



SMALL CLAIMS TRIBUNAL
(EUROPEAN SMALL CLAIMS PROCEDURE)

ADJUDICATOR
ADV. DR. KEVIN CAMILLERI XUEREB

Sitting of Wednesday, 5th of May, 2021

Claim Number: **12 / 2020**

CET LEISURE LIMITED
[C-47829]

VERSUS

GUEST SERVICES WORLDWIDE LIMITED (UK)
[Co.Reg.No. 8786791]

The Tribunal,

Having seen the Claim Form (Form A) filed by plaintiff company on the 5th of June, 2020 whereby the same, in line with Regulation (EC) no. 861/2007, requested the Tribunal to rescind the contract concluded by the parties and to order defendant company to refund the amount of €1,199.00c paid to it by plaintiff company for the reasons explained under Section 8.1 of the said Claim Form. Plaintiff demanded the costs of the proceedings as per Section 7.3.1 but failed to indicate whether it is requesting interest on the costs, as per Section 7.5 of the Claim Form. However, plaintiff indicated that it is not claiming statutory interest as per Section 7.4 of the Claim Form. The reasons supporting plaintiff company's claim, in its own words, are these:

CET Leisure Ltd ("CET") is a tour organising agency in Malta running the website: <http://myislandtoursmalta.com/>. CET signed an agreement dated 9th March 2020 with Guest Services Worldwide Limited ("Guest Services") Co.Reg.No.8786791 (herewith attached) who contracted to issue a publication to be distributed in 2 local hotels (AC The Palance and Victoria Hotel).

Mr. Constantino Mifsud, the owner and Director of CET, met Jason Knight, the salesperson, on the 5th March 2020, who informed him that in 2019, the hotels had 71,000 visitors, and were thus expecting similar numbers in 2020 (see email from Jason Knight dated 17th March 2020).

Mr Mifsud was told to confirm his acceptance to be included in the publication by latest 6th March 2020, which the client confirmed.

On the 7th March 2020, Malta had its first COVID-19 patient. Gradually, the government started taking measures in view of the global pandemic, which included a travel ban on all incoming commercial flights to Malta – which at the time of writing is still in force. This ban has effectively ceased all operations in the tourism and hospitality sector, including that of CET.

CET immediately reached out to the company to seek cancellation and refund, given that the very purpose of the contract could not be achieved. The contract was based on forecasts based on the 2019 number of visitors (71,000) to the hotels. CET appreciates that numbers may fluctuate, but the current situation has brought the entire industry at a standstill which means that the underlying obligation of the agreement cannot be attained in the foreseeable future.

The company refused to cancel the agreement, insisting that the publication is still going to happen, when the pandemic ends. In the last correspondence received on the 15 April 2020, Ash Wolf stated that “[...] *the pandemic will end. This, we have every indication that it should be in the coming weeks and a clearer picture will emerge hopefully in May and we will be able to update clients further*” – respectfully, to date not only the pandemic is still ongoing, but CET received no further update or information from Guest Services.

Guest Services keep stating that once the maps are delivered, the term will extend. However, the object of the contract was not for a printing deliverable. If that would have been the case, CET could have easily engaged a printing press to do the job. The object of the contract at the time of its conclusion was for a publication to be distributed in two hotels, which are operating in normal market conditions (as shown on page 1 of the contract).

Tourism may take years to recover from this pandemic. Even if flights resume or hotels re-open, we do not know if people would be willing to travel in the immediate future. CET, which is a small operation of only two people, has currently no revenues, and the stance taken by this company in refusing to cancel the contract and refund the money is adding pressure to an already difficult situation. It is unreasonable to hold on to consideration paid for a service for an indeterminate amount of time, without any prospect of it ever attaining the intended purpose.

Without prejudice to the above, the contract includes a number of unfair terms, by stating that it may not be non-cancelled, attributing all discretion to the company in respect of cancellation but none to my client, and even stating that time is not of the essence for the company to satisfy its obligation for publication. This was a standard form agreement, where CET had no option to negotiate its terms.

For the above reason, CET is asking the Tribunal to rescind the contract and order Guest Services to refund the amount paid, including legal costs.

Duly notified with the relative acts of the proceedings, the defendant company filed its response (Form C) in terms of Article 5(3) and/or 5(6) of Regulation (EC) no. 861/2007, wherein it explained as follows:

- A contract was entered into by the claimant on the 9th March 2020 to feature within a map publication to be produced for both the Palace and the Victoria Hotels in Malta. Please refer to Exhibit 1.
- The sum for the advertising in both properties amounted to €1199 including an artwork charge of €199.
- The publication was expected to be produced within 16 weeks of the date of signature (commencement date) as per term 2.2 of the agreement.
- Notwithstanding the above, as per term 6.6 of the agreement, the company has 12 months from the expected publication (29th June 2020) due to any reasons outside the companies control to publish the product.
- Please also refer to term 4.2.4 of the agreement.
- Due to the Covid-19 outbreak the company is relying on the terms 2.2, 6.6, 4.2.4 and as such the contract has not been breached.
- Since the initiation of the contract on the 9th March 2020, payment was made after the meeting with the representative on that date along with a subsequent Deal Check procedure on the 11th March 2020. The full payment was made via Bank Transfer and received by the defendant on 16th March 2020.
- On the 13th March the production department emailed the claimant requesting artwork via a Welcome Email which was responded to with a request to see example adverts. Please refer to Exhibit 2.
- On the 16th March the claimant contacted the representative with concerns over Covid-19 and what our response would be due to the reduction in Tourism. The representative confirmed to the claimant on the 17th of March 2020 that the company would be extending the advertising term as a gesture of good will to cover any loss of potential clientele. However, the claimant did not approve of the reply and the file was passed to Customer Services. Please refer to Exhibit 3.
- The claimant makes reference to a number of maps to be printed. To confirm, the contractual obligation is to feature the claimants business within the maps produced for the Palace and Victoria hotels for a period of 12 months as stipulated in the agreement, not until a specific number of products have been utilized during the term.
- The claimant had emailed Alex Dovey, Michael Holmes and Ash World in relation to cancelling the agreement. The claimant was advised on numerous occasions that the agreement was not subject to cancellation, that we would be extending the term and that the initial term before any extension would not commence until publication arrived on property. Please refer to Exhibit 4.
- The claimant has not supplied any artwork despite numerous requests by our artwork team and subsequently the artwork has been created in accordance with term 1.5 of the agreement. The claimant has had the proof of the advert sent via email and approval or amendment has not been forthcoming. Please refer to Exhibit 5.
- The hotel was approved the publication to go to print and on the date of the 10th July we have emailed the claimant stipulating the artwork will be going to print in its current form unless any amendments were received within a set period of time as the publication is imminently going to press. We received a read receipt confirming that the claimant received and read the email by our production team. Please refer to Exhibit 6.
- Paul Carney called the claimant on their mobile to offer a final opportunity for the claimant to amend their artwork before the publication is printed. The claimant advised that the

address on the advert we had produced was incorrect and advised us to check their website for the new address.

- The claimants amended artwork with his updated address has been sent. We have asked them to confirm that the updated address is correct, no response has been received. Please refer to Exhibit 7.

To conclude

The global pandemic of Covid 9 is a very unfortunate situation that has affected us all. In this particular case as with all our clients we cannot cancel an agreement due to the pandemic. We sympathize with the claimant and have agreed to extend the term of the agreement as a good will gesture along with all the current sponsors of the publication. We have addressed the concerns of the claimant, but we cannot cancel the business to business contract signed as we are in a position to fulfil all obligations under the same. The hotel has approved the maps and are looking forward to receiving them and issuing them to guests. AS no contractual terms have been breached, it is our requested that the claimant claims be dismissed.

The Tribunal;

Took cognizance of all the acts and documents relating to the case and having noted that both the plaintiff (*vide* section 9.1 of Form A at fol. 6) and also the defendant (*vide* section 3 of Form C at fol. 29) required no oral hearing in the present proceedings.

The Tribunal considers:

The facts of this case are, in short, as follows: Plaintiff company, a Maltese company whose business involves organising tours for tourists, contracted defendant company around the beginning on March, 2020 to include it in a publication which was to be distributed in two local hotels, after having been informed by it that the hotels in question had had 71,000 visitors in 2019 and were expecting similar numbers in 2020. The day after plaintiff company confirmed its desire to be included in this publication, that is, on the 7th of March, 2020, Malta discovered its first Covid-19 patient, which led to the incremental introduction of measures aimed at curbing the spread of the infectious disease which eventually included a travel ban and the closure of the airport. This led plaintiff company to seek the cancellation of the contract and request a refund of the €1,199 fee it had already paid, claiming that it was clear that due to the effects of the pandemic on tourism the object of the contract could not be fulfilled. Defendant company refused this request, claiming that cancellation was neither allowed by the contract nor necessary, since it would be extending the advertising term to cover any loss of potential clientele. No solution or compromise was ever found by the parties, which led plaintiff company to file the current proceedings.

The Tribunal observes that its competence – considered to be a “*presupposto processuale*” – is a matter which may be raised *ex officio* by the Tribunal itself.¹ It is indisputable that the competence with which this Tribunal is vested is strictly limited, and this by means of Article 3 of Chapter 380 of the Laws of Malta. The same article expressly states that this Tribunal is only competent to determine money claims.

In the present case, plaintiff company is seeking to rescind a contract that it entered into with defendant company, arguing that due to the current pandemic (Coronavirus Covid-19) there is no reasonable prospect of the contract ever attaining the intended purpose and that in any case the contract includes a number of unfair terms and was a standard form agreement.

The Tribunal is aware that Section 7 of the Application Form provides that a claim made under the European Small Claims Procedure does not necessarily need to be a money claim. However, as stated above, the law which establishes this Tribunal restricts its adjudicating authority and its intrinsic competence solely to money claims and makes no exception to this limitation. Moreover, in line with Art. 19 of Regulation (EC) no. 861/2007, “*Subject to the provisions of this Regulation, the European Small Claims Procedure shall be governed by the procedural law of the Member State in which the procedure is conducted.*” This signifies that the procedural rules and principles applicable to this case are those found under Maltese domestic law since Malta is “*the Member State in which the procedure is conducted.*”²

Under Maltese law, demands such as those made by plaintiff company may only be determined by the ordinary courts, and certainly not by this Tribunal. It is this Tribunal’s considered opinion that in order for non-monetary claims to be determined by this Tribunal, legislative intervention is required in order to create an exception to the limitation imposed upon this Tribunal by the legislator by means of Article 3 of Chapter 380 of the Laws of Malta. Without such intervention, it cannot determine plaintiff’s company demands, since by doing so it would clearly be usurping the role of the legislator. As stated in the local judgment *in re Neg. John Coleiro ne v. Onor. Dr. Giorgio Borg Olivier ne et* (First Hall, Civil Court, 22 ta’ Gunju, 1957), “*Il giudice deve applicare la disposizione quand’anche gli sembrasse ingiusta. “Dura sed lex”. Il giudice è istituito per giudicare secondo la legge. Permettere al giudice di non applicare la legge quando la trova iniqua sarebbe sostituirla colla coscienza del giudice e sostituire l’arbitrio*

¹ See on this matter *in re Jaqueline Rasenberg v. AM Language Studio* (European Small Claims Procedure, 11th June, 2020).

² See on this particular point *in re (Ivan Blazek v. Personal Exchange International Ltd* (European Small Claims Procedure, 21st March, 2018).

di lui alla volontà del legislatore (persone I, §236).” In the same decision there is cited the author **Foramiti**, who had written thus: *“i sudditi hanno l’obbligo di soffrire gli inconvenienti che possono risultare da alcune leggi ingiuste, piuttosto che esporre alla ribellazione lo stato ad essere rovesciato (Enciclopedia Legale, Vol. III, voce “Leggi”, pag.238, col.2a).”*³

THEREFORE, in the light of the above considerations and for the above-mentioned reasons, this Tribunal decides the present case by declaring that it does not have the required competence *ratione materiæ* to determine the present case and consequently takes no further cognisance of plaintiff company’s demands.

All the expenses connected with these proceedings are to be borne by plaintiff company.

Finally, the Tribunal orders that a copy of this judgment is served upon the parties in terms of Article 13 of Regulation (EC) no. 861/2007.

ft. AVV. DR. KEVIN CAMILLERI XUEREB

Gudikatur

ft. ADRIAN PACE

Deputat Registratur

³ See on this particular point *in re Awtorità għat-Trasport f’Malta v. Khadar Qaasim Abdi* (Small Claims Tribunal, 6th November, 2017).