



MALTA

**QORTI CIVILI**

**PRIM' AWLA**

**ONOR. IMHALLEF**

**JOSEPH ZAMMIT MC KEON**

Seduta ta' l-24 ta' Marzu, 2015

Rikors Numru. 399/2014

**Palmar Limited  
(C-4201)**

*kontra*

**Alternative Restaurants Limited  
(C-35099)**

**Il-Qorti :**

**I. Preliminari**

Rat ir-rikors prezentat fid-9 ta' Mejju 2014 li jaqra hekk :-

1. *Illi hija kreditrici tas-socjeta` intimata fis-somma ta` hamsa u tletin elf u hamsa u ghoxrin euro u tmienja u tletin centezmu (€35,025.38) bilanc ta` kera li ghalqet tan-negozju gestit fil-fond Point de Vue Guest House, is-Saqqajja, ir-Rabat ;*

2. *Illi barra s-socjeta` rikorrenti, is-socjeta` intimata ghandha kredituri ohrajn, fosthom :-*

- *ARMS Limited fis-somma ta` €50,577.47 ;*
- *TCR Services Limited fis-somma ta` €722.16 ;*
- *GO p.l.c. fis-somma ta` €459 ;*
- *Micallef Fisheries fis-somma ta` €1,925.05 ;*
- *CP Trading Company Limited fis-somma ta` €1,229.83 ;*
- *Malta Tourism Authority fis-somma ta` €250 ;*
- *Liquigas Malta Limited fis-somma ta` €473.42 ;*
- *Borg and Aquilina Limited fis-somma ta` €61.50 ;*
- *Valmor Borg Import / Export Limited fis-somma ta` €145.55 ;*

3. *Illi jista` jkun hemm kredituri ohrajn li r-rikorrenti ghadha ma tafx bihom ;*

## Kopja Informali ta' Sentenza

4. *Illi s-socjeta` intimata issa waqfet tinnegozja u ma hallsitx, u ma tistax thallas, dawn id-djun ;*

5. *Ghalhekk hemm raguni ghala s-socjeta` intimata ghandha tigi xolta u konsegwentement stralcjata taht l-Art. 214(2)(a)(ii) tal-Att dwar il-Kumpanniji bhala "kumpannija li ma tkunx tista` thallas id-djun taghha".*

*Ghaldaqstant is-socjeta` esponenti titlob bir-rispett illi din l-Onorabbli Qorti joghgobha tordna x-xoljiment u konsegwentement l-istralc tas-socjeta` intimata Alternative Restaurants Limited (C-35099) ;*

*Bl-ispejjez.*

Rat il-lista tax-xhieda ndikati mill-kumpannija rikorrenti u l-elenku ta` dokumenti esebiti mar-rikors.

Rat illi r-Registratur tal-Kumpanniji kien notifikat bir-rikors promotur fit-23 ta` Mejju 2014 (tergo ta` fol 27).

Rat illi ghalkemm il-kumpannija intimata kienet notifikata skond il-ligi hija ma pprezentatx risposta.

## Kopja Informali ta' Sentenza

Semghet ix-xiehda ta` Charles Gauci, Joseph Caruana, Reuben Bonnici, Anthony Bonnici, P.L. Quentin Tanti, Audrey Ghigo. Kenneth Borg Caruana, Stephen Muscat, Antoine Micallef u Victor Seguna fl-udjenza tas-7 ta` Ottubru 2014 u rat id-dokumenti li kienu prezentati waqt l-istess udjenza.

Semghet ix-xiehda ta` Paul Abela u Mario Galea fl-udjenza tal-24 ta` Novembru 2014 u rat id-dokumenti li kienu prezentati fl-istess udjenza.

Rat in-nota b`dokumenti li pprezentat is-socjeta` rikorrenti fl-udjenza tal-11 ta` Dicembru 2014.

Semghet ix-xiehda ta` Paul Abela fl-udjenza tat-12 ta` Frar 2015 u rat id-dokumenti li kienu prezentati fl-istess udjenza.

Rat id-digriet li tat fl-istess udjenza fejn halliet il-kawza ghas-sentenza *in difett ta` ostakolu* ghal-lum.

Rat l-atti tal-kawza.

Rat illi ma hemm l-ebda ostakolu sabiex tinghata s-sentenza llum.

**Ikkunsidrat :**

## II. Provi

Kien prezentat il-memorandum and articles of association tas-socjeta` intimata. Skond dan id-dokument, jirrizulta hekk :-

1) Is-socjeta` intimata kienet registrata bin-nru C35099 fid-9 ta` Awissu 2005.

2) L-ufficju registrat taghha huwa 3, Gardenia, Triq il-Bir, Madliena.

3) L-ghan ewlieni taghha huwa *to operate, own, rent, buy and sell restaurants, guest houses, hotels and similar establishments and to act as administrators, franchisers, franchisees of such establishments.*

4) L-*Authorised Share Capital* huwa l-istess bhall-*Issued Share Capital* u cioe` €29,999.99 maqsum fi 12,879 Ordinary Shares ta` €2.329373 kull sehem.

5) Ghandha direttur wiehed : Audrey Abela li hija s-segretarju u l-persuna li ghandha r-rappresentanza legali u gudizzjarja tas-socjeta`.

6) L-azzjonisti huma Audian Holdings Limited in kwantu ghal €12,877 shares ; Audrey Abela in kwantu ghal sehem wiehed ; u The estate of the late Ian Joel Shandler in kwantu ghal sehem wiehed.

## Kopja Informali ta' Sentenza

**Charles Gauci** – rapprezentant ta' CP Trading Company Limited – xehed illi s-socjeta` intimata hija debitrici tagghom ghal affarijiet tal-ikel lilha mibjugha u konsenjati fl-ammont ta' €789.03 skond l-anness Dok CP1. Ghalkemm ighidu li se jhallsu, baqghu ma hallsu xejn. Fl-istess waqt ma saret l-ebda kawza kontra s-socjeta` intimata sabiex CP Trading tigbor il-flus dovuti.

**Joseph Caruana** – rapprezentant tal-Bank of Valletta plc – xehed li s-socjeta` intimata ghandha overdraft ma' BOV. L-ammont dovut lill-bank huwa ta' €25,666.19 skond l-anness Dok BOV1.

**Anthony Bonnici** – rapprezentant ta' GO plc – xehed li s-socjeta` intimata kellha zewg servizzi – illum huma terminati t-tnejn. Fuq l-ewwel servizz, registrat bl-isem Alternative Restaurant Ltd, ghandha taghti lil GO is-somma ta' €592.11 waqt li ghas-servizz l-iehor registrat bl-isem Point De Vue Guest House ghandha taghti €291.11 skond l-annessi Dok GO1 sa GO3.

**P.L. Quentin Tanti** – rapprezentant tal-Malta Tourism Authority – xehed illi l-licenzjarju tal-Point De Vue kien Paul Abela mhux is-socjeta` intimata.

**Audrey Ghigo** – rapprezentant tal-HSBC Bank Malta plc – xehdet illi s-socjeta` intimata kellha zewg loan accounts ; fuq il-kont bin-nru 058107848200 hemm dovut l-ammont ta' €10,837.10 ; waqt li fuq il-kont bin-nru 058107848341 hemm dovut l-ammont ta' €27,441.79 skond l-annessi Dok HSBC1 u HSBC2.

**Kenneth Borg Caruana** – rapprezentant ta' Valhorm Borg Import Export Limited – xehed li minghand is-socjeta` intimata ghandhom jiehdu €145.55. Lil Azzopardi Fisheries ghandha taghtihom €59.32. Dan jirrizulta

## Kopja Informali ta' Sentenza

mill-annessi Dok VB1 u VB2. L-ahhar xoghol li s-socjeta` intimata hadet minghandhom kien f'Ottubru 2013.

**Stephen Muscat** – rapprezentant ta` Liquigas Malta Limited – xehed illi huma kienu ifornu lis-socjeta` intimata bl-LPG gas fil-Point De Vue, Rabat. Suppost li kienet thallas *cash basis*. Pero` ghall-2012 u 2013 kien hemm pendenzi ta` €338.42 skond l-anness Dok LM1. Il-hlas dovut baqa` ma sarx.

**Antoine Micallef** – rapprezentant ta` Micallef Fisheries Limited – xehed li l-Point De Vue tar-Rabat kellu jaghtihom skond l-invoices markati minn Dok MF1 sa MF10 l-ammont ta` €1,993.05. L-ammont ghadu mhuwiex imhallas.

**Victor Seguna** – rapprezentant ta` TCR Services Limited – xehed illi huma kienu jipprovdu servizz ta` tindif tas-sistemi ta` estrazzjoni ta` li jipproduci l-ikel fil-keina tal-Point De Vue. L-ahhar xoghol li sar kien f'Marzu 2013. Kellhom jiehu €722.16 skond Dok VS1.

**Paul Abela** xehed illi huwa direttur tas-socjeta` rikorrenti. Xehed illi s-socjeta` intimata kellha thallas lis-socjeta` rikorrenti bhala kera tal-Point De Vue is-somma ta` €35,000. Il-Point De Vue huwa propjeta` tas-socjeta` rikorrenti. Ipprezenta kopja tal-kuntratt tal-kera (Dok PL1). Audrey Abela ghas-socjeta` intimata hallset b`cheques li ma kienux onorati mill-bank. Ma kienx hemm il-hlas tal-kera ghax-xhur ta` Awissu, Settembru u Ottubru 2013. Kien hemm ukoll hlasijiet ohra ta` kera li kienu dovuti. Stqarr li Palmar Limited kienet ghamlet kawza kontra s-socjeta` intimata ghall-ammont ta` €20,782.38. Il-kawza kienet deciza favur Palmar Limited fit-23 ta` Mejju 2014. Ipprezenta kopja tas-sentenza (Dok PL2). Ippreciza li s-sentenza ma tkoprix l-ammont kollu li ghandha tiehu Palmar Limited. Fl-ewwel gimgha ta` Awissu 2013, Audrey Abela tathom l-avviz ta` tmiem il-kirja. Imbaghad fix-xahar ta` Ottubru 2013 tathom ic-cwieviet. Hemm is-socjeta` konvenuta temmet ir-rabta li

## Kopja Informali ta' Sentenza

kellha mal-Point De Vue li illum huwa gestit mit-tifel tieghu u mit-tifel ta' Mario Galea. Ipprezenta Dok PL3 li huwa l-kont tad-dawl ghall-ammont ta' €73,810.56 ; ghalkemm jissema l-perijodu ta' bejn it-12 ta' Lulju 2014 u t-12 ta' Settembru 2014, il-kont fil-fatt jikkompreni arretrati ghaz-zmien li l-Point De Vue kien gestit mis-socjeta' intimata fl-ammont ta' €57,000. Il-kont kien mahrug fuq isem ir-ragel ta' Audrey Abela illum mejjet.

**Mario Galea** – direttur iehor ta' Palmar – ikkonferma d-deposizzjoni tad-direttur l-iehor Paul Abela.

Fis-seduta tal-11 ta' Dicembru 2014, ir-rikorrenti pprezentat zewg dokumenti. Go dokument minnhom Dok PBX hemm lista tad-djun tas-socjeta' fl-ammont globali ta' €163,879.54.

Fis-seduta tat-12 ta' Frar 2015, ir-rikorrenti pprezentat tliet dokumenti ohra. Dok ECD1 huwa kopja ta' mandat ta' sekwestru kawtelatorju nru 1303 li Palmar kienet ipprezentat kontra s-socjeta' intimata fit-2 ta' Settembru 2013. Bhala parti mill-istess dokument, hemm digriet li din il-Qorti diversament presjeduta tat fl-14 ta' Lulju 2014 li permezz tieghu rrendiet l-atti tal-mandat ta' sekwestru 1303/2013 bhala att ezekuttiv. Is-socjeta' intimata ma kenitx notifikata bid-digriet tal-14 ta' Lulju 2014 (ara r-riferta negattiva tat-23 ta' Lulju 2014). In segwitu ghal digriet iehor ta' din il-Qorti diversament presjeduta tat-12 ta' Dicembru 2014, saret publikazzjoni go gazetta lokali tad-digriet tal-14 ta' Lulju 2014.

Fl-istess seduta tat-12 ta' Frar 2015, kienu prezentati l-*annual report* u *financial statements* tas-socjeta' intimata ghas-sena 2012. Fir-rapport tad-diretturi, jinghad illi *the level of business and the company's financial position remain satisfactory. The director expects the present level of activity to be sustained in the foreseeable future.* Skond l-istess rapport, il-kumpannija kellha



## Kopja Informali ta' Sentenza

profitt qabel it-taxxa ta` €19,255 li jfisser profitt net ta` €12,474. Skond l-*statement of financial position* is-socjeta` intimata kellha *total assets* ta` €215,429 u *total current liabilities* ta` €118,998 ; tidher *bank loan* ta` €24,667 u *trade and other payables* ta` €114,289 apparti t-taxxa ta` €4709.

**Ikkunsidrat :**

### III. Risultanzi

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

Is-socjeta` rikorrenti sejset it-talba taghha ghax-xoljiment u stralc tas-socjeta` intimata abbazi tal-Art 214(2)(a)(ii) tal-Kap 386, kif ikkonfermat fl-udjenza tad-19 ta` Gunju 2014 (fol 29).

Billi jirrizulta li s-socjeta` rikorrenti hija *kreditur* ta` s-socjeta` intimata ghandha *locus standi* biex tippromwovi dan il-procediment skond l-**Art 218(1)(b) tal-Kap 386**.

Bl-**Art 214(2)(a)(ii) tal-Kap 386** il-ligi taghti lill-Qorti diskrezzjoni li xxolji u tistralcja kumpannija *jekk il-kumpannija ma tkunx tista' thallas id-djun taghha*. Dan is-subinciz (ii) irid jinqara flimkien ma` l-**Art 214(5)** li jstabilixxi meta kumpannija skond il-ligi taghna ghandha titqies li ma tkunx tista' thallas id-djun taghha.

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

Fil-ligi taghna, li *kumpannija ma tkunx tista' thallas id-djun taghha* ghandu sinjifikat preciz u definit mil-ligi stess fl-Art 214(5). Fil-ligi Ingliza, il-posizzjoni hija aktar wiesgha. Il-koncett ta` insolvenza fil-ligi taghna huwa aktar ristrett minn dak tal-ligi Ingliza ghalkemm hemm *overlaps*.

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

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

Skond l-Art 214(5) **tnejn** huma c-cirkostanzi definiti mil-ligi fejn *kumpannija ma tkunx tista` thallas id-djun taghha* –

(a) *jekk id-dejn dovut mill-kumpannija jkun baqa' ma thallasx ghal kollox jew f'parti wara erbgha u ghoxrin gimgha mill-ezekuzzjoni ta' titolu ekekuttiv kontra l-kumpannija b`xi wiehed mill-atti ekekuttivi msemminjin fl-artikolu 273 tal-Kodici ta' Organizzazzjoni u Procedura Civili ; jew*

## Kopja Informali ta' Sentenza

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

Ir-rikorrenti qeghda tinsisti fuq il-fondatezza tal-pretensjoni taghha kemm abbazi tal-paragrafu (a) kif ukoll abbazi tal-paragrafu (b) [ara fol 29].

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

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

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

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

Fil-**Boyle & Birds` Company Law** (op. cit.) ikompli jinghad hekk –

*Failure to pay a debt which is due and not disputed amounts to evidence of cash flow insolvency. Thus a company which has a policy of late payment of bills could find itself the subject of a petition for a winding-up order or administration order. Such a petition will not be struck out at an early stage as a form of improper pressure and an abuse of the process of the court, because, as Staughton LJ explained in Taylor's Industrial Flooring (1990. BBC 44 at 51) creditors, not late payers, are more worthy of insolvency law's protection.*

*"Many people today seem to think that they are lawfully entitled to delay paying their debts when they fall due or beyond the agreed period of credit, if there is one ... This can cause great hardship to honest traders, particularly those engaged in small businesses recently started. Anything which the law can do to discourage such behaviour in my view should be done."*

Fil-ktieb **Insolvency Law – Corporate and Personal** ta' Andrew Keay u Peter Walton (pubblikat minn Pearson Longman – 2003) pg 17 jinghad hekk dwar *cash flow insolvency* kif mifhuma fil-kuntest tal-Insolvency Act 1986 –

*The court, in examining whether a company is suffering cash flow insolvency, will consider whether the company is actually paying its debtors. Courts must take into account what current revenue the company has as well as what the company can procure by realising assets within a relatively short time ... A company can rely upon money which might be obtained from the sale of assets or upon money which might be obtained on the strength of its assets ... It is possible that sometimes a debtor might be able to establish solvency by demonstrating that funds can be obtained through an unsecured loan. In considering whether a person or a company is insolvent, the debtor's whole financial position must be studied ... and a temporary lack of liquidity does not necessarily mean that the company is insolvent ...*

*At one time courts were rather strict on what they required to be established before they were willing to deem a person or a company insolvent, but in more recent times they have become more liberal as far as creditors are concerned and have held that a debtor is insolvent if a creditor is able to prove that he or she has*

## Kopja Informali ta' Sentenza

*not paid an undisputed debt after a demand has been made ... and this is the case even if there is other evidence which suggests that the value of the assets outweighs liabilities ...*

*Whether a company is cash flow insolvent is principally a question of fact and one which may be established in any number of ways, such as the existence of a large number of outstanding debts and unsatisfied judgments ... or there is lack of assets on which execution can be levied ...*

*It has been said that a debtor is not regarded as solvent just because if sufficient time were granted the debts could be paid off ...*

Meta tqis l-assjem tal-provi akkwiziti, hija l-fehma konsiderata tal-Qorti illi mhuwix ippruvat fil-konfront tal-intimata dak li l-ligi trid bl-Art 214(5)(a).

Irrizulta li fit-**23 ta` Mejju 2014, u cioe` wara l-presentata tar-rikors promotur**, is-socjeta` rikorrenti kisbet sentenza (li ghaddiet in gudikat) kontra s-socjeta` intimata fejn din tal-ahhar kienet ikkundannata thallas lil Palmar is-somma ta` €20,782.38 f`arretrati ta` kera bl-imghax u bl-ispejjez. Il-presentata tar-rikors guramentat ta` dik il-kawza kien precedut mill-presentata ta` mandat ta` sekwestru kawtelatorju nru 1303/2013 ; il-hrug tal-mandat kien akkordat fit-2 ta` Settembru 2013.

Socjeta` kreditrici hija prekluzza milli tistitwixxi azzjoni ghax-xoljiment u stralc ta` kumpannija debitorici skond l-Art 214(5)(a) fuq l-iskorta ta` mandat ta` sekwestru **kawtelatorju**. Infatti l-Art 214(5)(a) jitkellem dwar *l-ezekuzzjoni ta' titolu ezeuttiv* kontra *l-kumpannija b'xi wiehed mill-atti ezeuttivi msemmin fl-artiklu 273 tal-Kodici ta' Organizzazzjoni u Procedura Civili*.

## Kopja Informali ta' Sentenza

Ma jirrizultax li s-socjeta` rikorrenti ttentat tikseb il-hrug ta` wiehed mill-atti esekuttivi li huma elenkati fl-Art 273 tal-Kap 12 bil-procedura prevista fl-Art 274 tal-Kap 12 wara li hadet is-sentenza tat-23 ta` Mejju 2014.

Hija l-gurisprudenza ta` din il-Qorti illi fejn si tratta ta` atti ezekuttivi ndikati fl-Art 273 tal-Kap 12, il-fattur rilevanti sabiex jiskatta l-perijodu ta` erbgħa u ghoxrin (24) gimgha għall-fini tal-Art 214(5)(a) tal-Kap 386 huwa l-ezekuzzjoni tal-Mandat. U fil-kaz ta` mandat ta` sekwestru, l-ezekuzzjoni tal-mandat issehh bin-notifika tal-att lis-sekwestratarji.

Fil-kaz tal-lum, jirrizulta li fl-14 ta` Lulju 2014 il-kumpanija rikorrenti marret għall-procedura kontemplata bl-Art 838B(1) u (2) tal-Kap 12, li kien introdott bl-Att XII tal-2009.

Id-disposizzjoni taqra hekk –

(1) *Sakemm ma jigix imħassar mill-Qorti jew irtirat mill-parti li toħroġ il-mandat, kull mandat kawtelatorju għandu jibqa' fis-seħħ sa ħmistax-il gurnata wara li l-kawża tghaddi f'gudikat.*

(2) *Minkejja d-disposizzjonijiet tas-subartikolu (1), mandati kawtelatorji maħruġin skont l-artikolu 830(1) isiru ezekuttivi wara li kawża tghaddi f'gudikat jew meta, skont l-artikolu 166B, dik l-ittra ufficjali ssir titolu ezekuttiv b'dan illi :*

(a) *fil-kaz ta' mandat maħruġ skont l-artikolu 830(1)(b), (c), (d) u (f), il-kreditur għandu jippreżenta nota fi żmien ħmistax-il gurnata minn meta l-kawża tkun għaddiet f'gudikat fl-atti tal-istess mandat u jitlob li jestendi jew inaqqas l-effetti tal-mandat għas-somma ekwivalenti għall-ispejjeż legali, l-imghaxijiet u d-differenza fis-sorti skont is-sentenza, liema nota għandha tiġi notifikata lid-debitur, u daww kollha li għandhom interess;*

*(b) fil-kaz ta' mandat mahruġ skont l-artikolu 830(1)(a) u (e), il-kreditur għandu jipprezenta rikors skont id-disposizzjonijiet tal-artikolu 388E fi zmien hmistax-il gurnata minn meta l-kawża tkun għaddiet f'gudikat.*

Billi l-Mandat ta' Sekwestru Kawtelatorju huwa ndikat fl-**Art 830(1)(d)** il-procedura li kellha tigi segwita mill-kumpanija rikorrenti kellha tkun dik skond l-**Art 838B(2)(a)** sabiex il-mandat minn kawtelatorju jsir eżekuttiv.

Fil-kaz tal-lum, jirrizulta li n-nota li tissemma fl-Art 838B(2)(a) ma kenitx prezentata fi zmien hmistax (15) –il gurnata mid-data tas-sentenza tat-23 ta' Mejju 2014 ; infatti n-nota kienet prezentata fl-14 ta' Lulju 2014. Dan ifisser li n-nota kienet prezentata tardivament ; dan kellu l-effett li ma jirrendix eżekuttiv il-mandat ta' sekwestru kawtelatorju anke għaliex skond l-Art 838B(1) il-mandat kawtelatorju ma kienx baqa' fis-sehh ladarba kienu għaddew il-hmistax (15)-il gurnata mis-sentenza tat-23 ta' Mejju 2014.

Inoltre l-Qorti tirrileva li anke li kieku s-socjeta' rikorrenti agixxiet tempestivament kif previst fl-Art 838B(1) tal-Kap 12, it-trasformazzjoni tal-mandat minn kawtelatorju għal eżekuttiv ma sehitx għaliex id-digriet tal-14 ta' Lulju 2014 baqa' mhux notifikat lis-socjeta' intimata. Infatti l-pubblikazzjoni tad-digriet go gurnal wiehed ma tikkostitwix notifika valida skond l-Art 1877(4) u (5) tal-Kap 12 billi ma jirrizultax li saret l-affissjoni skond il-ligi u lanqas il-pubblikazzjoni fil-Gazetta tal-Gvern.

In aggunta ma' l-premess, il-bazi tat-talba tas-socjeta' rikorrenti skond l-Art 214(5)(a) kienet intempestiva, u kwindi ma tistax tirnexxi, għaliex fid-data tal-presentata tar-rikors promotur, is-socjeta' rikorrenti ma kellha l-ebda titolu eżekuttiv kontra s-socjeta' intimata.

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

Dak previst minn din id-disposizzjoni jabbina ruhu ma` *balance sheet insolvency*.

Dan l-abbinament jista` jsir minhabba d-dicitura tad-disposizzjoni rilevanti tal-Insolvency Act 1986 (li hija kwazi identika ghal taghna) u cioe` l-**Art 123(2)** li taqra hekk –

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

Fil-ktieb **Insolvency Law – Corporate and Personal** ta` Andrew Keay u Peter Walton (op. cit.) pg 19 jinghad hekk dwar *balance sheet insolvency* kif mifhuma fil-kuntest tal-Insolvency Act 1986 –

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



## Kopja Informali ta' Sentenza

*whether it is certain or contingent, or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion.*

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

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

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

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

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

Fil-Pag 130 ikompli hekk –

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

Fil-Pag 134 ighid –

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

Fil-Pag 136 ighid –

*The phrase “prospective liability” is neither a legal nor an accounting term of art. It has been judicially defined as : “ ... a debt which will certainly become due in the future, either on some date which has already been determined or some date determinable by reference to future events.” ... it has been described ... as unmatured liability which will inevitably ripen into a debt with the passage of time. Such a definition encompasses all forms of debitum in praesenti, solvendum in futuro including an indisputable claim for unliquidated damages which remains only to be quantified and will result in a debt far more than a nominal amount. “Prospective liability” thus embraces both future debts, the sense of liquidated sums due, and unliquidated claims.*

Bhala prova, is-socjeta` rikorrenti pprezentat l-*annual report and financial statements* tas-socjeta` intimata ghas-sena 2012. Dan id-dokument inkiseb mir-Registru tal-Kumpanniji u allura huwa ufficjali. Apparti dan, ma kienux presentati dokumenti ohra dwar il-kontabilita` tal-kumpannija intimata.

## Kopja Informali ta' Sentenza

Fir-rikors promotur, jinghad li *s-socjeta` intimata issa waqfet tinnegozja*. Pero` ma ngabet l-ebda prova ta` dan. Certament li sa tmiem l-2012, is-socjeta` intimata kienet ghadha *trading*.

Irrizulta li s-socjeta` intimata kienet kostitwita fid-9 ta` Awissu 2005. Ftit inqas minn xahar wara u cioe` fil-5 ta` Settembru 2005 hadet b`kera minghand is-socjeta` rikorrenti l-Point de Vue Guest House (ara fol 130 et seq). Ma jirrizultax jekk apparti dan il-post kenitx tiggstixxi postijiet ohra tenut kont tal-*principal object* wara l-kostituzzjoni taghha. Il-probabilita` hija li dak kien l-uniku post tan-negozju taghha. Irrizulta li s-socjeta` intimata telqet il-Point de Vue fl-1 ta` Ottubru 2013 wara li fl-ewwel gimgha ta` Awissu 2013 tat l-avviz tat-tmiem tal-kirja (ara x-xiehda ta` Paul Abela). Jekk wara l-1 ta` Ottubru 2013, kompletax topera xi restaurant iehor minn band`ohra ma jirrizultax.

Jekk il-Qorti sejra toqghod fuq l-*annual report and financial statements* tal-2012, u tqis lilhom fl-assenza ta` *financial statements* ghall-2013, u fl-isfond tal-qaghda tad-djun li certament irrizultaw, din il-Qorti ssib li l-qaghda finanzjarja tas-socjeta` intimata fil-kwadru tal-Art 214(5)(b) ma hija felici propju xejn.

Fil-kawza tal-lum, kien accertat li sal-ahhar tal-2014, is-socjeta` intimata kellha djun ippruvati u accertati li jqarrbu €164,000. Issa huwa minnu li skond il-*financial statements* ghall-2012, kellha *total assets* ta` €215,429 pero` x`kienu bl-ezatt dawn l-assets ma nafux ; kif lanqas ma nafu jekk tistax tiddisponi minnhom sabiex thallas id-djun taghha. Ghall-fini tal-verifika skond l-Art 214(5)(b), il-Qorti trid tqis il-*contingent and prospective liabilities* mhux il-*contingent and prospective assets*. Li certament irrizulta li fl-2014, id-djun accertati zdienu sew meta mqabbel mal-2012. Li huwa ta` thassib gravi huwa l-fatt li s-socjeta` intimata waqfet thallas lill-kredituri kollha, mill-kbir saz-zghir : mill-fornituri tal-ikel tar-ristorant, ghal min jaghmel it-tindif, sal-kontijiet tad-dawl u ilma, kera u dejn mal-banek. Dawn fatturi li kollha jkomplu jikkonfermaw li l-qaghda finanzjarja tas-socjeta` intimata hija mweghra u nsostenibbli. Fi kwalunkwe kaz mhuwiex mistenni mill-kredituri li joqghodu

jistennew lis-socjeta` intimata biex tiddisponi mill-assi taghha sabiex forsi xi darba jithallsu ; apparti li xejn ma huwa garantit li bil-bejgh tal-assi, sejra tkun tista` thallas id-djun. Kollox jindika li fl-2014, is-socjeta` intimata *reached the point of no return*.

Fil-fehma tal-Qorti, kienu ppruvati sal-grad rikjest mil-ligi r-rekwiziti tal-Art 214(5)(b) tal-Kap 386.

4) Id-diskrezzjoni tal-Qorti

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

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

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

## Kopja Informali ta' Sentenza

Ipprovati r-rekwiziti tal-Art 214(5)(b), il-Qorti ssib li l-perkors obligat tas-socjeta` intimata huwa li tigi xjolta u stralcjata ; dan il-process huwa ta` beneficju mhux biss ghas-socjeta` rikorrenti li tat bidu ghall-procediment izda ghall-kredituri kollha kollettivament.

### Provvediment

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

1) Tiddikjara li fir-rigward tal-kumpanija intimata Alternative Restaurants Ltd (C35099) jirrizultaw pruvati sal-grad rikjest mil-ligi r-rekwiziti tal-Art 214(2)(a)(ii) u tal-Art 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta.

2) Tordna x-xoljiment tal-kumpanija intimata Alternative Restaurants Ltd (C35099) b'effett mid-9 ta` Mejju 2014 skond l-Art 223(1) tal-Kap 386. Tordna wkoll l-istralc taghha.

3) Tahtar lir-Ricevitur Ufficjali bhala stralcjarju tal-kumpanija intimata Alternative Restaurants Ltd (C35099) bis-setghat u d-dmirijiet kollha previsti mid-disposizzjonijiet tal-Kap 386 tal-Ligijiet ta` Malta.

Kopja Informali ta' Sentenza

4) Tordna lill-kumpanija rikorrenti Palmar Limited (C4201) u lill-kumpanija intimata Alternative Restaurants Ltd (C35099) sabiex *in solidum* bejniethom ihallsu l-ispejjez kollha, inkluzi l-ispejjez tal-istralc, kif ukoll id-drittijiet u l-ispejjez tal-istralcjarju, u dan bl-applikazzjoni tal-Art 236(2) tal-Kap 386.

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

**< Sentenza Finali >**

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