



QORTI CIVILI PRIM`AWLA

**ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON**

Illum il-Hamis 17 ta` Marzu 2016

**Kawza Nru. 11
Rik. Nru. 494/14 JZM**

Panta Contracting Limited (C-15725)

kontra

D.A. Holdings Limited (C-18064) ;

u

**b`digriet tat-23 ta` Ottubru 2014 is-
socjeta` Mediterranean Corporate Bank
Limited (C-30432) gia` Volksbank Malta
Limited, giet awtorizzata tintervjeni fil-
kawza *in statu et terminis* ;**

u

**b`digriet tat-23 ta` Jannar 2015 is-
socjeta` Tal-Herba Group Limited (C-
46790) giet awtorizzata taghmel
sottomissjonijiet fil-kors tal-
procediment ;**

u

b`digriet tal-24 ta` Marzu 2015 il-Perit Dr Edwin Mintoff gie awtorizzat jaghmel sottomissjonijiet fil-kors tal-procediment ;

u

b`digriet tat-30 ta` Lulju 2015 Mark Vassallo ghan-nom u in rapprezentanza ta` Aluserv Limited (C-16207), gie awtorizzat jintervjeni fil-kawza ;

u

b`digriet tat-2 ta` Ottubru 2015 Xuereb Installations Limited (C-15321), giet awtorizzata tintervjeni fil-kawza *in statu et terminis* ;

u

b`digriet tat-2 ta` Frar 2016 Rabie Maloul (I.D. 23529A) gie awtorizzat jintervjeni fil-kawza

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentatai termini tal-Art 214 tal-Kap 386 fil-5 ta` Gunju 2014 li jaqra hekk :-

Ammont ta` €1,501,113.23 sena tard

1. *Is-socjeta` rikorrenti dahlet f`kuntratt mas-socjeta` intimata datat 14 ta` Frar 2011 (kopja annessa u mmarkata `Dok.PCL1`) fir-rigward ta` xoghlijiet u servizzi mekkanici u ta` elettriku.*

2. *L-ammont totali ghax-xoghlijiet ai termini tal-kuntratt huwa ta` miljun disa telef u ghoxrin erba` mija u wiehed u hamsin Ewro u seba` u tletin centezmu (€1,920,451.37) (VAT eskluż) (l-“**Ammont**”).*

3. *It-termini tal-pagament tal-Ammont huma stipulati fir-raba` klawzola tal-kuntratt li inter alia jipprovi illi l-hlas ghandu jsir bil-mod segwenti :*

“ ... a) Twelve (12) Monthly Progress Payments against Engineer`s Certificate valued at 33% of the Engineer`s Certificate.

b) Total remaining 67% of Engineer`s Certificate Payable in 24 (twenty-four) Monthly Payments following issue of Practical Completion Certificate by the Engineer.”

Ir-raba` klawzola tistipula wkoll illi ghandu jithallas l-ammont ta` tlieta u hamsin elf tlett mija u hamsin Ewro (€53,350) kull xahar, bl-ewwel pagament li jsir fl-1 ta` Marzu 2011 u l-pagamenti sussegwenti fl-istess ammont jsiru fl-ewwel gurnata ta` kull xahar successiv. Huwa stipulat ukoll illi t-terminu massimu ghall-pagament tal-ammont dovut fuq il-kuntratt huwa ta` sitta u tletin xahar, li jibdew jiddekorru mill-1 ta` Marzu 2011. Ie-certifikat li ghalih issir referenza fil-klawzola 4(b) aktar `l fuq inhareg fl-4 ta` Frar 2013 (kopja annessa u mmarkata `Dok.PCL2`).

Addizzjonalment, ir-raba` klawzola tistipula illi f`kaz ta` nuqqas tal-hlas ta` zewg pagamenti konsekuttivi jew l-ekwivalenti ta` zewg pagamenti, kwalunkwe ammont iccertifikat isir cert, likwidu u dovut u jintilef il-beneficcu tal-hin.

4. *Il-valur finali tax-xoghlijiet kien ta` zewg miljuni mija u sebgha tletin elf hames mija sebgha u sittin Ewro u sitta u tmenin centezmu (€2,137,567.86), li jinkludi xoghlijiet addizzjonali ta` mitejn u sbatax-il elf mija u sittax Ewro u disgha u erbghin centezmu (€217,116.49).*

5. *Sad-data ta` dan ir-rikors, is-socjeta` intimata effewat is-segweni pagamenti:*

<i>Data</i>	<i>Ammont (€)</i>
<i>09/06/2011</i>	<i>192,045.14</i>
<i>12/10/2011</i>	<i>36,808.65</i>
<i>12/10/2011</i>	<i>111,541.36</i>
<i>30/12/2011</i>	<i>36,808.00</i>
<i>20/02/2012</i>	<i>74,360.00</i>
<i>30/03/2012</i>	<i>74,353.00</i>
<i>04/05/2012</i>	<i>74,360.00</i>
<i>22/06/2012</i>	<i>37,180.00</i>
<i>Total</i>	<i>637,456.15</i>

6. *Wara l-pagament tat-22 ta` Gunju 2012, ma sar l-ebda pagament ulterjuri mis-socjeta` intimata lis-socjeta` rikorrenti.*

7. *Is-socjeta` rikorrenti ghamlet diversi talbiet ghall-hlas izda s-socjeta` intimata baqghet inadempjenti. Intbaghtu diversi ittri (anki b`mezzi elettronici) sa mis-27 ta` April 2013 (kopji annessi u mmarkati `Dok.PCL3` sa `Dok.PCL8`), inkluz ittra ufficjali (kopja annessa u mmarkata `Dok.PCL9`).*

8. *Kif inhu ovvju mill-fatt li l-hlasijiet dovuti lis-socjeta` rikorrenti (li jammontaw ghas-somma kbira ta` €1,501,113.23) huma sena tard u kif ser jigi ppruvat ulterjorment waqt is-smigh ta` dawn il-proceduri, is-socjeta` intimata ma tistax thallas id-djun taghha. F`dan ir-rigward qed jigu annessi kopji tal-kontijiet tas-socjeta` intimata mis-sena 31 ta` Dicembru 2008 sas-sena 31 ta` Dicembru 2012, u mmarkati `Dok.PCL10` sa `Dok.PCL14`. Il-kontijiet ghas-sena 2012 (Dok.PCL14, pagna 4) juru li s-socjeta` intimata hija cash insolvent :*

(D.A. Holdings Limited tidher li hi balance sheet solvent. Imma dan hu biss għaliex il-proprjeta` tidher li giet `revalued` b`€20,754,704. Kemm hi rejalistika din ir-revalutazzjoni hi kwistjoni li m`hemmx għalfejn wiehed jidhol fiha billi hu car li D. A. Holdings Limited ma tistax thallas id-djun taghha meta jigu dovuti) :

l-assi kurrenti jammontaw ghal zewg miljuni sitt mija u wiehed u hamsin elf tmin mija tlieta u ghoxrin Ewro (€2,651,823) filwaqt illi l-current liabilities jammontaw ghal hames miljuni mija u tnejn u tmenin elf erba` mija disgha u tmenin Ewro (€5,182,489). Ghalhekk hemm deficit ta` madwar zewg miljuni u nofs Ewro. Barra minn hekk, fis-sena 2012, is-socjeta` intimata sofriet telf ta` tlett miljuni disa` mitt elf tmien mija tlieta u erbghin Ewro (€3,900,843), qabza sostanzjali mit-telf sostnut fis-sena precedenti ta` sitt mija wiehed u sittin elf hames mija erbgha u ghoxrin Ewro (€661,524).

8. *Is-socjeta` intimata qiegghda u ilha fi stat ta` insolvenza u dan kif jafu, jew ghandhom ikunu jafu, d-diretturi taghha.*

Htiega ta` amministratur

9. *Il-kapital tas-socjeta` intimata hu l-ammont mizeru ta` tlieta u ghoxrin elf u tlett mitt Ewro (€23,300). Dan hu dak li investew – jekk wiehed jista` juza dan it-terminu ghal ammont irrizorju – l-azzjonisti, li huma effettivament ukoll id-diretturi.*

10. *Il-finanzjament tal-kumpannija, b`mod partikolari l-bini tal-kumpless maghruf bhala Daniel`s u t-telf li sar s`issa, sar bi flus il-banek u, minghajr ma kienu jafu, mill-kredituri, bhas-socjeta` rikorrenti. Tant hu hekk li d-diretturi issa qed jippretendu li s-socjeta` rikorrenti tikkonverti t-termini*

gosra moghtija ghal hlas f`termini applikabbli f`kaz ta` self minn bank. Kif jirrizulta mill-email datata 18 ta` Novembru 2013 (Dok.PCL6), id-diretturi qed jipproponu li jhallsu lis-socjeta` rikorrenti sas-sena 2020. Dan mhux biss mhux accettabbli imma juri li, meta dahlu fil-kuntratt, id-diretturi kienu jafu li ma setghux ihallsu fil-hin, hbew dan mis-socjeta` rikorrenti biex, wara t-tlestija tax-xoghlijiet jimponu termini ta` hlas godda ghaliex, f`dak l-istadju s-socjeta` rikorrenti kien ser ikollha taccetta.

11. *L-istess individwi li mxew b`dan il-mod ghadhom qed imexxu l-kumpannija u jgieghluha tinkorri telf sostanzjali. Parti mhux zghira ta` dan it-telf qed imur f`buthom, fil-forma ta` salarju, management fees jew arrangamenti simili. Ghandhom ghalhekk kull interess mhux biss li ma jhallsux lis-socjeta` rikorrenti imma ukoll li jtawwlu l-kontroll taghhom tas-socjeta` intimata.*

12. *Hu ghal dawn ir-ragunijiet, fost ohrajn, li qed tintalab il-hatra ta` amministratur provvizorju.*

Ghaldaqstant, abbazi tas-suespost, is-socjeta` rikorrenti titlob li din l-Onorabbli Qorti joghgobha :

1. *Tahtar amministratur provvizorju sabiex jamministra l-affarijiet tas-socjeta` intimata u dan taht dawk id-dispozizzjonijiet kollha li din l-Onorabbli Qorti jidhrilha opportun li taghti ;*

2. *Tiddikjara illi s-socjeta` intimata ma tistax thallas id-djun taghha ai termini ta` l-artikolu 214(2)(a)(ii) u l-artikolu 214(5) tal-Kap.386 tal-Ligijiet ta` Malta ; u*

3. *Tordna x-xoljiment u l-istralc tas-socjeta` intimata ai termini ta` l-artikolu 214(2)(a)(ii) tal-Kap.386 tal-Ligijiet ta` Malta u taghti kull provvediment opportun sabiex jinhatar stralcjarju ghall-istralc tas-socjeta` intimata ai termini tal-Kap.386 tal-Ligijiet ta` Malta.*

Bl-ispejjez u b`rizerva ghal kwalsiasi azzjoni ulterjuri spettanti lis-socjeta` rikorrenti.

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

Rat ir-risposta li pprezentat is-socjeta` ntimata fl-10 ta` Lulju 2014 li taqra hekk :-

1. *Illi fl-ewwel lok is-socjeta` rikorrenti trid iggib prova tal-kreditu taghha u dan peress illi l-istess ammont vantat gie ripetutament ikkontestat mill-esponenti minhabba diversi lanjanzi da parti tal-esponenti dwar xoghol mhux komplut (ara snag list Dok 1) ;*

2. *Illi minghajr pregudizzju ghas-suespost lanqas l-istess allegat kreditur rikorrenti ma hu car dwar il-valur li qed jippretendi u fil-fatt isemmi il-valur ta` €1,501,113.23 (fil-bidu), ammont totali ta` xoghol ta` €1,920,451.37) (paragrafu 2) u fil-paragrafu 4 jsemmi valur finali ta` €2,137,567.86. Mkien lanqas ma jikkonferma l-fatt illi dan l-ammont huwa cert, likwidu u dovut. Di fatti lanqas ma hemm certificate of full completion mahrug mill-inginier rilevanti ;*

3. *Minghajr pregudizzju ghas-suespost il-kawza odjerna hija frivola u vessatorja stante li la jezisti xi titolu ezequttiv u lanqas ma hemm sitwazzjoni ta` insolvenza kif mehtieg tassativament ai termini tal-artikolu 214(5) tal-Kap 386 tal-Ligijiet ta` Malta ;*

4. *Illi minghajr pregudizzju ghas-suespost hija s-socjeta` rikorrenti li qeghda intenzjonalment tinterspreta erronjament il-kontabilita` tas-socjeta` sabiex tipprova tohloq sitwazzjoni ta` insolvenza meta din ma tezistix. B` riferenza ghall-premessi 8 u 9 jigi rilevat illi kontra dejn ta` circa €14,000,000 (anke jekk €10,000,000 jiskadu fuq medda ta` 10 snin ohra) jezistu assi (Daniel`s Complex u l-appartament) b`valur cost price ta` €15,000,000 u bi potenzjal ta` market value ta` circa €35,000,000. Inoltre s-socjeta` rikorrenti taf ben tajjeb illi l-valur tal-assi kurrenti indikat bhala €2,651,823 huwa l-cost price tal-appartamenti u penthouses sabiex inbnew flimkien ma` receivables ohra. Il-cost price ma huwiex is-sale price. Ghalhekk jirrizulta illi l-valur reali tas-suq tal-assi kurrenti huwa dak ta` €6,200,000 (appartamenti*

li jinbieghu €4,800,000 oltre l-assi kurrenti l-ohra valutati €1,300,000) kontra current liabilities ta' €5,182,489. Fi kliem iehor is-socjeta` esponenti hija ben grad li thallas id-djun taghha. Inltre jirrizulta illi l-istess socjeta` esponenti qeghda fil-fazi li tbiegh dawn l-appartamenti sabiex ikollha likwidita` fil-valur ta' €4,800,000 fl-immedjat vicin. Jirrizulta ghalhekk illi l-premessi u talbiet tas-socjeta` attrici huma intenzjonati sabiex jikkawzaw hsara lis-socjeta` esponenti (ara accounts Dok 2 u valuation tal-appartamenti Dok 3) ;

5. Illi minghajr pregudizzju ghas-suespost, kuntrarjament ghal dak allegat fil-hames (5) u sitt (6) paragrafi baqghu jsiru pagamenti mis-socjeta` esponenti lil terzi inkluz lis-socjetajiet ohra relatati mas-socjeta` attrici (ara Dok 4) ;

6. Illi minghajr pregudizzju ghas-suespost, kuntrarjament ghal dak allegat fis-seba` (7) paragrafu, kienet is-socjeta` esponenti li pproponiet repayment programme ghall-pagament ta` xi kreditu (mhux dak vantat mis-socjeta` attrici) u dan wara li s-socjeta` esponenti kellha ftit waqfien fl-operat minhabba l-fatt illi l-bank li maghha l-esponenti kellha l-facilitajiet bankarji kienet fi process ta` takeover minn bank iehor. Kienet is-socjeta` attrici li rrifjutat dan il-programm ta` pagament. Issa ma tistax is-socjeta` attrici tilmenta min-nuqqas ta` pagament wara li hi stess irrifjutat offerta jew proposta ta` hlas;

7. Illi ma hemmx htiega ta` xi amministratur provizorju stante illi l-business plan adottat mid-diretturi kif ser ikun ipprezentat u spjegat fil-mori ta` dawn il-proceduri ser juri kif is-socjeta` attrici, minkejja d-diffikultajiet li kellha, qeghdin jagixxu prudentament, korrettament fl-ahjar interessi tal-kumpannija u l-kredituri ;

8. Illi mhux minnu illi d-diretturi kienu jafu li ma setghux ilahhqu mal-pagamenti. Il-fatt huwa illi fil-bidu tal-operazzjoni taghhom huma twaqqfu f'certu aspetti mill-operat taghhom peress illi l-bankiera taghhom kienu fi process ta` takeover. Dan ikkontribwixxa ghal retard ta` sentejn b`kummerc batut u b`introjtu baxx ;

9. Illi b`riferenza ghall-paragrafu 11, jekk is-socjeta` attrici ma kinitx lesta taccetta programm ta` pagamenti mifruq fuq 6 snin messha nfurmat lis-socjeta` esponenti b`dan, u mhux tibqa` siekta u tintavola din il-procedura li hija ntenzjonta BISS sabiex taghmel pressjoni indebita fuq is-socjeta` esponenti sabiex tithallas HI L-EWWEL qabel kredituri ohrajn ;

10. *Illi b`riferenza ghall-paragrafu 12, jigi sottomess li dan huwa totalment frivolu. Id-diretturi ghandhom kull dritt jippercepixxu salarju kif kieku jkun intitolat kull amministrator provizorju. Huwa sintomatiku illi ma hemm ebda riferenza ghas-salarju ta` direttur jew xi kumment li dan huwa eccessiv. Dan jinghad peress illi kuntrarjament ghall-insinwazzjonijiet malizzjuzi tas-socjeta` attrici effettivament iz-zewg (u mhux xi battaljun diretturi) jiehdu salarju diskret ghax-xoghol li jwettqu ghall-progett taghhom li ghexuh u jriduh jirnexxi ;*

11. *Illi jirrizulta illi l-premessi u talbiet tas-socjeta` attrici huma kollha nfondati fil-fatt u fid-dritt u fuq kollox immotivati minn malizzja sabiex tkun abuzata l-procedura fallimentari ghal skop wiehed biss : li ssir pressjoni fuq is-socjeta` esponenti thallas lis-socjeta` attrici l-ewwel, f`qasir zmien, a skapitu ta` kredituri ohrajn anke dawk pregradwati ghalaha. Jidher illi s-socjeta` attrici issa lanqas hi ma trid tirrispetta l-iskaletta tal-hlas minkejja li l-kreditu taghha jidher li huwa kkontestat. Fuq kollox dawn il-proceduri huma intempestivi ;*

12. *Ghal dawn ir-ragunijiet it-talbiet attrici ghandhom ikunu michuda bl-ispejjez kontra taghhom.*

Rat id-dokumenti li kienu prezentati mar-risposta.

Rat illi fl-udjenza tat-30 ta` Settembru 2014, id-difensur tas-socjeta` rikorrenti ddikjara illi l-istanza tas-socjeta` rikorrenti qeghda ssostni li s-socjeta` ntimata ma tistax thallas id-djun taghha abbazi tal-Art 214(5)(b) tal-Kap 386.

Rat id-digriet li tat fl-istess udjenza fejn innominat lill-Awditur Kevin Mahoney, bl-assistenza tal-Av. Richard Galea Debono, sabiex jisimghu l-provi tal-partijiet u jistabilixxu jekk il-kumpannija ntimata tistax jew le thallas id-djun taghha tenut kont tal-passiv kontingenti u prospettiv taghha skont l-Art 214(5)(b) tal-Kap 386.

Rat ix-xiehda bl-affidavit ta` Angelo sive` Lino Callus, Henry Attard u John Bugeja ; rat ukoll id-dokumenti li kienu annessi mal-affidavit ta` Angelo sive` Lino Callus.

Rat id-dokumenti li pprezenta b`gurament David Agius, direttur tas-socjeta` ntimata, fl-udjenza tat-13 ta` Ottubru 2014.

Rat id-digriet li tat fl-udjenza tat-23 ta` Ottubru 2014 fejn irrevokat l-inkariku tal-Av. Dr. Richard Galea Debono, li kien sostitwit bl-Av. Dr. Louis Cassar Pullicino. Fil-kors tal-kawza, miet l-Awditur Kevin Mahoney, u l-Av. Dr. Louis Cassar Pullicino kompla bl-inkariku wahdu.

Rat digriet iehor illi tat fl-udjenza tat-23 ta` Ottubru 2014 fejn hatret lill-Av. Dr. Richard Galea Debono bhala Amministratur Provvizorju tas-socjeta` ntimata.

Rat il-verbal tal-udjenza tal-20 ta` Ottubru 2015 fejn jirrizulta illi l-Amministratur Provvizorju *m`ghandu ebda diffikulta` ta` xejn li jiddikjara li l-kumpannija D.A. Holdings Limited m`hijiex f`qaghda li thallas id-djun taghha a tenur tal-Art 214(5)(b) tal-Kap 386.*

Semghet ix-xiehda ta` l-Av. Dr. Richard Galea Debono, ta` Manuel Castagna, tal-Perit James Farrugia, fl-udjenza tal-15 ta` Dicembru 2015 u rat id-dokumenti li kienu prezentati fil-kors tal-udjenza.

Rat ir-relazzjoni li pprezenta l-perit legali u li l-kontenut taghha kkonferma bil-gurament tieghu fl-udjenza tas-26 ta` Jannar 2016.

Rat l-atti tal-perizja li kienu prezentati flimkien mar-relazzjoni peritali.

Rat id-digriet li tat fl-udjenza tal-11 ta` Frar 2016 fejn halliet il-kawza ghal provvediment ghal-lum *in difett ta` ostakolu.*

Rat l-atti l-ohra tal-kawza.

II. Id-djun tas-socjeta` ntimata (fil-qosor : DAH)

Fir-relazzjoni tieghu, il-perit legali jaghmel riassunt tal-provi dwar il-kreditu kontra s-socjeta` ntimata.

In partikolari, il-perit legali jaghmel dawn ir-rilievi :-

1) Dwar il-kreditu ta` Panta Contracting Limited (fil-qosor : PCL) kontra DAH, il-perit legali jghid hekk :-

Illi jirrizulta mill-provi illi PCL ikkuntrattat ma` DAH fl-14 ta` Frar 2011 fejn effettivament intlahaq ftehim dwar xogholijiet u servizzi mekkanici u ta` elettriku.

Illi l-valur originali tal-kuntratt kien jammonta ghal Eur 1,920,451.37, liema valur zdied bis-somma ta` Eur 217,116.40 minhabba xogholijiet addizzjonali li gew ezegwiti minn PCL fuq talba ta` DAH, b`kollox ghalhekk il-valur tax-xoghol mwettaq minn PCL kien jammonta ghal Eur 2,137,567.86.

Illi l-pagamenti li saru minn DAH lil PCL b`kollox jammontaw ghal Eur 637,456.15 b`dan illi l-bilanc tal-kreditu dovut lil PCL jammonta ghal Eur 1,500,111.71.

Illi skont ir-raba` klawsola tal-kuntratt imsemmi, gie pattwit illi l-pagamenti kellhom isiru bil-modalitajiet segwenti :-

a) Twelve (12) Monthly progress Payments against Engineer`s Certificate valued at 33% of the Engineer`s Certificate.

b) Total remaining 67% of Engineer`s Certificate Payable in 24 (twenty-four) Monthly Payments following issue of Practical Completion Certificate by the Engineer.

Illi a tenur tar-raba` klawsola tal-imsemmi kuntratt DAH obligat ruhha li thallas pagamenti mensili ta` Eur 53,350 bl-ewwel pagament li jsir fl-1 ta` Marzu 2011 u dan tul medda ta` sitta u tletin xahar u li f`kaz li DAH tonqos li thallas zewg pagamenti konsekuttivi jew l-ekwivalenti ta` zewg pagamenti, kull ammont iccertifikat isir cert, likwidu u dovut u konsegwentement DAH tidedkadi mill-beneficcju tat-terminu.

Illi c-certikat kontemplat fil-klawsola 4 (b) tal-kuntratt inhareg fl-4 ta` Frar 2013. F`dan ic-certifikat mahrug minn Engineering Services Ltd jinghad illi :-

In virtue of a contract entered into between Panta Contracting Ltd and Daniel`s Shopping Complex, Hamrun, made on the 14th February 2011, WE HEREBY CERTIFY that this contract has been practically completed.

The final acceptance certificate will be issued after all the installations are completed, handed over, documented and all snags rectified.

DAH ma ghamlet l-ebda pagament lil PCL wara t-22 ta` Gunju 2012.

Illi fir-risposta taghha, DAH teccepixxi illi l-kreditu ta` PCL gie ripetutament ikkuntestat minhabba diversi lanjanzi dwar xoghol mhux komplut u dan b`riferenza ghal xogholijiet indikati fi snag list annessa mal-istess risposta markata bhala Dok. 1.

Illi apparti li l-kuntratt kif gja indikat kien strutturat b`mod illi l-kreditu dovut lil PCL skatta mal-hrug tac-certifikati tal-inginerja a tenur tar-raba` klawsola u jirrizulta sodisfacentement illi tali certifikazzjoni inharget debitament, DAH lanqas issostanzjat din l-eccezzjoni taghha bl-ahjar prova.

Fuq kollox minn dak li jirrizulta u b`mod partikolari il-korrispondenza skambjata bejn il-partijiet (ara dokumenti PCL 3 sa` PCL 8 annessi mar-rikors promotur), il-problema li nqalghet tirrizulta kjarament li kienet wahda ta` nuqqas likwidita ta` DAH u li kontinwalment kienet qed tipprova takkwista finanzjament addizzjonali mill-bank u wara xi zmien bdew iweghda lil PCL li kienu ser ibieghu numru ta` appartamenti bil-ghan li mbaghad ihallsu lil PCL. Sussegwentement u wara li ghaddha aktar zmien u diversi proposti gew rifjutati, kien hemm anke indikazzjoni li jinbiegh il-progett kollu. Issir riferenza b`mod partikolari ghal-proposti avanzati minn David

Agius, direttur ta` DAH, lil Henry Attard permezz ta` email datata 18 ta` Novembru 2013 (Dok. PCL 6) u li fiha ghalkemm issir riferenza ghal xi xogholijiet li kienu ghadhom ma sarux, hemm rikonoxximent car u esplicitu da parti ta` David Agius tal-obbligi li kellha DAH fil-konfront ta` PCL. Steven Delicata jaghmel accenn ghal dawn ix-xogholijiet fl-affidavit tieghu b` dan il-mod :-

“Unfortunately in the months following the opening of the complex, many works carried out by PANTA GROUP were not operational or delivered as agreed (particularly lifts and elevators, generators etc). An Engineer`s report was drafted and has already been presented to this Court. See exhibit (A).”

Similment xehed Charles Camilleri li jaghmel riferenza ghal fatt illi kien hemm hames lifts li ghadhom ma gewx stallati u li hemm xi xogholijiet zghar ohra li ma gewx kompletati.

Izda anke jekk jirrizultaw xi aspetti relattivament zghar mix-xogholijiet kuntrattati li ma gewx kompletati ghal kollox, ma jidhirx illi dawn innuqqasijiet kienu ta` xi valur sostanzjali jew b`xi mod materjali. Aktar importanti minn hekk u kif anke spjegat aktar qabel, ma tirrizultax xi inadempjenza kuntrattwali da parti ta` PCL fis-sens li una volta saret ic-certifikatazzjoni stipulata fil-kuntratt, DAH kienet obbligata thallas lil PCL.

Illi kif xehed Lino Callus fl-affidavit tieghu, liema xhieda ma giet bl-ebda mod kuntradetta :-

“Dak li pprezentaw bhala `snag list m`hi xejn aktar minn Handover Plan tal-progett li kienet ippreparata mill-projects department ta` PCL – certament m`hijiex snag list. Barra minn hekk, PCL ghandha fil-pussess taghha Certificates of Take Over / Acceptances (Dok. LC1 ma` dan l-affidavit) iffirmati fir-rigward tas-sistemi mekkanici u ta` elettriku. Kwalunkwe snag li seta` kien hemm hija nnotata f`dawn ic-certifikati. Inzid li hija prassi fl-industrija taghna illi snag list tigi redatta mal-practical completion ta` progett – din tipikament tikkonsisti f`diffikultajiet jew inkonvenjenzi minuri u li jridu jigu indirizzati mill-kuntrattur u li, fi kwalunwe kaz, ma jimpedux li l-progett jittiehed f`idejn il-klijent, kif gara fil-kaz prezenti. L-ezistenza ta` snags (li minnhom dejjem ikun hemm) ma taffetwax l-obbligu tal-hlas. Tfisser biss li l-kuntrattur irid jirrimedjahom tul il-perjodu kontemplat fil-kuntratt wara l-practical completion.”

Illi fid-dawl tal-premess l-esponent huwa sodisfatt illi PCH ghandha kreditu fil-konfront ta` DAH fis-somma ta` Eur 1,500,111.71 u kwindi gie sodisfatt l-ewwel rekwizit sabiex tigi istitwita procedura li tista` twassal ghal xoljiment u stralc taht l-ordni tal-Qorti u cioe li s-socjeta istanti PCL hija kreditur tas-socjeta DAH.

2) Dwar il-kreditu ta` Mediterranean Corporate Bank Limited (fil-qosor : MCBL) kontra DAH, il-perit legali jghid hekk :-

Illi permezz tal-affidavit tieghu, Charles Cini, Kap Ezekuttiv tal-istess Bank spjega fid-dettal il-kreditu tal-istess Bank fil-konfront ta` DAH. Huwa kkonferma illi Mediterranean Corporate Bank Ltd gja maghruf Volksbank Malta Limited kien ta b`self lil DAH s-segwenti ammonti :-

(a) Eur 5,800,000.00 permezz ta` kuntratt fl-atti tan-Nutar Dottor Pierre Attard tad-29 ta` Ottubru 2008 u Credit Agreement datat 16 ta` Mejju 2008 kif emendat b`First Amendment datat 31 ta` Awwissu 2009, Second Amendment datat 26 ta` April 2011 u Third Amendment datat 22 ta` Marzu 2012 ;

(b) Eur 700,000.00 permezz ta` kuntratt fl-atti tan-Nutar Anthony Grech Trapani tat-3 ta` Settembru 2009 u Credit Agreement datat 31 ta` Awwissu 2009 kif emendat bi First Amendment datat 26 ta` April 2011 u Second Amendment datat 22 ta` Marzu 2012 ;

(c) Eur 2,500.000.00 permezz ta` kuntratt fl-atti tan-Nutar Rachel Busuttil tat-12 ta` Ottubru 2011 u Credit Agreement datat 26 ta` April 2011 kif emendat b`First Amendment datat 22 ta` Marzu 2012.

Illi dan is-self kien kawtelat b`garanziji personali moghtija minn David Agius, Stephen Delicata u Mary Grace Delicata.

Illi sad-data tal-31 ta` Ottubru 2015i d-dejn kollu kien jammonta ghal Eur 11,084,522.00 kwantu ghal Eur 9,000.000.00 bhala kapital, Eur 2,076,709.74 bhala imghax u Eur 7,812.26 bhala spejjez legali u dan apparti imghaxijiet ulterjuri li jakkrexxu sal-pagament effettiv.

Illi apparti l-fatt illi DAH naqset lil thallas l-ammonti minnha dovuti lil Mediterranean Corporate Bank, irrizultaw ukoll diversi inadempjenzi fl-obbligi assunti a favur tal-Bank, inkluz nuqqas li jissottomettu Management Accounts, Audited Financial Statements ghas-snin li ghalqu fl-31 ta` Dicembru 2012 u 31 ta` Dicembru 2013, lista ta` kirjiet fil-kumpless, prova ta` hlas ta` kontijiet ta` dawl u l-ilma, kontribuzzjonijiet socjali, taxxa fuq il-qliegħ u taxxa fuq il-valur mizjud.

Illi ma saret l-ebda prova da parti ta` DAH li b`xi mod tikkontesta dan il-kreditu.

Illi minkejja diversi interpellazzjonijiet u laqghat, DAH baqghet inadempjenti u ghalhekk jirrizulta ppruvat il-kreditu pretiz minn Mediterranean Corporate Bank Ltd fl-ammont ta` Eur 11,084,522.00 oltre imghax ulterjuri mill-31 ta` Ottubru 2015 sad-data tal-pagament effettiv fuq il-kapital ammontanti ghal Eur 9,000,000.00.

3) Dwar il-kreditu ta` Xuereb Installations Limited (fil-qosor : XIL) kontra DAH, il-perit legali jghid hekk :-

Illi permezz ta` affidavit ta` Frank Xuereb, irrizulta illi s-socjeta Xuereb Installations Limited kienet giet inkarigata minn DAH sabiex tagħmel xogħolijiet estensivi fil-kumpless Daniel`s Shopping Complex. In segwitu tax-xogħolijiet esegwiti skont kif kkuntrattata permezz ta` kuntratt ta` appalt, l-imsemmija socjeta għandha kreditu fil-konfront ta` DAH fis-somma ta` Eur 77,751.05 oltre imghaxijiet u spejjez.

4) Dwar il-kreditu ta` Tal-Herba Group Limited (fil-qosor, THGL) kontra DAH, il-perit legali jghid hekk :-

Illi b`affidavit ta` Anthony Spiteri irrizulta illi Tal-Herba Constructions Limited kienet giet inkarigata minn DAH sabiex tibni l-progett magħruf bhala Daniel`s Shopping Complex u liema kuntratt ta` appalt igib d-data tal-5 ta` Frar 2009. Permezz ta` skrittura tas-17 ta` Dicembru 2010, Tal-Herba Construction Limited assenjat id-drittijiet tagħha lil Tal-Herba Group Limited u dan anke bil-kunsens ta` DAH.

Illi jirrizulta kreditu ta` Eur 900,000.00 li gie anke kawtelat bl-iskrizzjoni ta` privilegg Numru 229 registrat fil-5 ta` Jannar 2012 oltre kreditu iehor ta` Eur 551,649.70, b`kollox ghalhekk Eur 1,451,649.70, minn liema kreditu kienu nhargu kambjali sabiex ikopru s-somma ta` Eur 354,999.90 u liema kambjali gew rezi titolu ezekuttiv permezz ta` ittri ufficcjali datati 2 ta` Settembru 2013, 3 ta` Marzu 2014, 17 ta` Settembru 2014 u 7 ta` Jannar 2015.

Illi fl-udjenza quddiem il-Qorti tal-15 ta` Dicembru 2015 gie prodott il-Perit James Farrugia li huwa l-perit ta` Tal Herba Group Limited u li kkonferma illi il-valur tal-progett kollu kien jammonta approssimittavment ghal Eur 6,850,000.00 li minnhom thallsu Eur 5,400,000.00 u baqa` bilanc ta` Eur 1,450,000 u liema bilanch ghadu dovut.

5) Krediti ohra kontra DAH

a) Perit Dr Edwin Mintoff

Il-Perit Mintoff huwa kreditur ta` DAH fl-ammont ta` €283,478.53, bilanc ta` l-hlas ghal drittijiet u spejjez professjonali ghal xogholijiet li saru fid-Daniel`s Shopping Complex. Dan il-kreditu huwa kawtelat permezz ta` ipoteka legali specjali Nru 18534/2014.

b) Aluserv Limited (C16207)

Jidher li din is-socjeta` ghamlet xoghol ta` aperturi b`inkariku ta` DAH. Dettalji tal-kreditu ma gewx ipprovdu.

c) Rabie Maloul

Dan l-individwu ghamel xoghol ta` kisi go Daniel`s Shopping Complex b`inkariku ta` DAH. Il-kreditu tieghu jammonta ghal €100,000. Tirrizulta skrittura ta` kostituzzjoni ta` debitu minn DAH datata 7 ta` April 2014 ; kif ukoll l-iskrizzjoni ta` privilegg bin-Nru 5549/2104 fl-14 ta` April 2014.

III. Dritt

Qabel tghaddi sabiex tqis il-mertu, il-Qorti jidhrilha li jkun opportun jekk taghmel analizi ta` d-disposizzjonijiet li, fil-fehma taghha, huma attwali u rilevanti ghall-vertenza.

1) L-Art 218(1) tal-Kap 386

Riferibbilment ghall-mertu tal-kaz, persuna li tkun trid titlob ix-xoljiment u l-istralc ta` kumpannija, trid toqghod ghal dak li jipprovdi l-Art 218(1) tal-Kap 386 li jaqra hekk –

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

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

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

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

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

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

Fil-kaz tal-lum, ir-rikorrenti PCL mexxiet bl-istanza tax-xoljiment u tal-istralc tal-intimata DAH ghaliex fir-rikors promotur tikkontendi illi hija kreditur tal-istess.

Fil-kors ta` dan il-procediment, PCL gabet il-prova li hija kreditur ta` DAH u ghalhekk ghandha *locus standi* sabiex tippromwovi l-azzjoni.

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

B`din id-disposizzjoni, il-ligi taghti lill-Qorti diskrezzjoni li xxolji u tistralcja kumpannija *jekk il-kumpannija ma tkunx tista` thallas id-djun taghha.*

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

Tnejn huma c-cirkostanzi definiti fil-ligi :-

(a) jekk id-dejn dovut mill-kumpannija jkun baqa` ma thallasx ghal kollox jew f`parti wara erbgha 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-kumpannija ma tkunx tista` thallas id-djun taghha, meta din tqis ukoll il-passiv kontingenti u prospettiv tal-kumpannija.

Jirrizulta illi r-rikorrenti qeghda tikkontendi illi l-intimata ghandha tkun xjolta u stralcjata ghaliex ma tistax thallas id-djun taghha abbazi tal-Art 214(5)(b) tal-Kap 386.

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

Il-Qorti tirrileva illi meta tfassal il-mudell ghal-ligi taghna l-gdida dwar il-kumpanniji, sabiex tiehu post il-Commercial Partnerships Ordinance 1962, il-qafas maghzul kien dak tal-Companies Act Ingliza 1985.

Fil-ligi Ingliza, ix-xoljiment u l-istralc ta` kumpanniji kien trattat permezz ta` legislazzjoni *ad hoc* u cioe` l-Insolvency Act 1986. Meta sar l-Att XXV tal-1995 dwar il-Kumpanniji, ix-xoljiment u l-istralc kienu integrati permezz ta` disposizzjonijiet fl-Att stess.

Kif diga` accennat, li *kumpannija ma tkunx tista` thallas id-djun taghha* ghandu **sinjifikat preciz u definit** fil-ligi taghna.

Fil-ligi Ingliza, il-posizzjoni hija aktar wiesgha. Il-koncett ta` insolvenza fil-kaz 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”) ...

Dan premiss, il-Qorti sejra tghaddi ghall-konsiderazzjoni tal-Art 214(5)(b) tal-Kap 386.

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

For the purposes of subarticle (2)(a)(ii), a company shall be deemed to be unable to pay its debts ...

if it is proved to the satisfaction of the court that the company is unable to pay its debts, account being taken also of contingent and prospective liabilities of the company.

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

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

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

IV. Divergenzi

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

Id-divergenza bejn iz-zewg legislazzjonijiet hija li filwaqt li fil-kaz taghna l-mizura hija semplici : u cioe`

the company is unable to pay its debts account being taken also of contingent and prospective liabilities of the company.

Fil-kaz tal-ligi Ingliza, il-kriterju huwa divers ghaliex il-Qorti tkun trid tqis illi :

the value of the company`s assets is less than the amount of its liabilities ...

billi tiehu kont tal- ... *contingent and prospective liabilities.*

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

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

V. Dottrina

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

Bid-debiti riservi, u tenut kont tad-disparita` fid-disposizzjonijiet ta` bejn il-ligi Ingliza u dik taghna, il-Qorti sejra tirreferi ghal dak li tghid id-

dottrina Ingliza dwar dak li huwa maghruf bhala ***balance sheet insolvency*** meta abbinat mal-**Art 123(2)** tal-Insolvency Act 1986 tar-Renju Unit.

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

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

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

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

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

Fil-Pag 130 ikompli hekk –

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

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

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

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

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

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

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

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

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

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

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

... it has been described ... as unmatured liability which will inevitably ripen into a debt with the passage of time. Such a definition encompasses all forms of debitum in praesenti, solvendum in futuro including an indisputable claim for unliquidated damages which remains only to be quantified and will

result in a debt far more than a nominal amount. "Prospective liability" thus embraces both future debts, the sense of liquidated sums due, and unliquidated claims.

VI. Konsiderazzjonijiet tal-Qorti

Fir-relazzjoni, il-perit legali jagħmel din l-analizi tal-qagħda finanzjarja ta` DAH abbazi tar-risultanzi processwali :

Illi fl-ewwel lok ssir riferenza għall-kontijiet awditjati ta` DAH għas-snin 31 ta` Dicembru 2008 sas-sena 31 ta` ta` Dicembru 2012 li gew esebiti mar-rikors promotur ta` PCL u markati rispettivament Dok PCL 10 sa PCL 14. Illi mill-kontijiet tas-sena li għalget fil-31 ta` Dicembru 2012 jirrizulta li l-assi kurrenti ta` DAH jammontaw għal Eur 2,651,823 mentri l-current liabilities jammontaw għal Eur 5,182,489. Inoltr fl-istess sena finanzjarja DAH għamlet telf ta` Eur 3,900,843.00, zieda sostanzjali fuq it-telf li kienet sofreit fis-sena precedenti fl-ammont ta` Eur 661,524.00. B`kuntrast ma` dan, pero`, għandu jingħad ukoll illi mill-istess kontijiet għas-sena 2012, il-balance sheet turi sitwazzjoni solventi in kwantu l-passiv ma jeccedix l-attiv. Jidher in fatti minn Note 5 fl-istess kontijiet illi l-valur tal-proprjeta ossia l-kumpless gie awmentat bis-somma ta` Eur 20,754,704 għas-somma komplessiva ta` Eur 30,000.000.00.

Illi dwar il-valur tal-proprjeta appartenenti lil DAH xehed Manwel Castagna, li huwa socju fid-ditta ta` awdituri NEXIA BT, awdituri ta` DAH, li kkonferma illi l-aħhar kontijiet li saru kienu proprju daww għas-sena 2012 u li l-kontijiet għas-snin 2013 u 2014 ma sarux sa` issa billi ntalbet stima gdida mill-istess ditta ta` awdituri u dan peress illi l-valur mogħti lill-proprjeta fil-kontijiet kien bazat fuq il-fair value u mhux fuq l-ispiza. Il-valur mogħti fil-kontijiet ta` 2012 kien bazat fuq stima ta` perit u mhux a bazi ta` xi stima li saret appositament mill-awdituri u dan minhabba l-fatt li kienu nbdew proceduri legali kontra DAH u b`hekk inbidlu c-cirkostanzi u dan minhabba l-fatt illi kien aktar probabbli li l-proprjeta tinbiegh fuq ordni tal-Qorti u mhux permezz ta` bejgh volontarju.

Mistoqsi sabiex jiddeskrivi l-istat finanzjarju ta` DAH, Castagna ikkonferma illi :-

“Ara fir-rigward tal-audited financial statements tal-2012, ghaliex dawk huma finalzzati u esprimejna opinjoni fuqhom, ahna hassejna illi bl-assi li kellha l-kumpannija, inkluz l-immobbli, li dan kien valutat Eur 30,000,000, jekk l-immobbli jinbiegh ikun hemm biex jithallas kulhadd, dik kienet dak il-prezz, imma jigifieri jekk, forsi jekk nista nirreferi ghal-balance sheet.”

Castagna kompli jghid illi DAH ma kellhiex flus bizzzejjed biex thallas il-kredituri taghha kif u meta jsiru dovuti l-istess krediti u li l-unika mezz li kien hemm sabiex dawn il-kredituri jithallsu kien bil-bejgh tal-proprjeta jew b`investment ossia injection of fresh capital.

Illi f`dan l-istadju ser issir riferenza ghax-xhieda moghtija mill-Amministratur Provizorju.

Matul l-ewwel seduta quddiem l-esponent, l-Amministratur Provizorju esebixxa kopja tal-Management Accounts ta` DAH li minnhom jirrizultaw lista tal-attiv u tal-passiv. In oltre gie prodott prospett ta` krediti dovuti lil diversi fornituri ta` DAH, inkluz PCL , Tal-Herba Construction Ltd u Xuereb Installations Ltd li b`kollox jammontaw ghal Eur 3,753,086.97.

Dwar il-kirjiet illi gabar matul l-amministrazzjoni tieghu, l-Avukat Galea Debono xehed illi l-kirjiet li ngabru kienu jammontaw ghal Eur 86,287.00.

Dwar l-istat finanzjaru ta` DAH, l-Avukat Galea Debono xehed hekk :-

“Xtaqt inqid, sur Perit Legali, billi fil-fehma tieghi d-domanda principali hija jekk il-kumpannija hijiex f`qaghda skont dak l-artiklu tal-ligi, minghalija wiehed mis-sub sections tal-artiklu 214 sa fejn naf jien, thallas id-djun taghha evidentement mhijiex ghaliex jekk ahna nghidu li grosso modo l-kumpannija llum ghandha taghti mal-hmistax-il miljun Euro, hmistax il-miljun euro likwidi fil-Bank biex thallas il-kredituri definitely m`ghandhiex u mhux ser ikollha.”

Illi matul is-seduta li segwiet quddiem l-esponent, l-Avukat Galea Debono kompli jelabora dwar din it-tema u qal hekk :-

“ ... Ovvjament jien kull ma nista` nghid huwa dan – ix-xoghol tal-kumpannija kif inhu f`dan il-mument, fejn m`ghandniex flus biex naghmlu

advertising, m`ghandhiex flus biex naghmlu per ezempju xi ftit refurbishing jew redecoration, ghandna l-problema li s-supermarket illi kienet iggib hafna nies lejn il-complex sfortunatament kellha taghlaq ukoll ghar-ragunijiet li m`ghandhom x`jaqsmu xejn ma` dan il-kaz – dawn huma kollha affarijiet illi eventwalment nahseb jiena, li x-xoghol tal-complex jonqos sejjer mhux jizdied. Jekk mhux ser ikun hemm, biex nghid hekk, capital injection gdida minn xi hadd gdid jew mill-kredituri nnifishom, il-kumpannija, eventwalment in liquidation ser ikollha tmur. M`hemmx soluzzjoni ohra. Ameno anki kif qed nghid ma jintervjenix xi terz. U ahjar li nieqaf hemm.”

Illi fl-istess mod xehed l-Avukat Galea Debono matul l-udjenza quddiem il-Qorti tal-15 ta` Dicembru 2015 fejn ghal darba ohra tenna l-posizzjoni b`dan il-mod :-

“Sur Imhalled, fir-rigward tal-kwistjoni li qed tigi nvestita dan il-mument mill-Qorti, vuoldieri jekk il-kumpannija ghandhiex titqieghed f`fazi ta` stralc minhabba inabbilita li thallas id-debiti taghha, jiena l-informazzjoni li ghandi u l-esperjenza li ghandi ghal din is-sena li ilni amministratur hija li fil-fatt hekk hu, mhijiex f`qaghda li thallas id-debiti taghha. Jiena dan il-mument nigbor kirjiet illi jvarjaw, mhux kull xahar huma l-istess, qisu bejn Eur 8,000 u Eur 10,000 fix-xahar, illi tista` tghid imorru jekk mhux kollha kwazi kollha biex jithallsu l-ftit pagi li nhallsu, inhallsu l-kontijiet tal-ARMS li naghtuhom jidhirli Eur 2,500 fix-xahar biex ihalluna noperaw u nhallsu wkoll is-somma simili lill-Insurance Broker biex inzommu l-post assigurat. Pero wara dawk ma tantx jifdal. Jigifieri dawn il-miljuni kollha li l-kumpannija ghandha taghti biex thallas lill-Bank, lil min hadmilha x-xoghol, eccetra eccetra, mill-operat kif inhu llum zgur li mhux ser jithallsu, m`hemm l-ebda dubju. L-unika mod biex dawn jithallsu huwa li jkun hemm bejgh tal-assi, tal-kapital, li jammonta effettivament ghal liquidation. Daqshekk biss ghandi xi nghid jiena.”

Illi finalment ssir riferenza ghall-affidavits mressqa mis-socjeta intimata DAH u cioe dawk ta` Steven Delicata, David Agius u Charles Micallef. Fl-assjem taghhom u b`kull rispettt lejn dawn it-tliet xhieda, ma ngabet ebda prova utli jew rilevanti ghall-mertu ta` dawn il-proceduri. Huma jaghtu spjega tal-istorja tal-progett, il-mod kif gie finanzjat, il-problemi li kellhom jaffaccjaw, it-tentattivi li ghamlu u li ghadhom qed jaghmlu sabiex isalvaw dan il-progett izda fl-ahhar mill-ahhar ma ngabet l-ebda prova li hija utli ghall-kwistjoni centrali f`dan l-istadju tal-proceduri u cioe jekk il-kumpannija hijiex f`qaghda li thallas id-djun taghha. Steven Delicata qal hekk fl-ahhar tal-affidavit tieghu :-

“During the past year, despite all the difficulties that we encountered due to the loss of monies approximately Eur 500,000 due from Cassar & Schembri, operators of MORE Supermarkets and the legal complications to sub lease the supermarket to another operator, we have been negotiating with some companies to invest in the complex. Besides this we also have managed to potentially secure some tenants that will be beneficial to the recovery plan that our team are piecing together. Obviously due to the size of the investment and the legal complications, our team needs some more time to put all together and finally save our complex, which complex is a fitting tribute to my son “Daniel”, who has done so much to help others after his passing.”

Li johrog car mill-provi hu illi n-negozju ta` DAH ilu zmien jiffaccja diffikultajiet serji sal-punt li ma ghadux vijabbli fl-istat attwali tieghu billi d-dhul minn-negozju huwa fqir wisq u mhux qed ipoggi lil DAH f`qaghda li thallas d-djun taghha tant illi l-beneficcu tat-terminu li DAH kellha fil-konfront ta` zewg kredituri sostanzjali taghha, u cioe PCL u Mediterranean Corporate Bank, intilef u issa dan id-dejn gie accelerat. L-unika mezz kif dan id-dejn ta` DAH jista` jithallas fil-prezent huwa bil-bejgh tal-assi.

Il-Qorti qieset b`reqqa l-atti ta` dan il-procediment illi jaqzbu l-elf (1,000) folja. Hija tal-fehma illi l-analizi tal-perit legali hija bbazata fuq apprezzament korrett ta` fatti oggettivi hekk kif jirrizultaw mill-provi fl-assjem taghhom. Il-Qorti tikkondividi l-analizi fattwali tal-perit legali.

Abbazi tal-fatti accertati, il-perit legali jorqom **il-konkluzjonijiet** tieghu billi jghid :-

Illi mill-provi li ngabu f`dan il-kaz, ma ghandu jkun hemm l-ebda dubju dwar il-qaghda finanzjara hazina ta` DAH u li effettivament mhijiex f`qaghda li thallas id-djun taghha. Ir-realta attwali turi illi DAH ma ghandhiex likwidata u bil-ftit dhul li qed jircevi l-Amministratur Provizorju kull xahar, huwa qed jirnexxielu biss ihallas ghall-konsum tad-dawl u tal-ilma oltre l-premium ghall-assikurazzjoni li tkopri l-kumpless in kwistjoni. Dawn il-pagamenti jikkostitwixxi biss qatra fl-ocean meta wiehed iqis id-dejn sostanzjali li ghandha DAH.

Illi harsa lejn il-balance sheet ta` DAH ghall-2012 turi din l-istampa :-

D.A HOLDING LIMITED**Statement of Financial Position**as at 31st December 2012

	Notes	2012 €	2011 €
ASSETS			
Non-Current Assets			
Investment property – cost		9,245,296	-
Investment property- revaluation		20,754,704	-
Land in course of development		-	14,224,009
Property, plant and equipment		2,518,913	251,115
		<u>32,518,913</u>	<u>14,475,124</u>
Current assets			
Inventories		1,306,921	-
Trade and other receivables		1,321,156	602,662
Cash at bank in hand		23,746	23,362
		<u>2,651,823</u>	<u>626,024</u>
Total assets		<u>35,170,736</u>	<u>15,101,148</u>
EQUITY AND LIABILITIES			
Capital and reserves			
Called-up issued share capital		23,300	23,300
Revaluation reserve		20,754,704	6,172,420
Accumulated losses		(3,900,843)	(661,524)
Total equity		<u>16,877,161</u>	<u>5,534,196</u>
Non-current liabilities			
Long term borrowings		9,920,562	5,114,303
Deferred taxation		3,190,524	823,537
		<u>13,111,086</u>	<u>5,937,840</u>
Current Liabilities			
Short term borrowings		227,336	3,193,000
Trade and other payables		4,955,153	436,112
		<u>5,182,489</u>	<u>3,629,112</u>
Total liabilities		<u>18,293,575</u>	<u>9,556,952</u>
Total equity and liabilities		<u>35,170,736</u>	<u>15,101,148</u>

Illi mill-provi , pero, gja jirrizulta kambjament li fil-fehma tal-esponent hija materjali, u cioe illi l-krediti li mmaturaw u li huma dovuti lill-kredituri li gabu provi f'dawn il-proceduri, komplessivament jammontaw ghas-somma ta` Eur 14,112,384.76. Jekk wiehed ihares fejn fil-balance sheet ta` DAH ghas-sena 2012, dak li huwa deskritt bhala Long Term Borrowings taht Non Current Liabilities fis-somma ta` Eur 9,920,562.00, u cioe is-self tal-Bank, immatura u sar kollu dovut minhabba l-inadempjenzi deskritti aktar qabel da parti ta` DAH.

Wara senjalazzjonijiet ta` natura legali, in partikolari dwar kif il-cash flow test u l-balance sheet test tal-ligi Ingliza japplikaw fil-kuntest tal-ligi taghna, il-perit legali jasal ghall-konkluzjoni :-

... fil-kaz in ezami jirrizulta illi l-proprjeta ta` DAH giet revalued fis-somma ta` Eur 20,754,704 u dan skont dak li jirrizulta fl-audited accounts tal-2012. Jekk wiehed jillimita din l-indagni fuq dak li jidher f'dawn l-accounts, wiehed jista` jargumenta illi l-valur tal-assi huwa sufficjenti sabiex eventwalment d-djun jigu saldati. Izda fl-istess hin, jirrizulta wkoll illi l-awdituri ta` DAH mhumiex f'qaghda li jikkompletaw l-audited accounts ghas-snin sussegwenti proprju minhabba incertezza fil-valutazzjoni tal-proprjeta appartenenti lil DAH fic-cirkostanzi attwali taghha. Dan il-fatt abbinat mal-kunsiderazzjoni ovvja illi fl-istat attwali taghha, DAH ma ghandhiex dhul sufficjenti sabiex tlahhaq mad-djun taghha u dak li sa ftit snin ilu kien deskritt bhala prospective liabilities issa immatura u sar dovut proprju minhabba nuqqas ta` hlas u inadempjenza da parti ta` DAH, kif ukoll il-fatt li l-unika mezz kif tista` tkun f'qaghda li thallas id-djun taghha hu permezz ta` bejgh tal-proprjeta li ghandha, l-esponent huwa tal-fehma illi DAH hija insolventi u kwindi mhux f'qaghda li thallas d-djun taghha a tenur tal-art. 214 2 (a) (ii) u 5 (b) tal-Kap. 386. Il-kredituri ma jistghux jitqieghdu f'sitwazzjoni li jistennew sakemm DAH tillikwida jew tbiegh l-assi taghha sabiex forsi jithallsu d-djun taghha.

Din il-Qorti tikkondividi l-konkluzjoni tal-perit legali, taghmilha taghha u tkompli ssostniha hekk :-

1) Ghall-kaz tal-lum, huwa rilevanti dak li kien deciz minn 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" meta dwar l-Art 214(5)(b) tal-Kap 386 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.

2) Irrizulta bl-aktar mod evidenti illi bl-introjtu li qed ikollha mill-operations taghha, DAH ma tistax thallas id-djun li kienu ppruvati fil-kors ta` din il-kawza u li qeghdin ikomplu jizdied bl-imghaxijiet.

3) Ghalkemm *in limine litis* fil-kaz tal-kreditu ta` PCL, l-intimata jidher li kellha kontestazzjoni dwar l-entita` tal-ammont dovut, fil-kors tal-kawza, din il-kontestazzjoni bhal donnha sfumata fix-xejn ; ghalhekk il-Qorti ma kenitx rinfaccjata b`sitwazzjoni ta` *a bona fide disputed debt* li jista` jkun pregudizzjali ghal *a winding up order*.

4) Irrizulta ppruvat li kien hemm *default* da parti tal-intimata. Mhux biss ma thallasx id-dejn li ghandha ma` PCL izda anke mal-kredituri l-ohra.

5) Hawn si tratta ta` socjeta` li twaqqfet biex tibni l-kumplex u mill-gestjoni tieghu tmexxi l-operat taghha. Is-socjeta` twaqqfet b`kapital minimu meta mqabbel mal-*cost* tal-kumplex. Irrizulta wkoll illi sabiex sar l-izvilupp – in termini reali u prattici – l-azzjonisti qaghdu fuq il-kreditu li avvanza haddiehor. Ghalhekk dan mhuwiex kaz ta` *share capital* li seta` jikkontribwixxi ghall-hlas tad-djun.

6) Filwaqt li hemm certezza tal-ammonti dovuti lill-kredituri, ma jistax jinghad l-istess dwar l-assi tal-intimata. Bil-fatt li socjeta` tbiegh l-assi taghha sabiex thallas id-dejn, ma jfissirx li socjeta` ma tibqax insolventi, propju minhabba l-*contingent and prospective liabilities*. Inltre l-iskop tas-socjeta` huwa li tibqa` hajja u attiva ; bil-bejgh tal-assi minghajr *contrappeso*, is-socjeta` tiflew ir-raguni ghall-ezistenza taghha.

7) Fil-kors tal-kawza, qamet kontroversja shiha dwar kif seta` jsir bejgh ta` assi, u cioe` jekk huwiex in parte jew in toto. Eppure anke mill-mod kif kienet trattata dik id-disputa, il-kwistjoni fundamentali tibqa` : bejgh ta` assi ta` socjeta` li ma tistax thallas id-djun taghha. B`liema modalita`, u cioe` bil-bicca jew l-assjem, ghal liema skop ? Sabiex jithallsu l-kredituri jew sabiex tiehu r-ruh ? Anke dan huwa rifless tal-istat ta` insolvenza li sabet ruhha fiha l-intimata.

8) Dan tal-lum ma kienx kaz ta` socjeta` li ghal perijodu cirkoskritt u limitat ta` zmien waqfet thallas id-djun taghha. Kien kaz ta` socjeta` li waqfet ghal kollox milli thallas lill-kredituri principali taghha u cioe` dawk li kienu involuti direttament fil-bini tal-kumpless u bl-introjtu li kellha mqar kellha biex thallas *ir-recurrent expenses*. Sabiex tizen il-kapacita` ta` socjeta` li thallas id-dejn taghha, il-Qorti trid tistharreg il-metodologija adoperata mis-socjeta`. Kif irrizulta mill-assjem tal-provi, qabel il-hatra tal-Amministratur Provvizorju, is-socjeta` ma kellhiex tarf tas-sitwazzjoni ; ghalhekk waqfet thallas.

9) In tema ta` solvenza, il-Qorti trid tqis ukoll jekk is-socjeta` hijiex *a going concern* ghaliex jekk tkun hekk il-valur taghha jizdied. Pero` anke f`dan il-kaz, is-socjeta` ma ttentatax tkattar in-negozju taghha bl-injezzjoni ta` *fresh capital* sabiex tibqa` *a going concern*.

Anke ghal dawn ir-ragunijiet, b`zieda ma dak li ssottometta l-perit legali, din il-Qorti ssib li kienu sodisfacjentement ippruvati r-rekwiziti tal-Art 214(5)(b) tal-Kap 386.

VII) Id-diskrezzjoni tal-Qorti

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

Il-Qorti taghmel riferenza ghal Pg 913-914 ta` Boyle & Birds` Company Law (8th Edition – Jordans - 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.

Hija l-fehma meqjusa tal-Qorti illi s-socjeta` intimata waslet *at a point of no return*. Fl-istat li tinsab fih illum, l-intimata mhijiex tiggera dhul bizzejjed sabiex thallas il-kredituri li ppartecipaw fil-procediment tal-lum, sabiex thallas id-djun li l-gestjoni tal-kumpless iggib maghha, u anke eventwali bejgh tal-assi jhalli lis-socjeta` minghajr skop ta` negozju u mhux bilfors ikopri l-hlas dovut lill-kredituri. Ghalhekk ix-xoljiment u l-istralc tal-intimata huwa inevitabli.

Provvediment

Ghar-ragunijiet kollha premessi, il-Qorti qeghda tipprovdi dwar it-talba tas-socjeta` rikorrenti billi :

1) Tiddikjara u tiddeciedi illi l-kumpannija intimata D. A. Holdings Limited (C18064) mhijiex f`qaghda li thallas id-djun taghha abbazi ta` l-Art 214(2)(a)(ii) u l-Art 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta.

2) Tordna x-xoljiment tal-kumpannija intimata D. A. Holdings Limited (C18064) b`effett mill-5 ta` Gunju 2014 kif irid l-Art 223(1) tal-Kap 386 tal-Ligijiet ta` Malta. Tordna wkoll l-istralc taghha.

3) Tahtar lill-Avukat Dottor Richard Galea Debono bhala stralcjarju tal-kumpanija intimata D. A. Holdings Limited (C18064) bis-setghat u bid-dmirijiet kollha stabbiliti fil-Kap 386 tal-Ligijiet ta` Malta. Bla hsara ghall-generalita` ta` dawk is-setghat u dmirijiet –

a) jaghmel verifika aggornata ta` l-assi u tad-djun tal-kumpanija intimata D. A. Holdings Limited (C18064) u dwar il-gradwazzjoni tad-djun.

b) jiehu taht il-kustodja jew kontroll tieghu l-assi kollha ta` tal-kumpanija intimata D. A. Holdings Limited (C18064).

c) jaghmel jew jiddefendi kull azzjoni jew procediment legali iehor fl-isem u fl-interess ta` l-kumpanija intimata D. A. Holdings Limited (C18064).

d) jirrelata dwar il-mizuri mehtiega ghall-harsien tal-assi tal-kumpanija intimata.

e) jipprezenta rapport sas-16 ta` Gunju 2016.

5) Tordna li l-ispejjez kollha ta` dan il-procediment, kif ukoll l-ispejjez kollha tal-istralc, jithallsu mill-kumpanija intimata D. A. Holdings Limited (C18064).

6) Thalli l-istralc ghall-udjenza ta` nhar il-Hamis 16 ta` Gunju 2016 fid-9.00 a.m.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur