



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta ta' l-14 ta' Novembru, 2013

Appell Civili Numru. 45/2012

Plaza Centres p.l.c.

vs

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

Il-Qorti,

Rat ir-rikors tal-appell tas-socjeta Plaza Centres p.l.c. tas-16 ta' April 2012 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' Marzu 2012 fejn gie rifjutat l-applikazzjoni PA 5377/09 gja; 2, 2A u 3 Sqaq Bisazza, Sliema: To sanction excavation on Bisazza Lane and to carry out minor modifications on plans as approved in PA 2545/08 (enlarging of shop);

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

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

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

A. Il-Kummissjoni ghall-Kontroll ta' l- Izvilupp, fis-7 t' Ottubru 2010, irrifjutat l-applikazzjoni ghall-permess tal-izvilupp PA 5377/09 "2, 2A, 3, Sqaq Bisazza, Sliema: To sanction excavation on Bisazza Lane, and to carry out minor modifications on plans as approved in PA 2545/08 (Enlarging of shop)."

L-unika raguni ghar-rifjut kienet is-segwent:

"1. The extension encroaching beneath the Lane goes contrary to the official alignment for the area and is therefore considered to go against the spirit of Structure Plan policy BEN 1, which seeks to protect the amenity of the area."

B. In-nota tal-Perit Vincent Magri u tal-Avukat Dott.ssa Marisa Azzopardi ghall-Appellant nomine, ipprezentata fl-4 ta' Novembru 2010, inter alia l-punti segwenti:

"1. DCC brought up the issue of alignment without substantiating their argument to overturn the recommendation of the Directorate.

2. In addition, and without prejudice, the Local Plan policies indicate and depict Bisazza Lane as a building site, and previous permits issued by MEPA (exposed party wall) indicate the lane as a building site.

Structure Plan Policy BEN 1 does not apply. Indeed, [...] the amenity of the area in question will not be in any manner affected - adversely or otherwise. [...] Bisazza Lane, will remain free to pedestrians to access at any time and without any restrictions [and] access through the lane at ground floor level will be maintained.

In addition, [...] there exist a number of precedents throughout Malta where development by private entities

has been permitted under roads clearly identified in planning documents. One such example lies in the immediate area to this proposal and relates to Guze Fava Lane (formerly Fawwara Lane) further down Bisazza Street. This Lane is crossed both at basement level and at a higher suspended level by means of a bridge.

Further to the production by the Applicant of evidence to the effect that Bisazza Lane is privately owned, the Directorate had reversed its recommendation and recommended an approval of the application. This notwithstanding, the DCC still maintained that Bisazza Lane was public and that the development encroached on a public road.”

Ma n-nota gew sottomessi kopja ta' diversi dokumenti, fosthom: parti minn kuntratt ta' bejgh, clearances mill-Awtorita' ghat-Trasport f' Malta u mill-Korporazzjoni ghas-Servizzi tal-Ilma, u zewg dikjarazzjonijiet mid-Dipartiment tal-Artijiet fosthom rigwardanti atti datati fit-8 ta' Dicembru 1938, tan-Nutar R. Girard et. Cit 570/1927 Prim Awla tal-Qorti Civili tas-6 ta' Marzu 1929 - Elena armla ta' Carmelo Vella vs Carmelo Debono et.

C. In-nota ta' Mario Scicluna ghall-Awtorita', ipprezentata fil-25 ta' Novembru 2010, inter alia l-punti segwenti:

“5.1.4 The Authority disagrees with this statement since the issue of whether the part of the basement levels which protrudes underneath the lane could be permissible or not, has been discussed in the DPA report from the inception of this application. In fact, the Directorate had objected to this part of the development from the initial stages of the first assessment [...] so much so that the DCC, in meeting of 5th August 2010 the DCC specifically stated:

‘DCC 7303310 held on 5 August 2010
Architect to be informed that board intends to refuse application in view of encroachment on public road.’

5.1.5 The cited Local Plan maps are not the official documents which determine issues relating to whether a lane is public or re official building alignments. [... In fact, any] application is first assessed vis-a-vis the Local Plan Maps [...] but eventually the building is still subject to the official alignment which determines the exact location of the building line.

Furthermore, the official MEPA's unit which is responsible for road alignments issues, which is the Planning Control Unit, had confirmed (and also reconfirmed recently after receiving this appeal) that Bisazza Lane is actually a public lane which serves several houses and has been in existence and open as a public lane for many decades. A copy of the 1957 and 1949 Government Reconstruction Scheme has been retrieved and [...] show that Bisazza Lane was open to public from that time and by and large with the same configuration as is at present.

5.1 6 The section drawing Red 43B as submitted with appellant's letter dated 29th June 2010 clearly shows that the encroachment onto Bisazza Lane cannot be described as 'a minor extension' since in fact, it extends up to the building on the opposite side of this lane with only a 0.75m setback to be in line with the civil law. The Authority also acknowledges that presently, clearances has been submitted [...] but MEPA's remit as dictated by law is not limited to only 'present' circumstances but has to plan ahead for future land uses which may change from the present circumstances. Hence, Structure Plan Policy BEN 1 cannot be interpreted solely as to whether a proposed development is today objectionable to the existing situation but [...] whether a proposed development could conflict with future changes in an area. This is the main reason why it is the norm that development underneath a road is not permitted. Underground services and other necessities change from time to time. [...] Had the encroachment be limited to a small percentage of the lane's width, one could have argued that such a necessity could still be catered for since a large portion of the lane would still be free for any future underground needs. However, the section drawing clearly shows that since the underground extension

extends all the way up to the property on the other side of the road and with no space between the roof of the level of the finished lane level, any future requirements for any underground works or space for any services would be both physically impossible and objected to by the owners of the underground shops on the bases that such an extension was done through a full development approval. This future impediment for any possibility of any underground engineering works is surely not a positive contribution to this neighbourhood and so is in contrast to the overall aim of Structure Plan Policy BEN 1. One example of such a possibility is if the need arises to change or reroute the sewage systems of the several residences which are located within this lane.

5.1.7 The Authority also reiterates that even if the area underneath the lane is not government owned, the fact that it is schemed lane, it is also subject to specific restrictions such as official building alignments and even subject to approvals for any such underground development. [MEPA's remit is] to safeguard for future needs which are not always understood or easily foreseeable (in such cases the precautionary principle applies) In this regard, Structure Plan Policy BEN 1 is in fact such a safeguard and prohibits development that is, or could be, detrimental to the amenity of an area through a specific aspect of its presence.”

D. In-nota tal-Perit Wendy Jo Attard ghall-Appellant nomine, ipprezentata fl-4 ta' Frar 2011. Ma n-nota gew sottomessi kazijiet tal-permessi allegatament simili in sostenn tal-argumenti mressqa fin-nota precedenti fosthom: Dolmen Hotel – Bugibba, Intercontinental Hotel – Paceville, Fortina Hotel – Sliema, Suncrest Hotel – Qawra, Qawra Palace Hotel – Qawra, u parti oħra tal-Istess Plaza Commercial Complex - Sliema.

E. In-nota ta' Mario Scicluna ghall-Awtorita', ipprezentata fil-21 ta' Marzu 2011, precizament il-punti segwenti:

“The Authority has re-checked with the Planning Control Unit [and confirms...] that Sqaq Bisazza has been

officially schemed as far as 1968 [...]. Its official designation has not been altered since and thus the DCC's decision to refuse the requested sanctioning is fully justified since it encroaches beyond the official alignment. The same official part survey sheet shows that the covered part of Bisazza Lane which abuts Tower Road was never schemed and it was for this reason that in that part of Bisazza Lane a permit had been issued and which included development under the roofed foot path.

Furthermore, [with reference ...] to the previous Code of Police Laws section 20 [...] particularly sub-section (9) (vi) [, it] is to be noted that any private property includes the sub-terranean level, consequently when a private road is taken over by government for public use this includes also the sub-terranean level. Moreover today this is regulated by Legal Notice 29 of 2010 Chapter 499 and particularly 19 (6) where any private roads on their surfacing (and publication by the President in the Gazette) shall become government property if included in the scheme.”

Ma n-nota giet annessa kopja ta' parti minn survey sheet tal-1968 li turi Sqaq Bisazza.

F. In-nota tal-Perit Patrick Camilleri ghall-Appellant nomine, ipprezentata waqt is-Seduta numru 50, mizmuma fil-5 ta' Lulju 2011, inter alia l- punti segwenti:

“1. Sqaq Bisazza is NOT a schemed lane
The plan presented by MEPA is a part plan taken from the 1968 Survey Sheet. Such survey sheets are simply plans drawn up on the basis of information collected during an aerial photographic survey. They do not indicate where roads or lanes are "schemed" but simply provide a plan of the area in question.

One cannot put forward such a plan as proof that a road or lane is "schemed". These survey sheets form the basis of numerous other plans, such as those contained in the Local Plans which then provide specific information (such as that relating to building heights, etc.). It is such specific

plans which convey detailed information. MEPA has not presented any such specific plans showing that Bisazza Lane is indeed a – schemed lane -. Indeed, none of the plans in the North Harbours local plan show Bisazza Lane as a ‘schemed lane’.

2. Permit cannot be refused now simply to protect possible Government's future rights.

It seems to be uncontested [...] that the area beneath Bisazza Lane [...] is privately owned by Plaza. Evidence of this has been submitted and includes, amongst other things, a public deed in the records of Notary Pierre Attard dated 3/12/2009 [...] whereby Plaza purchased, amongst other things, part of the area underneath the lane.

It seems to be also uncontested between the parties that the Government does not own Bisazza Lane, nor does it own the area underneath it. This was the prevailing position at the time that the application for development was refused and it is still the prevailing position today.

MEPA argues that Government can however, one day, become the owner of the area underneath Bisazza Lane, the subject matter of this application.

The legal basis of MEPA's argument is two-fold and is based on:

- Section 20(9)(vi) of the Code of Police Laws;
- Section 19(6) of Legal Notice 29 of 2010.

The section of the Code of Police Laws relied upon by MEPA is no longer applicable as this has been repealed. We have argued this at length before the Development Control Commission (the DCC). In this respect, this Board is being referred to Plaza's submissions of 26 August 2010. [...] MEPA states in the Second Statement that it is relying on the provisions of the Code of Police Laws on the basis of the fact that ‘this road was still under that provision’. With all due respect, this argument does not hold. The Code of Police Laws and the laws which have replaced the Code of Police Laws do not contain any transitory provisions of this nature. The law applicable today governs all roads at whichever time the roads were built

or existed. In this respect, it is being submitted that any references made by MEPA, and prior to that by the DCC, to the Code of Police Laws are to be omitted. Indeed, it is important to highlight that this is the first time that MEPA has acknowledged the fact that such provisions have been repealed. A very brief and superficial read through of the DCC proceedings file will indeed show that the DCC was constantly relying on repealed provisions of the law to reject Plaza's application.

The position today is now regulated by the New Road and Road Works Regulations introduced by virtue of Legal Notice 29 of 2010 (the 'Road Regulations'). In terms of Article 19(6) of the Road Regulations - similar to the position under the Code of Police Laws - in order for a private road to be transferred to the Government, the following three cumulative conditions must be met:

- (a) The street needs to be in a scheme or local plan;
- (b) The street needs to be asphalted or otherwise surfaced; and
- (c) A publication in the Government Gazette of an order by the President stating that such street has become Government property.

Therefore, a private street does not automatically become owned by the Government and, unless all these conditions have been satisfied, the private street remains privately owned.'

It is not contested that the second condition (that is that the street is asphalted) is satisfied. However, even if one were to concede that the street in this case is in a scheme (hence also satisfying the first condition), the three conditions aforementioned are still not satisfied cumulatively to render the area beneath the lane Government owned. The Government until today has not issued a publication in the Government Gazette of an order by the President stating that the area beneath Bisazza Lane has become public property. Accordingly, given that the third condition remains, till today,

unsatisfied, the area beneath Bisazza lane is still privately owned.¹

In these circumstances, Plaza's only obligation at law is to allow access to the public. The remaining ownership rights of the private owner of a street remain unaffected by the sole fact that the street had become schemed.²

This position has been reproduced in the Road Regulations. The only rights granted to Government under the Road Regulations are to name the said road and to carry out works in and under any private road which it considers necessary or useful on grounds of public utility. Therefore, should Government deem it necessary or useful on grounds of public utility to carry out works in or under Bisazza Lane, Government is legally permitted to do so. Nowhere is it stated in the Road Regulations that the owner of a private road shall be prohibited from carrying out any developments beneath the said private road. [...]

In addition, Plaza has shown that, with the proposed development which it sought to sanction, all utilities that Government may wish to pass from the area underneath Bisazza Lane can be accommodated. [...] Our client, as stated in previous letters to MEPA, has restored the lane to its original layout at street level and the proposed extension relates only to the part of the area beneath the lane. Accordingly, public access through Bisazza Lane will not, in any way, be affected by the proposed development. [...] Just] because one day in the future the Government may become the owner of the area beneath Bisazza Lane, then this provides a good and sufficient justification for MEPA to confirm the refusal of the application for development beneath the lane.

¹ "This reasoning has been confirmed in a number of judgments including in particular Azzopardi Emidio Et vs Ellis Salvu et decided on 08 May 2009 by the Court of Magistrates (Gozo) in its Superior Jurisdiction wherein it was stated that: "Ghalkemm mill-provi rrizulta li dawn it-toroq huma schemed roads, ma tressqux provi li saret il-procedura kontemplata fil-Kodici tal-Pulizija sabiex isiru proprjeta' tal-Gvern. Ghalhekk m'hemmx dubju li dawn it-toroq m'humiex tal-Gvern. Il-fatt li fil-Gazzetta tal-Gvern tas-27 ta' Meju 1997 gie puublikat avviz bl-isem ufficcjali li nghataw dawn iz-zewg toroq ma jfissirx li t-toroq saru tal-Gvern."

² "In the same judgment quoted above, the Court further stated that: "tigi determinata biss il-kwistjoni dwar il-jedd ta' tranzitu u jekk jezistix dritt ta' indenniz mill-fatt biss ta' tranzitu" minn Triq ir-Rumani u Triq il-Kavallieri. Kull kwistjoni ohra (bhal per eżempju ftuh ta' aperturi f'bini fronteggjanti l-imsemmija toroq jew tqeghid ta' servizzi mill-privat) tibqa' mpregudikata."

The Utilities and Services (Regulation of Certain Works) Act (Chapter 81 of the Laws of Malta) grants the Authority for Transport in Malta (the 'Authority') a privilege over the property of Maltese residents which consists of the carrying out of works, placing of cables and wires, on, beside or below any tenement and that trenches, pits, poles, stays, brackets and all other accessories essential to the proper working of the electrical power and telecommunication systems be cut, placed, erected in or affixed to any tenement. [...] Consequently, if one day in the future there will be the need to put certain services below street level, the Government and the Authority have a legal right to do so. Plaza's rights of ownership should not be prejudiced and it should not be hindered from developing its own property simply because of a possible futuristic government right, which is, after all, already fully protected at law.

In addition, other analogies can be drawn from other areas of the law to support Plaza's submission that a possible future right cannot impinge on its right of ownership. Indeed, in order for a person or entity to be able to protect an interest, that interest must be actual and certain. This principle has been applied by the Maltese courts both when:

- (a) A person is instituting proceedings in Court; and
- (b) In expropriation of land.

In order for an applicant to institute proceedings in Court, the Courts have consistently held that the applicant must have an interest which is juridical, direct, personal and actual. It has also been held that the demand by the applicant must be aimed at achieving 'rizultament utili u vantaggju' as otherwise there would be no direct, personal and actual interest. Therefore, the interest must be certain and actual and not some futuristic event which cannot yet be determined.

The same reasoning has been adopted in the case where the Government has expropriated land. It has been held that in order for Government or any Government entity to deprive a person from his right to property and his right to

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peaceful enjoyment of that property the interest which is being protected must be certain and actual.

[...] There is no evidence that:

(a) Government will, eventually, expropriate the lane - to the contrary, the fact that the lane has been, according to MEPA's argument in the Second Statement, a schemed lane since at least 1968 is evidence that the Government does not have an intention to expropriate the lane;

(b) The development beneath the lane will prejudice Government in the event that the lane is expropriated - to the contrary, the fact that clearances have been obtained from both Transport Malta and Water Services Corporation and the fact that all utilities that Government may wish to pass from the area underneath Bisazza Lane can be accommodated [...] is proof that the development beneath the lane will not, in any manner whatsoever, prejudice Government.”

G. In-nota tal-Avukat Dott. Anthony DeGaetano ghall-Awtorita', ipprezentata fl-1 ta' Settembru 2011, senjatament il-punti segwenti:

“Fl-ewwel lok biex wiehed jara jekk Sqaq Bisazza kienx schemed jew le, wiehed ma jridx jara skont il-ligi li dahlet fis-sehh fl-2010 izda meta din in effetti giet schemed. X'ghandu x'jaqsam jekk kienx hemm transitory provision jew le - dak kollu li sar taht il-Kodici tal-Pulizija jibqa' validu w tista' biss tapplika l-Att il-gdid ghal toroq godda;

Ghaldaqstant in-nota prezentata mill-appellanti, ghalkemm studjata, ma tapplikax ghall-kaz de quo;

L-appellanti isemmu lil Victor Borg Fiorentino ghaf-favur tagghom. Pero' l- istess Victor Borg Fiorentino iddikjara li l-istess Sqaq Bisazza kienet schemed - vide [...] l-large scale maps antiki li juru rispettivament l-ischemes tal-1952 fejn Sqaq Bisazza kienet ikkunsidrata diga' schemed road u din minn parti tal-pjanta tal-Gvern "Govt. reconstruction scheme" - drawing no. R5176/45/52 sheet 2, u kien hemm

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ippjanat Bisazza Street u l-oħra tal-1956 meta Bisazza Street saret triq u tidher Sqaq Bisazza diga' sħemed u ezistenti;

Illi a bazi tal-Kodici tal-Pulizija dak iz-zmien l-istess saret proprjeta' tal-Gvern, irrispettivament jekk sarx l-esproprijazzjoni w hlas ta' kumpens effettiv - vide ddecizjoni ta' dan l-istess Tribunal ta' Catania vs l-Awtorita;

Fl-aħhar nett l-appellanti jergghu jagħmlu analogija w studju profund ma' esproprijazzjoni tal-Gvern - izda dan kollu sar għal xejn stante li hawn mhux fil-kamp tat-tehid tal-art izda r-regolamentazzjoni ta' tali art - l-Awtorita ma takkwistax jew tbiegh il-proprjeta' - tirregola r-regolamentazzjoni tiegħu u la darba hemm it-triq (sqaq) hi sħemed, kull haga taħtha tappartjeni lill-Gvern - irrispettivament jekk sarx l-esproprijazzjoni jew il-kumpens - l-Awtorita' ma tistax toħrog permess li tikkomprometti l-istess sħemed road;

Il-kazijiet li ssemew kienu ta' zewg kategoriji - (1) ta' zvilupp li jikkonnettu hotel mal-beach concessions - li kienet koncessjoni li tingħata mit-Turismu u (2) fil-kaz tas Sorijiet tal-Gudja, minhabba li kien sar bini illegali (gymnasium) tahr it-trig (li kienet sħemed road), u l-Ministru dak iz-zmien issanzjonalhom l-izvilupp bil-konsegwenzi pero' li kellu jnehhi l-istess wisa' mill-ischemed road bir-rizultat li ilium minhabba l-gymnasium, l-istess scheme inbidlet minn triq normali għal triq dejga hafna ta' hdax-il pied - haga li sfortunatament ikkompromettiet it-triq b'mod mhux għall-interess pubbliku - vide l-ischeme illum kif kienet giet imnaqqsa bl-approvazzjoni tal-Ministru Michael Falzon dak iz-zmien fl-1987 biex that it-triq ma jkunx hemm il-gymnasium tal-iskola – dok. TD3 hawn annessa;

Għaldaqstant l-istess zvilupp għandu jigi rifjutat kemm għax mhux ippjanar korrett kif ukoll għall-precedent li jista' jinholoq.”

Ma n-nota gew annessi inter alia, kopji ta' partijiet mis-survey sheets SLM 25 - 176/45/52 u SLM 24 - 176/76/56, migbura mill-ufficcju tal-Planning Control Records.

H. In-nota ulterjuri tal-Perit Patrick Camilleri ghall-Appellant nomine, ipprezentata fil-31 ta' Jannar 2011, precizament il-punti segwenti:

“1. Plaza Shopping Centre - Sliema

The Plaza Commercial Centre was built over the sites of the Majestic and Plaza Theatres. An underground link was approved that connected the two sites. This link passes below Fawwara Lane. [...] The link serves to connect the ex-Plaza site to the ex- Majestic Theatre site and hence creates a holistic development. The link is the full width of the Majestic site and incorporates a corridor and retail space. The link is thus more than a simple connection since it has a retail and hence commercial aspect to it.

2. Fortina Hotel- Tigne Seafront

This hotel is built on the North side of Tigne Seafront with a beach facility on the South side of the Road. These two facilities, i.e.: hotel and beach facility are linked by a connection running under the road itself. [...] The use of the Gymnasium and indoor pool is not restricted to hotel guests and membership is open to the public. There is therefore a commercial nature to this facility.

MEPA officials have argued that hotels are permitted to have an underground link to their beach facilities. This development goes way beyond a mere link and, given its commercial nature, it is clear to see that this argument does not hold water.

It also should be noted that the road in this case is a major public road with miscellaneous services running through it and not a very minor private alley under which no services pass as is the case under appeal.

3. Site at Villa Preziosi - San Pawl il-Bahar

This is a residential project in which permission has been granted to create an access to the private garage through

a link that runs below road level. A number of permits have been issued on this site and case number PA0693/05, (granted on the 26th February 2007), incorporates cross sections that indicate the link below the road. [...] It should be noted that the link is of direct commercial benefit to the development since, by creating the access to the garage from below the street, it effectively means that the developer did not need to provide ramps within his development. He was thus able to maximize his developable area.

4. Qawra Palace Hotel - Qawra

This hotel is built along the busy Triq tax-Xtut in Qawra. Miscellaneous facilities exist below Triq tax-Xtut including an indoor pool and a multi-function hall.

Once again the pool and other facilities are open to the public and hence are of a commercial nature. This development too goes beyond being a simple "link" between the beach facilities and the hotel. Triq tax-Xtut is a major public roadway with services running below it unlike Bisazza Lane.

5. Suncrest Hotel - Qawra

There exists a connection between the Hotel and Pool area. [...] The use of this connection is not restricted to hotel guests and hence the development below the road is also commercial in nature. Once again I would point out that Triq tax-Xtut is a major public roadway with services running below it.

6. Dolmen Hotel - Qawra

[...] some form of development exists below the roadway however, [...] it was not possible to trace any of the permits relating to this hotel and hence it was not possible to ascertain exactly what the development consists of.

7. The Intercontinental Hotel- Paceville

We believe that some form of development has also taken place below street level but again, it was not possible to locate the permits relating to this development or to ascertain what the development consists of."

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Ma l-istess nota gew annessi kopji ta' dokumenti in sostenn ta' parti mill-kaziztika pprezentata mill-Appellant nomine, cjoé' dokumenti li jirrelataw mal-izvilupp tal-Plaza Commercial Centre u tas-sit f' Villa Preziosi, kif indikati supra.

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda proposta sabiex jigi ssanat zvilupp bla permess that Sqaq Bisazza f' tas-Sliema. L-izvilupp in ezami jikkonsisti mit-tkabbir ta' sensiela ta' hwienet etc., li jiffurmaw parti minn shopping complex u li jirrizultaw livell mat-triq minn bnadi ohra; kif ukoll xi modifiki li saru f'hwienet fuq sulari ohra u li originarjament kienu approvati bil-permess PA 2 545/08.

Kienu diga' nhargu sensiela ta' permessi ohra, fosthom PA 5080/87 sabiex jinbena s-shopping complex innifshu, kif ukoll PA 4336/97 u PA 3017/05 sabiex jigi estiz l-istess kumpless.

Ir-raguni tar-rifjut hi bbazata fuq il-fatt li s-sottinterrat johrog il-barra mill-linja tal-izvilupp u li ghalhekk huwa in kontravenzjoni tal-policy BEN 1 tal-Pjan ta' Struttura (protection of amenities).

L-aggravji tal-Appellant nomine, jistrieħu fuq il-fatt li originarjament (anke kif ikkonfermat mill-ewwel abbozz tad-DPA Report), il-proposta ghas-sanar sabet rezistenza mill-Awtorita' peress li kien qed jigi allegat li saret encroachment fuq art pubblika; cjoé' parti mill-isqaq – kienet qed tigi usurpata. Skond l-Appellant nomine, imbagħad meta kien gie ppruvat li l-isqaq kien jappartjeni lilu, ir-raguni tar-rifjut inqalbet f' dik li l-isqaq kien jaqa' fl-iskema tal-Pjan Lokali (schemed) u peress li fl-istess sqaq kien hemm ukoll propjeta' ta' terzi, l-izvilupp kien ser jikkomprometti l-provvista' ta' servizzi pubblici lil dawn l-istess terzi. Jidher pero' li kemm l-Awtorita' għat-Trasport f' Malta u l-Korporazzjoni għas-Servizzi tal-Ilma, ma sabux oggezzjoni li dan l-izvilupp jigi sanat. In oltre, ngiebet konferma mid-Dipartiment tal-Artijiet li ma kien hemm l-

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ebda prova kuntrarja li l-isqaq ma jappartjenix lill-gvern. Ghalhekk, id-Direttorat fi hdan l-Awtorita' irrikmandt li jinhareg il-permess izda l-Kummissjoni zammet ferm l-oggezzjoni taghha.

L-Appellant isostni li l-Pjan Lokali (hawnhekk trid issir riferenza ghal Mappes SJ 1 u SJ 3), l-isqaq hu ndikat li jista' jinbena sa' tmien sulari u semi-basement. Jidher ukoll li l-istess sqaq ma jiffurmax parti mit-toroq pubblici. Fil-fatt permezz tal-Mappa SJ 1, Sqaq Bisazza huwa ndikat bhala parti mis-Sliema Primary Town Centre. Ta' min jinnota wkoll li sqaqien li hemm biswitu (cjoe' Sqaq it-Torri u Sqaq Fawwara), huma pero' ndikati formanti mit-toroq pubblici u cjoe' bhala parti mis-Sliema Town Centre Environmental Improvement.

Mill-banda l-ohra, l-Awtorita' tirrileva li sahsitra minn survey sheets tal-1958 u tal-1968, jidher li l-isqaq kien schemed, u li abbazi tal-Kodici tal-Pulizija, huwa rrilevanti jekk sarx l-espropjazzjoni (u r-rikumpens rispettiv) u ghalhekk, l-isqaq jirrizulta de facto art pubblika. In oltre, targumenta li l-kazjijiet imsemijja mill-Appellant nomine bhala precedenti, jirrigwardaw concessions, u ghalhekk ma jistax isir paragon ma' dawn.

Madankollu, ghalkemm giet sottomessa dikjarazzjoni ta' Peter Mamo, operations manager fi hdan l-Estate Management Department tal-Government Property Division bid-data tal-25 ta' Gunju 2010 li:

'to date, there is nothing indicating that Bisazza Lane is not private property';

lanqas ma gie kkonfermat li l-isqaq fil-fatt hu private property. Tajjeb li jigi nutat ukoll li d-dikjarazzjoni mill-Government Property Division taghmel riferenza ghal land file tal-1938, fuq sentenza li nghatat fl-1929; izda li l-Awtorita' ipprezentat survey sheets tal-1956 u tal-1968.

Ghalhekk, dan it-Tribunal hu tal-fehma kkunsidrata li l-aggravji ma jirrizultawx fondati: billi anke propjeta privata tista tigi utilizzata ghall-formazzjoni tat-toroq prevja l-

esproprijazzjoni u l-ghoti tal-kumpens lill-propjetarju tal-art, skond ma jipprovdi l-Kap. 88.

In oltre, anke semmaj l-izvilupp sottinterrat jaqbez il-linja tal-izvilupp, kwistjonijiet ta' alignment m'humieq fil-gurisdizzjoni ta' dan it-Tribunal (Qorti ta' l-Appell Inferjuri – Helen Pavia vs Kummissjoni għall-Kontroll ta' l-izvilupp, deciza fil-31 ta' Jannar 2007; u Qorti ta' l-Appell – Joseph Pavia vs. Kummissjoni għall-Kontroll ta' l-izvilupp, deciza fit-23 ta' April 2001); u dan, apparti l-fatt li skond l-Awtorita' u skond is-survey sheets, l-isqaq jirrizulta schemed u jagħti għal fuq schemed road.

Ezaminati fid-dettal l-ilmenti kollha tal-Appellant nomine, ma rrizultawx ragunijiet sufficjenti li jiggustifikaw r-revoka tar-rifjut; anzi irrizulta li l-kwistjonijiet ta' bejn il-partijiet m'humieq tant relatati ma konsiderazzjonijiet ta' ippanar, izda ta' drittijiet civili.

Għalhekk, in vista tal-konsiderazzjonijiet kollha hawn fuq magħmula, dan il-Tribunal qed jiddisponi minn dan l-appell billi jichad l-istess u jikkonferma ir-rifjut għall-PA 5377/09 mahrug mill-Kummissjoni għall-Kontroll ta' l-izvilupp, fis-7 t' Ottubru 2010.

Ilkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. L-isqaq hu privat u l-permess ma jistax jigi rifjutat abbazi ta' bzonnijiet li l-Gvern ipotetikament jista' jkollu fil-futur;
2. Il-kwistjoni li kellu quddiemu t-Tribunal ma kinitx wahda ta' bdil ta' alignment izda wahda purament ta' kontroll ta' zvilupp.

L-ewwel aggravju u t-tieni aggravju flimkien

Irid jingħad qabel xejn illi r-raguni ta' rifjut quddiem l-Awtorita kien illi 'the extension beneath the lane goes contrary to the official alignment for the area and is therefore considered to go against the spirit of Structure

Plan Policy BEN 1 which seeks to protect the amenity of the area'.

L-ewwel kontenzjoni f'dan l-aggravju hu t-titolu għall-isqaq fejn is-socjeta appellanti issostni illi l-kuntratt ta' akkwist esebit minnha juri li kien proprjeta tagħha u anki d-Dipartiment tal-Artijiet ikkonferma li mhux tal-Gvern. L-appellant isostni illi r-ragunament tat-Tribunal li anki proprjeta privata tista' tigi esproprijata hi barra minn postha u ddecieda l-kwistjoni fuq fatturi ipotetici u futuristici.

Għalkemm it-Tribunal għamel espozizzjoni sintetika tal-argumenti migjuba favur u kontra l-argument dwar il-proprjeta, pero inspjegabilment it-Tribunal f'sentenza wahda li mhix sorretta minn ebda argument legali jghid illi nonostante dak li qal ir-rapprezentant tad-Dipartiment tal-Artijiet, ma hemmx konferma li l-isqaq hu privat. Dan juri illi t-Tribunal abdika milli jezamina l-atti u dokumenti li kellu quddiemu b'mohh kritiku legali u jasal għal konkluzjoni tiegħu. Sta għat-Tribunal li jezamina d-dokumenti u jikkunsidrahom u mbagħad jiddeciedi mod jew iehor fuq it-titolu għall-isqaq.

Aktar minn hekk pero t-Tribunal jiskarta milli jikkunsidra dak li fl-opinjoni tat-Qorti hu ta' relevanza għal kaz cioe jekk fil-fatt jirrizultax li l-isqaq hux 'schemed' u l-konsegwenzi li jemanaw mill-konferma ta' dan l-istat ta' fatt fuq l-applikazzjoni.

Mhux bizzejjed li t-Tribunal jikkwota x'tghid l-Awtorita fuq l-allegazzjoni tagħha li Sqaq Bisazza hu 'schemed' u jirrendih de facto art pubblika, esproprijazzjoni jew le. It-Tribunal irid jinvestiga din il-kwistjoni u jagħtiha d-debita konsiderazzjoni għar-risoluzzjoni tal-kwistjoni.

Magħdud dan l-affermazzjoni xotta tat-Tribunal li anki proprjeta privata tista' tigi utilizzata għal formazzjoni ta' toroq prevja esproprijazzjoni ma ssolvi bl-ebda mod it-talba li saret mill-applikant.

Marbut ma' dan kollu mbagħad hemm argument ulterjuri cioe jekk hemmx alignment fi Sqaq Bisazza u kif dan l-

alignment jekk jezisti jinfluixxi fuq applikazzjoni ghas-sottosuol tal-isqaq. In oltre l-Awtorita gabet prova tal-estenzjoni tal-izvilupp fis-sottosuol u kif din ser timpedixxi kull forma ta' servizzi pubblici fil-futur jekk l-applikazzjoni tirnexxi u kwindi fuq konsiderazzjoni ta' ppjanar kellu jipprevali policy BEN 1 ghal protezzjoni tas-servizzi.

It-Tribunal invece hadha bhala fatt meta ma gabx argumenti ghalfejn jaqbel li jezisti tali alignment u zied li t-Tribunal ma ghandux gurisdizzjoni ibiddel alignment. Dan hu minnu pero jrid l-ewwel jiddeciedi jezistix alignment u kif dan jeffettwa s-sottosuol meta l-istess Tribunal jikkwota biss dak li allegat l-Awtorita li l-isqaq hu schemed u jaghti ghal schemed road minghajr ma l-istess Tribunal iddecieda hu jekk dan hux minnu jew le u l-konsegwenzi li johorgu minn ipotesi favur jew kontra.

Din il-Qorti tqis illi t-Tribunal kien legger meta kkonkluda li din kienet kwistjoni ta' drittijiet civili. Din mhix kwistjoni ta' drittijiet civili izda wahda purament ta' ppjanar bi kweziti ta' natura teknika legali speccjalizzata li t-Tribunal kellu izda naqas li jidhol fihom.

Id-decizjoni tat-Tribunal kienet nieqsa minn motivazzjoni bbazata fuq ragunijiet ta' ppjanar ghaliex l-izvilupp kellu jigi michud tenut kont li l-parametri tal-kwistjoni kienu ben delineati mentri t-Tribunal naqas li jaghtihom il-kunsiderazzjoni mehtiega. Dan irendi d-decizjoni nieqsa mic-certezza mehtiega u ghalhekk l-aggravji tal-appellant f'dan is-sens qed jigu milqugha.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tilqa' l-appell tas-socjeta Plaza Centres p.l.c. u tirrevoka u thassar id-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-ppjanar tad-29 ta' Marzu 2012 u tirrinviija l-atti lura quddiem it-Tribunal biex in linea ma' dak deciz jerga' jisma' mill-gdid l-appell u jiddeciedih fuq il-parametri kontestati mill-partijiet. Spejjez kontra l-Awtorita.

Kopja Informali ta' Sentenza

< Sentenza Finali >

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