkun tentata azzjoni ghal *fraudulent trading* kontra l-intimati.

Abbazi tal-assjem tal-provi, il-Qorti – wara li daret mal-kantunieri kollha – tibqa` tghid illi da parti tar-rikorrenti ma kienx hemm il-prova li trid il-ligi ta` hsieb frawdolenti fl-agir lamentat kontra l-intimati.

Din il-Qorti ma ssibx illi fl-agir tal-intimati kien hemm komportament meqjus, metodiku u regolari intiz sabiex jaghmel

hsara lill-kredituri tal-kumpanija Derby International Limited jew ghad-detriment tal-istess kredituri.

Ghalkemm tifhem il-pozizzjoni ta` kreditur li jibqa` sprovvist mir-realizzazzjoni tal-kreditu tieghu, il-Qorti tghid ukoll illi l-Art 315(1) tal-Kap 386 ma tistax tintuza bhala *a measure of last resort* akkost ta` kull konsiderazzjoni ohra.

Decide

Ghar-ragunijiet kollha premessi, il-Qorti qeghda taqta` u tiddeciedi din il-kawza billi :-

Tichad it-tieni (2), it-tielet (3), il-hames (5), it-tmien (8), u t-tlettax (13) l-eccezzjonijiet tal-intimati.

Tilqa` l-eccezzjonijiet l-ohra tal-intimati.

Tichad it-talbiet kollha tar-rikorrenti.

Bl-applikazzjoni tal-Art 223(3) tal-Kap 12 tal-Ligijiet ta` Malta, tordna illi s-socjeta` rikorrenti fuq naha wahda, u l-intimati flimkien fuq in-naha l-ohra, ibatu l-ispejjez taghhom.

Onor. Joseph Zammit McKeon
Imhalled