PRIM'AWLA TAL-QORTI CIVILI

IMHALLEF

ONOR. DR DAVID SCICLUNA LL.D. MAG. JUR. (EUR. LAW)

Seduta ta' nhar l-Erbgha, 11 ta' Lulju 2001

Numru 11

Rikors Numru 150/95 DS

Avukat Dottor Kevin F. Dingli bhala mandatarju tas-socjeta` estera GRANGES METALOCK GmbH
vs
Kaptan Sebastiano Pizzimenti, bhala kaptan ghan-nom u in rapprezentanza tal-bastiment merkantili m.v. "POKER", u b'nota tas-27 ta' Frar 1995 Dr. Tonio Fenech assuma l-atti tal-kawza minflok il-kaptan sabiex jirrapprezenta l-bastiment m.v. "POKER"

Illum, 11 ta' Lulju 2001

Il-Qorti,

Rat ic-citazzjoni pprezentata fl-1 ta' Frar 1995 li permezz taghha l-attur nomine wara li ppremetta:

Illi l-konvenut ghandu jaghti lill-attur nomine s-somma ta' mitejn tlieta u erbghin elf tlett mija sitta u hamsin Deutschemarks u hames pfennings (DM243,356.05) u dana bhala bilanc ta' somma akbar, prezz ta' diversi xoghoilijiet ta' tiswijiet esegwenti mis-socjeta' attrici fuq il-bastiment merkantili "POKER" fuq inkarigu tas-socjeta' Marinzulich Cap. Claudio armatore & C. s.r.l. fil-vesti taghha bhala l-*bareboat charteres* tal-imsemmi vapur – u dana skond ma jirrizulta mill-fattura tas-socjeta' attrici numerata 94.130541 u datata 22 ta' Novembru 1994 (Dok. "A").

Illi nonostante illi kienu saru diversi interpellazzjonijiet ghall-hlas da parti tas-socjeta' attrici, il-konvenut nomine baqa' ghal kollox inadempjenti u l-fuq imsemmi vapur spicca sabiex gie arrestat u maqbud fil-port ta' Valletta, Malta minn kredituri ohrajn.

Illi d-debitu fuq imsemmi huwa cert, likwidu u skadut u ghaldaqstant fil-fehma tal-attur nomine huwa l-kaz illi dina l-Onorabbli Qorti tghaddi sabiex tiddeciedi skond it-talba bid-dispensa tas-smiegh tal-kawza u dana a tenur tal-Artikolu 167 tal-Kodici tal-Organizzazzjoni u Procedura Civili (Kap. 12 tal-Ligijiet ta' Malta) u l-attur nomine qieghed jipprezenta kontestwalment ma; dina c-Citazzjoni affidavit slond kif rikjest mill-imsemmi Artikolu 167 tal-Kodici tal-Organizzazzjoni u Procedura Civili (Dok. "B").

talab lil din il-Qorti:

1. tiddeciedi skond it-talba bid-dispensa tas-smigh tal-kawza u dana a tenur tal-Artikolu 167 tal-Kodici tal-Organizzazzjoni y Procedura Civili [Kapitolu 12 tal-Ligijiet ta' Malta]; u

2. tikkundanna l-konvenut sabiex ihallas lill-attur nomine s-somma ta' mitejn tlieta u erbghin elf tlett mija u sitta u hamsin Deutschemarks u hames pfennings (DM243,356.05) fl-ekwivalenti taghha f'Liri Maltin skond ir-rata tal-kambju prevalenti fid-data tas-Sentenza, bl-imghaxijiet kummercjali mit-22 ta' Novembru 1994 sal-hlas effettiv, u dana bhala bilanc ta' somma akbar, prezz ta' diversi xogholijiet ta' tiswijiet esegwenti mill-attur nomine a favur tal-konvenut nomine skond il-fattura numru 94.130541 datata 22 ta' Novembru 1994 (Dok. "A").

Bl-ispejjez komprizi dawk tal-Mandat ta' Impediment ta' Tluq ta' Bastiment [Numru 283/95] kif ukoll dawk tal-Mandat ta' Qbid [Numru 281/95/LF] ippresentati fit-23 ta' Jannar 1995 kontra l-konvenut nomine illi huwa ingunt sabiex jidher ghas-subizzjoni.

Rat in-nota ta' l-eccezzjonijiet tal-konvenut nomine fejn qal:

1. Illi, in linea preliminari, din il-Qorti m'ghandiex gurisdizzjoni biex tiehu kunjizzjoni tal-kawza odjerna.

2. Illi subordinament u minghajr pregudizzju ghall-premess, il-gudizzju mhuwiex integru ghaliex is-sidien tal-bastiment in kwistjoni ma gewx imharrka imqar ghal interess li jista' jkollhom fil-bastment peress illi kull azzjoni "in rem" mhix proponibbli kemm il-darba s-sidien ma jkunux responsabbli ghall-kreditu pretiz.

3. Illi fil-mertu u minghajr pregudizzju ghas-suespost, stante li fil-kaz odjern si tratta ta' bastiment li kien "bareboat chartered" meta l-kreditu pretiz gie kontrattat, il-hlas ta' dan l-istess kreditu mhux biss mhuwiex r-responsabbilita' tas-sidien tal-istess bastiment – liema kreditu lanqas ma hu kopert bi privilegg – izda inoltre l-azzjoni "in rem" f'dawn ic-cirkostanzi ma tistax tkun legalment ammissibli.

4. Sussidjarjament u minghajr pregudizzju ghall-premess, fil-mertu t-talba tal-attur nomine ma tistax tigi milqugha minhabba li l-kreditu pretiz mill-attur nomine mhux dovut u mhux ezigibbli minghand il-bastiment stante illi s-sidien tal-bastiment mhux responsabbli ghall-hlas tal-istess in personam u dan peress illi l-krediti pretizi ma gewx kontrattati mis-sidien jew minn persuni awtorizzati in rappresentanza tas-sidien; dawn lanqas ma jirradikaw privilegg fuq il-bastiment. Ghalhekk l-eccipjent noe mhuwiex il-legittimu kuntraditur tal-attur nomine.

5. Salvi eccezzjonijiet ohra.

Rat id-digriet ta' l-1 ta' Gunju 1995 fejn gie nominat Dr. Richard Camilleri bhala perit legali bil-fakolta` li jisma' x-xhieda bil-gurament sabiex jirrelata dwar il-kaz;

Rat id-digriet ta' l-14 ta' Dicembru 1995 li permezz tieghu ghall-imsemmi perit legali gie sostitwit Dr. Henri Mizzi;

Rat ir-relazzjoni debitament mahlufa fl-4 ta' Frar 2000;

Rat in-noti ta' osservazzjonijiet tal-partijiet;

Rat l-atti l-ohra tal-kawza u d-dokumenti esibiti;

Ikkunsidrat illi:-

L-ewwel eccezzjoni

Permezz ta' din l-eccezzjoni preliminari l-konvenut nomine eccepixxa n-nuqqas ta' gurisdizzjoni ta' din il-Qorti, izda permezz ta' verbal ta' l-1 ta' Gunju 1995 Dr. Tonio Fenech ghall-konvenut nomine rrinunzja ghal din l-eccezzjoni. Il-Qorti ghalhekk qed tastjeni milli tiehu konjizzjoni ulterjuri taghha.

Il-fatti principali

Il-bastiment m.v. POKER huwa proprjeta` tas-socjeta` estera Sea Containers Ltd. Fl-1 ta' April 1994 din is-socjeta` dahlet fi ftehim mas-socjeta` Marinzulich li permezz taghha l-POKER gie *bareboat chartered* lil Marinzulich. F'Settembru 1994 Marinzulich dahlu fi ftehim mas-socjeta` attrici Granges Metalock GmbH sabiex taghmel xoghlijiet fuq l-i*starboard engine* tal-POKER. Jidher li Marinzulich ma kinux qed ihallsu lil Granges Metalock u ghalhekk rapprezentant ta' din is-socjeta` cempel lil rapprezentant ta' Marinzulich fil-5 ta' Ottubru 1994 u heddu li kien ser iwaqqaf ix-xoghlijiet jekk ma jsirux il-hlasijiet mitluba. Fuq talba li ghamlet Marinzulich, is-socjeta` Sea Containers Ltd. tat garanzija lil Granges Metalock ghall-ammont ta' DEM125,500 *"for the bearing shells and supply of an engineer to supervise the rebuilding of the starboard main engine"* (Dok. PB12). Wara li nghatat din il-garanzija, ix-xoghlijiet tkomplew. Fil-11 ta' Ottubru 1994 il-blokka tal-magna tal-POKER twaqqghet minn sub-appaltatur ta' l-attur nomine u bhala rizultat kien hemm bzonn ta' xoghlijiet estensivi ulterjuri li ghalihom inghatat ordni minn Marinzulich.

L-ewwel hlas li rcieva l-attur nomine kien fis-17 ta' Ottubru 1994 meta l-kont tieghu gie kkreditat bl-ammont ta' DM50,000. Pagament iehor ta' DM45,500 gie kkreditat fil-21 ta' Ottubru 1994. Ma sarux pagamenti ulterjuri nonostante l-insistenza ta' l-attur nomine. Ghalkemm skond l-affidavit ta' Peter Harbs, *production manager* tas-socjeta` attrici, il-bilanc dovut u li dwaru Marinzulich qablet, huwa ta' DM332,542.95, is-somma li qed tintalab bic-citazzjoni hija ta' DM243,356.05. Fi kwalunkwe kaz,

proposta ta' pagament li saret minn Marinzulich u kontro-proposta mis-socjeta` attrici baghu bla ezitu u l-ebda pagament iehor ma sar.

Fis-16 ta' Jannar 1995 il-POKER bahhar mill-Italja fuq struzzjonijiet ta' Marinzulich u fit-18 ta' Jannar 1995 dahal Malta fejn ha pussess tieghu immedjatament Malcolm Parrott ghan-nom tas-Sea Containers Ltd. Il-bastiment telaq minn Malta fl-1 ta' Marzu 1995 wara li nghataw garanziji ghall-pretensjonijiet vantati u wara li gew konkluzi xi diffikultajiet li nkontrat Sea Containers Ltd. fl-Italja in konnessjoni mad-dokumentazzjoni tal-bastiment.

Il-qofol tal-vertenza

Il-konvenut nomine jsostni li persuna li taghmel riparazzjonijiet fuq bastiment fuq ordni ta' persuna ohra li ma tkunx sid il-bastiment jew li ma tkunx qed tagixxi ghan-nom tas-sid ma tistax, fin-nuqqas ta' pagament, tezercita l-azzjoni *in rem* kontra l-istess bastiment sakemm id-dejn ma jkunx jikkostitwixxi privilegg fuq il-bastiment; ghalhekk l-azzjoni odjerna mhix proponibbli kontra l-knvenut nomine peress li l-bastiment in kwistjoni kien taht *bare boat* jew *demise charter*. L-attur nomine mill-banda l-ohra jsostni li l-azzjoni *in rem* hi proponibbli validament kemm-il darba jissussistu l-elementi necessarji biex ikun hemm *admiralty jurisdiction*.

Ir-relazzjoni tal-perit legali

Fir-relazzjoni tieghu l-perit legali ghamel analizi storika ta' l-*admiralty jurisdiction* qabel ma ghadda biex jaghmel analizi dettaljata tad-diversi aspetti mqajma f'din il-kawza:

"Admiralty Jurisdiction

Sa minn kmieni fis-seklu dsatax Malta kellha, bhal kolonji ohra, dak li kien maghruf bhal *Vice-Admiralty Court.* Lejn nofs dak is-seklu l-gurisdizzjoni ta' dawn il-Qrati kienu gew regolati b'Atti tal-Parlament Imperjali, senjament il-*Vice Admiralty Courts Act, 1863.* Issa pero' dan l-Att Imperjali gie abrogat b'Att iehor tal-istess Parlament, liema att kien il-*Colonial Courts of Admiralty Act, 1890* li gie fis-sehh fl-1 ta' Lulju 1891 u li ddelega poter lill-legislaturi kolonjali.

> "[to] declare any Court of unlimited civil jurisdiction…in that possession to be a Colonial Court of Admiralty, and provide for the exercise by such court of its jurisdiction under this Act"

F'Malta din id-dikjarazzjoni saret permezz tal-*Vice-Admiralty (Transfer of Jurisdiction) Ordinance)* (eventwalment abrogata, b'riservi, bl-Att dwar il-Bastimenti Merkantili) u l-Qorti li giet dikjarata *Colonial Court of Admiralty* kienet l-allura Qorti tal-Kummerc. Din id-dikjarazzjoni saret (fil-parti rilevanti taghha) f'dawn it-termini:

> "The jurisdiction hitherto exercised by the Vice Admiralty Court, or conferred, by the act of the Imperial Parliament, called "The Colonial Courts of Admiralty Act, 1890", on the Colonial Court, in these Islands, shall be exercised by His Majesty's Commercial Court, as part of its ordinary jurisdiction; and the mode of procedure shall be the same as that in force in this Court, under the Code of Organization and Civil Procedure (Chapter 12) with an appeal to His Majesty's Court of Appeal."

Minn qari ta' dan l-artikolu wahdu mhux car x'kienet il-gurisdizzjoni gdida moghtija lill-Qorti tal-Kummerc. Kienet dik "hitherto exercised by the Vice-Admiralty Court" jew dik "conferred, by the Act of the Imperial Parliament, called "The Colonial Courts of Admiralty Act, 1890"? Ir-risposta ghal din id-domanda tinsab fl-istess *Colonial Courts of Admiralty Act, 1890* li kien jiddisponi hekk:

> "Every Court of law in a British possession, which is for the time being declared in pursuance of this Act to be a Court of Admiralty, of which, if so much declaration is in force in the possession, has therin original unlimited civil jurisdiction, shall be a Court of Admiralty, *with the jurisdiction in this Act mentioned, and may for the purpose of that jurisdiction exercise all the powers which it possesses for the purpose of its other civil jurisdiction*…" (enfazi tal-esponenti).

L-istess Att kien ikompli hekk:

> "The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in the like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations."

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> "[the] colonial law shall not confer any jurisdiction which is not by this Act conferred upon the Court of Admiralty"

Jidher car minn dawn l-artikli tal-*Colonial Courts of Admiralty Act, 1890* li l-gurisdizzjoni validament moghtija lill-allura Qorti tal-Kummerc kienet dik li ghaliha ssir riferenza f'dak l-Att u mhux il-gurisdizzjoni li, qabel l-1 ta' Lulju 1891, kellha l-*Vice Admiralty Court.* Ghalhekk l-isem tal-Ordinanza nru III tal-1892 *(Vice-Admiralty Court (Transfer of Jurisdiction) Ordinance*) u l-iskop dikjarat tal-istess ordinanza jistghu jaghtu impressjoni hazina; inoltre l-artiklu operattiv (ikkwotat hawn fuq) xejn ma felici. Pero' meta moqri akkuratament u fil-kuntest tal-*Colonial Courts of Admiralty Act, 1890* kellu l-effett mixtieq, u cioe' li tigi konferita fuq il-Qorti tal-Kummerc l-*admiralty jurisdiction* ezercitata, fl-1891, mill-High Court ta' l-Ingilterra.

Issa x'kient il-gurisdizzjoni tal-High Court meta gie *in vigore* il-*Colonial Courts of Admiralty Act, 1890* li, bis-sahha tieghu, saret l-Ordinanza nru III tal-1892? Insibu f'*The Beldis* li

> "By the early part of the 19th century, as a result of the long war with the common law courts… the categories of "Admiralty causes" had become limited to damage, salvage, bottomry, and certain other causes arising out of maritime events and affairs of which there was then in truth a fairly well-defined list. Indeed it was just because the jurisdiction in Admiralty had become thus restricted that the aid of the legislature had to be invoked in order to effect the extensions of it contained in the Admiralty Courts Act, 1840 and 1861."

Wara l-1861 jista' jinghad li, ghal finijiet prattici, il-gurisdizzjoni tal-High Court kienet definita b'mod estensiv fl-imsemmija zewg Atti tal-Parlament Imperjali, u ghalhekk biex wiehed jistabilixxi x'inhi, anki llum, il-gurisdizzjoni ta' din il-Qorti f'materji ta' ammiraljat wiehed irid jezamina l-imsemmija Atti. Jizdied ghall-finijiet ta' kjarifika li wiehed m'ghandux illum ihares izjed lejn l-Att Imperjali li kien il-fonti tal-gurisdizzjoni tal-*Vice Admiralty Court* u cioe' l-*Vice Admiralty Courts Act, 1863.* Dan l-Att gie abrogat bl-Att Imperjali tal-1890 u m'ghadux rilevanti ghad-determinazzjoni tal-gurisdizzjoni ta' din il-Qorti f'materja ta' ammiraljat.

<u>Ir-rimedji fil-kamp tal-ammiraljat</u>

Wara din l-analizi tal-fonti tal-*admiralty jurisdiction* ta' din il-Qorti jmiss li l-esponenti jezamina x'inhuma r-rimedji applikabbli, fil-kamp tal-ammiraljat, kemm fid-dritt Ingliz u kemm f'dak Malti; u dana ghaliex, kif ser jinghad, din il-kwistjoni tista' tghin biex jigu ccarati certi distinzjonijiet bejn gurisdizzjoni, rimedji procedurali u drittijiet sostantivi. Jidher li fid-dritt Ingliz il-gurisdizzjoni tal-*Admiralty Court* setghet, almenu sa mill-bidu tas-seklu dsatax, tigi ezercitata jew permezz ta' azzjoni *in rem* jew inkella *in personam.* Jekk kien hemm xi dubbju dwar dan (ghaliex kien hemm xi sentenzi li kienu jindikaw li l-gurisdizzjoni tal-Qorti tal-Ammiraljat kienet ezercitabbli biss *in rem*) il-kwistjoni giet iccarata fl-1954 meta, fl-*Admiralty Act, 1854* (Att tal-Parlament Imperjali) giet inkluza disposizzjoni li kienet tipprovdi specifikament ghal azzjonijiet kemm *in rem* u kif ukoll *in personam.* Wara, fl-*Admiralty Court Act, 1861* kien gie pprovdut li

> "The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings in rem or by proceedings in personam."

Din ir-regola tapplika hawn Malta? Jidher illi r-risposta moghtija minn dawn il-Qrati, b'mod kemmxejn indirett, hi li l-gurisdizzjoni tal-ammiraljat hi ezercitabbli biss permezz ta' proceduri *in rem* u li proceduri *in personam* huma permissibli biss jekk jigu soddisfatti r-rekwiziti gurisdizzjonali ordinarji stabbiliti fil-Kap 12:

> "Although the British statutes state the jurisdiction therunder can be exercised *in rem* and also *in personam*, the common understanding is that the *in personam* jurisdiction is already catered for in the [code of Orgasnisation and Civil Procedure] and therefore that the British statute is superflous in that regard."

Fl-opinjoni tal-esponenti din il-fehma, ghalhekk fl-esperjenza tieghu hi verament dik preporderanti, mhix korretta:

> "The whole jurisdiction, be it *in rem* or *in personam*, was vested in the Commercial Court in 1892. Therefore, in a case in which a foreign creditor sues in Admiralty his debtor, who happens to be even by sheer accident in Malta, it is arguable that the commercial Court has jurisdiction to entertain the action (although it may be beyond the limits traced by s. [742] of the Code of Civil Procedure) on condition that the case fell within the Vice-Admiralty Court's jurisdiction in 1892."

Dana hu ghaliex meta l-allura Qorti tal-Kummerc giet moghtija l-*admiralty jurisdiction* dan sar bil-fakolta li l-Qorti

> "may exercise such jurisdiction in like manner and to as full an extent as the High Court in England".

u ghalhekk hi setghet, u din il-Qorti llum tista', tezercita dik il-gurisdizzjoni (a distinzjoni mill-gurisdizzjoni ordinarja taghha) kemm *in personam* u kif ukoll *in rem,* naturalment kemm il-darba l-kondizzjonijiet applikabbli ghall-esistenza tal-gurisdizzjoni ikunu jezistu.

Distinzjoni bejn gurisdizzjoni u azzjoni

Kif inghad l-eccezzjoni ta' nuqqas ta' gurisdizzjoni originarjament moghtija mill-konvenut noe giet irtirata. Fid-dawl ta' dan wiehed ikun gustifikat jistaqsi ghalfejn saret analizi tal-gurisdizzjoni ta' din il-Qorti u tar-rimedji li tista' taghti. Ir-raguni hi li l-attur noe qieghed isostni li l-kwistjoni *di fondo* hi gurisdizzjonali u li ghalhekk l-irtirar da parti tal-konvenut noe tal-eccezzjoni relattiva kien fatali ghall-kaz tieghu. Mill-banda l-ohra l-konvenut noe jsostni li l-eccezzjonijiet vigenti tieghu ma jirrigwardawx il-gurisdizzjoni ta' din il-Qorti – issa ammessa – imma jolqtu d-dritt sostantiv ta' azzjoni tal-attur noe.

Fil-fehma tal-esponenti ma jistax ikun hemm dubbju li hemm, u trid tinzamm, distinzjoni cara bejn il-poter gurisdizzjonali u r-rimedju jew rimedji li jistghu legittimament jintalbu quddiem tribunal vestit b'dak il-poter. Il-gurisdizzjoni hi is-setgha moghtija lil qorti jew tribunal iehor li tiddeciedi vertenza bejn soggetti ta' drittijiet u obbligi. L-azzjoni hi r-rimedju, jew il-mekkanizmu procedurali, li taghti l-ligi ghall-ksur jew salvagwardja ta' dritt sostantiv. L-azzjoni hi ghalhekk funzjoni ta' dritt sostantiv, u ma tistax tezisti fl-assenza ta' tali dritt.

Issa pero' dan ma jfissirx li ma jistax ikun hemm, jew li m'hemmx, aspetti gurisdizzjonali marbuta ma' certi rimedji partikolari. Fil-fatt l-analizi li saret hawn fuq turi b'mod car mhux biss li rimedju jista' jinghata biss fejn hemm gurisdizzjoni imma ukoll li r-rimedji fl-ammiraljat ghandhom rekwiziti gurisdizzjonali differenti. Filwaqt li kemm ir-rimedji *in rem* u dak *in personam* jirrikjedu l-esiztenza ta' *cause of action* elenkat fl-Atti Imperjali msemmija, ir-rimedju *in rem* jista' jinghata biss jekk certi rekwizita dwar il-presenza tal-bastiment jissussistu, filwaqt li dak *in personam* jirrikjedi l-presenza fizika tal-konvenut personalment. Pero' ghalkemm hemm – bhal ma hemm f'dan il-kamp – aspetti gurisdizzjonali applikabbli ghal rimedji partikolari, il-

fatt li jigu soddisfatti dawn l-aspetti ma jfissirx li r-rimedju jezisti ghaliex, kif inghad, ma jfissirx li r-rimedju jezisti biss fejn hemm dritt sostantiv. Din id-distinzjoni mhux dejjem tohrog cara mill-gurisprudenza taghna li, almenu f'certi siltiet, tista' taghti lil wiehed x'jifhem li l-azzjoni *in rem* u l-*admiralty jurisdiction* huma l-istess. Insibu, per ezempju, *f'Naudi noe v. Ganado noe* li:

> "…kien hemm perijodu fil-gurisprudenza taghna meta kien jigi ritenut illi l-vera prezenza tal-bastiment fl-ibhra territorjali taghna kien bizzejjed biex jirradika l-gurisdizzjoni ta' din il-Qorti. Pero', gurisprudenza aktar ricenti, insibu li tinsisti li jkun hemm oltre l-presenza tal-bastiment u l-arrest tieghu fl-ibhra territorjali, anke "*cause of action"* li taqa' strettament taht xi wahda mill-kawzi enumerati fl-imsemmija legislazzjoni Ingliza;
>
> "Illi ghalhekk biex ikun hemm "actio in rem" validament intavolata jrid ikun hemm: (a) kreditu li jaqa' taht xi "cause of action" elenkat fl-imsemmija legislazzjoni; (b) l-azzjoni trid titressaq kontra r-"res", cioe kontra l-vapur, ghax dan ikun strettament konvenut fil-kawza; (c) il-vapur irid ikun fl-ibhra territorjali ta' Malta u (d) il-vapur irid ikun maqbud jew mizmum milli jitlaq minn Malta sabiex l-eventwali sentenza tkun tista' tigi esegwita fuqu." (emfazi mizjuda)
>
> Hawnhekk il-Qorti elenkat, bhala r-rewiziti ghall-ezercizzju tal-azzjoni *in rem*, dawk li huma, fil-verita, r-rekwiziti gurisdizzjonali ghall-ezercizzju ta' dik l-azzjoni; Jew ahjar abbinat flimkien ir-rekwizit generali ghall-gurisdizzjoni tal-ammiraljat u r-rekwiziti partikolari ghall-ezercizzju tal-gurisdizzjoni *in rem.* Pero' wiehed irid jiftakar li dak li kellha quddiemha l-Qorti, u kwindi dak li kkunsidrat, kienet eccezzjoni ta' nuqqas ta' guirisdizzjoni u mhux, bhal f'dan il-kaz, eccezzjoni li tolqot id-dritt ta' azzjoni tal-attur noe. Ghalhekk fil-fehma ta' l-esponenti din is-sentenza ghandha titqies bhala awtorevoli biss fuq il-kwistjoni minnha deciza; u cioe' dik purament gurisdizzjonali. L-istess jista' jinghad ghas-sentenzi l-ohra kollha ccitati mill-attur noe.
>
> L-esponenti hu ghalhekk tal-fehma li t-tezi tal-attur noe, u cioe' li hemm azzjoni kemm il-darba jigu soddisfatti r-rekwiziti gurisdizzjonali ghall-ezercizzju tal-istess, mhix sostenibbli. Ghalhekk l-esponenti ser jghaddi issa biex jezamina jekk l-attur noe ssodisfax ir-rekwiziti sostantivi ghall-ezercizzju tal-azzjoni *de quo.*

L-azzjoni *in rem*

Din l-azzjoni *in rem* mhix wahda kkontemplata fil-ligi procedurali ordinarja Maltija. Hi azzjoni li l-Qrati taghna jezercitaw bis-sahha tal-art. 370 tal-Kap. 234 li zamm in vigore mhux biss il-gurisdizzjoni, imma anki l-procedura antecedenti, liema procedura kienet, f'materji ta' ammiraljat regolata mill-*Colonial Courts of Admiralty Act, 1890* u mill-Ordinanza nru III tal-1892. Hi azzjoni mehuda mid-dritt Ingliz u ghalhekk biex wiehed bilfors irid jara kif kienu jiddefinuh u jifmuh il-Qrati Inglizi fl-Ingilterra fl-1890. Dwar dan insibu f'*The Heinrich Bjorn.*

> "The action is in rem, that being, as I understand the term, a proceeding directed against a ship or other chattel in which the plaintiff seeks either to have the res adjudged to him in property or possession, or to have sold, under the authority of the Court, and the proceeds, or part thereof, adjudged to him in satisfaction of his precuniary claims. The remedy is obviously an appropriate one in the case of a plaintiff who has a right of property or other real interest in the ship, or a claim of debt secured by a lien which the law recognises."

Fl-istess sens jinghad f'*The Sardinia Sulcis and Al Tawwab:*

> "The defendants need not be named. Nor need the plaintiffs. The whole point of the action in rem is that it is an action against the ship itself, or the cargo, as the case may be, and not a personal action against the owners."

Pero' meta jinghad li l-azzjoni hi "a proceeding directed against a ship" dana jfisser li l-bastiment ghandu drittijiet u obbligi tieghu li huma distinti minn dawk tas-sid? Jfisser, fi kliem iehor, li l-bastiment hu *ut sic* suggett ta' drittijiet u obbligi? Jekk dan hu l-kaz hu bilfors ghaliex il-bastiment ghandu personalita guridika distinta minn diki tas-sid, ghaliex oggett inanimu qatt ma ghandu, ghajr fejn jinghata tali personalita, drittijiet u obbligi.

L-attur noe fil-fatt isostni li bastiment ghandu "personalita' guridika ben separata u distinta minn dik tal-propjetarju tieghu." Pero' l-attur ma rrifera ghal ebda ligi li tikkonferixxi tal personalita u ghal ebda ligi li tikkonferixxi tali personalita u ghal ebda gurisprudenza li tikkonfronta s-sottomissjoni tieghu. Mir-ricerka li ghamel l-esponenti ma seta jsib ebda

awtorita li ssostni din it-tezi; u jidhirlu li hu car mill-art. 181A tal-Kap. 12 li l-ligi taghna ma tqisx bastiment bhala enti guridika. Din tidher li hi ukoll il-posizzjoni fl-Ingilterra:

> "Before coming to the sections and cases, it is well to warn oneself, as one has often to do in this court, not to be misled by our habit of personifying the ship. We speak of a ship being to blame, when we mean that some person is guilty of negligence in relation to the ship. We speak of advances to a ship, when we mean that money is lent for ship's purposes to some person who becomes liable as debtor. It is convenient to speak in brief of advances made upon the credit of the ship. But it is an essential element of all actionable claims for necessaries that there should be a debtor, liable in personam."

Ghalhekk, tkompli tispjega l-Qorti, l-azzjoni *in rem* hi sempliciment procedura li tippermetti l-ezekuzzjoni ta' certi drittijiet *in personam*:

> "This personal liability may or may not be enforceable by proceedings in rem against the ship. <u>But a proceeding in rem is only machinery for enforcing a right in personam</u>" (enfazi tal-esponenti)

Issa qabel ma nghatat is-sentenza f'*The Heinrich Bjorn* kien hemm sentenzi, fosthom dik li ser tigi ccitata issa, li kienu fis-sens li l-azzjoni *in rem* kienet ezercitabbli biss minn persuna li kellu dritt reali jew *maritime lien* fuq bastiment:

> "A maritime lien is the foundation of the proceeding *in rem,* a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding in rem may be had, it will be found to be equally true that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing, into whomsoever possession it may come."

Gie pero' eventwalment stabbilit, kuntrarjament ghal dak li hemm fl-ahhar silta, li l-azzjoni *in rem* ma kienitx verament dipendenti fuq l-esistenza ta' *maritime lien:*

> "We have been informed that under the recent practice of the Admiralty Court the remedy [action *in rem*] is also given to creditors of the shipowner for maritime debts which are not secured by lien; and in that case the attachment of the ship, by process of the court, has the effect of giving the creditor a legal nexus over the proprietary interest of his debtor, as from the date of the attachment."

Fl-istess sentenza jinghad ukoll:

> "The position of a creditor who has a proper maritime lien differs from that of a creditor in an unsecured claim in this respect – that the former…can proceed against the ship notwithstanding any change in her ownership, whereas the latter cannot have an action *in rem* unless at the time of its institution the res is the property of the debtor. In this present case there was a change in the ownership of the *Heinrich Bjorn* between March 1882 and the time when this suit was instituted. Accordingly it is not matter of dispute that the action must be dismissed, if the appellants have not a maritime lien for the amount of their advances, which attached to and followed the ship, from and after the time when these advances were made." (enfazi tal-esponenti)

Hu ghalhekk car, u accettat, li fl-Ingilterra biex persuna tagixxi kontra bastiment permezz ta' azzjoni *in rem* irid jkollu jew dritt personali kontra s-sid jew dritt fuq il-bastiment. Sa fejn seta jistabilixxi l-esponenti ma kien hemm ebda kaz fejn gie deciz li d-dritt ta' azzjoni *in rem* jezisti basta jigu soddisfatti r-rekwiziti gurisdizzjonali, minghajr il-htiega li l-azzjoni tkun fondata fuq dritt personali kontra s-sid jew fuq dritt fuq il-bastiment. Jrid jinghad pero li f'*The Heinrich Bjorn* l-atturi f'dik il-kawza kienu striehu fuq

> "the provision of s. 6 of the Act of 1840 as evidencing the intention of the legislatur, not merely to give the Court of admiralty jurisdiction to entertain claims for necessaries supplied to a foreign ship within the body of a country, but also to create a new incident of the claimant's right when he elects to sue in that Court. It seems to be nrecessary result of the appellant's contention that the claimant, who is unsecured creditor without any preference, when he seeks to enforce his claim elsewhere, becomes by virtue of the Act, a creditor preferably secured when he brings an action in the Court of Admiralty.

> The whole provisions of the Act 3 & 4 Vict c. 65 appear to me to relate the remedies and not to the rights of suitors. Sect. 6 merely confers "jurisdiction to decide" certain claims which the Court of Admiralty had previously no power to entertain. That enactment enables every person having a claim of the nature of one or other of those specified in sect. 6 to bring an action for its recovery in the Admiralty Court, but it cannot in my opinion have the effect of altering the nature and legal incidents of the claim."

L-argument tal-attur noe mhux l-istess bhal dak imressaq f'*The Heinrich Bjorn:* l-attur noe jara l-gurisdizzjoni *in rem* bhala intrinsikament marbuta mal-azzjoni *in rem* mentri f'*The Heinrich Bjorn* l-argument kien li l-intenzjoni tal-legislatur ma kienitx biss illi jwessa' l-gurisdizzjoni, imma ukoll li jibdel in-natura tad-dritt. L-esponenti gja ta r-ragunijiet 'l ghaliex, fil-fehma tieghu l-argument tal-attur noe mhux sostenibbli; hawnhekk izid li anki kieku wiehed kellu jikkonsidra l-kwistjoni mill-perspetiva prospettata mill-atturi f'*The Heinrich Bjorn* it-tezi tal-attur noe xorta ma treggix.

Sitwazzjoni fattwali kwazi identika ghal dik odjerna giet ikkunsiderata f'*The Mogilweff.* Saru tiswijiet fuq ordni ta' *demise charterer* li ghalihom il-hlas ma sarx u ghalhekk min ghamel ix-xogholijiet mexa kontra l-bastiment b'azzjoni *in rem*. Gie deciz, a bazi ta' ligi statutorja ingliza li qatt ma kellha applikazzjoni Malta, li din l-azzjoni ma setghetx issir. Pero' ghall-finijiet ta' din il-vertenza huma interessanti l-osservazzjonijiet (*obiter*) li ghamlet il-Qorti dwar is-segwenti:

> "I find as a fact that there was no contract express or implied between the owners and the repairers, and I have had affidavit evidence to that effect. Mr Darling [l-avukat tal-konvenut] has submitted throughout that the wrong person was sued in this case and that there was no liability on the owners."

Il-Qorti, a bazi ta' dak li kien intqal minn Lord Watson f'*The Castlegate* fis-sens li "every proceeding in rem is in substance a proceeding against the owner of the ship" qalet li

> "I should still hold that he [l-attur] failed in this case because there was no contract between the shipowner and the ship repairer."

F'dan il-kaz it-talba fic-citazzjoni tal-attur noe mhix ibbazata fuq allegazzjoni ta' relazzjoni kuntrattwali jew ta' natura ohra kontra s-sidien

li setghet taghti lok ghal dritt kontrihom; lanqas ma hi bbazata fuq xi allegat privilegg fuq il-bastiment. Ghalhekk l-esponenti hu tal-fehma li l-attur noe mhux qed jallega l-esistenza ta' dritt sostantiv li jintitolah jezercita r-rimedju *in rem.*

Id-*demise charterer* jorbot lill-bastiment, ossia s-sid; u jekk le, hemm azzjoni ohra kompetenti lill-attur noe kontra s-sid?

L-attur noe isostni, *in subsidium,* li t-tiswijiet

> "gew validament ordnati mid-*demise charteres* fir-rigward tal-bastiment daqs li kieku gew hekk ordnati mill-propjetarju tal-istess bastiment…Hemm anke argument legali sostenibbli skond il-principji legali li ahna nhaddnu fis-sens illi l-propjetarji tal-bastiment huma ukoll responsabbli *in personam* ghall-hlas tat-tiswijiet li saru a favur tal-bastiment konvenut propjeta taghhom, billi b'hekk ibbenifikaw huma stess bl-apprezzament illi sar fl-istess propjeta taghhom. Minghajr l-ebda pregudizzju ghall-argument principali tal-esponent noe, dan il-punt jibqa' ghal kollox impregudikat u l-konvenut nomine ma jichadx li bbenifika – jilmenta biss illi ma kellux ikun hu illi jhallas ghal tali benefikati."

L-attur noe qieghed hawn jaghmel zewg osservazzjonijiet:

(a) li c-*charterers* kienu awtorizzati, anzi marbutin, mis-sidien li jaghmel tiswijiet;

(b) li ghandu, jew jista' jkollu, xi forma ta' azzjoni *in personam* kontra s-sidien ghal arrikament.

Dwar (a) mhux car jekk l-attur noe hux qed isostni li peress li c-*charterers* kienu awtorizzati u marbutin li jaghmlu tiswijiet (haga li dwarha m'hemmx kontestazzjoni fattwali) huma kienu b'hekk qed jorbtu, personalment, lis-sidien ukoll. Minn kif inhu redatt l-argument dwar (b) (fejn isostni li, possibilment, hemm responsabbilita personali) wiehed forsi ghandu jifhem li l-attur noe mhux qed isostni li hemm tali responsabilta; pero' kieku kien dan l-argument, f'dan il-kaz ma jistax jirnexxi, ghaliex hu ammess mill-istess attur noe, minghajr ebda ekwivoku, li hu kien jaf, qabel ma bdew ix-xogholijiet, li Marinzulich kienu biss *charterers* u li r-relazzjoni kuntrattwali kienet ma Marinzulich (hlief ghall-finijiet tal-garanzija moghtija mis-sidien).

A rigward ta' (b) jinghad fl-ewwel lok li ma jidhirx li l-attur noe qed isostni li din hi kawza apposita li fiha qed isostni tali argument: donnu qieghed biss izomm impregudikat (kif ghandu kull dritt jaghmel) kwalunkwe rimedju li jidhirlu li ghandu f'dak ir-rigward. Fit-tieni lok jigi osservat li anki kieku l-attur noe jikkontendi li din hi azzjoni bbazata fuq beneficcju li ha l-bastiment, hi l-fehma tal-esponenti li jekk, fil-fatt, il-bastiment bbenifika dan ifisser – stante li l-bastiment m'ghandux personalita guridika – li bbenifika s-sid. Pero' mehud wahdu dan il-fatt, anki jekk jezisti, ma jaghtix lok ghal azzjoni kontra l-bastiment; anki ghalhekk, allura, l-azzjoni ma tistax tirnexxi.

Konsiderazzjonijiet ohra

Fin-nota ta' l-eccezzjonijiet tieghu l-konvenut noe sostna li dan il-gudizzju mhux integru ghaliex is-sidien tal-bastiment ma gewx imharrka imqar ghal kull interess li jista' jkollhom fil-bastiment peress illi kull azzjoni *in rem* mhix proponibbli kemm il-darba s-sidien ma jkunux ukoll responsabbli ghall-kreditu pretiz. Din l-eccezzjoni mhix sostenibbli: Kif intqal hi l-fehma tal-esponenti li l-azzjoni *in rem* hi, sostantivament, azzjoni kontra s-sidien tal-bastiment u tipprezumi dritt personali kontra l-istess jew, possibilment, dritt fuq il-bastiment propjeta' taghhom. Proceduralment pero' mhux necessarju li s-sidien jigu mharrka – ara art. 181A(3) tal-Kap. 12 – avolja l-prattika Ingliza tidher li hi li l-proceduri, ghalkemm *in rem*, isiru kontra s-sidien tal-bastiment f'isem l-istess.

Finalment jigi osservat li din l-azzjoni mhix azzjoni li fiha l-attur noe qed jippremetti li hu intitolat ghal hlas taht il-garanzija lilu moghtija mill-konvenut noe u fejn hemm talba apposita. Ghalhekk l-istess konvenut noe ma jistax jigi kkundannat, permezz ta' dina l-azzjoni, biex ihallas lill-attur noe skond dik l-obbligazzjoni. Naturalment pero' d-drittijiet u rimedji tal-attur noe f'dak ir-rigward jibqghu ghal kollox impregudikati."

Huwa b'hekk ikkonkluda li t-tielet u r-raba' eccezzjonijiet ghandhom jigu milqugha u t-tieni michuda.

Il-Qorti ezaminat bir-reqqa kollha d-diversi noti ezawrjenti tal-partijiet u ssib li taqbel mat-tezi vantata mill-konvenut nomine u mal-konkluzjonijiet peritali u ghar-ragunijiet minnu elenkati. Difatti ma tistax tikkondividi l-linja mehuda mill-attur nomine fin-nota ta' kritika tieghu. Bizzejjed issir referenza ghal dak li jghid ***Scrutton*** *on Charterparties*, kwotat korrettement mill-konvenut nomine fin-nota ta' osservazzjonijiet tieghu tad-9 ta' April 1999:

> *"A charter by demise operates as a lease of the ship itself, to which the services of the master and crew may or may not be supra added. The charter becomes for the time the owner of the vessel; the master and crew become to all intents his servants, and through them the possession of the ship is in him."*

U fin-nota tieghu tat-30 ta' Novembru 2000 il-konvenut nomine jirreferi ghal digriet moghti minn din il-Qorti diversament presjeduta fl-4 ta' Awissu 2000 fl-atti tar-rikors numru 1537/00/GV fl-ismijiet **Avv. Dr. Carmel Chircop noe vs Dr. Ann Fenech** fejn il-Qorti qalet hekk:

> *"L-intimat ma jistax jagixxi in rem ghal bunkers li forna lil Navitankers meta dina kellha bareboat charter, billi r-rikorrenti noe mhix responsabbli in personam ghad-debitu li dahal ghalih il-bareboat charterer.*
> *Fil-kaz* ***Feoso Oil Ltd v The "Sarla" (1995) F.C. 68 (F.C.A.)****, il-Qorti ta' l-Appell 're-affirmed the general principle that an action in rem cannot be sustained unless the bunkers (or other necessaries) were supplied to the ship at the request of the owners or by someone acting on their behalf and with authority to bind them.' Fil-kaz in ezami c-charter kien bareboat, u l-owners ma kinux responsabbli. Ara kaz iehor fejn ma kienx hemm ukoll azzjoni in rem kontra l-owners* ***Cold Ocean Inc v The "Gornostaevka" et al (1999) 168 F.T.R. 269 (F.C.T.D.)****".*

Is-sentenza li rrefera ghaliha l-attur nomine fin-nota tieghu tat-30 ta' Awissu 2000 dwar **The "INDIA GRACE"** ma tbiddel xejn mill-pozizzjoni ormai kristalizzata, li fil-kaz odjern huma l-*bareboat charterers*, Marinzulich, li huma responsabbli ghall-hlas opportun. U kull suggeriment maghmul mill-attur nomine fin-nota tieghu tat-13 ta' April 2000 biex il-Qorti tikkunsidra l-possibilita` li tezisti responsabbilita` personali tal-proprjetarji tal-bastiment a bazi tal-kuncetti legali taghna tal-

kwazi-kuntratti huwa inammisibbli una volta l-azzjoni kif intavolata hija azzjoni *in rem*. Il-kawzali tac-citazzjoni hija dik li hemm espressa fic-citazzjoni u ma tistax tinbidel. Jekk imbaghad il-Qorti tiddeciedi fuq kawzali diversa, id-decizjoni taghha tkun *extra petita*. Ara f'dar-rigward is-sentenza fl-ismijiet **John Aquilina vs Giovanni Coleiro noe** moghtija mill-Qorti ta' l-Appell fis-27 ta' Gunju 1949 (Vol. XXXIII.i.748). Ara wkoll dak li qalet il-Qorti ta' l-Appell fis-sentenza taghha fl-ismijiet **Giuseppe Debono vs Chev. Antonio Cassar Torreggiani** moghtija fil-5 ta' Dicembru 1952 fis-sens li *"il-Qorti ghandha toqghod ghat-termini tad-domanda jew domandi; u s-sentenza ghandha tkun konformi ghad-domanda"* (riferenzi ohrajn: **Alice Amato noe vs Vivian B. De Gray noe et** deciza mill-Qorti ta' l-Appell fl-24 ta' Novembru 1958 Vol. XLII.i.587, **Profs. Joseph Galea noe vs Dr. Antonio Bonnici et** deciza mill-Qorti ta' l-Appell fis-6 ta' Novembru 1961, Vol. XLV.i.336, u **John Grech vs Saviour Abela** deciza mill-Qorti ta' l-Appell (Sede Inferjuri) fit-12 ta' Jannar 1996).

Ghal dawn il-motivi:-

Tiddeciedi billi, filwaqt li tichad it-tieni eccezzjoni tal-konvenut nomine, tilqa' t-tielet u r-raba' eccezzjonijiet u tillibera lill-konvenut nomine mill-osservanza tal-gudizzju. Bl-ispejjez kontra l-attur nomine u salvi u impregudikati kwalunkwe drittijiet ohra li l-attur nomine jista' jkollu.

Onor. Imhallef
Dottor David Scicluna

D/Registratur