

Qorti Civili, Prim'Awla

Imħallef Anthony Ellul

Rikors numru: 1180/2012

**Atlas Insurance PCC Ltd u Middlesea Insurance plc,
f'isimhom u bhala surrogati fid-drittijiet tal-assikurat
Attard Bros. Co Ltd**

vs

Elmo Insurance Ltd

11 ta' Frar, 2019.

1. Permezz ta' rikors ġuramentat preżentat fit-28 ta' Novembru 2012, l-atturi ppremettew u talbu:-

'Illi l-kumpanija Attard Bros. Co. Ltd., bhala sub-kuntrattur, kienet qeghda tesegwixxi appalt ta' xoghljiet fil-post maghruf bhala Pender Place, limiti ta' San Giljan;

Is-socjetajiet esponenti hargu Contractors All Risk Insurance Policy favur "Pender Ville Limited as the Principal and/or Pender Contracting Limited as Main Contractor and/or sub-contractors each for their respective rights and interests" li fosthom tkopri lis-subkuntrattur Attard Bros Co. Ltd., (Polza Numru 93371 870 001) li kopja taghha qed tigi hawn annessa bhala Dok A;

Illi rigward l-istess xoghljiet, is-socjeta' intimata Elmo Insurance Ltd harget ukoll "Contracts Works Policy" favur l-istess Attard Bros. Co. Ltd. (Polza Numru 258-35017) li kopja taghha qed tigi hawn annessa bhala Dok B, kif aktar 'l isfel ahjar spjegat;

Illi fit-2 ta' Gunju 2009 sehh hruq enormi fil-lant tax-xoghol b'konsegwenza tad-danni kif ser jinghad aktar 'l isfel;

Illi allura ghal dan l-incident kien hemm zewg poloz ta' assikurazzjoni, wahda tas-socjetajiet rikorrenti u l-ohra tas-socjeta' intimata Elmo Insurance Ltd u ghalhekk id-danni konsegwenzjali kellhom jithallsu bin-nofs bejn il-partijiet;

Illi d-danni ammontaw ghal zewg miljuni, hamsin elf, sitt mija u wiehed u ghoxrin Ewro (€2,050,621) li kellhom jithallsu bin-nofs bejn il-partijiet u cioe' in kwantu ghal miljun hamsa u ghoxrin elf, tliet mija u ghaxar Ewro u hamsin centezmu (€1,025,310.50) mis-socjetajiet rikorrenti bejniethom u in kwantu ghal miljun hamsa u ghoxrin elf, tliet mija u ghaxar Ewro u hamsin centezmu (€1,025,310.50) mis-socjeta' intimata Elmo Insurance Limited;

Illi s-socjetajiet rikorrenti, biex jonoraw l-obbligi taht il-polza minnhom mahruga u ma jdahhlux lill-kumpanija assikurata fil-kwistjoni bejn il-partijiet dwar min ghandu jhallas id-danni sofferti, hallsu, b'surroga ta' drittijiet, l-ammont totali tad-danni rizultanti mill-istess imsemmi incendju lill-assikurat taghhom, fl-ammont ta' zewg miljuni, hamsin elf, sitt mija u wiehed u ghoxrin Ewro (€2,050,621) f'diversi okkazonijiet kif jidher mill-ircevuti rilaxxjati, u hawn annessi bhala dokumenti markati bin-numri minn wiehed sa tmienja (1 sa 8); u cioe':

Dok. 1: Ftehim datat 24 ta' Settembru 2009 dwar accettazzjoni ta' hlas b'surroga tas-somma ta' €150,000;

Dok. 2: Ftehim datat 22 ta' Ottubru 2009 dwar accettazzjoni ta' hlas b'surroga tas-somma ta' €600,000;

Dok. 3: Ftehim datat 17 ta' Dicembru 2009 dwar accettazzjoni ta' hlas b'surroga tas-somma ta' €350,000;

Dok. 4: Ftehim datat 22 ta' Frar 2010 dwar accettazzjoni ta' hlas b'surroga tas-somma ta' €290,000;

Dok. 5: Ftehim datat 22 ta' April 2010 dwar accettazzjoni ta' hlas b'surroga tas-somma ta' €300,000;

Dok. 6: Ftehim datat 19 ta' Lulju 2010 dwar accettazzjoni ta' hlas b'surroga tas-somma ta' €110,000;

Dok. 7: Ftehim datat 22 ta' Ottubru 2010 dwar accettazzjoni ta' hlas b'surroga tas-somma ta' €250,000;

Dok. 8: Ftehim datat 22 ta' Gunju 2011 dwar accettazzjoni ta' hlas b'surroga tas-somma ta' €651, peress li ghalkemm is-somma imhallsa fuq l-istess ftehim kienet ta' €30,621, is-somma ta' €30,000 kienet thallset fuq bazi ta' "ex gratia";

Illi dawn id-danni gew kwantifikati u kalkolati mill-"Loss Adjustors" professjonali "A.P. Services" li kienet giet imqabba ghal dan l-ghan mis-socjetajiet rikorrenti u s-socjeta' intimata giet infurmata mill-istess A. P. Services bil-fatt li kienet giet hekk inkarigata u bil-fatt li kienet ser tghaddi sabiex taghmel l-ezercizzju tal-"loss adjustment", kif jigi pruvat waqt it-trattazzjoni tal-kawza, pero' dina dejjem baqghet inadempjenti;

Illi ghas-servizzi minnhom resi, l-imsemmija ditta A. P. Services thallset l-ammont ta' erbgħa u tletin elf, erba' mija u tmienja u disghin Ewro (€34,498) kif jidher mill-ircevuta rilaxxjata mill-istess ditta ta' Loss Adjustors li kopja tagħha qed tigi hawn annessa bhala Dok. C;

Illi nofs dan l-ammont ta' €34,498 ammontanti ghal sbatax-il elf mitejn u disgha u erbghin Ewro (17,249) ghandu jithallas mis-socjeta' intimata ghaliex huwa ancillari ghad-danni mhallsa mis-socjetajiet rikorrenti;

Ghalhekk id-danni totali mhallsa u sofferti mis-socjetajiet rikorrenti b'konsegwenza tal-incident fuq imsemmi tat-2 ta' Gunju 2009 jammontaw ghal zewg miljuni, u hamsa u tmenin elf, mija u dsatax-il Ewro (€2,085,119) u ghalhekk sehem is-socjeta' intimata jammonta ghal nofs dan l-ammont u cioe' ghal miljun, tnejn u erbghin elf, hames mija u disgha u hamsin Ewro u hamsin centezmu (€1,042,559.50c);

Illi saru diversi tentativi u laqghat bejn il-partijiet u skambju ta' korrisondenza bejn il-konsulenti legali tal-partijiet, biex din il-vertenza tigi risolta amikevolment, fejn is-socjetajiet rikorrenti, fuq talba tal-konsulent legali tas-socjeta' intimata permezz tal-ittra tal-15 ta' Frar 2012 (Dok. D) fornaw lis-socjeta' intimata bid-dokumenti kollha hemm mitluba skond kif jidher permezz tal-ittra tal-konsulent legali tar-rikorrenti (Dok. E);

Illi s-socjeta' intimata, minkejja li kienet taf li diga' inharget Polza ta' Assikurazzjoni (Dok. A) mis-socjetajiet rikorrenti li tkopri x-xogholijiet imsemmija, insistiet mas-socjeta' Attard Bros Co. Ltd., klijent taghha ghal diversi snin, illi fuq parir taghha stess tohrog il-polza ta' assikurazzjoni (Dok. B) a favur l-istess socjeta' Attard Bros Co. Ltd. Ic-cirkostanzi ta' kif giet mibjugha din il-polza jirrizultaw mill-Affidavit ta' Michael Attard hawn anness Dok. F, fejn anness mieghu hemm Endorsement minn Elmo Insurance Ltd. retroattiv hemm markat Dok. A u li gie ribattut mis-socjeta' Attard Bros Co. Ltd. permezz ta' ittra tal-konsulent legali taghha hemm markat Dok. B;

Illi fic-cirkostanzi la darba l-istess riskju kien assigurat kemm mas-socjetajiet rikorrenti u kif ukoll ma' dik intimata, is-socjeta' intimata kienet obbligata illi tikkontribwixxi ghall-imsemmija hssarat fil-proporzjon ta' nofs u cioe' fl-ammont ta' miljun, tnejn u erbghin elf, hames mija u disgha u hamsin Ewro u hamsin centezmu (€1,042,559.50c) kif fuq dettaljatament spjegat;

Peress li s-socjeta' intimata rrifjutat illi tikkontribwixxi ghall-imsemmija hssarat, u dana nonostante l-ittra ufficjali tas-socjeta' assikurata, Attard Bros Co. Ltd. tas-16 ta' Settembru 2009 (Dok. G), u ghalhekk kellha ssir din il-kawza.

Premessi d-dikjarazzjonijiet necessarji u moghtija l-provvedimenti opportuni, tghid is-socjeta' intimata ghaliex din il-Qorti m'ghandiex:-

(1) tiddikjara illi s-socjeta' intimata kienet qed tkopri r-riskji li sehew fl-incident tat-2 ta' Gunju 2009 fuq imsemmi u konsegwentement tiddikjara li s-socjeta' intimata hija obbligata tikkontribwixxi sehemha mid-danni mhallsa mis-socjetajiet rikorrenti fl-ammont ta' zewg miljuni, u hamsa u tmenin elf, mija u dsatax-il Ewro (€2,085,119) jew kull ammont iehor li jirrizulta waqt it-

trattazzjoni tal-kawza fil-proporzjon ta' nofs (1/2) jew fi proporzjon iehor li jirrizulta waqt it-trattazzjoni tal-kawza;

(2) tikkundanna lill-istess socjeta' intimata Elmo Insurance Ltd thallas lis-socjetajiet rikorrenti l-ammont ta' miljun, tnejn u erbghin elf, hames mija u disgha u hamsin Ewro u hamsin centezmu (€1,042,559.50c) jew kull ammont verjuri li jirrizulta waqt it-trattazzjoni tal-kawza, rapprezentanti sehemha mill-ammont ta' danni mhallas lill-assikurat Attard Bros Co. Ltd;

Bl-ispejjez inkluzi dawk tal-ittra ufficjali tad-19 ta' Mejju 2011 u bl-imghax legali mid-data tal-hlas ta' kull ammont rispettiv maghmul lill-assikurat sal-pagament effettiv, kontra s-socjeta' intimata, illi r-rapprezentanti taghha huma ngunti ghas-subizzjoni.'

2. Il-konvenuta wiegbet¹ illi t-talbiet attrici huma infondati fil-fatt u fid-dritt u għanhom jigu miċhuda bl-ispejjeż. Hija ressqet is-segweni eċċezzjonijiet:

1. Illi fl-ewwel lok it-talbiet attrici huma nsostenibbli stante illi s-socjetajiet attrici ddekadew mid-drittijiet taghhom taht il-polza ta' assikurazzjoni mahruga mill-istess socjeta' konvenuta u senjatament a tenur ta' dak provdut fl-art. 7 (e) u 14 tal-kondizzjonijiet kontenuti fl-imsemmija polza:-

All benefit under this Policy shall be forfeited if:

(e) the claim be made and rejected and an action or suit be not commenced either within three months after such rejection, or in the case of arbitration taking place in pursuance of Condition 14 of this Policy, within three months after the Arbitrator or arbitrators or Umpire shall have made their award.

Illi l-art. 14 jipprovdi wkoll:-

If the Company shall disclaim liability to the Insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.

Kif jigu pruvat, il-pretensjonijiet tas-socjetajiet attrici u tal-assikurat taghhom kienu gew respinti formalment izda la l-atturi u lanqas l-assikurat taghhom ma agixxew tempestivament entro t-termini indikati fl-imsemmija polza ta' assikurazzjoni;

2. Illi subordinatament u minghajr pregudizzju għall-premess, it-talbiet attrici huma nfondati fil-fatt u fid-dritt peress illi l-polza mahruga mis-socjeta'

¹ Fol. 92 et seq.

konvenuta ma kienet qatt intiza li tipprovd i kopertura simili u kurrenti ghal dik gja provduta mis-socjeta' attrici peress illi din intalbet minn ABL specifikament bhala kopertura addizzjonali fejn dik provduta mis-socjetajiet attrici ma kinitx tipprovd i kopertura partikolari u ghalhekk f'kaz illi ma jithallasx kumpens a bazi tal-polza mahruga mis-socjetajiet attrici. F'dan is-sens l-Endorsement No. 2 mahrug mis-socjeta' konvenuta kien jirrifletti l-intendiment tal-partijiet meta nharjet il-polza originarjament u ma zied xejn ma dak li kien gja intiz u miftiehem bejn il-partijiet;

3. Illi subordinatament u in kwantu s-socjeta' attrici qed jitolbu hlas fi proporzjon ta' nofs minn dak imhallas lill-assikurat tagghom, din it-talba hija nfondata fil-fatt u fid-dritt stante' illi apparti li ma ghandha l-ebda bazi fid-dritt, lanqas biss tirrizulta fondata in vista tal-fatt illi z-zewg poloz ta' assikurazzjoni mertu tal-vertenza ma humiex identici u ma kienux ikopru l-istess materja u riskji u b'hekk ma jistghux jitqiesu bhala poloz ta' assikurazzjoni dupplici, kif jigi pruvat ahjar waqt is-smiegh tal-kaz;

4. Illi subordinatament u minghajr pregudizzju, kwalunkwe kontribuzzjoni li tista' finalment tigi likwidata favur is-socjetajiet attrici ghandha tirrifletti r-responsabbilta' massima u rispettiva tal-assikuraturi nvoluti u t-talba tas-socjetajiet attrici li kwalunkwe hlas maghmul minnhom ghandu jinqasam b'mod ugwali mas-socjeta' konvenuta la hija gustifikabbli fil-fatt tenut kont tac-cirkostanzi li jiddistingwu dawn iz-zewg poloz u lanqas fid-dritt;

5. Illi f'kull kaz u minghajr pregudizzju ghall-premess, it-talbiet attrici huma nfondati fil-fatt u fid-dritt.'

3. Fis-seduta tal-15 ta' Frar 2013² gje verbalizzat:

"Hemm qbil li l-kwistjoni dwar l-ammont ta' hlas pretiz mill-atturi jigi trattat eventwalment wara li tinghata sentenza preliminari mill-qorti dwar jekk il-kumpannija konvenuta ghandhiex obbligu li tikkontribwixxi fil-hlas ta' danni li sofru l-assikurat."

4. Permezz ta' sentenza tal-31 ta' Ottubru, 2016 gew decizi l-ewwel zewg e'ccezzjonijiet tal-konvenuta kif gej:

'1. Fir-rigward tal-ewwel eccezzjoni:

i. Tiddikjara li l-kwistjoni tad-dekadenza ma tapplikax fir-rigward tal-kuncett ta' contribution, gialadarba l-azzjoni li pproponiet l-attrici hi l-azzjoni ta' kontribuzzjoni.

ii. Tiddikjara li ghalkemm fl-okkju tar-rikors guramentat l-atturi ddikjaraw li kienu qeghdin jagixxu wkoll bhala surrogati fid-drittijiet tal-assikurat

² Fol. 98

Attard Bros Co Ltd, fir-realta l-kawzali u t-talbiet huma bazati fuq il-principju ta' contribution, u ghalhekk il-kliem "...bhala surrogati fid-drittijiet tal-assikurat Attard Bros Co. Ltd (C3599)" m'huma tal-ebda konsegwenza ghall-ezitu tal-kawza.

Ghaldaqstant tichad l-eccezzjoni.

- 2. Tichad it-tieni eccezzjoni u tiddikjara li s-socjeta konvenuta hi obbligata li tikkontribwixxi fir-rigward tal-hlas li ghamlu l-atturi in konnessjoni mal-incident li sehh fit-2 ta' Gunju, 2009.*

Spejjez jibqghu rizervati ghas-sentenza finali.'

5. Il-Qorti komplet tisma' l-provi tal-partijiet dwar l-*quantum* tal-kontribuzzjoni dovuta mis-socjeta konvenuta u rat is-sottomissjonijiet tal-partijiet fir-rigward.

Konsiderazzjoni:

6. *Pender Contracting Limited* kienet ingaġġata minn *Pender Ville limited* bħala *main contractor* għall-appalt fuq żewġ siti ta' żvilupp f' San Ġiljan magħrufa bħala *Pender Car Park* u *Mercury House*. Sussegwentment, fis-7 ta' Novembru 2007, is-socjeta *Attard Bros Co Ltd* ingħatat b'sub-appalt kuntratt għal *civil works*. Peter Diacono inizjalment xehed li dan kien fil-valur ta' Lm3,030,040.85 (€7,058,096.55)³ iżda sussegwentement ikkoreġa ruħu u qal li l-valur kien €7,334,134.⁴
7. L-atturi ħarġu polza *Contractors' All Risks*⁵ fir-rigward tal-proġett fuq imsemmi li kienet tkopri fost oħrajn lil *Attard Bros Co Ltd*. Il-perjodu tal-assikurazzjoni kien mill-1 ta' Frar 2007 sal-31 ta' Jannar 2014 u kien ikopri s-segwenenti:

Section 1 – Material Damage

Insured Items	Sum Insured Lm	Deductables Lm
1. Contract Work (permanent and temporary work, including all materials to be		(see Endorsement NS23

³ Xhieda ta' Peter Diacono a fol. 106

⁴ Fol. 444 - 446

⁵ Fol. 10 et seq.

incorporated herein)		Deductibles)
1.1 Contract Price	44,400,000 (Mercury House – 8,634,000 and Pender Place – 35,766,000)	
1.2 Materials or Items supplied by the Principal(s)	Included in 1.1 above	
2. Construction Plant and Equipment	Not Insured	
3. Construction Machinery (according to attached list)	Not Insured	
4. Clearance of Debris	2,220,000 (see Endorsement NS12 – Debris Removal – Aggregate Limit	
Total Sum Insured under Section 1	46,620,000	

Section 2 – Third Party Liability

Insured Items	Limit of Indemnity ⁶ Lm	Deductables Lm
1. Bodily Injury	}	(see Endorsement NS23 Deductibles)
	} 3,500,000	
2. Property Damage	}	

8. Fir-rigward tal-istess proġett, is-soċjetà konvenuta **Elmo Insurance Ltd** ħarget favur Attard Bros Co Ltd *Contract Works Policy*.⁷ Oriġinarjament dan tal-aħħar kien ikopri l-perjodu bejn il-5 ta' Novembru 2007 sal 4 ta' Mejju 2009 li ġiet estiża sal-4 ta' Novembru 2009.⁸ Din il-polza kienet tkopri s-segwenti:

Section 1 – Property Insured		Sum Insured
Item 1	The Contract Works, which term shall include all permanent and temporary works executed in the performance of the Insured Contract plus all materials to be incorporated therein, the property of the Insured or for which they are responsible, all	€7,000,000

⁶ In respect of any one accident or series of accidents arising out of one event and in the aggregate in the Period of Insurance

⁷ Fol. 35 et seq.

⁸ Fol. 240

	situated in the Contract Site.	
Item 2	Constructional Plant and Equipment, Tools, Tackle, Temporary Buildings and their contents, all in accordance with the inventory submitted to and agreed with the company, being the property of the Insured or for which they are responsible in connection with the performance of the Insured Contract all situated at the Contract Site.	€470,000
Item 3	Costs and Expenses necessarily incurred by the Insured with the written consent of the Company in removing Debris of the portion or portions of the Property Insured under Items 1 and 2 above, destroyed or damaged by any peril hereby insured against.	€23,500
Item 4	Existing property belonging to the Principal, located on or immediately adjacent to the Contract	€120,000
	Total Sum Insured	€7,613,500

	Section 2 – Public Liability
LIMIT OF INDEMNITY	€1,175,000
INSURED CONTRACT	The construction of blocks 10, 11, 12, 13, 14, 15 up to shell form
CONTRACT SITE	The part of the site previously know as Pender Place and according to block plan submitted on the 3 November 2007 and included as part of this policy
THE PRINCIPAL	Messrs Pender Ville Ltd and/or Messrs Pender Contracting Ltd and/or Messrs Pendergardens Ltd
ESTIMATED TOTAL CONTRACT VALUE	€7,000,000
...	...

9. Illi fit-2 ta' Ġunju 2009 seħħ inċendju fis-sit ta' kostruzzjoni li kkwazza ħsarat li originaw miż-żona '*Block 10 Phase 1 speċifikament fil-livell -1*', ossija l-area

fejn kienet qegħda taħdem Attard Brothers Ltd. In-nirien infirxu għall-*areas l-oħra fil-vicinanzi, inkluż is-saqaf tal-livell -1 li jigi l-art tal-pjazza.*⁹

10. Attard Bros Co. Ltd għamel *claim* kemm kontra s-soċjetajiet atturi kif ukoll kontra l-konvenuta. Madankollu l-*claim* kontra l-konvenuta ma ġietx onorata.¹⁰ B'hekk is-somma sħiħa tħallset mill-atturi li ġew surrogati fid-drittijiet ta' Attard Bros Co. Ltd naxxenti mill-polza ta' assikurazzjoni maħruġa lilha mill-konvenuta. L-atturi ħarrku lill-konvenuta sabiex tikkontribwixxi għall-ħsara li sofriet Attard Bros Co Ltd fl-imsemmi ħruq u li għalih l-atturi ħallsu b'kollox is-somma ta' €2,085,119. Ħlas li l-atturi jsostnu li kellu jsir mill-kontendenti f'sehem ugwali ġialadarba fi żmien li seħħ l-incident Attard Bros Co Ltd kienet koperta minn dawn iż-żewġ poloz.
11. Da parti tagħha, l-konvenuta tirrespingi tali pretensjoni in kwantu tallega li ż-żewġ poloz ta' assikurazzjoni m'humieq identici u ma kinux ikopru l-istess materja u riskji.
12. Fis-sentenza tal-31 ta' Ottubru 2016 din il-Qorti qalet:

'... fiz-żmien tal-incident kien hemm zewġ poloz li qegħdin ikopru l-istess appalt (contract work) u tindif tas-sit mill-materjal, li jkopru dannu min-nirien u l-istess persuna (Attard Bros Co Ltd). Il-polza maħruġa mill-konvenuta kellha wkoll tirrispondi biex tindennizza lill-assigurat fir-rigward tal-contract works u tnehhija ta' debris.

Il-kuncett ta' contribution żviluppa fid-dritt Ingliz tal-assikurazzjoni u hu bbazat fuq il-kuncett tal-ekwita';

*"The contribution principle. If there is double insurance, so that two or more insurers are potentially liable for the same loss, the insurer called upon to make payment may have the right to seek contribution from the other insurers. **The right of contribution is an equitable principle of some antiquity which does not rest on contract or statute and which allows one insurer to recover from another by reason of having made payment to the assured in respect of a sum for which the latter was also liable.....***

There is a right of contribution only where the following conditions, which are discussed in what follows, are met:

⁹ Fol. 106.

¹⁰ Fol. 66, 70.

- (a) *There is double insurance, in that two policies cover the same assured, the same interest and the same period and are more or less of the same scope;*
- (b) *Both policies respond to the loss;*
- (c) *The paying insurer has paid under legal liability and not as a volunteer;*¹¹

Il-konvenuta m'hijiex tikkontesta li dan il-principju japplika fid-dritt tal-assikurazzjoni lokali.

Mill-provi rrizulta li fid-data tal-incident:

- i. Kien hemm zewg poloz ta' ndennizz;***
- ii. Il-poloz kienu jkopru l-istess interess;***
- iii. Iz-zewg poloz kienu jkopru r-riskju li ta lok ghat-telf li soffra l-assigurat;***
- iv. Il-poloz kienu jkopru l-istess oggett;***
- v. Kull polza kienet responsabbli tagħmel tajjeb ghat-telf li soffra l-assigurat*¹²**

13. Stabbilit li s-soċjetà konvenuta hi obbligata tikkontribwixxi fir-rigward tal-ħlas li għamlu l-atturi in konnessjoni mal-incident li seħħ fit-2 ta' Ġunju, 2009, jonqos li jiġi determinat x'għandha tħallas lill-atturi bħala kontribuzzjoni.
14. L-atturi ressqu bħala xhud lil Gaston De Giovanni, *surveyor* u *loss adjustor* indipendenti ingaġġat minnhom għal finijiet ta' *loss adjustment*. Fl-affidavit¹³ ta rendikont tad-danni li tħallsu mill-atturi lill-Attard Brothers u jindika safejn dawn huma wkoll koperti mill-polza tal-konvenuta. Skont dan ix-xhud, il-konvenuta għandha għalhekk tikkontribwixxi għall-imsemmija danni fis-somma ta' **€1,130,754** rappreżentanti *contribution amount net of professional fees, professional fees reduced to the Elmo Policy limit* u *contribution amount relating to loss adjustment fees* li huwa kkalkula bir-rata ta' 50%. Pero' x-xhud ma tax motivazzjoni għalfejn il-kontribuzzjoni għandha tkun bir-rata ta' 50%.
15. Fin-nota ta' sottomissjonijiet tagħha l-konvenuta tikkontesta dawn il-figuri iżda tagħmel dan biss b'mod sussidjarju għad-difiża prinċipali tagħha li hija bbażata fuq il-prinċipji ta' *contribution apportionment* mħaddna fid-dritt Inġliż u x-xhieda ta' Paul Reed, espert *ex parte* prodott minnha.

¹¹ *Colinvaux's Law of Insurance*, 8 Edizzjoni, Robert Merkin (London Sweet & Maxwell, 2006 pagna 414, ara pagna 201).

¹² Enfasi miżjud.

¹³ Fol. 430 – 439.

16. Dan l-espert xehed li skont il-gurisprudenza Ingliza hemm tlett possibilitajiet ta' kif tista' tigi stabbilita l-kontribuzzjoni dovuta:
- (i) *equally by reference to their **independent actual liabilities**;*
 - (ii) *by reference to their **independent maximum potential liabilities**;*
 - (iii) *and by reference to their **common liability**.*
17. Jgħid illi *'at the time the Elmo policy was in force the common liability method was no longer considered by the insurance market to be an appropriate method for assessing contribution arising in the context of property insurance'.*
18. Iż-żewġ metodi l-oħra ta' kif tista' tigi stabbilita l-kontribuzzjoni dovuta ġew imfissra kif ġej fl-estratt mill-ktieb pprezentat mill-atturi a fol. 236:¹⁴
- (i) **maximum liability method** –

'the maximum sum for which the insurer could be liable under his policy, i.e. according to the insured value of the property insured or, in liability insurance, the limit of the policy coverage ...

... the "maximum liability" approach dictates that the insurers should share proportionately in accordance with their maximum liability under the policies. Thus, if one insurer insures an assured against his liabilities up to a limit of £100,000 and another insurer insures the same assured for his liabilities up to a limit of £10,000 the first insurer would be proportionately liable for 10/11ths of the loss'
 - (ii) **independent liability approach** –

*'the extent of the insurer's liability in respect of the actual loss or losses sustained, i.e. the question is, **for what amount "is" the insurer liable for this particular loss**, without reference to what further cover might theoretically be available under the policy*

...'

... a contribution should be calculated in accordance with what should have been the insurers' respective liabilities towards the

¹⁴ **Insurance Disputes**, Second Ed. edited by The Right Honourable Lord Justice Mance, Iain Goldrein, Professor Robert Merkin, pg 226

assured if each had been the sole insurer. Thus if a loss falls within the sum of £10,000, in the above example, on the "independent liability approach" each insurer would be liable for the same amount and would therefore contribute equally to the loss'.

19. Skont l-istess awturi:

'9.37 In practice there are a number of different methods of applying the principles of contribution to the actual apportionment. Different approaches are adopted in respect of property and liability policies, and in respect of policies that cover the same property (concurrent policies), and those covering a range of different property that overlap (non-concurrent policies) ... There are only a few decisions of the English courts which consider how an insurer's liability for contribution is to be assessed.

...

9.42 The position would therefore appear in law to be the following:

- (1) ***In a property insurance the usual basis for contribution is the maximum liability basis except where the policies contain pro rata average clauses (which are now almost universal except in domestic policies) when the independent liability basis is used.***¹⁵
- (2) *In liability insurance where the policies are unlimited, as in motor insurance, the insurers contribute equally.*
- (3) *In liability insurance, where the policy liabilities are limited, the basis for contribution is the independent liability method.*¹⁶

20. Il-konvenuta, li tibbaża ruħha fuq l-opinjoni ta' Paul Reed, tgħid illi l-kontribuzzjoni talvolta dovuta minnha għandha tiġi kkalkulata abbażi ta' *maximum liability apportionment* peress illi *'the policies provide cover for property and they have markedly different limits, scope of the property insured and the contract values are also different.'*¹⁷ Skont Reed *'at the time the Elmo policy was in force it was established market practice in England to add the maximum possible liabilities together, with each insurer paying the proportion of the loss which its own maximum figure bears to the total maximum liability figure'.* Ighid li skont dak il-metodu, tenut kont tal-fatt li s-somma massima assicurata taħt il-polza tal-konvenuta hija ta' Lm3,000,000 u s-somma massima assicurata taħt il-polza tal-atturi hija ta' Lm44,400,000, il-kontribuzzjoni dovuta mill-konvenuta tammonta għal €163,914.00.

¹⁵ Enfasi tal-qorti

¹⁶ ***Insurance Disputes***, Second Ed. edited by The Right Honourable Lord Justice Mance, Iain Goldrein, Professor Robert Merkin

¹⁷ Fol. 601

21. L-atturi jaqblu li *'this is not liability insurance and not a liability claim'*. Jikkontendu iżda li Peter Reed:
- ma ngħatax il-fatti kollha u precizi;
 - ta opinjoni fuq siti li qatt ma aċċeda fihom;
 - ma rax il-kuntratt tal-appalt ta' Attard Bros. Co. Ltd.;
 - ma ġieħ infurmat li Pender Ville Limited kienet ukoll avviċinat lis-soċjetà konvenuta kienet dak iż-żmien ingħatat l-istess dettalji li kienu ngħataw lis-soċjetajiet rikorrenti;
 - naqas milli japprezza l-polza tal-atturi fil-kuntest tal-*operative clause* tagħha li ttiprovdi li, ***The insured having applied to Atlas Insurance PCC Limited (referred to as 'The Company') for this insurance by a proposal and declaration which together with any other statements made in writing (emfazi miżjud) by the Insured for the purpose of this policy shall be the basis of and incorporated in this contract (emfasi miżjud) and having paid or agreed to pay the Premium as consideration for this insurance.***¹⁸ Jgħidu għalhekk li kemm l-*insurance quotation slip* flimkien mal-*Project Description Statement*¹⁹ eżebiti minn Robert Micallef, kif ukoll il-*Projected Annual Costs*²⁰ eżebiti minn Andrew Grech jagħmlu parti u għandhom jinqraw bħala parti integrali tal-polza;
 - kien għalhekk żbaljat meta sostna li l-polza maħruġa mill-atturi ma kinitx tidentifika *'the sum insured in respect of particular categories of work or for the individual work packages'*.
22. L-atturi jkomplu jikkontendu li l-polza maħruġa minnhom kienet tkopri *contract works* li kienu jmorru ben oltré dawk koperti mill-polza maħruġa mill-konvenuta u kien għalhekk li s-somma assicurata kienet ferm ogħla minn dik assicurata taħt il-polza tal-konvenuta. Għalhekk isostnu li l-*maximum liability method* ma jistax iwassal għal kontribuzzjoni ekwa fiċ-ċirkostanzi.
23. L-avukat Reed ma jaqbilx ma' dan peress li fil-fehma tiegħu l-polza maħruġa mill-atturi m'għandhiex *sub-limits*. Hu esprima l-fehma li:

¹⁸ Fol. 27.

¹⁹ Fol. 424 – 429.

²⁰ Fol. 443.

27. In this case, having regard to the fact that it is a claim in respect of a fire under a property policy, and the fact that there is a substantial disparity between contract values with no values identified for the individual works packages, different Property Insured and different maximum contract sums insured in the policies, **it is reasonable to conclude that contribution will follow market practice at the time the policies were in force. Therefore, a Court will most likely apportion the loss on the basis of maximum potential liability.** The conclusion would be the same even if market practice at today's date is applied, based on the application of equitable principles and having regard to the nature of the insurance taken out. **If the loss is not apportioned on the basis of maximum potential liability then it may be apportioned by a court on the basis of independent actual liabilities or a court may adopt an intermediate or different approach, see American Surety Co of New York vs Wrightson. Ultimately, whilst this is a matter of discretion, it is based upon equitable principles which militate in favour of the maximum potential liability method being adopted.**²¹

28. The fact that differing approaches can be taken between liability and property policies and the wide range of possible facts highlights that a rigid and overly formulaic approach is probably not correct. In this case the disparity between the contract values (with no sub contract values identified), the sums insured and the extent of the insured property is consistent with an approach based upon a maximum potential liability apportionment. In my opinion a Court is likely to be sympathetic to this approach as it more accurately represents a fair apportionment of responsibility.'

24. Fir-rigward tal-polza tal-atturi, is-sum insured fil-każ ta' Pender Place kienet ta' **Lm37,986 (€88,483,578)** filwaqt li fil-każ tal-konvenuta s-sum insured kienet **€7,023,500**. M'huwiex kontestat li l-polza tal-atturi kienet tkopri iktar riskji.
25. Mill-opinjoni tal-avukat Reed hu evidenti li meta qorti tiddeciedi x'kontribuzzjoni għandha titħallas, m'hijiex marbuta b'xi sistema partikolari dwar kif isir il-kalkolu.
26. Il-qorti qieset l-opinjoni ta' Peter Reed, pero' hi tal-fehma li ma jkunx ġust u ekwu li għal dan il-każ tapplika l-maximum liability method meta tikkunsidra li:

²¹ Enfasi miżjud.

- a) Skont l-affidavit ta' Peter Diacono,²² il-valur tal-appalt kien ta' €7,334,127 eskluż il-VAT, liema figura hija sorretta bill-fatt li sad-data tan-nirien Pender Ville Limited kienet obligat ruħha li tħallas lill-Attard Bros. Co. Ltd. għax-xogħlijiet fl-ammont ta' **€6,953,671.38**.²³
- b) Il-polza ta' assikurazzjoni tal-atturi kienet qegħda tkopri ħafna iktar riskji minn dik tal-konvenuta;
- c) M'hemmx provi x'persentaġġ mill-*premium* li kien jitħallas lill-atturi kien jirreferi għax-xogħlijiet ta' Attard Bros Co Ltd;
- d) Il-ħsara saret biss fi blokk 10 tas-sit, ċjoe' parti ferm żgħira mis-sit (ara rapport ta' *loss adjustor* a fol. 474 et seq); u
- e) Hu evidenti li fir-rigward tal-*contract work*, *is-sum insured* mill-atturi kienet qegħda tkopri l-valur tax-xogħlijiet kollha li kellhom isiru fis-sit Pender Place, liema xogħlijiet ma sarux biss mill-kumpannija Attard Bros. Co. Ltd. Andrew Grech ikkonferma li s-somma ta' Lm44,400,000 "... *hija s-somma komplessiva tal-appalti kollha illi kienu qed jiġu maħsuba li isiru sabiex jitlesta l-proġett*"²⁴ (ara wkoll affidavit ta' Peter Diacono).²⁵

27. Li hu żgur hu li għat-telf li ssemew fl-affidavit ta' Gaston De Giovanni, mhux inkluż l-*items* li tnaqqsu mill-istess *loss adjustor* għar-raġunijiet li semma, kull wieħed mill-kontendenti seta' jiġi mgieghel iwieġeb għall-ammont kollu. Iż-żewġ poloz kienu qegħdin ikopru l-istess riskju, ovjament apparti riskji oħra li kienet tkopri l-polza tal-atturi.
28. Meħud in konsiderazzjoni dak li ngħad hawn fuq hu ġust li l-kontribuzzjoni tkun ta' 50%.
29. Minkejja dak li xehed Gaston De Giovanni (u ara wkoll Dok. GD1 a fol. 438), it-telf totali li għalih għamlu tajjeb l-atturi²⁶ huwa ta':
- €2,050,621 danni
 - €34,498 *loss adjustor fees* ancillari għad-danni
- Total - €2,085,11.**

²² Fol. 444.

²³ Fol. 447.

²⁴ Fol. 441.

²⁵ Fol. 444.

²⁶ Safejn il-komputazzjonijiet ta' Gaston DeGiovanni jeċċedu din il-figura din il-Qorti mhux se tieħu konjizzjoni tagħhom in kwantu l-atturi m' għandhomx dritt jitolbu aktar minn dak li huma ħallsu bħala danni.

30. Kien hemm ukoll is-somma ta' €30,000 li pero' m'għandhiex titqies għaliex tħallset *ex gratia* (ara wkoll Dok. GD1). Skont il-kalkoli li għamel il-*loss adjustor*, is-sehem f'kontribuzzjoni li kellha tħallas il-konvenuta kien €1,113,505 + €17,249 (nofs il-*loss adjusting fees*) = **€1,130,754** (Dok. GD1 a fol. 438). Somma li minnha l-*loss adjustor* naqqas dawk l-ammonti li l-konvenuta m'għandhiex l-obbligu li tikkontribwixxi jew fejn hemm massimu ta' kopertura (€23,500 – ara kolonna '*Amounts subject to a limit under Elmo's Policy*' f'Dok. GD1).
31. Madankollu l-qorti trid tiddeċiedi a bażi ta' x'talbu l-atturi, li hi somma inqas minn dik li llikwida l-*loss adjustor* u tirrifletti x'ħallsu l-atturi lill-assigurat. Għaldaqstant, il-kontribuzzjoni dovuta mill-konvenuta hi ta' **€1,042,559 (€2,085,119/2)**.

Għal dawn il-motivi tiddeċiedi billi tiċhad it-tielet, raba' u ħames eċċezzjoni u:-

- 1. Tilqa' l-ewwel talba tal-atturi billi tiddikjara li s-soċjetà konvenuta hi obbligata li tikkontribwixxi fir-rigward tal-ħlas li għamlu l-atturi in konnessjoni mal-inċident li seħħ fit-2 ta' Ġunju 2009 fis-somma ta' miljun tnejn u erbgħin elf ħames mija u disgha u ħamsin ewro (€1,042,559).**
- 2. Tilqa' t-tieni talba tal-atturi u tikkundanna lill-konvenuta tħallas lis-soċjetajiet atturi miljun tnejn u erbgħin elf ħames mija u disgha u ħamsin ewro (€1,042,559), bl-imgħax mid-data tan-notifika tal-ittra ufficjali.**

Spejjeż kollha a karigu tal-konvenuta.

Anthony Ellul.