



**FIT - TRIBUNAL GHAL TALBIET ZGHAR**

**Gudikatur: Dr. Claudio Zammit B.A. LL.D. M. Jur (Eu. Law)**

**Seduta ta' nhar it-Tnejn, 11 ta' Dicembru 2017**

**Talba Nru: 241/16 CZ**

**Atlas Insurance PCC Limited (C 5601) ta' 47-50, Ta' Xbiex Seafront, Ta' Xbiex,  
f'isimha propju u kif surrogata fid-drittijiet ta' l-assigurata taghha J. Grech  
Limited abbazi tal-polza ta' l-assikurazzjoni u tal-ligi u l-istess J. Grech Limited (C  
19079)**

**vs.**

**Express Trailers Limited ta' Velbro House, Qormi Road, Luqa**

**It-Tribunal,**

**Ra t-talba tas-socjeta' attrici mressqa fit-28 ta' Gunju 2016 li permezz taghha premettiet:**

Peress illi s-socjeta' J. Grech Limited inkarigat lis-socjeta' intimata sabiex tigbor u tittrasporta merkanzija lejn Malta u meta l-merkanzija giet ikkonsenjata lil J. Grech Limited fit-30 ta' Gunju 2015 irrizulta li kien hemm nuqqasijiet fil-merkanzija, ghal liema nuqqasijiet hija responsabbli s-socjeta intimata.

Peress illi ai termini tal-polza ta' assikurazzjoni relattiva, is-socjeta' rikorrenti Atlas Insurance PCC Ltd hallset lill-assigurata taghha s-somma ta' €1,954.68c u ghalhekk is-socjeta' rikorrenti hija surrogata fid-drittijiet tal-assigurata taghha u s-socjeta' J. Grech Limited sofriet €75 bhala excess.

Peress illi s-socjeta' intimata hija ghalhekk debitrici tas-socjetajiet rikorrenti fis-somma globali ta' elfejn u disgha w ghoxrin Ewro u tmienja u sittin centezmu (€2,029.68c), inkwantu ghal €1954.68 pagabbli lil Atlas Insurance PCC Ltd u €75.00 pagabbli lil J. Grech Limited, rapprezentanti l-valur tan-nuqqasijiet fil-merkanzija relattiva u l-excess, kollox kif premess u ghalhekk qed jintalab li s-socjeta' intimata tigi kkundannata thallas tali ammonti rispettivament lis-socjetajiet rikorrenti.

Bl-imghax legali rispettiv mill-1 ta' Settembru 2015 (u cioe' d-data tal-hlasijiet relattivi) sad-data tal-pagament effettiv u bl-ispejjez kollha kontra s-socjeta' intimata, li minn issa tibqa' ngunta ghas-subizzjoni taghha.

Illi permezz ta' risposta prezentata fit-28 ta' Lulju 2016 is-socjeta' konvenuta wiegbet bis-segwenti:

1. Illi s-socjeta' intimata m'ghandhiex tahti għall-allegati nuqqasijiet fil-merkanzija stante li, kif ser jigi ppruvat, jekk verament sehew tali nuqqasijiet, dawn sehew qabel ma l-merkanzija tpoggiet fil-kontroll u kura tas-socjeta' intimata.
2. Illi bla hsara għas-suespost, id-danni li s-socjeta' intimata tista' tigi ordnata li thallas hija limitata skond l-Artikolu 23 tal-Convention on the Contract for the International Carriage of Goods by Road (CMR), li jinsab riprodtt f'Kap. 486 tal-Ligijiet ta' Malta.
3. Illi bla hsara għas-suespost, trid issir il-prova da parti tas-socjetajiet rikorrenti tas-surroga, il-pagamenti li saru minn kull wahda minhom u l-hsarat li qed jigu allegati minnhom.

It-Tribunal;

Ra l-atti;

Ra x-xiehda ta' Joseph Mangion, l-affidavit ta' Rudy Degabriele, Dorianne Grech, u Amanda Brooks, il-kontro-ezami ta' l-istess Joseph Mangion, Rudy Degabriele, Doreen Grech, u Amanda Brooks, ix-xiehda ta' Jesmond Mifsud, Christopher Saliba, Noel Ellul u Kenny Roberts.

Sema' s-sottomissjonijiet ta' l-abbli difensuri tal-partijiet;

Ra illi l-kawza thalliet għal-lum għas-sentenza;

### **Ikkunsidra:**

Illi x-xhud **Joseph Mangion** xehed illis-socjeta' attrici J. Grech Limited kellha polza ta' assigurazzjoni mas-socjeta' attrici l-ohra, assiguratrici tagħha, u kienet għamlet claim

ghal xi konsenja ta' hwejjeg li fiha kien hemm xi nuqqasijiet. Is-socjeta' assiguratrici sussegwentement kienet hallset elf disa' mija u erbgha w hamsin Euro u tmienja w tmenin centezmu (€1,954.68) lis-socjeta' assikurata minnha, u din ta' l-ahhar hallset *excess* ta' hamsa w sebghin Euro (€75). Mill-post fejn tinzamm il-merkanzija f'Hal-Far, hemm post li huwa taht il-kontroll tas-socjeta' konvenuta. F'dan il-kaz kien hemm tnejn u tmenin (82) bicca ta' merkanzija neqsin.

In kontro-ezami qal li ma kien hemm ebda kummenti negattivi fil-punt meta Express Trailers gabru u rtiraw ix-xoghol. Il-kummenti negattivi saru meta s-socjeta' J. Grech marret tigbor ix-xoghol.

Illi x-xhud **Rudy Degabriele**, li jahdem mas-socjeta' attrici J. Grech Limited innota illi meta wasal fil-post fejn kienet il-merkanzija f'Hal-Far, kien hemm diga' xi kaxxi tal-kartun imqattghin u bit-tape ta' Tom Tailor maqtugh u maghluqa mill-gdid b'tape trasparenti. Hu u jiftah il-kaxxi ma' Kenny Roberts mis-socjeta' konvenuta, sabu li kien hemm xi kaxxi mifqughin. Meta ccekkja kollox, sab li kien hemm 82 bicca neqsin.

In kontro-ezami, qal li ghalkemm huwa normali li l-merkanzija tkun *shrink-wrapped* bil-mod kif kienet, kien hemm xi karti li kienu neqsin. Kien hemm ukoll kaxxi mifqughin. Qal li kien hemm madwar tnejn jew tliet kaxxi li ma kinux bit-tape tat-Tom Tailor.

Xehdet ukoll **Dorianne Grech** li qalet li meta Rudy Degabriele kien mar ghax-xoghol, kien cemplilha u qalilha li hemm xi problemi bil-konsenja. Fil-fatt dan baqa' hemm sakemm innota n-nuqqasijiet kollha. In kontro-ezami qalet li fuq il-post hi ma kinitx, pero' darba kienet fuq il-post u rat il-hsara, izda ma tiftakarx jekk hux f'dan il-kaz jew f'kaz iehor.

Xehdet ukoll **Amanda Brooks** li qalet li s-socjeta' attrici J. Grech kienet irceviet in-*notice of arrival* u meta wasal ix-xoghol Malta kien hemm xi nuqqasijiet. Il-fornitur tas-socjeta' J. Grech kien avzahom li t-trasportatur kien gabar il-merkanzija kollha relattiva mill-post ta' l-origini tal-merkanzija. Prezentat ukoll is-surroga relattiva.

In kontro-ezami qalet li l-agenti tas-socjeta' konvenuta fil-Germanja huma d-DHL u dawn jigbru l-merkanzija minghand Tom Tailor, li jkunu diga' *shrink wrapped*. Qalet ukoll li lill-Express ma jinkarigawhomx biex jghoddu l-merkanzija, izda biex imorru u jigbruha, izda fuq il-*pick up order* ikun hemm in-numru ta' kaxxi li ghandhom jingabru.

Xehed **Jesmond Mifsud** li pprezenta l-kuntratt ta' bejn is-socjeta' konvenuta u J. Grech Limited. Qal li wahda mill-kundizzjonijiet tkun dik li l-garr ikun taht CMR conditions.

Xehed ukoll **Christopher Saliba** illi qal li s-socjeta' konvenuta ghandha agent taghha f'Cologne, li jigbor ix-xoghol minghand it-trasportatur li jkunu ghazlu t-Tom Tailor, li f'dan il-kaz b'koincidenza kien id-DHL stess. L-agent ta' Express Trailers, f'kaz li jara xi nuqqasijiet, ikollu d-dritt jaghmel rimarka f'dan is-sens. Ikkonfermaw ukoll illi mill-jum tat-Tlieta (meta l-merkanzija titlaq minn idejn it-trasportatur ta' Tom Tailor) 'il quddiem, il-merkanzija tkun f'idejn nies inkarigati minn Express Trailers.

Xehed ukoll **Noel Ellul** li qal li f'din ic-cirkostanza partikolari ma kien hemm ebda rimarki fil-punt meta nhatt it-trailer, meta sar rapport apposta. Kien offra, ghan-nom ta' Express, hlas skond il-limiti tas-CMR, li ma giex accettat mis-socjeta' Atlas. In kontro-ezami qal li jaqbel li fir-rapport imsemmi hemm indikat li xi kaxxi kienu gew *re-taped*.

Xehed ukoll **Kenny Roberts** li pprezenta ghadd ta' dokumenti u qal li ma jaqbilx li f'dan il-kaz il-kartun kien mghaffeg, u li *x-shrink wrapping* kien imqatta'. In kontro-ezami qal li minn dak li ra hu, ma rrizultatux li kien hemm xi problema meta ngabret il-merkanzija minghand il-fornitur.

### **Illi t-Tribunal ikkonsidra s-segwenti:**

Illi jirrizulta mhux kontradett illi s-socjeta' attrici J. Grech Limited inkarigat lis-socjeta' konvenuta ghall-garr ta' merkanzija. Wara illi sabet xi nuqqasijiet fil-konsenja mertu ta' din il-kawza, is-socjeta' J. Grech, gharrfet lis-socjeta' assikuratrici taghha, is-socjeta' attrici l-ohra f'din il-kawza b'dawn in-nuqqasijiet, u din ta' l-ahhar ipprocediet sabiex thallas lill-klijenta taghha ghad-danni sofferti f'dan is-sinistru. Is-socjeta' konvenuta, min-naha taghha, offriet hlas a bazi tal-kundizzjoni tal-CMR, li gie rifjutat. Jirrizulta inoltre illi qabel ma l-merkanzija ttiehdet u nstaqet 'il barra mill-post fejn kienet tinsab f'Hal-Far, taht kontroll tas-socjeta' konvenuta, kien hemm ammont ta' kaxxi li kienu danneggjati. Dawn in-nuqqasijiet gew debitament komunikati lill-assikurazzjoni u lis-socjeta' konvenuta, li wara kollox kienet gia' taf bihom ghaliex kien hemm prezenti rapprezentant taghha fuq il-post f'Hal-Far stess.

Illi l-kuntratti li bihom kienet regolata r-relazzjoni bejn is-socjeta' J. Grech Limited u s-socjeta' konvenuta huma dawk a fol. 110 et seq. tal-process, li jaghmluha cara illi 'The carriage of goods is subject to the CMR conditions'.

Illi rrizulta wkoll, partikolarment mix-xiehda ta' Christopher Saliba, illi fil-mument li l-merkanzija ngabret minn DHL Warehousing (din mhux inkarigata mis-socjeta')

konvenuta) ma kien hemm ebda rimarki dwar il-merkanzija. Minn dak il-mument ‘il quddiem, pero’, u cioe’ mill-jum tat-Tlieta (li jidher li huwa l-jum li fih dan ix-xoghol jingabar mill-warehouse), il-merkanzija kienet taht ir-responsabbilta’ tas-socjeta’ konvenuta, jew direttament jew indirettament tramite l-agenti taghha.

Fir-rigward tal-mertu, izda, s-socjeta’ konvenuta invokat il-limitazzjonijiet ta’ responsabbilta’ misjuba fil-CMR, oltre r-risposti l-ohra li ressqet fil-mertu. Fl-ewwel lok ghandu jigi kunsidrat jekk il-CMR hux applikabbli ghall-kaz odjern. Fuq dan il-punt, intqal:

Illi fil-fatt kif inghad fis-sentenza fl-ismijiet “Alfred Grima noe vs Saviour Mifsud noe” (A.K. 27 ta’ Dicembru 1991 – Vol LXXIII.ii.648): “Biex il-konvenzjoni tapplika l-partijiet iridu jkunu espressament ftehm u hekk. Dan il-principju huwa segwit f’diversi sistemi guridici ... .. u l-Qorti tal-Kummerc, b’riferibilment ta’ dawk li huma maghrufa bhala The Hague Rules, irritjena l-istess principju fis-sentenzi “Avukat Dr Austin Sammut noe et noe vs Vivienne Bianch et noe” tat-3 ta’ Mejju 1990 u l-“Avukat Dr Austin Sammut noe et vs James G Gollcher et noe” tal-10 ta’ Mejju 1990.”<sup>1</sup>

Illi huwa pacifiku illi l-partijiet, fil-ftehim ta’ bejniethom, fil-fatt assoggettaw ruhhom ghall-kundizzjonijiet tal-CMR.

It-Tribunal f’dan il-punt jaghmel referenza ghas-sentenza Atlas Insurance PCC Limited et vs. B.A.S. Limited et, deciza ricentement<sup>2</sup>, fejn intqal:

*Fir-rigward ta’ l-obbligi tat-trasportatur l-Artikolu 3 tal-CMR jipprovdi li for the purposes of this Convention the carrier shall be responsible for the acts or omissions of his agents and servants and of any other persons of whose services he*

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<sup>1</sup> Atlas Insurance PCC Limited et vs. B.A.S. Ltd. et – Avviz Numru 211/09 CSH – Deciza mill-Qorti tal-Magistrati (Malta) fit-12 ta’ Settembru 2012.

<sup>2</sup> Qorti tal-Magistrati (Malta), Avviz Numru 213/09 VG – Deciza fis-26 ta’ Lulju 2017

*makes use for the performance of the carriage, when such agents, servants or other persons are acting within the scope of their employment, as if such acts or omissions were his own.*

Kif gie rilevat aktar 'il fuq, is-socjeta' konventa giet inkarigata bil-garr tal-hwejjeg mertu tal-kawza, u s-socjeta' konenuta min-naha taghha qabbdet lill-agenti taghha (DHL), li pero' skond l-istess regolament fuq citat, tibqa' responsabbli ghalihom hi. Pero' f'kull kaz ma jirrizultax li f'din il-kawza s-socjeta' konvenuta qieghda tipprova tqieghed ir-responsabbilta' fuq xi socjeta'/agent iehor taghha, u ghalhekk huwa car li s-socjeta' konvenuta hija dik li ghandha l-obbligi tat-trasportatur skond ir-regolament fuq citat.

Hawnhekk ghandu jinghad:

B'mod generali r-responsabilità tat-trasportatur taht il-CMR hija regolata bl-Artikolu 17(1) u (2) li jipprovdi illi: *the carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery.*

*The carrier shall, however, be relieved of liability if the loss, damage or delay was caused by the wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier, by inherent vice of the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.*

L-Artikolu 18(1) tal-CMR jipprovdi li *the burden of proving that loss, damage or delay was due to one of the causes specified in article 17, paragraph 2, shall rest upon the carrier.*



Fir-rigward tar-responsabilità tat-trasportatur huwa principju ormai assodat illi:

*there is a temptation to exonerate the carrier on this ground, if he has taken all 'reasonable steps' to avoid the event causing loss... This would sit easily with the general duty of exercising reasonable care of cargo, which, it has been suggested will be implied in a contract to carry goods by road". But the defense in article 17(2) makes no mention of reasonable steps and such steps are probably insufficient. What the carrier must show is more akin to the plea of impossibility of performance of a contract which involves an event which renders the contract not merely more onerous but completely impossible of performance. Writers on the CMR are agreed that the event must be one which literally 'could not' be avoided by the carrier. It need not however, like the concept of force majeure in France, be unforeseeable although many events will, by the very fact that they are foreseeable, be avoidable by the carrier of whom such a high standard is required".<sup>3</sup>*

Hu evidenti ghalhekk li kif osservat mill-Prim' Awla tal-Qorti Civili fis-sentenza fl-ismijiet **Thomas Smith Insurance Agency Limited noe v. MD Trucking Limited et, Citaz. Nru. 1093/01** deciza fit-18 ta' Frar 2004, fejn iccitat lill-awtur David Glass u l-ktieb tieghu "The Divided Heart of the CMR Convention" illi *the carrier cannot hope, simply by showing that ordinary care was taken to escape liability. He must show that in respect of the particular loss or damage, no failing on his part could have contributed to it. It follows that a high degree of proof is required on his part, normally by proving the actual cause and showing how it arose with no fault on his part". Il-Qrati taghna donnhom qed isegwu din il-linja rigida fl-interpreazzjoni tal-klawsola relattiva tas-CMR – ara "Sullivan v. Grech" deciza minn din il-Qorti fit-2 ta' Frar 2001, "Galdes v. Bowman" deciza minn din il-Qorti fil-25 ta' Jannar 2002 u "Farrugia noe v. Gatt noe" deciza mill-Onorabbli Qorti tal-Kummerc fis-16 ta' Jannar 1984, fejn intqal li "mhux bizzzejjed li c-cirkostanzi kienu straordinarji imma li jridu jkunu tant straordinarji*

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<sup>3</sup> Malcolm A. Clarke fil-ktieb "International Carriage of Goods by Road: CMR".

*li jirrenduha impossibbli illi carrier li jimpediha anke bl-akbar diligenza. L-essenza tad-difiza hija l-imprevedibilità u l-inevitabilità ”.*<sup>4</sup>

Illi t-Tribunal jirrileva illi s-socjeta' konvenuta ma' lahqitx dan il-livell, wiehed ikollu jghid pjuttost gholi ta' prova, li jehtieg issir sabiex tkun tista' tigi ezonerata mill-obbligi taghha skond il-CMR. Fil-verita' is-socjeta' konvenuta baqghet ma pprovdiet l-ebda raguni plawsibbli ghaliex il-merkanzija, wara li giet debitament konsenjata lill-agent taghha mill-warehouse tad-DHL, minghajr rimarki, kellha daqstant hsara meta giet spezzjonata hawn Malta. Irrizulta wkoll illi f'dak il-perjodu kien hemm incident iehor illi fih kienet involuta merkanzija tas-socjeta' attrici J. Grech Limited, dejjem bl-istess socjeta' konvenuta inkarigata mill-garr tal-merkanzija, u ghalkemm it-Tribunal jifhem li dawn kienu zewg kazijiet separati, dan jista' jindika wkoll illi fil-hsara riskontrata ma kien hemm xejn fortuwitu jew derivanti minn *force majeure*.

Illi in kwantu ghad-danni reklamati mis-socjeta' attrici, it-Tribunal josserva li dawn gew sewwa pruvati permezz tad-dokumenti relattivi, partikolarment dawk li jibdew a tergo ta' fol. 16 et seq, u fol. 28 et seq., li ma jidhirx li gew kontestati.

Illi kwantu ghall-prova tas-surroga u l-pagament favur is-socjeta' J. Grech Limited, kif ukoll il-prova tal-pagament ta' l-excess, dawn saru wkoll, u ssir referenza partikolarment ghad-dokument a fol. 89 tal-process.

Illi lit-Tribunal ghalhekk irrizultalu illi t-talbiet tas-socjetajiet' attrici huma gustifikati u jimmeritaw li jintlaqghu fl-intier.

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<sup>4</sup> Atlas Insurance PCC Ltd. vs. B.A.S. Ltd - Qorti tal-Magistrati (Malta), Avviz Numru 213/09 VG – Deciza fis-26 ta' Lulju 2017

Ghaldaqstant, it-Tribunal qiegħed jaqta' u jiddeciedi billi filwaqt li jichad l-eccezzjonijet tas-socjeta' konvenuta, jilqa' t-talbiet tas-socjetajiet attrici u jikkundanna lis-socjeta' konvenuta thallas lis-socjetajiet attrici s-somma ta' elfejn u disgha u ghoxrin Euro u tmienja u sittin centezmu (€2,029.68), bl-imghax kif mitlub. L-ispejjez tal-kawza jithallsu kollha mis-socjeta' konvenuta.

**Dr. Claudio Zammit**

**Gudikatur**

Mary Josette Musu'

Deputat Registratur