MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

EDWINA GRIMA

Seduta ta' l-24 ta' Gunju, 2015

Appell Civili Numru. 410/2008/1

Appell Numru: 410/2008

PETNUTRITION HOUSE LIMITED (C 27570)

Vs

JET SERVICES LIMITED (C 16337) permezz ta' digriet datat 24 ta' Frar 2009, giet kjamata in kawza JOHN ABELA LIMITED (C 18181)

Il-Qorti,

Rat fis-sentenza tal-25 ta' Marzu 2013, fejn il-Qorti tal-Magistrati (Malta) ippronunzjat is-segwenti sentenza fl-ismijiet premessi:-

"Il-Qorti,

Rat ir-rikors ippresentat fit 12 ta' Dicembru 2008 mis-socjeta rikorrenti Petnutrition House Limited kontra is-socjeta intimata Jet Services Limited, illi kienet tqabbdet bhala freight forwarders sabiex jigu lilha kkonsenjati

merkanzija f'Malta illi hija kienet xtrat minn kumpannija gewwa il-Germanja bl-isem ta' Vitakraft, fejn talbet lill-Qorti tikkundanna lill-istess socjeta intimata thallasha danni sofferti fl-import ta' hamest elef, tmien mija u disgha u tmenin Euro u erbgha u sittin centezmu (€5,889.64) rizultat tal-fatt illi l-merkanzija illi kellha tasal f'Gunju 2008 ma waslitx Malta.

Rat ir-risposta tas-socjeta intimata Jet Services Limited ippresentata fl 24 ta' Frar 2009 fejn huma sahqu illi l-merkanzija ma kienetx ingarret minnhom izda mis-socjeta John Abela Limited, li ghalhekk ghandha tigi kjamata fil-kawza. Apparti minn hekk, huma stqarrew illi waqt li l-merkanzija kienet fil-pussess ta' John Abela Limited, dina insterqet u ghalhekk ma ghandha ebda responsabbilta'.

Rat illi fl-24 ta' Frar 2009 intlaqat it-talba tal-jmata in kawza tas-socjeta John Abela Limited.

Rat illi, fil 25 ta' Frar 2010, wara illi s-socjeta intimata naqset milli tinnotifika lis-socjeta kjamata in kawza, l-istess socjeta kjamata in kawza John Abela Limited, ippresentat l-eccezzjonijiet taghha fejn, fost affarjiet ohra, tat ruhha notifikata bil-kawza u eccepiet, l-ewwel u qabel kollox illi, l-azzjoni odjerna kienet preskritta bit-trapass ta' sena, kemm ai termini tal-Convention on the Contract for the International Carriage of Goods by Road, maghrufa bhala CMR illi abbazi taghhom il-merkanzija ingarret, kif ukoll a tenur tal-artikolu 544 (e) tal-Kodici Kummercjali.

L-istess socjeta eccepiet ulterjorment illi qatt ma issejhu sabiex ihallsu ghal xi danni u ma kellhom ebda relazzjoni mas-socjeta rikorrenti u ghalhekk ghandha tigi liberata mill-osservanza tal-gudizzju.

Dwar il-meritu, s-socjeta intimata eccepiet li, la darba noll ma thallsietx lilha, il-kawza ma setghetx issir u sahqet ukoll illi d-danni pagabbli huma limitati a tenur tal-kundizzjonijiet stabbiliti fil-CMR.

Dwar responsabbilta' sahqet illi ma hijiex responsabbli ghad-danni riklamati peress illi s-serq tat-tralier ma sehhx tort taghha u hija dejjem agixxiet skond il-Ligi. Finalment, talbet illi s-socjeta assikuratrici Millenium Insurance Agency Limited tigi kjamata in kawza.

Rat illi fis 16 ta' Jannar 2012, il-Qorti cahdet it-talba tal-kjamat in kawza ta' Millenium Insurance Agency Limited.

Rat ix-xhieda moghtija fit 28 ta' April 2009 ta' Matthew Wismayer, rappresentant tas-socjeta rikorrenti fejn, wara x-xhieda tieghu, iddikjara li ma kienx fadallu aktar provi x'jippresenta.

Rat ix-xhieda moghtija fis-27 ta' Mejju 2009 ta' Olvin Galea, managing director tas-socjeta intimata Jet Services Limited, u dokumenti ohra minnu ppresentati.

Rat illi fis seduta tal-10 ta' Novembru 2009 is-socjeta intimata ddikjarat illi ma kellhiex aktar provi x'tippresenta.

Rat il-kontro ezami ta' Matthew Wismayer illi saret fit 3 ta' Frar 2010.

Rat ix-xhieda ta' Carmelo Abela, rappresentat tas-socjeta John Abela Limited, moghtija fit 3 ta' Novembru 2010 u dokumenti minnu esebiti kif ukoll il-kontro ezami tieghu li saret fis 16 ta' Frar 2011 u x-xhieda tieghu ri-prodotta darba ohra fit 2 ta' Marzu 2012.

Semghet ix-xhieda ta' Paul Ellul, Cargo Surveyor imqabbad mill-asskurazzjoni Millenium Insurance Agency Limited moghtija fil 25 ta' Mejju 2012 u dokumenti minnu esebiti kif ukoll il-kontro ezami tieghu li sar fil 15 ta' Ottubru 2012

Semghet ix-xhieda ta' Joseph Mallia, rappresentant tas-socjeta Millenium Insurane Agency Limited moghtija fil 25 ta' Mejju 2012 u dokumenti minnu ppresentati kif ukoll il-kontro ezami tieghu li sar fil 15 ta' Ottubru 2012.

Rat illi fis-seduta tad-19 ta' Novembru 2012 il-kawza giet differita ghas-sentenza bil-fakolta' tan-noti.

Rat illi noti ta' sottomissjonijiet ma gewx ippresentati.

Ikkunsidrat

Il-kaz odjern jirrigwarda talba illi saret mis-socjeta rikorrenti kontra is-socjeta minnha imqabbda ghal garr ta' merkanzija illi hija xtrat gewwa il-Germanja, liema merkanzija qatt ma wasslet Malta peress illi t-trailer li kien qed igorr il-merkanzija insteraq.

Infatti, jirrizulta illi s-socjeta intimata, illi hija freight forwarder, ikkuntrattat is-servizzi ta' socjeta illi taghmel il-garr tal-merkanzija permezz ta' trailers, ossija John Abela Limited, is-socjeta kjamata in kawza, sabiex dina tigbor il-

merkanzija bis-servizz 'groupage' li s-socjeta intimata topera, u tnizzel il-merkanzija Malta.

Jirrizulta illi meta t-trailer misjuq minn impjegat tas-socjeta kjamata in kawza, ossija John Abela Limited, kien niezel Malta huwa, f'mument minnhom, allegatament waqaf mal-gemb go parkegg pubbliku u waqqaf iz-ziemel li kien qed isuq flimkien mat-trailer hdejn trailers ohra sabiex jorqod ftit u ma ha ebda tip ta' prekawzjoni ta' security tant illi jirrizulta li s-sewwieq, fost nuqqasijiet ohra, lanqas biss attiva s-sistema ta' anti theft illi kien hemm fuq rota tat-trailer. Ir-raqda tas-sewwieq impjegat tas-socjeta kjamata in kawza, madanakollu, jidher illi kienet profonda hafna, peress illi l-ghada filghodu, meta qam, sab illi t-trailer li kien qieghed jigbed warajh kien inqala minn mat-truck ossija ziemel tieghu u kien insteraq.

Kien ghalhekk illi l-merkanzija li kienet xtrat is-socjeta rikorrenti u li kienet inkarigat lis-socjeta intimat sabiex tnizzel Malta qatt ma eventwalment wasalet Malta, peress illi impjegat tal-persuna imqabbda mis-socjeta intimata biex igorr il-merkanzija tas-socjeta rikorrenti, waqt li kien rieqed, safa vittma ta' serqa meta inseraqlu t-trailer ta' madwar erbghin pied illi kien imqabbad mat-truck tieghu stess, li fih huwa kien rieqed, u ta dan ma nduna b'xejn!

Ikkunsidrat

Is-socjeta intimata, Jet Services Limited, eccepiet illi ma kienx tort taghha li nsterqu l-affarjiet izda, semmai kien tort tas-socjeta John Abela Limited, li kienet qed iggorr il-merkanzija.

Is-socjeta kjamata in kawza, John Abela Limited, da parte taghha, eccepiet preliminarjament illi l-azzjoni kienet prekritta kemm ai termini tal-Artikoll 544 (e) tal-Kodici Kummercjali, kif ukoll a ternut tal-kundizzjonijiet tas-CMR, illi tahthom il-merkazija kienet qed tingarr. Fil-meritu, imbghad, is-socjeta kjamata in kawza eccepiet illi ma kellha ebda relazzjoni guridika mas-socjeta rikorrenti, illi ma kellha ebda responsabbilta' ghas-serq peress illi agiet fl-ambitu tal-Ligi u, anke jekk hija responsabbli, dawna huma limitati skond ic-CMR.

Ikkunsidrat

Jenhtieg, qabel xejn, f'dana l-istadju, li jigu kkunsdrati certi aspetti legali qabel ma tigi kkunsidrata aktar il-kwistjoni pendenti quddiemha.

L-Artikolu 29 tal-Convention on the Contract for the International Carriage of Goods by Road, ossija CMR, li fuqu il-kjamat in kawza qed jibbaza l-eccezzjonijiet kollha tieghu, jipprovdi dan li gej:-

Article 29
1. The carrier shall not be entitled to avail himself of the provisions of this chapter which exclude or limit his liability or which shift the burden of proof if the damage was caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court or tribunal seized of the case, is considered as equivalent to wilful misconduct.
2. The same provision shall apply if the wilful misconduct or default is committed by the agents or servants of the carrier or by any other persons of whose services he makes use for the performance of the carriage, when such agents, servants or other persons are acting within the scope of their employment. Furthermore, in such a case such agents, servants or other persons shall not be entitled to avail themselves, with regard to their personal liability, of the provisions of this chapter referred to in paragraph 1.

L-artikolu 544 (e) tal-Kap 13 tal-Ligijiet ta' Malta, li qed tinvoka wkoll is-socjeta kjamata in kawza jipprovdi dan li gej:-

L-azzjonijiet li ġejjin jaqgħu bil-preskrizzjoni kif sejjer jingħad hawn taħt:
....
(e) kull azzjoni għall-kunsinna ta' merkanzija, wara sena minn dak in-nhar li jasal il-bastiment.

Fil-kawza 'Joseph Ellul Sullivan vs Tancred Tabone' (Cit 782/04 LFS) deciza mill-Prim Awla tal-Qorti Civili fis 17 ta' Ottubru 2005, gie stabbilit illi:-
Il-preskrizzjonijiet qosra huma kollha eccezzjonijiet ghar-regola generali tal-preskrizzjoni li nsibu fl-artikolu 2143 tal-Kodici Civili. Ghalhekk, bhal kull eccezzjoni ohra, il-preskrizzjonijiet qosra ghandhom jinghataw interpretazzjoni restrittiva. (Ara kawza fl-ismijiet Ralph Naudi, Francis Micallef u William Mock vs Maltacom p.l.c. PA 9-Nov-2001, u Alf. Mizzi & Sons (Marketing) Ltd vs Dismar Co. Ltd. PA 12-Ott-2004, u Baudry- Lacantinerie et Tissier fit-trattato Teorico Pratico di Diritto Civile Vol XXVIII, "Della Prescrizione" Par. 712).

Dwar preskrizzjoni fil-kawzi ghal danni, imbghad, fil-kawza 'Perit Joseph Barbara vs Segretarju tal-War Damage Commission' (Cit 1196/80 NC) deciza mill-Prim Awla tal-Qorti Civili fil 15 ta' Ottubru 2003 il-Prim Awla intqal illi:-
In propositu ghat-tip ta' preskrizzjoni applikabbli fil-kaz ta' danni, l- Onorabbli Qorti tal-Appell fil- kawza Carmelo sive Charles Magri vs Il-Kummissarju tal-Pulzuija osservat li l-ligi u l-gurisprudenza jiddistingwu tlett xorta ta' danni,

jigifieri dawk derivanti minn delitt veru u proprju [fejn il-preskrizzjoni hija dik ta' l-azzjoni kriminali], dawk derivanti minn htija akwiljana [fejn il-preskrizzjoni hija dik ta' sentejn] u dawk derivanti minn inadempjenza kontrattwali [fejn il-preskrizzjoni hija dik ta' hames snin]
Illi finalment, kif osservat l-Onorabbli Qorti tal-Appell fil-kawza Joseph Bowman noe vs Emanuel Cachia et, ghall-fini tad-determinazzjoni ta' liema perijodu preskrittiv huwa applikabbli, wiehed ghandu jhares lejn in-natura ta' l-azzjoni esperita.

Ikkunsidrat

Illi, dwar l-eccezzjoni tal-applikabilita' tas-CMR, fil-kaz in ezami, johrog car mill-provi kollha prodotti quddiem dina l-Qorti, li l-fatt li s-sewwieq tat-trailer ipparkja it-trailer tieghu fi triq pubblika u lanqas biss ha xi tip ta' prekawzjoni sabiex jassikura li l-merkanzija illi huwa kien qieghed igorr tigi salvagwardjata b'xi mod, huwa nuqqas grossolana u intenzjonali da' parte tas-sewwieq u tinkwadra ruhha fid-definizzjoni ta' 'default on his part ... to be considered equivalent to wilful misconduct' stabbilita mis-CMR. Ghalhekk, a tenur tal-Artikolu 29 tas-CMR stess, is-socjeta kjamata in kawza ma tista b'ebda mod taghmel uzu mis-CMR bhala difiza ghall-azzjoni taghha.

Illi, dwar l-eccezzjoni tal-Artklu 544 (e), kif stqarret il-Qorti fil-kawza hawn fuq indikati, la darba l-preskrizzjoni hija wahda qasira, ghalhekk l-interpretazzjoni tal-Ligi ghandha tkun wahda restrittiva. Apparti minn hekk, u aktar importanti, sabiex wiehed jistabilixxi l-periodu preskrittiv applikabbli, wiehed irid ihares lejn in-natura tal-azzjoni.

Fil-kaz in ezami, l-azzjoni mehudha mis-socjeta rikorrenti hija wahda ta' danni sofferti rizultat ta' telf ta' merkanzija. Minn naha l-ohra, l-artikolu 544 (e) jikkontempla <u>biss</u> azzjonijiet ghal-kunsinna ta' merkanzija, li jfisser li biex tali eccezzjoni titqajjem, hija haga ovvja li l-merkanzija trid tkun ghadha reperibbli u presenti sabiex tittiehed u li qed issir talba sabiex tali merkanzija tigi kunsinjata.

Ghalhekk, la darba l-azzjoni hija wahda ta' danni u l-artikolu 544 (e) jipprovdi ghal preskrizzjoni ta' sena f'kaz ta' azzjonijiet ghall-kunsinna ta' merkanzija, tali eccezzjoni ma tapplikax ghal kaz odjern peress illi ma tinkwadrax ruhha fil-meritu tal-kawza odjerna, stante illi t-talba hija wahda ta' danni u mhux ta' kunsinna ta' merkanzija.

Ikkunsidrat

Sorvolati dawn l-eccezzjonijet ta' natura legali imqajjma mis-socjeta kjamata in kawza, il-Qorti kull ma fadallha huwa illi tivverifika jekk id-danni rikjesti mis-socjeta rikorrenti attwalment jirrizultawx.

Is-socjeta rikorrenti ippresentat il-fattura mahruga mis-socjeta Vitakraft fil-Germanja li minn ghandha kienet xtrat il-merkanzija li ntilfet rizultat ta' irresponsabbilta' tas-socjeta kjamata in kawza imqabbda mis-socjeta intimata, liema fattura kienet tghid li l-merkanzija kienet fil-valur ta' hamest elef, tmien mija u disgha u tmenin Euro u erbgha u sittin centezmu (€5,889.64).

Tali ammont gie anke kkonfermat mis-surveyor imqabbad mis-socjeta assikuratrici tas-socjeta kjamat in kawza, u ghalhekk il-Qorti ma ghandha ebda raguni ghaliex tiddubita illi dana kien realment il-valur tad-danni sofferti mis-socjeta rikorrenti.

Ikunsidrat

Illi stabbilit li l-valur huwa kkorroborat mid-dokumentazzjoni, u stabbilit illi t-telf tal-merkanzija kien rizultat ta' nuqqas da parte tas-socjeta kjamata in kawza li ghandu jitqies bhala 'wilful misconduct' kif jistabilixxi is-CMR, wiehed irid jikkonsidra il-posizzjoni tas-socjeta intimata Jet Services Limited.

Is-socjeta Jet Services Limited tiddefendi lilha nniffisha billi tghid illi t-trailer insteraq mhux tort taghha izda tort ta' John Abela Limited, illi kienet tqabbdet minnha sabiex iggorr il-merkanzija. Filwaqt illi l-Qorti tista tifhem tali argumentazzjoni, peress illi attwalment kien rizultat ta' nuqqas grossolan da' parte tas-socjeta kjamata in kawza illi l-merkanzija insterqet, tosserva izda illi kienet is-socjeta intimata li qabbdet is-servizz tas-socjeta kjamata in kawza, u ghalhekk ma tistax tezimi ruhha mir-responsabbilta' billi tghid li ma kienx tort taghha.

La darba is-socjeta intimata ghazlet illi tqabbad lis-socjeta kjamata in kawza, kwalsiasi nuqqas tas-socjeta kjamata in kawza ghandu jitqies bhala nuqqas tas-socjeta intimata ukoll.

Konkluzjoni

Il-Qorti,

Wara illi rat u semghet il-provi prodotti quddiemha u,

Wara illi fliet fid-dettal id-dokumentazzjoni kollha esebita quddiemha,

Wara illi ghamlet il-kunsidrazzjonjiet fuq imsemmija,

Tghaddi biex taqta u tiddeciedi billi

Tichad l-eccezzjonijiet kollha tas-socjeta intimata Jet Services Limited u tas-socjeta kjamata in kawza John Abela Limited u

Tilqa t-talba attrici u ghalhekk

Tikkundanna lis-socjeta intimata Jet Services Limited u tas-socjeta John Abela Limited, in solidum bejniethom, sabiex ihallsu lis-socjeta rikorrenti is-somma ta' hamest elef, tmien mija u disgha u tmenin Euro u erbgha u sittin centezmu (€5,889.64) flimkien mal-ispejjez kollha kif mitluba fit-talba attrici u bl-imghax mit 12 ta' Dicembru 2008 sad-data tal-pagament effettiv."

Bl-appell minnha introdott s-socjeta kjamata in kawza John Abela Limited interponiet dana l-appell fejn ilmentat:

1. Illi it-terminu statutorju tal-preskrizzjoni applikabbli ghal kaz in dizamina kellu ikun dak stabbilit fl-artikolu 32 tal-Konvenzjoni Internazzjonali dwar il-Kuntratt ghall-Garr Stradali Internazzjonali ta' Merkanzija jew kif inhi ahjar maghrufa bhala is-CMR Rules u mhux l-artikolu 29 erronjament iccitat mill-Ewwel Qorti u dan meta ikkonkludiet illi l-agir tas-socjeta kjamata in kawza u tal-impjegat taghha kien jammonta ghal "wilful misconduct" kif stabbilit fil-Konvenzjoni u kwindi l-azzjoni kienet impreskrivibbli.

2. Illi l-Ewwel Qorti ma ikkunsidratx it-tieni eccezzjoni sollevata mis-socjeta kjamata in kawza u cioe' illi ma kienet tezisti l-ebda relazzjoni guridika u kuntrattwali bejnha u bejn is-socjeta attrici.

Illi jidher li m'hemm l-ebda kontestazzjoni dwar il-fatt illi l-garr tal-merkanzija in kwistjoni sar taht ir-regolamenti tal-Konvenzjoni Internazzjonali dwar il-Kuntratt ghall-Garr Stradali Internazzjonali ta'

Merkanzija (CMR), li ghandhom forza ta' ligi f'Malta permezz tal-Att dwar Garr Stradali Internazzjonali ta' Malta (Kap. 486 tal-Ligijiet ta' Malta), u kwindi illi r-relazzjoni bejn il-kontendenti hija suggetta ghall-istess Konvenzjoni.

Illi l-artikolu 3 ta' l-istess CMR jipprovdi li:-

"*For the purposes of this Convention the carrier shall be responsible for the acts of omissions of his agents and servants and of any other persons of whose services he makes use for the performance of the carriage, when such agents, servants or other persons are acting within the scope of their employment, as if such acts or omissions were his own*."

Dan qed jigi rilevat billi is-socjeta attrici kienet inkarigat lis-socjeta konvenuta Jet Services Limited bhala *freight forwarders* sabiex tikkonsenjlaha merkanzija li hija kienet akkwistat minn socjeta gewwa l-Germanja bl-isem ta' Vitakraft, liema konsenja kellha tasal Malta f'Gunju tas-sena 2008. Illi l-kumpanija konvenuta kienet issubappaltat lis-socjeta kjamata in kawza appellanti sabiex tiehu hsieb it-trasport ta' dina l-merkanzija li kellha tingarr lejn Malta permezz ta' *trailer* minn Linate gewwa Milan fl-Italja. Gara izda illi l-impjegat tas-socjeta appellanti li kien qieghed isuq dana it-*trailer*, waqaf mal-genb tat-triq mal-lejl u raqad f'liema hin it-*trailer* insteraq. Illi l-Ewwel Qorti fid-decizjoni taghha filwaqt li cahhdet l-eccezzjoni tal-preskrizzjoni ta'l-azzjoni sollevata mis-socjeta appellanti laqghet it-talbiet attrici u ikkundannat kemm lis-socjeta intimata kif ukoll lis-socjeta kjamata in kawza sabiex *in solidum* bejniethom ihallsu lis-socjeta attrici il-prezz tal-merkanzija misruqa u mhux ikkonsenjata. Illi minn dina d-decizjoni appellat biss is-socjeta kjamata in kawza John Abela Limited u dan limitatament minn dik il-parti tad-decizjoni fejn it-talba attrici giet milqugha ukoll fil-konfront taghha.

Illi fl-ewwel aggravvju imressaq ‘il quddiem minnha, s-socjeta appellanti tishaq illi l-perijodu statutorju sabiex tigi ezercitata l-azzjoni attrici kellu ikun ta’ sena u dan kif stabbilt fl-artikolu 32 tal-Konvenzjoni. Illi madanakollu dan ir-regolament ikompli jispjega illi, meta jkun hemm ‘*wilful misconduct*’ il-perjodu li fih id-danneggat ghandu jaghmel il-kawza hu ta’ tlett snin:-

“*Nevertheless, in the case of wilful misconduct, or such default as in accordance with the law of the court or tribunal siesed of the case, is considered as equivalent to wilful misconduct, the period of limitation shall be three years.*”

Illi ghalkemm is-socjeta appellanti tishaq illi l-gurisprudenza dejjem ekwiparat il-kaz ta’ *wilful misconduct* ma’ kaz ta’ frodi, madanakollu il-Qorti tara illi dana ir-regolament huwa iktar wiesgha u jaghti id-diskrezzjoni lil min hu imsejjah biex jiggudika il-kaz jiddetermina jekk l-agir tat-trasportatur jistax jekwivali ghal hekk imsejjah “*wilful misconduct*”.

Illi kienu diversi is-sentenzi tal-qrati taghna illi sahhqu illi l-kazijiet ta’serq huma kazijiet ta’ forza magguri jew ‘cas fortuit”, madanakollu jekk it-traportatur ma jehux dawk il-prekawzzjonijiet mehtiega sabiex jevita dina l-evenjenza allura irid wiegeb ghan-nuqqas tieghu li giet definita bhala negligenza grossolana li hija ekwiperata mat-terminu ta’ *wilful misconduct* uzat fir-regolament 32:

*“***Illi fil-ligi taghna dawn l-istess kuncetti – ‘force majeure’ u ‘cas fortuit’ huma kodifikati fl-artikolu 1029 tal-Kap. 16 li jipprovdi li “kull hsara li tigri b’accident jew b’forza magguri, ibatiha, fin-nuqqas ta’ disposizzjoni espressa tal-ligi li tghid il-kuntrarju, dak illi fuq il-persuna jew il-beni tieghu tigri l-hsara”. Illi fil-kazijiet ezaminati l-iskrutinju li jsir huwa dak li jigi ezaminat jekk l-att kienx precedut minn att jew ommissjoni kolpuza. Jekk ma hemm l-ebda konnessjoni bejn il-fortuwitu u l-eghmil, doluz jew kolpuz ta’ l-agent, allura issehh l-effikacja tal-kaz fortuwitu bhala**

"mezzo liberatore della responsabilita' ("Ciantar –vs- Gatt, A.I.C - 15 ta' Mejju 1926).

Illi ghal kuntrarju "quando invece si ha la violazione di un dovere, ed una volontaria ommissione di diligenza per cui non si prevedono le conseguenze della propria azione ed ommissione e si viola il diritto altrui, senza volerlo ed anche senza avvedersene, allora si ha non il caso fortuito, ma la colpa ed il quasi delitto[1]"

Illi f'kawza simili fl-ismijiet "Thomas Smith Insurance Agency Limited noe vs MD Trucking Limited et" (P.A (TM) - 18 ta' Frar 2004) gie ritenut li:-

"Skond il-gurista Jan Ramburg ("The Law of Carriage of Goods: Attempts of Harmonization" - 9E.T.L. 1974), il-bazi ta' responsabbilta' enuncjata fis-CMR mhix eskluza billi dak li ikun agixxa diligentament, izda hemm oneru akbar mixhut fuq it-trasportatur, li jrid jiehu l-mezzi kollha biex jevita kull hsara jew serq . L-awtur S. Zamara ('Carrier Liability" Am. J. of Comp Law 1975) jghid li "the courts have been reluctant to admit as a defense that the carrier has simply not been negligent. Instead, they place a heavy burden on the carrier to show specifically how the unavoidable circumstance caused the loss". Illi huwa pacifiku li l-grad ta' diligenza rikjesta f'kazijiet simili mit-trasportatur hu deskritt hekk mill-awtur Malcolm A. Clarke fil-ktieb "International Carriage of goods by Road: CMR" "There is a temptation to exonerate the carrier on this ground, if he has taken all 'reasonable steps' to avoid the event causing loss… This would sit easily with the general duty of exercising reasonable care of cargo, which, it has been suggested will be implied in a contract to carry goods by road. But the defense in article 17 (2) makes no mention of reasonable steps and such steps are probably insufficient. What the carrier must show is more akin to the plea of impossibility of performance of a contract which involves an event which renders the contract not merely more onerous but completely impossible of performance. Writers on the CMR are agreed that the event must be one which literally 'could not' be avoided by the carrier. It need not however, like the concept of force majeur in France, be unforceseeable (sic) although many events will, by the very fact that they are foreseeable, be avoidable by the carrier of whom such a high standard is required."

[1] Compunet Limited vs B.A.S. Limited deciza PA -30/06/2010

Illi interessanti dak li inghad fid-decizjoni hawn fuq iccitata Compunet Limited bs B.A.S. Limited li hija ferm rilevanti ghal kaz in dizamina:

"**Illi fil-rigward tal-Italja huwa maghruf li hemmhekk jigu rraportati hafna serqiet tant li fil-1981, il-Federazzjoni Internazzjonali tat-Trasportaturi fuq it-Triq (il-FIATA), harget "notes of guidance" biex jigu evitati serqiet f'dak ilpajjiz. Estratt minn dawn in-noti jghidu hekk:-**

"How can theft be prevented'

A. MEASURES TAKEN PRIOR TO THE START OF AN INTERNATIONAL ROAD TRANSPORT:

1. An anti-theft device must be installed in the vehicle which must be used even during the shortest absence of the driver from his vehicle.

2. Engagement of Reliable drivers' who are handed envelopes containing papers likely to be of use to the police in the case of theft. These envelopes must always remain in the possession of the drivers.

3. NEVER TO DIVULGE the nature and value of consignments to strangers.

4. To arrange, whenever possible, a CONVOY of 2 to 3 vehicles or have a driving crew of 2 persons.

B. DURING THE JOURNEY

1. Never to give a LIFT to hitchhikers.

2. Whenever the driver notices something out of the ordinary he must stop at a busy place and, if necessary, ring the police.

3. Driver must stop AT GUARDED CAR PARKS, even for short breaks (or else relay on the brotherhood of vehicle drivers during the performance of customs and other formalities). In fact in one case, it was held that a road hauler whose vehicle had been left unguarded for two hours on the customs car park at an Italian border station outside office hours and was stolen, was liable for the theft. The Court decided that the driver did not take adequate safety measures to prevent the theft of

the vehicle and could not rely on Art. 17.2. of the CMR. That the vehicle was left locked up in a customs area was not sufficient evidence of careful securing.

4. Driver must never STOP IN A REMOTE AREA.

5. Driver should refrain from travelling alone at night, even on motorways.

6. Driver must be alert in restaurants, coffee houses etc.

7. NO DELIVERY of goods, if possible, after office hours or on Friday evenings."

Illi hija l-fehma ta' din il-Qorti, anke a bazi tal-gurisprudenza citata li dawn il-linji gwida ghandhom jigu addattati b'mod generali f'kull kaz ta' trasport ta' merkanzija fuq l-art. Din il-Qorti tqis dawn il-mizuri bhala necessarji biex trasportatur ikun jista' jipprova jehles mir-responsabbilta' tant li ghandhom jitqiesu bhala sine qua non ghal kull vjagg, b'dan li n-nuqqas tat-trasportatur li jadopera xi wahda minn dawk il-mizuri, ghandha twassal ghall-konkluzjoni li t-trasportatur ikun responsabbli ghal dak li jigri. Dan ifisser li dawn il-linji gwida ghandhom jigu segwiti u adoperati f'kull kaz ta' trasport fuq l-art, u nnuqqas li jigu adoperati dawk il-mizuri ta' sigurta' ikun necessarjament ifisser li l-att tat-terzi ma jkunx jista' jitqies bhala wiehed "which literally 'could not' be avoided by the carrier".

Illi fil-kaz in ezami jirrizulta li whud minn dawn il-*guidelines* ma gewx segwiti. Dan ghaliex fl-ewwel lok is-sewwieq kien wahdu, waqqaf it-*trailer* tieghu mal-lejl u raqad f'triq pubblika u mhux f'*guarded car park* li huwa mghasses generalment b'mezzi tas-sigurta. Illi t-*trailer* in kwistjoni inoltre ma kienx mghammar b'taghmir ta' sigurta' jew xi *anti theft device*. Illi mir-rapport tal-pulizija taljana irrizulta illi it-*trailer* inqala' minn maz-ziemel minghajr ma is-sewwieq induna b'dan il-moviment li necessarjament ma kienx wiehed minimu. Illi inoltre meta interrogat is-sewwieq ma jipprovdi l-ebda raguni plawsibbli ghan-nuqqasijiet tieghu tant illi sahansitra ghaddew diversi sighat qabel ma ghamel ir-rapport, tant allura illi kien ferm difficli ghal-pulizija u l-investigaturi li jintercettaw lill-hallelin. Illi sahansitra fir-rapport tas-socjeta assikuratrici Lloyds Underwriters ta' Londra li taghha

hija agent is-socjeta assikuratrici Millenium Insurance Agency Limited li harrget il-polza a favur tas-socjeta kjamata in kawza jinghad:

"*Due to the circumstances in which the theft was committed, even if it had occurred as officially reported, in our opinion numerous acts of negligence could be detected by counterparties in the driver's behaviour. ...*

The theft, in all of its aspects, is tainted with strange connotations."

Dan ghaliex jishqu illi ma kienx hemm evidenza illi t-*trailer* kien imwahhal maz-ziemel tat-trukk, ma kienx hemm evidenza bhal kif kien hemm f'kazijiet simili illi x-xufier kien gie intossikat, irrizulta ukoll illi ix-xufier waqt li kien rieqed halla ic-cwievet fit-trukk. Kwindi ikkonkludew illi l-fatti ma sehhewx kif rappurtat mix-xufier u kien hemm diversi nuqqasijiet da parti tieghu tant illi minhabba f'dawn in-nuqqasijiet ma setghux jaghtu l-indenniz skont il-polza.

Illi ghalhekk gustament l-Ewwel Qorti wasslet ghal konkluzjoni illi kien hemm nuqqas grossolan da parti tax-xufier tas-socjeta kjamata in kawza tant illi kien minhabba f'dawn in-nuqqasijiet illi sehhet is-serqa tat-*trailer* kontenenti l-merkanzija tas-socjeta appellata. Kwindi f'din is-sitwazzjoni t-terminu statutorju ta' sena ma ghandux japplika u kwindi l-ewwel aggravvju qed jigi rigettat.

Illi fit-tieni aggravvju, is-socjeta appellanti tilmenta illi l-Ewwel Qorti naqqset milli taghti decizjoni ghar-rigward tat-tieni eccezzjoni sollevata minnha u cioe' in-nuqqas ta' relazzjoni guridika bejnha u bejn is-socjeta attrici u dan billi il-ftehim ta' subappalt milhuq bejnha u s-socjeta konvenuta hija "*res inter alios acta*" li bl-ebda mod ma ibiddel jew ihassar l-obbligu tas-socjeta konvenuta li twiegeb ghal hsara kollha ikkagjonata. Dan ukoll

billi l-istess socjeta konvenuta fil-konfront tas-socjeta attrici kienet it-trasportatur tal-merkanzija u kwindi ghandha ir-reponsabbiltajiet kollha kif imfissra fir-regolament 3 tal-Konvenzjoni hawn fuq iccitat. Illi huwa minnu dak li tilmenta is-socjeta appellanti illi l-Ewwel Qorti naqqset milli taghti decizjoni dwar dina l-eccezzjoni sollevata minnha, difiza li, li kieku giet milqugha kienet iggib maghha bhala konsegwenza ic-cahda tat-talbiet atrici fil-konfront taghha. Kwindi l-Ewwel Qorti ma setax tissorvola tali difiza.

Illi huwa minnu ukoll dak li tishaq is-socjeta appellanti billi hija ma assumiet l-ebda obbligazzjoni kontrattwali fil-konfront tas-socjeta attrici, izda dahhlet biss fi ftehim mas-socjeta konvenuta ta' subappalt ghat-trasport fuq l-art tal-merkanzija. Illi kienet is-socjeta` konvenuta it-trasportatur responsabbli ghal konsenja tal-merkanzija fil-konfront tas-socjeta attrici appellata u hija tibqa' hekk responsabbli indipendentement mill-fatt illi tkun qabdet persuna ohra ghal dak ix-xoghol jew servizz. Illi il-gurisprudenza kopjuza in materja tishaq dan. Fis-sentenza Middle Sea insurance Limited vs Express Trailers Limited deciza minn din il-Qorti kif kollegjalment komposta saret ampja referenza ghal dina l-gurisprudenza meta sahhqet illi t-trasportatur, f'dak il-kaz is-socjeta konvenuta:

"**... tassumi r-responsabbilta` ghal dak kollu li s-sub-kuntrattur jaghmel ghan-nom taghha. Debitur ta' obbligazzjoni ma jistax jipprova jehles mill-konsegwenzi tal-inadempjenza tieghu billi jwahhal f'xi hadd li qabbad biex jghinu fl-ezekuzzjoni tal-kuntratt**. **F'dan is-sens huma wkoll is-sentenzi Abela v. S. Mifsud & Sons Ltd deciza mill-Prim'Awla tal-Qorti Civili fit-23 ta' Ottubru 2001, u Gasan Mamo Insurance Agency Ltd noe v. Sea Malta Co Ltd, deciza minn din il-Qorti, Sede Inferjuri, fis-17 ta' Novembru 2004. F'dan il-kuntest, allura, din il-Qorti tara li l-istess socjeta` konvenuta kienet u baqghet responsabbli ghat-tragitt kollu minn Malta lejn l-Ingilterra, inkluz meta t-trailer kien fil-pussess ta' terzi ghall-parti mill-vjagg u, cioe`, sal-port ta' Genoa fl-Italia.**"

Fuq l-istess nota insibu deciz:

"Illi l-fatt li saret u giet accettata l-kjamata fil-kawza fuq talba tas-socjeta' appellanti ma jfissirx li s-socjeta' appellanti tista' tezumi ruhha mir-responsabilita' li kellha bhala carrier ai fini tal-Ligi. Il-kjamata fil-kawza saret biss, kif kellha ssir ghall-ekonomija tal-gudizzju u ma bidlitx ir-relazzjoni tas-socjeta' li inkarigat lis-socjeta' appellanti ghall-garr tal-merkanzija[2]."

Illi din il-Qorti kif diversament ippresjeduta ghalhekk ghaddiet sabiex iddikjarat lit-trasportaur unikament responsabbli ghad-danni subiti mill-klijent taghha. Dan ghaliex:

"Jekk hi jidhrilha ... li ghandha zzomm dan l-operatur taghha responsabbli ghan-negligenza tieghu, qua depozitarju tal-kariku, dan tista' taghmlu liberament, imma dan ma jgibx ukoll illi hi skansata minn htija fil-konfront ta' l-importatur tal-merce jew ta' l-assiguratur tieghu. Ir-rizultat *del facere* jew *del non facere* ta' l-operatur gie sew stabbilit. Rizultat li kien kontrattwalment jinteressa ir-relazzjoni interkorrenti bejn is-socjeta` appellanti u l-istess operatur. Rizultat li gab mieghu f' termini rizarcitorji dannu lit-terz li kien estraneu ghal dik l-istess relazzjoni.[3]"

Premess allura dan l-insenjament gudizzjarju u b'applikazzjoni ta' dak stipulat fir-regolament 3 tas-CMR Rules, ma hemmx dubbju illi is-socjeta kjamata fil-kawza ghandha ragun fl-aggravvju minnha interpost u dan ghaliex li kieku l-Ewwel Qorti hadet in konsiderazzjoni l-eccezzjoni minnha sollevata kienet tasal ghal konkluzjoni illi hija is-socjeta konvenuta JetServices Limited li ghandha terfa ir-responsabbilta kollha fil-konfront tas-socjeta attrici appellata billi hija biss bejniethom li tezisti rabta kontrattwali u li b'rizultat ta' inadempjenza ta' dawk l-obbligi minnha assunti, is-socjeta attrici subiet dannu. Dana b'riserva ghal kwalsiasi azzjoni spettanti lis-

[2] MiddleSea Insurance plc vs Jet Services Limited et. App.Inf 16/10/2012

[3] Gasanmamo Insurance plc vs Express Trailers Limited App Inf 17/11/2004

socjeta Jet Services Limited fil-konfront ats-socjeta appellanti in konnessjoni ma’ dina l-vertenza.

Ghal dawn il-motivi il-Qorti filwaqt li tichad l-ewwel aggravvju, tilqa’ t-tieni wiehed imressaq mis-socjeta kjamata fil-kawza appellanti u ghalhekk tirriforma is-sentenza appellata billi tirrevokaha f’dik il-parti fejn it-talba attrici giet milqugha *in solidum* fil-konfront kemm tas-socjeta konventa kif ukoll dik appellanti kjamat in kawza u ghalhekk tghaddi sabiex tichad it-talba attrici fil-konfront tas-socjeta kjamata fil-kawza, izda tilqaghha unikament fil-konfront tas-socjeta konvenuta Jet Services Limited u tikkundanna lill-istess socjeta thallas lis-socjeta attrici appellata is-somma ta’ €5889.64, bl-imghax dekoribbli mit-12 ta’ Dicembru 2008.

L-ispejjez kollha kemm dawk tal-prim’istanza kif ukoll tal-presenti istanza ghandhom jigu sopportati mis-socjeta Jet Services Limited.

< Sentenza Finali >

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