



MALTA

**QORTI CIVILI**

**PRIM' AWLA**

**ONOR. IMHALLEF**

**JOSEPH ZAMMIT MC KEON**

Seduta tat-30 ta' April, 2015

Rikors Numru. 1015/2013

**Alex J Mamo (615256M)**

*u*

**Dixcart Management Malta Limited (C43184)**

*kontra*

Kopja Informali ta' Sentenza

**Ceramic Technology Europe Limited (C39264) u b`digriet tat-8 ta` April  
2014**

**gew nominati l-Avukat Dr Noel Bartolo LL.D. u l-Prokuratur Legali Noel  
Scerri bhala kuraturi deputati sabiex jirrapprezentaw l-interessi tal-  
kumpannija Ceramic Technology Europe Limited (C39264)**

**Il-Qorti :**

**I. Preliminari**

Rat ir-rikors prezentat fit-22 ta` Ottubru 2013 li jaqra hekk :-

*Illi z-zewg rikorrenti jipprestaw servizzi finanzjarji lill-kumpannija  
ntimata bhala company service providers.*

*Illi kif ser jigi pruvat fil-kors tal-kawza r-rikorrent Mamo huwa direttur  
tal-kumpannija Ceramic Technology Europe Limited.*

*Illi kif ser jigi pruvat fil-kors tal-kawza ir-rikorrent Dixcart Management  
Malta Limited hija kreditrici tal-kumpannija Ceramic Technology Europe  
Limited.*

*Illi kif ser jigi spjegat fil-kors tal-kawza n-negozju tal-kumpannija Ceramic Technology Europe Limited ilu sospiz ghal perijodu ta` aktar minn erbgħa u ghoxrin xahar.*

*Illi l-kumpannija Ceramic Technology Europe Limited ma tistax thallas id-djun tagħha.*

*Illi tenut kont tal-passiv kontingenti u prospettiv tal-kumpannija jirrizulta illi l-kumpannija intimata qatt ma tista` thallas id-djun tagħha.*

*Illi hemm ragunijiet gravi bizzejjed li jiggustifikaw ix-xoljiment u konsegwenti stralc tal-kumpannija ghaliex il-kumpannija ntimata mhux biss għandha djun mal-awtoritajiet fiskali izda persuna qrib l-imsemmija kumpannija giet akkuzata illi ccappset b`attivita` llecita gravissima.*

*Illi kien hemm zmien meta l-kumpannija esponenti Dixcart Managament Malta Limited kienet tippermetti lill-kumpannija konvenuta tuza l-fond "The Dixcart Suite", Level 11, Le Meridien, St. Julians, 30 Main Street, Balluta Bay, St Julians STJ 1017" bhala l-indirizz registrat tagħha. Dan il-permess gie revokat.*

*Illi sal-gurnata tal-lum il-kumpannija konvenuta għadha tuza l-indirizz "The Dixcart Suite", Level 11, Le Meridien, St. Julians, 30 Main Street, Balluta Bay, St Julians STJ 1017" bhala l-indirizz registrat tagħha u mpjegat ta` Dixcart Managament Malta Limited Sean Dowden għadu jagħmilha ta` company secretary tal-kumpannija Ceramic Technology Europe Limited.*

*Illi l-kumpanija intimata qed tuza l-imsemmi indirizz minghajr id-debitu permess b`mod illegali, irregolari u abbusiv.*

*Illi kif ser jigi spjegat fil-kors tal-kawza tezisti nuqqas ta` komunikazjoni bejn iz-zewg rikorrenti u l-azjonisti tal-kumpanija intimata u l-prassi titlob illi l-esponenti ghandhom jaghmlu distakk shih mill-kumpanija intimata.*

*Illi llum il-gurnata l-esponenti jridu, ghal ragunijiet gravi u sufficjenti, jiddisassocjaw ruhhom kompletament mill-kumpanija intimata.*

*Illi dan ir-rikors ghal xoljiment u stralc qed isir ai termini tal-artikolu 218 skond l-artikoli 214(2)(a)(i) u (ii) u (b)(iii) tal-Kap 386.*

*Ghaldaqstant ir-rikorrenti jitolbu illi dina l-Onorabbli Qorti joghgobha :*

*a) Taghmel ordni urgenti ghal stralc tal-kumpanija Ceramic Technology Europe Limited ;*

*b) Tinnomina kuratur biex jidher ghall-eventwali kontumacija.*

*U dana kollu taht dawk it-termini, pattijiet u kundizzjonijiet ohra illi dina l-istess Onorabbli Qorti jidhrilha xierqa u opportuni illi timponi fic-cirkostanzi.*

*Bl-ispejjez.*

Rat il-lista tax-xhieda li kienu ndikati mir-rikorrenti.

Rat ir-risposta guramentata li pprezentaw il-kuraturi deputati fis-6 ta' Mejju 2014 fejn iddikjaraw illi ma kienux edotti mill-fatti u ghalhekk irriservaw li jipprezentaw risposta ulterjuri meta u jekk jirnexxielhom jikkomunikaw mal-intimata minnhom rapprezentata u f'dan ir-rigward minn issa kienu qeghdin jitolbu lir-rikorrenti sabiex jipprovduhom kull informazzoni li jista' ghandha dwar kull mezz ta' komunikazzjoni mad-dirigenti u/jew rapprezentanti tas-socjeta' intimata ; salvi jekk ikun il-kaz eccezjonijiet ulterjuri.

Semghet ix-xiehda ta' Alex Mamo u Jonathan Vassallo fl-udjenza tal-24 ta' Ottubru 2014 u rat id-dokument li kien prezentat fl-istess udjenza.

Rat id-dokument li pprezentaw ir-rikorrenti fl-udjenza tal-15 ta' Jannar 2015.

Rat in-nota b'dokument li pprezentaw il-kuraturi deputati fit-2 ta' Frar 2015.

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Rat illi l-gbir tal-provi kien maghluq fl-udjenza tas-26 ta` Frar 2015 fejn id-difensur tar-rikorrenti ghamel is-sottomissjonijiet finali tieghu.

Rat id-digriet li tat fl-istess udjenza fejn halliet il-kawza ghas-sentenza ghal-lum.

Rat l-atti tal-kawza.

### Ikkunsidrat :

## II. Provi

Ir-rikorrent Alex Mamo xehed illi huwa kien appuntat direttur ta` l-kumpannija intimata ("Ceramic"). Ir-rikorrenti l-ohra ("Dixcart") taghti servizzi ta` accounting. Ma` Dixcart huwa kellu biss relazzjoni professjonali. Il-persuna li nkarikat lilu biex ikun direttur ta` Ceramic kien Sean Dowden li huwa direttur ta` Dixcart. Stqarr illi Ceramic hija debitrici ta` circa €100,000 ; minnhom €30,000 kienu ghal servizzi nkluzi uditjar, u l-bqija kienu dovuti bhala taxxa. Assi biex thallas m`ghandhiex bizzejjed ghaliex Ceramic ghandha depozitu zghir li qieghed il-bank. L-oggett tan-negozju taghha kien illi tbiegh makkinarju li ghandu x`jaqsam mac-ceramika. L-azzjonisti taghha huma kollha barranin. Ceramic kienet iffurmata fil-gurisdizzjoni Maltija ghal ragunijiet fiskali.

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Kompla jixhed illi qabel sar hu direttur, Ceramic kienet rappresentata minn kumpanija li toffri servizzi simili : Chetcuti Cauchi. Ghal ragunijiet taghhom, dawn ma riedux ikomplu bl-inkariku. Qabel sar hu direttur, Chetcuti Cauchi ma qalulu xejn dwar agir suspettuz da parti ta` Ceramic. Beda jiehu hsieb il-kontabilita` u l-VAT returns. Beda josserva li kien isir bejgh izda Ceramic kienet iddum ma tigbor il-flus. Ha hsieb jaghmel due diligence test hu izda ma sab xejn irregolari. Dan sakemm skopra li manager barrani ta` Ceramic, certu Elio Gerardi, li kien direttur taghha, izda ma kienx baqa`, kien qiegghed jaghmel serje ta` transazzjonijiet, li fil-fehma tax-xhud kienu strambi, ghaliex kien qiegghed ibiegh il-prodott u tieghu ma jithallasx. Mamo ghamel l-istharrig tieghu u sab illi dan Gerardi kien involut fl-importazzjoni ta` droga mill-Kolombja u l-Messiku u kien imfittex mill-Interpol. Inoltre sab ukoll illi Gerardi kien sahanistra ffalsifika l-firma tal-istess Mamo fuq kuntratt minnhom li kien ghamel Gerardi.

Mamo ppreciza illi huwa ma kienx l-uniku direttur tal-kumpanija. Fil-fatt kien hemm diretturi ohra li pero` kienu barranin. Insista li huwa ried jiddisassocja ruhu minn ma` Ceramic. Inoltre Dixcart bdiet toggezzjona li Ceramic taghmel uzu mill-indirizz taghha biex taghmel uzu minnu bhala registered address.

Spjega li l-bord tad-diretturi ta` Ceramic kien ilu ma jiltaqa` mill-2009. L-audited accounts kienu qeghdin lura fiz-zmien. Il-qaghda ta` Ceramic tirrizulta kollha kemm fid-Dok JV1.

**Jonathan Vassallo** – direttur ta` Dixcart – xehed illi fl-2008 Dixcart hadet l-inkariku minflok haddiehor (i.e. Chetcuti Cauchi) li tipprovdi servizzi lil Ceramic. Dawn is-servizzi kienu li jaghtuha ufficcju registrat, jipprovduha direttur mhux billi joqghodu huma direttament izda permezz ta` terzi (fil-kaz tal-lum : Alex Mamo), kif ukoll is-servizz ta` segretarju ; dan apparti l-kontabilita` matul is-sena. Meta dahlet Dixcart, u allura qabel Alex Mamo sar direttur, Ceramic ma kellhiex *a good standing* fis-sens illi kellha VAT returns b`lura kif ukoll l-accounts kienu lura b`xi tliet snin. Meta bdew jaraw il-karti

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biex igibu ordni fis-socjeta` intimata, sabu li Ceramic kellha konsulent barrani. Ta` din il-persuna talbu c-curriculum vitae u anke kopja tal-passaport tieghu. Ghal xi raguni, il-kopja tal-passaport baqa` ma wasalx la minghand Ceramic, la minghand il-konsulent stess u lanqas minghand Chetcuti Cauchi. Irnexxielu jikseb in-numru tal-passaport ; ghamel world check dwar il-persuna relatata ma` dak in-numru u l-esitu kien hazin fis-sens illi rrizulta li kien allegatament traffikant tad-droga ; infatti l-Interpol hargu mandat ta` arrest kontra tieghu fil-Kolombja u kien arrestat darbtejn il-Germanja. Ghamlu ghalhekk suspicious transaction report lill-Financial Intelligence Analysis Unit ta` Malta (FIAU) u kien terminat il-kuntratt mal-konsulent.

Kompla jixhed illi fit-tentattiv taghhom li jgibu ordni fis-socjeta` intimata sabu li kellha kont tat-taxxa ta` €140,000. Fil-bank kellha nofs dak l-ammont. Ghamlu ftehim mad-Dipartiment tat-Taxxi Interni biex ihallsu lura l-arretrati permez ta` pagamenti fix-xahar. Illum Ceramic ghandha dejn ta` €70,000 mad-Dipartiment tat-Taxxi u €30,000 xi thallas ghal servizzi ; dawn tal-ahhar jinkludu d-drittijiet taghhom, ta` Alex Mamo u tal-awdituri. Jidher li l-konsulent li semma qabel kellu nkwiet precedenti ma` Ceramic u mal-pulizija fl-Italja.

Stqarr illi sal-lum l-ufficju registrat ta` Ceramic ghadu dak ta` Dixcart. Huma ma jridux li Ceramic tibqa` tuza l-indirizz taghhom. Wara l-prezentata tar-rikors, ircevw fl-ufficju registrat ittra minghand avukati Taljani fejn qed jintalab hlas dovut minn Ceramic lil terzi fl-Italja. Avzaw lil Alex Mamo li ma riedux li Ceramic tibqa` tuza l-indirizz ta` Dixcart..

**Ikkunsidrat :**

### **III. Dokumenti**



**Id-dokumenti li jsostnu l-pretensjonijiet tar-rikorrenti huma migbura kollha fid-Dok JV1. Il-Qorti sejra tirreferi ghal uhud li fil-fehma taghha jindirizzaw il-bazi tal-azzjoni tar-rikorrenti :-**

**Fol 66 :** Ittra ta` Dixcart datata 25 ta` Ottubru 2010 fejn qieghed jinghad illi jekk Ceramic ma kenitx sejra tirregola l-pendenzi taghha mad-Dipartiment tat-Taxxi Interni ta` Malta, allura Dixcart *will be resigning from our position as directors and secretary*. Tghid ukoll illi *you will be required to inform us of the address for the new registered office in Malta as we will be unable to continue providing this service*. Inoltre jinghad illi *Dixcart fees since 2009 are also outstanding*.

**Fol 69 :** Email ta` Alex Mamo datata 17 ta` Mejju 2010 ; *inter alia* jinghad : ... *I note that you sent me an email on the 16 April 2010 regarding a potential contract (as received from Elio Gerardi). My initial impression is that the nature of sales and the margin of the contract were inconsistent with past business transacted. Upon further review, I also noted that my signature appeared on the contract. This is titally unacceptable as I was not party to any discussions or negotiations surrounding this. Elio is also not a director, nor does he have general power of attorney. In this regard, I would require explanation as to how my signature appeared on this contract and whether this contract has in fact gone ahead without the input of the directors of the company – this is a matter that I will not take lightly given its seriousness and casts further doubt over our further involvement with this company.*

**Fol 74 :** Email ta` Jonathan Vassallo datata 4 ta` Dicembru 2009 fejn qieghed jispjega l-kuntatti li kellu ma` FIAU dwar Elio Gerardi u x`kien behsiebu jaghmel. Kien hemm email b`risposta fl-4 ta` Dicembru 2009 b`dokumenti annessi ; *inter alia* jinghad *it was recommended that the directors of the company stop the relationship with Mr. Gerardi by cancelling his Consultancy Agreement*. Inoltre Dixcart inghatat direzzjoni fosthom li *organise the sale of the company (potential purchaser interested in trademark registered in the name of CTE)*.

**Fol 98 :** Email datata 9 ta` Dicembru 2009 ta` Sean Dowden ta` Dixcart lil Daniel Castillo ta` FIAU b`*suspicious transactions report with supporting*

*explanations over the suspicious activity relating to a consultant connected to our client company Ceramic Technology Europe Limited (company 39624).*

**Fol 143 :** File note datata 4 ta` Frar 2011 li tghid : *The file is currently dormant. Dixcart will not act any further in assisting the company to trade, however the company has been dormant for over a year with the intention of the shareholders to dissolve or sell the company when its tax debts have been paid. The shareholders have accepted an arrangement from the Malta tax authorities to make montly payments towards the extinguishing of the tax debts of the company. Once this has been achieved, Dixcart will resign as directors with immediate effect.*

**Fol 150 et seq :** Skond invoice datata 31 ta` Ottubru 2012, Dixcart kellha tiehu minghand Ceramic is-somma ta` €22,453.51 ghal servizzi resi, waqt li skond invoice datat 15 ta` Dicembru 2009, Ceramic kellha taghti lill-Awdituri SB Consulting Limited is-somma ta` €1,923.40.

**Fol 209 et seq :** Mir-report and financial statements ta` Ceramic li hejjew l-awdituri ghas-sena li ghalqet fil-31 ta` Dicembru 2007, jirrizulta li l-profitt tal-kumpannija wara t-taxxa kien ta` €99,235. Id-diretturi thallsu *interim dividend* ta` €96,700. Kellha *total liabilities* ta` €102,172.

**Fol 226 et seq :** Mir-report and financial statements ta` Ceramic li hejjew l-awdituri ghas-sena li ghalqet fil-31 ta` Dicembru 2008, jirrizulta li l-profitt tal-kumpannija wara t-taxxa kien ta` €100,870. Kellha *total liabilities* ta` €167,618. Bhala *taxxa*, kellha *pendenza* ta` €65,190.

**Fol 257 et seq :** Mir-report and financial statements ta` Ceramic li hejjew l-awdituri ghas-sena li ghalqet fil-31 ta` Dicembru 2009, jirrizulta li l-profitt tal-kumpannija wara t-taxxa kien ta` €55,335. Thallas an *interim dividend* ta` €103,404. B`effett mill-31 ta` Dicembru 2009, il-kumpannija *stopped carrying out trading activities*. L-uniku direttur li serva f`dik is-sena kien Alex Mamo. Kellha *total liabilities* ta` €158,792. Bhala *assi* kellha €176,458.

Min-naha taghhom, il-kuraturi deputati pprezentaw email li baghtu fil-25 ta` Jannar 2015 lil Fidserve SA ta` Luxembourg u ta` Geneva, li huma t-*trustees* ta` Ceramic, sabiex igharrfu lill-kuraturi deputati jekk kienux behsiebhom jikkontestaw il-pretensjonijiet ta` r-rikorrenti. Ma jirrizultax li kien hemm risposta ghal din l-email.

**Ikkunsidrat :**

#### **IV. Risultanzi**

##### **1) Locus standi tar-rikorrenti**

L-iskop dikjarat tar-rikorrenti huwa li jitolbu x-xoljiment u stralc ta` Ceramic skond l-**Art 214(2)(a)(i) u (ii)** u skond l-**Art 214(2)(b)(iii) tal-Kap 386**.

L-eligibilita` o meno tar-rikorrenti sabiex jittentaw l-azzjoni tal-lum hija stabbilita` bl-**Art 218 tal-Kap 386**.

Skond l-Art 218(1)(b) u (c), talba lill-Qorti fejn jintalab ix-xoljiment u l-istralc ta` kumpannija skond l-Art 214(2)(a) u l-Art 214(2)(b) ghandu jsir

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b`rikors, u fost il-persuni li jistghu jipprezentaw ir-rikors hemm inkluzi direttur u kreditur.

Fil-kaz tal-lum, irrizulta li r-rikorrent Alex Mamo huwa direttur waqt li Dixcart hija kreditur. Ghalhekk ghandhom *locus standi* sabiex jittentaw l-azzjoni tal-lum.

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

Skond l-Art 214(2)(a)(i) tal-Kap 386, *kumpanija tista' xxolji u tkun stralcjata mill-qorti ... jekk in-negozju tal-kumpanija jkun sospiz ghal perjodu bla waqfien ta' erbgha u ghoxrin xahar.*

Sabiex jissussisti dak li qeghda tesigi din id-disposizzjoni, jehtieg : i) li jkun hemm is-**sospensjoni tan-negozju** tal-kumpanija ; ii) ghal perijodu **bla waqfien** iii) ta` erbgha u ghoxrin **(24) xahar**.

Il-prova tat-tliet rekwiziti hija ghalhekk kwistjoni ta` fatt.

Jidher illi d-disposizzjoni kellha l-origini taghha fl-Art 12(1)(d) tal-UK Insolvency Act 1986, liema disposizzjoni Ingliza m`ghadhiex taghmel parti mill-Act, ghax kienet superata b`legislazzjoni aktar ricenti.

Bhala prova tar-rekwiziti tad-disposizzjoni de qua, tirrizulta l-*file note* datata 4 ta' Frar 2011 a fol 143 fejn jinghad illi tal-inqas mill-4 ta' Frar 2011 is-socjeta` intimata kienet *dormant ... with the intention of the shareholders to dissolve or sell the company when its tax debts have been paid.*

Jirrizulta wkoll mir-report *and financial statements* ta' Ceramic li hejjew l-awdituri ghas-sena li ghalqet fil-31 ta' Dicembru 2009 illi b'effett mill-31 ta' Dicembru 2009, il-kumpannija *stopped carrying out trading activities.*

**Jirrizultaw ippruvati r-rekwiziti tal-Art 214(2)(a)(i) tal-Kap 386.**

**3) L-Art 214(2)(a)(ii) tal-Kap 386**

Skond din id-disposizzjoni, *kumpannija tista' xxolji u tkun stralcjata mill-qorti ... jekk il-kumpannija ma tkunx tista' thallas id-djun taghha.*

Il-Qorti tirrileva illi meta tfassal il-mudell ghal-ligi taghna l-gdida dwar il-kumpanniji, il-qafas maghzul kien dak tal-Companies Act Ingliza 1985. Fil-ligi Ingliza, ix-xoljiment u l-istralc ta' kumpanniji kien trattat f'legislazzjoni *ad hoc* u cioe` l-Insolvency Act 1986. Meta fl-1995 saret il-ligi taghna l-gdida dwar il-kumpanniji li hadet post il-Commercial Partnerships Ordinance 1962, id-disposizzjonijiet li jolqtu x-xoljiment u l-istralc kienu integrati fl-Att XXV tal-1995.

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Kif sejrjn naraw, fil-ligi taghna, li *kumpannija ma tkunx tista' thallas id-djun taghha* ghandu **sinjifikat preciz u definit** mil-ligi stess. Fil-ligi Ingliza, il-posizzjoni hija aktar wiesgha. Il-koncett ta` insolvenza fil-ligi taghna huwa aktar ristrett minn dak tal-ligi Ingliza ghalkemm hemm *overlaps*.

Fit-Tmien Edizzjoni (2012) ta` l-ktieb **Boyle & Birds` Company Law** (pubblikat minn Jordans) pg 859 jinghad hekk –

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

#### 4) **L-Art 214(5) tal-Kap 386**

**L-Art 214(2)(a)(ii)** irid jinqara flimkien ma` **L-Art 214(5)** li jistabilixxi meta kumpannija ghandha titqies li ma tkunx tista' thallas id-djun taghha.

**Tnejn** huma c-cirkostanzi definiti mil-ligi stess –

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

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

**Ir-rikorrenti qeghda tinsisti fuq il-fondatezza tal-pretensjoni taghha abbazi tal-paragrafu (b).**

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

*Skond din id-disposizzjoni, kumpanija titqies li ma tkun tista' thallas id-djun taghha ... jekk ikun ippruvat ghas-sodisfazzjon tal-qorti li l-kumpanija ma tkunx tista' thallas id-djun taghha, meta din tqis ukoll il-passiv kontingenti u prospettiv tal-kumpanija.*

Dak previst minn din id-disposizzjoni jabbina ruhu ma' *balance sheet insolvency*. Dan l-abbinament jista' jsir minhabba d-dicitura tad-disposizzjoni rilevanti tal-Insolvency Act 1986 (li hija kwazi identika ghal taghna) u cioe' l-**Art 123(2)** li taqra hekk –

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

Fil-ktieb **Insolvency Law – Corporate and Personal** ta' Andrew Keay u Peter Walton (Pearson Education Limited - 2003) pg 19 jinghad hekk dwar *balance sheet insolvency* kif mifhuma fil-kuntest tal-Insolvency Act 1986 –

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

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

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

*Din il-kondizzjoni tista' tigi verifikata permezz tal-balance sheets wara li jigi kunsidrat jekk l-assets are less than its liabilities. Izda ... it is not sufficient for the company to be able to meet its current obligations if its total liabilities can ultimately be met only by the realisation of its assets over a lengthy period (Re : European Life Assurance Society 1869 LR 9 Eq 122). Ghalhekk ma hemmx raguni ghaliex il-kredituri ghandhom joqghodu jistennew sakemm il-kumpannija tbiegh l-assets taghha biex forsi xi darba jithallsu.*



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

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

Fil-Pag 130 ikompli hekk –

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

Fil-Pag 134 ighid –

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

Fil-Pag 136 ighid –

*The phrase “prospective liability” is neither a legal nor an accounting term of art. It has been judicially defined as : “ ... a debt which will certainly become due in the future, either on some date which has already been determined or some*

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

Mill-kumpless ta` dokumenti li flimkien jaghmlu Dok JV1 tirrizulta evidenti u kontinwa l-pressjoni li matul is-snin ghamlet Dixcart fuq it-trustees ta` Ceramic ghar-rigward tal-htiega li l-azzjonisti jipprovdu bizzejjed fondi lit-tmexxija tal-kumpannija, principalment sabiex ikunu jistghu jithallsu l-pendenzi li Ceramic kellha mad-Dipartiment tat-Taxxi Interni. It-thassib ta` Dixcart u *del resto* anke tar-rikorrent l-iehor Alex Mamo kien gej mill-fatt li huma kienu konxji li Ceramic ma kenitx qeghda taghmel negozju, kienet inqalghet il-problema gravi ta` Elio Gerardi kostitwit mill-allegat agir kriminali tieghu, u kif ukoll kien sar ftehim mad-Dipartiment tax-Taxxi Interni li t-taxxa dovuta tithallas ratealment kull xahar. Huwa evidenti li r-rikorrenti kienu qeghdin jinsistu li l-impenn mad-Dipartiment tat-Taxxi Interni kellu jigi onorat. Mir-risposti tat-trustees, huwa car it-tentattiv taghhom li jiksbu bizzejjed zmien biex il-kumpannija tinbiegh.

Il-Qorti tifhem li Dixcart ma kenitx komda li tippresta l-indirizz tan-negozju taghha lil Ceramic biex ikun l-ufficcju registrat taghha jekk din ma kenitx behsiebha toqghod mal-obbligi taghha mal-awtoritajiet Maltin. Wara kollox Dixcart u anke Alex Mamo kellhom reputazzjoni bhala *service providers* x`jittutelaw. Dan apparti li Ceramic kellha wkoll pendenzi xi thallasha fi drittijiet ghall-prestazzjonijiet taghha. Infatti rrizulta li skond invoice datata 31 ta` Ottubru 2012, Dixcart kellha tiehu minghand Ceramic is-somma ta` €22,453.51 ghal servizzi resi, waqt li skond invoice datat 15 ta` Dicembru 2009, Ceramic kellha taghti lill-Awdituri SB Consulting Limited is-somma ta` €1,923.40 (fol 150 et seq).

Irid jinghad li l-ahhar *report and financial statements* ta' Ceramic kienu dawk ghas-sena li ghalqet fil-31 ta' Dicembru 2009. Skond ir-rapport tal-awdituri, kien hemm profitt wara t-taxxa kien ta' €55,335. Fl-istess waqt thallas dividend ta' €103,404 meta l-kumpanija kellha *total liabilities* ta' €158,792. Kien inoltre dikjarat li b'effett mill-31 ta' Dicembru 2009, il-kumpanija *stopped carrying out trading activities* (fol 257 et seq).

L-accounts ghas-snin ta' bejn l-2007 u l-2009 mhux juru kumpanija li qeghda tissielet mad-dejn. X'gara wara, almenu mill-accounts, il-Qorti m'ghandhiex prova hlief illi mix-xiehda tar-rikorrenti qieghed jirrizulta li m'ghandhiex disponibbilita' ta' fondi biex thallas il-pendenzi taghha.

Dwar assi li mhumiex flus, l-accounts sal-2009 juru li kien hemm. Fil-kors tal-gbir tal-provi, in partikolari minn Dok JV1, issemma li Ceramic kienet is-sid ta' trademark li minnha nfisha hija *an asset*. Pero' l-Qorti m'ghandhiex taghrif iehor. Il-Qorti m'ghandhiex prova li dik l-asset ghadhiex tezisti, u jekk ghadha, kienx hemm xi hsieb li tinbiegh forsi flimkien mal-ishma tal-kumpanija. Jidher car mill-assjem tal-provi li r-rikorrenti kienu qeghdin jinzammu *all'oscuro* ta' li kien qieghed isir barra mill-kumpanija.

**In-nuqqas ta' taghrif dwar il-kontabilita' tal-kumpanija wara l-1 ta' Jannar 2010, il-waqfien tan-negozju taghha, il-fatt li kellha pendenzi x'taghamel tajjeb ghalihom meta kellha fondi nsufficjenti biex taghamel tajjeb, u nuqqas ta' taghrif car dwar is-sussistenza o meno ta' assi ohra jwasslu lil din il-Qorti biex tghid illi l-vot tal-Art 214(5)(b) tal-Kap 386 huwa sodisfatt ukoll.**

**6) Id-diskrezzjoni tal-Qorti**

Il-Qorti taghmel riferenza ghal Pg 913-914 ta' Boyle & Birds` Company Law – 8<sup>th</sup> Edition – 2011 :

*Unpaid creditors of a company may consider commencing winding-up proceedings against the company as an alternative to suing for payment. As a debt collection mechanism, winding up proceedings may be swifter and, for the individual creditor, less expensive than a claim that may come to trial for some time ; **on the other hand, winding up is a collective procedure for the benefit of creditors generally and it does not benefit specific creditors individually (F. Oditah “Winding Up Recalcitrant Debtors” 1995 LMCLQ 107) ...***

*Since winding up is a collective procedure for the benefit of creditors generally, one situation where the court may exercise its discretion against winding-up is where other creditors in the same class oppose the making of the order. In this regard the court will usually have regard to the majority of the creditors and will refuse the petition if its opposed by the majority.*

Fil-Palmer's Company Law (Edition 25 - Sweet & Maxwell) jinghad hekk –

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

## Kopja Informali ta' Sentenza

Dan premiss, hija l-fehma konsiderata tal-Qorti illi kumpannija li ma taghmilx negozju hija entita` bla ruh ghaliex ma tkunx qeghda taqdi l-ghanijiet taghha. Kumpannija li ma tiggerax attivita` ekonomika tkun sprovvista minn dhul, u minghajr dhul, ma tista` qatt thallas id-dejn taghha. Fil-kaz tal-lum, ma jidhirx illi l-azzjonisti wrew xi hajra li jqeghdu kapital frisk fil-kumpannija. Kif lanqas ma kkontestaw it-talbiet tar-rikorrenti tramite l-kuraturi deputati. Ghal din il-Qorti, ix-xoljiment u l-istralc tal-kumpannija intimata huwa inevitabbli.

### **7) L-Art 214(2)(b)(iii) tal-Kap 386**

Billi l-Qorti qeghda tezercita d-diskrezzjoni taghha u qeghda tordna x-xoljiment u l-istralc tal-intimata abbazi tal-Art 214(2)(a)(i), tal-Art 214(2)(a)(ii) u tal-Art 214(5)(b) tal-Kap 386, il-Qorti ma tarax il-htiega li tmur ghal analizi ta` jekk l-Art 214(2)(b)(iii) tal-Kap 386 huwix ippruvat ukoll fil-kaz tal-lum.

### **Provvediment**

**Ghar-ragunijiet kollha premissi, il-Qorti tipprovdi dwar it-talbiet tar-rikorrenti billi :-**

**1) Tiddikjara li fir-rigward tal-kumpannija intimata Ceramic Technology Europe Limited (C39264) jirrizultaw privati sal-grad rikjest mil-ligi r-rekwiziti tal-Art 214(2)(a)(i), tal-Art 214(2)(a)(ii) u tal-Art 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta.**

2) Tordna x-xoljiment tal-kumpannija intimata Ceramic Technology Europe Limited (C39264) b`effett mit-22 ta` Ottubru 2013 skond l-Art 223(1) tal-Kap 386. Tordna wkoll l-istralc taghha.

3) Tastjeni milli tippovdi dwar ix-xoljiment u l-istralc tal-kumpannija intimata Ceramic Technology Europe Limited (C39264) skond l-Art 214(2)(b)(iii) tal-Kap 386 tal-Ligijiet ta` Malta.

4) Tahtar lir-Ricevitur Ufficjali bhala stralcjarju tal-kumpannija intimata Ceramic Technology Europe Limited (C39264) bis-setghat u d-dmirijiet kollha previsti mid-disposizzjonijiet tal-Kap 386 tal-Ligijiet ta` Malta.

5) Tordna lir-rikorrenti u lill-kumpannija intimata Ceramic Technology Europe Limited (C39264) sabiex *in solidum* bejniethom ihallsu l-ispejjez kollha, inkluzi l-ispejjez tal-kuraturi deputati, l-ispejjez tal-istralc, kif ukoll id-drittijiet u l-ispejjez tal-istralcjarju, u dan bl-applikazzjoni tal-Art 236(2) tal-Kap 386.

Thalli l-istralc ghall-udjenza ta` nhar it-Tlieta 7 ta` Lulju 2015 fid-9.00a.m.

**< Sentenza Finali >**

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