



QORTI TA' L-APPELL

**ONOR. IMHALLEF
PHILIP SCIBERRAS**

Seduta tas-6 ta' Ottubru, 2010

Appell Civili Numru. 22/2010

Jack M. A. Olin u Margareta Mona Olin Santesson

vs

**Anthony Sant Portanier bhala Chairman ta'
Tower Mansions Association**

Il-Qorti,

Fl-14 ta' April, 2010, l-Arbitru fic-Centru Malti ta' l-Arbitragg ippronunzja s-segwenti decizjoni fl-ismijiet premissi:-

“1. Mr. Jack, Manuel, August Olin and Mrs Margareta, Mona Olin Santesson, in their statement of claim presented to the Malta Arbitration Centre on the 26th of August 2008 stated that they are the owners of an apartment forming part of a block of flats known as Tower Mansions, 161, Tower Road, Sliema, and that a

decision was taken at a residents' meeting held on the 29th of July 2008, to change the colour scheme of the facade, and that subsequently another decision was taken on the 8th of August 2008, which decision was not unanimous and thus in breach of the Condominium Act.

2. Together with their statement of claim, claimants submitted the following documents:-

- Copy of Agreement known as "TOWER MANSIONS ADMINISTRATION"
- Copy of minutes of meetings held on the 26th of June, 14th of May and 29th of July 2008.
- Photos showing the facade of the said block of flats.

3. The relief or remedy sought by claimants, is that the decision taken by the owners of the flats be annulled since they are in breach of the Condominium Act and that the original decor and aesthetics of the facade be reinstated.

4. In the statement of defence, the defendants stated that:-

- All flat owners have a judicial interest in the outcome of this arbitration and should be called into and notified of the proceedings, as per law.
- Claimant is to produce evidence that Anthony Sant Portanier is presently Chairman of Tower Mansions Association.
- That all decisions taken and agreed upon by the General Meeting of the 29th July 2008 and the 8th August 2008, were legal and valid in terms of the Condominium Act (Chapter 398 of the Laws of Malta).
- That the decisions taken did not refer to the decor and the aesthetics of the block
- That the Condominium Act (Chapter 398 of the Laws) does not give the right of action to the single condomini for the reinstatement of the block

after the decision taken by the General Meeting has been executed.

- That the reinstatement was not possible and is no longer effectively possible for reasons to be submitted in detail during the arbitration proceedings;
- That claimants' requests are unfounded in law and in fact.

5. The statement of defence was accompanied by:-

- A copy of contract.
- A copy of Tower Mansions Administration Agreement.

6. During the sitting of the 5th of March 2009, Dr Galea Salamone informed the Arbitrer that Mr Sant Portanier was not representing the residents of Tower Mansions any longer and that he was only representing himself.

7. In view of the above it was agreed that before further action be taken by the arbitrator, the owners had to convene a meeting and appoint a new chairman and to authorise him to appear on this litigation in the name of all the owners.

8. During the sitting of the 23rd of April 2009, both parties informed the undersigned that Mr F. Camilleri has been appointed the new chairman of the Tower Mansions Owners Association.

9. During the above mentioned sitting it was agreed by both parties to approach Perit Richard England with a view of getting his advice and recommendations.

10. A copy of the letter sent to Perit England together with photos were submitted to the arbitrator.

11. During the sitting of the 22 of May 2009, a copy of Perit England's reply was submitted to the arbitrator. In his reply Perit England stated that although he would have preferred to adhere to the original colours, he suggested a terracotta finish instead of the original colour.

12. It was then agreed that Mr Olin is to obtain the technical details from Perit England and Mr. Camilleri was then to get approval from all the other owners.

13. During the meeting of the 19th February, 2010, claimant submitted a copy of a letter received from Perit England together with a colour chart and technical details, namely, copper brown number 8004.

14. Both parties informed the arbitrator that no further evidence was being brought forward and authorised the arbitrator to proceed with his report.

RELEVANT POINTS

1. The undersigned makes reference to an agreement signed by all the owners of the flats in Tower Mansions and which is known and would here be referred to as "the agreement". A copy of this agreement is being attached to this report and is being marked Doc. JEV/1.

2. Special reference is being made to para. 6 of the above mentioned agreement wherein it is stated that all resolutions approved during a meeting, by a simple majority of votes, shall be binding on all owners without any right for contestation whatsoever.

3. Reference is also being made to para. 23 of the same agreement, wherein it is stated that the owners cannot renounce to their partnership of the agreement just mentioned.

4. Reference is being made to a copy of minutes of meeting held on the 29th July 2008 (Doc JEV/3) where in para 4, it was stated that all the owners of the flats with the exception of one (Mr and Mrs Olin) favoured option "B". Option B states "fresh paint of another earth colour instead of blue since the majority of owners expressed disappointment towards the blue colour applied to date irrespective of the patchy appearance due to inadequate colour matching"

Reference is also being made to para 7 of minutes of General Meeting held on the 29th July 2008, wherein it was stated that Mr and Mrs Olin left the meeting after the majority decision to reject the blue colour was taken.

5. Reference is made to minutes of General Meeting held on the 26th of June 2008. Wherein it was confirmed that the colour of the facade was to be in blue and not in grey. See Doc JEV/2.

6. Reference is being made to a booklet entitled "General Information about the Condominium Law" which states inter alia "then there are other alterations which require unanimous consent, for example, alteration in the aesthetics and decor of the condominium ..."

7. Reference is also being made to the above mentioned booklet, page 12, wherein it is stated that "decisions of the meeting necessitate a simple majority of units represented at the meeting. However there are other decisions regarding extraordinary repairs and alterations to the common part, which must be approved by two thirds of the units represented at the meeting."

CONSIDERATIONS

After taking into consideration all that has been presented by the parties to the undersigned and after taking into consideration all the documents submitted the undersigned states that:-

A. All the owners of the flats in Tower Mansions, Tower Road, Sliema, signed an agreement (Dic. JEV/1) which regulated the way the common parts are to be administered and laid down the parameters between which the owners could operate. Of special interest in this exercise is clause number 6 which stated simply and clearly that "all resolutions approved at meetings by a simple majority of votes shall be binding on all members to this administration without any right for contestation whatsoever.

B. Claimant in his statement of claim makes no reference to the above mentioned clause 6 and opted to alledge a breach of the provisions of the Condominium Act.

C. With reference to the booklet "General Information about Condominium Law" on page 8 it states that "there are other alterations which require unanimous consent, for example, alterations in the aesthetics and decor of the Condominium ..." In another instance, page 12 of the same booklet, it is stated that "regarding extraordinary repairs and alterations to the common parts, which must be approved by two thirds of units represented at the meeting"

Does the alw stipulates "unanimous" or "two thirds" in any case is it the "agreement" signed by all the owners or the Condominium Act which is to rule the outcome of this litigation?

CONCLUSIONS.

According to the agreement of Administration, Clause 23 states that "the partners cannot

renounce to their partnership as this agreement is binding on them so long as and until such time as they have the right to co-ownership in Tower Mansions." This proves without doubt that it is the agreement of Administration that dictates the formalities and procedure that have to be adopted in accepting or rejecting the statement of claim brought forward by claimants.

During the meeting of the 29th July 2008, at which meeting claimants were present, it was decided by a majority vote that they were "to buy fresh paint of another earth colour instead of blue".

This was a decision taken in accordance with and as per "agreement" signed by all the owners. The agreement gives no room or justification to refer to the Condominium Act should one disagree with a decision taken in accordance with the "agreement".

It is therefore the decision of the undersigned that the claims made by claimant in his statement of claim be rejected.

It is also decided that all professional fees and Arbitration Centre expenses be borne by claimant.

Finally the undersigned states that there is nothing to stop the owners of the flats from adopting the recommendations of Perit Richard England, at a time convenient to all concerned."

Ir-rikorrenti konjugi Olin jikkontestaw il-lodo ta' l-Arbitru bl-aggravji f'din l-ordni:-

1. L-Arbitru naqas milli japplika l-ligi, senjatament l-Artikolu 8 (3) (a) ta' l-Att dwar il-*Condominia* (Kapitolu 398);

2. L-Arbitru wasal ghal konkluzjoni kompletament zbaljata meta ddecieda illi dak deciz fil-laqgħat tas-sidien kien korrett ghax konformi għall-Istatut ta' l-Assocjazzjoni;

Kontra dawn l-aggravji l-appellat *nomine* wiegeb illi *ratione temporis* kellu japplika l-Istatut u mhux il-promulgazzjoni ta' l-Att li dahal in vigore bl-Att XXIX ta' l-1997. Huwa jkompli jsostni illi ghalkemm hu veru li skond l-Artikolu 31 (1) ta' l-istess Att, l-Artikolu 8 kellu jidhol għall-effetti tiegħu b'mod immedjat, b'danakollu ma jistax jigi validament argomentat illi dan kellu jkun applikabbli għal kaz meta l-Istatut sottoskritt kien jipprovdi xort'ohra u l-Artikolu 3 ta' l-Att ma kienx imħares b'dak l-artikolu transitorju. F'dan l-istess kuntest huwa jikkontendi wkoll illi għaladarba kien jezisti dritt kwezit in forza ta' l-Istatut il-ligi ma setgħetx retroattivament tegħleb dak li jkun għa gie miftiehem u thassar drittijiet vestiti u kompjuți qabel il-promulgazzjoni ta' l-istess ligi. Hu wkoll sottomess minnu illi f'kull kaz l-appell ma jinkwadrix ruħu taht l-Artikolu 70A ta' l-Att dwar l-Arbitragg għaliex ma jidherx li l-kwestjoni tmiss punt ta' ligi li taffettwa sostanzjalment id-drittijiet tal-partijiet;

Mill-inkartament tal-kaz jidher li l-kwestjoni principali li l-Arbitru kellu quddiemu kienet titratta mid-denucja ta' l-appellanti fil-konfront tad-decizjoni mehuda mill-kondomini l-ohra dwar it-tibdil fl-iskema tal-kuluri fuq il-faccata tal-blokk ta' appartamenti magħruf bħala "Tower Mansions" għal liema huma oggezzjonaw. Huma jikkontendu illi tali decizjoni ttieħdet bi ksur ta' l-Artikolu 8 (3) (a) tal-Kapitolu 398 li tipprovdi illi "bla ħsara għad-disposizzjonijiet tas-subartikoli (5) u (7), m'għandux isir dan it-tibdil jew tigidid li geġ fil-partijiet komuni kemm il-darba ma jkunx hemm il-kunsens unanimu (sottolinejar tal-Qorti) tal-condomini kollha (a) dak li jibdel l-estetika u d-dehra tal-condominium";

Kontra l-htiega ta' dan il-kunsens unanimu hu provvdut mill-klawsola 6 ta' l-Istatut ta' l-Assocjazzjoni illi "*all resolutions approved at meetings by a simply majority of*

votes shall be binding on all members to this administration without any right for contestation whatsoever". L-Arbitru ddecieda b'mod pjuttost zbrigativ illi gjaladarba d-decizjoni li ttiehdet fil-laqghat tas-sidien tad-29 ta' Lulju 2008 u tat-8 ta' Awissu 2008 kienet konformi ghal dak il-provvediment statutorju, "*the Agreement gives no room or justification to refer to the Condominium Act should one disagree with a decision taken in accordance with the Agreement*";

Jikkonvjeni li jigi premiss qabel xejn illi s-sidien tas-singoli appartamenti fil-blokk imsemmi kienu kkostitwew dak minnhom definit bhala "*civil partnership*" maghrufa bhala "Tower Mansions Administration". Jinghad fi klawsola 23 tieghu illi "*the partners cannot renounce to their partnership as this agreement is binding on them so long as and until such time as they have the rights of co-ownership in Tower Mansions, and accordingly this partnership is being entered into for the aforementioned defined time of duration according to law*". Evidentement, l-iskop ta' din ic-civil partnership ma kienx dak li l-konsocji jaqsmu l-qligh fis-sens ta' l-Artikolu 1644 tal-Kodici Civili, izda, invece, "*to ensure the proper administration and maintenance of the common parts of the said block of apartments known as Tower Mansions*";

Rigwardat *a se stante*, l-Istatut stabbilit huwa, bhal kull kuntratt iehor, konvenzjoni ta' ftehim bejn ghaqda ta' persuni illi bih tigi maghmula, regolata jew mahlula obligazzjoni (Artikolu 960, Kodici Civili). B'mod generali, kif jinsab deciz, "l-istatut ta' kwalunkwe socjeta` ghandu jigi ritenut li jirrifletti l-volonta` libera ta' l-assocjati sakemm ma jigix mibdul f'laqgha generali jew mod iehor sew, u ghalhekk sakemm id-decizjoni impunjata ma tkunx dimostrata in konflitt ma' l-istatut, li huwa l-kuntratt bejn l-assocjati, jew ma' principji fundamentali ta' gustizja, m'ghandhiex tqum ebda kwestjoni fuq l-espeditja jew ragjonevolezza tad-decizjoni". Ara "**Joseph Falzon -vs- John Stivala et nomine**", Prim' Awla, Qorti Civili, 21 ta'

Gunju, 1969 per Imhalled Maurice Caruana Curran (inedita);

Premess dan, ir-regolamentazzjoni tal-kondominja fil-ligi Maltija ddahhlet fis-sehh bil-promulgazzjoni ta' l-Att XXIX ta' l-1997 b'dan li d-disposizzjonijiet varji tieghu saru operattivi bis-sahha ta' l-Avviz Legali 160 tas-sena 2001 b'effett mill-1 ta' Lulju, 2001 jew l-1 ta' Jannar, 2002 skond il-kaz. *Inter alia*, dan l-Att haseb bl-Artikolu 31 (1) tieghu illi "id-disposizzjonijiet ta' l-Artikoli 2, 4, 5, 6, 8, 9, 10 u 22 (7) (d) ta' dan l-Att ghandhom japplikaw ghal *condominia* li kienu jezistu qabel il-bidu fis-sehh ta' dan l-Att". Il-punt kollu skond l-appellat *nomine* mhux qieghed hawn ghaliex skond l-assunt tieghu gjaladarba dan il-provvediment transitorju ma kkomprendiex ukoll l-Artikolu 3 ta' l-Att, l-Istatut ma tilefx l-effikacja tieghu u l-Assocjazzjoni ma kienetx marbuta bil-ligi in forza ta' l-ezistenza tad-"dritt kwezit" krejat b'dak l-Istatut. Fil-kuntest l-istess appellat *nomine* jiccita giurisprudenza rigwardanti r-retroattivita tal-ligi gdida f'materja kontrattwali u jippretendi li allura l-Att ma setax jimmodifika l-*istatus quo* definit bl-Istatut fil-mument tad-dhul in vigore tieghu u m'ghandux lanqas jipprevali fuq il-ftehim konkordat, senjatament il-klawsola li kienet tahseb ghat-tehid ta' decizjoni b'maggoranza semplici;

Wiehed logikament jifhem illi r-rikorrenza li l-appellat *nomine* jaghmel ghad-"dritt kwezit" hu dak minnu intenzjonat li l-ligi l-gdida ghandu jkollha zona delimitata ta' attwazzjoni u li allura d-disposizzjonijiet taghha ghandhom jirrispettaw dawk id-drittijiet li, mitwielda minn fatt akkwizittiv validu taht il-ligi precedenti, jkun gja dahlu fil-patrimonju tas-soggett avolja l-okkazjoni tipprezenta ruhha taht in-normi godda;

Huwa utli li jibda biex jigi osservat illi, kif deciz, "meta gudikant jew interpretu jigi biex japplika l-ligi ghall-kaz prattiku, l-ewwel tfittxija u indagni li ghandha ssir minnhom hija dik li jaraw liema ligi ghandha tigi applikata; u din in-

necessita tidher aktar cara speċjalment meta ligi għida tigi attivata u magħmula effikaci dwar materja li qabel jew ma tkunx regolata, jew li tkun regolata mil-ligi anterjuri. Dan aktar u aktar johrog car meta jigi kunsidrat fejn il-materja in diskussjoni tkun tirrigwarda fattijiet kompjuți, jew li kellhom il-bidu u l-inkomincjament tagħhom taht l-imperu tal-ligi antika jew anterjuri li tkun irregolathom u jipprotraw ruhhom, f'din l-ahhar ipotesi (mhux fl-ewwel wahda tal-fatt kompjuți), taht il-ligi l-għida". (**Chev. Antonio Cassar Torreggiani *nomine* -vs- Nutar Dr. Vincenzo Gatt *nomine***", Appell Civili, 12 ta' Mejju, 1950);

Din il-predetta decizjoni tkompli tillustra fuq l-insenjament ta' awturi kontinentali illi f'tema ta' dritt transitorju għandhom jigu rigwardati fost ohrajn dawn il-principji:-

- i. li l-attijiet jew it-trasferimenti huma regolati mil-ligi li taħtha jkunu gew kompjuți;
- ii. li l-attijiet mibdija taht il-ligi l-antika u li jestendu ruhhom taht il-għida, għandhom jigu regolati minn din ta' l-ahhar;
- iii. li meta jkun jezisti veru u proprju dritt kwezit kompjuți taht il-ligi antecedenti, dak id-dritt għandu effikacja fih innifsu li jirrezisti għall-applikazzjoni tal-ligi l-għida f'kaz ta' mutament tal-ligi anterjuri;

Applikati dawn il-principji għal kaz prezenti, jrid jinghad illi l-fatt li kien jezisti dak l-Istitut b'dawk il-klawsoli b'daqshekk ma kien krejat ebda dritt kwezit għaf-favur ta' l-assocjati. Id-decizjoni li jinbidel il-kulur tal-faccata ttiehdet ferm wara d-dhul fis-sehh ta' l-Att u dan kien tassattivament u espressament ipprovda illi għandhom japplikaw ukoll għall-*condominia* li kienu fis-sehh id-disposizzjonijiet għal liema jirreferi l-Artikolu 31 (1). Kien ikun differenti l-kaz kieku d-decizjoni ttiehdet qabel l-entrata in vigore ta' dan l-Artikolu għaliex allura l-att ikun diga gie kompjuți. Ara f'sens konsimili d-decizjoni fl-ismijiet "**Emanuel Mifsud -vs- Il-Kummissjoni għall-Kontroll ta' l-Izvilupp**", Appell, 31 ta' Mejju, 1996;

Hawnhekk non si tratta ta' veru u proprju dritt kwezit izda ta' modifikazzjoni ta' kif bis-sahha tal-ligi ghandhom jittiehdu d-decizjonijiet specjalment f'materji li jolqtu l-ambjenti komuni. Ukoll jekk l-Artikolu 31 (1) ma jsemmix *expressis* l-Artikolu 3 ta' l-Att huwa bil-bosta intwittiv illi l-*voluntas legislatoris* ma setghetx hlief tkun dik illi l-Artikolu 8 kien wiehed ta' ordni pubbliku u kellu jkollu effett immedjat u jigi osservat skrupolozament f'kull kaz ta' *condominium* ezistenti minghajr il-possibilita ta' xi deroga minnu fil-futur. B'dan gie li l-ligi ssuperat il-konvenzjoni statwita fl-Istatut ta' l-Assocjazzjoni;

Jikkonsegwi minn dan li nghad ir-ricerka jekk id-decizjoni mehuda kontra l-volonta tal-*condiminus* dissenzjenti kienetx wahda li, ghall-kontenut taghha, taghmilha tirrientra fil-parametri ta' l-Artikolu 8 (3) (a) ta' l-Att aktar 'il fuq riprodott, kif hekk mill-appellanti sostenut jew, inversament, skond kif kontez mill-appellat *nomine*, "*the decision taken did not refer to the decor and the aesthetics of the Block*" (ara l-Istatement of Defence tieghu);

Il-Qorti tirrikonoxxi illi dan il-punt huwa wiehed fattwali li ghandu jigi teknikament accertat mill-Arbitru bhala l-persuna kwalifikata ghal daqshekk. B'danakollu l-Qorti thoss li qabel ma tirrimetti l-atti lura lill-Arbitru ghandha opportunement tirregistra brevement dawn il-konsiderazzjonijiet ta' dritt fuq il-materja:-

1. Kif saput, l-Att dwar il-*Condominia* hu modellat estensivament fuq id-disposizzjonijiet korrispondenti tal-Kodici Civili Taljan. Hekk fuq il-punt specifiku hu mahsub fit-tieni parti ta' l-Artikolu 1120 ta' dak il-Kodici illi huma *inter alia* vjetati l-innovazzjonijiet "*che ne alterino il decoro architettonico*". In meritu, il-Qorti ta' Kassazzjoni Taljana tipprovdi illi b'dan "*si deve intendersi l'estetica data dall'insieme delle linee u delle strutture che ne costituiscono la nota dominante ed imprimono alle varie parte dell'edificio e dell'edificio stesso nel suo insieme*

una determinata armonica, fisionomia" (Cass. 8 ta' Gunju, 1995, Numru 6496);

2. Din l-istess kazistika tal-Qorti tal-Kassazzjoni Taljana tissokta tamplifika illi "*l'alterazione di tale decoro puo ben correlarsi alla realizzazione di opere che immutino l'originario aspetto anche soltanto di singoli elementi o punti del fabbricato tutte le volte che la immutazione sia suscettibile di riflettersi sull'insieme dell'aspetto dello stabile*" (Cass. 3 ta' Settembru, 1998, Numru 8731). Dan, ukoll, "*indipendentemente dal suo pregio artistico*" (Cass. 29 ta' Lulju, 1995, Numru 8381). Agguntivament, gie postulat illi dik l-alterazzjoni "*postula un mutamento estetico implicante un pregiudizio economicamente valutabile*" (Cass. 6 ta' Ottubru, 1997, Numru 9717);

3. L-attivazzjoni tal-principju u tal-kriterji direttivi ffissati mil-ligi u mill-gurisprudenza enuncjata ghandhom jiddeterminaw bi gwida lill-perit tekniku jekk it-tibdil tal-kulur fuq il-faccata ghandux jitqies ta' importanza skarsa jew jikkostitwix dik il-modifikazzjoni tad-dehra originarja ta' l-edificju u l-holqien ta' alterazzjoni sostanzjali ta' l-estetika arkitettonika tieghu minn dik li kienet.

Ghal dawn il-motvi l-Qorti qeghda tilqa' l-appell fis-sens illi tikkonferma illi l-materja involuta kellha tigi verifikata skond id-dispost ta' l-Artikolu 8 (3) (a) ta' l-Att dwar il-*Condominia*. Ghal din ir-raguni l-Qorti qeghda, ex-Artikolu 71 (2) ta' l-Att dwar l-Arbitragg, tirrimetti l-atti lura lill-Arbitru biex dan jaghmel l-accertamenti teknici tieghu fid-dawl tal-konsiderazzjonijiet premissi u konsegwentement jarbitra jekk id-decizjoni mehuda mill-Assocjazzjoni tilledix id-drittijiet ta' l-appellanti jew, jekk ix-xoghlijiet diga saru, kienx hemm da parti ta' l-Assocjazzjoni vjolazzjoni ta' l-Artikolu 8 (3) (a) tal-Kapitolu 398. Fic-cirkostanzi huwa gust u xieraq illi l-ispejjez relattivi ta' dan l-appell jitbatew fi kwoti ndaqs bejn il-partijiet.

Kopja Informali ta' Sentenza

< Sentenza Finali >

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