



MALTA

**QORTI TAL-APPELLI CIVILI (SUPERJURI)
MALTA**

**S.T.O. PRIM IMHALLEF
DE GAETANO VINCENT
ONOR. IMHALLEF
CAMILLERI JOSEPH D.
ONOR. IMHALLEF
FILLETTI JOSEPH A.**

Seduta tas-6 ta' Dicembru, 2002

Appell Civili Numru. 126/2000/1

**Edward Von Brockdorff ghan-nom ta' Von Brockdorff
Imports Limited**

Vs

Il-kummissjoni ghall-Kontroll ta' I-Izvilupp

Il-Qorti;

I. Preliminari

1. Edward Von Brockdorff, ghan-nom tas-socjeta` Von Brockdorff Imports Limited, ("L-appellant"), ressaq

applikazzjoni quddiem l-Awtorita' tal-Ippjanar biex jottjeni permess tal-izvilupp konsistenti f' "change of use from residential to a beauty salon" ezattament fil-flat Nru 4, Alga Flats, Abate Rigord Street, Ta' Xbiex.

2. Din it-talba ghall-hrug tal-permess giet rifjutata mill-Awtorita' tal-Ippjanar b'decizjoni datata 10 ta' Mejju 1996, mahruqa mill-Kummissjoni ghall-Kontroll tal-Izvilupp. Din l-applikazzjoni giet rifjutata ghal zewg ragunijiet:

“ 1. The proposal runs counter to Structure Plan policy TRA 4 and the car parking standards set out in Table A2.5 in the Structure Plan Explanatory Memorandum in that it fails to provide the required car parking spaces. It will give rise to unacceptable additional on-street car parking which would not be in the interests of the amenity of the area and which would exacerbate existing problems of congestion, potential highway danger and vehicular and pedestrian conflict.

2. The proposed development is unacceptable in a residential area as it would have a deleterious impact on the amenity of the area and of existing adjoining uses by virtue of additional traffic generation, parking congestion and loss of safety and privacy for the residents in the building.

It therefore constitutes bad neighbour development and so conflicts with Structure Plan policy BEN 1 which seeks to protect the amenity of existing uses.”

3. L-appellant talab lill-imsemmija Kummissjoni biex tirrikonsidra l-applikazzjoni tieghu, izda l-Kummissjoni, b'decizjoni datata 12 ta' Marzu 1997, ikkonfermat ir-rifjut ghall-istess ragunijiet.

4. L-appellant hassu aggrevat minn din id-decizjoni tal-Kummissjoni u ghalhekk intavola appell quddiem il-Bord tal-Appell dwar l-Ippjanar fis-26 ta' Marzu 1997. Ghar-ragunijiet li huma esposti fid-dokument tal-appell tieghu, huwa talab illi d-decizjonijiet illi kienet hadet il-Kummissjoni ghall-Kontroll tal-Ippjanar jigu revokati u

talab lill-Bord tal-Appell dwar l-Ippjanar li johrog il-permess mitlub, taht dawk il-kondizzjonijiet li l-Bord jidhirlu xieraq.

5. Il-Bord tal-Appell dwar l-Ippjanar ta d-decizjoni tieghu fid-29 ta'Marzu 2000. Din id-decizjoni tinkorpora fiha s-sottomissjonijiet li ressaq quddiem il-Bord l-appellant kif ukoll is-sottomissjonijiet li saru mill-Kummissjoni ghall-Kontroll tal-Izvilupp. Il-Bord qabel ma' s-sottomissjonijiet kollha migjuba mill-Kummissjoni tal-Kontroll tal-Izvilupp u ghalhekk cahad l-appell. Id-decizjoni tal-Bord taqra hekk :
“ L-Appellant issottometta:

a. The Directorate is not contesting the fact that premises have been used as a beauty salon since 1988 as explained in para. 4 of our appeal. I am attaching an extract of the winter edition of the 1987/99 Femme Magazine as well as another from the summer 1988 edition, respectively marked Docs I and J, as further evidence of this fact.

b. The Directorate is insisting that it considers this use to be incompatible with the residential apartments in the same block. Following over ten years of peaceful co-existence with my client's enterprise, have provided a written declaration stating that they “have no objection to a Beauty Salon operating from our block of apartments”. It is therefore clear that the incompatibility perceived by the Directorate is purely hypothetical.

c. My client's application was lodged on the 17th October 1994, which is before the Directorate came up with its unwritten policy to preclude mixed use development. The spirit of the amendments made to the Development Planning Act by Act XXIII of 1997 requires the determination of applications according the published policies at the time of their submission. In fact, since the passage of this act the Authority has published a periodically updated factbook wherein the date of coming into force of each particular policy is clearly specified. To this date there is no published policy precluding commercial uses in a residential block. On the contrary Legal Notice 53 of 1994, (The Use Classes Order),

authorises the concurrent practice of a business and residential use within the same unit in certain circumstances but does not stipulate that such dual use is only permitted where such premises has its own entrance.

d. The net area of my client's property, (excluding circulation space and bathrooms), is less than one hundred square metres (100 sq.m.) Hence, according to the Structure Plan Explanatory Memorandum, a new beauty salon of this size should have two-car spaces instead of the one space which would have been satisfactory for a residential unit. It will be noted that, in this locality, Structure Plan policy TRA 4 prescribes accommodating standards only where feasible and desirable. Hence, the Board of Appeal, in its decision dated 29th September 1997 of Appeal NO. 415/96 RR, authorized the construction of an additional floor over a site situated on a similar arterial road, without insisting on the provision of parking spaces.”;

L-Awtorita' ssottomettiet :

“DISCUSSION

The main concern of the Planning Authority is that (i) the proposed commercial premises shares the same entrance with the other residential units and (ii) permitting such development would jeopardize the rest of the residential flats within the block due to increase commercial outlets within the block.

The proposed use is likely to attract additional number of people within the block of flats, who may be considered as “foreign” (to the rest of the people living within the block). For this reason, this would cause had [recte: bad] neighborless and therefore runs counter to Structure Plan Policy BEN 1.

While the proposed use can be considered as ancillary use within residential area, however, the best location for such commercial uses are at ground floor level with a direct access from the street. This in conformity with the

Kopja Informali ta' Sentenza

concept of mixed use development, i.e. ground floor commercial development with overlying residential uses.

At present the ground floor use of the block of flats i/q is already committed for commercial use. The proposed change of use at first floor level, would further add to commercial development within an otherwise residential block of flats. If the trend is an increase in the commercial activities within the block, thus the commercial use becomes the primary use on the site, and eventually the character of the immediate surrounding uses within the block is no longer residential.”;

Il-Bord jaqbel mas-sottomissjonijiet migjuba mill-Awtorita`. Mhuwhiex il-kaz ta' diskussjoni oltre dak gja imsemmi mill-Awtorita` ghajr li wiehed jerga' jikkwota hekk:

“...the best location for such commercial uses are at ground floor level with a direct access from the street. This is in conformity with the concept of mixed development...”

Huwa minnu li dan it-tip ta' zvilupp irid isir x'imkien, izda huwa minnu wkoll li element ta' planning considerations iridu jigu applikati fiz-zoni ta' mixed development u dak li qed tippretendi l-Awtorita` huwa gust u, mill-punto di vista ta' planning, sewwa.

Ghal dawn il-motivi, il-Bord qed jichad l-appell.

II. L-Appell

6. L-appellant hassu aggravat minn din id-decizjoni tal-Bord tal-Appell tal-Ippjanar, u ghalhekk huwa intavola rikors ta' appell quddiem din l-Qorti fis-7 ta' April 2000. Ghar-ragunijiet indikati fl-istess rikors, l-appellant talab li din il-Qorti ghogobha tirrevoka l-imsemmija decizjoni appellata tal-Bord tal-Appell dwar l-Ippjanar, u b'hekk tiddeciedi billi tilqa' t-talbiet tieghu billi tordna l-hrug tal-permess in kwistjoni.

7. L-Awtorita` tal-Ippjanar, fir-risposta tal-appell taghha, ikkontestat l-appell billi fl-ewwel lok, eccepjet li l-appell kien null stante li ma kienx bazat fuq punt ta' ligi deciz mill-Bord. L-Awtorita` tal-Ippjanar ikkontestat l-appell anke fil-meritu u talbet lil din il-Qorti li ghogobha tichad l-appell u tikkonferma d-decizjoni appellata tal-Bord tal-Appell dwar l-Ippjanar.

III. **Konsiderazzjonijiet tal-Qorti:**

8. Fl-ewwel lok sejra tigi trattata u deciza l-eccezzjoni preliminari sottomessa mill-Awtorita' tal-Ippjanar u cioe` li l-appell odjern ma giex bazat fuq ebda punt ta' ligi li kien deciz mill-Bord fid-decizjoni appellata.

9. Din l-eccezzjoni hija bazata fuq l-Artikolu 15(2) tal-Att Nru. I tal-1992, li, qabel emendi recenti li pero` ma biddlu xejn fis-sustanza, kien jghid hekk:

“Id-decizjonijiet tal-Bord (tal-Appell dwar l-Ippjanar) ikunu finali hlief dwar punti ta' ligi decizi mill-Bord li minnhom hemm appell lill-Qorti tal-Appell.”

10. Ezami tad-decizjoni appellata tal-Bord (tal-Appell dwar l-Ippjanar) ma jhalli l-ebda dubju li din id-decizjoni ma fiha ebda investigazzjoni u decizjoni ta' xi punt ta' dritt. Allura difficilment wiehed jista' jsib motiv ta' appell minn din id-decizjoni minn din il-Qorti. Il-Bord wasal ghad-decizjoni li jikkonferma r-rifjut ghall-hrug tal-permess mitlub mill-appellant wara li l-Bord qabel mas-sottomissjonijiet tal-Awtorita` tal-Ippjanar u ghamel tieghu l-konsiderazzjonijiet tal-ippjanar li ssemew fid-decizjoni appellata.

11. L-appellant qiehed jilmenta li d-decizjoni mhix sufficjentament motivata anke ghaliex il-Bord naqas illi jiddiskuti u jiddeciedi r-ragunijiet li gew sottomessi mill-appellant bhala mottivi tal-appell quddiemu. L-appellant iqis li dan in-nuqqas allegat tal-Bord jammonta ghall-zball fil-ligi li jintitolah jappella quddiem din il-Qorti. L-appellant jikkritika d-decizjoni appellata billi din applikat policy informali u bla sahha ta' xejn u cioe' li propjeta' kummercjali u residenzjali m'ghandhomx ikollhom l-istess entratura.

12. Dawn l-argumenti tal-appellant huma kollha fieragh. Jidher car ghal din il-Qorti li l-Bord tal-Appell dwar l-Ippjanar ibbaza d-decizjoni tieghu fuq interpretazzjoni u applikazzjoni ta' Structure Plan policy BEN 1. Din kienet is-sottomissjoni principali li ghamlet l-Awtorita' tal-Ippjanar quddiem il-Bord biex tikkonvincih li jikkonferma d-decizjoni li kienet hadet. Fil-fatt il-Bord qabel ma' din is-sottomissjoni u ghamilha tieghu. Hu evidenti li d-decizjoni appellata tal-Bord fiha motivazzjoni sufficjenti, ghalkemm din il-motivazzjoni hija redatta b'mod telegrafiku. Huwa veru li l-Bord ma ndirizzax il-motivi kollha li ressaq l-appellant fl-appell quddiem il-Bord, pero', fic-cirkurstanzi tal-kaz, din il-Qorti ma tirravizax ebda nullita' f'id-decizjoni ghaliex, kif diga' intqal, jidhrilha li d-decizjoni appellata fiha motivazzjoni adekwata li tindika precizament ghaliex il-Bord wasal biex jirrifjuta li jilqa' l-appell. Il-kwistjoni involuta kienet wahda purament teknika dwar konsiderazzjonijiet tal-ippjanar, interpretazzjoni u applikazzjoni tal-policies tal-Pjan ta' Struttura, kamp dan li fih il-Bord igawdi diskrezzjoni fl-interpretazzjoni u applikazzjoni ta' dawn il-policies.

13. Certament il-fatt li l-Bord applika l-policy BEN 1 ghall-kaz in kwistjoni ma jfissirx li b'daqshekk huwa ddecieda xi punt ta' dritt. Id-decizjoni appellata ma fiha ebda decizjoni fuq punt ta' dritt u lanqas il-mottivi ta' appell imressqa mill-appellant quddiem il-Qorti, ma jinvolve ebda punt ta' dritt li gie deciz mill-Bord. Dana l-appell huwa wiehed intiz semplicement biex itawwal il-proceduri.

Ghal dawn il-mottivi, tilqa' l-eccezzjoni preliminari tal-Awtorita' tal-Ippjanar, tiddikjara l-appell null u ghalhekk tikkonferma d-decizjoni appellata tal-Bord. L-ispejjez jibqghu a karigu tal-appellant nomine, u peress li dana l-appell huwa wiehed fieragh u vessatorju fis-sens tas-subartikolu (4) tal-Artikolu 223 tal-Kap. 12, tikkundanna lill-appellant li jhallas lill-appellat l-ispejjez ghal darbtejn.

Deputat Registratur
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