TRIBUNAL GHAL TALBIET TAL-KONSUMATUR

CONSUMER CLAIMS TRIBUNAL

MALTA

Fit-Tribunal tal-Konsumatur

Zaneta Wargocka

vs

Chris Bonello - Throttle Monkeys u Roberta Ellul - Connect Travel

CCT 80/20/ MS

5 ta' Ottubru 2022

Ra l-avviz tar-rikorrentiipprezentat fil-15 ta' Lulju fejn talbet ir-rifuzjoni ta' elf sitt mija u tnejn u sebghin Euro (€1,672) u dan wara li xtrat pakkett tal-vjagg organizzat mill-intimati/ azjendi intimati, liema pakkett kellu jigi abbandunat mir-rikorrenti wara li l-Italja giet dikjarata żona hamra u minhabba restrizzjonijiet ohra in konnessjoni mal-pandemija Covid-19, kif ahjar deskritt fl-avviz tat-talba immarkata Appendix A.

Ra r-risposta pprezentata fis-16 ta' Frar 2021 fejn gie eccepit illi t-talbiet tar-rikorrenti huma infondati fil-fatt u fid-dritt u ghandhom jigu michuda bl-ispejjes kontrihom stante li:
preliminarjament ir-rikorrenti stess kienet helset lill-intimati minn kwalsiasi responsabbilita' u rrinunzjat ghal kwalisiasi pretensjoni li setghet kellha meta ffirmat l-iskrittura Dok A u konsegwentement ghandhom jigu mehlusa minn kwalsiasi responsabbilta' u liberati mill-osservanza tal-gudizzju;
illi preliminarjament, ghandhom jigu sfilzati d-dokumenti kollha li ntabghtu fuq bazi ta' minghajr pregudizzju mill-atti tal-kawza;
illi fil-mertu, l-pakkett tal-ivjaggar in kwistjoni kien beda meta r-rikorrenti attendiet fil-hanut tal-intimat Chris Bonello u mbaghad ghaddiet biex taqbad il-vapur lejn Sqallija. Konsegwentemet mhuwiex applikabbli r-regolament 11 tal-LS 409.19 ladarba l-pakkett tal-ivjaggar kien diga' beda meta r-rikorrenti ghazlet li titterminah; illi qabel il-bidu ta' dan it-tour ir-rikorrenti kienet taf li kienet ghadejja pandemia u kienet konsapevoli li kellha tiltaqa' mal-gwida gewwa Tunezija, u minkejja li kienet taf li kien hemm tibdiliet fil-programm u mir-riskji li kien hemm, hija ghazlet li taccetta t-tibdiliet u riskji u f'kull kaz tibda l-pakketta tal-ivjaggar;
illi ai termini tar-regolament 13(3)(c) tal-LS 409.19 ir-rikorrenti m'ghandhiex tkun intitolata ghal kumpens ghad-danni ladarba n-nuqqas ta' konfromita' kienet minhabba cirkostanzi inevittabbli u straordinarji;
illi l-ebda ammont huwa dovut lir-rikorrenti.

Ra l-atti kollha tal-kawza,

Sema' x-xhieda bil-gurament

Ra illi din il-kawza hija konessa mal-kawzi CCT 79/20, CCT86/20 u CCT u l-kawzi instemghu flimkien.

Ikkunsidra

Illi l-ewwel eccezzjoni tal-intimati hija li huma ghandhom jigu mehlusa minn kwalsiasi responsabbilita' u liberati mill-osservanza tal-gudizzju u dan wara li r-rikorrenti rrinunzjat ghall-kwalsiasi pretensjoni li setghet kellha fil-konfront tal-istess u heles lill-intimati minn kwalsiasi responsabbilta' ta kwalsiasi natura (Dok A).

Illi d-dokument in kwistjoni, huwa 'Throttle Monkeys Malta and Connect Travel Malta Waiver and Release of Liability Agreement' li gie ffirmat mir-rikorrenti fid-9 ta' Marzu 2020.

Illi l-artikolu 44 (cc) tal-Kap 378 jipprojibixxi kuntratti ma' konsumaturi li jiddaħħlu espressjonijiet li jkollhom l-effett li "jeskludu jew ifixxklu d-dritt li għandu l- konsumatur li jieħu azzjoni legali jew li jeżerċita xi rimedju legali ieħor, (contracts which have the effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy).

Artiklu 44(2)(ċċ) huwa transpożizzjoni ta' paragrafu (q) tal-Annex mal-Artiklu 3 tal-Council Directive 93/13/EEC tal-5 t'April 1993 dwar *unfair terms* in consumer contracts, li jaqra:

"Article 3

1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre- formulated standard contract.

Imbaghd l-artikolu 45 tal-Kap 378 jipprovdi hekk:

"An unfair term means any term in a consumer contract, which on its own or in conjunction with one or more terms,
(a) creates a significant imbalance between the rights and obligations of the contracting parties to the detriment of the consumer
(d) is incompatible with the requirements of good faith.

The unfairness of a term shall be assessed taking into consideration the following:

(b) the time of the conclusion of the contract.

Illi t-Tribunal jaghmel referenza wkoll ghal l-artikolu 22 (3) tal-LS 409.19 li jipprovdi li kwalunkwe arrangjamenti kuntrattwali li direttament jew indirettament jirrestringi d-drittijiet ta' vjaggatur permezz tal-istess regolamenti m'ghandhomx ikunu vinkolanti fuq il-vjaggatur.

It-Tribunal josserva wkoll illi l-ftehim gie iffirmat fid-9 ta' Marzu 2020, propju fil-gurnata illi r-rikorrenti telqet minn Malta ghal Sqallija, kmieni fil-ghodu.
It-Tribunal jidhirlu li dan il-ftehim jaqa' pjenament fil-parametri tal-Part VIII tal-Kap 378 - Unfair Contract Terms'. Ghalhekk l-ewwel eccezzjoni qed tigi michuda.

Illi ghal dik li hija t-tieni eccezzjoni, u cjoe' li ghandhom jigu sfilzati d-dokumenti kollha illi ntbghatu minghajr pregudizzju, apparti li dan missu gie ventilat fil-bidu tal-proceduri, t-Tribunal josserva, illi fl-avviz tar-rikorrent stess (appendix A) hemm referenza ghall-offerta ta' €875.00 li saret 'minghajr pregudizzju'. Jinghad ukoll illi din l-offerta ssemiet fix-xhieda tar-rikorrent Julian Boffa u ma kien hemm l-ebda oggezzjoni min-naha tal-intimati. Fix-xhieda taghha stess, ir-rikorrenti taghmel referenza ghax-xhieda ta' Julian Boffa u tikkonfermaha. It-Tribunal ghalhekk jidhirlu illi f'dan l-istadju din l-eccezzjoni hija superfluwa u ghandha tigi michuda.

Illi ghal dak li huwa l-mertu, rrizulta mill-provi u mhux kontestat illi r-rikorrenti u shabha xtraw pakkett tal-ivjaggar minghand l-intimati.

Fix—xhieda taghha ir-rikorrenti tikkonferma dak li qal ir-rikorrent Julian Boffa, b'differenza li hi spiccat hallset lill-organizatturi €1678.00

I confirm in essence what Julian Boffa already testified in the previous case but I wish to say that my amount is different. I had paid €1,850. From that amount I also purchased a ticket of €178.00 from Virtu ferries and I am claiming €1,672.00. We were all in the same situation, the evidence is very much my same experience.

Qalet illi ir-raguni ewlenija li ddecidiet illi tibbukja kien ghaliex dehrilha illi l-vjagg kien organizzat b'mod professjonali u li kien ha jkun hemm gwida, li kien fattur essenzjali ghaliha. Il-pakkett kien organizzat minn Chris Bonello b'kollaborazzjoni ma' agenzja talivjaggar (Connect Travel) u gwida. Kienet hi li xrat il-biljett minn Malta ghal Sqallija fis-27 ta' Jannar 2020. Hallset lil Chris direttament permezz ta' Revolut u anke fil-hanut tieghu stess. Ghalkemm kienet taf bir-riskji xorta wahda marret Sqallija u din kienet l-ghazla taghha. Tghid li l-ftehim originali kien li l-gwida jiltaqa' mal-grupp Pozallo, u ghalkemm ma kenitx kuntenta, minghabba s-sitwazzjoni, accettat li l-gwida kien ser jiltaqa' maghhom it-Tunesia. Fil-fehma taghha, l-pakkett tal-vjagg kellu jibda fit-Tunesia. Huma vjaggaw lejn Palermo wahdehom u kienu ser jitilghu abbord il-ferry ghal Tunesia biex jiltaqghu mal-gwida, pero hemmhekk saru jafu bis-sitwazzjoni fl-Italja u hemmhekk ippruvaw jaghmlu kuntatt mal-organizzaturi minghajr success. Irnexxilehom jaghmlu kuntatt mal-gwida u talbuh biex jikancella l-vjagg, pero irrifjuta. Fl-ahhar hi u l-grupp iddecidew biex ma jitilghux. Meta giet lura Malta, talbet rifuzjoni shiha ta' dak li hallset. Fil-bidu l-organizzaturi offrewlhom €875.00 kill wiehed, pero' dan gie rifjutat mir-rikorrenti. Min-naha taghhom, u minghajr pregudizzju, ir-rikorrenti kienu lesti li jaccettaw offerta ta' 1300 biex jaghlqu l-kwistjoni, pero' din l-offerta ma gietx accettata mill-intimati.

Illi xehed ukoll l-intimat Chris Bonello li qal illi l-pakket tal-vjagg kien jinkludi wkoll il-biljetti minn Malta ghal Sqallija, pero' Julian Boffa kien ha l-inizjattiva u xtara l-biljetti huwa stess, u hu kien accetta, u naqas l-ammont tal-biljetti mill-pakkett tal-vjagg. Dan sar hafna qabel il-vjagg. Pero skond hu, il-vjagg beda minn Malta fid-9 ta' Marzu u mhux minn Palermo. "*The Trip as organised initiated on Monday morning 9 March 2020 without a guide as agreed with all the customers due to the circumstances of travel. By the time the customers withdrew they had all checked in to a ferry that was part of the organised trip.*"

Qal ukoll illi tlett membri mill-grupp gew il-hanut tieghu vicin il-Virtù ferry terminal qabel ma telqu fid-9 ta' Marzu u li kienu hadu ritratt flimkien qabel ma telqu. Qal illi kien avzahom bir-riskji u huma iddecidew li jmorru. Qal li huma kienu jafu li l-gwida ma kienx ser jiltaqa' maghhom Palermo peress li diga kien it-Tunesia u li kieku iltaqa' maghhom Palermo kien ukoll jaghmel kwrantina mar-ritorn tieghu.

Skond hu, l-vjagg beda minn Malta fid-9 ta' Marzu ta' filghodu minghajr il-gwida u mhux minn Palermo u meta l-klijenti iddecidew li ma jmorrux kienu diga ghamlu check-in. Huwa kien f'kuntatt mal-grupp b'mod kostanti matul il-gurnata pero' meta huma ddecidew illi jirritornaw, wara t-8 ta' filghaxija, ma kienx disponibbli. Qal ukoll illi fit-3 ta' Marzu il-klijenti kienu qed jiddiskutu r-riskji u kellhom id-dubji, u anke esprimew thassib dwar il-possibilta' li l-vjagg lejn Tunisia jigi kancellat. Ighid illi hu qatt ma iddiskuta maghhom l-alternattivi li kieku ikancellaw, pero' qatt ma sfurzhom biex imorru. Xehed li kien hallas il-

gwida bil-quddiem u dan kien riskju ghalih ukoll. Ighid li l-ftehim originali kien li l-gwida kellu jiltaqa' maghhom jew f'Malta jew f'Pozzallo u fi qbil mal-klijenti il-gwida kien ser jiltaqa' maghhom Palermo. Pero' minhabba s-sitwazzjoni tar-red zone fl-Italja, kellhom jiltaqghu mal-gwida fit-Tunesia. Huwa konferma illi l-Italja giet dikjrata zona hamra bil-lejl fid-9 ta' Marzu pero' ma setax jikkonferma jekk kien wara li t-Tunesia harget l-avviz tal-kwarantina. Qal ukoll illi hu ghamel kuntatt mal-gwida f'xi hin bil-lejl u li l-gwida qallu li kien qal lill-grupp li ma kellhomx id-dritt illi jitterminaw il-vjagg. Rigward il-Waiver and release of Liability agreement, ighid li ntbaghtet lill-grupp fuq messenger xi jiem qabel.

Ikkunsidra

Illi ma hemmx kontestazzjoni li r-rikorrenti u shabha xtraw pakkett ta' vjagg minghand l-intimati/ azjendi intimati u fil-fatt il-waiver form jaghmel referenza kemm ghal Throttle Monkeys Malta kif ukoll ghal Connect Travel Malta. Il-vjagg - The Tunisian Road Trip, kien reklamat minn Throttle Monkeys in collaboration with Connect Travel (appendix F). Ghalkemm jidher illi l-hlas sar lil Christian Bonello permezz ta' zewg pagamenti tar-Revolut, l-invoice datat 8 February 2020 gie mahrug minn Connect Travel (Inv-1532).

Illi t-Tribunal jinnota wkoll illi l-intimata Roberta Ellul attendiet biss ghall-ewwel seduta fl-17 ta' Frar 2021, u dan minkejja li kienet notifikata ghas-seduti kollha ta' wara. Qatt ma regghet dehret quddiem it-Tribunal biex taghti x-xhieda taghha.

L-ewwel u l-ikbar punt ta' kontestatazzjoni bejn il-partijiet huwa propju metą dan il-vjagg inbeda. Il-vjagg kien intiz li jibda fid-9 ta' Marzu minn Malta ghal Sqallija u skond ir-rikorrent il-ftehim originali kien li l-gwida jiltaqa' maghhom Pozallo u jakkumpanjhom ghal Palermo u minn hemm kellhom jaqbdu ferry ghal Tunesia pero' minhabba l-kwistjoni tal-kwarantina hi u shabha accettaw illi jiltaqghu mal-gwida it-Tunisia. Il-prezz shih tal-vjagg originarjament kien €1,850.00 u dan kellu jinkludi il-biljett minn Malta ghal Sqallija. Pero' ir-rikorrenti spiccat xtrat il-biljett hija stess u fil-fatt, fl-avviz tat-talba, hi ma talbitx il-prezz tal-biljett, u naqqset l-ammont tal-biljett li xtrat. Ghalhekk zgur ma jistax jinghad illi dan is-servizz inghata u l-ammont li effettivament thallas lill-intimati ma kienx jinkludi il-vjagg minn Malta ghal Sqallija. It-Tribunal ghalhekk ma jaqbilx illi l-vjagg li pprovdew l-intimati effettivament bdiet minn Malta. Li kieku r-rikorrenti hadet zball fil-biljett, kien ikollha terfa' r-responsabbilta' hi u tassumi responsabbilta' ghall-izball, mentri li kieku l-biljett inxtara mill-intimati, kwalunkwe zball jew diskrepanza min-naha tal-kumpanija kien ikun ir-responsabbilita' tal-intimati. Ir-rikorrenti xtrat il-biljett f'Jannar 2020 u assumiet r-responsabbilta' ghal dik il-parti tal-vjagg. Il-fatt illi r-rikorrenti u shabha marru fil-hanut tal-intimat qabel il-vjagg ma taghmel l-ebda differenza fic-cirkostanzi.

Illi, di piu, ghalkemm il-ftehim originali kien propju li l-gwida jiltaqa' mal-grupp Pozzallo, dan il-pjan inbidel u fl-4 ta' Maru 2020, ntbghat messagg, prezumibilment mill-intimat li jinqara hekk:

Guys, no reason to panic, but more measures are being taken in Italy, there is a possibility (even though at this point not probable) that once Guido enters Italy from Tunisia, he is kept in quarantine. As it is right now, we are looking at options. One which we are considering is that he doesn't leave Tunisa. This means you guys are boarding on your own.

Illi hawn ukoll l-intimati spiccaw ma pprovdewx is-servizz ta' gwida kif kien il-pjan originali. Bhala fatt huma vjaggaw lejn Palermo wahedhom u kienu qed jistennew biex jaqbdu l-ferry ghal Tunesia biex jiltaqghu mal-gwida. It-Tribunal ghalhekk jidhirlu li l-ewwel parti tal-vjagg li ghalih kienu responsabbli l-intimati kien propju il-vjagg (ferry) bejn Palermo u Tunisia. U kien propju f'dak l-istadju li saru jafu li l-Italja giet dikjarata bhala red zone u li ddecidew li ma jkomplux bil-vjagg.

Din is-sitwazzjoni kienet ser taffettwa l-ajruporti u l-ferry terminals kollha u bezghu li jekk huma ikomplu bil-vjagg kienu ser jinqabdu t-Tunesia u jkollhom jaghmlu erbatax il-jum fil-kwarantina. Minkejja diversi telefonati lill-organizzaturi ma hadux risposta u meta kellmu l-gwida, talbuh biex jinkancella l-vjagg pero' huwa irrifjuta. F'dak il-hin kellhom jiddeciedu illi jew jitilghu fuq il-ferry jew jitilqu u decidedew li ma jivjaggawx lejn it-Tunesia.

It-Tribunal huwa sodisfatt illi r-rikorrenti u shabha itterminaw il-vjagg preciz qabel ma kellu jibda l-pakkett tal-vjagg lejn it-Tunesia. Huma kienu sejrin jiltaqghu mal-gwida li kien fit-Tunisia sabiex jibdew it-Tunisian motorcycle tour, pero' spiccaw ma telghux fuq il-ferry u minflok irritornaw Malta. Il-fatt li lahqu ghamlu c-*check in* ma jbiddel xejn mill-fatt illi l-vjagg ma kienx ghadu beda.

Ikkunsidra

Illi permezz ta' din il-kawza ir-rikorrenti qed titlob ir-rifuzjoni tal-ammont shih ta' pakkett ta' ivvjaggar u qed tinvoka Regolament 11 tal-LS 409.19 li jipprovdi li vjaggatur jista' jittermina pakkett tal-ivvjaggar fi kwalunkwe hin qabel il-bidu tal-pakkett. Skond ir-regolament 11(2), vjaggatur ghandu jkollu id-dritt jittermina il-kuntratt tal-pakkett tal-ivjaggar qabel il-bidu tal-pakket minghajr ma jhallas l-ebda mizata, f'kaz ta' cirkostanzi

inevitabbli u straordinarji li jsehhu fil-post tad-destinazzjoni jew fil-vicinanzi immedjati tal-istess u li jaffetwaw sinifikament l-ezekuzzjoni tal-pakkett, jew li jaffetwaw b'mod sinifikanti inevitabili.

Illi min-naha tieghu, l-intimati qeghdin jinvokaw l-artikolu 13 (3)(c) li ighid illi l-vjaggatur ma jkunx intitolat ghal kumpens ghad-danni jekk l-organizzatur jaghti prova li n-nuqqas ta' konformita' jkun minhabba cirkostanzi inevitabbli u *straordinarji*. It-Tribunal ma jaqbilx. Dan mhuwiex kaz ta' nuqqas ta' konformita' u anke kieku, ir-rikorrent mhuwiex qed jitlob kumpens ghad-danni. Il-ligi stess fl-artikolu 11 jaghmel distinzioni bejn rifuzjoni shiha ta' kull pagament li sar (li l-vjaggaur huwa intitolat ghalih), u kumpens addizzjonali (bhalma huma kumpens ghal danni) - li l-vjaggatur ma jkunx intitolat ghalih. Hawnhekk ir-rikorrent la qed jitlob kumpens ghal danni u lanqas kumpens minhabba nuqqas ta' konformita' u ghalhekk dan l-artikolu ma japplikax.

Illi t-Tribunal ra wkoll id-dokument intitolat 'Information on the Package Travel Directive in connection with Covid-19 li jispjega meta l-vjaggatur jew l-organizzatur jista jikancella il-pakkett. Dan jipprovdi hekk:

Unavoidable and extraordinary circumstances means a situation beyond the control of the party who invokes such a situation and the consequences of which could not have been avoided even if all reasonable measures had been taken. Significant risks to human health, such as the outbreak of a serious disease like the Covid-19 at the travel destination or its immediate vicinity usually qualify as such unavoidable circumstances.
An official travel warning of national authorities is an important indicator that the package contract can be cancelled due to unavoidable and extraordinary circumstances impacting the performance of the trip. This also applies where the public authorities prohibit certain travels or ban the movement of persons in a manner that excludes, de facto, the package travel contract to be performed.

Illi hadd ma seta' jbassar il-konsegwenzi u r-reperkussjonijiet tal-pandemija li kienet xi haga bla precedent. Il-WHO dikjrarat il-pandemija fl-11 ta Marzu u ghalhekk, li kieku l-vjagg sar ghaxar tijiem qabel, minkejja t-thassib u r-riskji li kien hemm, xorta wahda kienu jirnexxielhom jivjaggaw bla problema. Kien biss fil-gurnata li telqu li l-Italja kollha giet iddikarata red-zone u peress illi kellhom ighaddu mill-Italia, ma setghux ikomplu bil-vjagg minghajr konsegwenzi koroh.

Illi t-Tribunal jidhirlu illi fic-cirkostanzi ir-rikorrenti kellha d-dritt li tikancella u skond ir-regolament 11(2) hija intitolata ghal rifuzjoni shiha tal-pakkett li hallset.

Ghal dawn il-motivi it-Tribunal jaqta' u jiddeciedi illi jilqa' t-talba tar-rikorrenti u jordna l-intimati/ l-azjenda intimati biex in solidum bejniethom jirrifondulu is-somma ta' elf sitt mija u tnejn u sebghin euro (1,672). Bl-ispejjes kontra l-istess intimati/azjendi intimati.

Michela Spiteri LL.D
Arbitru