MALTA

QORTI TAL-APPELL
(Kompetenza Inferjuri)

ONOR. IMĦALLEF
LAWRENCE MINTOFF

Seduta tat-23 ta' Settembru, 2020

Appell Inferjuri Numru 92/2018 LM

Perfect Screen Printers Limited (C 5109)
(is-soċjetà appellata)

vs.

Citadel Insurance plc (C 21550)
(is-soċjetà appellanta)

Il-Qorti,

<u>Preliminari</u>

1. Dan huwa appell magħmul mis-soċjetà konvenuta **Citadel Insurance plc** (C 21550) (minn issa 'l quddiem "is-soċjetà appellanta"), mid-deċiżjoni mogħtija mit-Tribunal tal-Arbitraġġ fi ħdan iċ-Ċentru Malti tal-Arbitraġġ (minn

issa 'l quddiem "it-Tribunal"), fis-16 ta' Lulju, 2018, (minn issa 'l quddiem "id-deċiżjoni appellata"), li permezz tagħha t-Tribunal iddeċieda illi:

> "*For the reasons stated above, the Arbitrator upholds the claims made by the Claimant, and hereby directs the Respondent to pay the amount of €26,109.95 (twenty six thousand, one hundred and nine Euro and ninety five cents), together with interest at the rate of 8% from the date of filing of the Notice of Arbitration, that is from the 1st July 2015. Costs, as per taxed bill of costs issued by the Malta Arbitration Centre which is being attached to this award and marked Document A and which forms an integral part thereof, shall be shared between the parties on equal basis.*"

Fatti

2. Dan l-appell ġie intavolat mis-soċjetà appellanta, l-assiguratriċi tas-soċjetà attriċi, **Perfect Screen Printers Limited** (C 5109), hawnhekk "is-soċjetà appellata", wara li t-Tribunal iddeċieda li s-soċjetà appellanta għandha tagħmel tajjeb għall-ħlas tar-*Reserved Item* li hemm provvediment għalih fil-polza tal-assigurazzjoni maħruġa mis-soċjetà appellanta. Il-kwistjoni bejn il-partijiet inqalgħet wara nuqqas ta' qbil dwar jekk l-imsemmi ammont ta' sitta u għoxrin elf, mija u disa' Euro u ħamsa u disgħin ċenteżmu (€26,109.95) għandux jitħallas lis-soċjetà attriċi bħala inkwilina tal-fabbrika fejn ġrat il-ħsara konsegwenza ta' nirien li ħakmu lill-fond adjaċenti, jew inkella jekk dan l-ammont ta' flus għandux jitħallas lis-sid tal-proprjetà, Malta Industrial Parks Limited (minn issa 'l quddiem "MIPL").

Mertu

3. Is-soċjetà attriċi ppreżentat talba quddiem iċ-Ċentru dwar l-Arbitraġġ ta' Malta sabiex is-soċjetà konvenuta tiġi ordnata tagħmel tajjeb għall-ħlas ta' sitta u għoxrin elf, mija u disa' Euro u ħamsa u disgħin ċenteżmu (€26,109.95) rappreżentanti xogħol ta' titjib u miljoramenti li s-soċjetà attriċi għamlet fil-fabbrika mikrija lilha, fil-Qasam Industrijali ta' San Ġwann. Is-soċjetà attriċi kienet assigurata mis-soċjetà konvenuta taħt Polza tal-Assigurazzjoni tat-tip "*Industrial All Risks",* li kienet tinkludi wkoll l-interessi ta' MIPL fir-rigward tal-proprjetà UB36, fil-Qasam Industrijali ta' San Ġwann. Fid-29 ta' Settembru, 2005, żviluppaw nirien fil-fabbrika adjaċenti, dik ta' Trimite (Malta) Limited (hawnhekk "Trimite"), li kkawżaw danni u ħsarat sostanzjali fil-proprjetà okkupata mis-soċjetà attriċi, u konsegwenza ta' dan, kemm is-soċjetà attriċi, kif ukoll MIPL ressqu *claims* separati taħt il-polza tal-assigurazzjoni. Il-partijiet involuti laħqu diversi ftehim bejniethom, li permezz tagħhom saru ħlasijiet kemm minn Trimite lil MIPL, kif ukoll minn Trimite lis-soċjetà attriċi, u in segwitu għal dawn il-ftehim, is-soċjetà konvenuta bħala assiguratriċi tas-soċjetà attriċi, irrilaxxat b'mod sħiħ u mhux kundizzjonat lil Trimite fir-rigward tal-pretensjonijiet kollha preżenti u futuri li s-soċjetà konvenuta tista' tirċievi mingħand is-soċjetà attriċi. Il-partijiet qablu wkoll li l-ammont ta' €26,109.95 (LM11,209) għandu jitqies bħala *Reserved Item* u għalhekk ma sarx il-ħlas tiegħu mis-soċjetà konvenuta, li argumentat li l-ħlas ta' dan l-ammont, li jirrappreżenta l-interess tas-soċjetà attriċi fir-rigward tat-titjib fil-bini u xogħol

tal-elettriku li sar fil-fabbrika, huwa dovut lil MIPL bħala s-sid tal-fond u mhux lis-soċjetà attriċi bħala l-inkwilina tal-fond.

4. Permezz ta' ftehim data 15 ta' Jannar, 2014, is-soċjetà konvenuta u MIPL qablu li jħollu lil xulxin minn kull obbligu jew pretensjoni ta' ħlas fir-rigward tal-inċident tal-ħruq tal-fabbrika tas-soċjetà attriċi. Permezz ta' ftehim ieħor iffirmat fit-28 ta' Frar, 2014 bejn is-soċjetà konvenuta u Trimite, din tal-aħħar qablet li tħallas l-ammont ta' €708,129.51 għas-saldu tal-pretensjonijiet kollha tas-soċjetà konvenuta in segwitu għall-inċident mertu tal-kawża, u kien għalhekk li s-soċjetà konvenuta ħelset lil Trimite u lid-diretturi tagħha minn kwalsiasi obbligu fir-rigward tal-pretensjonijiet li nqalgħu in segwitu għall-imsemmi inċident. Iżda s-soċjetà attriċi ressqet talba quddiem iċ-Ċentru dwar l-Arbitraġġ ta' Malta wara li kien baqa' pendenti l-ħlas fl-ammont ta' sitta u għoxrin elf, mija u disa' Euro u ħamsa u disgħin ċenteżmu (€26,109.95), li s-soċjetà konvenuta qiegħda tirrifjuta li tħallas lis-soċjetà attriċi qabel jiġi stabbilit jekk dawn il-flejjes humiex dovuti lis-soċjetà attriċi *qua* inkwilina, jew inkella lil MIPL bħala sid il-fond.

5. Is-soċjetà konvenuta wieġbet li ladarba l-fabbrika fejn seħħet il-ħsara kienet mikrija lis-soċjetà attriċi minn MIPL, kull miljoramenti li saru fil-fabbrika huma proprjetà ta' MIPL, u għalhekk dawn il-flejjes li l-partijiet jirreferu għalihom bħala *'Reserved Item',* għandhom jitħallsu lil MIPL bħala sid il-fond u mhux lis-soċjetà attriċi. Il-partijiet kienu ffirmaw *Settlement Agreement* bejniethom fis-6 t'Awwissu, 2007, fejn is-soċjetà konvenuta ħallset somma

għas-saldu tal-obbligi tagħha kollha taħt il-polza tal-assigurazzjoni. Bis-saħħa ta' dan il-ftehim, il-partijiet qablu li r-*Reserved Item* kellu jitħallas lis-soċjetà attriċi f'każ biss li jiġi determinat li dan l-ammont huwa dovut lis-soċjetà attriċi u mhux lil MIPL. Skont dan il-ftehim:

> "*... the reserved item will be paid immediately to the insured by not later than fourteen days after the determination of the claim provided that the sum should be determined in the insured's favour.*"

6. F'dan ir-rigward, is-soċjetà konvenuta wieġbet li t-talba tas-soċjetà attriċi qiegħda tiġi kkontestata minnha, għaliex qatt ma kien hemm deċiżjoni li r-*Reserved Item* għandu jitħallas lis-soċjetà attriċi, u għalhekk l-ebda somma mhija dovuta lis-soċjetà attriċi qabel ikun hemm deċiżjoni dwar dan. Is-soċjetà konvenuta eċċepiet ukoll li s-soċjetà attriċi m'għandha l-ebda jedd għal dan il-ħlas għaliex ix-xogħol li s-soċjetà attriċi qiegħda tippretendi ħlas tiegħu sar minnha bħala inkwilina tal-fond. Is-soċjetà konvenuta qalet li l-valur tax-xogħol li jsir fil-fond jiġi likwidat favur is-sid tal-fond u mhux favur l-inkwilin.

7. Francis Xuereb, *Managing Director* tas-soċjetà attriċi, fl-*affidavit* tiegħu qal li l-kwistjoni mertu tal-kawża nqalgħet wara li s-soċjetà konvenuta kienet infurmat lill-attriċi li kien hemm:

> "*... building-related items for which MIP might file a claim, and which therefore Citadel might pay once the building claim would be settled.*"

Dan ix-xhud spjega kif fl-2005 hu kien *managing director* tas-soċjetà attriċi, li kienet topera l-fabbrika UB36, Industrial Estate, San Ġwann, liema fabbrika ġiet mikrija lilha mingħand MIPL. Spjega li fid-29 ta' Settembru, 2005, kien hemm nirien fil-fabbrika Trimite, li tinsab maġenb il-fabbrika tas-soċjetà attriċi, li kkawżat telf totali tal-i*stocks*, tagħmir, xkaffar, għamara u l-bini tal-fabbrika nnifisha. Ix-xhud qal li s-soċjetà attriċi kienet koperta b'polza tal-assigurazzjoni tat-tip "*Industrial All Risks*", u minkejja li l-*claim* oriġinali tagħha kienet għall-ħlas fl-ammont ta' LM130,000 (€302,818), wara xhur ta' negozjati, is-soċjetà konvenuta kienet infurmat lis-soċjetà attriċi li hija kienet disposta li tħallasha biss l-ammont ta' LM118,791, filwaqt li l-kumplament tal-bilanċ tħalla riservat sakemm jiġi stabbilit dan lil min huwa dovut. Fi kliem ix-xhud:

> "*... originally these items (consisting mainly of improvements to the building by PSP in the course of the lease, such as apertures, additional electric services, security grills, reinforced doors, etc), had cost the Claimant LM22,418 which were adjusted downwards to LM11,209 after the production of invoices and bills and lengthy adjustments with the loss adjuster and Citadel. Although I tried to resist the postponement of the settlement of this amount (LM11,209), eventually I was forced to reluctantly agree due to financial pressures on what had remained of my business including shortage of working cash and mounting bank interests.*
>
> *...*
>
> *A few weeks after the settlement in February 2014, through my lawyers I made a claim to recover the 'Reserved Item' amounting to LM11,209 as per the Settlement Agreement of the 07.08.2007 from 'Citadel'. ... regrettably and to my surprise, 'Citadel' refused to settle my valid claim in respect of improvements carried out at PSP's expenses and which claim they had agreed to in 2007."*

8. It-Tribunal tal-Arbitraġġ ikkonstata li filwaqt li bejn il-partijiet m'hemm l-ebda kontestazzjoni dwar l-ammonti pretiżi, ir-*Reserved Item* deskritt fis-

Settlement Agreement bħala "*improvements to the buildings and electrical works",* jirrappreżenta spejjeż inkorsi mis-soċjetà attriċi. L-argument tas-soċjetà konvenuta huwa li dan l-ammont ta' sitta u għoxrin elf, mija u disa' euro u ħamsa u disgħin ċenteżmu (€26,109.95), li jirrappreżenta l-interessi tas-soċjetà attriċi fir-rigward ta' miljoramenti fil-bini u xogħol tal-elettriku li sar fil-fabbrika, jista' jkun dovut lis-soċjetà attriċi, li wara kollox kienet l-entità li ħallset dawn l-ispejjeż, jew inkella lil MIPL.

9. It-Tribunal kellu għad-dispożizzjoni tiegħu l-kuntratt ta' kera ffirmat bejn il-Kummissarju tal-Artijiet u Persal Knitting and Manufacturing Company Limited, fil-21 ta' Ġunju, 1991, kif ukoll kopja ta' ittra li ntbagħtet lill-Malta Development Corporation fl-24 t'Awwissu, 1994 li tgħid li d-drittijiet tal-inkwilina fuq dik il-proprjetà kienu ġew trasferiti lis-soċjetà attriċi f'dawn il-proċeduri. It-Tribunal qies li minkejja li m'hemm l-ebda dubju li sar titjib mis-soċjetà attriċi fil-fond mikri lilha, u li dawn il-miljoramenti kienu jinkludu aperturi, servizzi elettriċi addizzjonali, u tagħmir għas-sigurtà tal-binja, ma nġabet l-ebda prova li dawn il-miljoramenti saru bil-kunsens tas-sid tal-fond inkwistjoni. Iżda t-Tribunal ikkonsidra li kull "*improvement*" li sar fil-fond u li seta' jinqala' minn fuq il-post mingħajr ma jikkawża ħsara, jista' jitneħħa mill-inkwilin, irrispettivament minn jekk kienx inkiseb il-kunsens tas-sid għal dan it-titjib. Ġie kkonsidrat li għalhekk is-soċjetà attriċi kienet ser tkun f'qagħda li jekk ma titlobx kumpens għall-valur tal-miljoramenti li hija tkun għamlet fil-fond, mat-terminazzjoni tal-kirja tkun tista' tneħħihom, sakemm il-fond jiġi ripristinat lura fl-istat li kien fih qabel.

10. It-Tribunal sema' kif ir-*Reserved Item* kien jirrappreżenta l-ispejjeż li saru mis-soċjetà attriċi sabiex il-fond mikri lilha jkun jista' jintuża minnha għall-iskop li għalih inkera. Il-proċeduri tal-arbitraġġ ma sarux bejn is-sid MIPL u l-inkwilin tal-fond, is-soċjetà attriċi, iżda bejn l-assiguratur u l-assigurat fil-kuntest ta' polza '*All Risks*'. It-Tribunal qies li huwa għalhekk li s-soċjetà attriċi għandha "*Insurable Interest*" fir-rigward tar-*Reserved Item,* u dan sa fejn il-*claim* tagħha hija limitata għar-riżarċiment tal-ispejjeż inkorsi minnha sabiex tirrendi l-fond mikri lilha tajjeb għall-iskop li inkera għalih. Id-danni relattivi konsegwenza tan-nirien, ġie soffert mis-soċjetà attriċi, u dan ir-riskju kien kopert taħt il-polza tal-assigurazzjoni.

Id-Deċiżjoni Appellata

11. Permezz tad-deċiżjoni mogħtija fis-16 ta' Lulju, 2018, it-Tribunal laqa' t-talbiet tas-soċjetà attriċi u kkundanna lis-soċjetà konvenuta tħallas is-somma ta' sitta u għoxrin elf, mija u disa' Euro u ħamsa u disgħin ċenteżmu (€26,109.95), u dan wara li għamel is-segwenti konsiderazzjonijiet:

> *"The Arbitrator has noted that there is no dispute as to the amounts being claimed, or as to whether the relevant amount characterised as the Reserved Item (which is decribed in the Settlement Agreement as covering "improvements to the buildings and electrical works", was in effect incurred and lost by the Claimant. Respondent has argued that the relevant amounts are not due to the Claimant, and bases its defence on two basic arguments:*

1. *That a determination has yet to be made as to whether the Reserved Item is due and payable to the Claimant or MIP;*
2. *The sum in question represents works (improvements) carried out by the Claimant qua Tenant on the Leased premises according to a contract of lease which stipulated that the said works would immediately accrue in favour of the Landlords without the obligation to compensate the Tenant. Tenant has thus no interest in being reimbursed the value of the works.*

Respondents do not argue that the relevant claim was excluded, and therefore a detailed analysis of the insurance policy does not appear necessary. Respondents' argument is rather that:

1. *A "determination" has yet to be made as to whether the Reserved item is payable to MIP or Claimant, inferring that such a determination must be made by a third party; and*
2. *The Reserved Item does not appear legally payable to the Claimant in the context of the contractual relationship between the lessor and the lessee pursuant to the contract of lease, and therefore it was incumbent on Claimant to prove that he is due proper compensation for the cost incurred in terms of the Reserved item under the contract of lease, and that the relevant amount is therefore claimable under the Insurance Policy contracted with the Respondents.*

<u>The Relationship between the parties</u>

The relevant amount is referred to in the Settlement Agreement as the "Reserved Item", being the amount of LM11,209 (€26,109.95) which the Claimant therein "accepts as representing his interest in respect of improvements to buildings and electrical works, which amount may be payable to the Insured (Claimant) under Item 1 of the Property Insured as described in the Policy Schedule and on which MIP also have an interest and possible claim."

In their Statement of Defence, the Respondent has sought to place the matter squarely within the law of contracts of lease, stating that the Claimant can only successfully claim the relevant amounts under the Insurance Contract, if the relevant amounts were recoverable from the owner of the relevant property.

Accordingly, the Arbitrator will consider the rights of the Claimant in terms of the rental agreement concerned, but he will then place such consideration within the

context of the relationship between the insurer and insured. The Arbitrator has also considered the net effect of the five agreements reached between 6th August 2007 and 28th February 2014 (Docs. A-E) in terms of any fiduciary obligations that may have been created as a result.

(i) The contract of lease

The Lease Agreement in respect of the relevant building was filed by the claimants during the sitting of the 16th February 2016, and was entered into on 21st June 1991 by the Commissioner of Land on behalf of the Government of Malta and Persal Knitting & Manufacturing Co. Ltd., together with a letter from Persal Knitting & Manufacturing Co. Ltd. to the Malta Development Corporation dated 24th August 1994, stating that Lessees' rights and obligations had been transferred to the Claimants. There is no contestation regarding this document, which will be taken as in fact crystallizing the terms of the contractual relationship between the relevant parties.

The said Agreement makes only indirect reference to improvements and works similar to the Reserved Item as articulated in Claimant's statement of Claim, in two specific clauses being, clause 5.6 and clause 9.

Clause 5.6 provides as follows:

> "The Lessees shall keep the tenement and all additions thereto and the Lessor's fixtures and fittings thereof including (inter alia) all fences and gas, water and electricity services and drains in good and substantial repair, order and condition and deliver up the same in such order and condition at the end or sooner determination of the lease."

Clause 9 deals with Structural Alterations. It is again only indirectly relevant, in that it states as follows:

> "The Lessees shall not make any structural alterations and additions to the tenement nor erect any new buildings thereon or remove any fixtures or fittings belonging to the Lessor without the previous consent in writing of the Lessor. Any such alterations and additions carried out or new buildings erected with the Lessor's consent shall not entitle the Lessees, in default of express agreement to the contrary, to any claim for compensation at the termination of the lease, whatever the cause of such termination may be."

Reference should here also be made to the provisions of Article 1564 of the Civil Code (Cap. 16), in order to help interpret the effect of the language utilized. The said Article provides as follows regarding improvements:

> "(1) The lessee may not, during the continuance of the lease, make any alteration in the thing let without the consent of the lessor, and he is not entitled to claim the value, whatever it may be, of any improvement made without such consent.
>
> (2) The lessee may, however, remove such improvements, restoring the thing to the condition in which it was before they were made, provided as regards improvements existing at the termination of the lease, he shows that he can obtain some profit by taking them away, and provided the lessor does not elect to keep them and pay to the lessee a sum equal to the profit which, by taking them away, the latter would obtain."

The improvements apparently made by the Claimants consisted mainly of "apertures, additional electric services, security grills, reinforced doors, etc" according to Mr Xuereb's sworn declaration. There is no indication that the lessor granted consent to the Claimant to add these improvements. Nor has there been substantial evidence adduced as to tenant's possible right or otherwise to remove at least part of these improvements made, pursuant to Art. 1564(2), had the premises not been destroyed. Clause 9 of the Agreement, which refers to the issue of compensation, was not entered into in detail in the course of deliberations by the parties.

The Courts have considered the provisions of Article 1564 on various occasions. In ***Investments Ltd vs Country Homes Ltd*** *(04/10/2011), the Court of Appeal stated as follows:*

> "Illi s-soċjetà attriċi qed tikkontendi li l-air conditioner kien "improvement" u bħala tali kellu jibqa' fil-fond skont il-kuntratt. Iżda din il-Qorti ma taqbilx li b'dawn il-klawsoli kull ma twaħħal fil-post kellu jibqa' fil-post, anzi jidher ċar, anke meta wieħed jaqra l-artikoli fuq indikati flimkien, li dak li l-kerrej kellu jħalli fl-aħħar tal-kirja kienu biss il-fixed furnishings li saru parti integrali u ħaġa waħda mal-fond b'mod li saru immobbli, b'dan allura li kull ħaġa li setgħet tinqala'

> mingħajr ħsara lill-fond, u għalhekk ma saritx parti waħda u integrali mill-istess fond, u setgħet tinqala' u tittieħed mill-kerrej."

This judgment indicates that where the object that resulted in improvement could be removed without damage to the factory, then the lessee could remove it, irrespective of the consent of the owner. The Claimant would have thus been in a position, not to claim compensation of the value of those improvements, but to remove the same at the termination of the lease, provided he restores the premises to their prior state, and Claimant shows that he could obtain some profit by taking them away.

The case at hand is one where a total loss was declared. It is therefore difficult to determine which of the improvements had become an integral part of the tenement, and which did not.

One would here normally seek to analyse the state in which the lessee found the factory. If it is the case that the factory was bare, except for the tiles, then it would stand to reason that the lessee would have made improvements.

The Respondent company had claimed that the Reserved Item could not be payable to the Claimant, as the law provides that the relevant works would have been for the benefit of the owner of the property, and it would be such party who would normally have the right to claim in respect of the resultant loss. The Claimant therefore had no enforceable interest in pursuing its claim. In the matter at hand, a loss was certainly suffered by the Claimant, but this does not necessarily mean that the Claimant can claim for such a loss under the policy, if the conclusion is that this was a loss for MIP to recover, as opposed to the Claimant.

The factual issue as to the actual state of the leased premises at the time when the leased premises were taken over by the Claimant, as well as whether or not the Claimant sought and obtained the consent of the Lessor in respect of any improvements made, was not focused on by the parties during the proceedings. There is only passing reference to the terms of the lease by Mr Francis Xuereb, first during the initial sitting of 29th September 2015 (when it was still believed that there was no written contract of lease) and again in cross examination during the sitting of 16th February 2016.

During the sitting of 29th September 2015, being the initial sitting, the Respondent requested that Claimants file a copy of the lease agreement. Mr Xuereb in fact states that "Kuntratt ma kienx hemm. Kien hemm terms of reference li kien jgħid li l-kumpannija trid terġa' tagħtihielhom f'liema stat ħaditha lura."

He is further recorded as having stated during the same sitting that "l-uniku ħaġa li kien hemm verbalment li jien irrid nagħtiha lura fl-istat li ħadtha*" and again as follows:*

> "Il-ftehim kien dejjem li jien il-fabbrika nagħtiha lura kif ħadtha. Barra minn hekk, irrid ngħid ukoll li din tagħtiha lura meta tkun għadha hemm sħiħa u inti tlaqt minnha. Fil-każ partikolari tagħna ma kienx il-każ. Fil-każ tagħna, inħaraq kollox kompletament."

During the sitting of the 16th February 2016, Claimant filed a copy of the relevant lease agreement. During the sitting, Mr Xuereb is recorded as having stated under oath in cross-examination as follows: "... għax jiena din il-fabbrika tawhieli għarwiena. Ma kien hemm xejn fiha. Kull ma tawna l-madum, imbagħad u xejn iżjed."

These remarks were not made in reply to a specific question as to the terms of the lease, but seem to have been made to provide context.

If the premises were leased out to the Claimant in a bare state, it would of course stand to reason that the Claimant was expected to make improvements to the building in order to proceed with the purpose of the contract, which according to clause 3.1 of the lease agreement dated 21st June 1991 was that the lessee "use the tenement exclusively for the manufacture of underwear, babywear and sportswear."

However, it is not clear whether Mr Xuereb's remarks refer to the situation prior to 1991, or whether they refer to the terms of the contract as crystallised in the said agreement. Furthermore, the legal submissions made do not refer to the issue in substance, and the Agreement itself establishes that the lease is to be deemed as having commenced on 1st September 1986.
The provisions of Art. 1564, Cap. 16 make it clear that a lessee can claim compensation for improvements made by him to the relevant building where he has obtained the consent of the Lessor. The Arbitrator cannot simply assume that the issue of Lessor's consent was established, unless clear evidence of this was

produced. In the opinion of the Arbitrator, the evidence in hand does not establish such consent to a sufficient degree in terms of the relevant contractual relationship.

Nor has sufficient evidence been brought forward, in the Arbitrator's view, to substantiate an argument that the Claimant could have removed parts of the improvements made to make profitable use of them elsewhere, had there not been the fire.

Therefore, if one were to limit oneself to the relationship which is pertinent to the contract of lease, the Arbitrator would have concluded that the Claimant has not proven to a sufficient degree the right to compensation.

However, the Arbitration is not one where the contract of lease alone is central. In fact such contract is to a large extent res inter alios acta, *and the Arbitrator has therefore focused on the relationship between insurer and assured in terms of the insurance policy in place.*

Also relevant in this case is the Settlement Agreement dated 6th August 2007 (Doc. A) for reasons that will be explained.

(iii) The insurance relationship

The Reserved Item is described in Doc. A as follows:

> "Reserved Item" shall mean the amount of LM11,209 being the amount which the insured accepts as representing his interest in respect of improvements to buildings and electrical works, which amount may be payable to the insured under Item 1 of the Property Insured as described in the Policy Schedule and on which MIP also have an interest and possible claim."

Item 1 is described in the Policy Schedule as follows:

> "Buildings constructed of brick stone and roofed with concrete including Landlord's fixtures and fittings, lighting installations, boundary walls, gates and fences occupied as a Factory, Offices and Stores."

The Reserved Item is clearly treated in the above definitions as a "building" related item, but more specifically allocated to improvements made therein by the tenant. It shall thus be taken as representing the costs incurred by the Claimant to render the

rented premises suitable for the stated purpose of the lease in clause 3.1 of the lease agreement.

Having stated this, it is likewise important to underline the fact that this Arbitration is not between Landlord and tenant of the relevant premises, but between insurer and assured in the context of an All Risks policy. The fact that Landlord and tenant have an interest in such relationship should not remove the focus of attention to the fact that the relationship under examination is that created by the Policy as opposed to the relationship created by the Lease contract. The Arbitrator must therefore focus on issues which are relevant from the perspective of that relationship between the insurer and his assured.

The question is whether the Reserved Item represented costs which were insurable by the Claimant under an Industrial (All Risks) Policy or otherwise, irrespective of whether such costs were claimable by the Tenant from the Landlord in the context of the contract of lease. Do such costs fall within the tenant's insurable interest under such a policy? Are such costs otherwise excluded? Can the assured claim the said amounts as part of his insurance claim, irrespective of whether the insured had a legal right to claim the said amount as compensation under the contract of lease vis à vis the owner of the relevant property?

Furthermore, given that the relevant amount is described as one "on which MIP also have an interest and possible claim", did MIP actually claim compensation for the Reserved Item, and were they actually compensated?

The judgment in ***Bartolo Wood Turners Limited vs Middlesea Insurance plc,*** *decided by the Court of Appeal on 29th May 2009, dealt with a number of legal issues which are pertinent to this Award, and generally enjoys various similarities to the case at hand. Among other things, the Court directly dealt with the issue of the insurable interest of the tenant as follows:*

> "Din il-Qorti, meħud in konsiderazzjoni dak li ngħad hawn fuq, hija tal-fehma li s-soċjetà attriċi ċertament kellha interess li tassikura l-proprjetà mertu tal-kawża, biss ma tistax tippretendi li titħallas ta' dak li mhuwiex tagħha. **Tista' biss tiġi indennizzata għal dak it-telf effettiv li sofriet bil-ħruq tal-istess ambjenti u, biex ma jkunx hemm ekwivoki, dan il-kumpens għandu jikkonsisti fir-riżarċiment tal-ispejjeż inkorsi mill-istess soċjetà attriċi biex tirrendi l-ambjenti lilha mikrija tajbin għall-iskop li kienu intiżi."** (*Emphasis added by the Arbitrator).*

The Arbitrator is in full agreement with the Court of Appeal's evaluation of the situation. Accordingly, the Arbitrator has considered that the Claimant had a clear insurable interest with respect to the Reserved Item, but only if the claim limited itself to "riżarċiment tal-ispejjeż inkorsi mill-istess soċjetà attriċi biex tirrendi l-ambjenti lilha mikrija tajbin għall-iskop li kienu intiżi." After all, as also cited with approval by the Court of Appeal in ***Bartolo Wood Turners Ltd vs Middle Sea Insurance plc****, for a valid insurable interest to exist, "it is not absolute ownership which is required but the existence of a relationship between the person insured and the thing which could be adversely affected by the happening of the risk assured against."*

It seems clear that the relevant loss was experienced by the Claimant, and that the relevant risk was covered under the policy (loss as a result of fire). Irrespective of whether it had a contractual right to demand indemnification under the contract of lease, the claimant had a prima facie *right to claim under the insurance policy as a loss which was experienced and which was covered by the policy, also because the Respondent has accepted that the claim is not excluded under any of the Policy exclusions.*

In fact, there does not seem to be any contestation that the amounts covered by the Reserved Item were amounts actually incurred and spent by the Claimant for the commercial activity that made the insurance coverage necessary. They were actual expenses incurred to render the relevant factory fit for the manufacturing activity which was the subject of the Policy.

The Policy was an All Risks Policy, in respect of which Respondents had already compensated the Claimants the sum of LM118,791 (around €276,708) in terms of the Settlement Agreement of 2007. The Reserved Item should therefore be seen as part of the overall figure of compensation under the Policy, but which were directly targeted for particular treatment.

Clause 2.1 of the Settlement Agreement makes it clear that the settlement figure paid was only a partial discharge of Respondent's exposure towards the Claimant: "This discharge does not include a settlement for the Reserved Item and for the outstanding claims pertinent to MIP against Citadel under the same Insurance Policy, which claims are in no way whatsoever prejudiced by this settlement."

One must therefore examine what particular treatment the Reserved Item was to be subjected to, and how it was effectively dealt with. This is described in clause 2.4 of the Settlement Agreement as follows:

> "Upon the definite determination of the outstanding claim pertinent to MIP in respect of the Building Item as specified in the Schedule forming part of the Insurance Policy the determined amount in respect of the Reserved Item will be paid immediatly to the Insured by not later than 14 days after the determination of the claim provided that the sum should be determined in the Insured's favour."

It seems clear that the parties did not have any issue concerning the question whether or not Claimant had an interest to claim the relevant figure, but the focus of concern was rather that of avoiding a claim from two different sources (the tenant as well as the Landlord) for the same building-related costs. The Arbitrator must therefore analyse Doc. B and Doc. D, being the agreements that included MIP as a party, in order to assess the manner in which any MIP claim which is pertinent to the Reserved Item was in fact handled.

This analysis will then be followed by some further considerations, in that the Settlement Agreement seems to impose fiduciary obligations upon Respondent in the manner that it places a central, perhaps determinant role on the Insurer, in the manner the repercussions and various cross-claims that resulted from the relevant fire incident were to be handled. The various Agreements that followed from conclusion of the initial Settlement Agreement were in fact handled separately, but they were clearly connected, and the issues may have had to be seen on a multi-lateral basis as opposed to merely on a bilateral basis.

(iv) The MIP claim

Document B provided that the relevant payment made by Trimite to MIP was "in full and final settlement of any and all claims of MIP against TML or otherwise directly or indirectly in respect of or arising from the incident."

As a result of this payment, MIP released and discharged TML completely for any liability connected with the Fire and damage caused thereby. Doc. B goes on to state at clause 4 as follows:

> *"4.1* This discharge also includes and covers claims by subrogated insurers or third parties which in any way, directly or indirectly, succeed to or are subrogated in any claims of MIP against TML or against other parties in respect of the incident.
>
> 4.2 This discharge also includes and covers any claims or proceedings instituted by MIP against any third parties where such third party may in turn attempt or seek to attribute responsibility or liability, or any part thereof, to TML or to otherwise seek to share responsibility or liability with TML, in respect of which, for the sake of good order, MIP is hereby declaring that it fully and finally relinquishes, and waives, any and all potential claims or pretences against TML even in this event."

It would therefore appear evident that Respondents were involved in the drawing up and finalization of the relevant document, and yet there is no particular mention of the Reserved Item.

The only other document in which MIP is a party is Doc. D, pursuant to which MIP and the Claimants merely noted that MIP had entered into a compromise agreement with "a third party", and that the parties therefore released, acquitted and discharged each other in respect of any matter connected with the said incident.

Docs. B and D are characterised by their simplicity besides the comprehensive nature of dishcarge from liability provided. Their express language completely ignores the existence of the Reserved Item, and it is therefore difficult to come to any conclusions by mere reference to the express language utilised in Doc. B and Doc. D, other than to say that the Discharge they represented was comprehensive, including any claim from the Respondent by way of subrogation or otherwise, and that MIP considered itself fully compensated.

The question that therefore arises is this: why is there no reference to the Reserved Item? Did the Respondent have any duty to ensure that the reserved item be properly determined in the relevant agreements negotiated that led to a would-be comprehensive settlement?

(v) Other Considerations

It is therefore important to consider whether there are other factors, even if necessary going beyond the contractual relationship rooted in the insurance policy,

which are relevant to the subject of the Award, given the various other agreements concluded between the parties which are relevant to the subject of this arbitral process.

The situation that led to the present proceedings in fact finds its origin in the set of agreements that were negotiated and concluded between 2006 and 2014 (docs. A-E), ostensibly in order to resolve issues that had arisen between the stakeholders following the fire that had broken out on the 29th September 2005.

The Settlement Agreement is Doc. A, entered into between the Claimants and the Respondents on 6th August 2007, while the other agreements were all entered into between July 2013 and February 2014 in what seems to have been an attempted general settlement arrangement.

a) Doc. A (the Settlement Agreement)

Doc. A is dated 6th August 2007 and entered into between the Claimant and the Respondent. It is referred to by both parties in the Statement of Claim and Statement of Defence, and is the focus of attention of both parties. Pursuant to this Agreement, a sum was paid to the Claimant in full and final settlement of its claim under the policy, and through which the Respondent was subrogated in all the insured's rights in respect of the damages sustained as a result of the fire. There is obviously one exception to this, being the Reserved item, as described above.

b) Doc. B

Doc. B is entered into between the Malta Industrial Parks Ltd (MIP) and Trimite Malta Limited (TML), and dated 23 July 2013. The Agremeent refers to the "incident", being the original fire, and pursuant to this Agreement TML made a substantial payment to MIP "in full and final settlement of any and all claims" of MIP against TML or otherwise directly or indirectly in respect of or arising from the incident. The Reserved Item and any issue concerning such item is not referred to at all in Doc. B. It should be noted that the relevant discharge also includes and covers claims by "subrogated insurers or third parties which in any way, directly or indirectly, succeed to or are subrogated in any claims of MIP against TML or against other parties in respect of this incident."

c) Doc. C

Doc. C was entered into between TML (including parties related thereto) and the Respondent, dated 22nd December 2013. In its recitals, it refers to current judicial proceedings between the parties, wherein the Respondent is described as a subrogated insurer of the Claimant in respect of the amounts paid to it as a consequence of the incident. The release given by the Respondent to TML consequent to payment received is however made "in its personal capacity and as subrogated insurer or future subrogated insurer" of the Claimant. The release further extends to "all and any present or future claims" that the Respondent may face from the Claimant. The release given to TML is comprehensive, and even specifically refers to the Reserved item at clause 4.3 thereof.

d) Doc. D

As already stated, this document was entered into between MIP and Claimants on 15th January 2014, but merely refers to the settlements entered into with third parties, and provides for a mutual discharge.

e) Doc. E

This was entered into between Claimants and TML (together with related parties) on 28th February 2014. TML make a substantial payment thereunder to the Claimant in full and final settlement. At clause 5 thereof, Claimants accept that the amount paid by TML to the Respondents pursuant to Doc. C above "represents part of the amount" paid by the Respondents to the Claimants, and in respect of which the Respondents were subrogated. This therefore refers to the amounts paid under the Settlement Agreement, excluding the Reserved Item, since this was not paid to the Claimant.

It is important to consider how all these various agreements are relevant, and how they should be seen as parts of a comprehensive set or agreements which can have a collective effect.

As already mentioned, and pursuant to clause 2.4 of the Settlement Agreement:

"Upon the definite determination of the outstanding claim pertinent to MIP in respect of the Buildings item as specified in the Schedule forming part of Insurance Policy of the determined amount in respect of the Reserved Item will be paid immediately to the Insured by not later than 14 days after the

determination of the claim provided that the sum should be determined in the Insured's favour."

This outstanding claim had been made by MIP pursuant to endorsement number 3/04 of 15th September 2004, whereby "the interest of the Malta Development Corporation and/or the Government of Malta is hereby duly noted in respect of Item Numbers 1 – Buildings and Item 3 – Rent."

Item number 3 appears to be irrelevant, while item 1 in the Policy states as follows: "Buildings constructed of brick stone and roofed with concrete including Landlord's fixtures and fittings, lightning installations, boundary walls, gates and fences ..." when describing the relevant building.

The reference in the Settlement Agreement to a matter being "determined" clearly implies that the relevant issues were being judicially tested, which is a further reason to question how, if at all, the subsequent agreements enter into and seek to regulate the Reserved item. One must here again refer to the original Settlement Agreement, and then see how the matter evolved by the time the subsequent agreements were concluded (Docs. B-E) were concluded in 2013 – 2014.

It should be noted that Clause 3.2 of the Settlement Agreement provides that the Respondent was to lead all recovery proceedings which were to be taken at the sole discretion of the Respondent, without making a specific exception for the Reserved Item.

The term "recovery proceedings" is in fact defined in the said agreement as covering "all negotiations, judicial and alternative dispute resolution proceedings and precautionary and executive actions which shall be undertaken by Citadel to recover the Settlement sum and the Reserved item and all other settlements made by it to any other party including MIP and all expenses and fees incurred by it and any additional damages due to the insured pursuant to the Fire."

The language utilized in clause 3.2 is normal in respect of payments with subrogation, but no distinction is made in the Settlement Agreement in respect of those items, such as the Reserved item, where no payment has been made. On the contrary, the Reserved item is specifically included as part of the recovery proceedings, despite the fact that, as far as the Reserved item is concerned, there was evidently no subrogation as there was no payment.

It should further be noted that the Settlement Agreement also includes an "Entire Agreement" clause and therefore it "supersedes all prior representations, arrangements, undertakings, understandings and agreements between the parties (whether written or oral) relating to the subject matter and sets forth the entire complete and exclusive agreement and understanding between the parties hereto relating to the subject matter hereof."

The Settlement Agreement was executed in 2007, well before any of the other agreements. Clause 3.2 makes it clear that the insurer was to take the lead in order to seek indemnification from the parties that were responsible for the loss experienced, and given that the initial negotiations between the Respondent and the Claimant seem to have taken a global view in the run-up to the conclusion of the Settlement Agreement, with the Reserved Item being distinguished at the last moment, one can presume that it was the intention of the parties to work together towards recovering the relevant amounts, and having the Reserved Item properly determined at the same time.

Very little evidence has been brought forward as to the manner in which the relevant strands of negotiation were conducted, and the degree of involvement of the parties in tackling the issue of the Reserved Item. There must have been a clear opportunity for the Claimant to negotiate the matter directly with MIP in the course of negotiation and finalization of the various documents, particularly Doc. D and Doc. E, but such negotiation would seem to have been stultified, at least from a formal perspective, by clauses 2 and 3 of the Settlement Agreement. Any such negotiation would have been directed by Respondent, but no evidence has been brought to show whether, and how any such negotiation was conducted.

A question that should be asked at this point is whether Respondent, given clause 3 of the Settlement Agreement, owed a fiduciary or other duty towards the Claimant with a view to having the Reserved item properly determined, given the clear expectation given in terms of clause 2.4.

Another question to be posed, given the "Entire Agreement" clause in Doc. A, is whether the contractual relationship between the Claimant and Respondent was transformed with respect to recovery of the Reserved Item, to the point that it cannot be seen as merely a contract of insurance between insurer and assured.

As per Article 1124 A of the Civil Code, fiduciary obligations arise in a number of situations, including where a person owes a duty to protect the interests of another person, or "holds, exercises control or powers of disposition over property for the benefit of other persons, including when he is vested with ownership of such property for such purpose."

Art. 3 of the Settlement Agreement can justifiably be argued as having placed the relationship between the parties squarely within the realm of fiduciary obligations, also given the fact that the Respondent accepted the responsibility to recover all amounts with discretionary powers, albeit in the context of a form of mandate to recover the Reserved Item for the party it had yet to pay.

Also relevant are the terms of Doc. C which was entered into between the Respondent and Trimite Malta Limited on 22nd December 2013.

In the recitals to Doc. C, Respondent made it clear that it had paid compensation to the Claimant and was therefore appearing in virtue of its payment with subrogation to Claimant. The amount of Eur 223,620 paid by TML to Respondent would therefore normally have covered the amount already paid to the Claimants. However, clauses 1-4 of Doc. C are particular, in that they cover other possibilities, including situations where the Respondent had previously kept open or reserved as far as the Claimant is concerned.

Thus, clause 2 makes it clear that the payment made to the Respondent is in full and final settlement of any and all claims against TML and its related parties, that Respondent may have, directly or indirectly, in respect of, or arising, whether at present or in the future, from the Incident. Clause 3 states that, in consideration of the said payment, Respondent in its personal capacity and as subrogated insurer or future subrogated insurer of Claimants, discharges TML and related parties, specifically including reference to the possibility of the Respondent facing a claim from the Claimant present or future which is consequent to or otherwise arising directly or indirectly from the Incident.

Without prejudice to the above referred two clauses, clause 4.3 then goes on to specifically refer to the Reserved Item, stating that the discharge includes any possible payment that is made as a result of a claim made by MIP and / or the Claimant against Respondent in respect of the Reserved item.

If the Respondent accepted such language, including without limitation clause 4.3 of Doc. C, and it is also accepted being referred to as "future subrogated insurer" of Claimant, then it is reasonable to presume that there was an expectation that it would in fact eventually be making payment of the Reserved Item to the Claimant or MIP. No other logical conclusion would explain the choice of this terminology in Doc. C.

An insurance contract is a contract of indemnity, not one where one party would seek profit through recovery efforts following a loss. The Reserved Item represented a figure that would have either compensated the Lessor or Lessee for amounts actually spent, or would have reinstated the insurer, as indemnifying party, to the status quo ante *following such indemnification.*

From the recovery efforts directed by the Respondent, it is not immediately clear how the Respondent handled the Reserved Item, but it certainly could not have been an item which did not correspond to a payment made, to one of the parties having an interest in the relevant contract of lease.

In the opinion of the Arbitrator, the wording of the Settlement Agreement placed a clear obligation on the shoulders of the Respondent to have the Reserved Item properly determined. Therefore, when negotiating an out of court settlement, the Respondent had the duty to clearly determine, one way or the other, that is payment to MIP as opposed to payment to the Claimant, the issue of the Reserved Item. In the circumstances, silence was not a choice it had at its disposal.

Given that the settlement agreement reached with MIP is expressly stated to be comprehensive, notwithstanding the fact that the Reserved Item had been expressly reserved in the Settlement Agreement, the indication is clear: there must have been an intention to actually pay the Reserved Item to the Claimant.

This conclusion is further substantiated by the fact that the wording of the Settlement Agreement seems to have altered the nature of the relationship between the parties, from one which was regulated purely by the terms of the insurance policy and payment by subrogation, to one where the Respondent took on a fiduciary obligation in terms of recovery of the Reserved Item.

Conclusion

For the reasons stated above, the Arbitrator upholds the claims made by the Claimant, and hereby directs the Respondent to pay the amount of Eur 26,109.95 (twenty six thousand, one hundred and nine euro and ninety five cents), together with interest at the rate of 8% from the date of filing of the Notice of Arbitration, that is from the 1st July 2015. Costs, as per taxed bill of costs issued by the Malta Arbitration Centre which is being attached to this award and marked Document A and which forms an integral part thereof, shall be shared between the parties on equal basis."

Ir-rikors tal-appell

Is-soċjetà appellanta **Citadel Insurance plc** ippreżentat l-appell tagħha mid-deċiżjoni appellata fl-4 ta' Settembru, 2018, fejn talbet lil din il-Qorti sabiex:

"*... jogħġobha tħassar u tirrevoka l-lodo arbitrali finali fl-arbitraġġ bin-numru u fl-ismijiet premessi u tgħaddi biex tiddeċiedi finalment il-vertenza billi tiċħad it-talbiet tal-kumpannija Perfect Screen Printers Limited bl-ispejjeż kontra tagħha.*"

Is-soċjetà appellanta tgħid li tħoss ruħha aggravata bid-deċiżjoni tat-Tribunal għaliex: (i) id-deċiżjoni tal-Arbitru li l-ammont ta' €26,109.95 għandu jitħallas lis-soċjetà appellata, sabiex is-soċjetà appellanta ma tagħmel l-ebda profitt indebitu, tmur kontra l-ftehim espress bejn il-partijiet, u tikkostitwixxi interpretazzjoni żbaljata tal-ftehim; (ii) l-Arbitru għamel żball fil-liġi meta kkonkluda li kienet saret xi forma ta' novazzjoni li biddlet in-natura tar-relazzjoni bejn il-partijiet; (iii) l-Arbitru għamel interpretazzjoni żbaljata tal-

ftehim ta' tranżazzjoni bejn is-soċjetà appellanta u s-soċjetà Trimite (Malta) Limited tat-22 ta' Diċembru, 2013 li permezz tiegħu s-soċjetà appellanta kellha tirkupra parti mill-ammont li kien diġà tħallas lis-soċjetà appellata; (iv) l-Arbitru injora għalkollox l-effetti tal-artikolu 3.6 tal-ftehim fis-sens li l-flejjes irkuprati mis-soċjetà appellanta kellhom jintużaw sabiex jitħallsu s-*Settlement Sum* u r-*Reserved Item;* (v) l-Arbitru qajjem punti li ma ġewx imqanqla waqt il-proċeduri tal-arbitraġġ, u li dwarhom l-partijiet ma ngħatawx iċ-ċans jagħmlu s-sottomissjonijiet tagħhom, bħalma hija l-karatterizzazzjoni tal-obbligazzjoni bħala waħda fiduċjarja.

<u>Ir-risposta tal-appell</u>

12. Is-soċjetà appellata fir-risposta tagħha tgħid li d-deċiżjoni appellata hija ġusta u timmerita konferma u għalhekk l-appell interpost għandu jiġi miċħud bl-ispejjeż. Is-soċjetà appellata qalet li b'mod ġenerali l-appell tas-soċjetà appellanta ma sarx fuq punt ta' dritt iżda fuq punti fattwali, u s-soċjetà appellanta ppruvat tagħti sembjanza ta' punti ta' dritt lill-aggravji mqajma minnha. Is-soċjetà appellata żiedet tgħid li anki f'każ li xi aggravji jistgħu jitqiesu bħala punti ta' dritt, il-Qorti xorta waħda m'għandhiex tikkonsidra dan l-appell għaliex ma jeżistux l-elementi meħtieġa biex il-Qorti tkun sodisfatta illi (i) id-deċiżjoni dwar il-punt ta' liġi ma taffettwax sostanzjalment id-drittijiet tas-soċjetà appellanta; (ii) ma kien hemm l-ebda punt ta' dritt li ġie

deċiż mit-Tribunal li fuqu ddependa biex wasal għad-deċiżjoni tiegħu; u (iii) id-deċiżjoni tat-Tribunal dwar il-punt ta' dritt hija *prima facie* miftuħa għal dubju serju. Is-soċjetà appellata qalet li huwa għalhekk li *ai termini* tas-subartikolu 70A (3) tal-Kap. 387, l-appell magħmul mis-soċjetà appellanta m'għandux jiġi kkunsidrat u għandu jiġi respint. Intqal ukoll li r-rikors tal-appell ippreżentat mis-soċjetà appellanta lanqas ma jissodisfa t-termini tal-artikolu 70B tal-Kap. 387, liema rekwiżiti huma mandatorji u mhux fakoltattivi, stante li s-subartikolu (1) tal-artikolu 70B jgħid li appell taħt l-artikolu 70A **għandu** jidentifika l-punt ta' liġi li għandha tittieħed deċiżjoni fuqu, u **għandu** jispeċifika t-tifsira li s-soċjetà appellanta tallega li hija t-tifsira korretta tal-punt ta' liġi identifikat, xi ħaġa li s-soċjetà appellata tgħid li s-soċjetà appellanta naqset milli tagħmel fir-rikors tal-appell tagħha. Is-soċjetà appellata qalet ukoll li l-appell tas-soċjetà appellanta huwa difettuż peress li ġie ppreżentat bi ksur ta' dak li jipprovdi s-subartikolu 71(2) tal-Kap. 387. Is-soċjetà appellata targumenta li l-appell inkwistjoni ġie ppreżentat mis-soċjetà appellanta qabel ma ġew eżawriti r-rimedji kumulattivament elenkati fil-liġi speċjali, li tipprovdi għal rimedju ulterjuri wara li jingħata l-lodo arbitrali, billi t-Tribunal jintalab jagħti spjega dwar xi punti li jkunu ġew deċiżi minnu, permezz ta' talba appożita għalhekk fi żmien ħmistax mid-deċiżjoni tiegħu.

13. B'riferiment għall-aggravji mressqa mis-soċjetà appellanta, is-soċjetà appellata tgħid li huwa skorrett li jintqal li hija pproċediet kontra s-soċjetà appellanta Citadel Insurance bi ksur tal-ftehim bejn il-partijiet. Żiedet tgħid li hija kellha kull dritt li tirrikorri għall-proċeduri istitwiti minnha quddiem it-

Tribunal. Ġie spjegat li s-soċjetà appellata kienet assigurata mas-soċjetà appellanta b'polza li tkopri l-bini u l-kontenut tal-fabbrika, u l-fabbrika tas-soċjetà appellata kienet inħarqet kawża ta' nirien imputabbli lil terzi Trimite (Malta) Limited. Trimite kienet ħallset id-danni relattivi għall-bini lil MIPL, liema fatt ibbenefikat minnu s-soċjetà appellanta bħala assiguratriċi, li għalhekk ma kellha toħroġ l-ebda flus għad-danni sofferti fil-binja taħt il-polza tal-assigurazzjoni. Trimite ħallset wkoll lis-soċjetà appellanta għall-kontenut tal-fabbrika, għajr għas-somma ta' €26,109.95 li baqgħet allokata bħala *Reserved Item* peress li hemm dubju dwar jekk dan il-ħlas kellux isir meta s-soċjetà appellanta tagħmel ħlas għall-binja wara li ssir *claim* għalhekk. Il-*claim* tal-binja baqgħet qatt ma tħallset minn Citadel taħt il-polza u għalhekk is-soċjetà appellata għamlet *claim* hija għar-*Reserved Items* li kienu jikkonsistu f'miljoramenti għall-binja li kienet ħallset għalihom is-soċjetà appellata stess permezz ta' diversi kontribuzzjonijiet li għamlet tul is-snin taħt il-polza tal-assigurazzjoni.

14. Is-soċjetà appellata tistaqsi b'liema mod id-deċiżjoni tat-Tribunal tista' titqies li hija żbaljata, u żżid tgħid li l-iskop tas-soċjetà appellanta huwa li tiżloq u tevita li tonora l-polza tal-assigurazzjoni. Is-soċjetà appellata tgħid li dak li qiegħda tilmenta minnu s-soċjetà appellanta huwa l-fatt li t-Tribunal, minkejja l-lodo tiegħu, baqa' ma tax deċiżjoni konkreta dwar jekk il-flejjes dovuti taħt ir-*Reserved Item* għandhomx jitħallsu lis-soċjetà appellata jew lil MIPL, u tgħid li f'dak il-każ, it-Tribunal kellu obbligu li jirrikorri għall-proċedura maħsuba taħt

is-subartikolu (1) tal-Artikolu 49 tal-Kap. 387, u tgħid li għalhekk ukoll, dan l-appell għandu jitqies li huwa null u bla ebda effett.

15. Is-soċjetà appellata tgħid li l-ammont in kontestazzjoni baqa' ma nġabarx minnha, u kien għalhekk li t-Tribunal iddeċieda li din is-somma għandha titħallas lilha taħt il-polza tal-assigurazzjoni, sabiex hija tiġi riżarċita għad-danni sofferti minnha. Is-soċjetà appellata tgħid li t-Tribunal kien korrett fl-interpretazzjoni li ta għall-ftehim tas-6 t'Awwissu, 2007, fejn kien hemm tliet entitajiet distinti involuti, is-soċjetà appellanta Citadel, is-soċjetà appellata Perfect Screen u Malta Industrial Parks Limited, li lkoll kienu qegħdin jikkonkorru għall-ħlas dovut lilhom mingħand Trimite, li dak iż-żmien kien hemm dubji dwar is-solvenza tagħha. Kien għalhekk li s-soċjetà appellanta assumiet l-obbligu fiduċjarju li tirkupra l-flejjes taħt ir-*Reserved Item,* lil hinn mill-konsiderazzjoni dwar dawn il-flus lil min huma dovuti.

16. Is-soċjetà appellata qalet ukoll li s-soċjetà appellanta ma setax ikollha *right of recovery* mingħand terzi, jekk qabel effettivament ma tħallasx lis-soċjetà appellata għar-*Reserved Item.* B'riferiment għall-klawsola 4.3 tal-ftehim tat-22 ta' Diċembru, 2013, is-soċjetà appellata tgħid li hija ma kinitx parti għall-ftehim bejn is-soċjetà appellanta u Trimite, u għalhekk dan il-ftehim ma setax jippreġudika l-pożizzjoni tagħha b'xi mod. Żiedet tgħid li f'każ li s-soċjetà appellanta rrinunzjat għall-jedd li tieħu azzjoni kontra Trimite, dan ma jfissirx li hija ġiet eżonerata milli twettaq il-ħlas dovut taħt il-polza tal-assigurazzjoni. Is-soċjetà appellata żiedet tgħid li meta s-soċjetà appellanta

ffirmat il-ftehim tas-6 ta' Awwissu, 2007 magħha, din assumiet obbligu fiduċjarju għall-iskop tal-irkupru tar-*Reserved item,* iżda mbagħad għamlet ftehim ma' Trimite fejn irrinunzjat għad-dritt li tiġbor il-ħlas għar-*Reserved Item* mingħandha. In segwitu għal dan il-ftehim, is-soċjetà appellanta bdiet tirrifjuta li tħallas lis-soċjetà appellata dak dovut minnha skont il-polza.

Konsiderazzjonijiet ta' din il-Qorti

17. Il-Qorti sejra tibda billi tikkonsidra l-eċċezzjonijiet preliminari mressqa mis-soċjetà appellata fir-risposta tagħha għall-appell, u dan sabiex tara jekk l-appell kif propost għandux jintlaqa', jew inkella jekk ir-rikors tal-appell għandux jitqies li huwa irritwali u null, kif qiegħed jiġi allegat mis-soċjetà appellata. L-ewwel punt imqajjem mis-soċjetà appellata huwa li l-aggravji ċċitati mis-soċjetà appellanta fir-rikors tal-appell tagħha, huma aggravji bbażati mhux fuq punti ta' dritt, iżda fuq punti fattwali, kif ukoll li d-deċiżjoni tat-Tribunal ma tistax titqies li ngħatat sostanzjalment fuq id-drittijiet tas-soċjetà appellanta. L-artikolu 70A(1) tal-Kap. 387 jispeċifika illi:

> "Parti fil-proċedimenti tal-arbitraġġ tista' tappella lill-Qorti tal-Appell fuq punt ta' liġi li jitnissel minn deċiżjoni finali magħmula fil-proċedimenti ...".

Is-subartikolu (3) tal-istess dispost tal-liġi jgħid illi:

> "Il-Qorti tal-Appell għandha tikkonsidra l-appell biss jekk il-Qorti tkun sodisfatta:

(a) Li d-deċiżjoni dwar il-punt ta' liġi taffettwa sostanzjalment id-drittijiet ta' waħda jew aktar mill-partijiet;
(b) Li l-punt ta' liġi huwa wieħed li t-Tribunal kien mitlub jiddeċiedi fuqu biex jasal għad-deċiżjoni;
(c) Li fuq il-bażi ta' dak li jirriżulta mill-fatti fid-deċiżjoni, id-deċiżjoni tat-Tribunal dwar il-punt ta' liġi hija *prima facie* miftuħa għal dubju serju; u
(d) Li a bażi tar-reviżjoni għar-rikors, kull risposta u d-deċiżjoni, l-appell ma jidhirx li hu dilatorju u vessatorju, u fil-każijiet l-oħra kollha l-Qorti għandha tiċħad l-appell."

18. Din il-Qorti kif diversament preseduta, f'deċiżjoni mogħtija fid-29 ta' April, 2015, fl-ismijiet **Kees de Jong noe *vs.* Winex Holdings Limited**, spjegat il-ħtieġa li rikors tal-appell minn deċiżjoni tat-Tribunal ikun ibbażat fuq punt ta' liġi, b'dan il-mod:

"Illi deċiżjoni arbitrali tista' tiġi impunjata fil-limiti stretti ta' dak dispost fl-Artikolu 70A (1) tal-Kapitolu 387 tal-Liġijiet ta' Malta jiġifieri "fuq punt ta' liġi li jitnissel minn deċiżjoni finali magħmula fil-proċedimenti." In vista tal-preġudizzjali mqanqla mill-appellat, il-Qorti għandha allura tivverifika jekk il-kontestazzjoni formulata mis-soċjetajiet tikkorrispondix eżattament għall-każ ta' impunjattiva skont kif stabbilita fil-liġi. Illi di più d-dettam tal-Artikolu 70B (1) jipprovdi illi meta jsir appell taħt Artikolu 70A, l-appellanti għandu jidentifika l-punt ta' liġi li għandha tittieħed deċiżjoni fuqu u għandu jispeċifika t-tifsira li r-rikorrenti jallega li hi t-tifsira korretta tal-punt ta' liġi identifikat.

"**Jikkonsegwi minn dan illi hu dejjem neċessarju li mill-att tal-appell jirriżulta liema hi n-norma vjolata ossija l-prinċipju tad-dritt li l-apellanti jippretendi li ġie leż. Li jfisser illi min jimpunja d-deċiżjoni, għandu jispeċifika, fil-konkret, il-punt tal-liġi vjolat, u in aġġunta jġib in riljev il-punt u l-mod fejn l-Arbitru ddiskosta ruħu minnu. Irid jiżdied illi mhux suffiċjenti s-sempliċi kritika tad-deċiżjoni sfavorevoli formulata bi prospettazzjoni ta' interpretazzjoni diversa u aktar favorevoli minn dik interpretata mill-Arbitru. Dan, għaliex kritika f'din id-direzzjoni ma tistax ħlief**

tittraduċi ruħha, in sostanza, għal talba tal-aċċertament *ex novo* tal-fatti tal-każ u dan, kif ġia rilevat, hu inammissibbli;

Premess dan, ... irid jingħad illi minn qari akkurat tal-imsemmi Artikolu 70B(1), ma jidhirx li hu indispensabbli illi l-impunjattiva trid bilfors tikkontjeni indikazzjoni speċifika ta' xi artikolu tal-liġi li jingħad li ġie vjolat. Jibbasta li jiġi ppreċiżat il-punt tal-liġi estratt mis-sentenza attakkata u li tingħata t-tifsira korretta dwaru."[1]

19. M'hemmx dubju li bir-rikors tal-appell intavolat mis-soċjetà appellanta, din qiegħda tattakka d-deċiżjoni tat-Tribunal li ddeċieda li f'kontestazzjoni bejn is-soċjetà appellata bħala inkwilina, u MIPL bħala sid il-fond, il-flus li għandhom jitħallsu taħt ir-*Reserved Item,* għandhom jitħallsu lis-soċjetà appellata. Huwa minnu li r-rikors tal-appell ma jindikax b'mod speċifiku liema huwa l-punt ta' dritt li qiegħed jiġi attakkat, iżda minn qari tal-imsemmi rikors jirriżulta bl-aktar mod ċar li s-soċjetà appellanta qiegħda tappella mid-deċiżjoni fejn intqal li kien hemm novazzjoni, kif ukoll fejn tgħid li kien hemm żball fl-interpretazzjoni tal-ftehim li s-soċjetà appellanta laħqet mat-terz, dwar jekk il-ftehim bejn is-soċjetà appellata u terzi b'xi mod jaffettwax il-jeddijiet tas-soċjetà appellanta, li għaliha dan il-ftehim huwa *res inter alios acta.* Mil-lat proċedurali, is-soċjetà appellanta ħassitha aggravata wkoll bil-fatt li ngħatat deċiżjoni dwar punti legali li tqajmu mit-Tribunal u li l-partijiet ma kellhomx l-opportunità jagħmlu s-sottomissjonijiet tagħhom dwarhom, għaliex ssemmew għall-ewwel darba fil-konsiderazzjonijiet tat-Tribunal b'riferiment speċifiku għall-kwistjoni tal-obbligi fiduċjarji.

[1] App. Inf. 14.03.2007 Maryanne Scicluna *vs.* Dr Daniela Chetcuti

Il-Qorti hija tal-fehma li minn dan isegwi li l-preġudizzjali tas-soċjetà appellanta dwar l-allegata irritwalità u nullità abbażi ta' dak li qalet fir-rikors tal-appell tagħha, hija insostenibbli.

20. Is-soċjetà appellata ressqet punt ieħor li abbażi tiegħu tgħid li r-rikors tal-appell huwa irritwali u null, billi qalet li l-appell ġie ppreżentat qabel ġew eżawriti r-rimedji kumulattivament elenkati fil-liġi speċjali. Id-dispożizzjoni tal-liġi li tagħmel riferiment għaliha s-soċjetà appellata, hija l-artikolu 71A(2) tal-Kap. 387, li jgħid li rikors ma jistax isir jekk l-appellant ma jkunx qabel eżawrixxa kull proċess kuntrattwali disponibbli ta' appell jew reviżjoni, u kull mezz disponibbli taħt l-artikoli 47, 48 u 49 tal-Kap. 387 dwar it-tifsir tad-deċiżjoni, it-tiswija tad-deċiżjoni u dwar xi deċiżjoni addizzjonali li tista' tkun meħtieġa. Testwalment dan l-artikolu tal-liġi jaqra hekk:

> "Rikors ma jistax isir jekk ir-rikorrent jew l-appellant ma jkunx qabel eżawrixxa:
>
> (a) Kull proċess kuntrattwali disponibbli ta' appell jew reviżjoni; u
>
> (b) Kull mezz disponibbli taħt l-artikolu 47 (Tifsir tad-deċiżjoni), 48 (Tiswija tad-deċiżjoni), jew 49 (Deċiżjoni addizzjonali)."

L-artikolu 49 tal-Kap. 387, li skont is-soċjetà appellata kien joffri rimedju alternattiv lis-soċjetà appellanta qabel ma kellha tintavola l-appell, jipprovdi illi:

> "Fi żmien ħmistax-il jum minn meta taslilhom id-deċiżjoni, kull parti, wara li tagħti avviż ta' dan lill-parti l-oħra, tista' titlob lit-Tribunal tal-Arbitraġġ li jagħti deċiżjoni

> addizzjonali dwar talbiet magħmula waqt il-proċedimenti abritrali iżda li jkun tħalla barra mid-deċiżjoni."

Is-soċjetà appellata spjegat li ladarba wieħed mill-argumenti ewlenin tas-soċjetà appellanta huwa li qabel ma t-Tribunal iddeċieda li l-ħlas tar-*Reserved Item* għandu jsir favur is-soċjetà appellata, dan naqas milli jasal għal konklużjoni dwar jekk l-ammont inkwistjoni kienx jispetta lil Malta Industrial Parks Limited bħala sid il-fond jew inkella lis-soċjetà appellata bħala inkwilina tal-fond. Is-soċjetà appellata spjegat li l-fatt li l-appellanta qabdet u intavolat ir-rikors tal-appell mingħajr ma qabel talbet li tingħata deċiżjoni addizzjonali dwar talbiet li saru waqt il-proċedimenti arbitrali, iżda li tħallew barra mid-deċiżjoni, ir-rikors tal-appell għandu jitqies li huwa irritwali. Il-Qorti tqis li hawnhekk ikun ta' siwi li tagħmel riferiment għal dak li qalet f'dan ir-rigward din il-Qorti kif diversament preseduta f'deċiżjoni mogħtija fl-10 ta' Mejju, 2006, fl-ismijiet **Recoinvest Limited *vs.* Catherine Ripard**:

> "... ta' min josserva illi bl-użu grammatikali tal-verb "tista' titlob" espress fl-artikoli 47, 48 u 49, il-parti hi fakoltizzata li tagħmel użu minn dawk ir-rimedji u mhix xi ħaġa imposta b'obbligu fuqha. Ferma din l-osservazzjoni, għandu imbagħad ifisser, kif hekk donna tikkontendi s-soċjetà appellata, illi għaliex il-parti ma titlobx ebda ordinanza mingħand l-Arbitru fit-termini tal-preċitati Artikoli tal-liġi l-appell interpost mid-deċiżjoni għandu jitqies irritwali. Fil-fehma konsiderata ta' din il-Qorti l-Artikolu 71A (2) (b) ma għandux jiġi interpretat fis-sens tad-deduzzjoni restrittiva proposta mis-soċjetà appellata. Ma jagħmilx sens li jiġi mitlub rimedju anke fejn dan mhux hekk neċessarju, għallinqas avut rigward tal-perspettiva soġġettiva tad-deċiżjoni da parti tal-appellant jew ta' min jintanta impunjattiva biex dik id-deċiżjoni tiġi mwarrba. Jikkonsegwi illi jekk għall-appellant l-lodo hu ekwiparat għal sentenza li ma jirrikjedi ebda mezzi rimedjali xorť oħra, dik is-sentenza ma tistax ma titqiesx waħda finali li tkun idderimiet il-kontroversja."

Din il-Qorti tikkondividi din il-linja ħsieb, u tqis li minkejja dak li ntqal mis-soċjetà appellata, lanqas taħt dan is-subartikolu tal-liġi speċjali ma jista' jitqies li hemm irritwalità stante li s-soċjetà appellanta kellha biss il-fakoltà u mhux l-obbligu li titlob lit-Tribunal jagħti deċiżjoni addizzjonali sabiex jispjega b'liema mod huwa wasal għall-konklużjoni li l-flus li ġie deċiż li għandhom jitħallsu lis-soċjetà appellata, fil-fatt għandhom jitħallsu lilha bħala inkwilina tal-fond, u mhux lis-sid, għalkemm anki hawnhekk din il-Qorti tqis li t-Tribunal spjega b'mod dettaljat kif wasal għal din il-konklużjoni, li wara kollox iffavoriet lis-soċjetà appellata.

22. Hekk stabbilita l-kwistjoni dwar jekk dan l-appell għandux jitqies li huwa irritwali u null, il-Qorti sejra tgħaddi sabiex tikkonsidra l-aggravji mressqa mis-soċjetà appellanta.

L-ewwel aggravju: *Id-deċiżjoni tal-Arbitru li l-ammont ta' €26,109.95 għandu jitħallas lis-soċjetà appellata, sabiex is-soċjetà appellanta ma tagħmilx profitt indebitu, tmur kontra l-ftehim espress bejn il-partijiet, u tammonta għal interpretazzjoni żbaljata tal-ftehim ta' bejniethom.*

Is-soċjetà appellanta spjegat li fl-2007 kienet intlaħqet tranżazzjoni dwar il-*claim* tas-soċjetà appellata, billi l-partijiet kienu ftiehmu li s-soċjetà appellata tirċievi somma flus immedjatament, filwaqt li somma oħra kellha tibqa'

riservata u titħallas wara li jiġi determinat jekk din tispettax lis-soċjetà appellata jew lis-sid tal-fond, l-MIPL. F'każ li l-appellata tiġbor dan l-ammont separatament, is-soċjetà appellanta ma tibqax obbligata li tħallas hi dan l-ammont. L-appellanta qalet li kemm l-MIPL kif ukoll is-soċjetà appellata nnegozjaw individwalment ma' Trimite it-termini tal-ħlas li kellhom isiru lil kull wieħed minnhom, iżda minkejja dan it-Tribunal xorta waħda ddeċieda li l-ammont riservat għandu jitħallas lis-soċjetà appellata sabiex ma jkunx hemm profitt indebitu għas-soċjetà appellanta, li kienet irkuprat dawn il-flejjes. Is-soċjetà appellanta sostniet li ladarba t-Tribunal ma wasal għall-ebda konklużjoni dwar jekk l-imsemmija flus kellhomx jitħallsu lis-soċjetà appellata bħala inkwilina, jew inkella lil MIPL bħala sid il-fond, ma seta' qatt jiġi determinat li l-ammont ta' flus riservat kellu jitħallas lis-soċjetà appellata. Is-soċjetà appellanta sostniet li meta s-soċjetà appellata ftiehmet u aċċettat il-ħlas ta' somma flus mingħand Trimite, din kienet qiegħda taġixxi kontra l-ispirtu tal-klawsola 3.6 tal-ftehim ta' tranżazzjoni li jgħid, "*any sums collected during the recovery proceedings shall first be applied to refunding the Settlement Sum and the Reserved Item and all other sums which Citadel will settle or be bound to settle to any other party as a consequence of the fire together with all the relevant costs to Citadel.*"

23. Il-Qorti kkonsidrat it-termini tal-ftehim tas-6 ta' Awwissu, 2007, li ġie ffirmat bejn il-partijiet, minn fejn jirriżulta li s-soċjetà appellanta ħallset lis-soċjetà appellata l-ammont ta' LM118,791, maqbul bħala *Settlement Sum*

filwaqt li ġie riservat l-ammont ta' LM11,209, li jiffurma l-mertu ta' dawn il-proċeduri. Dan il-ftehim ġie ffirmat wara nirien li kienu ħakmu il-fabbrika maġenb dik tas-soċjetà appellata, liema nirien kkawżaw ħsarat sostanzjali fil-fabbrika mikrija lis-soċjetà appellata minn MIPL. Fiż-żmien meta ġie ffirmat il-ftehim tas-6 ta' Awwissu, 2007 bejn il-partijiet, diġà kien hemm nuqqas ta' qbil dwar jekk l-ammont riservat għandux jitħallas lis-soċjetà appellata bħala inkwilina, jew inkella lil MIPL bħala sid il-fabbrika. Iżda l-partijiet qablu li għandhom jikkollaboraw bejniethom fir-*recovery proceedings,* li kellhom jitmexxew mis-soċjetà appellanta, filwaqt li l-klawsola 3.6 iċċitata f'dan l-aggravju tas-soċjetà appellanta tgħid li kull somma irkuprata minn xi waħda mill-partijiet, għandha l-ewwel tiġi applikata għas-*Settlement Sum* li kienet diġà tħallset lis-soċjetà appellata, u għall-ammont riservat, u għal kull somma oħra li s-soċjetà appellanta għad tkun tista' tiġi obbligata tħallas konsegwenza tal-imsemmija nirien.

24. Il-Qorti tqis li d-deċiżjoni tat-Tribunal li l-ammont riservat għandu jitħallas lis-soċjetà appellata, bl-ebda mod ma timpinġi fuq dak li kien ġie miftiehem bejn il-partijiet fis-6 ta' Awwissu, 2007. Is-soċjetà appellata kienet ħadet polza tal-assigurazzjoni li kienet tkopri l-bini u l-kontenut tal-fabbrika mikrija lilha fil-Qasam Industrijali ta' San Ġwann, u għal dan l-iskop kienet tagħmel ħlasijiet regolari taħt il-polza lis-soċjetà appellanta. Il-proċeduri quddiem iċ-Ċentru dwar l-Arbitraġġ ta' Malta kienu ġew istitwiti proprju għaliex is-soċjetà appellanta baqgħet tirrifjuta li tħallas dan l-ammont riservat

lis-soċjetà appellata, skont it-termini tal-polza, u minflok baqgħet tinsisti li tibqa' żżomm dan l-ammont 'riservat' sakemm jiġi stabbilit jekk dan l-ammont għandux jitħallas lis-soċjetà appellata bħala inkwilina, jew lil MIPL bħala sid il-fabbrika. Dik il-vertenza ġiet determinata finalment bil-lodo arbitrali, li ddeċieda li dak l-ammont li kienet assigurata għalih s-soċjetà appellata, u li jirrappreżenta spejjeż minfuqa minnha għall-miljoramenti li għamlet fil-fabbrika, għandu jitħallas lilha. Il-klawsola 3.6 fil-ftehim bejn il-partijiet bl-ebda mod ma timpinġi fuq dak li ġie deċiż bil-lodo arbitrali, u għalhekk peress li l-ewwel aggravju tas-soċjetà appellanta mhuwiex mistħoqq, il-Qorti qiegħda tiċħdu.

It-tieni aggravju: *sar żball fil-liġi meta t-Tribunal kkonkluda li kien hemm xi forma ta' novazzjoni li biddlet in-natura tar-relazzjoni bejn il-partijiet*

25. Is-soċjetà appellanta ssostni li t-termini tal-ftehim iffirmat bejn il-partijiet biddlu n-natura tar-relazzjoni bejn il-partijiet, minn waħda li kienet regolata mill-polza tal-assigurazzjoni u l-ħlas li jsir taħtha wara li jkun hemm surroga tal-jeddijiet, għal waħda fejn is-soċjetà appellanta assumiet obbligu fiduċjarju meta obbligat ruħha li tirkupra l-ammont riservat. Is-soċjetà appellanta qalet li din kienet *claim* li permezz tagħha s-soċjetà appellata tħallset mis-soċjetà appellanta sal-limitu li kellha assigurat, u l-partijiet iffirmaw ftehim bejniethom sabiex jevitaw sitwazzjoni fejn ikun hemm tiġrija

bejniethom dwar min minnhom ser jiġbor il-flus l-ewwel. Is-soċjetà appellanta qalet li meta t-Tribunal kkonkluda li kien hemm xi forma ta' novazzjoni li biddlet in-natura tar-relazzjoni bejn il-partijiet, dan kien żbaljat, u t-Tribunal ma kellu qatt jasal għall-konklużjoni li l-ftehim iffirmat bejn il-partijiet biddel in-natura tar-relazzjoni bejniethom għal waħda ta' obbligi fiduċjarji. Is-soċjetà appellanta saħqet li kuntrarjament għal dak li ġie konkluż mit-Tribunal, il-ftehim ta' tranżazzjoni bejn il-partijiet, fil-klawsola 3.5 tal-istess ftehim teskludi espressament li hemm xi obbligi fiduċjarji bejn il-partijiet, partikolarment meta l-ftehim espressament jeskludi d-*duty of care* tas-soċjetà appellanta fil-konfront tas-soċjetà appellata. Is-soċjetà appellanta saħqet li sa fejn il-ftehim kien jobbliga lis-soċjetà appellata ma tiħux passi indipendentement mis-soċjetà appellanta, kienet is-soċjetà appellata li kisret it-termini tal-ftehim meta pproċediet separatament u indipendentement mis-soċjetà appellanta, billi istitwiet proċeduri kontra s-soċjetà Trimite u kontra l-aħwa Coleiro personalment.

26. Il-Qorti kkonsidrat illi fl-isfond ta' dan kollu kien hemm il-fatt li diversi partijiet kienu qegħdin jikkonkorru bejniethom sabiex jirkupraw il-flejjes li kienu dovuti lilhom mingħand Trimite, li wara li kien seħħ l-ħruq, kien hemm dubji dwar il-qagħda finanzjarja tagħha. F'dan ir-rigward kemm is-soċjetà appellanta, kemm is-soċjetà appellata, u anki l-MIPL kienu involuti f'diversi tranżazzjonijiet u ftehim bl-intiża li kull wieħed minnhom jiġbor il-flus li kien tilef konsegwenza tal-inċident inkwistjoni. Il-ftehim tas-6 t'Awwissu 2007 bejn

il-partijiet f'dawn il-proċeduri, intlaħaq proprju bil-ħsieb li almenu s-soċjetà tal-assigurazzjoni u l-assigurata ma jikkonkorrux bejniethom dwar flus li kellhom jingabru minnhom, u kien għalhekk li t-Tribunal wasal għall-konklużjoni li s-soċjetà appellanta assumiet obbligu fiduċjarju meta ġie miftiehem bejn il-partijiet li kellha tkun hi li tieħu ħsieb tirkupra l-ammont pretiż taħt ir-*Reserved Item.* Fil-fatt jirriżulta li s-soċjetà appellata ma rkupratx dan l-ammont mingħand xi entità jew oħra u kien għalhekk li hija proprju pproċediet kontra s-soċjetà appellanta permezz ta' proċeduri arbitrali għall-ħlas tal-imsemmi ammont. Is-soċjetà appellata kienet ilha snin twettaq l-obbligi tagħha taħt il-polza tal-assigurazzjoni, u sa fejn it-Tribunal qies li kien inħoloq obbligu fiduċjarju bejn il-partijiet li kien jobbliga lis-soċjetà appellanta tipprova tirkupra kwalsiasi ammont li seta' kien għadu dovut lil terzi jew lis-soċjetà appellata, dan ma wasalx għal konklużjoni żbaljata. Il-Qorti hija tal-fehma li irrispettivament minn kull konsiderazzjoni dwar jekk kienx hemm tibdil fin-natura tar-relazzjoni legali bejn il-partijiet, id-deċiżjoni finali tat-Tribunal ma jidhirx li ttieħdet biss wara li ġie stabbilit li kien hemm tali bidla fir-relazzjoni jew wara li nħoloq obbligu fiduċjarju fuq is-soċjetà appellanta, kif qiegħed jiġi allegat, iżda wara li ġew ikkonsidrati l-punti sostantivi l-oħra kollha li tqajmu fil-proċess arbitrali.

It-tielet aggravju: *Interpretazzjoni żbaljata tal-ftehim tat-22 ta' Diċembru, 2013*

27. Is-soċjetà appellanta tagħmel riferiment għall-klawsola 4.3 tal-ftehim tat-22 ta' Diċembru, 2013, li tgħid:

> "*Without prejudice to the above, this discharge also includes any claim or responsibility or proceedings instituted by Malta Industrial Parks and / or Perfect Screen Printers Limited against CI consequent to any claim related to improvements at factory UB3 San Ġwann Industrial Estate and specifically to the sum of Euro equivalent of circa eleven thousand Malta Liri (LM11,000) or any other amount which Perfect Screen Printers Limited is claiming CI withheld in respect of such improvements or the building occupied by Perfect Screen Printers Limited.*"

Is-soċjetà appellanta tgħid li dan il-ftehim għandu jitqies fil-kuntest tad-diversi tranżazzjonijiet li saru bejn id-diversi partijiet involuti bl-iskop li din il-vertenza tingħalaq darba għal dejjem. Is-soċjetà appellanta tgħid li t-Tribunal kellu l-obbligu jaċċerta ruħu jekk l-ammont riservat inġabarx minn Trimite jew mis-soċjetà appellata, qabel ma jasal għall-konklużjoni li huwa raġonevoli li tinħoloq preżunzjoni li bit-termini ta' dan il-ftehim is-soċjetà appellanta kienet qiegħda taqbel li ser tagħmel tajjeb għall-ħlas futur tal-ammont riservat favur is-soċjetà appellata.

27. Il-Qorti kkonsidrat li permezz tal-ftehim '*Compromise Agreement between Citadel Insurance plc, Trimite (Malta) Limited, u CI u TML, Louis Coleiro u Kenneth Coleiro',* is-soċjetà appellanta irkuprat mingħand Trimite parti mill-ammont li s-soċjetà appellanta kienet diġà ħallset lis-soċjetà appellata, fl-ammont ta' €223,620, għas-saldu b'mod sħiħ ta' kull ammont li s-soċjetà appellanta setgħet tippretendi mingħand Trimite. Għal darb'oħra il-Qorti tqis li l-obbligi tas-soċjetà appellanta huma dawk li joriġinaw mill-polza

tal-assigurazzjoni maħruġa favur is-soċjetà appellata, u mhux minn ftehim bejn is-soċjetà appellanta u terzi. Tali ftehim ma jista' qatt jintuża jew jiġi interpretat b'tali mod li jippreġudika l-jeddijiet tas-soċjetà appellata, ladarba hija kienet estraneja għall-imsemmi ftehim. Il-ftehim tat-22 ta' Diċembru, 2013 jgħid li s-soċjetà appellanta mhija ser tivvanta l-ebda pretensjoni ulterjuri fil-konfront ta' Trimite, la fir-rigward tal-ammont riservat u lanqas fir-rigward ta' xi ammont ieħor. Iżda dan il-ftehim jmur kontra l-ispirtu tal-ftehim li kellhom bejniethom il-partijiet, li kien ilu li ġie ffirmat mis-6 t'Awwissu, 2007, u li bis-saħħa tiegħu s-soċjetà appellanta qablet li kellha tkun hi li tieħu ħsieb tirkupra l-ammonti kollha li kellhom jinġabru, u li permezz tagħhom kellha tagħmel tajjeb għall-ħlasijiet dovuta lil terzi, inkluż lis-soċjetà appellata. Tqis għalhekk li dan l-aggravju wkoll mhuwiex ġustifikat u qiegħda tiċħdu.

Ir-raba' aggravju: *it-Tribunal injora għalkollox l-effett tal-artikolu 3.6 tal-ftehim bejn il-partijiet, fis-sens li r-rikavat kellu jintuża għar-rifużjoni tas-'Settlement Sum' u tar-'Reserved Item'*

28. Is-soċjetà appellanta tispjega li l-intenzjoni tal-partijiet kienet li hija jkollha l-possibilità li tiġbor mingħand terzi s-somma li kienet sejra tħallas lill-assigurati tagħha, u meta l-assigurati ġabru huma stess il-ħlasijiet mingħand it-terzi, dawn ippreġudikaw il-jeddijiet tas-soċjetà appellanta. Intqal li t-Tribunal naqas milli jevalwa jekk is-soċjetà appellata imxietx b'bona fede meta ressqet

għal ftehim ma' Trimite, li permezz tiegħu huma ittransiġew il-pendenzi ta' bejniethom, u b'hekk is-soċjetà appellanta iggarantiet lil Trimite li ma tkunx tista' tipproċedi kontriha biex tiġbor dak li tħallas minn Trimite lis-soċjetà appellata. Il-Qorti kkonsidrat li fil-klawsola 5 ta' dan il-ftehim ġie ppreċiżat li s-soċjetà appellata qiegħda tirrikonoxxi li l-ħlas li sar minn Trimite favur is-soċjetà appellanta, jirrappreżenta parti mill-ammont li s-soċjetà appellanta ħallset lis-soċjetà appellata, fir-rigward ta' liema ammont is-soċjetà appellanta ġiet surrogata fil-jeddijiet tas-soċjetà appellata. Dan ifisser li meta ġie ffirmat dan il-ftehim bejn Trimite u s-soċjetà appellata, s-soċjetà appellanta kienet diġà rkuprat mingħand Trimite l-ammonti li kellhom jitħallsu minnha taħt il-polza tal-assigurazzjoni, u dak li tħallas minn Trimite lis-soċjetà appellata kien jirrappreżenta l-*uninsured interest* tas-soċjetà appellata u mhux dak li kien kopert permezz tal-polza tal-assigurazzjoni. Tqis għalhekk li dan l-aggravju tas-soċjetà appellanta mhuwiex mistħoqq u qed tiċħdu.

Il-ħames aggravju: *it-Tribunal qajjem punti li ma ġewx dibattuti waqt l-arbitraġġ, u l-partijiet ma kellhomx opportunità jagħmlu sottomissjonijiet dwarhom*

29. Is-soċjetà appellanta qanqlet dan l-aggravju speċifikament minħabba li fil-konsiderazzjonijiet tiegħu t-Tribunal ikkonsidra li l-obbligazzjoni partikolari tista' tiġi kkaratterizzata bħala waħda fiduċjarja, peress li s-soċjetà appellanta obbligat ruħha, skont klawsola 3 tal-ftehim li ntlaħaq bejn il-partijiet, li tkun hi

li tirkupra l-ammonti li hija tista' jkollha tħallas *ai termini* tal-polza tal-assigurazzjoni.

Il-Qorti tqis li l-karatterizzazzjoni tal-obbligazzjoni hija immaterjali għal fini tad-determinazzjoni dwar jekk l-ammont riservat kellux jitħallas lill-inkwilin jew lil sid il-fond. Jirriżulta li kien fl-istadju tal-konsiderazzjonijiet li għamel it-Tribunal, li dan approfondixxa dwar in-natura tar-relazzjoni legali bejn il-partijiet u l-mod kif din żvolġiet in segwitu għad-diversi ftehim li ġew iffirmati bejn l-entitajiet involuti f'din il-vertenza. Dawn il-konsiderazzjonijiet iżda bl-ebda mod ma jistgħu jitqiesu li kienu konklussivi jew li b'xi mod jinċidu fuq il-vertenza proprja ta' dawn il-proċeduri, jiġifieri jekk l-ammont ta' €26,109.95 kellux jitħallas lis-soċjetà appellata jew lil MIPL. Lil hinn mill-kategorizzazzjoni tan-natura tal-obbligazzjoni bħala waħda fiduċjarja jew xort'oħra, it-Tribunal kien mitlub jiddeċiedi jekk għandux jiġi likwidat l-ammont ta' €26,109.95 favur is-soċjetà appellata, flok ma l-imsemmi ammont jinżamm bħala ammont riservat f'każ li s-soċjetà appellanta tintalab minn MIPL tagħmel tajjeb għal dan il-ħlas anki f'xi data futura. It-Tribunal ddeċieda, u din il-Qorti ma ssib xejn fl-aggravji mressqa mis-soċjetà appellanta li jiġġustifikaw li d-deċiżjoni appellata tiġi b'xi mod mittiefsa jew revokata. Il-mertu proprju tal-proċeduri li saru quddiem it-Tribunal kien jirrivolvi madwar il-kwistjoni dwar jekk l-ammont riservat għandux jitħallas u lil min. Dan ġie deċiż, wara li t-Tribunal għamel diversi konsiderazzjonijiet kemm ta' natura fattwali, kif ukoll ta' natura legali.

<u>Decide</u>

Għar-raġunijiet premessi, din il-Qorti qiegħda tiddeċiedi l-appell tas-soċjetà appellanta billi tiċħad l-aggravji kollha mressqa mis-soċjetà appellanta u tikkonferma d-deċiżjoni appellata fl-intier tagħha.

Spejjeż taż-żewġ istanzi a karigu tas-soċjetà appellanta.

Moqrija.

Onor. Dr Lawrence Mintoff LL.D.
Imħallef

Rosemarie Calleja
Deputat Reġistratur