MALTA

QORTI CIVILI

PRIM' AWLA

ONOR. IMHALLEF

ANTHONY ELLUL

Seduta tas-7 ta' April, 2014

Citazzjoni Numru. 959/2011

Michael **Debono Limited u MDL Capital Investments Limited**

vs

Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-Avukat Generali

<u>Rikors Guramentat</u>.

1. *Premess illi s-socjeta attrici hija l-proprjetarja ta' l-art fil-limiti ta' Haz-Zebbug, Malta li kienet tifforma parti mill-ghalqa gja maghrufa bhala ta' Enun u li tmiss mit-tramuntana ma' Valletta Road u min-nofsinhar ma' triq pubblika ohra;*

2. *Din l-ghalqa kienet giet zviluppata u gja tezisti fuqha fabbrika maghrufa bhala Medcor Limited gja Medcor Radiators Limited;*

3. *Dan l-izvilupp sar b' permessi regolari mahruga mill-awtoritajiet kompetenti u dawn l-istess permessi ghadhom in vigore stante li l-art giet u tinsab zviluppata skond l-istess permessi;*

4. *Fis-sena 2006, ad insaputa tas-socjeta rikorrenti, l-Aworita intimata approvat il-Pjan lokali ossia s-South Malta Local Plan f'liema dan is-sit gie indikat bhala "stategic open gap" u cioe jista' jsir l-ebda zvilupp fuq is-sit.*

5. *Id-desinjazzjoni tas-sit bhala "strategic open gap" tmur oltre kull raguni in kwantu ghalkemm tali desinjazzjoni tipprojibixxi zvilupp is-sit huwa gja zviluppat minhabba l-presenza ta' fabbrika proprjeta tas-socjeta rikorrenti;*

6. *Ghalkemm l-intimati ghandhom l-awtorita illi b'ligi jirregolaw il-pjan ta' zvilupp, l-agir tal-intimati fil-kaz odjern hija nulla u bla effett in kwantu hija abbusiva u mehuda irragonevolment peress li art tinsab mibnija u zviluppata skond permessi mahruga regolarment u ghalhekk ma tistax klassifikata bhala "strategic open gap" u li ma hix art tajba ghal zvilupp;*

7. *Inoltre u fi kwalsiasi kaz il-klassifikazzjoni ta' art bhala "strategic open gap" tammonta ghal esproprju tad-drittijiet tal-mittenti bhala sid minghajr hlas ta' ebda kumpens u inoltre jigi rilevat li fil-kaz in dezamina in kwantu l-agir ta' l-awtorita tista' titqies bhala kontroll t'uzu ta' l-art ma tikkreax bilanc gust bejn l-interessi tas-sid u dak tal-pubbliku;*

8. *Ghalhekk ir-rikorrenti qeghdin jikkontestaw il-validita tal-parti tas-South Malta Local Plan, inkwantu din tikkoncerna l-proprjeta taghhom ghar-ragunijiet fuq premessi u billi dik id-desinjazzjoni tohloq pregudizzju rrimedjabbli lill-rikorrenti, u hija agir impermessibbli u uzu abbusiv mill-Awtoritjiet ta' dak li hu dritt taghhom li jaghmlu;*

Jghidu ghalhekk il-konvenuti, prevja kwalsiasi dikjarazzjoni necessarja u opportuna u ghar-ragunijiet premessi, ghaliex m'ghandhiex din il-Qorti ma ghandiex tiddeciedi din il-kawza billi:

1. *Tiddikjara illi d-decizjoni tal-awtorita ta' Malta dwar l-Ambjent u l-Ippjanar kif fuq premess hija nulla u illegali ghal ragunijiet hawn imfisra u kif ser jirrizulta tul it-trattazzjoni tal-kaz;*
2. *Tikkundanna lil konvenuti sabiex immedjatament u minghajr dewmien jannullaw u jirrexxindu kull decizjoni minnhom mehuda fir-rigward;*
3. *Tiddikjara l-konvenuti responsabbli ghad-danni li ser isoffru l-atturi b'risultat ta' l-isvillup premess, salv likwidazzjoni permezz ta' kawza ulterjuri;*

Bl-ispejjez u bl-ingunzjoni tal-konvenuti in subizzjoni.

RISPOSTA GURAMENTATA tal-Avukat Generali.

Illi l-allegazzjonijiet tas-socjeta' attrici huma nfondati fil-fatt u fid-dritt ghar-ragunjiet segwenti:

Illi fl-ewwel lok il-process li gab fis-sehh id-dispozizzjonijiet dwar il-pjan ta' struttura huwa wiehed legislattiv u mhux amministrattiv, liema process inkluda konsultazzjoni pubblika wiesgha u huwa ghalhekk inveritier li s-socjeta' rikorrenti tallega li sar 'ad insaputa taghha';

Illi effettivament il-process ta' approvazzjoni tal-pjan ta' struttura sar permezz ta' mozzjoni mressqa ghall-approvazzjoni tal-Kamra tad-Deputati fil-5 ta' Lulju 2006 u dan a tenur tal-Artikolu 22 tal-Kap 356 tal-Ligijiet ta' Malta.

Illi l-pjani lokali kollha saru skont il-kriterji applikabbli u fil-parametri tal-ligi.

Illi ghalhekk l-allegazzjonijiet tas-socjeta' attrici dwar agir abbuziv jew decizjonijiet nulli u bla effett da parti tal-awtoritajiet huma legalment insostenibbli.

Illi fid-dawl tas-suespost ukoll m'hemm ebda bazi legali sabiex is-socjeta' rikorrenti titlob xi danni allegatament sofferti mid-decizjoni tal-parlament dwar il-pjan lokali ghan-nofsinhar ta' Malta u l-inkluzjoni tas-sit in kwistjoni dikjarat bhala 'strategic open gap'.

Ghalhekk it-talbiet kollha tas-socjeta' attrici ghandhom jigu michuda bl-ispejjez kontra taghha.

<u>Risposta guramentata ta' l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar</u>.

1. Preliminarjament, is-socjeta` attrici trid tiddikjara abbazi ta' liema disposizzjoni tal-ligi qed issejjes l-azzjoni taghha. Jekk din hija azzjoni ta' stharrig gudizzjarju dwar ghemil amministrattiv, l-azzjoni perenta jew ma gietx intavolata entro` t-terminu kontemplat ***fl-artikolu 469A (3) tal-Kap 12,*** *liema terminu jiddekorri minn meta s-socjeta' rikorrenti saret taf, jew setghet saret taf bl-approvazzjoni tal-Pjan Lokali li qed jigi attakkat f'din il-kawza. Qed tigi annessa ittra mibghuta mis-socjeta' rikorrenti lill-Awtorita' intimata fl-14 ta' Dicembru 2010 dwar l-istess mertu tal-kawza (Dokument A). Il-kawza odjerna infethet fl-4 ta' Ottubru 2011. Jigi rilevat ukoll illi l-parti relattiva tal-Pjan Lokali msemmija f'din il-kawza giet approvata mill-Ministru fit-3 ta' Awwissu 2006.*

2. Preliminarjament ukoll, jekk is-socjeta` attrici tiddikjara li din ma hijiex kawza dwar stharrig gudizzjarju ta' ghemil amministrattiv, allura trid tindika liema disposizzjoni tal-ligi taghtiha l-jedd li tmexxi din ix-xorta ta' azzjoni u tressaq it-talbiet kif kontenuti fir-rikors mahluf.

3. Preliminarjament ukoll, in kwantu ghat-talbiet relattivi ghall-inkluzjoni ta' l-art de quo fil-Pjan Lokali ossia s-South Malta Local Plan, l-Awtorita' intimata mhijiex il-legittimu kontradittur, stante` li l-Awtorita' intimata m'ghandhiex il-vires legali illi tinkludi art fil-Pjan Lokali, u dan peress illi tali setgha tispetta lill-legislatur. Jigi rilevat illi l-involviment tal-Awtorita' intimata fil-kaz ta' tfassil u l-approvazzjoni tas-South Malta Local Plan huwa li tapprova abbozz tal-istess Pjan Lokali, liema abbozz, biex jigi fis-sehh, jehtieg ad validatem l-approvazzjoni ministerjali jew parlamentari skont dak kontenut fih.

4. Illi, minghajr pregudizzju ghas-suespost, il-process ta' approvazzjoni tal-pjan lokali sar mill-Ministru fit-3 ta' Awwissu 2006 u dan a tenur tal-Kap 356, li jfisser ghalhekk li l-Awtorita` intimata ma hix il-legittimu kontradittur ghat-talbiet attrici.

5. Illi, fil-mertu u minghajr pregudizzju ghas-suespost, it-tezi proposta mis-socjeta' rikorrenti illi l-klassifikazzjoni ta' art bhala 'strategic open gap' tammonta ghal esproprju tad-drittijiet tal-mittenti bhala sid ma hix korretta stante illi l-pjan lokali ma jolqotx b'mod negattiv areas li fuqhom inghataw permessi ghall-izviluppi validi mahruga qabel id-data tal-bidu fis-sehh tal-istess pjan lokali.

6. Illi l-Awtorita' intimata qdiet l-inkarigu taghha fil-kumpilazzjoni u tlestija tal-Pjan Lokali in ottemperanza mal-provvedimenti tal-Ligi, kif ukoll skont il-kriterji u policies applikabbli.

7. Illi minghajr pregudizzju ghas-suespost, is-socjeta' rikorrenti ghandha tressaq prova tat-titolu taghha dwar l-art imsemmija fl-ewwel premessa tar-rikors guramentat, u dan sabiex jigi radikat l-interess guridiku li hi ghandha f'din il-kawza. Fl-eventwalita' li ma ssirx tali prova, l-Awtorita' intimata qieghda minn issa stess tressaq l-eccezzjoni dwar in-nuqqas ta' interess guridiku. Inoltre`, is-socjeta'

rikorrenti ghandha tindika fuq pjanta liema hija l-art mertu tal-vertenza odjerna stante illi l-konfini indikati minnha ma jidhrux li huma korretti.

8. Illi, minghajr pregudizzju ghas-suespost, ma hemm l-ebda bazi fuq x'hiex is-socjeta' rikorrenti tista' titlob id-danni sofferti dwar il-klassifikazzjoni ta' l-art mertu tal-kawza bhala strategic open gap.

9. *Ghaldaqstant u in vista tas-suespost, it-talbiet tas-socjeta' rikorrenti huma infondati fil-fatt u fid-dritt u ghandhom jigu michuda bl-ispejjez kontra l-istess socjeta' rikorrenti.*

Il-qorti semghet il-provi u rat l-atti li jinkludu noti ta' sottomissjonijiet tal-partijiet.

Kwistjoni.

Fit-3 ta' Mejju 1971 il-Bord ghal Permessi dwar Area ta' Pjan Regulatur kien ta permess lil Malta Radiators Limited sabiex fis-sit in kwistjoni tibni fabbrika (fol. 36)[1]. Fil-fatt din inbniet. Jirrizulta li bil-pjan lokali tas-sena 2006 (South Malta Local Plan, approvat f'Lulju 2006), is-sit fejn tinsab il-fabbrika sar jifforma parti minn art li giet klassifikata bhala *strategic open gap*. Skond il-policy relattiva (SMCO 10):

"Urban development will not be permitted in all Strategic Open Space Gaps and particularly those between the following settlements: Ghaxaq and Gudja; Fgura and Zabbar; Ghaxaq and Zejtun; Safi and Zurrieq; as illustrated on the respective Policy Maps.

MEPA will exercise strict control on development within these gap sites and may refuse any uses outside the development zone if they lead to urban sprawl. Where suitable informal recreational areas will be encouraged within such areas in the form of play areas/picnic areas." (fol. 14).

L-ilment tal-atturi hu li llum fis-sit ma jista' jsir l-ebda zvilupp, u jsostnu li:

i. L-agir tal-Awtorita hu abbuziv u mehud irragonevolment ghaliex l-art inbniet skond permess ta' zvilupp;

[1] Geoffrey Debono, direttur tal-kumpannija Michael Debono Limited, xehed li kien bidlu l-isem tal-kumpannija ghal Medcor Radiators Limited li kienet taghmel xoghol ta' manifatturar sas-sena 2005, u eventwalment fl-2006 il-proprjeta giet trasferita lil MDL Capital Investments Ltd (fol. 48).

ii. Il-klassifikazzjoni tal-art bhala *strategic open gap* jammonta ghall-esproprju minghajr ghoti ta' kumpens. Inoltre, l-agir tal-awtorita' jista' jitqies bhala kontroll ta' uzu t'a l-art li ma jikkreax bilanc gust bejn l-interessi tas-sid u dak tal-pubbliku.

Konsiderazzjonijiet.

1. Originarjament l-atturi ddikjaraw li l-kawza hi *"... bazata fuq talba ghal stharrig gudizzjarju ta' eghmil amministrattiv abbinat ma' ksur ta' drittijiet fundamentali."* (seduta tat-12 ta' Dicembru 2011, fol. 46). Wara qalu li kienu jaqblu mat-tezi tal-Awtorita' li l-pjan lokali ma kienx jaqa' taht l-ambitu ta' l-Artikolu 469A tal-Kap. 12 (ara wkoll in-nota ta' sottomissjonijiet). Fis-seduta tat-28 ta' Novembru 2012 (fol. 87) id-difensur tal-atturi ddikjara: *"..... l-attrici qeghda ssostni li l-kawza hi ghall-stharrig gudizzjarju li ma jaqax taht dak il-provvediment* (Art. 469A) *u ghalhekk il-perjodu ta' dekadenza ma japplikax."*.

2. B'riferenza ghat-tielet eccezzjoni tal-Awtorita, kien il-Ministru responsabbli ghall-ippjanar tal-izvilupp li ta l-approvazzjoni tieghu ghall-pjan lokali *South Malta Local Plan*. Il-pjan lokali dahal fis-sehh bl-approvazzjoni tal-Ministru, ghalkemm hu minnu li l-Awtorita' konvenuta kienet direttament involuta fit-thejjija tal-pjan lokali. Fil-fatt hu biss wara li l-pjan lokali jigi approvat mill-Ministru li jigi ppubblikat mill-Awtorita. Ghalhekk it-tielet u raba' eccezzjoni, li huma abbinati wahda mal-ohra, huma gusitifikati.

3. Min-nota ta' sottomissjonijiet tal-atturi hu evidenti li qeghdin jekwiparaw il-pjan lokali ghal legislazzjoni sussidjarja. L-ewwel ilment tal-atturi hu li l-klassifikazzjoni tas-sit fejn hemm il-fabbrika bhala *strategic open gap* hi *"... abbuziva u mehuda irragonevolment peress li l-art tinsab mibnija u zviluppata skond permessi mahruga regolarment."* (fol. 2). F'dan ir-rigward il-qorti tosserva li:

3.1 L-atturi ddikjaraw li l-azzjoni ma saritx *ai termini* tal-Artikolu 469A tal-Kap. 12;

3.2 L-atturi ma semmew l-ebda ligi li taghti l-awtorita' lill-qorti li tistharreg il-pjan lokali, li l-atturi ddeskrivewh bhala kwazi legislattiv, approvat mill-Ministru fit-3 ta' Awissu 2006 fuq it-tezi li huwa **irragonevoli** in kwantu jirreferi ghas-sit proprjeta ta' MDL Capital Investments Limited (MDL);

3.3 Ir-riferenza li l-atturi ghamlu ghall-kawza **Attard et nomine vs Profs Roger Ellul Micallef nomine**, deciza mill-Qorti tal-Appell fl-4 ta' Marzu 1998, m'hijiex flokha ghaliex f'dak il-kaz il-qorti kellha tiddeciedi jekk il-kriterji li fuqhom iddecieda l-Bord ta' l-Ghazla kienux validi gialadarba ma kienux gew promulgati bil-mod provdut fl-Att ta' l-Edukazzjoni. Min-naha l-ohra fil-kaz in ezami l-ilment hu li d-decizjoni li l-art ta' MDL tkun inkluza fi *strategic open gap*, hi irragonevoli. Mela l-kontestazzjoni hi fiha nnifisha d-decizjoni u mhux ghaliex ma giet segwita xi procedura kontemplata mil-ligi. Inoltre ma jidher li m'hemm xejn fil-ligi li jipprojbixxi li fi pjan lokali xi art f'Malta tigi klassifikata

bhala *strategic open gap*. Ghalhekk il-fatt li hemm bini fl-art, ma jidhirx li jipprekludi li l-proprjeta' ta' MDL tigi nkluza fi *strategic open gap*.

3.4 Il-qorti trid tiddeciedi a bazi tal-kawzali kif proposti mill-atturi fir-rikors guramentat. L-atturi ma lmentawx minn xi irregolarita' procedurali fil-mod kif gie adottat il-pjan lokali in kwistjoni, u fejn il-proprjeta ta' MDL giet inkluza fi *strategic open gap*. Ghalkemm fil-kors tas-smiegh tal- provi d-difensuri tal-atturi semmew kemm-il darba 'l fatt li l-atturi ma kienux formalment notifikati bit-tibdil li kien propost li jolqot is-sit ta' MDL (ara wkoll in-nota ta' sottomissjonijiet fil-parti **Konkluzjoni**), dan l-ilment ma jissemmix fir-rikors guramentat. Ghalhekk il-qorti ma tistax tqiesu.

4. Ilment iehor tal-atturi hu li l-klassifikazzjoni tal-art bhala *strategic open gap* jammonta ghal esproprju tad-drittijiet tar-rikorrenti bhala sid minghajr hlas ta' ebda kumpens, jew kontroll ta' uzu tal-art. Ilment li hu relatat mad-drittijiet fundamentali tal-bniedem. Din il-qorti ghandha l-kompetenza biex tiddeciedi dan l-ilment. F'dan ir-rigward il-qorti tosserva:-

4.1 'il fatt li l-proprjeta ta' MDL tinsab illum fi *strategic open gap* ma jfissirx li sehh esproprju. Ma kien hemm l-ebda konsegwenza fuq il-permess ta' zvilupp. Inoltre, MDL baqghet sid tal-proprjeta u ghadha tista' taghmel uzu mill-fabbrika.

4.2 Il-perit Frans Mallia, ufficjal tal-Awtorita' konvenuta, spjega li l-fabbrika ta' MDL kienet qeghda f'zona barra z-zona ta' zvilupp. Bil-klassifikazzjoni ta' din iz-zona bhala *strategic open gap*, gie limitat iktar x'jista' jsir f'dik iz-zona. Dan certament ikollu wkoll effett fuq il-valur tal-proprjeta'. Fil-kaz **Lay Lay Company Limited vs Malta** (30633/11) deciz mill-Qorti Ewropea ghad-Drittijiet tal-Bniedem fit-23 ta' Lulju 2013, inghad: "*the applicant company was the co-owner and later the sole owner of the land that is the subject of the present case and which undoubtedly constitutes a possession for the purposes of the Convention. The Court reiterates that the* ***refusal to issue a building permit must be regarded as an interference with the applicant company's right to peaceful enjoyment of its property, as guaranteed by Article 1 of Protocol No. 1*** *(see, inter alia, Borg v. Malta, Commission decision, 18 October 1995; Allan Jacobsson v. Sweden (no. 1), 25 October 1989, Series A no. 163, § 54; and Kugler v. Austria, (dec.), no. 65631/01, 27 November 2008). It follows that Article 1 of Protocol No.1 is applicable*." (enfazi mizjuda). Fil-fehma tal-qorti t-tqeghid tal-proprjeta ta' MDL f'zona *strategic open gap* minflok f'*outside development zone*, hi fiha nnifisha nterferenza mad-dritt tas-sit ghall-pacifiku tgawdija ta' hwejgu.

4.3 Il-konvenuti ghamlu ampja riferenza ghas-sentenza tal-Qorti Kostituzzjonali fil-kaz **Trimeg Limited vs Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar** tal-14 ta' Mejju 2010 fejn il-qorti kkonkludiet li skedar ta' proprjeta' minghajr hlas ta' kumpens ma kienx jikser id-dritt ta' Trimeg ghat-tgawdija ta' hwejjigha. Il-qorti kienet ibbazat id-decizjoni fuq 'l fatt li:

4.3.1 Trimeg ma kenitx akkwistat art fabrikabbli u wara tnehhielha l-permess ta' zvilupp, izda art li ghalkemm kienet taqa' f'*white area* kien hemm incertezza jekk qatt setax johrog permess ta' bini fuqha;

4.3.2 L-art li xtrat Trimeg kienet b'potenzjal incert ta' zvilupp;

4.3.3 L-iskedar kien irrestringa l-potenzjal incert ta' zvilupp, kien ghal skop legittimu u ma poggiex fuq Trimeg *"xi piz sproporzjonat ghaliex hija qatt ma kienet akkwistat dritt jew almenu stennija legittima li fuq l-art jinhargu permessi ghall-bini. Ghalhekk f'dan il-kaz ma jistax jinghad li hemm dritt ta' kumpens."*.

4.4 Il-kaz in ezami hu differenti. Il-fabbrika tal-atturi nbniet wara l-hrug ta' permess ta' zvilupp. Ghalhekk MDL ghandha aspetattiva legittima li fil-futur f'dik il-parti tal-art fejn inbiet il-fabbrika, ikun jista' jsir zvilupp skond il-policies li japplikaw ghal *Outside Development Zones*. M'hemmx dubju li l-bini industrijali ta' MDL ghandu *lifespan*. Issa li l-art tinsab fi *strategic open gap*, jidher li ser ikun difficli jekk mhux impossibbli li jsir xi zvilupp. Ghalkemm f'nota prezentata mill-perit Mallia fis-seduta tas-26 ta' Frar 2013 jinghad: *"Id-direzzjoni fil-prezent hija li zvilupp industrijali huwa gwidat li jsir f'Zoni ta' Zvilupp Industrijali (Industrial Areas), jew Siti ta' Zvilupp ghall-SME's, hekk approvati mill-Parlament."*, l-istess xhud xehed: *"Hargu hafna permessi miz-zona ta' zviupp, ODZ areas.... Naf b'hafna kazijiet fejn kellek ODZ u hargu permessi ta' zvilupp."* (seduta tat-28 ta' Novembru 2012). Kazijiet li kemm-il wiehed minnhom nisimghu bihom ghaliex tinghata pubblicita' dwarhom fil-mezzi ta' xandir. Id-decizjoni li z-zona fejn ghandha l-proprjeta MDL tkun klassifikata bhala *strategic open gap* ghandha konsegwenza fuq il-valur ekonomiku tal-proprjeta'. Il-perit Frans Mallia, ufficjal tal-Awtorita', xehed:

"Nikkonferma li l-policy ta' strategic open gap hi aktar restrittiva mill-ODZ. Ghalhekk ghall-applikant huwa iktar difficli li jinghata permess ta' zvilupp f'zona ta' strategic open gap. Strategic open gap hija area li suppost ma jsirx zvilupp. Jekk diga' hemm zvilupp jibqa' hemm imma mhux iktar. Mistoqsi mill-qorti x'inhi s-sitwazzjoni jekk l-atturi jaghmlu applikazzjoni biex ikabbru l-fond tal-garaxx, nghid li dan ikun zvilupp li nikkunsidrawh li jkun laterali. Ifisser li gialadarba hija strategic open gap, dan ma jistax jinghata permess. Fil-kaz li jkollok ODZ, hemm diga commitment allura l-applikant ghandu iktar cans li jinghata permess biex ikabbar dak li ghandu. Min-naha l-ohra fil-kaz ta' Strategic Open Gap, id-diffikultajiet huma ikbar. Ovvjament, irrid niccara li l-fatt li hemm commitment, ma jfissirx li l-Mepa ghandha idejha marbutin li bilfors trid taghti l-permess ghax dan jibqa' ODZ." (fol. 76).

4.5 M'hemmx dubju li l-Gvern ghandu obbligu li jipprotegi l-ambjent ghalina u l-generazzjonijiet tal-futur. Fis-South Malta Local Plan jinghad:

"..... the strategic open gaps are priority areas requiring substantial protection. These locations are visually important being the first step outside urban areas offering a brief respite from the monotone visuals of heavily urbanized landscapes. It is important that settlements retain their distinctive identity with countryside around them. However, in various cases development has been permitted within such areas. This policy aims to contain such permitted development and discourage any expansion or further intensification that may compromise the quality of this strategic open space.

8.4.18 With regard to the settlement pattern of the plan area, strategic open gaps are protected for the following purposes:

i. To check unrestricted urban sprawn and coalsescence.
ii. To safeguard the countryside from urban encroachments.
iii. To preserve the setting, townscape identity and character of towns and villages and prevent them from merging into one another." (fol. 15).

Hu pozittiv li jkun hawn zoni ta' *strategic open gaps*, fejn ma jkunx jista' jsir zvilupp. Il-qorti m'ghandix dubju li l-klassifikazzjoni tas-sit ta' MDL ma' ohrajn bhala *strategic open gaps* saret fl-interess generali tal-komunita. Fil-kaz **Allan Jacobbson vs Sweden (10842/84)** deciz fil-25 ta' Ottubru 1989, il-Qorti Ewropea osservat: *"Moreover, nothing suggests that the impugned prohibitions were not aimed a* ***facilitating town planning, which purpose undoubtedly falls within the general interest as envisaged in Article 1 of Protocol No. 1 (P1-1)****."* (enfazi mizjuda). M'huwiex il-kompitu tal-qorti li tindaga jekk kienx hemm alternattivi ohra. Fil-kaz **Mellacher v Austria** (1989) il-Qorti Ewropea, f'kaz li kien jitratta ligi relatata ma' kirjiet, osservat:

"The possible existence of alternative solutions does not in itself render the contested legislation unjustified. Provided that the legislature remains within the bounds of its margin of appreciation, it is not for the court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way.".

Pero' fuq in-naha l-ohra tal-munita hemm id-drittijiet tac-cittadin. Hu veru li m'hemm xejn x'izomm lil MDL milli tkompli taghmel uzu mill-bini bhala fabbrika jew milli tittrasferiha. Pero' dan wahdu m'huwiex bizzejjed meta tqies il-konsegwenza li s-South Malta Local Plan ghandu fuq il-proprjeta' tal-atturi.

Irid jintlehaq *fair balance* bejn il-htigijiet tal-interess generali tal-komunita' u l-htiega ghall-protezzjoni tad-drittijiet fundamentali tal-individwu. Fil-kaz **Baner v Sweden** (1989) il-Kummissjoni osservat:

"The legislation regulating the use of property sets the framework in which the property may be used and does not, as a rule, contain any right to compensation. This general distinction between expropriation and regulation of use is known in many, if not all, Convention countries.

This does not exclude that the law may provide for compensation in cases where a regulation of use may have severe economic consequences to the detriment of the property ower. The Commission is not required to establish in the abstract under which circumstances Article 1 may require that compensation may be paid in such cases. ***When assessing the proportionality of the regulation in question it will be of relevance whether compensation is available*** *and to what extent a concrete economic loss was caused by the legislation."* (enfazi mizjuda).

Fil-kaz **Sporrong & Lonnroth vs Sweden** (7151/75; 7152/75) deciz fit-23 ta' Settembru 1982, parti mill-meritu kien dwar il-projbizzjoni li ghal numru ta' snin ma setax isir zvilupp f'art. Il-Qorti osservat:

"... the two series of measures created a situation which upset the fair balance which should be struck between the protection of the right of property and the requirements of the general interest: the Sporrong Estate and Mrs Lonnroth bore an individual and excessive burden which could have been rendered legitimate only if they had had the possibility of seeking a reduction of the time-limits or of claiming compensation. Yet at the relevant time Swedish law excluded these possibilities and it still excludes the second of them."

Fil-kaz in ezami ma jirrizultax li l-ligi qeghda tikkontempla ghall-hlas ta' kumpens. M'hemmx dubju li issa li l-proprjeta' ta' MDL qeghda f'zona mmarkata bhala *strategic open gap*, hemm iktar restrizzjonijiet ghal dak li jikkoncerna:-

i. uzu li jista' jsir fil-proprjeta' jekk ma tibqax tintuza bhala fabbrika;
ii. zvilupp li jista' jsir jekk MDL tiehu decizjoni li trid tizviluppa l-proprjeta mill-gdid.

Dan apparti meta tqies ir-restrizzjonijiet li jimponi l-policy SMCO 10 li jirregola dawn it-tip ta' spazji, il-qorti m'ghandix dubju li ghandha mpatt fuq il-valur ekonomiku tal-proprjeta ta' MDL. Jekk ghada pitghada MDL tkun trid tbiegh il-proprjeta, min jithajjar jixtri zgur li ser jikkunsidra li l-policy applikabbli tipprovdi: *"Where suitable informal recreational areas will be encouraged within such areas in the form of play areas/picnic areas."*. Kliem li juri bic-car x'tip ta' attivita' ghandha ssir minn dawn iz-zoni. Bla dubju dan ser ikollu mpatt negattiv fuq il-prezz. Il-Gvern argumenta li irrispettivament f'liema tip ta' zona tinsab il-proprjeta, is-sid m'ghandux garanzija li jekk japplika ser jinghata permess ta' zvilupp, gialadarba l-applikazzjoni trid tigi kkunsidrata a bazi tal-policies li jkun japplikaw fiz-zmien li tigi pprezentata l-applikazzjoni. Ghalkemm dan hu minnu, jibqa' 'l fatt li issa li l-proprjeta' tinsab fi *strategic open gap* ir-restrizzjonijiet huma ferm ikbar.

Fil-fehma tal-qorti dan il-kaz ma jistax jigi pparagunat mal-kaz ta' **Pine Valley Developments Limited v Ireland** (12742/87) deciz mill-Qorti Ewropea fid-29 ta' Novembru 1991. F'dak il-kaz, ghalkemm kien jitratta dwar ir-revoka ta' *outline development permit*, dan kien minhabba 'l fatt li kien inhareg *ultra vires* peress li l-art kienet tinsab f'zona fejn ma setax isir zvilupp. Il-Qorti osservat:

*"**The interference was designed and served to ensure that the relevant planning legislation was correctly applied by the Minister for Local Government not simply in the applicants' case but across the board**. The decision of the Supreme Court, the result of which was to prevent building in an area zoned for the further development of agriculture so as to preserve a green belt (see paragraph 9 above), must be regarded as a proper way - if not the only way - of achieving that aim* (enfazi mizjuda).

The applicants were engaged on a commercial venture which, by its very nature, involved an element of risk ……. and they were aware not only of the zoning plan but also of the opposition of the local authority, Dublin County Council, to any departure from it (see paragraphs 10 and 12 above). This being so, the Court does not consider that the annulment of the permission without any remedial action being taken in their favour can be regarded as a disproportionate measure.".

Hekk ukoll hu differenti mill-kaz ta' **Frijns vs Netherlands** (11838/06) deciz fit-13 ta' Novembru 2008 mill-Qorti Ewropea, decizjoni li kienet titratta l-ammissibilita' tal-applikazzjoni. F'dak il-kaz l-ilment kien bazat fuq l-Artikolu 1 tal-Protokoll 1 tal-Konvenzjoni:

"….. that no fair balance had been struck between their personal interests and the general interests involved, in that they had suffered excessive damage as a result of the new zoning plan without being granted compensation".

F'dak il-kaz proprjeta li originarjament kien intiza ghall-agrikoltura, saret zvilupabbli pero snin wara regghet giet klassifikata bhala art agrikola. Il-qorti cahdet l-ilment tar-rikorrent u osservat:

"As regards the question whether the decision to reject the applicants' claim for compensation for damage under section 49 of the Town and Country Planning Act was compatible with Article 1 of Protocol No. 1, the Court notes at the outset that there had been no formal expropriation of the plot in question and finds that it cannot be said that there was a de facto deprivation of property. ***The case concerns the permissible use of the plot which is a form of control of use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1****.*

The Court reiterates that, in an area as complex and difficult as that of spatial development, the Contracting States should enjoy a wide margin of appreciation in order to implement their town- and country-planning policy. *Nevertheless, the Court must determine whether the requisite balance was maintained in a manner consonant with the applicants' right of property (see Housing Association of War Disabled and Victims of War of Attica and Others v. Greece, no. 35859/02, § 37, 13 July 2006).*

The Court observes that the applicants, like their legal predecessors, have always used the plot for agricultural purposes. The Court appreciates that both the 1952 Outline Extension Plan – which allowed for the construction of hotels and country houses on this agricultural plot – and the 1997 revised zoning plan – which changed the planning destination of the plot from constructible land to a protected landscape with an agricultural destination must have affected the market value of the plot.

Against this background, the Court considers that, by deciding not to construct any buildings on the plot or to sell the plot for that purpose whilst

this was possible under the 1952 zoning plan until 1997 when the possibility to build on the plot became finally defunct whereas it was clear as from 1973 that the local authorities were planning a revision of this zoning plan including the plot's destination, ***the applicants and their legal predecessors were actually making entrepreneurial choices which, by their very nature, involve an element of risk. This being so, the Court does not consider that the ultimate change in destination of the plot in the revised zoning plan without granting the applicants compensation can be regarded as a disproportionate measure contrary to Article 1 of Protocol No. 1*** *(see Pine Valley Developments Ltd and Others v. Ireland, 29 November 1991, §§ 59-60, Series A no. 222)* [enfazi mizjuda].

Fil-kaz in ezami d-differenza hi li hemm fabbrika li nbniet wara li nhareg permess ta' zvilupp.

Il-qorti tosserva:

i. m'hemmx dubju li l-presenza tal-fabbrika m'hijiex garanzija u wisq inqas jaghti xi dritt li fuq il-kumplament tal-art ta' MDL jista' jsir bini. F'dan ir-rigward ma nghatatx prova li meta hareg il-pjan lokali kien diga jezisti permess ta' zvilupp fuq l-art mhux zviluppata.
ii. 'il fatt li hemm il-fabbrika ma jfissirx li MDL kellha xi dritt awtomatiku li tkompli zzid il-bini, meta tqies li kienet tinsab f'zona li taqa' barra z-zona ta' zvilupp, u lanqas ma jfisser li l-bini jista' jintuza ghal kull uzu;
iii. Ghalkemm illum il-fabbrika qeghda f'zona klassifikata bhala *strategic open gap*, ma jfissirx li saret bini illegali. Inoltre m'hemm xejn x'jostakola lil MDL milli tkompli taghmel uzu mill-bini ghall-uzu industrijali attwali;
iv. Il-volum ta' art f'Malta hu limitat minhabba d-daqs tal-gzira. Ghalhekk hu ferm iktar accentwat id-dmir u 'l bzonn tal-Istat li jiehu mizuri biex jigi salvagwardat l-ambjent;

Pero' l-problema li ssib il-qorti hi li issa li ghal bini tapplika l-policy SMCO 10, li qeghda fis-sehh ghal zmien indefinit, dik il-policy mhi tipprovdi xejn dwar bini ezistenti li hu kopert minn permess ta' zvilupp u li bil-pjan lokali tas-sena 2006 spicca f'zona maghrufa bhala *strategic open gap*. Jekk per ezempju jiggarraf il-bini jew jekk minhabba t-trapass ta' zmien minn meta nbniet ikun essenzjali li l-fabbrika kellha terga' tinbena, b'applikazzjoni ta' policy SMCO 10 mhux suppost li jinghata permess ta' zvilupp. Fil-fehma tal-qorti din hi l-unika konkluzjoni li tista' taghmel a bazi ta' dak li tghid il-policy. Cirkostanza li jkollha effett fuq il-valur tal-bini jekk kellu jinbiegh. Hu f'dan il-kuntest li fil-fehma tal-qorti ma ntelhaqx il-*fair balance*. F'dan il-kuntest issir riferenza ghal

Case of Housing Association of War Disabled and Victims of War of Attica and Others v Greece (35859/02) tat-13 ta' Lulju 2006 li kien jitratta dwar art li fl-1966 kienet inklua f'urban development plan u li sussegwentement b'ligi ma setatx tigi zviluppata. Il-Qorti Ewropea osservat:

"38. In the present case, the principal thrust of the Government's arguments is that the protection of forests is guaranteed without limitation in time and notwithstanding illegal destruction or deforestation. However, the Court considers that in such a complex situation in which any decision could weigh heavily on the property rights of a large number of people, the legitimate concern to protect the forests, understandable as it is in the modern day, should not absolve the State of its responsibility to provide adequate protection to people such as the applicants who bona fide possess or own property (see, mutatis mutandis, Papastavrou and Others v. Greece, no 46372/99, § 37, ECHR 2003-IV).

39. ***The Court is particularly struck by the fact that, although the very substance of the applicants' ownership has been affected (see Sporrong and Lönnroth v. Sweden, judgment of 23 September 1982, Series A no. 52, p. 23, § 60), the applicants were not successful in obtaining compensation under Greek law***" (enfazi mizjuda).

L-atturi jsostnu li l-ahjar rimedju hu li l-qorti tnehhi l-imposizzjoni ta' *strategic open gap* fuq il-proprjeta meritu tal-kawza. Il-qorti ma taqbilx. F'dan ir-rigward l-interess pubbliku huwa ikbar mill-interess privat. Dan apparti li fir-rigward ta' ippjanar il-Gvern ghandu jkollu *margin of appreciation* wiesgha. M'huwiex fl-interess pubbliku li jinghata r-rimedju li qeghdin jitolbu l-atturi. Sabiex jinzamm il-bilanc mhux bilfors li tigi annullata l-ordni. Il-bilanc jista' jinzamm ukoll billi jithallas kumpens lil MDL.

Ghal dawn il-motivi l-qorti tiddeciedi l-kawza billi -

1. **Tiddikjara li l-ewwel u tieni eccezzjoni tal-Awtorita' huma ezawriti gialadarba l-atturi ddikjaraw li l-kawza proposta m'hijiex dik kontemplata fl-Artikolu 469A tal-Kap. 12 u spjegat il-pretensjoni taghha.**
2. **Tilqa' t-tielet u raba' eccezzjoni tal-Awtorita u tilliberaha mill-osservanza tal-gudizzju.**
3. **Tiddikjara li l-inkluzjoni tal-proprjeta fi *strategic open gap* jekwivali ghal kontroll ta' uzu ta' l-art, u ghar-ragunijiet li nghataw ma johloqx bilanc gust bejn l-interessi tas-sid u dak tal-pubbliku u dan bi ksur tal-Artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni Ewropea.**

4. **Tichad l-ewwel u tieni talba.**

Spejjez tal-Awtorita' a karigu tal-atturi. Il-kumplament tal-ispejjez jinqasmu nofs bin-nofs in kwantu mhux l-ilmenti tal-atturi kollha intlaqghu.

< Sentenza Finali >

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