

Tourism Appeals Board

Blue Sea Malta Limited (C57940)

(vs)

Malta Tourism Authority

(Case no. 91 of 2015)

10 September 2015

The Board:

Has examined the appeal lodged by Blue Sea Malta Limited in regard to the decision – enforcement notice EN009.15 - of the Malta Tourism Authority dated 10th April 2015 in virtue of which it ordered appellant to stop operating or permitting the operation of the licensed Tourism Activity at La Vallette Hotel, Triq id-Dragonara, St. Julian's and this is in breach of article 4 (3) & 17 of Subsidiary Legislation 409.04 and of article 43 (1) (b) of the Malta Travel and Tourism Services Act (Cap 409) as per article 18 of Subsidiary Legislation 409.04, and in violation of the standard requirements as shown in the First Schedule (Classification Criteria) and Second Schedule Part I (Operational Requirements) and Second Schedule Part II (Requirement for Establishments providing Self Catering apartments) of Subsidiary Legislation 409.04 as per attached report.

Has examined the Declaration of Facts of the Malta Tourism Authority (hereinafter referred to as 'MTA' or 'the Authority' as the case may be) and the documents filed with the said declaration.

Held two sittings on the 4th May 2015 and 19th June 2015 during which the Board heard the evidence of German Alcaraz Espinosa and Louis and Karl Tabone produced by the appellant and of David Mifsud, Director (Quality Assurance), MTA and of Charles Grech (senior management enforcement – MTA) produced by the MTA.

Examined the documents submitted by appellant and the Authority during the sitting of 4th May 2015.

Heard the oral submissions made by the appellant's legal counsel, Dr. Sonia Vancell and Dr. Frank Testa, legal counsel of the MTA.

Considers:

In its appeal of 13th April 2015 appellant basically mentions facts of the items it has put in order and what it will rectify in the future when it stated:

'We would like to appeal to this Board EN 009.15 and the grounds for our appeal are as follows–

Bedspreads – We will be replacing all the bedspreads as follows – 200 by the middle of May 2015 and another 225 by the end of June 2015

TVs – Floors 2, 3 and 4 are already in working order. We will have the TVs in the remaining floors working and in order by the 30 April 2015

Radio – We will have this served via the TV system and it will be ready by the 30 April 2015

Bathroom Mirrors – We will be replacing all mirrors with any amount of rust. We will also be over-mounting strips of aluminium on all mirrors

Hair Dryers – We will be installing these by the 31 May 2015

Mattresses – We will be replacing 400 of these with new 13 cm thickness mattresses - 200 by 30 April 2015 and 200 by the 31 May 2015

Pillows – We will be replacing 400 of these with the following time frames - 200 by 30 April 2015 and 200 by the 31 May 2015

Telephone System – This will be serviced and completely brought up to working order by the 30 April 2015

Wake-Up call device – This will be incorporated in the telephone system by the 30 April 2015

Bathroom rugs will all be replaced as follows - 200 by 30 April 2015 and 200 by the 31 May 2015

Nylon Hooks to hang Suit Carrier Bags will be installed in all rooms

Multilingual Instruction Manual is available in all rooms today

Air Conditioning units – We have ordered and paid a deposit on another 800 units. These will be in the hotel as follows - 20 in reception are available today, all 800 will be in the hotel by the 10 June 2015 (subject to shipping movements)

Cookers – All rusted cookers will be replace by Microwaves by the 30 June 2015

Water Pipes protruding over the baths – these will be covered by a suitable plastic box which will be secured to the wall'.

The motivations for the appeal were put forward by appellant's lawyer verbally during the sitting of 4th May 2015. Appellant's learned legal counsel basically proposes three arguments, namely:

1. Preliminarily, the enforcement notice the subject of this appeal is null and void as it should not have been addressed to Mr. German Alcaraz Espinosa because he is not the owner of the tourism activity. Chapter 409 article 41 specifically states that the Authority shall serve a notice to the owner of the tourism operation or in the case of a tourist guide on the tourist guide requiring the tourism operation to be stopped forthwith.
2. That the inspection was carried out in only ten rooms whilst in virtue of the enforcement notice the Malta Tourism Authority is requesting that a hotel with more than 400 rooms is to close down based on an inspection carried out on just 10 rooms.
3. That the administrative decision to stop operating or permitting the operation of the tourism activity the subject of this appeal was not reasonable primarily because the Authority, when faced with these alleged irregularities, should have initially informed the appellant that he had to make the necessary changes and all the necessary additions within the established time frames which had to be based on reasons which were logical and practical. If the appellant failed to comply with these orders then the Authority should have exercised its discretion. In succinct, appellant is contending that the Authority should have initially informed Mr. German of the necessary changes and gave appellant a time-frame, and only on failure of this should the Authority have issued the enforcement notice. But this step was completely omitted.

In its Statement of Facts the Authority states that the Enforcement Notice was issued by the Authority as during an inspection carried out on the 6th April 2015 the appellant company was found to be operating the establishment *La Valette Resort* (Licence Number H/404) in violation of the conditions imposed by the Malta Tourism Services Act (Chapter 409 of the Laws of Malta), in particular those imposed under the First and Second Schedule as found under the Tourism Accommodation Establishments Regulations (Subsidiary Legislation 409.04). A first enforcement Notice was issued on 10th April 2015. On 24th April 2015 another inspection was carried out and another enforcement notice was issued on 28th April 2015 ordering appellant to stop operating the tourist establishment by 10th May 2015 (extension of first Enforcement Notice).

The Authority's legal counsel rebutted appellant's motivations of appeal made during the first sitting held on 4th May 2015 as follows:

1. On the issue of to whom the enforcement notice should be addressed and notified, although the Authority shares appellant's interpretation of article 41, unfortunately, the Court of Appeal doesn't. The Authority used to interpret the law in the sense that the owner is the actual owner of the immovable property. However, the Authority referred the Board to a decision of the Court of Appeal in its inferior jurisdiction in the names *Lonoris Limited vs Malta Tourism Authority* delivered on the 14th January 2015 (per Hon. Judge Edwina Grima) where in essence the Court interpreted the provision as the owner of the tourist operation, the licensee, and not the owner of the immovable property who rents out the property. The Authority's learned counsel continued that the point was only contested once and the Authority argued similarly to appellant's thesis. However, the Court of Appeal thought otherwise and so basically after that decision the Authority decided to follow the direction given by the Court of Appeal.
2. The Enforcement Notice was the result that a considerable amount of time has elapsed where certain issues were not rectified by appellant. Out of the 15 items that appellant was requested to rectify seven items are still pending.
3. The Authority has no legal obligation to give notice. The Malta Tourism Authority regulates the standard of the tourism industry. If the hotel is not up to the standard that the stars assigned to it suggest, the enforcement notice will have to be issued.

Considers:

The Enforcement Notice against the operator was issued as the Authority considered that it was in breach of article 4 (3) & 17 of Subsidiary Legislation 409.04 and of article 43 (1) (b) of the Malta Travel and Tourism Services Act (Cap 409) as per article 18 of Subsidiary Legislation 409.04, as well as in violation of the standard requirements as shown in the First Schedule (Classification Criteria) and Second Schedule Part I (Operational Requirements) and Second Schedule Part II (Requirements for Establishments providing Self Catering apartments) of Subsidiary Legislation 409.04.

Article 4 (3) of the Tourism Accommodation Establishments Regulations (Subsidiary Legislation 409.04) states that:

‘Licensees shall ensure that their tourism accommodation establishments conform with the provisions of these regulations and to any policy guidelines that may be established from time to time.’

Article 17 of the same Legal Notice then states that:

‘Any licensee of a tourism accommodation establishment shall ensure that the whole premises, facilities and equipment are properly maintained and cleaned at all times.

The Enforcement Notice was also issued as the operator breached the classification requirements mentioned in the First Schedule of the said Legal Notice as well as the operational requirements for hotels and the requirements for establishments providing Self Catering apartments mentioned in the Second Schedule thereafter.

The Board will not consider the provisions of article 43 (1) (b) of the Malta Travel and Tourism Services Act (Cap 409) as these are of a criminal nature and consequently out of its competence – *vide* decisions of the Tourism appeals Board in Case no. 57 of 2010 Jeremy Dalli fir-rigward ta’ “The Qube Bar” (vs) L-Awtorità tat-Turizmu ta’ Malta, 7 July 2011 and Case no. 81 of 2013 Oswald Scicluna pro et noe (vs) L-Awtorità tat-Turizmu ta’ Malta, 29 October 2013.

Considers more:

It is clear from the evidence produced before this Board that that appellant was given various chances over the years to regularise its position. However, this was to no avail – *vide* evidence

of David Mifsud, Director (Quality Assurance) MTA and of Charles Grech (senior management enforcement – MTA).

During the sitting of 4 May 2015 David Mifsud states that:

‘I also took the matter in hand when we were arriving with complaints about lack of standards we were told by the hotel that la Vallette closed for refurbishment. It opened again. There was an inspection and we saw that there was lack of standards. We gave them time and I went with them after the enforcement notice was issued. And several items again, and I can vouch for them because I’ve seen them myself, and it is unfair with all due respect that the other side is saying that we have only based out inspection on 10 rooms. Each time we go we address the rooms which we have seen and we see further rooms. This time I went we had seen 14 rooms in addition to the rooms we had seen before. And to be fair with them during the inspection I told them to open a number of rooms randomly on each floor and I chose the rooms and a number of deficiencies were found. I also allowed them to show me where they have rectified because they opened rooms which they chose randomly themselves hoping to go in and say at least in these rooms there are no deficiencies. Even in those rooms there were deficiencies. This is the reason why we continued.’

At the end of the first sitting of the 4 May 2015 the Board gave appellants time to rectify the situation and in fact adjourned the appeal to June 2015 and with the consent of the Authority extended the benefit of time in the enforcement notice till that date.

However, it appears that the chance given by the Board to appellant was not adequately taken up. In fact, in the sitting of 19 June 2015 Charles Grech stated that:

‘The last inspection was carried out on the 15 June by 2 executives, Mr. Vella and Mr. Cutajar, and myself. A report was generated following the inspection. We inspected several rooms and found deficiencies practically in all rooms. The main deficiencies were aging furniture, mattresses were stained and worn out. We also found rooms where the mattresses were literally torn. Other, in my opinion, quite noticeable short comings were a toilet seat that was broken ...

... .. and even the cleaning in places leaves much to be desired. There is an effort of improving the premises but in my opinion, being such a large premises, it is not covering the whole area.'

Considers further:

Appellant brought forward verbally three motivations for its appeal and these will be considered hereunder.

I. **Nullity of the appeal**

Appellant's preliminary plea is that the enforcement notice should not have been addressed to Mr. German Alcaraz Esponisa as he is not the owner of the tourism operation. The Enforcement Notice was issued to German Alcaraz Esponisa on his behalf and on behalf of Blue Sea Malta Limited.

Although it is true that article 41(1) of Malta Travel and Tourism Services Act (Cap 409) states that 'the Authority shall serve a notice on the owner of the tourism operation', sub-article (2) of the same provision states that:

'A copy of the notice given under subarticle (1) shall also be served on any operator of the tourism operation and on any employees in the tourism operation and a copy shall be fixed at a point of entry into each of the premises used for or in connection with the tourism operation.'

This Board cites with approval the judgment of the Court of Appeal in its inferior Jurisdiction given on the 14 January 2015 in the names Lonoris Limited vs L-Awtorita' tat-Turizmu ta' Malta (App. Civ. 38/11) which confirmed the decision of this Board differently composed of the 17 October 2011 which established that the enforcement notice must be served on:

1. the owner of the tourism operation;
2. the operator of that activity;
3. all of the employees of that tourist operation; and
4. a copy of the enforcement notice shall be fixed at a point of entry into each of the premises used for or in connection with the tourism operation.

In its judgment of 17 October 2011 this Board differently composed had decided that the enforcement notice must be served on the operator of the tourist activity (be it the owner or a third person like a tenant).

The Court of Appeal confirmed the decision of the Board and stressed that in the definition of 'owner' in the Malta Travel and Tourism Services Act (Cap 409) the legislator refers to 'a person who is entitled to receive the rent in respect of a tourism operation' and not rent in respect of a tenement.

This Board sees no reason to depart from the learned judgment of the Court of Appeal, even in the light of, as the Court rightly observed, the unfortunate wording used by the legislator.

Consequently, this motivation for the appeal is being rejected.

II. Inspection carried out only in 10 rooms of the Hotel

The Board observes that this is more of a factual motivation, rather than a legal one. In fact, appellant did not substantiate on which provision of the law it is basing its argument. The Authority's learned legal counsel did not even see the reason to legally rebut this argument. This argument was in fact factually rebutted by the evidence of David Mifsud, Director (Quality Assurance) MTA¹, which evidence the Board considers as having been adequately proven.

Consequently, this motivation is also being rejected.

III. Reasonableness of the Authority's decision

The third argument brought by appellant is that the Authority should have initially informed Mr. German Alcaraz of the necessary changes and gave appellant a time-frame, and only on failure of this should the Authority have issued the enforcement notice. The Authority's legal counsel rebutted that the Authority has no legal obligation to give notice.

¹ *Vide* pg. 6 of this decision.

This Board totally agrees with the Authority's position on this point. In fact, sub-article 3 of article 41 of the Malta Travel and Tourism Services Act (Cap 409) states that:

'... .. a notice given under subarticle (1) (in this Act also referred to as an "enforcement notice") shall --

- (a) in respect of any requirement stopping or prohibiting the further carrying on of a tourism operation, take effect immediately upon service of the notice;
- (b) in respect of any other requirement, take effect immediately upon service of the notice or at the expiration of such period as shall be specified.'

Consequently, this argument is also being rejected.

For these reasons, the Board rejects the appeal lodged by Blue Sea Malta Limited and confirms the Malta Tourism Authority's decision ~~decision~~ – enforcement notice EN009.15 - of the Malta Tourism Authority dated 10th April 2015 in virtue of which it ordered appellant to stop operating or permitting the operation of the licensed Tourism Activity at La Vallette Hotel, Triq id- Dragonara, St. Julian's. As inferred in the enforcement notice EN009.15 appellant Blue Sea Malta Limited is to stop operating or permitting the operation of the licensed Tourism Activity at La Vallette Hotel, Triq id-Dragonara, St. Julian's within fifteen (15) days from the delivery of this decision. All other conditions mentioned in enforcement notice EN009.15 dated 10 April 2015 are hereby being confirmed.

All expenses in connection with this appeal shall be borne by the appellant.

Dr. Ivan Sammut
Chairman

Mr. Jeffrey Cutajar
Member

Mr. Reuben Buttigieg
Member

Dr. David Camilleri
Secretary

