



**QORTI TA' L-APPELL**

**S.T.O. PRIM IMHALLEF  
VINCENT DE GAETANO**

**ONOR. IMHALLEF  
ALBERT J. MAGRI**

**ONOR. IMHALLEF  
TONIO MALLIA**

Seduta tal-25 ta' Mejju, 2007

Appell Civili Numru. 11/2003/1

**Elmo Insurance Agency Ltd, bhala rapprezentant tas-socjeta` estera Royal & Sun Alliance Insurance plc, u b'nota tal-11 ta' Gunju 2004, is-socjeta` Elmo Insurance Limited bhala cessionarja tad-drittijiet u obbligi tas-socjeta` estera Royal & Sun Alliance Insurance plc f'isimha proprju u kif surrogata fid-drittijiet ta' l-assikurat taghha s-socjeta` Nylon Knitting Limited assumiet l-atti tal-kawza, Middlesea Insurance plc u Atlas Insurance Agency Limited, bhala rapprezentant tas-socjeta` estera AXA Insurance plc, f'isimhom proprju u bhala surrogati fid-drittijiet ta' l-assikurat taghom is-socjeta` Nylon Knitting Limited, u b'nota tat-23 ta' Ottubru 2006, is-socjeta` Atlas Insurance Limited bhala cessionarja**

**tad-drittijiet u obbligi tas-socjeta` Atlas Insurance Agency Limited, u tas-socjeta` estera AXA Insurance plc kif surrogata fid-drittijiet ta' l-assikurat taghha s-socjeta` Nylon Knitting Limited, assumiet fil-vesti ta' attur l-atti ta' din il-kawza u b'nota tas-26 ta' Marzu 2007, Atlas Insurance plc Limited assumiet fil-vesti ta' l-attur l-atti tal-kawza minflok is-socjeta` Atlas Insurance Agency Limited**

v.

**Fahrenheit Freight Forwarders Co. Ltd.**

**Il-Qorti:**

Rat ic-citazzjoni pprezentata mis-socjetajiet attrici li tghid hekk:

"Peress illi s-socjeta` Nylon Knitting Limited inkarigat lis-socjeta` konvenuta bil-garr u trasport ghall-esportazzjoni lejn l-Italja ta' zewg *industrial knitting machines* (Dok. ZM1 sa ZM4);

"Peress illi fit-13 ta' Jannar, 2002, waqt li z-zewg magni kienu qed jingarru fl-Italja gewwa *trailer* tas-socjeta` konvenuta, dawn sfaw danneggjati estensivament u rreparabilment meta nar hakem it-*trailer*,

"Peress illi s-socjetajiet attrici kienu qed jaghtu kopertura assikurativa fir-rigward tal-merkanzija trasportata u ghalhekk, kif kienu obbligati, huma hallsu ghall-hsara li garrab l-assikurat is-somma komplessiva ta' hamsa u hamsin elf hames mija erbgha u erbghin lira Maltin (Lm55,544): mis-socjeta` attrici Elmo Insurance Agency noe thallsu s-somma ta' Lm723.15c de proprio bhala "survey fees" u s-somma ta' Lm24,271.65c favur is-socjeta` assikurata u ghal dan l-ammont kienet surrogata fid-drittijiet tas-socjeta` assikurata; mis-socjeta` attrici Middlesea Insurance plc thallsu s-somma ta' Lm562.45c de proprio bhala "survey fees" u s-somma ta' Lm18,877.95c favur is-socjeta` assikurata u ghal dan l-ammont kienet surrogata fid-drittijiet tas-socjeta` assikurata; u mis-socjeta` attrici Atlas Insurance Agency

Limited noe thallsu s-somma ta' Lm321.40c de proprio bhala "survey fees" u s-somma ta' Lm10,787.40c favur is-socjeta` assikurata u ghal dan l-ammont kienet surrogata fid-drittijiet tas-socjeta` assikurata (Dok. ZM5);

"Peress illi s-socjeta` konvenuta hija responsabbli ghall-hsara li garrbet il-merkanzija *de qua*;

"Peress illi s-socjeta` konvenuta, ghalkemm kienet interpellata ufficjalment biex thallas il-"quantum" tad-danni fuq riferit, baqghet inadempjenti;

"Tghid ghalhekk is-socjeta` konvenuta ghaliex ghar-ragunijiet premessi din il-Qorti m'ghandhiex:

"1. Tiddikjaraha responsabbli ghall-hsara fuq riferita.

"2. Tillikwida d-danni komplessivi fl-ammont ta' hamsa u hamsin elf hames mija erbgha u erbghin lira (Lm55,544).

"3. Tikkundannaha sabiex thallas lis-socjeta` attrici Elmo Insurance Agency Limited noe is-somma ta' erbgha u ghoxrin elf dis' mija erbgha u disghin lira tmenin centezmu (LM 24,994.80c) kwantu ghal LM 723.15c li l-istess socjeta` nkorriet de proprio bhala "survey fees", u s-somma ta' LM 24, 271.65c li sborsat a favur is-socjeta assikurata u ghal dan l-ammont kienet surrogate fid-drittijiet tas-socejta assikurata.

"4. Tikkundannaha sabiex thallas lis-socjeta` attrici Middlesea Insurance plc is-somma ta' dsatax-il elf erba' mija u erbghin lira erbghin centezmu (LM 19,440.40c) kwantu ghall LM 562.45c li l-istess socjeta nkorriet de proprio bhala "survey fees" u s-somma ta' LM 18,877.95c li sborsat a favur is-socjeta assikurata u ghal dan l-ammont kienet surrogata fid-drittijiet tas-socejta assikurata.

"5. Tikkundannaha sabiex thallas lis-socjeta` attrici Atlas Insurance Agency Limited is-somma ta' hdax-il elf mija u tmien liri tmenin centezmu (LM 11,108.80c) kwantu

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ghal LM 321.40c li l-istess socjeta nkorriet de proprio bhala "survey fees" u s-somma ta' Lm 10,787.40c li sborsat a favur tas-socjeta assikurata u ghal dan l-ammont kienet surrogate fid-drittijiet tas-socejeta assikurata.

"Bl-ispejjez komprizi dawk tal-ittra ufficjali tat 23 ta' Lulju 2002 li kienet notifikata lis-socjeta konvenuta fil 25 ta' Lulju 2002, u bl-imghax legali mill 25 ta' Lulju 2002 kontra s-socjeta konvenuta li hija ngunta ghas-subizzjoni."

Rat li s-socjeta` konvenuta, ghalkemm debitament notifikata bl-att tac-citazzjoni, naqset milli tipprezenta nota ta' l-eccezzjonijiet, u, ghalhekk baqghet kontumaci;

Rat is-sentenza moghtija mill-Prim Awla tal-Qorti Civili fid-29 ta' Ottubru 2004, li in forza taghha ddecidiet il-kawza fis-sens illi:

"Tiddikjara lill konvenuti responsabbli ghall-hsara fuq riferita.

"Tillikwida d-danni komplessivi fl-ammont ta' hamsa u hamsin elf hames mija u erbgha u erbghin lira Maltin (Lm55,544).

"Tikkundanna lill konvenuti jhallsu s-somma imsemmija kif mitluba;

"Bl-spejjez kontra s-socjeta` konvenuta u bl-imghax tal 5% (ara artikolu 27(1) tac CMR) mill-25 ta' Lulju, 2002 sad-data tal-effettiv pagament."

Dik il-Qorti tat id-decizjoni taghha wara li ghamlet is-segwenti konsiderazzjonijiet:

**"FATTI**

"Illi dina l-kawza tirrigwarda incident li gara l-Italia meta zewg makni industrijali li kienu qed jingarru fuq *trailer* mis-socjeta` konvenuta, sfaw mahruqa u danneggjati totalment meta wahda mir-roti qabdet u hadet in-nar u mbaghad in-nar infirex u hakem it-*trailer* bil-makni b'kollox. L-atturi, bhala assikuraturi, qed ifittxu ghal hlas li

huma ghamlu lill assikurat taghhom wara li kienet saret *claim* minnhom fuq dina l-hsara u huma gew surrogati fid-drittijiet tal-assikurat taghhom. Huma qed jitolbu s-somma komplessiva ta' Lm55,544, liema somma tinkludi s-*survey fees*.

## "KONTESTAZZJONI

"Il-konvenuti, ghalkemm kontumaci, fin-nota li gew awtorizzati li jaghmlu, (artikolu 158/10 tal-Kap 12) issottomettew li skond ir-rapport li sar barra minn Malta u li gie ezibit fil-process, jirrizulta (ara fol. 39 u fol. 116) li l-kawza ta' l-incident kienet "*mechanical breakdown*" u dan kien relatat ma l-istess uzu ta' l-istess vettura. Il-hsara kienet tikkonsisti fi ksur ta' parti wahda mir-roti ta' wara. Skond l-istess rapport, fatturi ohra bhala velocita` qabel l-incident ma kienitx il-kawza ta' l-istess. Meta kienu ezaminati r-roti kienu jidhru mantenuti u nstabu f'kundizzjoni tajba. Ir-rota li waslet ghan-nirien kellha tracci ta' "*grease*" u dana nonostante l-hruq li sehh.

"L-atturi minn naha l-ohra qed jissottomettu li l-konvenuti huma responsabbili billi ma ppruvawx li huma hadu dawk il-prekawzjonijiet kollha biex tigi evitata l-hsara li kkaggunat in-nar, speċjalment jekk huma qed jistrieħu fuq id-difiza li jaghti l-artikolu 17(2) ta' CMR.

## "KONSIDERAZZJONIJIET

"Responsabilita` tat-trasportatur

"Jirrizulta li t-trasport in kwistjoni huwa regolat bir-regolamenti ta' CMR (ara dok a fol 6 tal-process.)

"Il-bazi tar-responsabilita' tat-trasportatur toħrog mill-artikolu 17(1) tal Carriage of Goods by Road (CMR) li jipprovdi li:

*"The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery."*

"Il-konvenuti, ghalkemm kontumaci, fin-nota taghhom, qed jirritjenu li huma m'humiex responsabbli ghal dak li gara billi l-hruq kien rizultat ta' *mechanical breakdown* fit-trailer. Huma qed jibbazaw id-difiza taghhom fuq l-artikolu 17(2) tas CMR u senjatament fuq il-parti li tipprovvdli li:

*"The carrier shall... be relieved of liability if the loss, damage or delay was caused ...through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent"*.

"Dwar dina d-difiza l-awtur **M. A. Clarke fil-ktieb tieghu "International Carriage of Goods by Road: CMR"** 3<sup>rd</sup> Edition isemmi l-*leading case* in materja **Sibler v Islander Trucking, (1985)** fejn Mustill J. stabilixxa li *"Article 17.2 sets a standard which is somewhere between, on the one hand, a requirement to take every conceivable precaution, however extreme, within the limits of the law, and on the other hand a duty to do no more than act reasonably in accordance with prudent current practice.... Article 17.2 requires the utmost reasonable care compatible with good sense"*.

"Dana jfisser li t-trasportatur irid jezercita aktar minn *reasonable care in accordance with current practice in the transport industry* u gie meqjus li l-grad ta' "care" li ghandu jkun hemm hu *"barely distinguishable from liability without fault"*. L-istandard ta' "utmost care" tas 17.2 huwa aktar minn dak ta' "reasonable care" u ghandu jigi assessjat fil-prattika fil-kaz konkret u mhux fl-astrett.

"L-istess awtur ighid li *"a fire which starts in the vehicle or its equipment is a defect in the vehicle and thus no defence, whether it could have been avoided by the carrier or not"* u jikkwota il-kaz ta' O.L.G.Dusseldorf 18.11.71 fejn kien hemm prova li l-hruq beda mit-tyres. Il-Qorti kienet iddecidiet li *"the carrier had to show absence of any defect in the vehicle. The carrier showed that the vehicle was new and in good condition . The Court was not satisfied, stating that the carrier must prove that the cause could not lie with the vehicle. The onus is heavy,*

*perhaps because the Courts are aware that defects may appear in the vehicle as a result of misuse by the driver; tyres may burst because the driver has hit the curb and may catch fire because of overheating in the brakes.*

"Fil-kaz Brussels 17.6.71 li the carrier proved that the tyre in question was in good condition at the beginning of the journey and argued that therefore the damage had occurred in circumstances which he could not avoid. The Court however held the carrier liable saying that the evidence produced by the carrier does not exclude the possibility that the damage was caused by error, carelessness or negligence on the part of the driver...**and does not at all imply that it was impossible for the carrier to avoid the circumstances causing the damage or to prevent their consequences**".

"Fil-kaz in ezami, skond ir-rapport li sar barra minn Malta, a fol 116:

"the fire developed in correspondence of the left rear wheel of trailer due to mechanical breakdown.....From our inspection, we may reasonably hypothesise that, breakage of the second roller bearing of the left rear wheel and consequent friction between rolls, shearing hub and the housing of shearing hub inside drum had caused increase in temperature. Turning of wheel, due to vehicle drive and the weight of loaded cargo, made temperature rise up to causing melting of roller bearing and burning of grease and dust present therein. Soon as the driver stopped to verify what was happening the tyre due to high temperature reached by drum caught fire..... The breakage of the roller bearing may rely in possible mechanical breakdown due to usage....

"Biex jehles mir-responsabilita`, it-trasportatur ghalhekk irid jipprova li hu ha l-mezzi kollha biex jevita kull hsara u li *it was impossible for the carrier to avoid the circumstances causing the damage or to prevent their consequences*. Mhux bizzejjed li c-cirkostanzi kienu straordinarji imma jridu jkunu tant straordinarji li jrrenduha impossibli lill carrier li jimpedieha anke bl-akbar diligenza.

"Fil-kaz in ezami kien jispetta lill konvenuti li jiproducu *history* u *maintenance records* tal vettura biex juru li t-*trailer* li kien qed jintuza ghal *transport* fit-tul internazzjonali ta' merkanzija kien qed jigi regolarment *serviced* u moghti *maintenance* adekwata u li ma kien hemm xejn hazin fit-*trailer* precedentement. Fil-fatt dina l-prova ma saritx u dawn ir-*records* ma gewx prodotti.

"Il-fatt biss li kien hemm *mechanical breakdown* fit-*trailer* ma jezonerax lill konvenuti mir-responsabilita'. Il-konvenuti ma ppruvawx li kien impossibli ghalihom li jevitaw dana l-incident. Jidher li l-*mechanical breakdown* setgha jigi evitat bid-debita attenzjoni u manutenzjoni. Jirrizulta li fi tlett roti ma sviluippawx problemi mentri fir-rota partikolari kien hemm nuqqas li kkawza l-incident u li l-konvenuti setghu jevitaw. Waqt li r-roti l-ohra kellhom manutenzjoni ghax kien jidher li kellhom *grease*, dik li minnha qabad in-nar ma kelliex *grease* jew jekk kellha ma kelliex bizzejjed speċjalment meta wiehed jikkonsidra t-toqol tal-merkanzija li kien qed igorr fuq dak it-tragitt fit-tul. Inltre minhabba n-nuqqas ta' informazzjoni dwar it-**trailer** ma jirrizultax jekk din il-*wheel hub* qatt gietx riparata qabel jew kelliex bzonn li tinbidel. Minhabba wkoll dan in-nuqqas ta' dokumenti dwar l-istat tat-*trailer*, il-Qorti lanqas tista' tezamina jekk "*the condition of the vehicle ...was fit to receive and to contain the goods of the type in question*", f'dan il-kaz zewg makni kbar hafna (ara ritratti).

"Ghalhekk anke taht l-artikolu 17(3) tac CMR l-konvenuti ma jistghux jigu ezonerati mir-responsabilita' billi *the carrier shall not be relieved of liability by reason of the defective condition of the vehicle used by him*.

## "Danni

"Il-konvenuti qed jissottomettu li huma m'ghandhomx ihallsu l-ammont kollu mitlub billi hemm il-*weight limitation* skond ic CMR. L- artikolu 23 jipprovdi li:

"When, under the provisions of this convention, a carrier is liable for compensation in respect of total or partial loss of



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goods, such compensation shall be calculated by reference to the value of the goods at the time and place at which they were accepted for carriage.,

"u li

*"Compensation shall not, however, exceed 25 francs per kilogram of gross weight short.*

"Il-limitazzjoni tapplika kemm fil-kaz ta' partial loss kif ukoll ta' total loss, izda l-artikolu 29 tac CMR Convention jeskludi l-limitazzjoni tar-responsabilita tal-carrier f'kazi fejn dan juri wilful misconduct jew *equivalent default*. Gie ritenut (ara Malcom Clark fuq riferit) li l-equivalent default must be weighed by the lex fori jigifieri l-ligi Maltija. Fil-kaz in ezami l-agir tal-konvenuti li jittrasportaw l-merkanzija in kwistjoni fuq *trailer* li ma kienx idoneju ghal *transport* internazzjonali u fit-tul jammonta ghal *equivalent default*. Ghalhekk id-difiza u limitazzjonijiet ta' responsabilita' tal-*carrier* ma japplikawx ghal kaz odjern. Konsegwentement l-ammont intier mitlub mill-atturi huwa dovut."

Rat ir-rikors ta' l-appell kif ipprezentat mis-socjeta` konvenuta;

Rat ir-risposta tas-socjetajiet attrici;

Semghet lid-difensuri tal-partijiet;

Rat l-atti kollha tal-kawza u d-dokumenti esebiti;

Ikkunsidrat;

Illi qabel ma din il-Qorti titratta l-meritu ta' l-appell, irid qabel xejn tigi diskussa l-pregudizzjali sollevata mill-Qorti *ex officio* fl-udjenza ta' l-20 ta' Marzu, 2007. F'dik is-seduta giet sollevata l-problema naxxenti mill-fatt li s-socjeta` konvenuta appellanti, li kienet waqghet kontumaci quddiem l-ewwel Qorti, ma kenitx talbet li tipprova tiggustifika l-kontumacja taghha. Dan il-punt gie sollevat peress li skond il-gurisprudenza ta' dawn il-Qrati ghalkemm konvenut li jibqa' kontumaci quddiem l-ewwel Qorti mhux prekluz milli jappella minn sentenza ta' dik il-

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Qorti u sahsitra jitratta l-kawza, huwa ma jistax jissottometti aggravju fil-meritu qabel ma jiggustifika l-kontumacja tieghu ghas-sodisfazzjoni tal-Qorti (ara **Vella v. Vella**, deciza minn din il-Qorti fil-21 ta' Mejju 1993, **Zammit noe v. Agius**, deciza wkoll minn din il-Qorti fis-6 ta' Gunju 1994, u **Grech v. Ali Idris**, deciza minn din il-Qorti fis-26 ta' Jannar, 2007).

F'dan il-kaz, is-socjeta` konvenuta ma ressqet ebda raguni biex tipprova tiggustifika l-kontumacja taghha. Is-socjeta` konvenuta, fit-trattazzjoni ta' l-appell, issottomettiet biss kwistjonijiet li jolqtu l-meritu, u xejn ma gie sottomess dwar il-kontumacja taghha. Kwindi din il-Qorti ma tistax titratta l-aggravji fil-meritu mressqa mis-socjeta` appellanti, u l-appell qiegħed, għalhekk, jigi respint.

Għaldaqstant, għar-ragunijiet premeffi, tiddisponi mill-appell interpost billi tichad l-istess bl-ispejjez kontra s-socjeta` konvenuta appellanti.

### < Sentenza Finali >

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