MALTA

QORTI CIVILI
PRIM' AWLA

ONOR. IMHALLEF
GIANNINO CARUANA DEMAJO

Seduta tat-30 ta' Mejju, 2003

Citazzjoni Numru. 1163/1999/1

Giuseppe Tabone & Co.
versus
Atlas Insurance Agency Limited* b]ala a[ent u in rappre\entanza tas-so`jetà estera *Guardian Royal Exchange Assurance p.l.c.* b]ala `essjonarja tad-drittijiet tas-so`jetà assikuratri`i estera *Commercial Union Assurance Company p.l.c.* li kienet rappre\entata mis-so`jetà *R. von Brockdorff Insurance Agency Limited

Din il-kaw\a hija dwar assikurazzjoni ta' \ew[t ibraken.
I`-`itazzjoni tg]id illi s-so`jetà attri`i g]andha \ew[t ibraken, jisimhom *Saint Francis* u *Saint Joseph*, li kienet assikurathom mas-so`jetà assikuratri`i barranija *Commercial Union Assurance Company p.l.c.*, li kienet rappre\entata f'Malta minn *R. von Brockdorff Insurance Agency Ltd*. *Commercial Union Assurance Company p.l.c* imbag]ad ittrasferiet il-*portfolio* tan-negozju tag]ha lis-so`jetà barranija *Guardian Royal Exchange Assurance*

p.l.c. rappre\entata f'Malta minn *Atlas Insurance Agency Ltd.*

I\-\ew[t ibraken tas-so`jetà attri`i g]erqu bejn il-21 u t-22 t'Ottubru 1995, u min]abba f'din l-g]arqa is-so`jetà attri`i [arrbet danni ta']amsin elf lira (Lm50,000).

Is-so`jetà konvenuta, b]ala assikuratri`i, g]andha t]allas]amsin elf lira (Lm50,000) lis-so`jetà attri`i ta]t il-polza t'assikurazzjoni, i\da, g]alkemm l-attri`i ilha snin f'ta]ditiet mas-so`jetà *Commercial Union Assurance Company p.l.c.*, dawn it-ta]ditiet ma wasslu g]al xejn. Is-so`jetà attri`i wkoll sej]et lill-konvenuta b'ittra uffi`jali tal-25 ta' Lulju 1997 biex t]allas, i\da g]alxejn.

Is-so`jetà attri`i g]alhekk fet]et din il-kaw\a u qieg]da titlob illi l-qorti:

1. tg]id illi s-so`jetà konvenuta g]andha t]allas lis-so`jetà attri`i ]amsin elf lira (Lm50,000) b]ala ]las ta' danni li s-so`jetà attri`i [arrbet bl-g]arqa tal-braken; u

2. tikkundanna lis-so`jetà konvenuta t]allas lis-so`jetà attri`i]amsin elf lira (Lm50,000) flimkien ma' l-img]ax u l-ispejje\.

Is-so`jetà konvenuta ressqet dawn l-e``ezzjonijiet:

1. ebda wie]ed mir-riskji espli`itament koperti bil-polza t'assikurazzjoni fil-forma ta' *Institute Time Clauses Hulls Port Risks* ma kien il-kaw\a tal-g]arqa; u

2. bla]sara g]all-ewwel e``ezzjoni, id-danni ma [ewx provati b'dokumenti.

Il-fatti li wasslu g]al din il-kaw\a [raw hekk:

I\-\ew[t ibraken tas-so`jetà attri`i, u barkun ie]or, kienu marbutin [enb ma' [enb u wie]ed minnhom kien marbut mal-moll: il-barkun l-ie]or, *Saint John*, kien dak li kien marbut mal-moll; mal-[enb tieg]u kien marbut il-barkun *Saint Francis*, u mal-[enb ta' *Saint Francis* kien marbut *Saint Joseph*, b'mod illi *Saint Francis* kien bejn *Saint John* fuq in-na]a tal-moll u *Saint Joseph* fuq in-na]a tal-ba]ar[1]. Dawn il-braken g]andhom tankijiet biex i[orru l-ilma, u huma *self-propelled*.

Nhar is-Sibt 21 t'Ottubru 1995, wara nofs in-nhar, *Saint Joseph* u *Saint Francis* tg]abbew bl-ilma, g]alkemm mhux g]al kollox, biex ikunu lesti biex l-g]ada l-}add jag]tu l-ilma lill-bastimenti fil-port. Wara li kien tg]abba l-ilma fuq il-

1 *Fol.* 166.

braken dawn t]allew we]edhom minn xi l-4.00 *p.m.* jew l-4.30 *p.m.* tas-Sibt.

Kmieni filg]odu l-g]ada l-}add, meta mar l-ekwipa[[biex ikompli jimla l-braken u je]odhom jag]tu l-ilma lill-bastimenti, instab illi *Saint Joseph* u *Saint Francis* kienu g]erqu. *Saint John*, li ma kienx mg]obbi bl-ilma, baqa' fil-wi``, g]alkemm kien marbut ma' *Saint Francis*. Irri\ulta illi l-ewwel li g]ereq kien *Saint Francis*; dan [ibed mieg]u lil *Saint Joseph* li g]ereq ukoll u stra] fuq *Saint Francis*.

Fil-*hull* ta' *Saint Francis* ma kienx hemm]sara u l-*valves* kienu kollha mag]luqin; g]alhekk ma setax ikun illi l-ilma ba]ar da]al minn xi xaqq fil-*hull* jew minn xi *valve* li t]alla miftu], u l-kaw\a tal-g]arqa kienet o]ra. L-ipotesi mressqa mis-so`jetà attri`i dwar x'kien li wassal biex g]ereq *Saint Francis* hija din:

Il-barkun g]andu spazju vojt mag]luq fuq wara. Minn dan l-ispazju jg]addi tubu g]ax-*shaft* tat-tmun u f'dan it-tubu hemm toqba \g]ira, ta]t il-livell ta' l-ilma, bi djametru ta' g]axar millimetri, mnejn jing]ata \-\ejt jew *grease* g]al-lubrifikazzjoni. Suppost illi minn din it-toqba kien ig]addi *pipe* i\da dan il-*pipe* kien nieqes, u t-toqba, li tag]ti g]al barra, kienet instaddet bi *plug* ta' *grease* qadim li g]aqad.

Is-so`jetà attri`i tg]id illi fil-lejl ta' bejn is-Sibt 21 u l-}add 22 ta' Ottubru 1995 dan il-*grease* mag]qud x'aktarx inqala' bl-imbatt tal-ba]ar, u hekk beda bil-mod il-mod die]el l-ilma fl-ispazju l-vojt ta' wara tal-barkun. Meta mtela dan l-ispazju, il-barkun tilef il-*buoyancy*, beda nie\el ta]t wi`` il-ba]ar u hekk]a aktar ilma ba]ar, li issa seta' jid]ol ukoll minn *exhaust pipe* g]al [ol-kompartiment tal-makni, sakemm ni\el g]al kollox. {ibed mieg]u lill-barkun l-ie]or li, meta beda nie\el, hu wkoll imtela bl-ilma ba]ar u baqa' sakemm g]ereq ukoll[2].

Is-so`jetà konvenuta ressqet ipotesi xi ftit differenti. Tg]id illi d-d]ul ta' l-ilma sar mill-*exhaust pipe* li kien imsaddad u nqasam[3]. Minn dan il-*pipe* l-ilma ba]ar da]al fil-kompartiment tal-makni u kien il-*flooding* ta' dan il-kompartiment, u mhux ta' l-ispazju vojt ta' wara (fejn hemm it-tmun) il-kaw\a ewlenija tal-g]arqa ta' *Saint*

[2] Ara x-xhieda ta' l-In[inier Daniel Grima fis-seduta tat-12 t'Ottubru 2001, *foll.* 105 *et seqq.*; ara wkoll ir-rapport ta' l-In[inier Grima, *foll.* 59 *et seqq.*

[3] Ara r-ritratt *fol.* 154.

Francis[4]. G]alkemm il-ksur fl-*exhaust pipe* kien 'il fuq mil-livell ta' l-ilma, il-moviment laterali tal-braken kull darba jippompja l-ilma 'l fuq u ji[i jil]aq il-livell tal-ksur. Il-fatt illi kien hemm in-nugrufun mal-[enb tal-pjan`a li mag]ha kien imwa]]al dan l-*exhaust pipe* juri illi l-*pipe* kien [à mxaqqaq minn qabel.

L-espert imqabbad mis-so`jetà konvenuta kien tal-fehma illi ma setax ikun illi l-barkun g]areq g]ax imtela' bl-ilma l-ispazju ta' wara g]ax, skond il-kalkoli tieg]u, biex jimtela dak il-volum ta' ilma minn toqba b'djametru ta' `entimetru trid erbg]a u g]oxrin sieg]a[5], li hu aktar mill-]in li t]allew we]edhom il-braken. Kompla fisser illi wkoll bl-ispazju ta' wara mimli kollu bl-ilma, lill-barkun kienet naturalment tonqoslu l-*freeboard* i\da mhux bi\\ejjed biex jeg]req.

Kif sewwa qalet is-so`jetà konvenuta fin-nota ta' osservazzjonijiet tag]ha, imiss lis-so`jetà attri`i li turi li l-g]arqa [rat min]abba wa]da mir-ra[unijiet koperti fil-polza. Fin-nota tag]ha tad-9 t'Ottubru 2000[6], is-so`jetà attri`i fissret illi t-talba qieg]da tag]milha ta]t il-klawsoli tal-polza li jkopru kontra dawn ir-riskji:

4.1.1 *perils of the seas*;

4.2.2 *bursting of boilers breakage of shafts or any latent defect in the machinery or hull*;

4.2.4 *negligence of repairers or charterers*.

Ng]addu issa biex naraw jekk intweriex illi l-g]arqa kienet min]abba xi wie]ed jew aktar minn dawn ir-riskji.

Perils of the seas.

"*Peril of the seas*" huwa kaw\a ta']sara jew telf li [rat b'*casus* min]abba forza straordinarja [ejja minn barra l-bastiment, mhux minn [ewwa l-bastiment innifsu. Is-silta minn *Marine Insurance*, ta' E.R. Hardy Ivamy, mi[juba fin-nota tas-so`jetà konvenuta tfisser sew x'inhu dan il-kun`ett ta' *peril of the seas*:

To come within the meaning of the expression "perils of the seas" the occurrences must not be such as can be foretold as, *e.g.*, the gradual decay of a ship's timbers by

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4 Ara x-xhieda ta' l-In[inier Paul Cardona fis-seduta tas-6 ta' {unju 2002, *foll.* 179 *et seqq.*; ara wkoll ir-rapport ta' l-In[inier Cardona, *foll.* 147 *et seqq.*

5 *Foll.* 168 *et seq.*

6 *Fol.* 49.

the action of the water. Something fortuitous and unexpected is involved in the word “peril” or “accident.

… … …

Hence, insurers are answerable for casualties arising from the violent action of the elements, as distinguished from the silent, natural and gradual action of the elements upon the vessel itself, which properly relate to wear and tear.[7]

… … …

The term “perils of the seas” does not cover damage by seawater entering a vessel through holes in her caused by natural decay.[8]

Da]alx l-ilma ba]ar mill-*exhaust pipe* g]al [ol-kompartiment tal-makni, jew da]alx mit-toqba fl-ispazju vojt ta’ wara, dak li [ieg]el l-ilma jid]ol kien il-moviment normali ta’ l-imbatt tal-ba]ar u t-tendenza naturali ta’ l-ilma li jin\el minn fuq g]al isfel; ma ntwera li kien hemm ebda vjolenza straordinarja ta’ l-elementi li wasslet g]all-]sara; il-kaw\a kienet l-attività normali ta’ l-ilma ba]ar f’kuntest ta’ dg]ufija jew nuqqas ta’ integrità ta’ l-istruttura tal-barkun innifsu.

Il-qorti g]alhekk taqbel mas-so`jetà konvenuta illi l-]sara ma kinitx min]abba *perils of the seas*.

Latent defect in the hull

Rajna illi, skond il-ver\jonijiet tal-partijiet, l-ilma seta’ da]al jew mit-toqba li kienet ma]suba g]al-lubrifikazzjoni tat-tmun jew mill-*exhaust pipe* maqsum. Fil-fehma tal-qorti, il-]sara fl-*exhaust pipe* ma tistax titqies xi]a[a “latenti”; rajna illi n-nugrufun mal-pjan`a fil-livell fejn inqasam il-*pipe*[9] kien juri, sa minn qabel l-in`ident, illi l-*pipe* ma kienx s]i] u l-]sara g]alhekk kienet tidher.

Min-na]a l-o]ra, it-toqba li tag]ti g]all-ispazju vojt ta’ wara, billi kienet ta]t il-livell ta’ l-ilma, tista’ titqies illi kienet “latenti”? I\da qabel ma nqisu jekk dik it-toqba kinitx “latenti”, je]tie[li nqisu ftit aktar fil-fond x’konsegwenzi seta’ kellha dik it-toqba.

Rajna illi l-ipotesi tas-so`jetà attri`i hija l-ilma ba]ar da]al minn dik it-toqba kif fisser l-In[inier Grima. Dwar l-effett ta’ l-ilma fl-ispazju ta’ wara, l-In[inier Grima qal hekk:

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[7] E.R. Hardy Ivamy, *Marine Insurance*, 4th edition, 1985, p. 141.

[8] *Ibid.*p. 147.

[9] Ara r-ritratt *fol.* 154.

On Saturday 21st October 1995 the prevailing swell inside the creek where the barges were lying must have contributed for the hardened core of old grease inside the 10mm hole to blow out allowing sea water to enter the aft peak void space. This space continued to flood reducing the freeboard aft until sea water was then easily washing the aft deck in way of the deckhouse.

We are informed that the exhaust pipe in way of deck penetration was slightly weak and a small hole was noted in this area. The swell which caused the barges to range against each other must have contributed to the corrosion scale on the exhaust pipe to crack and drop off, exposing the hole discovered when the barge was re-floated. Sea water must have entered the exhaust pipe, into the engine and out of the air inlet duct into the engine compartment. The water ingress has continued until the engine compartment has become partially flooded, sufficiently to lose buoyancy and sink.[10]

Bla ma nqisu g]alissa jekk din hijiex ipotesi mibnija fuq fatti mag]rufa u provati jew hijiex biss mibnija fuq suppo\izzjonijiet li dwarhom ma n[iebet ebda prova, g]andu jing]ad illi qari sew ta’ din is-silta juri illi, ukoll fil-fehma ta’ l-espert tas-so`jetà attri`i, l-ilma li da]al mit-toqba ta’ 10mm ma kienx dak li g]erreq il-barkun; kull ma g]amel kien li ni\\el il-barkun aktar ’l isfel fl-ilma b’mod illi l-ilma ba]ar, bl-ippompjar tal-moviment tal-braken ma’ xulxin, seta’ jitla’ sal-livell fejn kien hemm il-qasma fl-*exhaust pipe*.

{à rajna illi l-In[inier Cardona wera illi kieku mtela l-ispazju ta’ wara, wa]du ma kienx ig]erreq il-barkun; l-In[inier Grima jaqbel ma’ din il-konklu\joni:

To prove the above we have simulated the above condition on 15th April 1996 by flooding the aft peak compartment when the cargo tanks were full and in similar condition to that at the time of casualty. Underwriters’ surveyor Mr Cardona was invited and attended during the simulation test, which proved that in the event of a flooded after peak the freeboard aft would be lost which

10 *Foll*. 62 *et seq.*

could have reasonably been the root cause of the casualty as detailed above.[11]

Mela kien l-*exhaust pipe* maqsum, li ma kienx "latenti", u mhux it-toqba ta' 10mm, li wassal biex g]ereq il-barkun; it-toqba we]edha ma kinitx tg]errqu u, irrispettivament jekk kinitx latenti jew le, ma kinitx il-kaw\a ta' l-in`ident, ukoll jekk l-in`ident se]] kif fisser l-espert imressaq mis-so`jetà attri`i.

Barra minn hekk, il-qorti taqbel mas-so`jetà konvenuta illi l-ipotesi tas-so`jetà attri`i hija mibnija fuq suppo\izzjonijiet li baqg]u ming]ajr prova, u mhux fuq fatti provati.

Negligence of repairers

Il-qorti taqbel ma' l-osservazzjoni tas-so`jetà konvenuta illi ma n[iebet ebda prova li kien hemm xi negli[enza minn dawk li fl-1993 kienu fdati biex jag]mlu xi tiswijiet fil-braken. Kif fisser l-In[inier Cardona, l-*exhaust pipe* huwa espost g]al atmosfera korro\iva kemm minn barra kif ukoll minn [ewwa; il-fatt illi `eda fl-1995 ma jfissirx illi sar]a\in fl-1993: ifisser illi f'dawk i`-`irkostanzi l-]ajja tieg]u hija qasira u kellu jinbidel hekk kif, bil-]ru[tan-nugrufun, wera li kien beda j`edi.

Il-kaw\a g]ala g]ereq *Saint Joseph* hija l-fatt illi g]ereq qablu *Saint Francis* u [ibdu mieg]u, flimkien mal-fatt illi ma kienx marbut direttament mal-moll i\da ma' *Saint Francis* stess. Ladarba l-g]arqa ta' *Saint Francis* hija l-kaw\a tal-g]erqa ta' *Saint Joseph*, u l-g]erqa ta' *Saint Francis* ma kinitx b'kaw\a koperta bil-polza, mela lanqas l-g]erqa ta' *Saint Joseph* ma hija koperta bil-polza.

Il-qorti g]alhekk taqbel mas-so`jetà konvenuta illi lis-so`jetà attri`i ma se]]ilhiex li turi illi t-telf se]] min]abba xi riskju illi huwa kopert ta]t il-polza.

G]al din ir-ra[uni il-qorti ti`]ad it-talbiet tas-so`jetà attri`i u tikkundannaha t]allas l-ispejje\ tal-kaw\a.

--------------------------------TMIEM--------------------------------

[11] *Fol.* 63.