MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

EDWINA GRIMA

Seduta tad-29 ta' April, 2015

Appell Civili Numru. 29/2011

KEES DE JONG bhala amministratur ta' "Tigne Place Residents Association"

Vs

1. WINEX HOLDINGS LIMITED

2. VANILLA TELECOMS LTD.

Il-Qorti,

Rat il-lodo arbitrali moghtija mit-Tribunal tal-Arbitragg fit-12 ta' Lulju 2011 fejn gie deciz:-

"L-Abitru;

On the 4th March 2008, applicant nomine started arbitration proceedings under the Arbitration Act against the two defendant companies.

On the 19th December 2008 an arbitral award was given in the above names. The content of this award is not being reproduced since both parties are well aware of its content.

Two appeals were filed from this arbitral award – that of the two defendant companies, Winex Holdings Limited and Vanilla Telecomms Limited, and that of the plaintiff, Kees de Jong nomine.

That the Court of Appeal in its final decision held that the arbitral award that had been given on the 19th December 2008 was null since the arbitrator had not determined a number of pleas that had been raised by defendants.

The same Court of appeal held: "Gjaladarba s-sentenza appellata ma tistax legittimament, ghar-raguni predetti tithallas 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."

The undersigned was appointed as an arbitrator by the Chairman of the Malta Arbitration Centre to hear and determine this case, and in view of the decision of the Court of Appeal the Arbitrator shall hear and determine this case ex novo as if it has never been determined before.

Statement of Claim:

The applicant brought forward his statement of claim in virtue of which he stated:

"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 fo the Association. 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' Palace Residents Association."

The applicant prayed for:

"The removal of communication antennae and other installations without Association's consent and payment of damages."

In his statement of claim the applicant did not establish the amount of damages that were being claimed, yet he said that this amount had yet to be established.

In virtue of its statement of defence Vanilla Telecomms Limited raised a number of pleas that are being herebelow reproduced:

Vanilla Telecomms Ltd, as respondent company submits:

1. *That preliminary, according to the fourth schedule (article 15) of Chapter 387 of the Laws of Malta, all disputes regarding a condominium, which according to Chapter 398 of the same laws of Malta are to be submitted for arbitration, are to be settled by mandatory arbitration.*
2. *Consequently and since Chapter 389 does not specifically provide, these proceedings are not for mandatory nature and that therefore this dispute should be settled by mandatory arbitration.*
3. *Moreover, even in the event that Chapter 387did not provide for a mandatory referral to arbitration for some cases, the roof, including the washroom in question, does not form part of the condominium, since it is owned by the co-defendant company Winex Holdings Ltd.*
4. *Moreover and again assuming that the law provides for a mandatory referral to arbitration, according to Article 2(2) fo Chapter 398 of the Laws of Malta, Vanilla Telecomms Ltd. is not a condominus of the condominium in question, since it is not an owner of a separate unit within the condominium, nor an ephyteuta nor an usufructuary of any such unit and therefore cannot be involved in special proceedings intended by the law to settle disputes between condomini;*
5. *Without prejudice to the pleas of the respondent company, the same respondent company has no objection to the appointment of Doctor of Laws Kris Borg LL.D. as arbiter in this arbitration.*
6. *That the respondent company has no judicial relationship with the claimant;*
7. *That as far as the respondent company is aware and as emanates from its arrangements with Wines Holdings Ltd, the same respondent company believes that Winex Holdings Ltd is the owner of the roof and several units forming part of the condominium in question;*

8. *That any and all installations made by the respondent company have been made with the prior approval of Winex Holdings Ltd;*
9. *That, without prejudice to any other plea, the installations cannot cause any damage to property or to persons and that the claims submitted by the claimant are based merely on assumptions and allegations which have no scientific foundation, as evidence by conclusive international research on the subject, and that the same installations and apparatus are in conformity with the standards required by the European Telecommunications Standards Institute (ETSI), that the respondent company makes reference to three judgments delivered by the First Hall of the Civil Court in the acts of the warrants of prohibitory injunction in the names* ***"Anna Spiteri vs Mobile Communications Ltd (****2423/01 – delivered on the 6th September 2001),* ***Paul Bugeja et vs Mobile Communications Limited et"*** *(1121/02) – delivered on the 28th June 2002 and* ***"Frank Muscat et vs Pierre Sammut et"****(1422/02 DS – delivered on the 12th of July 2002), the merits of which bear close resemblance to the case under review, and that the court denied the plaintiff claims in all three abovementiond judgements;*
10. *That furthermore the claimant has not brought any evidence in support of the abovementioned claim;*
11. *Therefore, the respondent company prays upon the Tribunal to free it from these proceedings for the reasons abovementioned with all costs to be borne by the claimant.*
    Saving ulterior please."

That from an analysis of the file in question it did not result that Winex Holdings Limited ever presented a statement of defence. In terms of a letter dated 26th June 2008, respondents Winex Holdings Limited states that it had agreed to take the matter to arbitration subject to certain terms and conditions, one such condition being, according to Winex, that no lawyers would take part in the arbitration proceedings. Winex had requested assurances in writing from claimant that this condition would be respected.

The Arbitrator cannot accept this letter by Winex as substituting a statement of defence that is required by law to reply to the statement of claim of applicants. Neither can this letter justify that fact that Winex Holdings did not file a reply. In the circumstances Winex Holdings Limited has remained contumacious.

It is noted that eventually on the 2nd November 2008, notwithstanding its initial objection to the arbitration, Winex Holdings Limited presented a not

of submissions stating why the claimants requests were not to be entertained.

Prior to embarking upon a consideration of the legal issues at stake in this arbitration, the undersigned shall first go through the please raised by Vanilla Telecomms Limited.

The firs three pleas are going to be treated together since in the opinion of the arbitrator these are interconnected. In essence, what is here being stated is that the matter at hand is the type of matter that requires settlement by mandatory arbitration, while the arbitration filed is notan arbitration of a mandatory nature as catered for in Chapter 387 and hence it is not the type of arbitration that should have been filed.

A reading of article 1.1. of the Fourth Schedule of Chapter 387 states:

All disputes regarding a condominium which according the Condominium Act (Cap. 398) are to be submitted to for arbitration.

A reading of the Condominium Act shows that not all matters dealing with a condominium are to be referred to arbitration. The Condominium Act states the instances where a condomini may refer a matter to arbitration. The removal of movable effects from the common parts of a condominium is not one of the instances where the legislator has required that the matter will be referred to Arbitration according to the Condominium Act and hence the rules dealing with mandatory arbitration are not applicable to the issue at hand.

The Arbitrator is hence disposing of the first and second ples by rejecting the same.

To this effect the proceedings between the parties are normal arbitration proceedings, irrespective for the nature that is being discussed between the parties. To this effect whether the roof is a common are or not and whether Vanilla Telecomms Limited is a condominus or not, does not have a bearing on whether the matter can be settled by arbitration or not. Indeed in view of the fact that the matter at hand is not one that requires a mandatory arbitration, both Vanilla Telecomms and Wines Holdings Limited could have filed a statement of defence stating that they were not submitting to the arbitration and the matter would have had to stop there. In the absence of mandatory arbitration, no person can be compelled to partake in arbitration proceedings. Vanilla Telecomms Limited did not raise the plea.

To this effect respondent is hereby disposing of the fourt and fifth plea raised by the respondent Vanilla Telecomms Limited.

The Arbitrator shall not enter into the merits of whether the equipment in question can cause harm or damage to person and property since this is not the issue at hand. The issue at hand is a patrimonial issue as shall be detailed below. In the circumstances the Arbitrator is also disposing of the ninth plea raised by Vanilla Telecomms Limited.

The remaining pleas raised by Vanilla Telecomms Limited are going to be treated together with the position raised by Winex Holdings Limited in its note of submissions.

The issue at hand is whether satellite dishes and telecommunications equipment can be affixed to the outer part of the lift shaft and the stairwell. Winex Holdings Limited states that it is the owner of the area where the said telecommunication equipment has been affixed, which Claimants state that in view of the fact that the lift shaft and the stairwell are common parts, no such equipment could be affixed on the outer part of this area without the consent of the Owners Association.

Vanilla Telecomms Limited relies on the position taken by Winex Holdings Limited that the area where the equipment has been affixed belongs to Winex Holdings Limited, as emanates from the third, seventh and eight plea raised by Vanilla Telecomms Limited.

From the evidence brought forward and from the site inspection held by the Arbitrator it resulted that when effecting transfers Winex Holdings Limited specifically excluded the roof and the air space over Blocks C and D, from forming part of the common parts. Even the plans attached to the deeds of transfer clearly excluded the airspace over the lift room and the landing from sale, and there is no doubt that the air space over the lift room and the landing are actually owned by Wines Holdings Limited.

On the other hand there is no doubt that the lift room and the stairwell and the landing are part of the common parts of the block of apartments in question.

The issue thus revolves as to whether Winex Holdings Limited may affix, or allow the affixation of equipment, on a wall or on a roof, the outer airspace of which belongs to it and the internal part of which is part of the common parts of the block of apartments in questions, and thus owned by the various condomini.

The Arbitrator makes reference o article 5(a) of the Condominium Act which states:

5. unless otherwise resulting from the title fo the owners of the separate units, or unless it is otherwise agreed by the condomini by a public deed,

the common parts of a condominium are the following, even if one or more of the condomini do make use thereof:

(a) the land on which the condominium is constructed, the foundations, the external walls, including the common dividing walls with neighbouring tenements, the roofs, the shafts, the stairs, the entrance doors, the lobbies, corridors, the stairwells, the courtyards, the gardens, the airspace above the whole property and in general, all the other parts of the property which are intended for the common use;

Special reference to the above is made to the term "external walls". There is no doubt that the wall on which the telecommunications equipment has been installed is in effect an "external wall" in terms of the above definition.

Against this argument that the wall in question is in effect a common part, there is the clause contained in the deeds of transfer stating that the roof and the airspace was not included in the sale of the respective apartments. This clause in essence states that specifically excluded from the sale is the roof and airspace of the Block. Respondents are arguing that this reservation fo ownership gives them the right to affix equipment on the outer side fo the walls of lift shaft and the outer wall fo the stairwell/landing.

The arbitrator feels that the arguments raised by defendants cannot be entertained, in view of the fact that the walls in questions, i.e. the outer part of the wall of the lift shaft, the ceiling of the lift shaft, the outer wall of the stairwell/landing and the roof of the stairwell/landing are in terms of law common parts of the condominium, and the reservation of ownership on the part of the respondents does not exclude these areas from being common parts.

The Arbitrator has come to the conclusion after two facts:

a) *In deed dated 27th July 2001 in virtue of which the respondents sold an apartment in the block to one of the condomini, it is expressly stated: "The External walls of Block C, including the common dividing walls with neighbouring tenements, shall be considered as common parts of Block C…". thus the respondents are hereby confirming in virtue of a public deed that the wall in virtue of which this dispute is arising is a common part.*
b) *In addition the matter at hand was also discussed and considered by the Maltese Courts of Appeal in the case Andrew Xuereb noe vs Kurt Coleiro decided n the 20th June 2008 by Mr. Justice Philip Sciberras. The legal appreciation done by the Court of Appeal in this case is very*

similar to that which has been requested by the arbitrator and this Arbitrator is relying on the legal interpretation given by the Court of Appeal. As a matter of fact in this case, the argument in favour of considering the wall of the lift shaft and the stair well and landing as a common part (including its external part) is beyond any doubt in view of the above referred to clause declaring that the external walls are common parts.

In view of the above the arbitrator is determining this case by accepting the request of the claimant in parte and ordering the defendants to remove the communication antennae and other installations which are affixed to the external part of the walls or roof of the lift shaft and the external part fo the wall or the roof of the stair well or landing without the Association's consent.

The arbitrator is not ordering the payment of any damages as these were not proven.

The costs related to the arbitration are to be borne by respondents".

Illi s-socjetajiet appellanti Winex Holdings Limited u Vanilla Telecoms Limited aggravati b'dan il-lodo arbitrali ressqu appell minnu abbazi tas-segwenti aggravvji:

1. Illi l-kaz in ezami ma jinkwadrax ruhu taht id-disposizzjonijiet li jikkontemplaw risoluzzjoni permezz ta' arbitragg mandatarju, u ghaldaqstant fin-nuqqas ta' ftehim bejn il-partijiet kollha ma setghux jigu intavolati il-proceduri arbitrali odjerni li ghaldaqstant huma nulli ghall-finijiet u effetti kollha tal-ligi. Dan gie affermat mill-Arbitru, li izda ghadda sabiex cahad l-eccezzjoni sollevata mis-socjeta appellata Vanilla Telecom Limited dwar in-nuqqas ta' gurisdizzjoni arbitrali billi iddecieda illi l-arbitragg ghandu jitqies bhala "normal arbitration" u ghalhekk wiehed volontarju u dana billi l-partijiet issottomettew rwiehom ghall-proceduri ta'l-arbitragg fil-mument illi huma ressqu l-eccezzjonijiet taghhom fil-mertu.

2. Illi l-hajt fejn twahhlu l-ariels u l-apparat relattiv, mertu tal-kontestazzjoni li huwa il-hajt estern fuq il-bejt tal-blokk ta'l-appartamenti ("outer part of lift shaft and stairwell") ma kellux jitqies bhala parti komuni u ghalhekk ma kienx jenhtieg il-kunsens preventiv ta'l-Assocjazzjoni qabel ma isiru dawn ix-xogholijiet.

Illi preliminarjament l-appellat jilqa' ghal dan l-appell meta jissolleva l-pregudizzjali dwar in-nullita ta'l-istess ghar-raguni illi ma jikkonformox ruhu mal-procedura dettata bil-ligi fl-artikoli 70A u 70B tal-Kapitolu 387 tal-Ligijiet ta' Malta. Illi qabel kull konsiderazzjoni ohra, il-Qorti necessarjament trid tissupera dan l-iskoll procedurali billi l-ezitu ghall-istess jista' ikollu effett fuq is-success o meno ta'l-appell odjern.

Illi decizjoni arbitrali tista tigi impunjata fil-limiti stretti ta' dak dispost fl-artikolu 70A(1) tal-Kapitolu 387 tal-Ligijiet ta' Malta, jigifieri "fuq punt ta' ligi li jitnissel minn decizjoni finali maghmula fil-procedimenti." In vista tal-pregudizzjali imqanqla mill-appellat, il-Qorti ghandha allura tivverifika jekk il-kontestazzjoni formulata mis-socjetajiet appellanti tikkorrispondiex ezattament ghal kaz ta' impunjattiva skond kif stabbilit fil-ligi. Illi di piu' id-dettam ta'l-artikolu 70B(1) jipprovdi illi meta jsir appell taht l-artikolu 70A, l-appellanti ghandu jidentifika l-punt ta' ligi li ghandha tittiehed id-decizjoni fuqu u ghandu jispecifika t-tifsira li r-rikorrenti jallega li hi it-tifsira korretta tal-punt ta' ligi identifikat.

"**Jikkonsegwi minn dan illi hu dejjem necessarju li mill-att ta' l-appell jirrizulta liema hi n-norma vjolata ossija l-principju tad-dritt li l-appellanti jippretendi li gie lez. Li jfisser illi min jimpunja d-decizjoni ghandu jispecifika, fil-konkret, il-punt tal-ligi vjolat, u in aggunta igib in riljev il-punt u l-mod fejn l-Arbitru ddiskosta ruhu minnu. Irid jizdied illi mhix sufficjenti s-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, ghal talba ta' l-accertament *ex novo* tal-fatti tal-kaz u dan, kif gja rilevat, hu inammissibbli;

Premess dan, …. irid jinghad illi minn qari akkurat ta' l-imsemmi Artikolu 70B (1), ma jidherx li hu indispensabbli illi l-impunjattiva trid bilfors tikkontjeni indikazzjoni specifika ta' xi artikolu tal-ligi li jinghad li gie vjolat. Jibbasta li jigi pprecizat l-punt tal-ligi estratt mis-sentenza attakkata u li tinghata t-tifsira korretta dwaru.[1]"

Dawn ir-regoli ta' procedura huma xi ftit differenti meta si tratta ta' arbitragg mandatorju billi l-artikolu 70C ta'l-Att jaghti jedd ghall-appell lil din il-Qorti "kemm fuq fatti kif ukoll fuq punti ta' liġi li jitnisslu minn deċiżjoni finali magħmula fil-proċedimenti."

Illi minn qari tal-lodo arbitrali jirrizulta deciz illi l-arbitragg mertu tal-kaz ma kienx wiehed hekk imsejjah mandatorju billi fil-fehma tat-Tribunal "***the rules dealing with mandatory arbitration are not applicable to the issue at hand.***"
Illi ma jidhirx illi din il-parti tal-lodo qed tigi impunjata minn xi hadd mill-partijiet. Illi l-gravam sottopost ghal gudizzju ta' din il-Qorti huwa in-nuqqas ta' gurisdizzjoni arbitrali stante illi ma kienx hemm ftehim arbitrali milhuq bejn il-partijiet u kwindi l-Arbitru erronjament wasal ghal konkluzjoni illi s-sottomissjoni tal-partijiet ghal-proceduri arbitrali, u allura l-oggezzjonijiet moghtija fil-mertu mill-intimati, kienu jekwivalu ghal ftheim arbitrali skont il-ligi.

Illi ma hemmx dubbju allura illi bl-impunjattiva imressqa 'il quddiem mis-socjetajiet appellanti huma qeghdin jattakkaw il-punt ta' dritt deciz mit-Tribunal dwar l-eccezzjoni tal-gurisdizzjoni sollevata mis-socjeta Vanilla Telecoms Limited. Il-Qorti tara ghalhekk, illi ghalkemm huwa minnu illi l-att ta'l-appell ma jindikax fl-ispecifiku il-punt ta' dritt attakkat, madanakollu jindika bl-iktar

[1] App.Inf. 14/03/2007 Maryanne Sciclunna vs Dr. Daniela Chetcuti

mod car il-principju legali impunjat u allura dak li fil-fehma tal-appellanti kellu jigi indirizzat mill-aspett ta' dritt mit-Tribunal fid-decizjoni tieghu dwar l-eccezzjonijiet procedurali sollevati. L-istess jista' jinghad dwar l-aspett ta' dritt l-iehor imfassal fit-tieni aggravvju dwar il-principju legali tal-proprjeta' tal-bejt u l-arja in kontestazzjoni.

Spjanat ghalhekk it-terren mill-pregudizzjali sollevat mill-appellat, din il-Qorti ser titratta qabel xejn l-ewwel aggravvju dwar il-gurisdizzjoni tat-Tribunal ta'l-Arbitragg sabiex jitratta u jiddeciedi il-vertenza insorta bejn il-partijiet.

"L-istitut ta' arbitragg fis-sistema Maltija llum huwa regolat bid-disposizzjonijiet tal-Kapitolu 387 tal-Ligijiet ta' Malta. Huwa relevanti ghal finijiet ta' dan l-aggravju li jigi nnotat li kemm il-Kodici ta'l-Organizazzjoni u Procedura Civili, kif kien qabel l-emendi introdotti bl-Att II tal-1996, kif ukoll il-Kapitolu 387 jirrikjedu li ftehim ta' arbitragg jsir bil-miktub. Infatti l-allura Artikolu 970 (1) tal- Kapitolu 12 kien jipprovdi li "*L-att ta' arbitragg jista' jsir sew b'att pubbliku kemm b'kitba privata ....*".. Il-Kapitolu 387, ippubblikat bl-Att II tal-1996, jehtieg li sabiex ftehim ta' arbitragg jkollu l-effetti mehtiega ghandu jkun "*an agreement as defined in Article 7 of the Model Law*" u cioe` il-"Model Law on International Commercial Arbitration" li giet adottata mill-United Nations Commission on International Trade Law fil-21 ta' Gunju, 1985. Din il-Model Law, li giet riprodotta fl-ewwel skeda annessa mal-Kap. 387, tipprovdi fl-Artikolu 7 li "*Arbitration agreement is an agreement by the parties to submit all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not*.....". Izda fis-subartikolu (2) tal-istess Artikolu 7 hemm dispost li "*The arbitration agreement shall be in writing.*" Isegwi li kull lodo konsegwenti ghall-ftehim ta'

arbitragg li ma jkunx sar bil-miktub, ma ghandux validita` legali u ma jifformax stat bejn il-partijiet.[2]"

Illi l-artikolu 7(2) tal-Model Law tispjega kif ghandu ikun il-ftehim bil-mitkub meta jinghad:

"**Ftehim ikun bil-miktub jekk dan ikun jinsab f'dokument iffirmat mill-partijiet jew fi <u>skambju ta' ittri, telex, telegrammi jew mezzi oħra ta' telekomunikazzjoni li jipprovdu prova tal-ftehim,</u> jew fi skambju ta' dikjarazzjonijiet ta' talba u ta' eċċezzjonijiet li fihom jiġi allegat minn xi parti li jkun hemm xi ftehim u dan ma jiġix miċħud mill-parti l-oħra. …**"

Illi s-socjetajiet appellanti jishqu illi dan il-ftehim bil-miktub ma kienx sar bejn il-partijiet u isostnu illi bil-fatt illi s-socjeta Vanilla Telecoms Limited ressqet l-eccezzjonijiet taghha fil-mertu (billi is-socjeta l-ohra ma ipprezentat l-ebda risposta) u anke it-tnejn li huma kienu sokkombenti ghal proceduri arbitrali ma ifissirx illi kienu b'daqshekk qed jirrinunzjaw ghall-eccezzjoni preliminari sollevata.

Illi l-artikolu 32(4) tal-Kapitolu 387 jiddisponi illi "**generalment, it-tribunal tal-arbitraġġ għandu jiddeċiedi eċċezzjoni dwar il-ġurisdizzjoni tiegħu bħala eċċezzjoni preliminari. Iżda t-tribunal tal-arbitraġġ jista' jibqa' għaddej bl-arbitraġġ u jaqta' dwar dik l-eċċezzjoni fid-deċiżjoni finali tiegħu.**" Dan ma jistax hlief ifisser allura illi ghalkemm it-Tribunal ikun inoltra ruhu fil-mertu tal-kaz u kwindi il-partijiet ikunu necessarjament ressqu l-provi taghhom fil-mertu, ma ghandux ifisser illi l-eccezzjoni preliminari dwar il-gurisdizzjoni tkun qed tigi rinunzjata kif ikkonkluda l-Arbitru fid-decizjoni tieghu. L-eccezzjoni sollevata mis-socjeta Vanilla Telecoms Limited allura

[2] Rev.Patri Vigarju Provincjali Raymond Francalanza vs Nike Ventures Limited et – App.Sup. 09/01/2007

necessarjament kellha tekwivali ghall-oggezzjoni da parti ta'l-istess socjeta ghal gurisdizzjoni tat-Tribunal. Il-fatt illi gew ipprezentati eccezzjonijiet ohra fil-mertu u il-fatt illi s-socjeta intimata appellanti ressqet il-provi fil-mertu ma setax ifisser illi hija kienet qed tirrinunjzaw ghal tali eccezzjoni u li kienet qed taqbel illi l-kwistjoni kellha tigi rizolta permezz ta' proceduri arbitrali ai termini tal-Kapitolu 387.

Illi l-appellat madanakollu jishaq minn naha tieghu, illi matul il-procediment jidher illi kien hemm skambju ta' korrispondenza bejn il-partijiet minn fejn ghandu johrog illi kien qed isir ftehim sabiex il-kwistjoni tigi risolta permezz ta' arbitragg volontarju. Illi allura gie sodisfatt il-vot tal-ligi kif delinjat fl-artikolu 7(2) hawn fuq iccitat.

Illi l-Qorti ezaminat l-atti kollha u sabet illi f'iktar minn okkazzjoni wahda kien hemm skambju ta' korrispondenza bejn il-partijiet fejn kien sar qbil illi il-vertenza tigi risolta f'arbitragg bil-kundizzjoni izda illi ma ikunx hemm l-ebda avukat jirrapprezenta lil xi parti. F'wahda mill-*emails* mibghuta minn Ray Vassallo ghan-nom tas-socjeta Winex Company Limited tas-17 ta' Lulju 2008, lill-appellat jinghad hekk:

"***I have just spoken to David Thake of Vanilla and I confirm on his behalf and on behalf of Winex that the Arbitration may proceed on the basis of the two conditions you highlighted – in short, no lawyer participation in the proceedings***."

Din l-affermazzjoni tirrizulta ukoll ghal darb'ohra f'ittra mibghuta lir-Registratur tat-Tribunal Dr. Fiona Farrugia f'ittra fl-istess sens mibghuta lilha minn Ray Vassallo ghan-nom tas-socjeta appellanti Winex Holdings Limited, u fejn kien hemm accettazzjoni minn naha tal-appellat tal-kundizzjonijiet imposti. Abbazi ta' dawn l-affermazzjonijiet, ghalhekk, ir-Registratur ipprocediet biex

tat bidu ghall-proceduri ta’ arbitragg bejn il-partijiet. Dan l-iskambju ta’ korrispondenza ghalhekk certament jissodisfa il-vot tal-ligi kif imfisser fl-artikolu 7(2) tal-Model Law u ghalhekk jekwivali ghal ftehim milhuq bejn il-partijiet sabiex jissottomettu il-kwistjoni ta’ bejniethom ghal gudizzju arbitrali. Ghal dawn il-motivi l-ewwel aggravvju ma jistax isib akkoljiment.

Illi, sorvolat allura l-ostakolu dwar il-gurisdizzjoni tat-Tribunal, il-Qorti ser tghaddi biex titratta it-tieni aggravvju imressaq mis-socjetajiet appellanti fejn jilmentaw illi t-Tribunal erronjament iddecieda illi l-hajt estern fejn twahhal l-apparat huwa in komun bejn il-membri ta’l-Assocjazzjoni u is-socjeta Winex Holdings Limited u dana billi huwa fatt inkontestat u anke ikkonfemrat mit-Tribunal illi l-bejt u l-arja tal-blokk ta’l-appartamenti B u C baqghu proprjeta esklussiva tas-socjeta venditrici u cioe’ tal-appellanti. Kwindi jishqu illi ma kienx hemm bzonn il-kunsens preventiv ta’l-Assocjazzjoni qabel sar ix-xoghol ta’ twahhil ta’l-apparat u oggetti ohra mal-hajt estern u fuq il-bejt.

Illi ma jidhirx illi hemm kontestazzjoni dwar il-fatt ippruvat illi is-socjeta Winex Holdings Limited hija proprjetarja tal-bejt sovrastanti il-*lift room* u il-*landing* tal-partijiet komuni. Il-vertenza madanakollu tikkoncerna il-parti esterna tal-hajt u/jew saqaf ta’ dina il-parti tal-proprjeta. Illi is-socjetajiet appellanti isostnu illi l-Arbitru malament interpreta il-kliem “external walls” fl-artikolu 5 tal-Att dwar il-*Condominia* bhala li jikkomprendi kwalsiasi hajt estern billi il-ligi hawnhekk qed taghmel referenza biss ghal hitan tal-faccata u mhux ghal hitan divizorji fejn is-sidien rispettivi ghandhom dritt iwahhlu kwalsiasi oggett mal-parti tal-hajt taghhom basta li l-istess ma jirrekawx hsara lill-istess hajt komuni.

Illi il-Kapitolu 398 jikkreja l-presunzjoni li “l-hitan ta’ barra, inkluzi l-hitan divizorji komuni mal-fondi ta’ biswit” ghandhom jitqiesu komuni [subinciz (a)

ta’ l-Artikolu 5]. Illi l-kuntratt tal-kompro-vendita ta’l-appartamenti specifikatament jirriserva id-dritt ta’ proprjeta lill-venditur tal-bejt u l-arja sovrastanti, madanakollu bid-dritt ta’ uzu ta’l-istess bejt favur ir-residenti ta’l-appartamenti. Illi di piu’ kif superjorment deciz fil-kawza Andrew Xuereb vs Kurt Coleiro deciza minn din il-Qorti kif diversament ippresjeduta fl-20 ta’ Gunju 2008:

“**Mill-kontenut tas-subparagrafu (a) ta’ l-Artikolu 5 tal-Kapitolu 398 huma individwati dawk il-partijiet li jifformaw l-istruttura tal-korp ta’ bini, cjoe, dawk il-partijiet necessarji ghall-istess ezistenza tieghu. B’mod partikulari, l-art, il-pedamenti, il-hitan u s-soqfa tieghu. Dawn, ilkoll, huma necessarjament kondominjali in kwantu accessorji indivizibbli per natura u destinazzjoni. Ragonevolment, allura, ghall-istess ezistenza konkreta tal-kondominju, dawn huma, innegabilment, parti organika u essenzjali tal-korp ta’ bini, hekk integranti oggett ta’ komunjoni bejn is-sidientad-diversi appartamenti.”**

Issa huwa veru li fl-awtonomija negozjali taghhom l-kontraenti jistghu jiftehmu liema huma dawk il-partijiet li ghandhom jitqiesu komuni. B’danakollu fil-kaz ta’ art, pedamenti jew hitan, ankorke t-titolu ta’ akkwist ma jispecifikahomx huwa difficli in bazi ghal konsiderazzjoni maghmula li jkun accettat kif dan jista’ validament jidderoga mill-presunzjoni ta’ komproprjeta` jew tal-kogodiment dwarhom affermata mill-Artikolu 5, kombinat ma’ l-Artikolu 2 ta’ l-Att. Fil-prattika, lanqas ma jidher li kien logikament mistenni li l-kuntratt jelenka wkoll l-ovvju fid-definizzjoni moghtija meta, bla dubju, dawk il-partjiet huma mill-istess natura strutturali taghhom, indifferenzjatament iddestinati ghas-servizz u utilita` ta’ l-appartamenti kollha fil-blokk ta’ bini. Jinzel mill-konkluzjoni ta’ dawn il-konsiderazzjonijiet li l-appell mhux fondat.”

Illi minn dan l-insenjament allura jitnissel l-obbligu li ma isirux tibdiliet fil-partijiet komuni minghajr il-kunsens ta’ kull min ghandu il-godiment taghhom. Jekk wiehed kellu jirrifletti fuq din it-tematika mill-perspettiva tal-principji generali tad-dritt taht il-Kodici Civili nsibu li l-Artikolu 493 fejn si tratta ta’

tibdil fil-haga komuni illi l-kunsens tal-komproprjetarji hu *di rigore*. Di piu' mbaghad l-artikolu 419(b) jipprovdi li:

"*Ebda wiehed mill-girien ma jista' jwahhal jew ipoggi mal-hajt komuni, minghajr il-kunsens tal-gar l-iehor, xi bicca xoghol gdida, inkella, jekk dan ma jkunx irid, minghajr qabel ma jkunx stabilixxa, b'periti, il-mezzi mehtiega sabiex dik il-bicca xoghol gdida ma tkunx ta' hsara ghall-jeddijiet tal-gar l-iehor."*

F'certu sens din id-disposizzjoni tal-Kodici Civili tikkorrispondi ghall-Artikolu 8 tal-Kapitolu 398 fejn hemm dispost:

"**…. m'għandux isir dan it-tibdil jew tiġdid li ġej fil-partijiet komuni kemm-il darba ma jkunx hemm il-kunsens unanimu tal-condomini kollha:**

(a) dak li jibdel l-estetika u d-dehra tal-condominium; jew

(b) dak li jolqot b'mod sostanzjali l-użu jew it-tgawdija ta' xi parti komuni minn xi wieħed mill-condomini; jew

(ċ) dak li jista' jippreġudika l-istabbiltà jew is-sigurezza tal-bini."

Ghal dawn il-motivi allura il-Qorti ma tara l-ebda raguni 'il ghala ghandha tiddipartixxi mil-fehma raggunta mill-Arbitru fid-decizjoni tieghu u kwindi anke dan l-aggravvju qed jigi michud.

Ghaldaqstant l-appell qed jigi michud u s-sentenza appellata ikkonfermata.

Bl-ispejjez ikunu ghak-karigu tas-socjetajiet appellanti.

< Sentenza Finali >

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