MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF
PHILIP SCIBERRAS

Seduta tat-13 ta' Novembru, 2009

Appell Civili Numru. 21/2008

Kees De Jong bhala Amministratur ta'
"Tigne Place Residents Association"

vs

Winex Holdings Ltd u Vanilla Telecomms Ltd

Il-Qorti,

Fid-19 ta' Dicembru, 2008, l-Arbitru fic-Centru Malti ta' l-Arbitragg ippronunzja s-segwenti decizjoni fl-ismijiet premessi:-

> **"**Claimant declared, in their statement submitted on 8th of April 2008 at the Malta Arbitration Centre (MAC) that respondents installed communication devices and aerials attached to the engine room of the lift and stairwell hood without the consent of the residents or the Residents' Association as well as that such installations are causing damage to

the common property of the Association and that they are a health hazard because of the emissions of the electromagnetic waves and this was done without the consent of the Association.

Claimant further declared that no such installations could have been made by respondents without the approval of the Association and that moreover respondents have to make good for the damages that such installations are causing to the common parts of the Tigne Place Residents Association. Claimant finally asked for the removal of all such installations and the payment of damages.

In their statement of defence, presented on the 5th May 2008, respondent company Vanilla Telecomms Ltd submitted various legal arguments as well as "inter alia" that is had no juridical relationship with claimant and that all installations made by the company have been made with the prior approval of Winex Holdings Ltd. Respondent's company stated, as well, that the installations cannot cause any damage to property or persons omissis. Thus respondent company prays upon the Tribunal to free it from the proceedings with all costs to be borne by the claimant.

By a letter dated 17th June 2008 Dr Fiona Farrugia, Registrar of the Malta Arbitration Centre informed the Arbitrator that the Chairman of the Centre had appointed him as arbitrator to hear and decide the above case.

Following his appointment, the Arbitrator held an onsite inspection on the 13th August 2008 and three sittings at the MAC respectively on the 15th and 22nd September 2008 and on the 2nd October 2008. The Arbitrator, during the onsite inspection, asked the parties to present any documents which might have a bearing on the

dispute, prior to the first sitting held at the Malta Arbitration Centre. Both parties obliged.

Claimant presented a document which contained ample photographic evidence showing the various transmission elements fixed against the alleged common areas and the damage caused to the common property. Such transmission elements shown in the photos were identified during the evidence tendered by David Thake during the sitting held on the 2nd October 2008 and such photos are marked Doc A, B, C, D and E.

Other elements presented in the documents were

i. section of a contract entered by the purchaser of Flat no 702 with Winex Ltd
ii. rules of the condominium at 13, Tigne Place, Tigne Street, Sliema
iii. minutes of meeting held by TPROA
iv. report from Perit Etienne Micallef Grimaud
v. document where claimant refuted the statement of defence of respondents - with a conclusion whereby claimant on behalf of TPRAO demands the immediate removal of various steel mast mounted aerials, reflectors, transponders and similar contraptions as well as compensation, etc.

Respondents, in their document, presented a series of contracts entered with third parties as well as a further defence of their stance. Moreover, reference information, relating to legal and regulatory notices relating to telecommunication aerials, etc was also presented.

Following the sittings held at the Malta Arbitration Centre and the onsite inspection, the Arbitrator, as duly authorised by the parties, during the sitting of the 2nd October 2008 consulted with members of the Malta Communications Authority (MCA) on the

27th October 2008. The persons representing the Authority at the meeting were Dr Philippa Gingell Littlejohn LL.D. LL.M. (Lond.) as legal advisor to the Authority and Messrs Ivan Borg and Kevin Aquilina who are Frequency Investigation Technicians within the Authority. The Arbitrator queried with the members present representing the Authority about what was stated by Mr David Thake regarding whether prior approval was required from MCA before any installations were carried out. It transpired that the company Vanilla Telecomms Ltd was fully licensed by the MCA and that no prior approval from the MCA was needed for the installation of the telecommunication devices. They further confirmed that all masts erected were in line with what an Internet provider supplies.

To a further question by the Arbitrator on whether checking for radiation is carried out to forestall possible health hazards, the members present explained that, when asked to, their competence rested with the establishment of the amount of radiation generated, the results obtained are sent to the Health Authorities and the Health Authorities would then decide on whether there is any health hazard or not. It was, however, further stated by all present that to date there have been no health hazards reported from tests carried out elsewhere.

In the light of the above, once claimant, in the sitting of the 22nd September 2008, stated there is, as yet, no evidence of any medical damage, the Arbitrator feels that on this particular element, the claim for alleged health hazards should not be pursued further.

The Arbitrator makes further reference to the minutes of the sitting held at the Malta Arbitration Centre on the 15th September 2008, wherein respondent accepted *"to make good, at his company's expense, for any damage, slight or*

otherwise, caused as a result of the installation of the telecommunication apparatus, should it result from the Arbitrator's report that the installation were legitimately placed and this without prejudice to claimant's alleged non-acceptance of the fixing of the telecommunications apparatus". In view of the above declaration, the Arbitrator does not need to pursue further the claim on this point re: making good for damages caused.

The Arbitrator notes that Perit Ray Vassallo, for respondents, confirmed, in the sitting of the 22nd September 2008, in reply to a question by the Arbitrator, that the area adjacent to stairwell and lift shaft would have to be common area serving as access, should there be vertical extension of the property.

The Arbitrator read through the salient points in the contracts of sale presented by respondents and notes that while areas above the penthouses were sold to the purchasers of the penthouses, the area adjacent to the lift shaft and stairwell was not sold. In the opinion of the Arbitrator, this area would of necessity have to remain common to serve as access to the additional units, if any, built and as such, no matter what is stated in the statement of defence or in the note presented by respondents after the sittings, the Arbitrator is of the opinion that this area effectively forms part of the common areas as in the case for the lower floors.

The Arbitrator feels that given that respondent company Winex Holdings Ltd did not own any more the common areas, it should not have given permission to respondent company Vanilla Telecomms Ltd to affix the telecommunications apparatus prior to consultation with and acceptance by the TPROA. Furthermore, although these apparatus might not have been the cause behind the damage to the lift machinery from the

lightning, the non-provision of the lightning conductor in the building by the respondent company should have made the respondent company more aware of the possible increase in hazards through lightning attraction as a result of the installation of the telecommunications apparatus which normally would have a pointed vertex.

The Arbitrator established that these apparatus were serving some of the owners or tenants inside the volumetric envelope of the building apart from people in the neighbourhood and thus feels that the fixing of some telecommunications apparatus had to be done above roof level, whether where in fact placed or over the roof of the stairwell or lift hood or over the roofs of the penthouses where this is allowed as per contract of sale.

The Arbitrator decides that claimants were right to object to the placing of these apparatus where placed and in what way they were placed and in view of the fact that placing elsewhere on the roofs of the apparatus other than in the area which eventually can serve as a common area could still create a negative reaction from claimant, in the first instance respondents would then have to ask at their expense for MCA officials to test the radiation level from these apparatus and thereafter get a clearance from the medical authorities that they create no health hazard.

The Arbitrator condemns the fact that prior to the installation of the telecommunications apparatus the TPROA were not consulted since, as rightly asserted by claimant, the installation of the apparatus pre-supposed the entry through the common areas owned by TPROA.

The Arbitrator decided that while claimant is correct to state that the telecommunication apparatus has been fixed against a wall belonging

to the co-owners forming part of TPROA, and this in a way which was not in line with good workmanship, and in an area which can eventually become an internal part of the common areas should a vertical building extension take place, it might be opportune to allow "in tolerance" the apparatus where fixed but in a manner which would reflect good worksmanship, and this

i. after respondents would have repaired all damage done to the structure of the stairwell and lift hood to the satisfaction of claimant;
ii. after installing lightning conductor or conductors to avoid possible increase of lightning incidence as a result of the installation of the apparatus;
iii. after getting clearance from the medical authorities that there is no health hazard from these apparatus after radiation levels are tested by the MCA officials; and
iv. adequate compensation must be made by respondent company Winex Holdings Ltd for making common the walls enclosing the stairwell and lift hood at roof level and for giving third parties Vanilla Telecomms Ltd the right to affix telecommunication apparatus in areas which are not under their domain and this latter case only for a nominal fee. All the above will have to be done by Winex Holdings Ltd at their expense.

The Arbitrator further decides that if respondent company Winex Holdings Ltd fails to honour any of the above conditions, then all the telecommunication apparatus will have to be housed elsewhere.

Finally since parties informed the Arbitrator verbally that costs of the arbitration proceedings would be equally shared, the Arbitrator is refraining from pronouncing himself on this point.**”**

Minn din id-decizjoni gew intavolati zewg appelli. Dak tas-socjeta` Winex Holdings Limited u Vanilla Telecomms Ltd hu fformulat bl-ilmenti li jsegwu:-

(1) Il-mertu tat-tilwima ma jinkwadrax ruhu fl-Att dwar il-*Condominia* u r-rikorrenti ma kellux dritt jintavola arbitragg mandatorju;

(2) L-Att referenzjat ma japplikax stante li l-kamra tal-bejt, il-bejt u l-arja relattiva ma jifformawx f'dan il-kaz parti mill-ambjenti komuni tal-blokk in kwantu proprjeta` esklussiva tas-socjeta` appellanti Winex Holdings Ltd;

(3) Il-kwestjonijiet rigwardanti d-dritt u t-titolu dwar proprjeta` jaqghu eskluzivament fil-gurisdizzjoni tal-Qrati ordinarji;

(4) Is-socjeta` Vanilla Telecomms Ltd mhix kondominu u qatt ma setghet tkun parti fil-proceduri ta' l-arbitragg;

(5) L-istess socjeta` imsemmija ma ghandha ebda relazzjoni guridika mar-rikorrenti u ghandha tigi liberata mill-osservanza tal-gudizzju;

(6) L-Arbitru naqas milli jiddeciedi numru ta' eccezzjonijiet;

(7) Il-lodo mar oltre t-talbiet tar-rikorrenti u ghandu ghalhekk jigi dikjarat null u bla effett;

(8) Id-decizjoni ta' l-Arbitru hi kontradittorja ghaliex jekk ma giex provat ebda *health hazard* ma kienx jaghmel sens illi huma ghandhom jottjenu "*clearance from the medical authorities that there is no health hazard from these apparatus after radiation levels are tested by the MCA officials*";

Evidentement id-decizjoni ta' l-Arbitru lanqas ma ghogbot lir-rikorrenti Kees de Jong, *qua* Amministratur

kondominjali, u dan appella minnha bl-aggravji f'din l-ordni:-

1. Avolja l-Arbitru esprima ruhu favorevolment dwar il-materja lilu sottomessa, huwa naqas, imbaghad, milli jordna lis-socjetajiet intimati, jew min minnhom, sabiex inehhu dak kollu li wahhlu minghajr l-awtorizzazzjoni tieghu;

2. Mhix accettabbli il-proposizzjoni ta' l-Arbitru li dak installat *in situ* u bla kunsens ghandu jithalla hemm b'mera tolleranza;

3. L-Arbitru naqas li jipprefiggi zmien ghall-ottemperament mis-socjetajiet intimati ghar-riparazzjoni tal-hsarat fl-indana tat-tarag u fil-*lift hood*;

4. It-talba devoluta kienet ghat-tnehhija ta' l-apparat u mhux ghall-kumpens;

5. L-ispejjez kellhom jigu interament sopportati mis-socjetajiet intimati;

Premessi l-aggravji ta' naha u ta' ohra huwa fl-ordni logiku illi l-Qorti trid tghaddi qabel kollox biex tinvesti l-iskolji procedurali li l-partijiet iqanqlu fir-risposti rispettivi taghhom di fronte ghall-appell wiehed u l-iehor. Hekk il-Qorti hi mesjha biex tezamina jekk l-appell tas-socjetajiet appellanti ghandux jigi dikjarat inammissibbli in kwantu pprezentat *fuori termine* kif hekk kontez mill-kontro-parti. Minn naha l-ohra, jekk l-appell tar-rikorrenti Kees de Jong *nomine* huwiex inammissibli in kwantu ma jmissx "punt ta' ligi" u dan kif ikkontestat lilu fir-risposta tas-socjetajiet appellanti ghal dak l-appell;

Fuq l-ewwel xorta ta' inammissibilita` jibda biex jigi rilevant illi hu provvediment esplicitu tal-ligi dwar l-Att ta' l-1996 dwar l-Arbitragg (Kapitolu 387) illi "bla hsara ghal dak li hemm specifikament provvdut f'artikolu 6 tat-Taqsima B tar-Raba' Skeda li tinsab ma' dan l-Att, appell ghandu jsir

fi zmien hmistax-il gurnata minn meta tigi ricevuta d-decizjoni finali ...” [Artikolu 70B(2)]. Minn naha tieghu l-artikolu 6 imsemmi tat-Taqsima B tar-Raba’ Skeda jikkollega d-dekorrenza ta’ dan it-terminu qasir ghall-appell billi jiddisponi illi “d-decizjoni ghandha titqies li tkun giet ricevuta mill-partijiet fid-data li d-decizjoni tinghata fil-miftuh”;

Minn dawn il-provvedimenti tal-ligi jikkonsegwu dawn il-principji generali. Fl-ewwel lok illi t-terminu ta’ hmistax-il gurnata ghandu karattru perentorju. Fit-tieni lok, illi l-parti li tkun trid tattakka d-decizjoni ghandha, presuntivament, il-konoxxenza legali taghha fl-istess mument tal-ghoti taghha fil-miftuh;

Fuq l-ewwel principju din il-Qorti gja kellha bosta okkazjonijiet fejn esprimiet il-fehma taghha fir-rigward. Hekk, ad ezempju, irrilevat illi “innegabilment, it-terminu ghall-appell minn sentenzi, kemm taht il-ligi ritwali ordinarja, kif ukoll taht il-ligijiet specjali, jiddekorru ghal fatt materjali tat-trapass taz-zmien. Huma termini perentorji u dwarhom, di regola, ma hemmx possibilita` la ta’ proroga u lanqas ta’ sospensjoni jew interruzzjoni, jekk mhux fil-kazijiet eccezzjonalment mil-ligi prevvisti. Ad ezempju, fejn il-gurnata ta’ l-iskadenza tahbat nhar ta’ Sibt jew il-Hadd jew xi gurnata festiva. Din in-natura inderogabbli tat-termini processwali ggib b’konsegwenza illi dwarhom ma jistghux jigu applikati provvedimenti sanatorji jew ta’ rimessjoni, ankorke d-dekors inutli taghhom ma jkunx imputabbli lil parti interessata. Dan ghal motiv illi dik l-improrogabilita` hi hekk necessarja ghal raguni ta’ certezza u, ukoll, ta’ uniformita`”. Ara “**Salina Wharf Marketing Limited -vs- Malta Tourism Authority**”, 12 ta’ Dicembru, 2007;

Fuq it-tieni principju kull ma jista’ jinghad hu illi l-bidu tad-dekors taz-zmien ghall-appell hu identifikat mill-jum li fih tinghata d-decizjoni. Hu b’dan il-mod dirett li l-ligi tqis bhala tempestiva l-kompiment tal-formalita` tar-ricezzjoni

tad-decizjoni finali mill-parti li tkun trid timpunjaha bil-mezz ta' l-appell lil din il-Qorti;

Issa hu f'dan il-kaz attestat mill-inkartament tal-kaz quddiem l-Arbitru illi d-decizjoni ta' dan inghatat il-Gimgha, 14 ta' Dicembru, 2008. Li jfisser illi l-appell minnha kellu jkun introdott almenu sat-3 ta' Jannar 2009. Gara illi din il-gurnata kienet jum tas-Sibt u la darba l-appell gie effettivament ipprezentat it-Tnejn, 5 ta' Jannar, 2009 dan ma jistax jitqies tardiv in kwantu propost kif kellu jkun u skond il-previzjoni ta' l-Artikoli 108 u 109 tal-Kapitolu 12 kombinati flimkien. Jikkonsegwi illi l-appell interpost mis-socjetajiet ma jistax jigi dikjarat inammissibbli. Konsegwentement il-pregudizzjali tal-kontro-parti fil-kuntest ma hijiex sostenibbli u qed tigi rigettata;

Il-Qorti ser tghaddi issa biex tikkonsidra l-eccezzjoni ta' l-inammissibilita` ta' l-appell sollevata mis-socjetajiet intimati fil-konfront ta' l-appell tar-rikorrenti Kees De Jong *nomine*. A norma ta' l-Artikolu 70A tal-Kapitolu 387 hu provvdut illi appell lil din il-Qorti jista' jsir "fuq punt ta' ligi li jitnissel minn decizjoni finali". Mhux dan biss pero`. Skond l-Artikolu 70B (1) ta' l-istess Kap l-appell "ghandu jidentifika l-punt ta' ligi li ghandha tittiehed decizjoni fuqu u ghandu jispecifika t-tifsira li r-rikorrenti jallega li hi t-tifsira korretta tal-punt ta' ligi identifikat";

Ukoll fuq din il-materja din il-Qorti okkupat ruhha f'aktar minn decizjoni wahda. Brevement, gie minnha ravvizat illi "min irid jimpunja sentenza arbitrali ghandu l-oneru li jidentifika l-principju tad-dritt li hu jidhrilu li gie vjolat (u mhux sempliciment il-kap tad-decizjoni li hu jintendi jikkontesta) u kif u fejn l-Arbitru iddiskosta ruhu minn tali principju" (ara "**Stanley Spiteri -vs- Eileen Bonett**", 4 ta' Ottubru, 2004). Ukoll, fl-istess waqt, mhux bizzejjed ir-rikjam generiku ghar-regola ta' dritt li titqies hekk leza u lanqas "is-semplici kritika tad-decizjoni sfavorevoli formulata bi prospettazzjoni ta' interpretazzjoni diversa u aktar favorevoli minn dik adottata mill-Arbitru. Dan

ghaliex kritika f'din id-direzzjoni ma tistax hlief titraduci ruhha, in sostanza, ghat-talba ta' l-accertament *ex novo* tal-fatti tal-kaz u dan, kif gja rilevat, hu inammissibbli". (Ara "**Maryanne Scicluna -vs- Dr. Daniela Chetcuti**", 14 ta' Marzu, 2007);

Ribaditi hawn dawk l-istess konsiderazzjonijiet f'dawk is-sentenzi, ma jistax ma jigix notat illi fl-appell ipprezentat mir-rikorrenti Kees De Jong *nomine* ma nsibu mkien indikazzjoni specifika ta' l-affermazzjonijiet ta' dritt fis-sentenza kontenuti u li hu, motivatament, jassumi li gew vjolati jew, xort'ohra, f'kuntrast mad-disposizzjonijiet regolaturi tal-fattispeci. Ghax, ukoll, ankorke wiehed kellu remotament u ghall-grazzja ta' l-argoment jarravviza fl-aggravji sottoposti sembjanzi ta' "punt ta' ligi" li l-appellanti jiddenunzja, huwa imbaghad, jonqos li joffri b'spjegazzjoni l-punt ta' ligi li kellu jigi applikat u l-argomenti ta' l-interpretazzjoni korretta tieghu. Dan ukoll fir-rigward ta' dak l-ilment tieghu illi l-Arbitru ma qaghadx fil-limiti tal-mitlub u dan ghall-motivi li t-talba devoluta ma kienetx ghall-kumpens izda ghat-tnehhija ta' l-apparat. In mertu jigi rilevat illi kif jirrizulta mill-Istatement of Claim, taht il-firma ta' l-appellanti; ir-rimedju konsegwit minnu kien "*the removal of all such installations and the payment of damages*". Ma jistax allura jinghad illi l-Arbitru ddecieda 'l hinn mid-domanda posta lilu. F'dawn ic-cirkostanzi r-rapport processwali li l-appellanti *nomine* jippretendi li ghandu jigi instawrat bl-appell tieghu ma jistax jircievi l-favur ta' din il-Qorti in kwantu l-appell tieghu ma huwiex ritwalment kompost skond id-dettami tal-ligi espressi fl-Artikoli 70A (1) u 70B (1) ta' l-Att dwar l-Arbitragg;

Maghdud dan, fil-hsieb tal-Qorti, id-decizjoni arbitrali hi xorta wahda affetta minn nullita. Dan ghal motiv illi kif sottomess mis-socjetajiet appellanti b'aggravju generali (ara ilment 6 fl-esposizzjoni *supra* ta' l-aggravji taghhom) l-Arbitru naqas milli jokkupa ruhu, u jiddeciedi wkoll, uhud mill-eccezzjonijiet taghhom, sew procedurali, sew sostanzjali;

Hu mill-Artikolu 70(1) (b) ta’ l-Att prevvist illi d-decizjoni ta’ l-Arbitru ma ghandhiex tigi ezercitata jekk jirrizulta lil din il-Qorti illi “d-decizjoni tmur kontra l-ordni pubbliku ta’ Malta” (subpara. ii). Jezisti zgur f’dan il-kaz vjolazzjoni ta’ natura processwali li tintegra kawza ta’ nullita, in kwantu l-Arbitru, ghalkemm fl-esposizzjoni tas-sentenza jaghmel referenza espressa ghall-eccezzjonijiet tas-socjetajiet appellanti huwa ommetta mbaghad milli jiddecidihom, forsi wkoll ghaliex, trattasi ta’ kwestjonijiet purament legali, hu ma kienx il-persuna idoneja li jiddecidihom;

B’kull rispett dovut ghas-sottomissjoni ta’ Kees de Jong fir-risposta ta’ l-appell tieghu l-fatt konkordat illi l-kontestazzjoni tinstema minghajr il-presenza ta’ l-avukati rispettivi ma jfisserx, lanqas lontanament, illi l-Arbitru kellu ghal dak il-patt maqbul jiddeklina milli jiddeciedi dwarhom una volta l-eccezzjonijiet tqajmu *in limine* fl-“*Istatement of Defence*”. Ir-rispett tal-prinicpju tal-kontradittorju kien certament jesigi, ukoll fejn l-arbitragg mandatorju jigi, ghal xi raguni, rimess lill-konsulent tekniku, illi d-difizi kollha li parti citata tressaq ‘il quddiem ghal konsiderazzjoni jigu trattati u definiti, ammenokke l-istess ma jkunux gew rinunzjati, li ma jidherx li hu l-kaz hawnhekk. Dan, aktar u aktar fejn certa difiza minnhom tkun tincidi fuq il-gurisdizzjoni u l-kompetenza nnifisha tat-tribunal ta’ arbitragg;

Gjaladarba s-sentenza appellata ma tistax, legittimament, ghar-raguni predetti tithalla tissussisti, l-istess qed tigi annullata u l-partijiet mqeghda fl-istat *ante quo*. L-atti ser ikollhom ghalhekk, fis-sens ukoll ta’ l-Artikolu 71(2) (c) tal-Kapitolu 387, jigu rinvjati lura lit-tribunal ta’ l-Arbitragg biex jkun dispost minnhom fis-sens tal-konsiderandi affermati.

Ghal motivi kollha predetti l-Qorti tiddeciedi z-zewg appelli sottoposti lilha fis-sens infraskritt:-

1. Tichad l-eccezzjoni tat-tardivita` opposta minn Kees de Jong *nomine* fil-konfront ta' l-appell tas-socjetajiet intimati appellanti;

2. Tilqa' l-pregudizzjali ta' l-inammissibilita` opposta mill-istess socjetajiet intimati di fronte ghall-appell principali ta' Kees de Jong *nomine* in kwantu dan ma jmissx "punt ta' ligi";

3. Tannulla s-sentenza appellata ghal motiv ta' l-ommissjoni mit-Tribunal ta' l-Arbitragg ta' decizjoni fuq numru ta' eccezzjonijiet ventilati mis-socjetajiet intimati fl-Istatement of Defence taghhom;

4. Tirrimanda l-atti lura lit-Tribunal ta' l-Arbitragg ghat-trattazzjoni u definizzjoni minnu tal-kaz skond il-ligi u fis-sens tal-konsiderazzjonijiet premessi;

L-ispejjez taz-zewg appelli jinqasmu ugwalment bejn il-partijiet hlief li l-appellanti ghandu jbati l-ispejjez tal-pregudizzjali tat-tardivita` minnu mqanqla ghall-appell tal-kontro-parti.

< Sentenza Finali >

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