



QORTI TA' L-APPELL

**ONOR. IMHALLEF
PHILIP SCIBERRAS**

Seduta tat-12 ta' Gunju, 2009

Appell Civili Numru. 37/2007

John Gambina

vs

Realhouse Property Shops Ltd

Il-Qorti,

Fil-31 ta' Ottubru, 2007, l-Arbitru fic-Centru Malti ta' l-Arbitragg ippronunzja s-segwenti decizjoni fl-ismijiet premessi:-

“Summary Of Statement Of Claim

Claimant owns four apartments in a block of seven apartments constructed over a plot of land acquired by him by means of a public deed dated 5th August 1976. Three of the apartments were sold to third parties and four remain claimant's property and are rented out. Condition 5 of the

deed of sale stipulates that the purchaser (claimant) was responsible for one tenth of the maintenance costs of the garden and pool area. In accordance with this obligation claimant feels that his share of the expenses should be at a rate of four sevenths of one tenth or four over seventy of the total expense.

Claimant furthermore states that:

1. the contents of a public deed override any decision taken by the condomini of the condominium;
2. the maintenance costs should be apportioned as laid out in section 11 of the Condominium Act.

Summary Of Statement Of Defence

Respondent states that the Riviera Garden Estate is composed of twenty five units built around a common area within which exist a garden and pool accessible to all residents of the estate.

Respondent furthermore states that on the 27th June 2005 a meeting of the condominus was held in accordance with clause 22 of the Condominium Act at which eighteen of the twenty-five condomini attended. This meeting approved a statute for the formation of the association as well as rules relating to the use of the common parts and pool expenses.

Respondent states that the Pool Expenses Rules approved by the general meeting held on the 27th June 2005 state that the maintenance and running costs of the pool area be shared equally by all the owners of the twenty-five units which form the estate.

Respondent also contends that claimant was time barred from referring the matter to arbitration

since the stipulated period of thirty days from the date of the associations' decision had lapsed.

Respondent also argues that since all residents enjoy the common areas in equal measure, all should share the expense equally irrespective of their various ownership rights.

Arbitrator's Considerations

After having taken cognizance of the documentation submitted and heard the testimony at the hearing held on the 6th July 2007, the arbitrator submits the following considerations:

1. Claimant's acquisition of property by public deed was subject to a condition regarding payment of maintenance costs for the common areas;
2. Claimant developed his property and constructed seven apartments;
3. Claimant's property forms part of the Riviera Gardens Estate and shares the common areas including garden and pool with the remaining owners;
4. Claimant states that his share of the common areas costs should reflect his obligations in terms of the contract of purchase;
5. Respondents administer the common areas of the Riviera Gardens Estate on behalf of the Riviera Gardens Owners Association, which association was formed at a general meeting of the condominis on the 27th June 2005 in accordance with the provisions of Clause 22 of the Condominium Act;
6. Respondents are insisting that the association approved the Pool Expenses Rules at a meeting

held in July 2006 and that all owners should share the costs equally irrespective of their property rights since the use and enjoyment of the common parts is available to all irrespective of ownership shares;

7. Claimant was not in agreement with the Pool Expense Rules and objected; Respondent states that the objection is time barred as it was made later than the thirty days stipulated in Clause 23 (2) of the Condominium Act.

Award

The Arbitrator's decisions regarding the two points in contention in this dispute shall be as set out hereunder:

(a) Time Barring Of Claimant's Objections To Pool Expenses Rules.

Claimant's response to the apportionment of costs as approved in the Pool Expenses Rules was immediate and well within the thirty day period; Clause 23(2) does not specify in which format an objection be made, claimant's objection by e-mail was received by the President of the association¹. Claimant's response was not time barred, moreover according to Clause 11 (5) Claimant had the right to refer the matter to arbitration.

(b) Maintenance Costs Of Common Parts.

The question of equal use and enjoyment of the common parts has no bearing whatsoever on the matter as different parts of the properties forming part of this estate may have been subjected to different obligations regarding the maintenance costs of the common areas. The fact that all owners have a right to use the facilities in equal

¹ Vide page 16 of the transcript of the hearing held on the 6th July 2007

measure does not automatically imply that they have to share the costs equally unless they voluntarily agree to do so.

Claimant's obligation regarding the costs of the common parts was stipulated in the public deed dated 5th August 1976; these obligations could only be changed by another public deed and in the absence of such a change the obligations are still in force. Clause 11(1) of the Condominium Act specifically states that common area costs are to be divided between the condomini in proportion to the value of the property of each condominus saving any contrary agreement. Claimant did not give up his rights re the maintenance costs of the common parts as stipulated in his contract of purchase, therefore these rights still apply and the Riviera Gardens Owners Association have to take cognizance of such rights and obligations and amend the Pool Expenses Rules to reflect and respect Claimant's share of the common parts costs as set out in the public deed aforementioned².

(c) Costs Of The Dispute.

All costs incurred in this arbitration shall be to the account of Respondents.”

Is-socjeta` Realhouse Property Shops Ltd tikkontesta l-lodo ta' l-Arbitru nominat mic-Centru Malti ta' l-Arbitragg bl-ilmenti proposti f'dawn it-termini:-

(1) L-Arbitru ghamel interpretazzjoni errata ta' l-ipotesi tal-ligi dettata fl-Artikolu 23 ta' l-Att dwar il-Condominia;

(2) Similment, l-Arbitru ma interpretax tajjeb u skond id-dispost ta' l-Artikolu 11 ta' l-Att imsemmi l-

² Clause 23 (3) of the Condominium Act

kwestjoni lilu devoluta dwar ir-ripartizzjoni ta' l-ispejjez kondominjali;

In linea preliminari fit-twegiba tieghu l-appellat jissollewa l-pregudizzjali ta' l-insostenibilita` ta' l-appell ai termini ta' l-Artikolu 70A (3) ta' l-Att dwar l-Arbitragg. In partikolari, l-appellat jirreferi ghall-inciz (c) ta' l-istess artikolu biex jafferma l-assunt tieghu illi d-decizjoni ta' l-Arbitru dwar il-punt ta' ligi ma hijiex *prima facie* miftuha ghal dubju serju;

B'kontemplazzjoni ta' din il-pregudizzjali dwar l-ammissibilita` ta' l-appell mil-lodo ta' l-Arbitru, hu certament kompitu ta' din il-Qorti li taccerta l-fattispeci legali kostitutivi li fformaw il-bazi tad-decizjoni appellata, kif ukoll il-korrispondenza bejn il-fatti storici verifikati u dawk il-fattispeci legali. Dan, naturalment, ghall-iskop li l-Qorti tindividwa u tistabilixxi jekk tabilhaqq l-Arbitru inkorriex fi zbalji jew vjolazzjonijiet tad-dritt regolanti l-materja sottomessa lilu. Ovvjament il-kontroll li jokkorri taghmel il-Qorti ma jistax jirrigwarda l-konvinciment ta' l-Arbitru fuq ir-rilevanzi probatorji ta' l-elementi indizzjarji imma biss, u b'mod esklussiv, dwar il-kongruwenza ta' dak l-istess konvinciment mill-punto di vista tal-logika u tar-rispett tal-principji tad-dritt li jghoddu ghall-materja kontrovertita;

Koncizament rigwardata l-kwestjoni mill-ottika ta' l-Artikolu 23 (2) ta' l-Att, l-Arbitru ddelibera illi l-obbjezzjoni ta' l-appellat ghad-decizjoni tal-laqgha kondominjali saret fit-terminu preskrittiv statutorju stabbilit mil-ligi. F'kull kaz, gie mill-istess Arbitru affermat illi l-materja lilu devoluta kienet tirrientra fil-parametri tas-subinciz (5) ta' l-Artikolu 11 ta' l-Att. Ma' dan ir-regonament is-socjeta` appellanti ma taqbelx u, in kwantu jikkoncerna l-Artikolu 23 (2) kombinat mas-subinciz (1) tieghu, tirribatti illi l-ligi mkien ma tghid illi s-semplici oggezzjoni hija bizzejjed imma tesigi li l-kondominus dissidenti ghandu jirreferi l-kwestjoni ghall-arbitragg fi zmien 30 jum mid-data li d-decizjoni tal-laqgha tkun giet lilu notifikata. L-istess socjeta` appellanti

tissokta telabora illi, gjaladarba fil-kaz prezenti d-decizjoni fil-laqgha ttiehdet fis-26 ta' Lulju 2006, u l-appellat ghamel ir-referenza ghall-arbitragg fl-1 ta' Marzu, 2007, il-kwestjoni giet b'hekk preskritta. Fost kummenti ohra, l-appellat jikkonfuta dan l-argument tas-socjeta` appellanti bil-kontenzjoni illi l-ilment minnu mressaq lill-Arbitru ma kienx jaqa' taht id-dispost ta' l-Artikolu 23 izda kien wiehed annoverat fil-qafas ta' l-Artikolu 11 (5) ta' l-Att;

Huwa importanti ghar-risoluzzjoni ta' din il-vertenza u in kwantu jikkoncerna l-ewwel aggravju illi jigi qabel xejn riprodott l-Artikolu 23 (1) ta' l-Att li jipprovdi illi "meta condominium ma jkunx jaqbel ma' decizjoni tal-laqgha minhabba f'li d-decizjoni tmur kontra l-ligi jew ir-regolamenti tal-condominium jew tkun irragonevoli jew oppressiva, huwa jista' jirreferi l-kwestjoni ghall-arbitragg". Huwa mill-ewwel evidenti illi, apparti xi zidiet li fih, dan id-dispost tal-ligi specjali taghna [Artikolu 23 (1) u (2)] fuq il-Condominia huwa modellat fuq l-Artikolu 1137 tal-Kodici Civili Taljan. Jinzel mid-dixxiplina normattiva taht dan l-artikolu illi jistghu jingiebu ghall-arbitragg mill-kondominus dissenzjenti kwestjonijiet konducivi ghall-annullabilita` tad-decizjonijiet mehuda mil-laqgha, li ma tistax tkun hlief dik generali li jsemmi l-Artikolu 22 precedenti, u li jkunu f'kuntrast mal-ligi jew ir-regolamenti jew xort'ohra irragonevoli u oppressivi. Ir-rapport li taghmel id-dottrina u l-kazistika tal-Qorti ta' Kassazzjoni Taljana f'dan il-kuntest, ghandu x'aktarx konnessjoni ma' vjolazzjonijiet formali. Ad ezempju, *"per la convocazione dei partecipanti, o che richiedono qualificate maggioranze per formare la volontà dell'organo collegiale, in relazione all'oggetto della delibera da approvare"* (**Cassazione, 2 ta' Ottubru, 2000, Numru 13013**). Hekk ukoll, is-sentenza ta' l-istess Qorti ta' Kassazzjoni tippreciza illi *"sono invece semplicemente annullabili – e come tali possono essere impugnate solo a istanza della minoranza condominiale dissenziente o assente – le deliberazioni affette da vizi formali, e cioè prese in violazione di prescrizioni legali, convenzionali o regolamentari attinenti al procedimento di convocazione o di informazione dell'assemblea. Sono parimenti annullabili le deliberazioni"*

affette da eccesso di potere e quelle viziate da incompetenza, che invadono cioè il campo riservato all'amministratore, le quali devono essere impugnate a pena di decadenza, nel termine di trenta giorni decorrenti dalla data della deliberazione per i dissenzienti e dalla data di comunicazione per gli assenti.” (Cassazione, 14 ta' Marzu, 1972 Numru 740);

Ippezizat dan, mill-mod ta' kif inhi fformulata t-talba ta' l-appellat fin-Notice of Arbitration huwa eskluż, fil-fehma tal-Qorti, illi din hi allaccjata ma' impunjattiva ghal xi wahda mir-ragunijiet dettati mill-Artikolu 23, kif ahjar imfisser fil-kazistika tal-Qorti tal-Kassazzjoni Taljana. Huwa veru li fin-Nota ta' sottomissjonijiet tieghu quddiem l-Arbitru l-appellat jipproponi *inter alia* illi n-notifikazzjoni ta' l-avviz tal-laqgha – dik tat-12 ta' Lulju, 2006 – kellha titqies “*null and void*” in kwantu mhux konformi ghad-dispost ta' l-Artikolu 22. Dan pero` jaghmlu biex iwiegeb ghal certa difiza tas-socejta` appellanti u mhux ghaliex ried jattakka il-mod tal-konvokazzjoni tal-laqgha. Il-vera mira tieghu ma kienetx din izda, fuq l-interpretazzjoni tal-Qorti kif tinzel min-Notice of Arbitration, dik li “*the manner in which maintenance fees of the condominium are apportioned by the respondents is not fair or legal*”. Din il-formulazzjoni tqarreb il-kwestjoni lejn il-hsieb tal-legislatur meta ddetta illi “meta condominium iqis li s-sehem tieghu ghar-rigward ta' dawk l-ispejjez ma jkunx wiehed gust fil-qies tal-valur tad-drittijiet li ghandu bhala wiehed mis-sidien tal-condominium, huwa jista' jirreferi l-kwestjoni ghall-arbitragg” (Artikolu 11, subinciz 5 ta' l-Att). F'din il-perspettiva l-ewwel aggravju ma jistax jitqies tenibbli;

Ghas-sostenn tat-tieni motiv ta' aggravju s-socjeta` appellanti tissottometti illi l-ligi tikkontempla fl-Artikolu 11 (1) illi dak minnha stabbilit jista' jigi varjat anke jekk tinsisti illi dan irid isir bi ftehim. Tghid ukoll illi dak stipulat fil-kuntratt ta' akkwist ta' l-appellat (5 ta' Awissu, 1976) ma setax japplika ghal qagħda li kienet tezisti fl-2007 ghaliex l-Att dwar il-Condominia ma kienx għadu dahal fis-sehh u ma kienx hemm Assocjazzjoni kondominjali. L-appellat

ma jikkondividix dawn is-sottomissjonijiet u, anzi jikkontendi, illi l-ispejjez ma setghux jinqassmu fil-manjiera ssuggerita fl-Artikolu 11 (1) peress li kien jezisti dak il-“fthem kuntrarju” kostitwit mill-kuntratt ta' l-akkwist tieghu fuq imsemmi li jistipula illi “l-kompratur jobbliga ruhu li jhallas decima parti mill-ispejjez tal-manutenzjoni tal-gnien u swimming pool” u tali spitulazzjoni kienet timpera fuq kwalunkwe decizjoni tal-condomini;

Premessi l-veduti ta' naha u ta' ohra, il-konsiderazzjonijiet li din il-Qorti jidhrilha opportun li ghandha taghmel in mertu ghall-kontenut u ghall-portata ta' l-Artikolu 11 ta' l-Att huma dawn li gejjin:-

(1) B'mod generali l-Artiklu 11 jiddixxiplina s-suddivizjoni interna bejn is-singoli kondomini fir-rigward ta' l-ispejjez relattivi ghall-partijiet komuni. Proprju fl-ewwel subinciz tieghu jistabilixxi l-principju illi l-ispejjez necessitati ghall-preservazzjoni, manutenzjoni, tiswijiet ordinarji u straordinarji jinqassmu bejn il-kondomini “fi proporzjoni ghall-valur tal-proprjeta` ta' kull kondominus”. L-imsemmi principju jidher li jinsorgi in virtu ta' l-effett ta' l-attivitaa` gestjonali kompjuta fil-konkret u b'mod indistint bit-“tgawdija tal-partijiet komuni”, “l-ghoti ta' servizz fl-interess komuni” jew “ghal kull tibdil li jsir bi qbil”, u, mhux ukoll, b'effett ta' xi approvazzjoni preventiva da parti ta' l-assocjazzjoni kondominjali relattiva ghall-ispejjez u r-ripartizzjoni tagghom;

(2) L-uzu ta' l-espressjoni “salv dejjem kull fthem kuntrarju” f'dan l-ewwel subinciz ifisser illi l-kriterju legali surreferit jista' jigi derogat. Tqum hawn il-problematika jekk din id-deroga setghetx issir *ab origine* kif predispost mill-proprjetarju originarju u recepit fil-kuntratt ta' akkwist, kif hekk kontez mill-appellat, jew permezz ta' xi regolament kondominjali successiv ta' natura konvenzjonali approvat mill-kondomini. Approvazzjoni din li, skond l-ispirtu u l-kliem tal-ligi, kellha wkoll tkun wahda unanima;

Il-Qorti tapprezza illi din il-problematika mhix ta' facili soluzzjoni izda la jkollha tiddeciedi ser tittanta, skond l-ahjar dehen taghha, toffri r-riflessjonijiet taghha fir-rigward;

Fl-assenza ta' regoli kondominjali precizi fl-Ordinament guridiku ta' pajjizna, il-kontroversji kondominjali kienu f'certu zmien storiku regolati bid-disposizzjonijiet rilevanti tal-Komunjoni tal-Beni taht il-Kodici Civili. Ezemplikativ ta' dan li nghad hi s-sentenza tal-Qorti ta' l-Appell, sede Inferjuri, tat-12 ta' Dicembru, 1936 in re” “**Antonia Azzopardi -vs- Emmanuele Abela et'**”. Issa meta sar il-kuntratt ta' akkwist mill-appellat fl-1976, l-Att relativ dwar il-Condominia ma kienx ghadu dahal in vigore, u allura fil-hsieb tal-Qorti l-intendiment tal-kontraenti bil-klawsola hamsa tal-kuntratt kien mahsub biex jovvja ghal qagħda prezuntiva li tinzel mid-dispost ta' l-Artikolu 490 (1) u (2) tal-Kodici Civili, b'mod li jiffissaw il-partecipazzjoni tal-kompratur fl-ispiza tal-manutenzjoni tal-gnien u tas-*swimming pool*. Tant dan huwa hekk illi fl-istess patt hamsa l-kontraenti pprovdew ukoll illi l-kompratur kellu jassocja ruhu ma' Owner's Association;

Issa bl-introduzzjoni tal-Kapitolu 398 dawk id-disposizzjonijiet “Fuq il-Komunjoni ta' l-Beni” fit-Titolu V tat-Taqsima I tat-Tieni Ktieb tal-Kodici Civili gew, ex-Artikolu 4 ta' l-Att, rezi inapplikabbli għall-proprjeta` li tkun *pro indiviso* fil-partijiet komuni tal-condominium u dan ma jistax hlief ifisser illi f'rapport kondominjali dawk l-istess disposizzjonijiet ma baqghux imperanti, u l-appellat, allura almenu *ex-lege*, ma jistax jikkampa ruhu fuq il-beneficcjju għalih li jitnisslu minnhom, għaladarba hu wkoll, illum, komponenti mill-Assocjazzjoni tal-kondomini;

Forsi aktar fundamentali minn dan hi l-osservazzjoni illi l-Artikolu 11 (1), a kuntrarju ta' dak li nsibu ad ezempju fl-Artikolu 5 ta' l-istess Att, ma jagħmel ebda rizerva favur it-titolu ta' l-akkwist tas-singoli sidien, u, allura, lanqas ma

jista' jinghad, dejjem ghal fini ta' l-Artikolu 11 (1), illi dak it-titolu kostitwit mill-att ta' akkwist kien jimponi ruhu fuq ir-regolamentazzjoni legali li titnissel mill-Att. Kif taraha din il-Qorti, l-espressjoni surreferita "salv dejjem kull ftehim kuntrarju" li jsemmi l-Artikolu 11 (1) ma tikkomprendix dak li seta' nghad fil-kuntratt ta' akkwist tas-singoli proprjetarji izda ghal modifiki li l-kondomini jistghu jaqblu dwarhom b'deroga tal-principju illi l-ispejjez jinqasmu bejn il-kondomini "fi proporzjon ghall-valur tal-proprjeta` ta' kull kondominus";

Jikkonsegwi minn dawn il-ftit riflessjonijiet, u dejjem fuq il-fehma tal-Qorti, illi l-Arbitru ma kienx guridikament korrett fil-konsiderazzjoni tieghu illi l-appellat kellu ragun isostni l-immutabilita tal-kontribuzzjoni minnu tas-sehem mill-ispejjez kif raffigurat fil-kuntratt ta' l-akkwist tieghu tal-5 ta' Awissu, 1976, u li, b'konsegwenza, l-Owners' Association kellha tirrispetta dak il-patt kontrattwali u tghaddi biex tvarja l-Pool Expenses Rules taghha. Fl-opinjoni tal-Qorti l-Arbitru kien messu jkun iggwidat mill-kriterju legali dettat mill-Artikolu 11 (1), ukoll f'raffront mad-decizjoni tal-kondomini l-ohra, anke ghaliex s-subinciz (5) ta' l-Artikolu 11 kien jakkordalu l-fakolta li wkoll hu, liberament jidderoga minn dak l-istess kriterju legali u jiddetermina r-ripartizzjoni gusta ta' l-ispejjez mehtiega ghall-preservazzjoni, manutenzjoni u riparazzjoni tal-partijiet komuni. Il-Qorti tifhem illi proprju n-nomina ta' perit tekniku, u mhux ukoll legali, kienet mahsuba biex jigi kondott ezercizzju li jwassal ghall-mekkanizmu ta' din id-distribuzzjoni gusta u ekwa ghal liema l-kaz gie lilu riferut;

Billi, apparentement, dan l-ezercizzju baqa' ma sarx, il-Qorti thossha fid-dmir li konformement ma' l-ipotesi dettat fl-Artikolu 71 (2) (c) ta' l-Att dwar l-Arbitragg tirmimanda l-atti lura lill-Arbitru biex hemm il-kwestjoni tigi trattata *ex novo* fid-dawl tal-konsiderandi f'din id-decizjoni maghmula.

Kopja Informali ta' Sentenza

Ghal motivi kollha predetti din il-Qorti filwaqt li tichad l-ewwel gravam, tilqa' t-tieni wiehed fis-sens tal-konsiderazzjonijiet predetti u tghaddi biex tirrinviya l-atti lura lill-Arbitru biex id-decizjoni tieghu tigi hemm trattata mill-gdid u definitiva fid-dawl tad-decizjoni ta' din il-Qorti. L-ispejjez gudizzjarji ta' dan l-appell jibqghu fic-cirkostanzi bla taxxa bejn il-partijiet.

< Sentenza Finali >

-----TMIEM-----