MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF
PHILIP SCIBERRAS

Seduta tas-6 ta' Gunju, 2008

Appell Civili Numru. 33/2007

Pirella Supermarkets Limited

vs

SISA Malta Limited

Il-Qorti,

Fil-25 ta' Settembru, 2007, l-Arbitru fic-Centru Malti ta' l-Arbitragg ippronunzja s-segwenti decizjoni fl-ismijiet premessi:-

> **"A. Preliminary**
>
> By notice of claim filed on the 15th January 2007, the claimant Pirella Supermarkets Limited, declared that a dispute had arisen with the respondent Sisa Malta Limited due to the non-payment of Lm47,000 in rent arrears and vat. The relief claimed was (a) the payment of the rent

arrears, (b) the eviction of the tenant from the leased premises and (c) the recovery of the legal costs of representation. The claimant submitted a copy of the lease agreement dated 12th November 2005.

2. The claimant further submitted a statement of claim on the 5th February 2007. In brief the facts as alleged by the claimant are the following:

(a) The breach of contract consisted in the failure to pay the rent on the due date, which in terms of the lease agreement (Section 3.01) was due on the 14th November and 14th May of each year.

(b) In terms of Article IX of the lease agreement (Section 9.01), the failure by the tenant to make any payment of rent promptly when due, if such failure continues for a period of 30 days after notice in writing, constitutes a material default and breach of the lease.

(c) The claimant demanded the payment of rent by letter dated 23rd November 2006 (Dok PS1) for the six month period from 13th November 2006 up to the 12th May 2007 in the amount of Lm40,000 plus vat.

3. The respondents in rebuttal alleged that the rent due had been set off against the sum of Lm83,843 due by the claimant to the respondent for stock sold and delivered by the respondent to the claimant.

4. The claimant objected to this set off on the grounds that the lease agreement in Section 3.01 stated that: "Save for the deductions or set offs expressly contemplated by the Sale and Purchase of Debts Agreement and the Sale and Purchase of Stock Agreement, any rent payable in terms of

this agreement shall be paid without demand, deduction or set off."

5. The claimant is further alleging that the respondent is also in breach of Section 6.01 of the lease agreement. This clause stipulates that the tenant shall at its sole expense at all times keep the leased premises, both interior and exterior, in a good state of ordinary repair and maintenance. The claimant is alleging that the central part of the car park is in a bad state of repair and the tiles close to the playing area are broken. The automatic main door is not working and the light bulbs are not being changed.

6. The claimant is also alleging that the respondent has carried out alterations to the leased premises without having obtained the claimant's consent in breach of Section 5.01 of the lease agreement. The claimant refers to alterations in the cafeteria, stores and office area.

7. The claimant declares that in terms of Section 9.01(c) these breaches, if not corrected within 30 days from notice in writing, shall also constitute a valid ground for termination of the contract. Such notice was given by judicial letter filed on the 27th December 2006. A copy is attached as Dok PS2.

8. The respondent filed a statement of defence in March 2007. The facts as alleged by the respondent are, in brief:

(a) The claimant had approached the respondent with a view to respondent taking over its supermarket business which according to the respondent was facing financial difficulties.

(b) In the course of the negotiations, the claimant informed the respondent that suppliers of the Zabbar supermarket were

refusing to supply the supermarket as the claimant was not settling long overdue debts due to them thereby prejudicing the viability of the claimant's going concern.

(c) The parties therefore agreed that as a stop gap measure and until such time as negotiations between the parties were concluded, respondent would pay for supplies made to the claimant and invoice the claimant accordingly with 30 to 90 days credit depending on the supplier.

(d) Up to the date of taking over of the business, the respondent paid Lm65,164.53 to suppliers against which the sum of Lm18,645 was credited to the claimant as commission by suppliers which credit was actually due to the respondent.

(e) The final transaction between the parties incorporated (a) the lease agreement for the supermarket in Zabbar, (b) the obligation by the respondent to pay the claimant debts to suppliers of approximately Lm600,000 and (c) the sale by the claimant to the respondent of existing stock and the taking over of the employees.

(f) The respondent alleges that following the signing of the above agreements, it repeatedly requested meetings with the claimant to sort out various pending issues including the repayment of the amount due by the claimant to the respondent for supplies made in the negotiations stage as indicated above.

(g) As the claimant refused to discuss this issue, the respondent set off the amount of Lm47,200 due in rent plus vat for the 14th November 2006 instalment against the

amount due to it for supplies made in the negotiations stage.

(h) The respondent claims that the term "without set off in Section 3.01 of the lease agreement was intended and restricted to cover set offs arising within the ambit of the transaction and could not be extended to cover other agreements between the parties. The agreement concerning the payment for supplies made in the negotiations stage was extraneous to the taking over of the business and was not consequently regulated by the lease agreement.

(i) The respondent had paid Lm94,400 on concluding the transaction in respect of one year's rent for the period 14th May 2006 to the 13th November 2006 and it had also paid approximately Lm600,000 to the claimant's creditors. The respondent had never intended to further affect its liquidity by another Lm84,000 and its only remedy was to set off against the rent, given that it could not garnishee monies in the hands of any third party once the amount was already in its hands and it could not seize the monies in the hands of the claimant once, in terms of the lease agreement, the rent is paid to a third party (Carmen Farrugia) and not to the claimant.

(i) The respondent has the right in terms of the lease agreement to deduct a portion of the rent of the leased premises over a period of time. In the event the lease is terminated, the claimant is to pay any balance due over ten years, which obligation is very weakly secured and this is a risk for the respondent.

(k) The respondent finally denies any allegations that it has made structural alterations in the leased premises.

9. The respondent filed the following documents with its Statement of Defence:

Doc A: Statement of amounts due by claimant to respondent;

Doc B: sale and Purchase of Debts Agreement dated 12th November 2006.

B. Evidence

1. Apart from the documentary evidence indicated above, the claimant submitted the following affidavits:

Carmen Farrugia

This witness, a director of the claimant company, gives the background to the takeover of claimant's business by the respondent with effect from the 13th November 2005 and confirms that the rent for the period 13th November 2006 to 12th May 2007[1] was not paid by the respondent. The witness also stated that the respondent had effected structural alterations without the consent of the claimant and had failed to keep the leased premises in a good state of repair. The witness claimed that during recent meetings with suppliers, she had been informed that the respondent was not paying its suppliers on time. On the basis of this information, the witness as a representative of the claimant company, asked the claimant's lawyer to write to the respondent[2] demanding payment of rent and on the 27th December 2006 a judicial letter was

[1] Should be 14th November 2006 to 13th May 2006 in terms of the lease agreement.
[2] Doc dated 23rd November

also filed in connection with the alleged structural alterations[3].

Subsequently, in the words of the witness: *Since the default in the payment of rent persisted and we were aware of the dire position of Sisa's business operation, we had no option but to issue a garnishee order which was filed on the 15th January 2007.*

Upon cross-examination by Dr Robert Attard & Dr Lorraine Conti, Carmen Farrugia confirmed that what she meant by structural changes was the closure of the play area and the butcher shop and the consequent damage to the tiling and other fixtures. She further specified that the allegation regarding the demolition of a wall referred to a partition and not to a masonry wall.

Dr Mark Sammut

This witness is a business consultant to the claimant appointed in November 2004. He was involved with the negotiations leading to the take-over of the business. He recalls that during the negotiations, the claimant has insisted on displaying SISA branded products on the shelves so as to acquaint the present clientele and facilitate the transition to the SISA brand.

The witness alleges that the respondent failed to present the Total Yearly Turnover for the initial twelve month period by the end of December 2006 as stipulated in the lease agreement and that there had been an over 60% decrease in turnover when compared to the period when the claimant was operating the supermarket. He claims that this decrease came as no surprise considering the neglected state of the said supermarket. He believes that this lack of

[3] Doc

performance was the real cause for the lack of payment of rent "*as also witnessed in the considerable LOSS presented in their audited accounts for the past years."*

Joseph Portelli

This witness is the father to Carmen Farrugia and a director of the claimant company. He had set up the supermarket in 1992 and stated that since then sales had increased every year. He also gave the background to the taking over of the supermarket by the respondent.

He claims that the respondent is not respecting the terms of the lease agreement and that lease should be terminated and the premises returned to the claimant. He alleges that the breaches in the lease agreement consist in (a) the arbitrary closure of the play area; (b) the closure of the butcher shop in the premises; (c) the general state of neglect in the premises and the failure to maintain and make good damaged fittings and fixture; (d) the lack of choice for customers; (e) the failure to submit audited accounts and (f) the failure to pay the rent due in November 2006.

Joseph Portelli was subsequently cross-examined by Dr Robert Attard for the respondent on the 25th April 2007. He confirmed that the respondent did not demolish any part of the leased premises.

Simon Mifsud

This witness is a director of the respondent company. In his affidavit, Doc SM, confirmed on the 10th April 2007, he too gives the background to the take-over of the business, the premises and the employees. He states that it was agreed at the start of negotiations that the respondent would supply goods to the claimant and that the claimant will pay for these supplies from day to day sales at

the tills. This strategy was adopted as suppliers were refusing to supply goods to the claimant due to payment issues. The witness claims that Carmen Farrugia, who was managing the supermarket in that period, had instead paid other suppliers from the takings at the tills.

He states that the amount due to the respondent for supplies were never intended to form part of the amount owed to creditors in terms of the Sale and Purchase of Debts Agreement dated 12th November 2005. The balance due to the respondent in this regard is Lm65,164.53. This amount was never contested by the claimant.

He further states that in agreeing to pay the rent without deductions or set-offs, apart from those mentioned in Section 3.01 of the lease agreement, the parties were referring and limiting this to the transactions regarding the taking-over of the supermarket business. It did not extend to extraneous transactions such as where, as in this case, the respondent was acting as a supplier and not a tenant.

The witness stated that the respondent paid Lm553,153.56 to creditors as indicated in the list exhibited as Doc SM3. On the 14th November 2006 the respondent set off the amount due in rent against part of amount due to it as a supplier. The claimant however contested this set-off and applied for the issue of a garnishee order against the respondent which then had to deposit the amount due in rent in Court, meaning that in effect the respondent has paid the rent twice for the same period.

As to maintenance, repairs and structural alterations in the premises, the witness categorically states that absolutely no structural alterations were carried out. The respondent simply removed an aluminum partition which is not

a structural alteration. The respondent has also carried out necessary works on the drainage and electricity systems and has had problems with the sliding door "since day one". He claims to have had this fixed on each occasion.

Joseph Sacco

This witness is a director of the respondent company responsible for finance. His affidavit, confirmed on the 10th April 2007, is marked as Doc JS.

The witness refers to the discrepancies in the stock take carried out by each party on the 12th November 2006. The amount reached by the claimant was approximately Lm45,000 more than the amount reached by the respondent. Various attempts were made by the respondent to resolve this difference but the claimant gave the impression it was not interested and used delaying tactics.

The witness then dwells on the lease agreement confirming that the parties had agreed that the first year's rent was to paid in advance whereas 40% of the rent on future installments was to be deducted as repayment of the amount paid by the respondent to the claimant's creditors as indicated in the list Doc B with respondent's statement of defence.

The witness further explained the arrangement whereby, in the negotiations stage, the respondent ordered supplies to stock the supermarket as suppliers were refusing to sell on credit to the claimant. The respondent then invoiced the claimant following the generation of delivery orders, countersigned by a representative of the claimant company. This procedure was adopted during the months of October and

November 2005 and the total amount invoice was Lm83,809.53.

The witness stresses that the claimant was reluctant to hold meeting to discuss pending issues following the take-over. When they eventually met Carmen Farrugia claimed she did not have the invoices for the supplies delivered in the negotiation stages and no headway was made.

He also mentions the issue relating to non-payment of water and electricity invoices by the claimant and the threat of suspension by the provider.

He confirms that the rent payment due on the 14th November 2006 was set off against part of the amount due by the claimant to the respondent leaving a balance in the respondent's favour of Lm36,609.53.

Alexander Zammit

This witness[4] recalls the period when the respondent was supplying goods to the claimant during the negotiations stage. He explains the procedure adopted so as not to alert the suppliers. In fact goods were first delivered to the respondents stores in Qormi and then to the supermarket in Zabbar. This procedure went on for around three weeks when the imminent takeover became public knowledge and supplies were delivered directly to the supermarket. He confirms that each delivery was checked by the claimant's storekeeper Daisy Mizzi and once accepted as correct, an invoice was issued.

Patricia Ellul Sullivan

[4] Affidavit Doc AZ confirmed 10th April 2007

This witness[5] also confirms that towards the last week of October 2005, the respondent ordered goods for delivery to claimant's supermarket in Zabbar. They were originally delivered to the respondent's stores in Qormi and then to the supermarket in Zabbar. The total invoice value wa Lm83,809.53.

Maruska Attard

This witness[6] was appointed as the Zabbar supermarket manager on takeover by the respondent in November 2005.

She confirms that the only changes to the premises made by the respondent were the removal of the aluminium partitions opposite the fruit and vegetable section and in a room upstairs that divided the room in two.

As to maintenance of the premises, she confirms that on takeover she noticed that (a) there was a large pothole in the parking area, which was filled by the respondent; (b) the tiles in the office upstairs were in a bad state, some were broken and others were lifted; (c) rainwater seeped through the roof and (d) the shelving was in a bad state and broken in most parts. These were all problems that existed prior to the takeover.

Subsequent to the takeover, an electricity pole was removed as it was dangerous and a passing car hit the centre strip in the car park, denting it slightly.

Saviour Gauci

[5] Affidavit Doc PS confirmed 10th April 2007
[6] Affidavit Doc MA confirmed on the 25th April 2007

This witness[7] is employed in the maintenance department of S. Mifsud & Sons Limited. This company has a maintenance agreement with the respondent company to maintain all the supermarkets operated by the respondent. The witness enumerates the maintenance problems encountered on takeover, such as the state of the cargo lift, the cracks in the roof, the absence of a connection with the main sewers for the toilet behind the children's play area. He confirms that no structural alterations were carried out by the respondent since the takeover and the only changes were the removal of two aluminium partitions.

Francesco Maraschi

This witness[8] was a director with the respondent company between February 2004 and August 2006. He explains the background to the take-over of the supermarket and the system whereby the respondent supplied stock to the claimant during the negotiations to ensure that the venture was a stable going concern at moment of take-over. This was done as suppliers were refusing to give any more credit to the claimant. The witness confirms that the amount due remained unpaid throughout the period he acted as director. He confirms that agreement was also reached on passing on any cash bonuses received from suppliers at the end of each year as a percentage of turnover. This arrangement was completely independent of the negotiations leading to the take-over and in fact no mention of it is made in the agreements, but it was always clear that the claimant was to pay for the supplies.

As to the actual take-over, the witness explains that the respondent had agreed to pay up to

[7] Affidavit Dok SG confirmed 25th April 2007
[8] Affidavit Doc FM in the Italian language

Lm600,000 to creditors for supplies made in 2004 and 2005. The amount paid was to be deducted gradually from the rent as a fixed percentage.

Agreement had also been reached on the acquisition of stock in the supermarket, but the payment to the respondent for supplies made during the negotiations was not regulated by the agreements as this was an entirely independent arrangement with agreed credit terms.

Following the take-over, the respondent had several issues with the claimant regarding the stock inventory, the payments to be made to the creditors and the repayment to the respondent for supplies delivered prior to take-over.

Several unsuccessful attempts were made to contact the claimant as represented by Carmen Farrugia, in order to meet and discuss these pending issues. The witness states that to the best of his knowledge, Carmen Farrugia has never contested the invoices issued by the respondent to the claimant.

The witness finally declares that on take-over, the respondent closed down the children's play area and the cafeteria, there being no obligation in the lease agreement to retain these facilities, but the respondent has not effected any structural modifications to the premises.

C. Submissions

Claimant:

1. The claimant submits that the respondent failed to pay the rent instalment due on the 14th November 2006 and the 14th May 2007 despite being called upon to pay in virtue of letters dated 23rd November 2006 and 14th May 2007. The respondent has not contested the amount but

claims to have set off the rent against amounts allegedly owed to them by the claimant. They have not filed a counter-claim or otherwise initiated any judicial/arbitral proceedings.

2. The claimant quotes Section 3.01 of the lease agreement which states that:

"Save for the deduction or set offs expressly contemplated by the Sale and Purchase of Debts Agreement and the Sale and Purchase of Stock Agreement any rent payable in terms of this agreement shall be paid without demand, deduction or set off."

3. Section 6.2 of the Sale and Purchase of Debts Agreement in fact authorises the respondent *"to withhold and set off from the rent due to it pursuant to the lease agreement an amount equivalent to 40% of each rent payment (exclusive of VAT) due to Pirella from Sisa in terms of the Lease Agreement, commencing from the second lease year up to such time as the Outstanding Amount is paid in full."*

4. The claimant holds that the respondent cannot even justify the set off in virtue of Article 1197 of the Civil Code as set off only operates at law between two debts which are both for a liquidated amount and exigible. The claimant further states that the amount claimed by the respondents is contested, as some invoices are in fact paid and many are not accompanied by delivery notes or refer to deliveries made after the 14th November 2005, on which date the respondent had taken over the operation of the supermarket.

5. The claimant ends its submissions by quoting an extract from the judgement delivered on the 7th October 2004 in the names *Francis Paris et vs Maltacom plc* in which the Court stated that the terms of a contract between the parties have to be

respected and cannot be modified by other principles, based on equity or otherwise and the Court cannot substitute its terms for those already agreed to by the parties, in line with the principle *pacta sund servanda.*

Respondent:

6. The respondent states the agreement whereby the respondent was to sell various supplies to the claimant prior to the commencement of the lease was "verbal, was reached prior to the first supplies being made, and was concluded totally independently of the successful conclusion or otherwise of negotiations" that eventually led to the lease of the supermarket by the claimant to the respondent. The total amount due to the respondent by the claimant in this regard was Lm83,809.53 and the claimant deducted the sum of Lm47,200 from the rent due for the 14th November 2006 instalment as partial set off against the Lm83,809.53 allegedly due by the claimant to the respondent.

7. The respondent points out that although the claimant has asked in these proceedings for termination of the lease due to an express resolutive condition in that the respondent is in breach of the obligation to pay rent on the due date, it has during the course of these proceedings demanded rent for the instalment due on the 14th May 2007. Hence, it is still recognising the respondent as its tenant and the lease agreement as still running. This is incompatible with a demand for termination of the lease. The respondent has quoted judgements in support of this position.

8. The respondent further submits that it is not possible for the claimant to state that the respondent has failed to pay the rent for the 14th

November 2006 instalment. The respondent has credited the amount due as rent in the claimant's favour and this is equivalent to payment. The amount allegedly due by the claimant to the respondent has consequently been reduced to Lm36,608.53. What is in contestation is whether the respondent is legally entitled to effect such set-off and this is an entirely different issue to non-payment of rent. It is the method of payment which is in dispute and not the payment itself.

9. The respondent further submits that once the amount allegedly due by the claimant to the respondent is not mentioned and regulated in the lease agreement and other agreements entered into by the parties, the intention of the parties was that this was to be settled independently of such agreements and without any particular credit terms but out of sales generated prior to the take-over of the supermarket. This was because the amount would still be due to the respondent if the negotiations leading to the lease had failed and it therefore did not make sense to combine the two issues.

10. The respondent also submits that the wording "rent is payable without deduction or set off ....." in Clause 3.01.1 of the lease agreement cannot apply across the board for all transactions concluded between the parties and should be interpreted to cover only situations where the respondent in its capacity as tenant has a claim against the claimant as lessor arising from the lease agreement itself, such as a claim for refund of monies spent on extraordinary repairs. The respondent also hints that a creditor cannot renounce to set-off as this is a public policy matter in that the institute helps to reduce further judicial proceedings.

11. The respondent also quotes Art. 1010 of the Civil Code which states that: *... however general*

may be the terms in which a contract is worded, it shall only tend to things which the parties appear to have intended to deal with.

12. It also quotes a judgement *(Frank Camilleri vs Philip Morgan - Vol XXXI-1-385)* to the effect that in case of doubt in the interpretation of clauses in a lease agreement, the benefit should be given to the tenant who would otherwise suffer serious consequences

13. The respondent then goes on to consider claimant's allegation to the effect that amount set off by the respondent was not *certain, liquidated and due* as required by law and quotes various judgements regarding the consequences of non-payment of rent and the extent of the right of the lessor to demand termination of the lease agreement for the unexpired period and consequent eviction of the tenant. It also dwells on the good faith of the respondent in honouring the terms of the contract and quotes Baudrey Lacantinerie to the effect that set off is an institute based on equity which economises on proceedings and ensures that one party is not the victim of the insolvency of the other bringing a legal *equality of arms* between the parties. The respondent makes it clear that it has grave and founded doubts on the solvency of the claimant and feels that set off is the only way it can ensure it is paid for the supplies made prior to take-over.

14. The respondent concludes its submissions by making reference to the claimant's allegation that the respondent has effected unauthorised structural alterations to the leased premises. It states that the claimant has failed to substantiate this claim.

D. Considerations

1. The arbitrator has examined all the evidence, documentary and otherwise, submitted by the parties and has considered all the submissions made.

2. It is felt that the final paragraph to Clause 3.01 of the 12th November 2005 lease agreement is clear and leaves no room for interpretation. The parties have expressly agreed that deductions or set off against the rent is only allowed in terms of (a) the Sale and Purchase of Debts Agreement and (b) the Sale and Purchase of Stock Agreement. The amount allegedly due by the claimant to the respondent is not due in terms of any of these two agreements and cannot therefore be set off. The respondent's submission that the prohibition of set off must be interpreted as referring only to obligations arising from the lease agreement is not tenable as there is no indication to this effect in the clause. The parties have agreed to accord a special status to the obligation to pay rent and have restricted the possibility of set off which would otherwise have applied at law.[9] This special status cannot be unilaterally disregarded by the respondent and failing any evidence to the effect that the parties have altered the terms of the lease agreement in accordance with the procedure outlined in Clause 12.05[10], must be respected by the parties. This clause also stipulates that the lease agreement contains all agreements of the parties with respect to any matter mentioned herein and no prior agreements or understandings pertaining to any such matter shall be effective. Moreover, the parties have not opted to authorise the arbitrator to decide the issue on the basis of equity.

[9] Qorti ta' l-Appell 3.9.93 Marianna Spiteri vs Joseph Spiteri: it-tpacija tapplika *ipso jure* u d-djun jinqatlu wiehed bl-iehor sa fejn ikunu indaqs - basta t-tnejn likwidi u jistghu jintalbu.

[10] *This lease may be modified in writing only, signed by the parties at the time of modification.*

3. The arbitrator consequently has no power to decide the issue on the basis of equity or to examine the good faith or determine the solvency or otherwise of the claimant. It is therefore not necessary to establish to what extent the amount claimed by the respondent for provision of supplies prior to the lease is in fact certain, liquidated or due in the absence of a counter-claim[11].

4. The arbitrator therefore holds that it is not possible in terms of the lease agreement for the respondent to set-off the rent due of Lm40,000 and Lm7,200 VAT for the instalment due on the 14th November 2006 against sums due by the claimant to the respondent.

5. The claimant has also demanded the termination of the lease agreement due to alleged breaches by the claimant in the terms and conditions. The alleged breaches consist in the non-payment of rent for the instalment due on the 14th November 2007 as well as the failure to keep the premises in a good state of ordinary repair and maintenance and the carrying out of structural repairs without the consent of the lessor.

6. The arbitrator has reflected on the issue of non-payment of rent and holds that that the respondent's action in claiming payment by set-off does not constitute an outright refusal or inability to pay, but rather the exercise of a right otherwise applicable at law were it not for the provisions of Clause 3.01 of the Lease Agreement. As the issue is, in the words of the respondent, about the mode of payment rather than the payment itself, the arbitrator considers that any doubt in the interpretation of Clause 9.01(b) of the Lease Agreement, which stipulates that the failure by the

[11] Qorti tal-Kummerc 24.2.1995: when the credit to be set off is not liquidated, the defendant can file a counter claim to nullify the claim of the plaintiff.

tenant to pay the rent, for a period over 30 days from notice in writing, constitutes a material default, should go in favour of the respondent as tenant. Consequently, the arbitrator determines that as there is no definite material default in terms of Clause 9.01(b), the remedy available to the claimant of terminating the lease for the unexpired period in terms of Clause 9.03 of the Lease Agreement does not apply and cannot be granted.

7. The claimant has also based its demand for termination of the lease agreement and eviction of the tenant on the failure to keep the premises in a good state of repair and maintenance and the carrying out of structural alterations without the consent of the lessor. These are both material defaults in terms of Clause 9.02 of the Lease Agreement as they are conditions of the lease as per Clause 5.01 and Clause 6.01.

8. The arbitrator has examined the evidence produced by the claimant to substantiate these allegations, in particular that given by Carmen Farrugia and Joseph Portelli. Clearly, the closure of the play area and the butcher shop as well as the removal of a partition cannot be considered structural alterations. As to lack of maintenance, the claimant has failed to produce any concrete evidence whereas the evidence given by Maruska Attard and Saviour Gauci[12] is, in the arbitrator's opinion, credible and it appears that the premises were not in perfect condition on take-over.

9. The arbitrator consequently rejects the claimant's demand for a declaration of breach of contract and the consequent termination of the lease and the eviction of the tenant from the leased premises in that (a) the non-payment of rent for the instalment due 14th November 2006

[12] Produced by the respondent

was an issue relating to the interpretation of the contract in the that the respondent paid by set off when such set off was not permissible in terms of the lease agreement and (b) there is no proof of lack of maintenance or that structural alterations have been carried out by the respondent.

E. Determination

1. For the above reasons, the arbitrator resolves the issue between the parties by declaring that the instalment of rent due on the 14th November 2006 has not been validly paid by the respondent and determines that the respondent is to pay the sum of Lm40,000 plus Lm7,200 Value Added Tax to the claimant in settlement of such rent without any deduction or set-off.

2. Finally, the arbitrator determines the issue of costs of these proceedings by declaring that the fees due to the Malta Arbitration Centre and to the arbitrator are to be shared equally by the parties whereas each party is to bear its own costs for legal representation.**"**

L-appell tas-socjeta` rikorrenti Pirella Supermarkets Ltd fil-kontestazzjoni tal-lodo ta' l-Arbitru hu fis-sens illi dan naqas milli japplika l-ligi kontrattwali maqbula konsenswalment bejn il-partijiet u wasal ghal konkluzjonijiet *extra petita*. Hi ghalhekk talbet ir-riforma ta' dak il-lodo f'dik il-parti tieghu fejn l-Arbitru ddecieda li ma jakkoljix it-talba taghha ta' l-izgumbrament tas-socjeta` appellata mill-fond mikri lilha;

Kontra dan il-gravam is-socjeta` appellata wiegbet fis-sens infraskritt:-

(1) L-appell interpost ghandu jitqies irritu u null ghaliex il-ftehim bejn il-partijiet jeskludi d-dritt ta' l-appell.

Is-socjeta` appellata tiddezumi dan mit-test tal-klawsola 12.0 tal-kuntratt lokatizju tat-12 ta' Novembru, 2005 f'kombinazzjoni mal-vot tal-ligi, ex-Artikolu 70A (1) (a) ta' l-Att dwar l-Arbitragg (Kapitolu 387);

(2) L-appell huwa wkoll improponibbli ghar-raguni li ma jikkontjeni ebda punt ta' ligi;

(3) Ir-*ratio decidendi* tal-lodo hi konformi ghall-gurisprudenza affermata. F' dan il-kuntest tikkontendi illi ghalkemm il-lodo ddetermina li t-tpacija vantata minnha ma setghetx issir ma kienx ifisser li effettivament ma sarx il-hlas izda biss li dak il-hlas sar b' mod errat;

(4) Mit-termini tad-disposizzjonijiet varji ta' l-Att dwar l-Arbitragg, il-Qorti ghandha thares b'mod restrittiv lejn appelli li jsiru ghat-twarrib tal-lodo;

Premessi l-aggravju sottopost u t-twegibiet ghalih, wisq logikament, il-Qorti hi fid-dover li qabel kollox tinvesti l-ewwel pregudizzjali sollevata mis-socjeta` appellata, in kwantu jekk din tigi akkolta mhux il-kaz li l-Qorti tinoltra ruhha fl-istharrig tal-motiv ta' aggravju u tar-risposti oppositorji l-ohra ghalih;

Il-kuntratt ta' lokazzjoni tat-12 ta' Novembru, 2005 testwalment jipprovdi fi klawsola 12.09 tieghu illi "*all disputes arising in connection with this Agreement shall be finally settled by arbitration by the the Malta Arbitration Centre, which shall apply the provisions of Part IV of the Arbitration Act 1996, and the Arbitration Rules of the Malta Arbitration Centre.*" Huwa evidenti illi din il-klawsola kompromissorja ghandha biss funzjoni processwali in kwantu tindividwa it-tribunal li quddiemu jridu jigu aggudikati l-kontroversji insorti bejn il-partijiet fil-qafas tal-kuntratt;

Issa s-socjeta` appellata tinterpreta din l-istess klawsola fis-sens illi gjaladarba jinghad illi l-kontroversji ghandhom

jigu “*finally settled by arbitration*”, *ergo*, u *quod erat demonstrandum*, il-partijiet b’hekk ftehmu espressament illi ma hemmx dritt ghall-appell mill-arbitragg. Biex issahhah din il-fehma taghha s-socjeta` appellata tirrikorri ghad-dispost ta’ l-Artikolu 70A (1) li jakkorda dritt ta’ appell fuq punt ta’ ligi li jitnissel minn decizjoni finali kemm-il darba “l-partijiet ma eskludewx espressament dan id-dritt ta’ l-appell fil-ftehim ta’ arbitragg jew mod iehor bil-miktub” [subpara (a)];

Huwa mill-ewwel distingwibbli mit-test ta’ dan is-subparagrafu illi l-enfasi li taghmel il-ligi hi fuq il-kelma “espressament”. Li jfisser lil-eskluzjoni trid tkun wahda esplicita. Mhux bizzejjed, allura, li tkun tacita jew, altrimenti, estratta *per impliciter* minn deduzzjonijiet li mat-termini precizi u l-ispirtu tal-klawsola kompromissorja ma ghandhom ebda konnessjoni. A kuntrarju ta’ dak ritenut mis-socjeta` appellata, il-Qorti hi tal-fehma illi minn imkien ma jirrizulta minn dawn l-istess termini li l-kontraenti ftehmu dwar rinunzja jew eskluzjoni espressa tad-dritt ta’ l-appell. U la dan huwa hekk, ma jidherx li huwa lecitu li s-socjeta` appellanti tigi privata minn dan id-dritt li titlob ir-revizjoni tal-lodo, anke fil-parametri limitati li jippreciza l-Artikolu 70A (1) ta’ l-Att. Il-pregudizzjali qeghda ghalhekk tigi skartata;

Bit-tieni pregudizzjali s-socjeta` appellata tavvanza l-proposizzjoni illi l-appell huwa improponibbli jew inammissibbli ghaliex ma jmissx “punt ta’ ligi”. Ghall-ezami ta’ din il-pregudizzjali jokkorri jigi ezaminat u verifikat jekk il-kontestazzjoni formulata mis-socjeta` appellanti tikkorrispondix ghal dik il-kritika limitata fuq il-punt ta’ ligi fl-ambitu ta’ l-Artikolu 70A (1). Naturalment, f’dan l-ezercizzju l-Qorti trid mill-bidunett taghmilha cara illi ma jispettax lilha ri-ezami tal-fatti tal-kaz in kwantu l-valutazzjoni dwarhom hi istituzzjonalment rizervata lill-Arbitru u mhux ukoll lilha. Is-sindakabilita` taghha hija wahda ristretta ghal kontroll dwar jekk l-Arbitru vvjolax xi regola jew principju tad-dritt, li jrid ikun ukoll ben identifikat

u specifikat fit-tifsira tieghu mill-appellanti skond l-Artikolu 70B (1) ta' l-Att in referenza ghall-materja lilu sottoposta;

Skond is-socjeta` appellanti, bl-aggravju minnha denunzjat, il-vjolazzjoni tal-"punt ta' ligi" hi postulata fis-sens illi l-Arbitru ma rrispettax l-osservanza ta' dak statwit bejn il-partijiet fi Klawsola 3.01 tal-kuntratt lokativ u li kien jiddisponi illi "*any rent payable in terms of this Agreement shall be paid without demand, deduction or set off*". Ma' din il-klawsola s-socjeta` appellanti tikkombacja dik l-ohra enumerata 9.03, krejattiva ta' "*material default or breach*" mill-inkliwilin u allura ta' l-isfratt tieghu ghal kaz li dan jonqos milli puntwalment ihallas l-iskadenza tal-kera meta dovuta (klawsola 9.01). In partikulari, is-socjeta` appellanti ticcensura lill-Arbitru billi dan, skond hi, holoq kawzali gdida mhix stipulata meta rraguna illi n-nuqqas ta' hlas ma kienx jikkostitwixxi "*outright refusal or inability to pay*";

Jibda biex jigi osservat in linea preliminari illi, indubbjament, is-soluzzjoni tal-kwestjoni li l-Arbitru kellu quddiemu kienet tiddependi mill-pattijiet li saru bejn il-partijiet fil-kuntratt ta' lokazzjoni. Bhala aspett ta' ligi generali skond l-Artikolu 992 (1) tal-Kodici Civili, il-kuntratt maghmul skond il-ligi ghandu sahha ta' ligi bejn il-kontraenti tieghu. Dan il-karattru enfatiku li taghmel id-disposizzjoni jesprimi l-kuncett illi dak il-kuntratt ma jistax, in linea ta' principju, jithassar bil-volonta unilaterali ta' xi parti. In effetti, l-istess disposizzjoni, fis-subartikolu (2) taghha, tissokta tipprovdi illi l-kuntratti ma jistghux jigu mhassra hlief bil-kunsens ta' xulxin. Naturalment, la l-kuntratt hu ligi hu mistenni mbaghad li l-obbligazzjonijiet li jiskaturixxu minnu jigu osservati u adempiti bil-bwona fede, skond ix-xorta taghhom, bl-ekwita, bl-uzu jew bil-ligi (Artikolu 993 Kodici Civili). Fil-fattispeci, dan jimporta illi s-socjeta` appellata kienet fl-obbligu li thallas il-kera meta dovuta fl-iskadenza taghha. F'dan ma hemm xejn gdid, ghax wara kollox, tali jirrientra f'dak l-obbligu primarju ta' kull kerrej li jistipula l-Artikolu 1554 (b) tal-Kodici Civili. Li jfisser, allura, illi n-nuqqas ta' hlas tal-kera fl-iskadenza

taghha jikkostitwixxi in se vjolazzjoni, anke gravi, ta' l-obbligazzjoni fundamentali tal-kuntratt;

Premessi dawn il-konsiderazzjonijiet generali u preliminari in meritu ta' l-effetti tal-kuntratt, ma jistax ma jigix aggunt, ukoll b' mod generali, illi l-ligi komuni taht l-istitut tal-kiri fil-Kodici Civili tipprovdi, mill-anqas f'zewg disposizzjonijiet ta' dan il-Kodici [Artikoli 1541 (2) u 1543] meta l-kerrej hu abilitat li jzomm il-kera maghluq biex ikopri l-ispiza tat-tiswijiet li jkun ghamel fil-fond mikri. Minn ebda disposizzjoni ohra taht dan l-istess istitut ma jirrizulta, ad ezempju, illi l-inkwilin jista' jzomm ghandu l-kera dovut minhabba pretiza da parti tieghu ta' xi kompensazzjoni. Ta' l-istess fehma hi wkoll certa gurisprudenza tal-Qrati taghna, kif illustrat fis-sentenzi fl-ismijiet "**A.I.C. Luigi Sansone -vs- Maria Giuseppina Philips**", Appell, 28 ta' Mejju, 1948 u "**Joseph Borg *nomine* -vs- Edgar Galea**", Appell, 7 ta' Ottubru, 1996. Fit-tnejn l-espressjoni ta' fehma hi fis-sens illi l-kerrej ma jistax *marte proprio* jippersisti li ma jhallasx il-kera ghaliex minn naha tieghu jippretendi li hu kreditur tal-lokatur u hu ghalhekk intitolat ghat-tpacija. Fil-kaz in ezami, addirittura, din it-tpacija hi imbaghad espressament vjetata;

Maghdud dan, ma tridx lanqas tisfuggi dik il-gurisprudenza l-ohra ben konsolidata li tafferma, f'materja ta' morozita, illi "l-ligi mhix intiza biex taghti pretest lil-lokatur biex jirrexindi l-kuntratt tal-kirja, imma biss li tissalvagwardjah fil-hlas tal-kera. U ghalhekk meta jkun hemm cirkustanzi li jiggustifikaw l-atteggjament ta' l-inkwilin fin-nuqqas tieghu li josserva l-obbligi tieghu skond il-ligi, huwa ma jiddekadix mid-dirtt tieghu biex tigi mgedda lilu l-lokazzjoni". Ara "**Frank Camilleri *nomine* -vs- Wing Commander Philip Morgan, R.A.F.**", Appell, 28 ta' Jannar, 1949, "**Baruni Lino Testaferrata Bonici *et* -vs- Emily Moakes**", Appell, 14 ta' Novembru, 1955 u "**Giuseppe Chetcuti Bonavita -vs- Joseph Naudi**", Appell, 22 ta' Ottubru, 1956, fost hafna ohrajn. Dejjem, in meritu, issokta jigi ritenut illi "trattandosi, bhal fil-kaz ta' kondizzjoni espressament imposta mil-ligi ghall-finijiet ta'

dekadenza minn dritt importanti li l-ligi in generali saret biex tipprotegi, wiehed ghandu jkun ferm rigoruz fl-interpretazzjoni u fl-applikazzjoni taghha. Anke jekk, kif qalet din il-Qorti fis-sentenza riporatata a **Vol. XXXI P I p 110**, hemm dubju fl-interpretazzjoni … dan id-dubju ghandu jmur favur il-kerrej, li minhabba dik l-interpretazzjoni l-ohra jista' jigi jitlef il-pussess tal-fond." ("**Anthony Calleja *et* -vs- Carmelo Debono**", Appell, 10 ta' Frar, 1961);

Issa hu veru li dawn id-decizjonijiet kollha kienu jirrigwardaw il-punti minnhom dibattuti mill-ottika tal-ligi specjali kif stabbilita fil-Kapitolu 69, izda din il-Qorti ma tarax ghaliex l-enuncjazzjonijiet fihom ma ghandhomx jircievu favur fil-kwadru ta' rapport kontrattwali espress. Kull kaz ghandu l-fattispeci partikulari tieghu u ma tkunx gustizzja u lanqas ekwita jekk wiehed jonqos milli jistharreg l-ezistenza ta' xi gustifikazzjoni oggettiva u ragonevoli anke fl-ambitu ta' pattijiet vinkolanti. Fil-kaz in ispecje jidher li hu dan l-istharrig li gie kondott mill-Arbitru u, filwaqt li dan iddetermina li s-socjeta` appellata ma kienetx legalment korretta li tippretendi tpacija, ic-cirkustanzi tal-kaz dejjem fuq l-evalwazzjoni tieghu tal-provi, iddettawlu illi ma ghandux legittimament jigi impost fuqha l-estrem ultimu ta' l-izgumbrament;

Taqbel jew ma taqbelx ma' din il-konkluzjoni, din il-Qorti ma tistax, lanqas jekk tkun trid, tissindika dan l-apprezzament tal-materjal probatorju ghax il-kontroll rizervat lilha ma jistax jirrigwarda l-konvinciment ta' l-Arbitru fuq ir-rilevanza probatorja ta' l-elementi indizzjarji, kif dawn jemergu mill-kwadru generali u c-cirkustanzi pekuljari tal-kaz;

Il-fatt, imbaghad, ta' l-ilment ta' xi extra-petizzjoni fil-konkluzjoni raggunta mill-Arbitru lanqas tista' titqies sostenibbli. Jekk l-Arbitru deherlu li kellu jiddetermina li l-atteggjament tas-socjeta` appellata ma kellux jikkwalifika

bhala "*outright refusal or inability to pay*" dan ma jigix li b'daqshekk holoq xi kawzali gdida;

Jinsab insenjat illi "hemm l-*extra petita* jew *ultra petita* meta tigi sostitwita ghall-azzjoni jew ghad-domanda avanzata mill-attur azzjoni jew domanda ohra li minnu ma gietx proposta, jew meta d-decizjoni tmur aktar 'l hemm mid-domanda jew azzjoni avanzata" ("**Professur Joseph Galea *nomine* -vs- Dr. Antonio Bonnici M.D. *et***", Appell Civili, 6 ta' Novembru 1961. Ara wkoll "**John Aquilina -vs- Gioavnni Coleiro *nomine***", Appell Kummercjali, 27 ta' Gunju, 1949). Fil-kaz taht konsiderazzjoni ma nsibu xejn minn dan. L-ebda pronunzjament fuq xi kwestjoni estraneja ghall-oggett tal-gudizzju jew oltre l-limitu tal-pretensjoni jew ta' l-eccezzjoni. L-Arbitru, difatti, ma jidherx li tbieghed la mill-*causa petendi* u lanqas mill-*petitum* tat-*terms of remit*. Jekk b'dak il-kumment tieghu rrileva li ma kienetx tezisti l-effikacja kostitutiva tal-pretensjoni tas-socjeta` appellanti tendenti ghall-izgumbrament tas-socjeta` appellata, dan ma jfisserx li b' hekk induca ruhu f'extra-petizzjoni imma, sempliciment, li hu adotta fid-decizjoni tieghu konsiderazzjoni ta' fatt u ta' dritt diversament minn dik prospettata lilu mis-socjeta` appellanti. B' dan il-mod ma jistax jinghad li hu wessa', arbitrarjament, l-oggett tal-gudizzju tieghu, anke ghaliex l-argoment divers minnu artikolat fis-sentenza jinsab sew korrelatat mad-domanda ta' l-izgumbrament post lilu. Taht dan il-profil il-Qorti ma tistax allura taccetta s-sottomissjoni tas-socjeta` appellanti illi l-Arbitru inkorra f'vizzju ta' extra-petizzjoni.

Ghal dawn il-motivi kollha l-appell qed jigi michud u d-decizjoni ta' l-Arbitru, ikkonfermata, bl-ispejjez kontra s-socjeta` appellanti.

< Sentenza Finali >

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