



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta tat-2 ta' Mejju, 2013

Appell Civili Numru. 123/2012

Dr Simon Mercieca

VS

L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar

Il-Qorti,

Rat ir-rikors tal-appell ta' Dr Simon Mercieca tal-11 ta' Lulju 2012 kontra d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-21 ta' Gunju 2012 għall-applikazzjoni PA 8017/06;

Rat ir-risposta tal-Awtorita li ssottomettiet illi l-appell għandu jigi michud u d-decizjoni tat-Tribunal tigi konfermata;

Rat l-atti kollha u semghet id-difensuri tal-partijiet;

Rat id-decizjoni tat-Tribunal li tghid hekk:
Ikkunsidra:

B'applikazzjoni tad-29 ta' Frar 2008 - Full Development Permission – PA/08017/06 fejn l-appellant, f'18, Triq is-Sirena, Senglea (Isla) talab:

"To replace deteriorated roofs and construct an additional floor (2 units)."

Illi permezz t' rifjut tad-29 ta' Frar 2008 l-Awtorita cahdet it-talba għall-hrug tal-permess relattiv għar-ragunijiet segwenti:

"1 The proposed floor would have an adverse impact on an scheduled Grade 1 Area of High Landscape Value and Harbour Fortifications and therefore run counter to Structure Plan policy RCO 1.

2 The proposed development runs counter to Structure Plan policy UC010 in that it would adversely affect views of the Urban Conservation Area and detract from the traditional urban skyline.

3 The proposed parapet wall would detract from the overall objectives of the Structure Plan for the preservation and enhancement of buildings, spaces and towns capes within Urban Conservation Areas and so does not comply with Structure Plan policies UC06 and BEN 2.

4 The proposal runs counter to Paragraph 11 of Part A of the Adopted Design Guidance: Development Control Within Urban Conservation Areas since the predominant height of the buildings in the vicinity of site in question are erected on two floors. In these circumstances, any building on site which is proposed to be higher than two floors is not permitted by the Malta Environment & Planning Authority."

Illi l- Perit Duncan Mifsud ressaq l-aggravji tal-appellant inter alia kif gej:

"In a nutshell, the objection is for the construction of a (full) additional floor over the existing block of buildings because in the opinion of the board, such proposal would detract from the urban skyline of Cottonera. I tend to differ to this conclusion, mainly because the buildings at the back of my client's site are built at a higher level, as can be attested from photos submitted with previous correspondence to MEPA. In the absence of specific building height limitation in the Cottonera area, it has always been the procedure adopted by MEPA, that in similar cases, the heights of the buildings in the vicinity of the site in question are taken in consideration. If such yardstick is also used to assess my client's proposal, then I feel that my client should be granted permission to carry out his development.

Moreover, I would like to point out the important fact that in the same street (vide attached block plan) a permit was granted by MEPA to construct the third floor, whereas my client was deprived from constructing even a receded third floor!"

Illi permezz tar-rapport taghha l-Awtorita ressqet il-kummenti taghha inter alia kif gej:

"5.0 COMMENTS ON APPELLANT'S ARGUMENTS

5.1 The Authority has noted the arguments as brought forward in appellant's request for appeal and shall address these issues hereunder:

5.1.1 In this request for appeal, appellant is stating that the buildings at the back of the site under appeal are built at a higher level and hence, according to the procedure adopted by the Authority in the Cottonera area, an additional floor could be acceptable.

5.1.2 However, the Authority disagrees with this statement on various accounts.

5.1.3 During the processing of this application, the file was forwarded to the Heritage Advisory Committee who inspected the site and reported that whilst the replacement of the unsound roofs is not objectionable, an additional floor is not acceptable since it would disturb the skyline. Furthermore, such requests for additional floors in the Cottonera area has to be primarily assessed vis-a-vis the existing building heights of the areas in close proximity to the site in question so that additional floors would not disturb the established skyline as well as respect the topography of the land.

5.1.4 In this request for appeal, the main argument of appellant is that other buildings in the vicinity have a higher height than the proposed floor, but the Authority states that this argument alone does not justify an additional floor since a major concern in such UCA areas is that of protecting and enhancing the natural topography of the ground levels.

5.1.5 In this particular case, the 'nearby buildings' which seem to be higher than the site in question, are located on higher ground than that of appellant, and hence, if the requested floor was to be accepted, both buildings would be of same height in spite that the topography dictates otherwise. A city with a 'square volume' is not aesthetically acceptable and defies one of the main features which makes Senglea such an interesting area with the building heights following the topography of the land.

5.1.6 In fact, the area is already scheduled for its high landscape value and such a development would infringe the existing landscape which is unique to the island. Furthermore, while the original drawings had requested a full floor, fresh drawings submitted by applicant and eventually decided upon by the DCC, had requested a receded floor with a setback of 4m and 4.5m respectively. Additionally these plan request one penthouse without the provision of onsite parking provision and hence, are also subject to the UIF payment for 1 car parking space (through a condition to be followed in an eventual full

development permission) if this request was to be accepted. "

Illi permezz tat-Tieni Statement taghha l-Awtorita kkummentat inter alia kif gej:

"In these submissions, appellant had stated that a similar permit as per PA 6646/99 had been issued and the Board should take note of this similar case when assessing this appeal. The Authority has noted this case and notes that: Although the original proposal of this development read - Addition at third floor level to existing residence, the detailed report of the Directorate includes:

This is a request to construct a bedroom at third floor level. The building has a frontage on two streets with a considerable difference in street levels. It is a very restricted building since it includes only a room and a stairwell at each floor level. The original request of this application was to carry out additions at third floor level and to construct a stairwell at roof level. The site was inspected and it was noted that the proposed stairwell was likely to have a detrimental visual impact on the area and was not compatible with the height of the adjoining buildings. Therefore, the architect was requested to submit fresh plans to indicate the removal of the stairwell. Fresh plans (Red 12 in file) were submitted and rendered the extension acceptable. Condition No. 2 of this permit reads - The height of the building should not exceed the height as indicated on plan PA 6446/99/12B.

Hence, the cited permit did not approve a whole floor but only a small extension to the small dwelling. Additionally, the location of the cited permit does not entail long distance views as the case under appeal and the height of the neighborhood differs from area to area in Senglea. Thus, the cited case had different planning considerations to the one under appeal (it was approved on May 2000 through DC1/88 policies and three years prior to the GHLP) and cannot be cited as a precedence in such circumstances.

In this regard, the Authority reiterates that in line with its previous reports, the requested development goes against the present planning policies relevant to this area and states that the DCC's decision to dismiss this request for development was justified and hence respectfully requests the Planning Appeals Board to dismiss this request for appeal.

Illi fl-access tal-1 t'April 2011 it-Tribunal ikkonstata li l-fond jinsab f'kantuniera li hija fformata minn Triq is-Sirena u Triq St. Anglu, Isla. It-Tribunal nnota wkoll illi jekk wiehed ihares lil hinn mit-Triq Sant Anglu l-binja in kwistjoni ma dik parigga fuq il-kantuniera l-ohra, huma t-tnejn gholjin tlett sulari u l-bini ta' warajhom huwa sular izjed gholi.

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda talba ghall-kostruzzjoni ta' sular addizzjonali fir-raba livell (third floor) li jikkomprendu zewg residential units. Pjanti sussegwenti juru receeded floor b'residential unit wiehed.

Is-sit mertu ta' dan l-appell jinsab kantuniera bejn Triq Sirena u Triq Sant Anglu, fil-UCA tal-Isla. Il-bini ezistenti huwa block ta' appartamenti li nbena wara l-gwerra u l-access tieghu hija minn triq pedonali.

Din l-applikazzjoni giet rifjutata peress li

- Is-sular propost ser ikollu effett negattiv fuq zona skedata Grade 1 Area of High Landscape Value and Harbour Fortifications;
- Imur kontra il-policies RCO 1, UC010, UC06 u BEN 2 tal-Pjan ta' Struttura; u
- Imur kontra paragrafu 11 ta' Part A of the Adopted Design Guidance: Development Control Within Urban Conservation Areas, in vista li l-bini fil-madwar huwa predominantement ta' zewg sulari u ghalhekk bini ghola mhumix permiss.

L-argumenti li tqajmu mill-partijiet fil-kors tas-smigh ta' dan l-appell jistghu jigu migburin fil-qosor kif gej:

L-appellant jissottometti li il-bini fuq wara tas-sit in kwistjoni huma tal-istess gholi w ghalhekk l-appellant qed jitlob l-istess u li inhargu permessi ghal tlett sulari fl-istess triq fejn jinsab is-sit;

L-Awtorita tissottometti li

- Skond il-Heritage Advisory Committee, is-sular propost ser itellef l-iskylene,
- Anki jekk il-block in ezami huwa fl-livell izjed baxx mill-bini tal-madwar, f'area f'UCA bhal din, ghandha tigi rispettata it-topgrafia tal-post;
- Il-bini tal-madwar jidher oghla izda jinsab fuq pedamenti oghla u dawn id-dizlivelli ghandhom jinzammu (ara l-punt ta' qabel); u
- L-area hija skedata minhabba il-high landscape value taghha u ghalhekk l-izvilupp innifsu mhuwiex gustifikat.

Dwar il-permess PA 6646/99 l-Awtorita tghid li dan il-permess huwa biss ghal bedroom fuq bini b' footprint zghira hafna li qiegħed f'kantuniera bejn zewg triqat li ghandhom dislivell kbir bejniethom.

F' dan il-kaz l-Awtorita ma jidhirx li ghandha sett ta' policies cari biex tirregola l-izvilupp mill-punto di vista ta' ppjanar f'din il-belt. L-Awtorita ghamlet attentat biex tispjega, mhux dejjem b'mod konvincenti, x' inhija l-filosofia tal-ippjanar li ghandha ghal din il-belt. Waqt li huwa car ghal kullhadd li l-izvilupp f'din il-belt ghandu jigi kkontrollat mhux car ezatt x'inhu accettabbli u x'mhux. Per eżempju kif ser tkejjel il-visual impact ta' xi zvilupp fi triq dejqa fil-qalba tal-belt meta dan jista' jkun li ma' jidher minn imkien? L-issue ta' building congestion u tal-impatt li jista' jkollu fuq l-infrastruttura ta' din il-belt fragli ma' ssemwex.

Hawnhekk irid jingħad ghalhekk li l-appellant f'certu sens ghandu ragun ghaliex il-kriteji ta' fuq hix ser tigi protetta l-Isla mill-punto di vista ta' ippjanar mhux cari. Dan huwa evidenti hafna mir-ritratti li pprezenta l-appellant, Minn-naha l-ohra, fil-kors tas-smigh ta' dan l-appell, l-appellant ma giebx argumenti li huma konvincenti f'terminu ta'

ippjanar biex jirribattijew jikkontradixxi il-punti li ssottomettiet l-Awtorita.

Fil-fehma kunsidrata ta' dan it-Tribunal, ikun perikoluz hafna jekk tigi accettata din il-proposta ghalix tista tikkontribwixxi biex ftit ftit jinfetah il-bieb biex kull min ghandu l-pussess tal-arja f' bini fl-Isla isir potenzjalment eligibbli biex jakkwista sular zejjed. Dan jista jwassal biex biz-zmien tigi sfigurata din il-belt storika u dan bi hsara kbira ghall-pajjizna u bi ksur ta' wiehed mill-oggettivi principali tal-pjan ta' struttura. It-Tribunal ma jaqbilx mat-tezi li jipprova jaghmel l-appellant biex juri li l-kaz in ezami huwa b'xi mod sui generis u dan johrog car meta wiehed idur ftit ma din il-belt. Tista tghid li kwazi kull minn ghandu l-arja ta' xi bini fl-Isla jista jaghmel l-istess argumenti li ghamel l-appellant,

L-Awtorita ma kienitx konvincenti fl-ispjegazzjoni li tat ghal ghoti tal-permess PA 6646/99 li ikkwota l-appellant. Fil-fatt waqt li vera li dan is-sit jinsab bejn zewg triqat b'dislivell qawwi bejniethom ta' izjed minn sular, jirrizulta mir-ritratti li ssottometta l-appellant li l-bini issa huwa ta' erbgha sulari mit-triq l-gholja u hamsa mit-triq il-baxxa. Apparti minn hekk l-argumenti li gabet l-Awtorita biex tiggustifika dan il-permess ma tantx jaghmlu sens f'termini ta' ippjanar peress li i-visual impact ta' dan is-sular zejjed huwa verament negattiv.

In fatti wiehed jista' jzid ukolli dan il-permess huwa ezempju car ta' kemm wiehed irid joqghod attent meta japprova permessi biex jizdiedu s-sulari f'din il-belt.

Hija hasra li l-Awtorita spiss issib ruhha darha mal-hajt ghalix ma tkunx tista' tiddefendi certi permessi li inghataw fil-passat. Anki jekk jirrizulta li m'hemmx gustifikazzjoni ghall-ghoti tal-permess li ikkwota l-appellant, dan it-Tribunal ihoss li dan m'ghandux jitqies bhala precedent sufficenti jew li jikkostitwixxi xi tip ta' commitment ghas-semplici raguni li fi kwalunqwe kaz l-Awtorita tista iggib hafna ezempji ta' applikazzjonijiet biex isir zvilupp simili li gew rifjutati u kull wiehed minn dawn jikkostitwixxi precedent il-kontra. It- Tribunal huwa tal-

fehma li, f'termini ta' ppjanar, commitment f'dan il-kaz jinholoq meta izjed minn-nofs tal-bini fl-Isla jizdiedlu sular fuqu.

In oltre peress li l-oggettiv principali ta' kullhadd ghandu jkun li din il-belt tigi protetta fl-interess publiku, ghandu jsir dak kollu possibbli biex l-Awtorita, fi zmien qasir tizviluppa kriteri cari u sostenibbli ta' ippjanar ghal din il-belt, jekk hemm bzomm triq bi triq u kwartir bi kwartir.

In konkluzjoni, kif jidher mill-fatti li hargu fil-kors tas-smigh ta' dan l-appell, billi jirrizulta li l-proposta in ezami tikser il-policies RC01, UCO 10, UCO 6 u BEN 2 tal-Pjan ta' Struttura u kif ukoll tmur kontra paragraph 11 tal-Parti A tal-Adopted Design Guidance: Development Control within Urban Conservation Areas, dan l-appell ma jirrizultax fondat u ghalhekk ma jimmeritax kunsiderazzjoni favorevoli.

It-Tribunal, ghalhekk, qieghed jichad dan l-appell u jikkonferma ir-rifjut mahrug mill-Awtorita tal-applikazzjoni, PA 8107/06, f'18, Triq is-Sirena, Senglea (Isla), "To replace deteriorated roofs and construct an additional floor (2 units).", b'decizjoni tad-29 ta' Frar, 2008.

Ikkunsidrat

L-appellant ressaq zewg aggravji kontra din id-decizjoni.

1. It-Tribunal agixxa ultra vires meta fin-nuqqas ta' policies, kkonfezzjona policies hu biex jiggustifika r-rifjut tal-permess;
2. Naqas li jqis il-'commitment' li hemm fil-lokalita u ikkreja teorija ta' dak li jikkostitwixxi 'commitment'. In oltre kellu japplika t-tagħlim tal-'ugwaljanza' f'dan il-kaz in-konsonanza ma' permessi simili fil-vicinanze.

L-ewwel aggravju

L-ewwel aggravju jirrigwarda punt ta' ligi cioe jekk it-Tribunal agixxiex ultra vires il-poteri tieghu meta skond l-appellant ikkreja policies biex jirrigetta applikazzjoni. Dan

L-aggravju mhux gustifikat ghalkemm il-Qorti tifhem dak li pprova jissottometti l-appellant. Harsa lejn id-decizjoni tat-Tribunal juri bic-car illi t-Tribunal qed jistieden lill-Awtoritajiet biex ghar-rigward tal-Isla u l-izvilupp permess u permissibbli fiha ghandu jsiru regoli ad hoc jekk hemm bzonn triq bi triq u dan biex jigi evitat kull element diskrezzjonali fejn applikazzjoni tircievi trattament mod u applikazzjoni ohra trattment mod iehor li ghalkemm gustifikabbli mill-punto di vista tekniku legali pero mhux dejjem facilment konvincenti ghal min bhal kaz in ezami ma jkunx irceva trattament favorevoli ghall-applikazzjoni tieghu.

Infatti t-Tribunal fil-konsiderazzjonijiet tieghu jidhol f'certu dettal dwar l-objezzjonijiet tal-Awtorita u s-sottomissjonijiet tal-appellant, u indika fejn taqbel uma jaqbilx magghom. Mhux komputu ta' din il-Qorti li tidhol fil-mertu ta' dawn l-apprezzamenti fattwali. Pero dak li jimmerita konsiderazzjonijiet f'dan l-appell hu l-aggravju cioe jekk fid-decizjoni tieghu t-Tribunal iddecidiex li juza xi diskrezzjoni arbitrarja bla ma allacja r-rifjut ma' konsiderazzjonijiet teknici u legali bbazati fuq il-fatti quddiemu. Ghalkemm it-Tribunal wera riservi dwar partijiet mir-ragunament tal-Awtorita pero fl-istess waqt kkonceda illi l-policies in generali cioe RC01, UCO10, UCO6, u BEN 1 tal-Pjan ta' Struttura gew vjolati. Dawn kienu jinvolvu l-impatt avers fuq Grade 1 Area of High landscape value, inkluz l-impatt negattiv vizwali u estetiku tal-belt u l-binjiet li fiha. Dawn huma verament konsiderazzjonijiet ta' fatt li din il-Qorti ma ghandhiex dritt tissindaka pero dak li hu rilevanti illi t-Tribunal li wkoll ghamel access fuq is-sit ikkonstata li huma kwistjonijiet ta' fatt pprovati u kwindi jmorru kontra l-pjanijiet u policies suddetti.

Ghalhekk din il-Qorti ma tistax taccetta l-argument li t-Tribunal addotta xi policies non ezistenti ghax fil-fatt hu addotta policies ezistenti ghal fatti quddiemu u applikahom kif inhu fid-dover ai termini tal-artikolu 69 tal-kap. 504 li ghandu jinqara konguntament mal-artikolu 41(13) tal-istess Kapitolu.

Ghalhekk dan l-aggravju qed jigi michud.

It-tieni aggravju

L-appellant jilmenta li t-Tribunal kellu jikkonsidra li hemm 'commitment' billi hemm proprjetajiet ohra fit-triq li inghatalhom permess u ghalhekk ukoll kellu japplika l-principju tal-'ugwaljanza'.

Il-Qorti taghmel distinzjoni bejn kwistjoni bhal din li titqajjem ghal konsiderazzjoni tat-Tribunal li tigi injorata u fejn il-kwistjoni titqajjem u tigi konsiderata mit-Tribunal u rigettata ghal ragunijet li jaghti l-istess Tribunal. L-ewwel kaz jista' f'certi cirkostanzi jaghti lok ghal appell fuq punt ta' dritt ghax decizjoni trid tkun motivata sew u dan hu punt ta' dritt u zvilupp simili fil-vicinanze jimmerita konsiderazzjoni jekk l-applikazzjoni sotto skrutinju qed tigi analizzata mit-Tribunal u din il-kwistjoni hi rilevanti fic-cirkostanzi. Pero f'dan il-kaz ma jistax jinghad li l-aggravju mressaq mill-appellant ma giex trattat mit-Tribunal. Anzi t-Tribunal dahal sew f'din il-kwistjoni u accetta illi l-Awtorita ma ggustifikatx sew ir-raguni ghaliex inhareg il-permess ghal bini ta' kamra f'sular iehor f'binja fl-istess triq. Pero fl-istess waqt it-Tribunal gustament jirraguna illi anki jekk il-permess mahrug 6646/99 ma kienx gustifikat dan wahdu ma jikkostitwix precedent biex jintitola lill-appellant li jigi approvat din l-applikazzjoni u vice versa meta applikazzjonijiet ohra simili jigu rigettati. It-Tribunal zied li l-kwistjoni ta' 'commitment' kien ikollha importanza kieku izjed minn nofs il-bini tal-Isla jizdiedlu sular. Ghalkemm il-Qorti mhix konvinta illi dan l-argument ahhari jghin biex jinholoq commitment, il-kwistjoni quddiem din il-Qorti hi li t-Tribunal ikkonkluda li ma jilqax l-applikazzjoni fuq policies ezistenti ghalkemm mhux specifici ghas-sit in kwistjoni, liema policies l-appellant naqas li jikkontrobatti validament, kif esprima l-istess Tribunal. In oltre t-Tribunal ittratta jekk f'dan il-kaz il-permess uniku msemmi mill-appellant kienx jikkostitwixxi xi forma ta' commitment u l-piz li kellu jinghata u meta wizen il-fatti ma sabx li kien hemm xi forma ta' commitment. La darba t-Tribunal ikkonsidra l-kwistjoni kollha li waslitu ghal din il-konkluzjoni, mhux lecit u ghal Qorti li tiddisturba dawn il-

konstatazzjonijiet iktar u iktar meta t-Tribunal applika l-artikolu 69 li jaghmilha tassativa illum ghat-Tribunal li ghandu japplika l-pjanijiet u l-policies l-ewwel u qabel kollox ghalkemm ghandu jqis kwistjonijiet ohra ta' rilevanza fid-deliberazzjonijiet tieghu li f'dan il-kaz qieshom ukoll aktar u aktar billi l-pjanijiet u policies huma ta' natura generali u mhux specifici ghall-Isla.

Ghalhekk anki dan l-aggravju qed jigi michud.

Decide

Ghalhekk din il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Dr Simon Mercieca u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-21 ta' Gunju 2012. Bl-ispejjez jithallsu mill-appellant.

< Sentenza Finali >

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