



CIVIL COURT FIRST HALL

**THE HON. MR. JUSTICE
JOSEPH ZAMMIT MCKEON**

Tuesday 28 February 2017

**Case No. 5
Sworn Appl. No. 1213/08 JZM**

**Avv. Simon Tortell, debitament
awtorizzat, in rappresenza
tal-kumpanija estera
CHONGHAEJIN MARINE Co. Ltd;**

**u b`nota pprezentata fit-23 ta`
April 2013 John Sullivan gie
appuntat biex jirraprezenta lill-
kumpanija estera
CHONGHAEJIN MARINE Co. Ltd.;**

**u b`digriet tal-20 ta` Ottubru 2014
l-assunzjoni tal-atti giet revokata;**

**u b`digriet tat-8 ta` Gunju 2015
gew mahtura l-Avukat Dr Martin
Fenech LL.D. u l-Prokuratur
Legali Jeremy Buttigieg bhala
kuraturi deputati biex
jirraprezentaw lill-kumpanija
estera CHONGHAEJIN MARINE
Co. Ltd.;**

vs

**G.S. SPECIALIST VEHICLES LTD.
(C33195) ;**

u

ghal kull interest li jista` ikollhom

**GEORGE SMITH, Passaport Ingliz
Nru.701998349 ;**

**GLADYS SMITH Passaport Ingliz
Nru.701998350 ;**

**STEPHEN SMITH, Passaport
Ingliz Nru.704976468 ;**

**WATERBUS INTERNATIONAL
LTD. (C44843)**

The Court :

I. The Sworn Application

Having seen the **sworn application** which was filed on the 3 December 2008 wherein plaintiff stated as follows :-

Bis-sahha ta` ftehim datat 1 ta` Gunju, 2007, sussegwentement modifikat fit-12 ta` Lulju, 2007, ir-rikorrenti noe u l-intimati G.S. Specialist Vehicles Ltd. ftehm u illi din tal-ahhar tikkonsenja hames “amphicoaches” cioe` coaches maghmula sia ghall-uzu tal-art kif ukoll fl-ilma “by the beginning of October 2007”, liema kuntratt u modifika huma hawn annessi u mmarkati Dok. CMC1 ;

In konsiderazzjoni ta` dan il-patt, u kif jirrizulta mill-Art. 5 tal-ftehim tal-1 ta` Gunju, 2007, Dok. CMC1, ir-rikorrenti noe hallsu depositu akkont ta` mija u hmistax-il elf lira sterlina (GBP 115,000) ekwivalenti ghal mitejn u

tmienja u ghoxrin elf dollaru Amerikan (US \$228,000), u l-bilanc kellu jithallas mal-konsenja ;

Fl-Art. 11 tal-modifika datata 12 ta` Lulju, 2007, liema artikolu huwa miktub bl-idejn, gie miftiehem illi r-rikorrenti kellhom ihallsu sa hamsin fil-mija tal-prezz, u fis-16 ta` Lulju, 2007, ir-rikorrenti noe hallsu disa` mija u sitta u tletin elf dollaru Amerikan (US\$ 936,000), in adempjenza ta` dan il-patt ;

Dan il-pagament sehh wara li r-rikorrenti rebhu tender u nghataw il-jedd esklussiv li joperaw “amphibious bus tours” fix-xmara Han li tghaddi minn gewwa nofs Seoul, il-kapitali Koreana, bhala parti minn progett kbir inniedi minn Seoul City Government fl-2006, sabiex jirrivitalizza x-xmara u l-waterfront li tmiss maghha ;

L-intimati kienu jafu r-raguni il-ghaliex inxtraw dawn l-amphicoaches, tant illi t-tieni preambolu tal-ftehim datat 1 ta` Gunju, 2007, jghid espressament “the Buyer wants to buy the vehicle produced by the Seller and use the vehicle in compliance with the requirements of the Government of Seoul” ;

Ir-rikorrenti noe jafu illi fl-4 ta` Awissu, 2008, iben George Smith, li jismu Stephen u li jahdem mieghu, ikkostitwixxa kumpannija hawn Malta jisimha Waterbus International Limited, ukoll citata fil-proceduri odjerni, u sa meta gie ntavolat il-Mandat ta` Qbid numru 1884/08 li bih inqabdu diversi amphicoaches, kienu biss jissusspettaw illi dan sehh sabiex G.S. Specialist Vehicles Ltd. u George Smith jeludu l-obbligi kontrattwali tagghom, u ghalhekk Stephen Smith u Waterbus International Limited gew citati f`dan il-gudizzju ;

Il-korrettezza ta` dan is-suspett gie kkonfermat meta l-avukat mandatarju tar-rikorrenti rcieva ittra intimidatorja datata 2 ta` Dicembru, 2008, fuq il-firma ta` Stephen Smith, hawn annessa bhala Dok. CMC2, li fiha inter alia jghid: “Waterbus International has taken over production and sales of amphibious vehicles ...”

B`hekk, il-proprijeta` tal-hames amphicoaches maqbuda hija ta` G.S. Specialist Vehicles Ltd., il-pussess (qabel gie esegwit il-Mandat ta` Qbid u l-

oggetti ghaddew fidejn il-konsenjatarju) kien fidejn Waterbus International Limited, li allura ex-admissis assumiet l-obbligu tal-produzzjoni tal-imsemmija amphicoaches ;

Mill-bidu nett, l-intimati bdew jiddipartixxu mid-data tal-konsenja, u dan kif jirrisulta minn dokument hawn anness u mmarkat CMC3 imsejjah “Chonghaejin Marine Co. Summary of Events with GSSV” ;

In sintesi d-data tal-konsenja inbidlet kif gej :

12 ta` Settembru, 2007 :

G.S. Specialist Vehicles Ltd. qalet illi billi sar “late deposit tal-40%” – li skond il-ftehim originali ma kellux isir – l-ewwel zewg “Amphicoaches” ikunu lesti fil-hin, izda l-ohrajn jitlestew sa qabel il-Milied ;

10 ta` Ottubru, 2007 :

Gie rappurtat illi l-vapur li kien qed jittrasporta il-“Complete bodies (actual buses that are cut to make the Amphicoach)” mic-Cina, inqabad f'typhoon ;

14 ta` Dicembru, 2007 :

G.S. Specialist Vehicles Ltd. assigurat lir-rikorrenti noe illi l-ewwel zewg “Amphicoaches” ikunu lesti sal-14 ta` Jannar, 2008, u t-tlieta l-ohra sal-25 ta` Frar, 2008 ;

24 ta` Jannar, 2008 :

G.S. Specialist Vehicles Ltd. assigurat lir-rikorrenti noe illi l-ewwel zewg “Amphicoaches” ikunu lesti sal-ahhar ta` Frar ;

14 ta` Frar, 2008 :

G.S. Specialist Vehicles Ltd. bidlet il-frame structure tal-vetturi sabiex takkomoda windshields godda mixtrija mic-Cina ;

18 ta` Marzu, 2008 :

Ferm wara li skada t-terminu ghall-konsenja, G.S. Specialists Vehicles Ltd. talbet pagament iehor ta` US\$ 300,000 u r-rikorrenti noe akkomodaw din

it-talba permezz ta` zewg pagamenti maghmulin rispettivament fil-25 u fil-31 ta` Marzu, 2008 ;

13 ta` April, 2008 :

Sea trials fuq l-ewwel vettura jfallu minhabba f`difett fil-cooling system, li jrid jigi sostitwit ;

23 ta` April, 2008 :

Seoul City Government hassret il-kuntratt mar-rikorrenti noe ;

30 ta` April, 2008 :

G.S. Specialist Vehicles Ltd. assigurat lir-rikorrenti noe li l-ewwel zewg "Amphicoaches" ikunu lesti ghall-konsenja fit-8 ta` Mejju, 2008 ;

10 ta` Mejju, 2008 :

G.S. Specialist Vehicles Ltd. ikkonfermat illi "shipping via ocean gCMAH to korea for May 20" ;

13 ta` Mejju, 2008 :

Ir-rikorrenti noe jinsistu illi l-vettura ghandha tigi shipped bl-air conditioning and "sufficiently tested" ;

5 ta` Gunju, 2008 :

G.S. Specialist Vehicles Ltd. tinforma lir-rikorrenti noe illi l-vettura tinghata lis-shippers for loading fis-16 ta` Gunju ;

13 ta` Gunju, 2008 :

Il-problema tal-arja kondizzjonata giet risolta ;

16 ta` Gunju, 2008 :

Prenotazjoni tas-shipping issir ghas-27 ta` Gunju ;

26 ta` Gunju, 2008 :

Problema fil-generator, konness mal-arja kondizzjonata. Konsenjata ritardata ;

28 ta` Lulju, 2008 :

G.S. Specialist Vehicles Ltd. tavza illi l-vapur sejjer jitlaq fid-29 ta` Lulju, lejn il-Korea, u r-rikorrenti noe jinfurmauwhom illi kellha ssir spezzjoni finali u full load test sabiex jaccettaw il-konsenja ;

29 ta` Lulju, 2008 :

G.S. Specialist Vehicles Ltd. titlob li tithallas € 350,000 ghal kull vettura, flok il-prezz pattwit ta` €Stg. 230,000 ;

1 ta` Awissu, 2008 :

G.S. Specialist Vehicles Ltd. tikkonferma l-htiega li l-kuntratt jigi rinegozjat ;

8 ta` Awissu, 2008 :

G.S. Specialist Vehicles Ltd. tinforma lir-rikorrenti noe li m`hemmx cans li l-kuntratt jigi esegwit, u trid tikkonsidera biss il-bejgh tad-drittijiet ghall-Asia, u mhux il-kuntratt iffirmit.

Qed jigi wkoll anness dokument imsejjah "Correspondence Highlights" konsistenti f`riassunt tal-korrispondenza interkorsa bejn il-partijiet li qed tigi mmarkata Dok. CMC4 ;

Il-konsenja tal-hames amphicoaches ghadha sal-lum ma saritx, u issa l-intimata G.S. Specialist Vehicles Ltd. permezz tad-direttur taghha George Smith, qed tirrifjuta li tikkonsenja dawn il-vetturi, minkejja li sal-lum irceviet akkonti li jammontaw fit-total taghhom ghas-somma ta` US\$ 1,464,000 ;

Dan ir-rifjut ta` konsenja gie konfermat minn Smith wara laqgha li kellu fis-6 ta` Novembru, 2008, ma` Lee Berger, avukat Ingliz li qed jassisti lir-rikorrenti noe ;

F`dik il-laqgha, Smith informa lil Berger illi G.S. Specialist Vehicles Ltd. ma tipproducix il-veikoli, izda l-produzzjoni ssir minn kumpannija ohra li ottjeniet finanzjament ghall-istess produzzjoni kontra xi forma ta` garanzija fuq l-imsemmija vetturi ;

Lanqas ma jirrizulta car hemmx xi patent registrata fisem xi wiehed mill-intimati ;

Waqt laqgħa telefonika fl-4 ta` Awissu, 2008, bejn Smith li kien Malta u rappresentanti tar-rikorrenti noe li kienu jinsabu l-Korea, Smith kien qallhom li “secured creditor” kien silifhom is-somma ta` tliet miljun euro (€3,000,000) izda ma riedux ikomplu jiffinanzjaw billi kien sehh dewmien konsiderevoli u issa dawn il-kredituri bdew jistaqsu hafna domandi, u għalhekk ma kinux qed ihalluh jeffettwa l-konsenja tal-vetturi billi tilfu hafna flus fuq din il-produzzjoni ;

Qal ukoll illi kellu parir legali illi r-rikorrenti noe ma setghu jagħmlu xejn legalment sabiex jottjenu l-konsenja ;

Waqt il-laqgħa ma` Berger tas-6 ta` Novembru, 2008, Smith insista li jirrifjuta li jikkonsenja l-vetturi kif promess, u kien dispost biss jew ibiegh il-jeddijiet intellettuali tiegħu għal SE Asia, u possibilment Awstralja u New Zealand għas-somma ta` US\$4,500,000, flimkien mal-konsenja ta` zewg amphicoaches minflok il-hamsa pattwiti, jew jirrifondi l-flejjes imħallsa sa issa mir-rikorrenti noe ;

Għal din ir-rifuzjoni, dahal garanti personalment flimkien ma` martu ;

Permezz tal-esekuzzjoni ta` Mandat ta` Qbid numru 1884/08 Dok. CMC5, gew maqbuda hames amphicoaches, u mghoddija fidejn konsenjatarju mahtur mid-debitur u accettat mill-Marixxal bhala persuna idonea ;

Ir-rikorrenti noe dejjem insistew, kif għadhom jinsistu, fuq l-adempjenza u l-esekuzzjoni – “specific performance” – tal-ftehim datat 1 ta` Gunju, 2007, sussegwentement modifikat fit-12 ta` Lulju, 2007, bil-konsenja tal-hames amphicoaches kif pattwit, u għalhekk in parti qed issir din il-kawza ;

Barra minn hekk, ir-rikorrenti noe sofrew danni naxxenti minn hlas ta` penali lil Seoul City Government, interessi passivi, spejjez inkorsi f`kiri ta` ajruplani għall-garr tal-amphicoaches li ma gewx konsenjati, telf ta` qligh

risultat ta` dewmien fil-konsenja, u spejjez u danni ohra, kif jigi ppruvat fit-trattazzjoni tal-kawza ;

L-Art. 11.4 tal-ftehim Dok. CMC1 tikkonsisti f`klausola arbitrari, li pero` hija konfuza u inaffidabbli ghaliex taghmel riferenza ghal International Arbitration Centre, li minnhom hawn mijiet madwar id-dinja, u ghalhekk qed issir din il-procedura quddiem din l-Onorabbli Qorti ;

Ghaldaqstant, prevja kull dikjarazzjoni li tirrizulta mehtiega, ir-rikorrenti noe jitolbu bir-rispett li din l-Onorabbli Qorti joghgobha :

1. Tiddikjara u tiddeciedi li l-intimati jew min minnhom huma obbligati jikkonsenjaw hames amphicoaches lir-rikorrenti noe, kif pattwit fil-ftehim datat 1 ta` Gunju, 2007, sussegwentement modifikat 12 ta` Lulju, 2007, hawn anness u mmarkat Dok. CMC1 ;

2. Tikkundanna lill-intimati, jew min minnhom sabiex, jekk ikun il-kaz, u fi zmien qasir u perentorju li tiffissa din l-Onorabbli Qorti, u taht is-sorveljanza ta` periti nominandi, jikkompletaw u jikkonsejaw l-imsemmija hames amphicoaches, kif pattwit ;

3. Fin-nuqqas, tawtorizza lir-rikorrenti noe sabiex huma stess jikkompletaw il-hames amphicoaches, a spejjez tal-intimati ;

4. Tiddikjara u tiddeciedi illi l-intimati jew min minnhom huma tardivi fil-konsenja ta` hames amphicoaches, kif pattwit fil-ftehim datat 1 ta` Gunju, 2007, sussegwentement modifikat fit-12 ta` Lulju, 2007, u konsegwentement ikkagunaw danni lir-rikorrenti noe, kif jigi ppruvat fit-trattazzjoni tal-kawza ;

5. Tillikwida d-danni sofferti, okkorrendo bl-opera ta` periti nominandi ;

6. Tikkundanna lill-intimati jew min minnhom ihallsu d-danni hekk likwidati.

Bl-ispejjez, inkluzi dawk tal-ittra ufficjali datata 19 ta` Settembru, 2008, u bl-imghax skond il-ligi.

B`riserva ta` kull azzjoni ohra talvolta spettanti lir-rikorrenti noe. ”

Having seen plaintiff's list of witnesses and documents.

II. The Sworn Reply of G.S. Specialist Vehicles Limited, George Smith and Gladys Smith

Having seen the **sworn reply** which defendants G.S. Specialist Vehicles Limited, George Smith and Gladys Smith filed in Maltese on the 13 January 2009 wherein was stated as follows :-

1. *Illi t-talbiet attrici huma nfondati fil-fatt u fid-dritt u ghandhom jigu michuda bl-ispejjez kontra l-istess attur noe, u dan stante illi, preliminarjament, dina l-Onorabbli Qorti ma hijiex kompetenti biex tiehu konjizzjoni, tisma` jew tiddeciedi din il-kawza stante l-klawsola arbitrali kontenuta fi klawsola 11.4 tal-ftehim anness mar-Rikors Guramentat bhala DOK. CMC1 skond liema klawsola kwalunkwe tilwima bejn l-attur noe u s-socjeta` esponenti G.S. Specialist Vehicles Ltd ghandha tigi determinata minn Tribunal ta` l-Arbitragg Internazzjonali ;*

2. *Illi preliminarjament, u ghal kull buon fini, dina l-Onorabbli Qorti ghandha tiddetermina liema hi l-ligi applikabbli, u dan stante li l-Artikolu 11.5 ta` l-istess ftehim jistipula li “The Contract shall be governed by International laws” ;*

3. *Illi preliminarjament, u minghajr pregudizzju ghas-suespost, l-esponenti George Smith u Gladys Smith ghandhom jigu liberati mill-osservanza tal-gudizzju a spejjez tal-attur noe in kwantu kwalsiasi ftehim li seta` sar mill-attur noe sar mas-socjeta` esponenti G.S. Specialist Vehicles Limited kif jirrizulta mid-Dokument CMC1 anness mar-Rikors Guramentat ;*

4. *Illi inoltre, kuntrarjament ghal dak indikat mill-attur noe fil-premessi, l-esponenti George u Gladys Smith fl-ebda moment ma dahlu*

garanti personalment ghad-dejn li seta` kellha s-socjeta` esponenti G.S. Specialist Vehicles Limited mal-attur noe, u fi kwalsiasi kaz ghoti ta` garanzija hija nulla jekk ma tirrizultax minn ftehim bil-miktub ;

5. Illi, preliminarjament, u minghajr pregudizzju ghas-suespost, l-azzjoni intentata mill-attur noe fil-konfront tal-esponenti hija inammissibbli in kwantu l-attur noe qed jitlob l-adempiment f`forma specifika tal-ftehim anness mar-Rikors Guramentat bhala DOK CMC1 meta tali eseguzzjoni specifika permezz ta` konsenja mitluba mhijiex aktar possibbli ghaliex kif anke jammetti l-istess attur noe fil-premessi tar-Rikors Guramentat minnu mressaq, il-mobbli in kwistjoni kienu gew akkwistati minn Waterbus International Ltd li da parti taghha kienet akkwistathom minghand finanzjaturi Ingliz li kienu mpussessaw ruhhom mill-mobbli msemmija ;

6. Illi fil-mertu t-talbiet tal-attur noe huma nfondati fil-fatt u fid-dritt u ghalhekk jimmeritaw li jigu michuda bl-ispejjez kontra l-istess attur noe u dana kif ser jirrizulta ahjar waqt it-trattazzjoni tal-kawza ;

7. Illi l-eccipjenti m`huma responsabbli ghal ebda danni li gew allegatament sofferti mill-attur noe ;

8. Illi fi kwalsiasi kaz, l-attur noe ghandu jressaq prova cara tal-allegati danni li soffra l-attur noe ;

9. Salv eccezzjonijiet ulterjuri. ”

Having seen defendants` list of witnesses.

III. The Sworn Reply of Stephen Smith and Waterbus International Ltd.

Having seen the **sworn reply** which defendants Stephen Smith and Waterbus International Ltd filed in Maltese on the 13 January 2009 wherein was stated as follows :-

1. *Illi t-talbiet attrici huma nfondati fil-fatt u fid-dritt u ghandhom jigu michuda bl-ispejjez kontra l-istess attur noe, u dan stante illi, preliminarjament, dina l-Onorabbli Qorti m'ghandhiex kompetenza biex tisma` u tiddeciedi din il-kawza, u dan stante li skond l-Artikolu 11.4 tal-ftehim anness mar-Rikors Guramentat bhala DOK. CMC1, kwalunkwe tilwima bejn l-attur noe u s-socjeta` esponenti G.S. Specialist Vehicles Ltd ghandha tigi determinata minn Tribunal ta` l-Arbitragg Internazzjonali ;*

2. *Illi preliminarjament, u ghal kull buon fini, dina l-Onorabbli Qorti ghandha tiddetermina liema hi l-Ligi applikabbli, u dan stante li l-Artikolu 11.5 ta` l-istess ftehim jistipula li "The Contract shall be governed by International laws" ;*

3. *Illi preliminarjament, hemm nuqqas ta` relazzjoni guridika bejn l-eccepjenti u l-attur noe ;*

4. *Illi l-kuntratt imsemmi mill-attur noe huwa res inter alios acta, u certament l-eccepjenti ma kinux parti tal-ftehim imsemmi – ghaldaqstant l-eccepjenti jirrilevaw li semmai huma l-konvenuti l-ohra li ghandhom iwiegbu ghat-talbiet attrici ;*

5. *Illi l-eccepjenti Waterbus International Ltd qatt ma assumiet ebda obbligu li seta` kellhom il-konvenuti l-ohra versu l-attur noe, wisq anqas l-eccepjenti Stephen Smith personalment ;*

6. *Illi hija assolutament inveritiera u nfondata l-allegazzjoni attrici li s-socjeta` Waterbus International Ltd giet iffurmata sabiex il-partijiet l-ohra f`din il-kawza jevitaw xi obbligi versu l-attur noe ;*

7. *Illi l-eccepjenti Stephen Smith m`ghandux, u qatt ma kellu ebda involviment fis-socjeta` G.S. Specialist Vehicles Ltd ;*

8. *Illi li gara effettivament kien li meta l-finanzjaturi tas-socjeta` G.S. Specialist Vehicles Ltd ippussessaw ruhhom mill-vetturi li kienu proprjeta` ta` l-istess socjeta` konvenuta GS. Specialist Vehicles Ltd, l-eccepjenti Waterbus International Ltd xtrathom, b`mod legittimu, mill-*

finanzjaturi sabiex tibda topera fl-istess negozju – dan ma jikomporta b`ebda mod xi forma ta` assunzjoni ta` obbligu da parti ta` l-eccepjenti ;

9. *Illi l-eccepjenti m`humiex responsabbli ghall-ebda danni li gew allegatament sofferti mill-attur noe ;*

10. *Illi ghalhekk l-eccepjenti ma jistghux iwiegbu ghat-talbiet attrici – la qatt kienu obbligati lejn l-attur noe [u allura l-ewwel 3 talbiet ma jistghux japplikaw ghalihom], konsegwentement ma jistghux jigu dikjarati tardivi u lanqas ma huma responsabbli ghall-ebda danni ;*

11. *Illi l-attur noe ottjenta l-hrug ta` Mandat ta` Qbid fuq vetturi proprjeta` ta` l-eccepjenti Waterbus International Ltd, liema stat ta` fatt qiegħed jirreka Danni ngenti lill-istess eccepjenti, u li ghalhekk qegħdha tipprevalixxi ruhha mid-dritt tal-kontro-talba ;*

Salv eccezzjonijiet ulterjuri.

Having seen defendants` list of witnesses.

IV. The Counter-Claim of Stephen Smith and Waterbus International Ltd

Having seen the **counter-claim** which was filed in Maltese wherein was stated as follows:-

1. *Illi l-esponenti Waterbus International Ltd hija socjeta` li tipproduci vetturi tat-tip amfichoaches ;*

2. *Illi l-esponenti Stephen Smith huwa direttur tas-socjeta` Waterbus International Ltd ;*

3. *Illi l-esponenti m`ghandhom ebda konnessjoni mas-socjeta` G.S. Specialist Vehicles Ltd ;*

4. *Illi l-esponenti ma kellhom ebda trattattivi ma` l-attur rikonvenut noe, u lanqas ma assumew ebda obbligi ma` l-istess ;*

5. *Illi jidher li nqalghet tilwima bejn l-attur noe u l-konvenuti G.S. Specialist Vehicles Ltd, George Smith u Gladys Smith dwar ftehim li kien hemm bejniethom, li l-esponenti ma humiex midhla taghha ;*

6. *Illi l-attur noe ntavola, u ottjena l-hrug ta`, Mandat ta` Qbid fuq vetturi tat-tip amphicoaches proprjeta` tas-socjeta` Waterbus International Ltd, u dan ghalkemm l-istess socjeta` m`ghandhiex x`taqsam mall-partijiet l-ohra f`din il-kawza, u dan bil-valur ta` USD 3,000,000.00 ;*

7. *Illi l-effett tal-Mandat ta` Qbid Nru. 1884/08 qieghed jikkaguna danni ngenti lill-esponenti kull gurnata li tghaddi ;*

8. *Illi l-attur rikonvenut noe gie nterpellat permezz ta` protest gudizzjarju sabiex icedi l-Mandat de quo fil-konfront taghhom, u nzamm responsabbli ghad-danni, izda madankollu baqa` inadempjenti ;*

9. *Illi dawn il-fatti huma maghrufa personalment lill-esponenti ;*

10. *Illi ghalhekk kellha ssir din il-kawza ;*

Ighid l-attur rikonvenut noe ghaliex dina l-Onorabbli Qorti m`ghandhiex :-

1) *Tiddikjara u tiddeciedi li frott l-agir ta` l-attur noe l-esponenti qeghdin isofru danni ngenti li ghandu jaghmel tajjeb ghalih l-attur noe ;*

2) *Tillikwida d-danni kollha sofferti, occorrendo bl-opra ta` periti nominandi ;*

3) *Tikkundanna lill-attur noe jhallas lill-esponenti d-danni hekk likwidati.*

Bl-ispejjez, inkluz dawk tal-Mandat ta` Qbid Nru. 1884/08 u tal-Protest Gudizzjarju datat (sic) ta` Dicembru 2008, piu` l-imghax legali sad-data tal-pagament effettiv. ”

Having seen defendants` list of witnesses for the purposes of their counter-claim.

V. The Sworn Reply to the Counter-Claim

Having seen the sworn reply which plaintiff filed in Maltese on the 27 January 2009 wherein was stated as follows :-

1. *Ir-rikonvenzjonanti STEPHEN SMITH u WATERBUS INTERNATIONAL LTD. (C44843) iridu jippruvaw il-legittimita` tat-titolu li huma jallegaw li ghandhom fuq l-amphicoaches, sabiex jistghu jirreklamaw id-danni minghand l-esponenti rikonvenzjonati naxxenti mill-hrug tal-Mandat ta` Qbid. Jirrizulta mir-risposta tal-rrikonvenzjonanti ghall-azzjoni promotorja tal-esponenti rikonvenzjonati illi jallegaw illi finanzjaturi Inglizi “ippussessaw ruhhom” mill-amphicoaches mill-poter ta` G.S. SPECIALIST VEHICLES LTD. (C33195), il-ko-intimati flimkien mar-rikonvenzjonanti f`din il-kawza, u li r-rikonvenzjonanti akkwistaw l-amphicoaches minghand dawn il-finanzjaturi Inglizi. Fid-dritt Malti, huwa kuntrarju ghall-ordni pubbliku li kreditur jimpussessa ruhu mill-propjeta` tad-debitur, u anke f`kaz ta` inadempjenza, hliet fil-kazijiet li tippermetti l-ligi, per eżempju fir-raham tal-ishma, jew bis-sahha tal-kap. 459 imsemmija “Set-off and Netting on Insolvency Act” ;*

2. *Dan il-kaz m`huwiex wiehed minn dawk ikkontemplati mil-ligi kif suespost, u ghalhekk kull allegazzjoni ta` xi tip appropriazzjoni ta` oggetti sabiex jigi sodisfatt dejn ma jistax jigi konsidrat legittimu ghaliex kuntrarju ghall-ordni pubbliku. Jigi rilevat illi la gew zvelati l-persuna jew persuni tal-finanzjaturi Inglizi, u lanqas ma gie esebit ebda ftehim bejn dawn il-finanzjaturi u r-rikonvenzjonanti ;*

3. *Inoltre, meta l-akkwiredent tal-mobbli jkun qed jagixxi in buona fede, it-titolu tal-predecessur tieghu huwa rrilevanti. Izda f`dan il-kaz, Stephen Smith huwa iben George Smith, azzjonista li jikkontrolla lil G.S. SPECIALIST VEHICLES LTD. (C33195), liema kumpannija hija parti fid-*

dokument CMC1, l-istess Stephen Smith hadem fuq l-amphicoaches bil-konozzenza shiha tal-kuntratt mal-esponenti rikonvenzjonati, tant li l-istess Stephen Smith anke hebb fizikament ghal rapprezentanti tal-atturi Koreani u saq bil-karozza ghal fuq xi wiehed minnhom, kif jigi ppruvat fit-trattazzjoni tal-kawza ;

4. Jidher ghalhekk illi WATERBUS INTERNATIONAL LTD. (C44843) giet kostitwita proprju bil-hsieb illi l-familja Smith tqarraq bl-esponenti rikonvenzjonati, u ghalhekk l-esponenti rikonvenzjonati m`ghandhom ibatu ebda danni li jallegaw li sofrew STEPHEN SMITH, kif ukoll WATERBUS INTERNATIONAL LTD. (C44843) ;

5. Isegwi ghalhekk illi t-talbiet tar-rikonvenzjonanti huma nfondati fil-fatt u fid-dritt u ghandhom jigu michuda bl-ispejjez kontra l-istess rikonvenzjonanti;

6. Salv eccezzjonijiet ulterjuri skond il-ligi. ”

VI. The Proceedings

Having seen the decree given during the hearing of the 17 February 2009 whereby the parties were directed to make submissions on the preliminary pleas filed by defendants.

Having seen the notes of observations that were presented.

Having seen its judgement given on the 29 September 2009 whereby the first plea filed by defendants G.S. Specialist Vehicles Ltd, George Smith and Gladys Smith was dismissed, as was also dismissed the first plea filed by defendants Stephen Smith and Waterbus International Limited, whereby the Court declared that it had jurisdiction to hear and decide the cause, ordered that costs be borne by defendants jointly and severally, and adjourned the cause for the presentation of plaintiff's evidence.

Having seen the judgement given by the Court of Appeal on the 26 March 2010 whereby the Court dismissed the appeal filed by defendant G.S. Specialist Vehicles Ltd and confirmed the judgement of first instance. The costs of the judgement of first instance were to stand as decided by this Court, while the costs of the judgement at second instance were to be borne by G.S. Specialist Vehicles Ltd.

Having seen that with effect from the hearing of the 15 November 2010 the proceedings were conducted in the English language, including the presentation of evidence on the claim and counter-claim.

Having seen the decree pronounced in open court at the hearing of the 23 April 2013 whereby Adrian Rizzo was appointed technical referee with the assistance of legal referee Adv. Anna Mifsud Bonnici with the task of proceeding to the premises Garden of Eden in Zurrieq where the vehicles belonging to defendant Waterbus International Ltd are being held under the control of the Court by virtue of precautionary warrant of seizure no 1884/2008 in order to examine the vehicles in question, and report in writing on their present condition including the assessment, if any, of any damages, shortages and/or depreciation in value. In a later decree given on the 9 May 2013 Adrian Rizzo was replaced by Kurt Gutteridge with the same powers and duties as the former appointee.

Having seen the joint report filed by the court referees. The report was duly confirmed on oath during the hearing of the 5 May 2014.

Having noted at the hearing of the 21 October 2014 that plaintiff company had not appointed a mandatary in substitution of John Ellul Sullivan (who had replaced Adv. Simon Tortell following the latter's demise) and who in turn had declared in the acts of this cause that he had relinquished his office.

Having noted at the hearing of the 27 November 2014 that Adv. Frank Testa declared that he had renounced to the defence of plaintiff company. The hearing of the suit was adjourned *sine die*.

Having noted the appointment of Adv. Martin Fenech and L.P. Jeremy Buttigieg as curators for absentee CHONGHAEJIN MARINE Co. Ltd. by decree of the 8 June 2015.

Having seen its decree of the 8 October 2015 whereby the Court declared the sworn application as deserted as plaintiff company failed to request that the cause be re-appointed for hearing with six months from the decree of the 27 November 2014.

Having seen its other decree of the 8 October 2015 whereby the cause for the purpose of the counter-claim.

Having heard witnesses and their relative cross-examination.

Having seen all other evidence submitted in the course of the proceedings.

Having seen the notes of submissions regarding the counter-claim.

Having seen the other acts of the proceedings, including the various decrees given *pendente lite*.

VII. Witnesses

The acts of the proceedings in this cause exceed 2,800 pages spread over 13 volumes.

The Court will be referring to the evidence of witnesses with particular reference to the counter-claim.

Jaejik Shin testified that he was president of Pleasant Seoul Co Ltd which formed part of a group of companies that included Chonghaejin Marine Co Ltd ("**CMC**"). Pleasant Seoul Co Ltd used to operate the Han River Water Taxi Business and later merged in CMC. He explained that when he heard

news about the amphibious bus project that the Seoul City Government (“**SCG**”) wanted to launch through a bidding process, he proposed the project to CMC’s board of directors. The board agreed to bid, and he was appointed Technical Director for this project in charge of Business Development and Project Management. He was also responsible for the import requirements, export contract, delivery and other details related to the bid. Preparations for the bid started in early 2007.

He explained that the project was intended to run amphibious tour buses between the Han River and Central Seoul to promote the city on the global scene, as well as increase the people’s interest in the Han River. The tender issued by the SCG included a very important condition in that the delivery of the amphicoaches had to be completed at the earliest possible date. As soon as the tender was announced, Trigon Canada Enterprises Inc represented by Jung Hum Baek, were appointed as consultants and a search was carried out to identify all the amphibious bus manufacturers in America, Australia and Europe (including the UK). They found two companies in USA, two in Australia, and one in Malta. As a potential manufacturer, the Maltese company did not seem to have a problem to meet SGC’s conditions. When he meet the various companies, he found out that one of the USA companies had the best system and manufacturing experience but for the delivery purposes defendant G.S Specialist Vehicles Ltd (“**GSSV**”) could meet the deadlines. GSSV was therefore selected as the supplier following a visit to Malta in May 2007 where he was given a test tour on a prototype amphicoach produced by GSSV. In Malta he was accompanied by consultant Baek and the technical person Jaechul Lee. The test drive was conducted by defendant Stephen Smith, while defendant George Smith, director of GSSV, and Trevor Woodfine, an employee, were also on board.

He continued to state that George Smith was very convincing in his arguments that GSSV would have no difficulty in meeting the deadlines. Smith told them that GSSV would build the hulls, buy the chassis from IVECO, and purchase the body, and would then fit the chassis into the hull and the body onto the rest. Smith was clear that the amphicoaches would be ready by October 2007. CMC required two by the beginning of October, and another three by the end of that month. George Smith and his wife Gladys Smith signed a personal guarantee in favour of CMC to warrant for GSSV that it would fulfil its obligations in terms of the agreement. George Smith also implied that GSSV was the only company to obtain international certification and that its amphicoaches were of much better quality, than those built in Australia and the USA. In an email dated 21st June 2007, George Smith stated that the amphicoaches would comply with EURO 5

specifications and with R66 TUV classification. That meant that certification of the amphibious coaches was obtainable without difficulty. George Smith provided them with a copy of the test certificates that had been given to GSSV. After due verification in South Korea, the documentation was found to be satisfactory, and therefore the coaches were ordered from GSSV for delivery in South Korea.

Witness pointed out that George Smith was very confident that he would be able to meet delivery as promised. On 1 June 2007, a contract was signed. In July 2007, there was a change in the terms of the contract in the sense that it was agreed that GSSV would supply two amphibious coaches by the beginning of October 2007 and another three by the end of October 2007. George Smith and his wife signed the personal guarantee in July 2007.

He stated that CMC was awarded the SCG tender for the supply of amphibious tour bus, on the basis of the contract that had been concluded with GSSV. SCG was strict on the delivery dates as it had officially announced to the people of Seoul that the project would come to fruition by a specific date. In fact CMC had to report on the progress of the construction of the amphibious coaches on a bi-weekly basis.

He explained that he communicated directly with George Smith on 12th September 2007 after it became apparent from correspondence with Paul Baek that GSSV was falling behind schedule. George Smith repeatedly assured CMC that the deadline of October 2007 would be fulfilled. On 21 September 2007, he wrote to George Smith and explained that failure to fulfil contractual obligations with the SCG would effectively blacklist CMC and he would have to resign from the post of director of CMC. In that letter he pointed out that he had no choice but to have the two amphibious coaches delivered by air at a cost of US\$ 435,000. He had made it clear that once set it would be difficult to change the delivery date. He was also very clear that if the vehicles did not arrive by 24 October 2007, CMC would face hefty fines on a daily basis, followed by a cancellation of the contract. SCG was insisting on sending two inspectors to Malta to view the progress. In actual fact, due to default on the part of GSSV, SCG imposed hefty penalties on CMC.

He testified that CMC entered into an agreement with Russian International, a company that provided air transport services. He based himself on information given by GSSV that the bodies of the vehicles would arrive in Malta twenty-two days after the ship set sail from China. He

thought that an extension to the original deadline was needed nonetheless, and he managed to obtain an extension in the sense that the first two amphicoaches would arrive by the end of October in South Korea. George Smith was informed about the extension via email dated 8 October 2007. Subsequently Paul Baek informed him that on the 8 October 2007, he himself had spoken to George Smith who informed him that the ship coming from China had encountered a typhoon; on 12 October 2007, George Smith advised that the shipping agents in China mentioned a cyclone. George Smith wrote to SCG on 14 October 2007 where he requested an extension for delivery. Following this letter, SCG requested CMC to send Paul Baek and Jaechul Lee to Malta immediately in order to report on the current situation. Despite that visit, it was not possible to establish anything with certainty. And SCG granted an extension to the 15th December 2007.

He continued to explain that through several email exchanges, there were further delays in the delivery of the bodies and thus it was decided that more bodies would be ordered and that these be transported by a non-stop liner. The bodies of the coaches which were ordered later arrived in Malta first at the beginning of December 2007. This meant in real terms that GSSV would not meet the extended deadline of the 15th December 2007. George Smith wrote to SCG where he stated that the first two amphicoaches would be delivered by 14 January 2008 and the rest by the 25 February 2008. On 19 December 2007, George Smith informed him that it would not be a problem to obtain the certification as explained to him by Paul Baek and Jaechul Lee. During a mid-December 2007 visit by SCG officials, it was agreed with George Smith that Jaechul Lee would remain in Malta and report daily to SCG. Smith was against this move. They insisted that the head of the amphibious vehicle project had been dismissed and therefore the presence of an official from CMC was essential to avoid termination of the contract by SCG. In actual fact then George Smith barred Jaechul Lee from entering his factory with effect from 26 December 2007.

He stated that on the 3 January 2008, he sent an email to George Smith informing him that SCG had extended the deadline for yet another time against an immediate payment of a penalty of US\$ 56,500 and that a manufacturing report had to be sent daily. George Smith replied by emails dated 4 January 2008 and 7 January 2008. He alleged that Jaechul Lee was a spy secretly taking measurements. Incidentally Smith had already given CMC the measurements on a previous occasion. In his email of the 7 January 2008 Smith said that he was not happy that the vehicles were going to South Korea because he alleged that due to spying, the manufacturing process had been jeopardised. Another manufacturing crisis occurred when alterations

were required for fitting the windshield. In an email of the 24 January 2008, George Smith informed him that the two vehicles would be completed by the end of February, but in a later email of the 28 January 2009, George Smith was not as categorical on the end-February deadline.

He insisted that there were long delays because GSSV was not technically competent to bring the amphicoach together. This insufficiency in quality meant that the Lloyd's Register relating to ship inspection and TUV relating to land vehicle inspection could not provide certification. It was only in mid-August 2008 that TUV certification could be obtained, but not Lloyds. As GSSV could not keep the delivery date, CMC lost the contract with the SCG on the project. After the contract was cancelled, CMC continued to keep contact with GSSV in the hope that they would deliver the amphicoaches and CMC would then approach SCG to have the contract revived. In August 2008 George Smith asked to renegotiate the price and informed them that he could not deliver the amphicoaches because of a secured creditor. Evidently to them that was not the truth as Smith wanted to avoid delivery.

On **cross-examination** Jaejik Shin testified that since 24 March 2010 he did not hold the position of technical officer with CMC, and since February 2010 he was not any longer Chairman of Pleasant Seoul Company Limited. He never was Chairman of CMC; he was only a director of the company. He confirmed his signature on Doc JG2. CMC was awarded the tender in question on 6 July 2007. Their bid was submitted toward the end of June 2007. He was present when the contract was signed on the 1 June 2007. Asked for the reason why on the 20 June 2007, an email was sent asking for an amendment to the contract, he stated that the contract was signed on 1 June 2007 and Pleasant Seoul Company requested the documents to view them. He did not recall when the personal guarantee was effected although it was around the 1 July 2007. The guarantee refers to Chonghaejin Company Limited; the correct name of plaintiff is Chonghaejin Marine Company Limited. He knew of a meeting held in mid-December 2007 although he was not present. His contact within GSSV was George Smith. He was involved in the negotiations that preceded the finalization of the contract. He confirmed that the claims for non-delivery of the amphicoaches and relative damages were directed only against GSSV. Furthermore he stated that the earliest date for delivery imposed by SCG was the end of October 2007.

On **re-examination**, Jaejik Shin stated that he was not aware that Stephen Smith is claiming possession of the amphicoaches and that the amphicoaches were purchased by Waterbus International Limited which is

owned by Stephen Smith. Nor was he aware that the coaches were under the control of Stephen Smith.

Duane Lee testified that he is employed by Trigon Canada Enterprise Inc and has worked closely with Jung Hum (Paul) Baek. He worked as a consultant with CMC, Pleasant Seoul Co Ltd and on other projects with CMC affiliate companies. He became involved in this particular matter around February 2008 when the relationship with GSSV and CMC was beginning to face problems largely due to GSSV's inability to keep the contracted delivery date for the five amphicoaches ordered by CMC, the subsequent pressure placed on CMC by the SCG to get clear answers to justify the delay and the unwillingness of George Smith to co-operate with both Paul Baek and Jejik Shin. Prior to his involvement, he had accompanied people from SCG and CMC on a visit to Malta in December 2007. That was the first time he met George Smith, his son Stephen Smith and factory manager Trevor Woodfine.

He stated that the delay in production and delivery of the amphicoaches, and the failure to provide clear information on progress in production lead to a visit to Malta by officials from SCG. On 14 December 2007, George Smith sent a letter sent to the Mayor of Seoul City Government where he explained that the first two amphicoaches would be completed by 14 January 2008. However this did not happen with the consequence that CMC sustained losses including a cancellation penalty on a chartered aircraft of US\$ 162,500USD. Apart from that several high-ranking CMC officials were demoted or discharged.

He affirmed that on 16 January 2008, he was asked to go to Malta urgently as the deadline had expired, and Paul Baek and Jaechul Lee who were both in Malta at the time were having problems with GSSV. On his arrival in Malta, he contacted George Smith via telephone but the latter refused to meet him and Hykju Lee. Smith had mistakenly thought Hykju Lee was a lawyer. The trip to Malta ended in failure.

Witness pointed out that he tried to call George Smith for updates but he refused all contact. The emails exchanged in February 2008 were only technical. Another problem arose when the screens which arrived from China were not satisfactory and this would entail further delay. Smith decided to alter the frame structure in order to accommodate the new windshields. SCG made contact with John Ellul Sullivan, Hon Consul for South Korea in Malta. On 22 February 2008 he accompanied CMC Chairman to Malta. However

George Smith refused to meet them. At long last, they were allowed to take view of the amphicoaches but George Smith was not present. Through the Hon Consul, George Smith provided VIN numbers. The Hon Consul informed him that matters were running smoothly for the visit by SCG officials. George Smith even informed him that he could arrange a test ride for them.

He explained that on 18 March 2008 GSSV sent the photographs of the amphicoaches and requested a payment on account of US\$ 300,000 in order to hasten the construction of the three others. Shin immediately agreed to help GSSV. On 19 March 2008 it was confirmed that the payment was required to fund the material. However in August, George Smith disclosed that a secured creditor had lent him money. There were several emails exchanged as regards the certification issues. He had specified which certificates were required for registration of the amphicoaches.

He continued to state that a first payment of US\$ 150,000 was sent to GSSV. George Smith gave him updates on the certification issues. The shipping date was established as the 9 April 2008. On 28 March 2008, George Smith informed him that both the TUV and the Malta Government certification appeared to be in order. A second payment of US\$ 150,000 was effected on 31 March 2008.

He pointed out that George Smith complained of delays in the issue of the Lloyds design certificate. On 13 April 2008 he received an email that the testing of the amphicoach was aborted due to a fault in the cooling system. He explained that there had been mention of problems in the air-conditioning system but the matter had degenerated. When asked when the problem would be remedied, George Smith replied by suggesting to postpone the shipment.

He continued to state that Smith told them that the cooling system had to be changed completely and instead of a roof cooling system, they would be placing a rear keel cooling system. A new deadline for shipment was discussed. Smith told them that the cooling system set up was a masterpiece of skill and innovation. He instructed Smith to effect shipment by air. Smith did not oppose to this.

Witness affirmed that Smith had insisted that the vehicle would be ready for shipment on 8 May 2008. Nonetheless delays in shipment recurred.

While on a visit to Malta, he insisted with Smith that the air conditioning unit had to be installed and tested before transfer to South Korea. As the air conditioning remained a problem, it was proposed to install the air conditioners in South Korea. This proposal was rejected. Delays in shipment persisted due to the air-conditioning issue and the changing policies of the TUV. On 14 June 2008, GSSV informed CMC that the vehicle was ready for shipment, and that it had been properly tested. Subsequently, another email was sent where it was stated that inverter of the air conditioner had to be changed. He visited the GSSV factory and after inspecting the vehicle, problems were encountered with the strength and coverage of the air conditioner. The shipment was later postponed as GSSV decided to alter the electrical system to an onboard generator to run the air conditioner. During that inspection, he also outlined a number of outstanding matters.

Witness continued to state that on the 4 July 2008, he and Jaechul Lee boarded the amphicoach for a full load test which was carried out. Then Jaechul Lee asked for another full load test to take place without him as he had to view it from the pier. Stephen Smith who was driving the amphicoach expressed reserve. However this second full load test did take place but some seconds after the amphicoach was engulfed with black smoke. Smith told him that the diesel pipe had melted and burned. As time passed, the engine overheated again. IVECO technicians were summoned to check on the engine, and a technician had to rectify the fault on the air conditioner. IVECO did not locate the problem.

Witness explained that he called Smith and had made it clear to him that before shipment, a full load test and certification were required. George Smith asked for more money that is US\$ 80,000. This was the 4 August 2008. At that point, Smith mentioned that he had borrowed money and that GSSV owed its creditors €3,000,000. Smith tried to renegotiate the price. Smith told witness that the creditors allegedly transferred the assets of GSSV to a new company and would not allow the transfer of the assets to CMC at the price agreed. Witness considered Smith's statement as a sham because he never mentioned any creditors, not even during the nearly eight weeks witness had stayed in Malta between February and August 2008.

He continued to state that on 5 August 2008 Smith sent an email saying that he would deliver the five coaches if CMC bought the rights to build the amphicoach for SE Asia for the price of US\$4,500,000. It was difficult for them to understand what rights CMC would purchase. Meanwhile an English solicitor resident in Malta was requested to mediate.

Smith continued to insist on that offer. At that point their lawyers in Malta were instructed to take legal action against GSSV. At that point, they realised that Stephen Smith had formed defendant company Waterbus International Limited to resume production of the coaches.

Witness affirmed that following service of warrant no 1884/2008, Stephen Smith sent a letter dated 2 December 2008 addressed to CMC lawyers wherein he stated that Waterbus International Limited had taken over taken over production from GSSV and was not responsible for GSSV's obligations. He pointed out that every time he was in Malta, Stephen Smith was at the GSSV factory dressed in overalls and working on the amphicoach. He was the driver in Holland when the ramp collapsed and the amphicoach ended in the sea. His father proposed that he should go to Korea and instruct the eventual drivers. He drove a car at high speed in the direction of Paul Baek and Jaechul Lee outside GSSV's factory. He knew very well that those amphicoaches were being produced for CMC. During the course of proceedings that were filed for the revocation of the warrant, which request for revocation was dismissed by the Court, Waterbus International Limited presented a secured loan agreement with a firm called J Rae and Associates. In the preamble to the agreement, it is stated that Waterbus International Limited agreed to purchase from J Rae Associates the secured assets i.e. the amphicoaches previously owned by GSSV. Those assets were taken over under the terms of a previous secured loan agreement between J Rae Associates and GSSV. That secured loan agreement for the sum £1,420,000 represented the full sale price of the assets.

Witness stated that CMC does not believe that there was a bona fide loan, nor that GSSV received €3,000,000 by way of loan from J Rae and Associates, nor that Waterbus was given a loan by J Rae and Associates of GBP 1,420,000 to purchase the coaches, when litigation was on the cards. In any event, if any lender truly advanced such sums, recovery would be in doubt, as the activity at the factory was practically at a standstill.

On **cross-examination**, Duane Lee explained that currently he was an accountant, but at the time, he was a translator and a consultant for a shipyard. He confirmed that he has heard of a company named Chonghaejin Company Limited, i.e. a company without the word "Marine" included. He confirmed that he was present for a meeting that was held in December 2007 in Malta. The meeting was held because the SCG at the time was suspicious due to the reports which were transmitted to them that there was no progress regarding the amphicoaches. He confirmed that two SCG officers came to

Malta with him to see for themselves. These same two officers were dismissed from their job once the project failed. He stated that in that meeting, delivery dates were also discussed. He also said that there was a discussion about the refund of the deposits paid in case GSSV did not meet the deadlines. When shown Doc JG2, he stated that he had never seen that document before. He confirmed that contents of Doc GS2. He did not have technical expertise.

He explained that when he was translating what Mr Smith was saying, he did highlight to his clients the sign language and facial expressions of Mr Smith. He confirmed that Paul Baek was with him in December 2007 and also in July 2008. He stated that when he called on John Ellul Sullivan, Smith shouted at him on the phone. Ellul Sullivan had told him that he was falling out of favour with George Smith. He confirmed that he had refreshed his recollection of events by referring to emails and other documents. He stated that Doc DL16 consists of notes taken during a particular telephone meeting he had with George Smith.

Lee continued to state that in March 2008, Smith did co-operate as CMC paid him a further US\$ 300,000. He confirmed that the company was aware that Smith was not going to meet the deadlines because what he stated in signed letter he later withdrew by email. He insisted that none of the coaches were delivered. Stephen Smith is involved in GSSV although he is not listed in any documents pertaining to GSSV.

On **re-examination**, Duane Lee confirmed that he came ten times to Malta. He confirmed that in none of the meetings he had with George Smith and Stephen Smith was there ever mention of a loan for €3,000,000. Because of the mess created by defendants, three employees from CMC and two from SCG had to resign.

Jung Hum (Paul) Baek testified that he was born in South Korea but resides in Canada although he visits South Korea frequently mainly on matters concerning his consulting business. His firm Trigon Canada Enterprise Inc. acted as a consultant to CMC in the amphibious bus project. He worked on the contract with GSSV and entered into correspondence with George Smith. SCG had issued a tender for the delivery of amphibious coaches to regenerate the Han River. As a quick delivery was of essence to CMC, Trigon Canada Enterprises Inc was instructed to help find and contract a manufacturer. He advised CMC to select the amphicoach produced by GSSV after a visit in May 2007, and after a test drive on a prototype built

by GSSV was carried. GSSV had also provided copies of test certificates acquired by the prototype. George Smith had given assurances that GSSV would meet the deadline. From the meeting and the correspondence that followed, CMC was lead to believe that certification of the amphicoaches could be obtained without particular difficulty. George Smith informed them that in order to meet the deadlines, he would produce the hulls and purchase the bodies and the chassis from IVECO. The chassis would be placed in the hull and the body would be fitted on to the hull. He made it clear to Smith that the deadlines had to be met. Smith was also clear that he would honour the deadlines in so much as he stated this in writing including in a letter dated 27 June 2007. An agreement was signed on 1 June 2007 with GSSV, together with a personal guarantee from directors George and Gladys Smith.

He continued to state that at a point in time, GSSV had no difficulty at all in providing CMC with all the information required. The dimensions of the amphicoaches was sent. During a visit on the 12 July 2007, the parties agreed to a change to the 1 June 2007 agreement, and on the 16 July 2007 CMC paid GSSV a further sum of US\$ 936,000, after a first amount of US\$ 228,000 had been settled on the 4 June 2007. The two amounts were in consideration of the price of the amphicoaches. The contract between SCG and CMC following the award of the contract to the latter was signed on the 30 July 2007. Following that, he emailed Smith that CMC required the drawings of the amphicoaches. George Smith started to show his true worth when he told them that he would deal directly with SCG, and that he would not allow anyone to take measurements.

Witness testified that on 1 August 2007, he received the first news of problems with the shipment of the body of the coaches. This news was of concern to CMC because the company had already paid \$1,164,000 and was already exposed with GSSV. Because of the quick delivery factor, Smith informed them that CMC were saddling GSSV with additional costs. He therefore decided to order finished buses as opposed to just the body. At the start of August 2007, George Smith inquired with CMC whether it wanted to acquire an amphicoach which had been ordered from GSSV by a Hungarian firm as the latter was not cooperating. On the 15 August 2007, George Smith informed him that the first two IVECO chassis had arrived in Malta; he also mentioned the supplier of the bodies as being CRDO, a Hungarian manufacturer which Smith alleged uses IVECO mechanical parts in their buses. He, Mr Shin and Mr Lee wanted to go to Malta on the 23 August 2007 but Smith replied that they were being pushy. They did go nonetheless however the bodies were nowhere to be seen. If CMC were to meet the deadline with SCG, assuming that the bodies did arrive in Malta in the short

term, the finished vessel would have to be transported to South Korea from Malta by air. George Smith ordered the shipment by tramper instead of by liner ship. The bodies were delivered to Malta in December 2007. Smith told him that the delayed delivery was due to a typhoon but this was not true as the delay was caused by the fact that the bodies were actually shipped on a tramper. Furthermore, the vessel owner advised that they did not meet any typhoons during the voyage. He insisted with Smith that a second order be made by means of a liner.

Witness stated that CMC were desperate but still hopeful. Smith started to attribute the fault on the part of CMC. He alleged that CMC officials were harassing GSSV on the delivery issue. By the end of October, CMC was charged to pay a late delivery penalty by SCG. Apart from that, SCG wanted a letter from GSSV with a definite delivery date of the amphicoaches. An extension was granted until 31 December 2007 provided that CMC submitted a daily manufacturing progress report. CMC requested GSSV to allow CMC officials to visit its factory to report on progress, and to send photos of the five amphicoaches in the various stages of completion. The deadline lapsed and a penalty was imposed on CMC. In late December 2007 George Smith banned Jaechul Lee from entering the factory.

Witness continued to state that on 10 January 2008, Jaechul Lee and himself made an attempt to visit the GSSV factory, but Stephen Smith informed them that his father told them to leave, and later drove at them at high speed. They managed to meet George Smith, but later Stephen Smith turned up with two police officers and in their presence alleged that they were trying to commit industrial espionage. They were told by the police the premises belonged to GSSV and therefore they could accede the permission with the permission of GSSV.

He affirmed that CMC suspected that there was a problem with the manufacturing process. Therefore a decision was taken to send two legal experts and two shipbuilding experts to check on the problem. The four met with George Smith and went on a test drive. They concluded that there were technical problems. CMC even asked GSSV to deliver the second amphicoach without installing the air conditioner and CMC would have the air conditioner installed in South Korea. CMC insisted with GSSV that a sea trial be conducted under full load conditions. On 28 July 2007 GSSV sent four emails in a span of 28 minutes asking for money and other unreasonable requests. GSSV refused to ship the amphicoaches and wanted to renegotiate the contract with CMC.

On **cross-examination**, witness stated that Trigon Canada Enterprise Inc were assisting CMC with their request to buy materials and products from abroad. He clarified that the assistance consisted of translation and interpretation. Baek insisted that the technical person who was involved in the decision for the choice of GSSV as the supplier of the amphicoaches was director Shin and technician Jaechul Lee. He personally was involved in the translation even before the signing of contract with GSSV. He explained that the contract was first signed in Malta and then it was signed later by Mr Ahn in South Korea. He did not remember whether he was present during the signing of the agreement. He confirmed the contents of Doc JG1 being emails which he exchanged with George Smith. When asked about the date of the contract, he stated that it was agreed that the date would be the 1 June.

Witness continued to explain that when he first saw GSSV's prototype, it appeared to be in order, and had all the certificates in place. He explained that George Smith was very persuasive and enthusiastic. He gave an opinion as consultant to CMC to proceed with the deal. He insisted that the certificates of the prototype were given to him before the contract was signed and that the prototype was fully functional both on land and in the sea. He confirmed that Smith sent him emails advising him that a Korean competitor had communicated with him about these amphicoaches. He also confirmed that he was present during a meeting with George Smith held at the Radisson in December 2007. He could not recall however whether any document was signed or discussed. Nor did he remember compiling the summary of events contained in Doc CMC3. The date of the signing of the personal guarantee by Gladys and George Smith was after the signing of the contract between CMC and GSSV. This guarantee was first issued in his name but it was then changed to the name of CMC.

Witness confirmed that emails were exchanged including Doc PB9. CMC started to query the deadline soon after the contract was signed. For CMC the time factor was of essence. He confirmed that an addendum to the contract was signed on the 12 July 2007. He could not recall whether Clause 10.3 was discussed during the December meeting. He insisted that they had always discussed the delivery of five amphicoaches as that was a condition in the tender of SCG. The amount was five amphicoaches but they had different dates of delivery.

Witness explained that the personal guarantee was affected as CMC had its concerns regarding deadlines. As a matter of fact, GSSV had very few employees, and it seemed that the company was lagging behind from the very

start. He was aware that the first shipment was on a tramper (not a liner) because Smith gave him the name of the vessel i.e. the Verona Castle.

He stated that the contract with SCG was terminated in April 2008. Despite that, in July 2008, CMC was still insisting on delivery of the amphicoaches. CMC had disbursed considerable amounts in favour of GSSV, and wanted to place the amphicoaches with another city. At that time, there was also still a possibility for a new contract with SCG following a change in the mayor of Seoul and the fact that there still were no amphicoaches in Seoul City.

He insisted that his opinion that GSSV should be chosen by CMC rested mainly on the fact that the prototype appeared very good and it had all certificates required. The time factor for delivery was essential to CMC to beat other competitors for the tender. GSSV had no production history as the prototype they had was the only one they had produced.

He confirmed that he was aware of Doc PBX. That document was given to him by GSSV when he first came to Malta.

Jaechul Lee testified that he was an employee of CMC involved in the business dealings with GSSV. His responsibilities were to receive the amphicoach as a final product, to inspect relative certificates, to receive regular manufacturing reports from GSSV, to report to SCG, and to register the amphicoach in accordance with South Korean legislation following receipt of documentation from GSSV.

He explained that when he first visited the GSSV `s factory and went on a trial ride of the prototype amphicoach, he found the finishing of the outfitting and interior rather deficient but the hull and the body were made in one piece and he thought it would be structurally safe. He explained that he was given copies of the various test inspections and certificates that the prototype had been given. George Smith was very convincing on the feasibility of producing identical vehicles, composed of two separate parts, namely a hull produced by GSSV and a body supplied by an independent producer. Smith stated that he would meet the deadlines. According to GSSV, it would be quicker if they were to manufacture the aluminium hull and assemble same with a bus body manufactured by IVECO (which was then later revealed to be a body produced by ZONDA).

Lee explained that after CMC won the bid for the Amphibious Tour Bus project, SCG requested CMC to provide weekly and monthly manufacturing reports. GSSV however refused to provide these reports and thus CMC had to visit the factory in Malta, and report to SCG. Between May 2007 and July 2008, he went to the factory on several occasions and Stephen Smith was always present. The first reason for GSSV's failure to meet the deadline was their mistake in selecting the vessel for the delivery of the Zonda body. The bus came from China not from Italy as would have happened had the body been an IVECO. Smith raised the excuse that the ship *Verona Castle* was being delayed due to bad weather, as well as repair work. But when CMC verified, it resulted that *Verona Castle* was a vessel that was chartered to make several stops in different ports. CMC insisted with GSSV to find a faster route; indeed the second body of the Zonda bus arrived in Malta before the arrival of the first shipment.

Lee continued to state that the second reason of GSSV's failure to meet the deadline was that GSSV did not have the technical skill to assemble a Zonda bus body onto their hull. Hence the production was delayed due to methods dictated by trial and error.

According to witness, the third reason was GSSV's lack of technological knowledge and skill. He explained that they had problems in different parts, including the assembly of the body, window, air conditioner, duct, engine, and generator.

Lee stated that the body of the bus arrived in Malta in mid-December 2007. According to GSSV, assembly of the Body to the Hull would take ten days. However, when they were cutting the deck of the bus, the body of the bus began to twist to one side, causing problems to the overall structural safety, affecting the windows. On the 13 November 2007, SCG extended the deadline for delivery of the first two amphicoaches. CMC had to spend extra expenses to rent a cargo plane for transport as an alternative to carriage by sea. SCG insisted on viewing at first hand whether the deadlines could be met. When the government officials went to GSSV premises, the latter requested a further extension.

Lee stated that after the SCG left Malta, they requested CMC to visit the GSSV facility every day. George Smith was not happy that he was staying in Malta to monitor the production. Smith stated that he would co-

operate with the monitoring program until December 24, and after that GSSV would send daily production notes and photographs. When he went to visit the GSSV site on the 26 December, George Smith told him not to go there anymore. Smith started to make false accusations that he was entering a technologically sensitive area and that he was performing industrial espionage by measuring the hull. He insisted that none of those present including Stephen Smith had stopped him from taking that measurement. He continued to describe the incident which occurred on the 10 January 2008 when Stephen Smith told him and Mr Baek to leave, and then later approached them with his car at a speed. They reported the matter to the police, but the position taken by the latter was that the facility was under the control of GSSV who had therefore every right to refuse permission to enter the site.

Lee continued to state that since GSSV did not have the expertise to assemble the body unto the hull, they persisted to continue by trial and error. The windshield was damaged when they tried to fit the body into the hull. GSSV re-ordered the windshield from China but the size did not fit with the result that the frame had to be changed. There was also a problem with the cooling system, as the cooling system that was installed on the roof of the bus had issues with overheating, and thus GSSV attempted to change it to a rear cooling system. All these problems delayed delivery. The final test run prior to shipment took place on 5 July 2008 but this turned out to be a disaster. During the first test run at full load, the vehicle was not driven at top speed; and even at normal speed, the revolutions per minute (RPM) seemed abnormally high. During the second trip, black smoke came out of the engine room, and filled the passenger area, whilst the engine stalled. He was later informed that the water pipe and the diesel pipe were damaged.

Lee testified that a requirement in the contract of the 12 July 2007 were the issue of the Lloyds Certificate, the Malta Marine Inspection Certificate and TUV Certificate. These documents were requested prior to shipment on several occasions but GSSV did not provide an inspection certificate, not even by August 2008. He explained that one of the reasons SCG selected CMC's bid for the Amphibious Tour Bus (ATB) Project was the unique exterior design. CMC sent the design to GSSV so that it could be painted on the exterior of the completed amphicoach. Instead GSSV used the design on its website without permission of CMC. Lee outlined that GSSV had told CMC that new model amphicoach, which GSSV was to manufacture and supply, would be completed in a much shorter time, and with much greater ease than the prototype amphicoach, since it was applying a new

technology of mounting an existing body unto a hull. In reality, GSSV's methodology was riddled with deficiencies and uncertainty.

On **cross-examination** witness testified that he was employed for four years as a technical engineer with CMC until December 2009. He was present during the negotiations, but not at the signing of the contract. The summary of events marked Doc CMC 3 was compiled by Duane Lee on his instructions. Before he prepared his sworn statement, he referred to other documents. GSSV was chosen because although the finishing of the outfitting and interior of the prototype amphicoach was rather deficient, the certificates achieved and the ride on the amphicoach confirmed that the structure was good. He compared the outfitting and interiors of coaches in South Korea to the outfitting and interior of the prototype amphicoach and found the latter to be defective. However his advice was still to go on with the deal. He confirmed that CMC had visited another company in America before they signed the contract with GSSV.

Jaechul Lee continued that GSSV was chosen because no fault was found during the test ride. He came to Malta with regard to this business for eleven times. He confirmed also that during these visits, he was accompanied by different company officials. He confirmed that Paul Baek and at times Duane Lee would assist him in the translation, as he could not communicate verbally with George Smith in English. Baek and Lee translated into English his affidavit.

Myung Soo Ahn testified that between 24 February 1999 and 24 March 2010 he was Chairman of CMC. He pointed out that SCG cancelled the Amphibious Coach Project after GSSV was unable to meet the delivery deadline of five amphibian coaches ordered by CMC. When SCG officials came to Malta in December 2007, CMC was advised to terminate the contract because CMC had become victim of deception. He explained that on his first visit to Malta in December 2007, George Smith reassured him and SCG officials that the new delivery dates would be met. During his second visit, Smith refused to meet him. The losses incurred by CMC included a damaged reputation, in that SCG sent out a notice to all the government agencies in South Korea detailing CMC's failure to follow through the project. CMC was therefore blacklisted. CMC sustained also financial losses, which included the cost of manufacture, numerous delays in delivery, and penalties for the cancellation of air shipment. Losses amounted to circa €US\$ 2 million.

He further stated that when CMC was unable to communicate with GSSV, CMC made contact with Hon Consul for South Korea in Malta, Mr John Ellul Sullivan and sought his advice.

On **cross examination**, Myung Soo Ahn stated that the purchase of the amphicoaches was effected by CMC. With regard to his sworn statement at fol 1049 of the court file, he confirmed his signature. However the date shown on the document was not correct; the correct date was May 2010. The contents of the sworn statement are correct. With reference to Doc CMC at fol 10 to 15, he confirmed his signature and relative date i.e. 1 June 2007.

He stated that George Smith was not with him at that time when he signed the document, because Smith had already signed the contract. He stated that Mr Shin had negotiated with SCG. And it was he who selected GSSV. The contract between CMC and the SCG was terminated on 23 April 2008. That notwithstanding CMC still insisted on delivery of the amphicoaches as these could have been directed to other projects of the company.

He further testified that even though CMC was blacklisted, it tried to continue doing business as regulations varied depending on the provinces.

He stated that the figure of US\$ 2 million was established by the company financial officer on the basis of receipts in hand.

Yong Jun Cho explained that he is a financial director for CMC and was involved in this project. He explained that on June 4, 2007, CMC wired 10% of the total purchase price in the amount of \$228,000 USD to GSSV. On July 16, 2007, CMC wired 40% of the total purchase price in the amount of \$936,000 USD. He stated that after these payments, GSSV delayed the completion and delivery date several times. In March 2008, GSSV asked for an additional payment of \$300,000 USD because they lacked funds to purchase supplies needed and these funds were wired in 2 instalments on 25 March 2008 and 31 March 2008. Cho continued to state that CMC decided to have the amphicoaches shipped via air shipment in the hope that the deadline would be met. A contract was made with Yun World Trade network Inc for air transportation on the 2nd October 2007 where the full amount was prepaid. CMC lost the sum of \$162,500 USD as a 25% penalty fee due to the cancellation of these services. Moreover, he explained that a total of

\$332,000USD was paid in penalties to the Seoul City Government in view of penalties. There were other fees including \$63,794 USD as legal fees, \$37,184 USD as travel expenses; \$34,504 USD as advisory fees; \$6,891 USD as costs associated to the Government`s bid and \$32,387USD as administrative costs related to the bid. Cho explained that he had numerous meetings with Government officials who in the beginning were positive but when the amphicoaches were not delivered, they began to have doubts and a series of unpleasant meetings took place. He continued that the city of Seoul dispatched an official letter to the regional governments regarding CMC`s inability to fulfil the agreement with the Seoul Government. He stated that thus CMC has been blacklisted and its reputation has been severely damaged.

On **cross-examination**, Yong Jun Cho confirmed his involvement in the amphibious tour bus project in the finance department. He confirmed that all the payments were being effected only to GSSV. He stated that GSSV sent an invoice for three hundred thousand USD. He obtained the information that this money was needed to speed up the production from GSSV. He confirmed that CMC paid Seoul City Government penalties due to the delays. He confirmed the calculations he made and stated that the insurance guarantee is a claim fee paid to the insurance company. As regards the travel expenses, he explained that these consisted of travelling expenses of six members for seven times to Malta with different airlines. He stated that the expenses related to the Government bid consisted of fees for drawings and plans for the amphicoaches. Advisory fees refer to lawyers` fees. He stated that the legal fees denoted with letter “A” are related to Seoul.

Cho stated that he was instructed by Mr Ahn to pay and arrange for the transport by air of the amphicoaches. He stated that Yun World Aviation Centre sent the amount to the Russian International Limited for the full amount and then a refund of the amount was sent less hundred and sixty tow thousand and five hundred dollars which was lost as a penalty. He confirmed that CMC entered into this contract at its own risk and there was no insurance policy. He confirmed that the amphicoaches were never delivered.

In a further cross-examination, Yong Jun Cho affirmed that he held the position of the financial director of the company. He confirmed that he knows about a company called Changhaejin Company Limited, but he belongs to CMC, i.e. Changhaejin Marine Company Limited. He explained that Changhaejin Company invests in Changhaejin Marine Company Limited but these are 2 separate entities. He insisted that he has nothing to do with

Changhaejin Company Limited. With reference to the document a fol 1051, he stated that Changhaejin Company Limited sent it to his company and it was that former company who paid the amount therein indicated. He confirmed that he had seen the original of this document. He explained that there was a bid bond between the Seoul City Government and CMC, and the bid bond was paid in favour of the Seoul City Government. He noted that 10% of the entire bid bond was paid by their insurance. He stated that what CMC is asking for in this court case, is the amount which the insurance company is entitled to demand from CMC after that the insurance was made to pay the Seoul City Government. He insisted that CMC had to pay the penalties for all the three delayed penalties.

Cho insisted that the services of the attorney Chang Hi Choy was required due to the delays for the delivery of the amphicoaches. He agreed that he visited the factory where GSSV was producing the amphicoaches which was situated in Malta. He confirmed that amongst the receipts there is the expenses incurred for a trip to Gozo and also the purchase of a bottle of wine.

Cho also replied in writing to a number of questions that were made to him in writing. He agreed that with reference to Doc A-2(1), Professor Han was engaged solely to advise on the legal aspects relating to the operation of the amphibious buses internally in Korea and with the contract between CMC and the Seoul City Government. He confirmed that Professor Han's engagement had nothing to do with the failings on the part of GSSV with respect to the contract between GSSV and CMC. He explained that it was at Mr Ahn's discretion to decide whether Professor Han would have been engaged by CMC anyway irrespective of whether GSSV honoured its contractual obligations with CMC or not. With reference to Dok A-3(3), he explained that this page was printed directly from the bank's website and thus the bank makes a disclaimer so as to protect itself from saying that the printed copy is not official. He agreed that the Dok B-1(2) relates to travel for 2 persons, i.e. Mr Duane lee and Mr Myung Soo Ahn. He stated that the term "international trip of CEO" is a short memo for internal use so that the officers can quickly recall what this expense was for. He explained that Duane Lee accompanied by Mr Ahn because of his understanding in the previous dealings with GSSV and to serve as a translator. He explained that with reference to Doc B-3(1), at that time the board of directors were not happy with the continued delays in the completion of the amphicoaches and as he was the main contact person between the Seoul City Government and CMC, he went to Malta to observe the situation in person. He continued to explain that Song Bok Park was an engineer assigned the task of registering

the amphibious bus in Korea while Jung Nim Lee was a driver who was sent to get trained to operate the amphicoach. He confirmed that Mr Lee Cheong was sent to Malta for training of the operation and driving of the amphicoaches. These people did not play an important role in this lawsuit so they were not asked to testify.

Cho stated that George Smith was not able to keep his promise on when the amphicoach would be ready for a test drive and thus they had to make additional expenses in their stay in Malta. He described Dok B-6(1) as an internal expense slip for CMC which is used for accounting purposes to keep track of expenses which in this case were those receipts accumulated during a business trip to Malta from June 19 to August 13. Dok B-6(2) was the hotel receipt for Mr Jaechul Lee, Mr Duane Lee and other CMC people who stayed in Malta in regards to the completion of the amphicoaches. He explained that Duane Lee was at that time stationed in the Philippines and working on a project there. He continued that in order to accompany any employee of CMC, he had to first fly to Incheon Korea and then after any business trip to Malta, CMC had to pay for his flight back to the Philippines. He explained that Doc B-8(2) clearly states on top that it is an Advance Invoice which means that the hotel wants to get payment upfront before allowing a guest to stay. He explained that the stay was for May 8 2008. He explained that the Radisson Hotel (Doc B-8(3)) allowed for accommodation payments after the stay of Mr Jaechul Lee and Mr Duane Lee. He stated that they checked out on May 8 2008 and paid their bill on that day.

With reference to Doc ST1, Cho explained that he found a calculation error in the original sum and thus he had to modify the amount. He stated that Dok C-1 and C-2 were the legal fees involved in preparing for the lawsuit against the Seoul City Government. Dok C-3 and Dok C-4 were the amounts that they were told to pay by the Government after that the lawsuit was lost. There were two lawsuits made by CMC against the Government – one was for the cancellation of the amphibious bus project and the other was to stop the Government from taking the bid bond from CMC. He continued to explain that Dok C-3(2) is an actual bill from the Seoul City Government after that the lawsuit was lost. He confirmed that Dok E-1(1) is an expense slip used internally for CMC accounting purposes. This amount was paid to Moreal Design for design work involved with the amphicoaches. He stated that GSSV did not provide designs of the amphibious buses to CMC. Cho explained that although George Smith claims to have given them to CMC, he is a very disorganized person and never gave such designs to CMC. He stated that these designs were requested from GSSV in several emails. He explained that the services of Moreal Design were utilized to make an exterior design for the

amphibious buses. He stated that since George Smith did not provide designs to CMC, CMC had to utilize the services of Shipping Safety Technology Corp to design blueprints that could be submitted to the government vehicle testing department for vehicle registration. He explained that since these amphicoaches were new to Korea, they needed to undergo testing from the road vehicle department, as well as the marine boat department.

Cho explained that Moreal Design and Shipping Safety Technology were not shown the designs (blueprints) of the amphibious bus. He stated that Smith only sent a blueprint of the Zonda bus body to CMC but he never sent a blueprint of the amphicoach as this would have all measurements on it. He continued that Plustech Co Ltd was hired by CMC to work on the vehicle registration documents and requirements of the amphibious buses for Korea. HE continued that CMC hired 2 employees to work solely on the amphibious project for Korea. He stated that these employees worked on setting the routes the amphibious buses would travel in Seoul, worked on marketing the new tour bus and also carried out requests made by the Government. These employees were Han Gil Tae and Kim Jaebum. He stated that an office was rented in Yeoido, Seoul to be the main office for the amphibious bus business in Korea and the office space was rented for five months from January to May. He confirmed that CMC has no office in Malta and is operating from the same office. With regards to the entry "others" on Document ST 1, he was refereeing to expenses related to opening a new office in Seoul. He confirmed that all the figures in the documents submitted in support of his evidence are present in CMC's audited accounts.

Rodney Lee Berger confirmed that during August 2008, he was contacted by Duane Lee on behalf of CMC with respect to the situation regarding GSSV. He explained that he met Mr Smith at the offices of Grech Vella Tortell Hyzler on the 6th November 2008. During this meeting, Smith and Berger discussed 3 possible outcomes which were GSSV completes the contract, GSSV assigns the benefit of the proprietary rights to the design of the amphicoaches and GSSV refunds the moneys thus paid by CMC under the contract. He continued that whilst discussing the option that GSSV completes the Contract, Smith was adamant about this as he expressed a distrust of CMC and that he thought that it was the intention of CMC to copy the engineering of the amphicoaches. Berger explained that Smith stated that GSSV was now set on selling the proprietary rights of the design of the amphicoaches for various territories other than Europe and stated that GSSV's preferred settlement was to sell to the Claimant the proprietary rights for SE Asia and probably also Australia and New Zealand for a consideration of US \$4.5 million. He continued that Smith stated that GSSV

would then give credit for the moneys paid by CMC; deliver 2 completed vehicles; include all training required and supply the requisite parts to enable the operation in Korea to be an assembly operation only. He stated that Smith pointed out that at this stage, GSSV did not own the proprietary rights to the Amphicoaches but that he could procure the assignment of the appropriate rights by the actual owner.

Berger continued that Smith stated that GSSV would be prepared to refund all moneys paid but he stated that GSSV did not have sufficient funds and thus these repayments could only arise on sale of vehicles and/or on sale of proprietary rights to third parties. He explained that on sale of the first 2 amphicoaches, sufficient money would be generated to repay one half of what had been invested by CMC. He continued that Smith had explained that the manufacturing of the amphicoaches was done by another company which had financing and which financing was secured against the amphicoaches. He explained that this was why GSSV could not release the amphicoaches and why any settlement reached by agreement had to be sanctioned by a third party company and also by the secured creditors. He explained that these offers made by Smith were repeated in an email dated 5th August 2008.

Berger continued to say that he reported to CMC the outcome of this meeting but none of the proposals were acceptable to CMC and thus appropriate proceedings were done before the Courts in Malta. He also stated that Advocate Simon Tortell received a letter dated 10th March 2009 and the reply was dated 11th March 2009. He explained that he had drafted this reply, after discussing the letter with Dr Tortell and Dr George Hyzler.

On **cross-examination**, Rodney Lee Berger stated that Dr Tortell is an old colleague of his and when he came out to Malta, he worked out of the offices of GVTH. He stated that he is an English lawyer who provides assistance on matters to do with the UK Law. He stated that he reported on the meeting which he had with Mr George Smith and he was also involved in a number of discussions. He did not recall if he had signed any letter addressed to Smith, although he confirmed that there was correspondence from the law firm with Smith. He stated that he was contacted by Duane Lee and he accepted to try and intervene. Berger stated that the meeting was held on the ground floor at 192, Old Bakery Street and George Smith was not represented by any lawyer. He stated that this wasn't a legal meeting as it was just a request by the company in Korea to see whether he could resolve the problem. He insisted that in the meeting he was not acting in any legal capacity and he believed that Smith knew that he was a lawyer. He stated

that he never met Smith between August 2008 and November 2008, except for the one meeting held on 6th November 2008.

John Ellul Sullivan - Honorary Counsel General for the Republic of Korea in Malta – testified that on the 31st January 2008, he received an email from Seoul City Government which explained that they had commissioned a Korean Company to introduce an amphicoach in Hangang River in order to promote tourism in the city of Seoul. He continued that in this email, it was stated that the Korean company had ordered these amphicoaches from a Maltese company GSSV and that they had some trouble related to the vehicles. He stated that in this email they were enquiring about a certain Joseph Amato who they had heard was an inspector of the vehicles and worked for the Maltese Government. John Ellul Sullivan stated that he replied to this email and gave them all the relevant information. He offered to put them in contact with an independent marine surveyor/engineer in order for the latter to give them his opinion. He contacted Amato who informed him that he was a consultant for GSSV and that Amato told him that he had to inform Smith before giving out any information. Ellul Sullivan continued that Smith phoned him later and he told him that a Korean delegation was in Malta a few weeks earlier and were aware of the problems. He stated that Smith insisted that the production was behind schedule because of a delay in the consignment of products and parts and that the delay would be rectified within a few weeks. He stated that Smith told him that he was prepared to cancel the contract for the outstanding order of 2 amphicoaches and to refund all payments.

Witness explained that on the 5th February 2008, he was informed that the Government was worried also because there were additional problems in the vehicle inspection of amphicoaches. He continued to explain the various correspondence that was exchanged. He continued that on the 22nd February 2008, the chairman of CMC Ahn Myung Soo and Duane lee met him in Malta and he advised them that it would be useful to contract an independent marine surveyor. These agreed to appointing Paul Cardona but George Smith refused to allow Paul Cardona or any other of the buyers` consultants, to inspect the vehicle before the vehicles were completed. He explained that subsequently, Paul Cardona was allowed to enter and see but not to inspect the vehicle in a detailed manner and he wrote a report which was sent to Duane Lee. He explained that at a certain point, Smith informed him that he would contact him when it was an appropriate time to visit the vehicle and on the 11th March 2008, he was asked to visit the factory towards the end of the month. He confirmed that Smith had authorized the Seoul City Government delegation to view the vehicle and even consented to the possibility to ride on

the amphicoach. Ellul Sullivan explained that the delegation's visit was postponed and that Smith had confirmed that the amphicoaches would be completed and ready for transport by 9th April 2008. He continued that he then lost contact until on the 3rd December 2008, Duane Lee sent him an email to inform him that Smith did not deliver any of the amphicoaches and had told them that he had transferred them to his son's company.

On **cross-examination**, he confirmed that he was aware that the business deal concerned several amphicoaches. He stated that when he went to GSSV's factory, he observed 5 amphicoaches. He explained that he went to the factory after the telephone call he received from Seoul and therefore this may have been after January 2008. He stated that he had a good discussion with Mr Smith but he informed him that he could not take photographs. He stated that Smith told him that photos could not be taken due to industrial espionage. He stated that Smith did not tell him the reason for imposing this condition even whenever the Korean delegation was going to visit. He stated that he met the Korean delegation on one of their visits. He stated that he had suggested that perhaps they should call in an independent surveyor to see the whole issue.

Defendant George Smith testified that GSSV is a company registered in Malta whose shareholders are himself and his wife. He explained that he is the sole director and his wife was a former director. He continued that in late May 2007 a group of people JaeJik Shin, JaeChul Lee, Paul Baek came from Korea to look and test the prototype amphibious vehicle. He was informed that they intended to tender for a contract with the Seoul City Government (SCG) for a project for amphibious vehicles on the Han River in Seoul. He explained that a purchase contract was agreed and signed on 1st June 2007 with a company called Chonhaiji Co Ltd whose address was 1, Janggi-Ri, Donghae-Myun, Goseong-Goon, Gyungnam, Korea. He explained that a directors' guarantee was made in the name of this company and a deposit was transferred to his account on 4th June 2007 in connection with this contract.

George Smith stated that he had a difficult time with the Koreans as they started to push and make unrealistic demands. He insisted that he was plagued with emails and telephone calls. He stated that being the first vehicles in the production, there were problems some of his making and some out of his control, all of which caused major delays. He stated that he ordered bus bodies from Zonda of China but there was a major problem with shipping as they were too large for a container ship. He stated that Zonda found a

smaller shipping freighter but this suffered damage to its engine and had to lay up in the Red Sea for repairs. He stated that to try and help the situation, he ordered complete vehicles from Zonda as these could be driven and thus could sail on a Roll On – Roll OF ship which was available. However, there was a problem with funds as they cost more than \$600,000 USD which depleted their funds greatly.

George Smith stated that the Koreans kept pushing them and a meeting was set up for the 14th December 2007. He stated that he offered to return their deposit of \$1,400,000 USD as he had customers ready to place orders and the funds from them could repay them back. He stated that he was under pressure as he agreed to sign a letter whereby he agreed to give them 110% of their deposit should they cancel the deal. He alleged that the clause on the original purchase contract numbered 10.3 which stated that they would be paid their funds when the vehicles were sold to the next clients on the waiting list was illegally removed. He alleged that another clause was inserted wherein it was stated that the seller will refund the deposit in full to the buyer immediately, regardless of whether there is a client available to purchase the vehicle. He stated that the signature on this page of the contract is not his and that the first page of the contract was also changed so that the name be corrected to Chonghaejin Marine Company Limited.

George Smith stated that when the Koreans were here in Malta they demanded to be given testing time on the prototype vehicle on every trip. He stated that Stephen who did not work for GSSV but who is a ship captain and has the licence and certifications for driving and operating the vehicle on land and water, was asked to be on hand during their visits. He stated that Stephen is the only person licensed in Malta to drive and sail these vehicles and he was paid as a self employed captain. He stated that Stephen was not at any meetings with the Koreans and did not discuss any business matters. He insisted that Stephen Smith is not an employee or a company officer or had any financial connection with GSSV.

George Smith continued to testify that the bodies and the complete vehicles from Zonda arrived within a few days of each other in December. He stated that the Koreans were pushing even harder and despite his concerns of the realistic delivery times, they chartered an aircraft to fly the vehicles to Korea. He stated that he protested but the Koreans kept insisting. He stated that at that point he realized that Zonda had sent the wrong windscreens and the ones that were needed were out of stock. He stated that this strained the relationship with the Koreans but he managed to take two vehicles that were

on the waiting list in front the Koreans off the list. He stated that these 2 vehicles were for Tonnisson Shipping in Rotterdam Holland but this cost him \$300,000 USD in returned deposits to the other company. It was at this point that he asked for a further payment from the Koreans as he had spent all the funds given. He stated that the original agreement was that the Koreans wanted firstly one vehicle rising to five vehicles once they had secured the tender in Seoul. He stated that they had provisionally agreed to sell the Koreans the manufacturing rights to the amphicoach vehicles for Asia.

George Smith continued that he noticed changes in the Koreans` attitude in that their engineer Mr Lee demanded more comprehensive information. It was at this point that he informed the Koreans that Mr Lee was banned from the factory and would not be allowed entry. He stated that a week or two later, Mr Lee was caught in the factory by a worker in an information sensitive area and was caught taking measurements and photos. He stated that at that point he realized that the Koreans wanted to copy the production system and his sensitive inventions. He protested about this and he had to involve the police as the Koreans would not leave the factory. He stated that he had no choice but to carry on but new problems caused a series of delays whilst the Koreans kept bombarding him with emails and phone calls.

George Smith stated that things came to a head in midsummer 2008 when the Koreans threatened legal action against GSSV. He stated that at this point, he informed them that he had a secured loan agreement with a UK company and they owned the assets and not GSSV. He stated that they had to work towards getting their deposit returned by selling the vehicles to the clients on the waiting list. He stated that he was a client of GVTH law firm, and his lawyer was Dr Karl Briffa. Thus he was surprised when he received a letter from GVTH addressed to GSSV. He stated that on a previous occasion, he had shown Dr Briffa the secured loan agreement GSSV had and he had agreed that GSSV had no alternative but to allow J.Rae Associates to take possession of their property. He continued that a meeting was arranged between Dr Briffa, Lee Berger and himself at the offices of GVTH. He stated that Berger was going to Korea to discuss the deal with them but the next thing he heard was that the Koreans were going to take legal action.

George Smith stated that GVTH denied that he was their client and he made a formal complaint to the Commission for the Administration of Justice. He stated that Berger was incorrect when he stated that he had attended without a lawyer. He insisted that the purchase document had

several unauthorized changes. He insisted that the contract was done by Chonhaiji Co Ltd and not with Chonghaejin Marine Company. He insisted that this former company existed and that the CEO of this company is none other than JaeJik Shin. He insisted that the original purchase contract be submitted so that forensic investigations take place to determine the forgery done.

George Smith stated that it was six months after the return of the assets to J Rae Associates that action was taken on behalf of the Koreans to seize the former pledged assets. He stated that these assets were reassigned to Waterbus international ltd in September 2008 in an arrangement with J Rae Associates. The warrant of seizure was carried out on 18th February 2009. He stated that his son along with other family investors in Australia including his co designer James Garritty started a new company named Waterbus International Ltd. He stated that these new investors financed the company and entered into a new agreement with J Rae Associates where they signed a new secured loan agreement. He insisted that this agreement had nothing to do with the previous agreement between GSSV and J Rae Associates and is a completely separate matter.

George Smith concluded that it is common in the UK to take loans over assets especially when investing abroad and indeed 8-% of UK companies when starting a project abroad secure their assets either by a loan or insurance. He stated that the secured loan was totally correct and legal. He stated that the Koreans were told about this before they took legal action and were asked to negotiate their way through this whilst recovering their deposit. He stated that they decided to take this path despite knowing that the company assets were back with the finance company.

On cross-examination, he stated that he has designs of this project but he cannot get a patent for an overall object like that in question. He stated that what he meant by selling the manufacturing rights to the amphibious vehicles for Asia, is selling the designs for the vehicles. He stated that there was an understanding verbally between them that he would be selling the Koreans the rights to build that vehicle. He pointed out that this had been discussed verbally but there was no agreement. He agreed that he had built a prototype which was built using design ideas which were then translated into engineers' drawings. He agreed that he bought an engine from Iveko whilst he built a body for the prototype together with the hull. He agreed that the body was built in aluminium by himself. He explained that the prototype was produced after several years but he had only 3 people

working on it. He confirmed that he registered the company in February 2004 and he then started the project. When asked how come he agreed to produce 5 amphicoaches, he insisted that the contract stated one amphicoach. He insisted that it was only if they won the tender, that it was planned that 5 would be manufactured. He insisted that the deposit paid was for one vehicle and not a deposit for five vehicles. He stated that the other money came later but they wanted a contract to infer that 5 vehicles were already ordered even though they weren't. He agreed that in July, it was confirmed that it was 5 vehicles.

Upon being asked how come Smith agreed to manufacture 5 vehicles in such a short time period, whilst knowing that it had taken him years to manufacture the prototype, Smith stated that the understanding was only one vehicle. He stated that he had employed 25 people to assist him and he also intended to buy the bodies from a manufacturer instead of producing the aluminium body himself. He agreed that the engine was always bought but the body was going to be bought for these amphicoaches. He denied that he ordered Iveko engines for these buses. He insisted that he ordered a chassis package which included engines from Iveko. He stated that he had spoken to Iveko to buy the bodies from them but he had problems with the design work. Then he stated that he decided to order the vehicles from Zonda. He stated that he had looked at other manufacturers in Turkey, Hungary and Great Britain.

George Smith confirmed that the bodies couldn't be fitted into containers as normal ships. He stated that he didn't know that the Chinese manufacturers of Zonda were building them on huge frames and thus could not foresee the problems related to their shipping. He stated that he designed the hull to fit that body. He explained that Zonda had to arrange for the transport of the Zonda buses to Malta. He insisted that he had emails confirming that the ship which was ultimately found to transport the bodies got caught in a typhoon and then had problems with the engine. He stated that the people from Zonda informed him that the ship had met with a typhoon. He stated that when he informed the Koreans about this delay, they panicked and insisted that he orders complete coaches as this was the only way how they could be taken on a roll on roll off ferry.

George Smith continued to explain that the contract which he signed was altered. Particularly clause 10.3. He confirmed that he had a buyer ready to place orders and with those funds, he could have repaid the deposit to the Koreans. He insisted on being shown the original copy of the purchase

contract. However, upon being shown the copy exhibited, he confirmed that the signatures on the tenth and the fourteenth page of the contract were not his. He insisted that they changed the name of the company which had appeared on the purchase contract and also changed the address of the company. He continued that if one looks at the next page, it starts off at half a sentence. He stated that the signature on page 10 and 14 is very similar to his. He stated that it is a normal habit of doing initials in a different way. He insisted that the contract was signed by him on the 1st of June 2007. He stated that the contract was then taken to Korea but he was never given a copy of it. He stated that although there was the change in the name of the company, he had no problem in dealing with Chonghaejin Marine Company Limited.

George Smith continued to be cross-examined in another sitting where he clarified that it was the Korean clients who intended to tender for a contract with the Seoul City Government. He explained that he had no idea if the tender was going to be placed in their personal name or on behalf of a company. He stated that it was Changhaejin Co Ltd who paid the deposit on the 4th June 2007. He insisted that his son Stephen had nothing to do with the construction of these amphibious coaches. He stated that the plaintiff company tried to steal his idea and he forbade them to take any photos of the sensitive engineering parts. He insisted that all knew that the time requirements could not be kept but the attitude of the Koreans changed drastically into harassment. He confirmed that he was behind schedule but this was due to things which were beyond his control. He agreed that plaintiff paid the payments he requested. He stated that the loan agreement was needed to set up the machinery, the engineering and all the things which were needed to manufacture these buses. He agreed that the security for these loans were the actual buses. He said that notwithstanding the change in the name of the company, he continued working for CMC.

In a further cross-examination, he confirmed that his son Stephen was never involved in any negotiations involving this deal with the Koreans. He confirmed that Stephen Smith was never present during any meetings with the Koreans. He confirmed also that his son had never any involvement with GSSV nor was he ever employed by the company. He stated that he has no involvement with Waterbus International Limited. Smith explained that J Rae & Associates is a company which deals with finance. He stated that he resorted to this company to secure the assets abroad. He stated that the directors of GSSV were obliged under the terms of the contract to inform the company should any legal action be threatened against GSSV or carried out against GSSV. He explained that when the Koreans threatened legal court

action, J. Rae & Associates called in the loan. He explained that as the company did not have the assets to pay the loan, they took repossession of the vehicles. He insisted that he did not transfer any rights or obligations GSSV has with the Koreans to Waterbus International Limited. He stressed that neither himself nor the company transferred any rights or obligations with regards to this deal to Steven Smith.

George Smith stated that GSSV is a registered Maltese company which had around twenty to thirty employees. He stated that because of the deterioration of the relationship between GSSV and the Korean client, Smith insisted that the amphicoaches could not be supplied as it was obvious that they wanted the vehicles to copy them in Asia. He stated that he was willing to give them the money back plus a 10% extra. He stated that clause 10.3 of the contract envisaged the possibility of selling the vehicles to other clients if the deal fell through. He said that he was investigated by the Economic Crimes Unit as a report was filed against him. He repeated again where he was contesting the contents of the purchase contract and stated that he reported the plaintiff for forgery. He stated that he was cleared by the police from the charges that were made against him. He stated that he did not deliver the amphicoaches because he caught the clients spying. He offered them their money back. He explained that he became aware of the forged purchase contract at a later stage when he was being investigated by the police.

Defendant Stephen Smith testified that he runs the company Waterbus International Limited and his parents are George and Gladys Smith. He stated that his father owns GSSV and he was not involved with this company whether as a shareholder or director. He stated that he was never formally employed by this company. He stated that his job was that of a captain on a vessel owned by foreigners. He continued that he never entered or negotiated any form of business with the Koreans. He stated that he has never acted on behalf of GSSV. The only thing he did was to test drive the prototype of the first Amphicoach due to his experience at sea and for this he was not paid any remuneration.

Stephen Smith stated that he is the only certified person capable of operating the Amphicoach in Malta as it needs a qualified ship captain certification together with a Public Service Vehicle Operating Licence and a Marine Engineer's Certification. He insisted that he never entered into any obligation with the Korean Company nor his company Waterbus International Limited. He continued to state that Waterbus and himself have

nothing to do with the contract his father signed with the Koreans. He stated that Waterbus International Ltd did not even exist at the time that the contract was negotiated. He stated that he was present at every visit because they insisted to test the prototype.

Stephen Smith stated that he knew that his father was being pestered by the Koreans and his father couldn't get them to understand that their timescale was unreasonable. He stated that he is aware that the Koreans tried to steal sensitive information regarding the Amphicoach. He stated that his father was protective of the design of the hull which was the trade secret behind the Amphicoach. He stated that his father tried his best to assist the Koreans and even postponed previous clients. He stated that as his father didn't sell what was ordered by the other clients and was stuck with the Koreans, J.Rae & Associates, decided to call GSSV's debt and this is what made GSSV collapse as an entity. He stated that the finance company seized the existing vehicles as under British law, and made them their own thus satisfying GSSV's outstanding debt.

Stephen Smith stated that he was then contacted by a relative James Garrity in Australia who is the co designer with his father of the amphicoach. He stated that Garrity was preoccupied and was thinking of moving production of the vehicles to Australia. He stated that he arranged meetings to see if the extended family could help him finance a new company to start manufacturing the vehicles. He continued that an agreement was reached but they could not meet up with the sum that J.Rae & Associates required for the Amphicoach it repossessed. He said that he approached this finance company and they agreed to finance them if certain guarantees were met. He insisted that his father was not involved in this operation. Stephen Smith continued that as part of the agreement, J. Rae & Associates insisted on keeping control of the vehicles and kept all documentation and legal paperwork concerning the vehicles. He stated that the vehicles were moved to another location away from the factory and they were only allowed access to 2 vehicles at a time. He stated that once an amphicoach had been manufactured, J. Rae & Associates would send the documents by FedEx once they received the final payment for each vehicle.

Stephen Smith stated that this arrangement was in place for 5 months until the Koreans places a warrant of seizure on the vehicles in storage. This was done despite that the vehicles were clearly labelled as belonging to J.Rae & Associates and Waterbus. He stated that the vehicles seized were new vehicles that were completed since starting the new production and had

nothing to do with the Koreans. He insisted that his father has no connection to the new company. He continued that he and the investors of Waterbus suffered huge damages due to the Warrant of Seizure. All this slowed production and eventually they could not continue production as the Seizure seized up all the stock and parts. He stated that this warrant placed him in a position that they could not dispose of assets which had been legally obtained from J. Rae & Associates. All this led to Waterbus International Ltd being unable to continue operating.

Stephen Smith explained that he had written a letter personally to Dr Tortell demanding him to remove any warrants against himself personally and against Waterbus International Ltd. He stated that his letter was ignored and thus he had no alternative but to file a counterclaim against Dr Simon Tortell, in representation of his Korean clients, for damages sustained. He stated that he filed a judicial protest against Dr Tortell to formally warn him.

On **cross-examination** he testified that at the moment he is the director of Ultimate Technology Limited. He stated that this company started off to produce amphibious buses for his family's own tourist company. He explained that he has a marine engineer certificate and has attended quite a few courses on welding procedures. He agreed that he is also a qualified ship captain. He stated that Waterbus International Company Limited was formed as he was contacted by a family member from Australia in the hope that he would start this company. He confirmed that Waterbus International Limited is no longer producing. He stated that this company produced amphicoaches. He stated that he was the director of this company but was not involved in any hands on work on the vessels. He stated that GSSV operated from Unit K4B Industrial Area Kordin which is the same premises from where Waterbus International Limited operated. He stated that he did not expect any remuneration from his father for driving the amphicoach.

Stephen Smith stated that James Garrity was involved in Waterbus International Limited. He insisted that he had a decent idea of how to go about things in this business as he had conversations with his father. He insisted that he had an engineer which was involved in the technical aspect of building the amphicoaches.

While insisting that he was still a director of Waterbus International Limited, he testified that Waterbus International Limited is no longer

operational due to the warrant of seizure as he had no access to the assets and eventually the company just had to stop producing. He confirmed that the company still exists but is not trading. He stated that he wrote personally to Dr Tortell for the warrant of seizure to be removed. He stated that he filed a judicial protest in this sense which was also ignored. He also explained that he attempted a procedure to remove the warrant but the Court presided by Mr Justice Caruana Demajo rejected the request. He stated that the greatest damage to WaterBus was caused due to loss of business and the damage of the vehicles. He stated that he gave the information to Clarke to compile the report. He stated that the damages he suffered personally are the wage as director for the past 4 years, the legal cost that he has incurred and the outstanding loan. He stated that the current situation with J Rae & associates is that they are waiting for this case to close to come to a decision. He stated that the fees as director of the company were projected to be EUR 69,881 annually.

Stephen Smith was produced as a witness by plaintiff on another sitting where he explained that he was behind technical part in relation to Waterbus International Limited. He explained that this entailed certain designs for thorough hull fittings. He stated that there was a manager who had a vast background in the field and there was a naval architect. He confirmed that one of these, precisely Trevor Woodfine, was previously employed with GSSV. He stated that the premises Waterbus used was the same premises used by GSSV, due to the fact that this is the only available factory on the island that can be used to produce such buses. He stated that this warehouse is owned by Malta Industrial Parks. He stated that he is still awaiting an agreement as it is not currently leased and no rent is being paid. He stated that the services` bills are being paid by Ultimate Technology. He confirmed that Waterbus International Limited has a VAT number and that he is responsible for taking care of the VAT returns. He stated that Waterbus International Limited is responsible for income tax returns and National Insurance Payments of its employees. He stated that over the past two years, Waterbus has had no employees.

Stephen Smith explained that a loan was taken by Waterbus International Limited from J Rae & Associates which is a financial company. The loan was of assets, i.e. basically vehicles, parts and machinery which was valued at 1.4 million Sterling. He stated that this was not a loan cash. He stated that the loan was in parts and machinery and the security was the actual parts and machinery themselves. He confirmed that J Rae & Associates loaned the equipment to Waterbus. He confirmed that the machinery that J Rae & Associates loaned to Waterbus was secured with the

same machinery. Asked whether this machinery were the same machinery that GSSV was working on in relation to the Korean project, Stephen Smith stated that he wouldn't be aware of this information. He stated that the machinery were initially purchased by GSSV through a loan from J Rae Associates which was given in cash. He stated that cash was given by J Rae & Associates to GSSV to set up a production facility to buy raw materials etc on condition that if there were any legal issues, GSSV had to notify J Rae & Associates so that the loan be called in. He stated that the loan was called in and instead of getting the loan, they took the material. He continued that J Rae & Associates then gave the items that had belonged to GSSV to Waterbus on a loan.

Stephen Smith stated that the initial authorized share capital of Waterbus International Limited was one thousand two hundred Euros. He stated that the vehicles that were intended to be produced and that GSSV produced were the subject of intellectual property rights. He stated that James Garrity came up with the designs but he modified them. He stated that he has designed five new vehicles, which were completely different from the vehicles produced by GSSV. He stated that he got this expertise from his childhood working on cars and his engineering background at the nautical college. He stated that Waterbus produced and sold 3 vehicles but no profit was made because they were very late and the labour costs ran very high. He stated that these projects were funded from the deposit supplied by the client. He stated that the parts for these products came from various companies in UK and the production cost was roughly 230,000 Euros. He stated that these vehicles were sold for EUR 350,000 but one of them was sold for EUR 250,000. He confirmed that some of the employees who worked on these projects had worked with GSSV.

Stephen Smith confirmed that Waterbus was producing a vehicle which was not completely different from the vehicles produced by GSSV. The intention behind Waterbus was to find new clients, sell new vehicles which were different and better than those manufactured by GSSV. Asked by the Court why the two companies GSSV and Waterbus did not act under the same premises or share the same premises and the same machinery since they were not in competition, Smith stated that when GSSV was in production, he was in a different field and he had nothing to do with it. He explained that when GSSV stopped producing, his father decided to retire and thus he approached J Rae & Associates and his family in Australia to try and start this new business venture. He confirmed that he was seeking to moving production abroad but he could not do so as the assets of Waterbus have all been seized and are at Garden of Eden. He confirmed that the

vehicles started by GSSV are seized in Garden of Eden. He insisted that the vehicles are neither the invention of GSSV nor of Waterbus as the rights are owned by third parties.

Stephen Smith gave evidence in another sitting held on the 10th March 2014 where he emphasized that the vehicles are so large that he had to use the same premises as that of GSSV. He insisted that the similarities between the vehicles of GSSV and of Waterbus are that they can be driven on land and that they float. He stated that he designed an extra three models and that he has changed the whole construction method. He stated that they were redesigned for use and for more profitability. He stated that his company was not involved with the plaintiff but plaintiff's action affected his company.

Patrick Clarke testified that he has been practicing his profession as a certified public accountant since 1986. He confirmed on oath the report filed in Volume 11 folio 1,892 and explained that this is a report he compiled to estimate the actual and consequential damages that the company Water Bus International has incurred since the garnishee order. He explained that the estimation of damages has been split into two – the damages of the vehicles that are physically there and the consequential losses as a result of the fact that company could not operate since the warrant of seizure was served. He explained that the amphibious vehicles retail at around EUR 350,000. He stated that these were left open to the elements as there is no way how to store these vehicles. He explained that these vehicles have been vandalized and subjected to all kinds of abuse. He stated that he saw the vehicles but he relied on a report that was taken by engineer Alex Galea. He explained that at this point in time it is very difficult to sell these vehicles in the European Union as this has elevated the registration of commercial vehicles to EUR five. He stated that there is a diminution of value and if they had to be refurbished, there would be a massive cost. He explained that he is not aware whether when the warrant of seizure was filed, an application was made to substitute the vehicles with a guarantee. He stated that in his opinion, these vehicles are beyond economical repair. As regards, the quantification of the consequential losses, he explained that he based the calculations on the projections that were made for this company. He stated that the projections are not factual. He deciphered a percentage of what would have been the closing rate, the closing rate meaning that if out of the total number of enquiries there were for 100 units in one year and ten were sold, the closing rate would be 10%. He stated that in the first year, he found a mere closing rate of 4.1%. He stated that he took a conservative approach and struck 50% off the closing rates and thus he achieved a closing rate of 2.1% in 2009, 4.3% in 2010 and 6.1% In 2011. He stated that he took the middle scenario and

established what the profits would have been had these closing rates been achieved. He concluded that over those three years, the company would have gained a profit of EUR 12,800,000. He stated that the company still exists and it never traded. He explained that what the company did was research and development on the busses.

On **cross-examination**, he stated that the company had invested all its worth in those assets and with the garnishee, no finance would be granted. He confirmed that this company had no employees and Stephen Smith was doing the research himself. Clarke confirmed that Stephen Smith manages the company and is involved in it. He admitted that he was given information of a technical nature by the directors of the company, i.e. primarily Stephen Smith. He agreed that Waterbus International Limited employed other employees and at one point there were about 20 to 25 employees. He admitted that the source of the intellectual knowledge of the company which was very specific and technical came from Stephen Smith. He confirmed also that the company operated from a premises in Korradino, K4, Industrial Estate, Paola. He explained that the premises is a Malta Industrial Park premises but he is not aware of the arrangements that Waterbus had on these premises.

Patrick Clarke explained that the cost element of this production was taken into account, including an accrual for rent. He explained that he does not do the accounts for the company and that this report is not the actual accounts of the company. He explained that he was asked to try and establish the liabilities in question. He continued that there were practically no operations previously. He explained in the preamble to this report that he relied on the projections that had been made for the company because the Korean deal happened to be one of the very first deals. He stated that the report is based on projections and he could not say if any rent for the premises was paid or not. In his report, he included an accrual for rent. He admitted that in his report, there is information about GSSV which information was given to him by Stephen Smith. He agreed that GSSV also operated from the same premises. He explained that he was not aware if the employees of Waterbus were shared with GSSV. He explained that all the data which has served as a basis for his calculations and his projections were furnished to him by Stephen Smith. He continued that he did not check Stephen Smith's data but only relied on what he said. He clarified that the projections could not be compared to actual data from previous years because the company was a fresh company.

He further pointed out that the information about the initial manufacturing of the coaches and the eventual involvement of J Rae & Associates were provided by Stephen Smith and that the relevant documents were shown to him. He confirmed that the machinery and the equipment was paid using money loaned from J Rae & Associates. He stated that GSSV seized production of amphicoach vehicles due to legal issues with the loan company. He stated that he had no information as to the reason why the loan was called in. He confirmed that he knew that a deposit had been paid by the Korean clients to GSSV but he didn't know the quantum of the deposit. He stated that GSSV lost its financing and it was reassigned to Waterbus International Limited. He continued that Waterbus had a share capital of six hundred and 20% was paid up and thus this amounted to one thousand and two hundred Euros. Being asked whether he went into detail how Waterhouse could have survived in such an expensive industry with such a limited authorized share capital, Clarke stated the he didn't need to go in that detail for the production of this report as what he needed to ascertain was that Waterbus had the resources to be able to manufacture. He explained that Waterbus had these resources from the loan taken from J Rae & Associates. He stated that he is not in a position to answer as to who owns the intellectual rights to the specifications of the amphicoaches. He stated that he didn't know if Waterbus came up with its own designs or whether it took someone else's designs to construct these vehicles. He stated that it was Waterbus that took the vehicles off GSSV and temporarily put them in Garden of Eden. He agreed that Waterbus obtained a loan of 1.4 million pounds sterling from J Rae & Associates, but he didn't know what security was given for this loan. He stated that in his report, it was laid down that Waterbus produced and sold one amphicoach in early 2009 but he had no information as to where was the material purchased from.

Patrick Clarke testified that he and Stephen Smith had worked on some projections prior to the set up of Waterbus International Limited. He stated that these projections are not part of the report but they are the basis for the projections given the scenarios included in the report. He confirmed that there was no historical data to rely on. He stated that when Waterbus took the loan from J Rae & Associates, it had no problems, but when it tried to get financing from banks, these refused as these pending legal issues were already in existence. He stated that he was not able to visit and observe the deteriorated vehicles himself so he relied on the report of a local engineer Alex Galea. He stated that he reproduced emails consisting of enquiries made to Waterbus International Company. He confirmed that Waterbus only used internet as advertisement for its services. He explained also that subcontracting overseas could have been an option but this could not be done as Waterbus had its assets frozen.

He further explained that the information compiled from page 1 to 6 of his report, was given to him by Stephen Smith but the information from pages 7 to 19 was based on his personal experience riding the amphicoach and also based on the information of the first pages. He stated that as a product, one could anticipate a certain growth in the month. He confirmed that what he projected was on the potential of this company having seen the product in operation. He stated that he is the general manager at Toyota Malta and he is aware of the problems resulting from the fact that these deteriorated amphicoaches had Euro 3 emission classifications, when in Europe, the situation is that it has moved on to Euro 5 emission classifications. He stated that in 2007, GSSV took an order from the Koreans when it already had the agreement with J Rae & Associates. He stated that GSSV operations stopped and J Rae & Associates made an arrangement with Waterbus International Limited whereupon Waterbus International Limited took on the assets from J Rae & Associates. He insisted that Waterbus International Limited had no contract with the Koreans.

III. The technical report

The Court considered the technical report.

The following is stated therein:-

Based on the findings outlined herein, it is the opinion of the undersigned that the amphibious vehicles are now in a stated whereby it is not economically viable to have them repaired. In reaching this conclusion, the undersigned has taken into account:

- *the extensive amount of man-hours that would be required to have the vehicles re-instated for service. This particularly when considering the extensive amount of outfitting that has to be completely stripped out, disposed of and refitted.*
- *the substantial electrical and mechanical interventions required including the removal and replacement of the consoles, re-wiring in this area as well as in most of the passenger and engine areas. Such interventions would also be required on the air conditioning, hydraulic and mechanical systems. On the latter, particularly, the main engines, the emission standards for light passenger and commercial vehicles, 715/2007/EC is also expected to have a significant influence. The vehicles with their present*

engines are not attractive on the market at best or may be even banned from operations in the European Union.

- Watertight integrity and seaworthiness: It is the opinion of the undersigned, that any previous approvals or certification issued to these vehicles in relation to their hull and machinery as well as their suitability for navigation is now void. Thus, prior to re-instating into service, the vehicles would have to be re-submitted to the Certification Body for survey and plan approval. This, apart from carrying considerable cost, is expected to translate in all windows, doors and hatches having to be removed and re-sealed, the buoyant tanks re-tested and all penetrations re-sealed to the applicable standards. It is also likely that any recent regulatory developments and requirements would now become applicable and thus may have a bearing on the design of the vehicles or require additional modifications.

With regards to the two Iveco Eurocargo trucks, much of the above may be applicable, although the limited inspection carried out did indicate that the condition of these vehicles is not as poor. Nonetheless, the depreciation of the market value of these vehicles would have a significant impact on the viability of their re-instatement.

As a result, on the basis of the survey outcome, the residual value being assigned to these vehicles, being judged as “beyond economic repair” is the equivalent scrap and parts value EUR 90,000.

IV. The considerations of this Court

First and foremost, the Court clarifies that this judgement is limited to the matter of the counterclaim filed by Stephen Smith and Waterbus International Limited, as plaintiff's claim was declared to have been deserted in terms of Article 964(1) of Chapter 12 of the Revised Laws of Malta.

1. Responsibility or otherwise of plaintiff company for damages sustained

In the counterclaim, Stephen Smith and Waterbus International Limited are requesting this Court to declare that the warrant of seizure obtained in plaintiff's favour caused several damages to them, which damages are to be liquidated and be paid by plaintiff company. Indeed, it was premised clearly that neither Waterbus International Limited and Stephen Smith had any connection whatsoever with defendant company GSSV nor with the plaintiff company. Notwithstanding this, it was argued that a warrant of seizure numbered 1884/08 was obtained in favour of plaintiff company for the amount of USD 3,000,000 on several amphicoaches who were the property of Waterbus International Limited; and this caused both defendants several damages.

Having taken account of the counter-claim, it transpires that this action rests mainly on Article 836(9) of Chapter 12 of the Revised Laws of Malta which stipulates that:

In the case under the previous sub-article, the court at the request, by application, of the person against whom the precautionary act was issued may condemn the applicant at whose request the precautionary warrant was issued to pay such damages as may have been caused by the issue of the warrant, and in any such proceedings the court shall refer to, and make use of, the records of the proceedings of the precautionary act and of any other proceedings arising therefrom or consequential thereto, and such records shall be admissible evidence for the purposes of this action.

This court in a judgement of the 7 April 2016 in re : acts of garnishee order number 18/16/LSO : **Maria Theresa sive Marthese Thorn vs Alfred Saliba** :

“Bl-emendi ghall-artikolu 836 tal-Kodici ta` Organizzazzjoni u Procedura Civili li dahlu fis-sehh in forza ta` l-Att XXIV tal-1995, il-legislatur irrikonoxxa r-responsabbilita` ghad-danni tal-parti li titlob u tottjeni l-hrug ta` mandat kawtelatorju kemm-il darba jirrikorru c-cirkostanzi imsemmija fl-istess artikolu. F`dan ir-rigward li t-talba ghall-hlas ta` danni, hija intimament konnessa mal-mod kif intalab il-hrug tal-mandat kawtelatorju u c-cirkostanzi kollha prima facie li wasslu l-istess sabiex tali talba tintlaqa` mill-Qorti.”

In **Joseph Parnis vs Raymond Pace** decided on the 6th April 2001, this court directed its attention at those persons who have a precautionary warrant issued against them, and may suffer damages and thus has a remedy under articles 836(8) and 836(9) of Chapter 12:

“L-artikolu 873(7) jaghti l-poter lill-qorti kompetenti biex takkolji mandat ta` inibizzjoni provizorjament cioe` ghal zmien qasir u that dawk il-pattijiet u kondizzjonijiet li l-qorti jidhirlha opportuni u xierqa. Ma hemmx dubju li l-effetti u l-konsegwenzi ta` meta mandat ta` inibizzjoni jigi akkolt provizorjament huma ezattament l-istess bhal meta l-istess mandat jigi akkolt b` mod definittiv. Min jissubixxi l-hrug tal-mandat sew jekk provizorjament sew jekk definittivament ghandu jieqaf milli jaghmel dak li jkun qed jaghmel. Id-differenza hi li meta l-mandat jigi akkolt provizorjament iz-zmien li fih ghandu jsehh il-mandat jista` jkun qasir u limitat. Ghalhekk il-provedimenti tal-imsemmi artikolu 836(8) huma applikabbli anke meta l-mandat ta` inibizzjoni jkun biss akkolt provizorjament. Min jissubixxi l-hrug provizorju ta` mandat ta` inibizzjoni jista` jsofri danni, anke ingenti u dan ghandu r-rimedju tieghu f` dak li hemm dispost fl-istess artikolu 836(8) u (9).”

The same was said in re **Piju Borg vs Mary Calleja** decided on the 12th June 2007 by the Court of Magistrates (Gozo) Inferior Jurisdiction:

“ ... (b) Il-mandati kawtelatorji jinargu fuq ir-responsabilita` ta` min jitlob il-hrug taghhom. Jinkombi fuq ic-cittadin id-dover li ma jabbuzax minn dan id-dritt u jekk jabbuza jkun ritenut responsabbli ghad-danni provokati b` tali abbuz. L-Artikolu 829 tal-Kap 12 jaqra: `Kull persuna tista` minghajr ma hu mehtieg li qabel ikun hemm decizjoni, tqieghed fiz-zgur il-jeddijiet taghha bil-mezz ta` wiehed jew izjed mill-atti kawtelatorji hawn taht imsemmija, illi wara li jigu mharsa minn dik il-persuna l-kondizzjonijiet li jrid dan il-Kodici, jigu mahruga u esegwiti taht ir-responsabbilita` tieghu.`

....(c) ...Hekk ukoll “il-fatt li minn jottieni l-ispedizzjoni ta` mandat kawtelatorju jibqa` sokkombenti fil-gudizzju li l-mandat kien intiz jikkawtela mhuwiex wahdu, raguni sufficjenti biex jigu akkordati lill-ezekutat id-danni u l-interessi, imma kull kaz ghandu jigi trattat skond il-mertu tieghu, billi jittiehdu f` kalkolu u apprezzament ic-cirkostanzi kollha ta` dak il-kaz, qabel ma` wiehed jikkonkludi sija ghar-responsabbilita` li ggib dritt ghal indenizz,

sija ghal eskluzzjoni ta` dak id-dritt.” (**Edward Rizzo vs Joseph cost Chretien pro et noe** deciza mill-Qorti tal-Kummerc fis-7 ta` Ottubru 1954).

(d) *Il-vessatorjeta` twassal ghar-responsabilita`. Min ikun adixxa lill-qorti ghall-hrug ta` mandat kawtelatorju u jkun ibbaza t-talba fuq cirkostanzi manifesti `priva di qualsiasi fondamento nel fatto e nel diritto per cui il giudizio promossa si dimostri vessatorio. Ma un fallace apprezzamento dei fatti posta a base dell` istanza e delle conseguenze giuridiche che ne derivano non e` sufficiente a legittimare una domanda per danni da parte del vincitore nella lite` (sentenza riportata fil-Volum XXVI.i.405 – **Mugliette vs Bezzina**). Fil-kawza fl-ismijiet **Jane Spiteri vs Nicholas Camilleri** deciza mill-Prim`Awla tal-Qorti Civili (Onor Imhalled J. Said Pullicnio) gie rilevat li : `l-element tal-vessatorjeta` jimplika certu grad ta` kolpozita`, ta` kattiverija..Element ta` vessatorjeta` ikun jimplika abbuz tad-dritt ta` azzjoni gudizzjarja. Il diritto cessa dove cominica l` abbuso...riteniamo che diritto cessa dove cominicia l` abbuso...riteniamo che basta, per proteggere tutti gli interessi che ne sono basata, per proteggere tutti gli interessi che ne sono degni, per dare una base giuridica alle diverse decisioni che provocano I bisogni della societa, di aderire al concetto generale che tutti I diritti hanno dei limiti.”*

Moreover, as defendants Stephen Smith and Waterbus International Limited outlined in their note of submissions, by virtue of the general principles of responsibility for damages caused, no person is allowed to abuse the judicial process and in case damages are caused due to this abuse, such persons would be held responsible for the damages caused.

An interesting judgement on this point was that given in the names of **Paul Attard noe vs Loreto Abela** delivered on the 25th May 2005 by this Court :-

“Il-Qrati taghna dejjem gharfu wkoll li l-jedd li wiehed idur ghal rimedji gudizzjarji ma ghandux jitbiddel f`abbuz tal-procedura bil-hsieb li, biex idejjaq jew b`mod fieragh, igib lill-parti avversarja f`qaghda li jkollha ccedi ghar-rikatt, ghandha jew m`ghandhiex ragun. Kien ghalhekk ukoll li fil-qafas ta` kwestjonijiet ta` din l-ghamla, il-Qrati taghna, minn zmien ghal zmien, fissru l-limiti u c-cirkostanzi dwar fejn u kif jista` jitqies li jkun sehh abbuz mill-process gudizzjarju bi hsara ghal haddiehor...Illi, generalment, l-abbuz mill-procedura gudizzjarja jitqies

biss f'kazijiet eccezzjonali li, x`aktarx, jintrabtu mal-qerq tal-persuna li tkun irrikorriet ghalha jew mal-frugha tal-pretensjoni nfisha. Fejn ikun hemm element ta` agir fieragh fi procedura gudizzjarja, dan normalment jixhed l-abbuz tal-process gudizzjarju. . .

Illi, minbarra dan, l-azzjoni ta` min ikun garrab danni minhabba t-tehid ta` procedura gudizzjarja mibdija minn haddiehor hija wahda li l-Qrati taghna qiesu sa minn zmien sewwa qabel ma ddahhlet procedura specjali fil-Kodici Procedurali fl-1995...Il-Qorti irriteniet li azzjoni bhal din tista` titressaq minn kull persuna li ggarrab hsara fi hwejjigha minhabba att gudizzjarju hekk mahrug. Ir-raguni ewlenija hi li, kif inghad, il-bazi tal-azzjoni huwa l-applikazzjoni tal-principju generali tar-responsabbilta` ghad-danni. Dak il-principju jrid li kull min igib hsara lil kull haddiehor b`ghamil jew b`nuqqas li ghalih iwiegeb, irid jaghmel tajjed ghal dik il-hsara. Il-ligi ma taghrafx jekk il-persuna mgarrba kinitx fil-hsieb jew fil-mira tal-persuna li tkun ghamlilha dik il-hsara: il-kriterju huwa r-rabta bejn l-ghamil u l-hsara li dak l-ghamel ikun gab fuq il-persuna jew hwejjigha.”

In this judgement, the Court continued that the responsibility for damages in such cases is not limited to the four scenarios envisaged in article 836(8):

F`dan ir-rigward inghad li ghalkemm ir-ragunijiet li ghalihom min ikun talab u kiseb il-hrug ta` Mandat kawtelatorju jista` jinsab hati ghad-danni ma jintrabtu biss mal-erba` cirkostanzi msemmija fl-artikolu 836(8), taht ir-regoli generali tar-responsabbilta` irid jintwera li tali persuna tkun mexxiet b`imprudenza, traskuragni jew nuqqas ta` hsieb ta` missier tajjed tal-familja.

The same principles had been established earlier in re **John Zarb vs Port Cottonera Limited** decided by this Court on the 18th September 2002:

"Din il-Qorti, ghalhekk, fil-waqt li tista` taqbel li c-cirkostanzi ta` meta min ikun hareg mandat kawtelatorju jista` jinsab responsabbli ghad-danni, mhux limitat ghal dak provdut fl-artikolu 836 (8) tal-Kap 12, thoss li r-responsabbilta` trid tohrog mill-applikazzjoni tal-artikolu 1031 u 1032 tal-Kodici Civili (Kap 16), b`mod li jkun responsabbli biss jekk jagixxi b`imprudenza, b`negligenza jew mhux bil-hsieb ta` bonus pater familias”.

This Court refers also to the judgement outlined by Stephen Smith and Waterbus International Limited in their note of submissions, namely that in re **Blye Engineering Co Ltd vs Paolo Bonnici** decided on the 7th July 2004 where it was stated that a person could be held responsible for damages in terms of articles 1031 and 1032 of Chapter 16 of the Laws of Malta:

“Huwa biss meta persuna tagixxi kapriccjosament jew b`mala fede, li hija tista` tkun responsabbli ghad-danni li jsegwi l-agir irresponsabbli taghha. Fil-waqt li c-cirkustanzi ta` meta min ikun hareg Mandat kawtelatorju jista` jinstab responsabbli ghad-danni, mhux limitati ghal dak provdut fl-artiklu 836(8) tal-Kap. 12, irresponsabilita` trid tohrog mill-applikazzjoni tal-artikoli 1031 u 1032 tal-Kodici Civili (Kap. 16), b`mod li jkun responsabbli biss jekk jagixxi b`imprudenza, b`negligenza jew mhux bil-hsieb ta` bonus paterfamilias.

Huwa principju fundamentali illi min jezercita dritt li jispetta lilu ma jistax jitqies li f`dan l-ezercizzju ikun responsabbli ghall-hsara li bhala konsegwenza jista` jbaghti haddiehor, in omagg ghall-massima "qui suo iure utitur, non videtur damnum facere", bil-konsegwenza li d-dritt ghar-rikors ghall-protezzjoni tal-Qorti, huwa dritt li l-ezercizzju tieghu mic-cittadin m`ghandu bl-ebda mod jigi mxekkel;

Tali dritt tac-cittadin ghar-rikors lejn il-Qorti m`ghandux jigi abbuzat;...Tali abbuz jigi riskontrat biss f`kazijiet eccezzjonali u dan kwazi dejjem f`kazijiet ta` vessatorjeta` nascenti minn mala fede jew dolo jew almenu negligenza gravament kolpuza fejn min ikun adixxa lill-Qorti ghall-hrug ta` tali mandat kawtelatorju ikun ibbaza fuq cirkostanzi manifesti nieqsa minn kull fundament kemm fil-fatt kif ukoll fid-dritt u b`hekk il-procedura promossa tirrizulta vessatorja. Izda apprezzament zbaljat tal-fatti u tal-konsegwenzi guridici derivanti mill-istess mhux bizzzejjed sabiex tigi legittimata talba ghad-danni mill-parti rebbieha fil-kawza.

Dan l-ahhar principju huwa bbazat fuq il-fatt li l-element ta` vessatorjeta` jimplika abbuz tad-dritt ta` azzjoni gudizzjarja, min jagixxi in mala fede jew minhabba zball grossolan jista` jigi kkundannat ihallas id-danni.

Tali kazijiet ma eliminawx per principju l-azzjoni generali ghad-danni fuq riferita fis-sentenzi citati ai termini tal-Artikolu 1031 tal-Kap16, dejjem fil-kuntest u b`konsegwenza ta` dritt ta` azzjoni, pero` in verita` u fil-prattika tali azzjoni, diretta ghall-hrug ta`

Mandati kawtelatorji, giet illum kristalizzata bl-istess Artikolu 836(9). Dan ghaliex l-istess artikolu introdott bil-ligi tal-1995, ikkodifika u applika l-principji elenkati fil-gurisprudenza ta` qabel in materia, dwar l-ezercitazzjoni ta` azzjoni ta` danni wara il-hrug ta` mandat kawtelatorju, u minn ezami tal-istess ragunijiet hekk elenkati, huwa diffiqli li wiehed jahseb li hemm ragunijiet barra dawk elenkati fl-istess Artikolu 836, fejn l-azzjoni in generali tista` tirnexxi.”

Another judgement of marked significance is the case decided on the 3rd July 2003 in the names of **Josephine Sammut vs Emanuel Sammut et**

There this Court made it clear that precautionary warrants had a precise scope in that they had to be utilized to safeguard the interests of the person who requests them. It was clearly enunciated that these are not to be used vexatiously or maliciously. It was further stated that a creditor is obliged to control the effects of the warrant issued in his favour and if he sees that his demand is excessive, he should ask for an amendment or a revocation of the warrant.

Having established the general principles governing situations as the one under examination, the Court referred to the following records of the proceedings of the precautionary act and also those proceedings arising therefrom or consequential thereto in line with Article 836(9) of Chapter 12 of the Revised Laws of Malta. Indeed, the Court viewed:

- (i) the acts of the warrant of seizure exhibited at fol 1869 et seq;
- (ii) the procedure taken by Stephen Smith and Waterbus International Limited in an attempt to revoke this warrant of seizure;
- (iii) the acts of Application number 1210/2015 in the names of Avv Simon Tortell noe vs George Smith et, from which it transpired that the seized amphibious coaches were released in favour of Stephen Smith and Waterbus International Limited by virtue of a decree dated 8th February 2016.
- (iv) the judicial protest against the plaintiff company, by virtue of which Stephen smith and Waterbus International Limited insisted that this warrant be removed and that in default, plaintiff company would be held responsible for the damages suffered by the said Stephen Smith and Waterbus International Limited.

The Court outlines that from a reading of the warrant of seizure, which is the basis for this counterclaim for damages, it emerges quite clearly and evidently that this warrant was issued against all defendants including Stephen Smith and Waterbus International Limited, in lieu of “*danni sofferti sa issa naxxenti minn **inadempjenza kuntrattwali**, liema kuntratt huwa datat 1 ta` Gunju 2007, bis-sahha ta` liema d-debituri, jew min minnhom, kellhom jikkonsenjaw hames amphibious coaches “by the beginning of October 2007”, liema coaches ma gewx konsenjati.*”

Consequently, this warrant of seizure was based on a dispute arising from a contract which was signed between plaintiff company and GSSV. This fact already denotes a lack of clarity as to the reason why Stephen Smith and Waterbus International Limited were included in this warrant of seizure when they were not themselves parties to the contract upon which the said warrant of seizure was based.

This warrant of seizure was then followed by the present sworn application.

Upon investigation of the sworn application, it resulted quite clearly, that the plaintiff company was acting in lieu of the non performance of the contractual obligations pertaining to the delivery of five amphicoaches by GSSV. However, it was also premised that there was a suspicion of tort, or fraud or of assumption of GSSV's obligations by Waterbus International Limited and that thus Stephen Smith and Waterbus International Limited were for this reason included as parties to the suit.

From a review of the reply which plaintiff company presented regarding the counterclaim, it transpired that the main defence was based on the same suspicion of tort, fraud or of assumption of GSSV's obligations by Waterbus International Limited. Indeed, the pleas brought forth by plaintiff company were that (i) Stephen Smith and Waterbus International Limited had to bring proof of the legitimacy of the title they are assuming to have on these amphicoaches; (ii) that Stephen Smith is the son of George Smith who was the shareholder who controls GSSV and that Stephen Smith worked on the amphicoaches and also attacked the representatives of plaintiff company when he drove at them with his car in an aggressive manner; and (iii) that Waterbus International Limited was formed with the intent to defraud plaintiff company.

Nonetheless, throughout the acts of this case, plaintiff company did not produce sufficient evidence as to the involvement of Stephen Smith and Waterbus International Limited with regards to its doubts of tort, fraud or of assumption of GSSV's obligations nor did it substantiate with sufficient evidence its pleas of defence.

The main evidence brought forth in this respect was that by Duane Lee who insisted that George Smith mentioned the issue of the secured loan that GSSV allegedly had on the 4th August 2008 and that this was all a sham created as George Smith wanted to renegotiate the price. It was implied that the secured loan agreement was all a fraud and was created so that CMC would be denied of its rights over the amphicoaches ordered from GSSV. The plaintiff company contested the existence of a secured loan between GSSV and J Rae & Associates and also insisted that Waterbus International Limited was created during this period of time when conflicting tensions were present between plaintiff company and GSSV so that plaintiff company would end up being frauded and deceived.

It was stressed out by those representatives of the plaintiff company who visited Malta, that Stephen Smith was always present and was also seen working on the amphicoaches. Thus, it was argued that Stephen Smith's involvement with GSSV was such that when father and son smelt trouble brewing in the form of court litigation, the new company Waterbus International Limited was formed which then took over all the assets of GSSV.

This Court points out that the timing of the new company Waterbus International Limited might be viewed as suspicious, as it was clearly established on the 4th August 2008, which coincides with the date when Duane Lee had the phone call with George Smith and was informed about the secured loan that GSSV had with J Rae & Associates. Nonetheless, although the Court understands the reasoning behind plaintiff company's arguments, such arguments are very serious in nature and have dire consequences. The fact that George Smith and Stephen Smith are father and son, does not necessarily amount to proof that they were colluding together with intent to deceive and defraud plaintiff company. Neither was it out of place that George Smith did not mention previously to the plaintiff company that GSSV had a secured loan with J Rae & Associates, which resulted to have been taken so that GSSV could be set up and start operating.

More dubious would be how come Waterbus International Limited managed to obtain this secured loan from J Rae & Associates with such a limited share capital which has no realistic and effective value in this extremely sophisticated and expensive sphere of developing amphicoaches. Nonetheless, it is logical enough that after J Rae & Associates possessed the assets from GSSV and not liquid cash, it needed urgently a way how to use these assets so as not to lose their value which would depreciate the more time passes. Hence, it seems to this Court that it was more to the advantage of J Rae & Associates to get rid of these movables by obtaining another debtor who was willing to receive such movables which are not so demanded for by the general market but are only demanded by very specific companies.

Moreover, from the evidence brought forth, no official documents were brought to prove plaintiff company's allegations that Stephen Smith worked on the amphicoaches and was thus involved. It is true that it resulted that Stephen Smith was behind the technical part involved in the designing of the amphicoaches for Waterbus International Limited but this does not necessarily amount to sufficient proof that Stephen Smith worked on the amphicoaches which were to be delivered to plaintiff company. Being the son of George Smith and taking into consideration the technical training he had, it is no great wonder that Stephen Smith would be capable of working in this type of business.

The fact that Waterbus International Limited operated from the same premises as that of GSSV and that it had even some previous employees from GSSV working with it, do not constitute proof of the alleged fraud perpetrated by Stephen Smith and Waterbus International Limited. This type of industry is very particular and specific and thus the necessary people with the required expertise on these islands are not so common. The fact remains that Waterbus International Limited had a separate juridical relationship from GSSV.

Considering the above, this Court deems that it was very imprudent by plaintiff company to act against Stephen Smith and Waterbus International Limited in this lawsuit whilst keeping *in vigore* a warrant of seizure based solely upon the non-performance of contractual obligations assumed by GSSV. This is mostly being said because in this court case, no action was taken as to contest the validity of the taking possession of the movables pertaining to GSSV by J Rae & Associates. Neither was any action taken to contest the validity of the agreement reached between J Rae & Associates and Waterbus International Limited from which agreement it transpired that

Waterbus International Limited was granted by way of loan the previous movables owned by GSSV. No representative of J Rae & Associates was ever asked to testify by plaintiff company in the aim of validitating its suspicions of foul play being involved. In default of all this, the agreement between Waterbus International Limited and J.Rae & Associates remains valid and applicable.

Moreover, the plaintiff company did not substantiate its claim that Waterbus International Limited or Stephen Smith took on the obligations of GSSV and its guarantors George Smith and Gladys Smith. All this lack of evidence denotes how farfetched plaintiff company`s claims with regards to Stephen Smith and Waterbus International Limited are. It seems to this Court that plaintiff company adopted a fishing expedition when taking action against GSSV and felt the desire to include more defendants in an attempt to put more pressure. Such action definitely goes against what the legislator had in mind when precautionary warrants were introduced. These cannot be used as an extortion mechanism. Even more so these cannot be used against parties whom there is only a vague suspicion of such parties` involvement.

Another point to be outlined and which is quite significant is the quantum which covered this warrant of seizure. Such was made for the sum of US \$ 3,000,000 whereas from the evidence brought forth by witness Yong Jun Cho, it resulted that had all plaintiff company`s claims for expenses incurred with regards to this business deal be found to be admissible, the grand total of damages together with deposits paid to GSSV reached the sum of US \$2,133,260 and not that of US \$3,000,000. As highlighted by the above mentioned jurisprudence, it is the creditor`s responsibility to take the necessary steps to amend the warrant ordered upon his application in case it was clear to him that the amounts were exceeding his claims. This was never done by plaintiff company.

On another note, Stephen Smith and Waterbus International Limited made reference to the abandonment of these proceedings as denoting an abuse of procedure or irresponsibility that should be punishable if such action causes loss to the other party. It was emphasized that if a party loses interest or otherwise behaves in a manner that requires court sanction; such party should be deemed to have used the legal proceedings abusively and so should be subject to the responsibility in damages for such losses. The court does not agree with this argument in that it transpired quite clearly from the acts of this case that the plaintiff company took a very active part in these proceedings. It was only when disaster struck due to the tragic incident

which happened in the Korean waters off the coast of Incheon, that the plaintiff company had urgent problems to deal with, which ultimately seemed to have disintegrated its members in that officers of the said company ran away and were at large being searched for by the Korean police. In the light of these exceptional, serious and grievous circumstances, the Court does not see the abandonment of these proceedings as further proof of the allegedly malicious intent of the plaintiff company.

Consequently, the Court concludes that in this case, the plaintiff company acted maliciously and should bear responsibility for its actions in terms of Article 1031 and 1032 of the Civil Code. Plaintiff company did exceed the rights granted to it by law when it filed a warrant of seizure under a cause which was completely inapplicable to Stephen Smith and Waterbus International Limited. It was a known fact, confirmed by all representatives of the plaintiff company, that the purchase contract on which the warrant of seizure was done, was done with GSSV and with guarantors George Smith and Gladys Smith, but certainly not with Stephen Smith and Waterbus International Limited (which did not even exist at the time of signing of the purchase contract). Had the warrant of seizure been also based on the allegation of tort or fraud, the issue might have been somewhat different. Nonetheless, it emerged quite clearly even during the hearing of this case, that Stephen Smith and Waterbus International Limited had no juridical relationship with plaintiff company and thus, steps should have been taken by the plaintiff company to limit the warrant of seizure to those who were allegedly responsible for non-performance of the contractual obligations.

The Court also took note of the decree issued by this Court as differently composed on the 13th February 2009 with reference to the application made by Stephen Smith and Waterbus International Limited to revoke this warrant of seizure (fol 202 et seq). In this decree, the Court found that although Stephen Smith and Waterbus International Limited were not parties to the contract, it was due to the illegitimate involvement of Stephen Smith and Waterbus International Limited as a result of which the vehicles were transferred to them, that George Smith, Gladys Smith and GSSV could not fulfill their contractual obligations. Thus it was argued that Stephen Smith and Waterbus International Limited were also responsible for the non-performance of the contractual obligations assumed by GSSV and the spouses Smith.

This Court highlights that this decree was only given on a *prima facie* basis in the acts of this particular warrant of seizure. However, when it took

cognizance of all the evidence produced by the plaintiff company, such evidence did not constitute sufficient proof to denote that it was indeed due to Waterbus International Limited's involvement that the contractual obligations did not take place. From the evidence, it transpired quite obviously that GSSV took on a bigger fish than it could swallow and finding itself in such pressure being exerted by plaintiff company, incurred extra expenses which at the end rendered it impossible for the project to be completed without more finance and time. On the other hand, the plaintiff company was too optimistic in giving such a project to a company such as GSSV which had only produced one amphicoach as a prototype and which had no further expertise in manufacturing in such a short time not one but five amphicoaches.

Moreover, it also transpired that prior to Stephen Smith and Waterbus International Limited involvement with J Rae & Associates Limited, it was the said J Rae & Associates which called in the loan took by GSSV and this was done in terms of the condition imposed that when being faced with warnings that legal proceedings could be instituted, this secured creditor had to be informed. Stephen Smith and Waterbus International Limited involved themselves later on, after that J Rae & Associates had taken possession of the amphicoaches. Due consideration was also made to the letters exhibited at fol 1778 et seq by Patrick Campbell & Co (solicitors and notaries) and at fol 378 et seq and also to the secured loan agreement between J Rae & Associates and Waterbus International Ltd at fol 1830 et seq. All this reminisces that which this Court has already outlined, that the plaintiff company did not bring sufficient proof with regards to the involvement of Stephen Smith and Waterbus International Limited, by not even attempting to summon representatives of J Rae & Associates with the competent applicable procedures.

2. Liquidation of Damages

In the note of submissions, Waterbus International Limited claims that the damages suffered are those relating to the damage of the vehicles and those relating to the loss of business whereas Stephen Smith claims that the damages suffered by him are the loss of director's wages.

i) Damages to the vehicles

It was stated by both *ex parte* accountant Patrick Clarke and also by technical referee Engineer Kurt Gutteridge under the guidance of legal

referee Dr Anna Mifsud Bonnici, that 7 vehicles were found and inspected and were considered to be beyond economical repair with a wreck value of EUR 90,000.

The Court observes that a very important element was not mentioned by defendants Stephen Smith and Waterbus International Limited, namely that these vehicles were under the custody of a consignee. The relevant legal dispositions relating to the duties of the consignee are the following:

“289. (1) The consignee shall be responsible for the proper preservation of the property entrusted to him and he shall not use, nor shall he allow any person to use, such property unless otherwise ordered by the court:

Provided that the debtor may be allowed to use or retain in possession such articles of the property seized as the court may authorise if the court considers that such articles are normally required by an average household for decent living to maintain the human dignity of the debtor and his family.

(2) Where the property seized is of a perishable nature, the Registrar shall, without further authorisation, sell the goods seized and with the profit made from that sale, he shall proceed according to the provisions of article 284.

290. The consignee is bound to exercise for the safe keeping of the property seized, such care as is exercised by a bonus paterfamilias; if the consignee fails to present such property when called upon to do so, the court shall order him to appear before it to explain his failure to do so; the consignee shall be responsible for damages and interest and the court, after examining the circumstances of the case, may issue such orders as appear to be appropriate, including the personal arrest of the consignee for a period not exceeding three months, to compel him to present such property. The failure of the consignee to present such property when ordered by the court shall of itself constitute contempt of court in terms of the applicable provisions under this Code.”

It is thus the responsibility of the consignee to safe keep the property seized with care being exercised by a bonus paterfamilias. Jurisprudence has also highlighted this duty and responsibility of the consignee. In the decision delivered on 2nd November 1954 in the names of **Ferdinando Galea vs Angelo Axjaq et.** the Commercial Court stated that:

Il-konsenjatarju, bhala depozitarju gudizzjali tal-hwejjeg elevati, ghandu, skond il-ligi, juza fil-kusotdja tagghom l-istess diligenza li juza ghall-kustodja tal-hwejjeg proprji, u ma jistax jisserva bihom minghajr il-kunsens, almenu prezunt, tad-deponent; u ghalhekk, skond id-dottrina, wisq anqas jista` jikkonsenjathom lil haddiehor, u ghal raguni aktar qawwija lill-istess debitur proprjetarju tagghom, lif`dak il-kaz ikun jista` jiddisponi minnhom. U jekk il-konsenjatarju jhalli f`idejn id-debitru l-oggetti elevati, il-kreditur jista` jitlob li l-konsenjatarju jigi kundannat jirtira dawk l-oggetti minghand id-deitur biex dan ma jkunx jista` juzahom; u l-konsenjatarju huwa responsabili tad-danni li l-kreditur jista` jsofri mill-fatt li l-konsenjatarju jkun ippermetta lid-debitur uzu mill-hwejjeg elevati

In the subsequent judgement delivered by the Commercial Court of Appeal in the names of **Godfrey Aquilina vs Anthony Farrugia** on the 23rd October 1998, it was stated that :

“L-artikolu 301 tal-Kodici tal-Procedura Civili jiddisponi hekk “il-kunsinnatarju hu fid-dmir li juza, ghall-irfigh tal-hwejjeg maqbuda, id-diligenza ta` missier tajjed tal-familja u jista` jigi mgiegghel jipprezentahom ukoll bl-arrest tal-persuna sabiex jinbieghu u jithallas il-kreditur u sabiex jinghataw lura f`kaz li l-mandat jigi mhassar.” L-obbligu tieghu hu car u stabbilit bl-artikolu fuq citat u cjoe` li jiehu hsieb l-oggetti maqbuda u wara meta jigi hekk ordnat lilu jipprezentahom ghall-iskop ta` bejgh biex jigi sodisfatt il-kreditur. Ma hu b` ebda mod komputu tieghu li jinvestiga biex jara l-oggetti lil min isejhu. Hu biss tenut li juza ghall-kustodja ta` l-oggetti (li tagghom huwa l-konsnejatarju) id-diligenza ta` bonus pater familias. Dan ifisser li hu jissorveljahom biex jara l-ewwelnett li l-istess oggetti jibqghu hemm u jghasses biex jara li ma jehodhom hadd mill-post fejn huma minghajr ordni mill-Qorti u jara wkoll li jinzammu fil-kondizzjoni li fiha tpoggew f` idejh;...Kif taraha l-Qorti, il-konvenut appellant kellu, skond l-artikolu 300 fuq citat, l-obbligu li jiehu hsieb il-karozzi in kwistjoni bid-diligenza ta` missier tajjed tal-familja.....” (enfazi mizjud minn din il-Qorti).

Of particular relevance to this case is the judgement reported in **Massimarji tal-Imhallef Philip Sciberras – Procedura Civili** reference is made to the judgement in re **Albert Xuereb vs Joseph Baldacchino**

decided by the Court of Appeal on the 8th June 2005 wherein it was stated that:

*“Fl-isfond ta` din id-dikjarazzjoni, kompriz ukoll il-fatt illi l-mandat ta` qbid kawtelatorju kien fic-cirkostanzi gustifikat, inhareg minn min inhareg, kif determinat a posteriori mill-motivazzjoni u l-parti operattiva tas-sentenza tal-Prim` Awla, dan igib illi d-deterjorament jew deprezzament fil-valur tal-vettura, li drabi ohra gie rikonoxxut mill-Qrati taghna (ara b`ezempju **Godwin Grech vs Anthony Zammit**, Appell Civili, 28.06.1974) avvera ruhu se mai meta l-istess vettura kienet fil-pussess tal-konsenjatarju. Rebus sic stanibus, kienet ghal kollox korretta l-ewwel Qorti fejn esprimiet illi allura **hu l-konsenjatarju li jista` jkun talvolta passibbli ghad-danni**. Din l-espressjoni t` opinjoni hi konformi kemm mal-ligi kif ukoll ma` dik il-gurisprudenza li ssostni illi **“l-konsenjatarju, bhala depozitarju gudizzjali tal-hwejjeg elevate, ghandu, skont il-ligi, juza fil-kustodja taghhom l-istess diligenza li juza ghall-kustodja tal-hwejjeg proprji.”** (Kollez. Vol. XXXVIII.iii.731).”* (fol 399).

In the light of the above, this Court observes that from the observations made by its referees and even those made by Patrick Clarke, it resulted that these vehicles were kept in an outdoor yard having boundary walls around the perimeter, a gate on Triq il-Barrieri on the North Side and facing the cliffs on the South sea side. It also transpired that the damages of these vehicles was primarily caused due to heavy deterioration as a result of continuous exposure to the elements, lack of maintenance, and also due to possible acts of vandalism. Clarke even referred to the fact that these vehicles were being utilized as a shooting target. All this shows that this actual damage to the physical condition of the vehicles could have easily been safeguarded had they been properly taken care of by the consignee, who at least should have deposited the same in an enclosed space and not left such vehicles exposed to the elements. The consignee has very specific duties and thus such a post should not be accepted lightly.

Indeed the Court had made it clear in its decrees which were presented during this case that the consignee Joseph Baldacchino had strict duties which he should not take lightly and which should be strictly observed. (Vide its decree at fol 186 et seq).

Consequently, the Court cannot attribute the damages suffered on the vehicles as attributable to plaintiff company, as it was clearly the consignee who had the responsibility at law to take care of such vehicles and preserve them as a bonus pater familias would.

The defendants also argued that there was also an issue with the matter of emissions. Changes in the rate of emissions have a bearing on these vehicles so much so that even had they remained in tip-top shape, these vehicles could never be sold on the market, being non-compliant with applicable EU regulations. Nonetheless, the court finds this argument also to be unfounded because these had implications as regards selling in the European Union whereas from an overview of the enquiries made to Waterbus International Limited, a fol 1981 et seq, there were several countries outside the EU which enquired about these products amongst which Canada, Mozambique, Singapore, Morocco, Japan, United States, Australia, Turkey, Malaysia, Russian Federation, Mexico, United Arab Emirates, Lebanon, Thailand, Iraq, Kuwait, South Korea, Uruguay, Philippines, China, Nigeria, Barbados, Iran, Brazil, Egypt New Zealand, Sierra Leone, Guyana, Honduras, Brunei Darussalam, Nigeria, India, Tunisia and South Africa. Hence, these vehicles could be sold in other markets outside the European Union. No evidence was brought forth that these vehicles could not be sold in such other foreign markets. The burden of such proof rested with the defendants.

Waterbus International Limited also attributed further damages in terms of interests that Waterbus International Limited has been obliged to pay to J Rae & Associates. It was held that the interests are in the sum of EUR 12,000 monthly and that these are being claimed as Waterbus International Limited was crippled and unable to operate due to the warrant of seizure and thus could not purchase new raw materials to continue its operations. The Court is not convinced that sufficient proof in this regard was brought. No official receipts or at least confirmation by J Rae & Associates was brought forth to prove that these interests were indeed running and being charged. All this had to be proved by Waterbus International Limited.

Moreover, from the evidence that was given by Stephen Smith, he stated that indeed Waterbus International Limited managed to built 3 amphicoaches and that projects were funded from the deposit supplied by the client. It was also stressed out by Stephen Smith that Waterbus International Limited was producing a completely different and better style of vehicles than GSSV and indeed had reduced the length of the manufacturing period

and revolutionized the amphicoaches. Thus the Court is not particularly convinced Waterbus International Limited was indeed crippled due to this warrant of seizure and neither that it needed these vehicles as an essential element of its livelihood.

ii) Future losses

Stephen Smith and Waterbus International Limited are also claiming loss of future earnings/profits as a consequence to the Warrant of Seizure filed by plaintiff, contrary to warnings communicated to plaintiff company, which crippled the operation of Waterbus International Limited. These damages both with respect to Stephen Smith and to Waterbus International Limited are based on the projections which were made by Patrick Clarke, an ex parte accountant brought forth by defendants and who admitted of being a close acquaintance to Stephen Smith. Clarke also outlined that he based all these projections on information given to him by Stephen Smith and that there was no historical data on which to base these projections.

As a result, the quantification of the consequential losses was based on calculations on the projections that were made for this company and which were not factual. It is true that Clarke attempted to keep a conservative approach in his calculations by striking 50% off the closing rates, but the issue still remains that these projections were basically the aspirations of Waterbus International Limited and Stephen Smith and not concrete facts. This report did not reflect the actual accounts of this company but is only based on conjectures and projections.

The Court is very hesitant and reluctant to adopt these calculations which appear to be over inflated, given that Stephen Smith himself admitted that the only 3 amphicoaches which were produced by the company Waterbus International Limited did not yield any profit. Moreover, from the testimony of Stephen Smith and even that of Patrick Clarke, the company was researching and studying new means of developing these amphicoaches. Stephen Smith himself stated that the cost of labour and the length of the manufacturing were being detrimental to profit making. It seems to the Court that this was still a very unstable business in that it was based on trial and error when it comes to the actual manufacturing. Thus the Court cannot rest on projections, which were created by the assumptions made ultimately by Stephen Smith who has every interest in demanding the highest amount possible of damages.

The Court also has its doubts as to how this company could have made such projections when its share capital was a miserly sum of one thousand and two hundred Euros, which is certainly a non-starter amount for this expensive and particular industry. Moreover, the actual projections which were allegedly discussed between Clarke and Stephen Smith prior to the formation of Waterbus International Limited were not made accessible to the Court. The emails which were reproduced in an identical fashion leave much to be desired as to their veracity. No reply from the defendant company was reproduced and the informality of them all leaves much doubt as to whether these enquiries were actually followed up to a discussion of a business deal. Moreover, some are also simply queries concerning the hiring of amphicoaches or simply asking for the price of such vehicles. It is dubious how much actually would have indeed resulted in a firm order and an eventual sale.

Moreover, the Court still is not convinced that Waterbus International Limited simply had to cease its operations due to this warrant of seizure, considering its emphasis that it dealt with newer and different amphicoaches. The objects seized were not actual machinery which Waterbus International Limited may have needed to operate but the actual amphibious buses, Zonda buses and Iveco Euro carriage which had previously been the property of GSSV. Waterbus International Limited was designing new models and had changed the whole construction method for more profitability. Thus the Court is not convinced that Waterbus International Limited simply ceased operating solely due to the issue of this warrant of seizure. There were other motives, which the Court doesn't have the power to investigate in these proceedings. The projections were not attained certainly not solely because of this warrant of seizure.

Moreover, the Court must always keep in mind that the alleged victim has the obligation to try and minimize the damages suffered by him and not exaggerate and expand their entity, as is clearly being done by defendants Stephen Smith and Waterbus International Limited. This is in line with what was stated in the judgement given by this Court as differently composed on the 30th June 2004 in the names of **Anthony Xuereb et vs Noel Caruana;** **on** the 26th November 2003 in the names of **Elmo Insurance Services Ltd noe vs Trevor Vassallo;** and that given by the Court of Appeal in its Inferior Jurisdiction on the 20th October 2003 in the names of **Maria Xuereb et vs Tbs Services Ltd.**

The Court also finds support in her conclusion in the light of the fact that had this warrant of seizure been such a crippling effect, the defendants would have taken action themselves to try and revoke it or reduce its effects. The law provides remedies for a production of a valid guarantee which could be presented by the alleged debtor. No such guarantee was ever produced. Moreover, Stephen Smith and Waterbus International Limited took no action as is allowed to them in the case of such movables which are perishable and which lose their value with the passing of time. No action was taken either to at least have the amount of the claim be reduced instead of being revoked. All this further supports this Court's conclusions that this warrant of seizure did not cause the damages so alleged by the defendants. Had the projections of this business of Waterbus International Limited and the projections of the salary of Stephen Smith as director, been truly realistic, the defendants would have made their best to see to providing a guarantee to substantiate the claim! Surely a third party could have been found if sought by defendants if these future projections were so certain in the eyes of defendants.

Thus the Court concludes that no sufficient proof was brought forth to substantiate the quantum of damages effectively sustained by defendants Stephen Smith and Waterbus International Limited.

Decision

For the reasons above, the Court gives judgement on the counter-claim as follows –

Admits the first demand.

Rejects the second and third demands.

Orders that the parties to the counter-claim are to bear their respective costs.

Orders that the curators appointed by the Court are to be paid according to law.

**The Hon. Joseph Zammit McKeon
Judge of the Superior Courts of Malta**

**Amanda Cassar
Deputy Registrar**