



QORTI TAL-APPELL

(KOMPETENZA INFERJURI)

(TRIBUNAL TA' REVIZJONI TAL-AMBJENT U L-IPPJANAR)

ONOR. IMHALLEF MARK CHETCUTI LL.D.

Illum Il-Hamis, 5 ta' Novembru, 2015

Numru 26

Appell Nru. 42/2015

Franco Debono

vs

**L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar u
l-kjamat in kawza Carmelo Borg**

Il-Qorti,

Rat ir-rikors tal-appell ta' Franco Debono, terz interessat, tat-22 ta' Lulju 2015 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-2 ta' Lulju 2015 li biha ikkonferma l-permess PA 164/13 'to sanction as built side elevation slope gradient changes – height of garage in 9 courses as approved in PA 7013/06 – construction of column in side curtilage to sustain cantilevered balcony and minor alterations indicated on drawings';

Rat ir-risposti tal-Awtorita u ta' Carmelo Borg li ssottomettew li l-appell ghandu jigi michud u d-decizjoni tat-Tribunal konfermata;

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

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra:

Ra r-ragunijiet ta' l-appell hekk kif gej:

"We write on behalf of Franco Debono of Daffodil, 15, Triq i1-Blata l-Kahla, Santa Venera, as registered objector to the above planning application, in order to submit an appeal from the decision given by the Environment and Planning Commission during a meeting held on the 7th May, 2013, and eventually published in the press on the 21st September, 2013, whereby the application was approved following submission of amended drawings.

1.0 Preliminary

Prior to setting out the reasons for this appeal, appellant would like, by way of background, to explain the context which led to this particular application.

Appellant is the owner of the ground floor maisonette numbered 30, Destiny, Dawret in-Nawfragju, Xemxija, Saint Paul's Bay. On his part, applicant is the owner of an verlying maisonette "Dolphin Haven" number 1, block 3D, Dawret in-Nawfragju, Xemxija, San Pawl il-Bahar, At the back of the block there is a courtyard, which appellant Debono contends to be his sole property. Carmelo Borg on the other hand contends that this back yard is "common property" which is jointly owned by himself and Debono. Contiguous to this back yard there are two garages on two levels, the upper one of which belongs to applicant Borg. These garages had been built following an agreement between Borg and Debono in 2006/2007 at a time when there were as yet no legal disputes between them. In fact, the garages had been built by Carmelo Borg or by contractors appointed by him although the application (PA07013/06) was filed in our client's name.

Whilst the building of the garages was carried out with our client's knowledge and consent (so much so that the application was, as explained, originally filed in Debono's name), there were other subsequent works to which appellant never gave his consent namely:

- The enlargement of a balcony on the back elevation, overlooking our client's backyard
- The opening of doors and windows in one of the above-mentioned garages
- Two columns to support balconies

- Formation of a bridge between Borg's balcony and the roof of his garage. This bridge was later removed following service of an enforcement notice [EC0909/09]

Besides being built without appellant's consent, these works were not covered by a building permit. Borg is separately seeking to sanction these works [except the bridge, since removed] through an application (PA 01976/09) which was refused by MEPA and is currently the subject of a pending appeal before this Tribunal.

At the same time however, Carmelo Borg filed the present application (PA 00164/13) which partly overlaps the earlier application. Borg is requesting the sanctioning of the height of the garage and the construction of a column in side cartilage to sustain cantilevered balcony.

This application has been approved. Client is hereby appealing from this decision for reasons which will be explained in greater detail below.. At the same time, he makes reference to past submissions/objections made with reference to this same application and reiterates its position and arguments as explained therein.

2.0 Grounds of Appeal

The appeal is being based on the following grounds:

Procedural

1. The application as originally submitted was based on a false declaration of ownership which, it is submitted, taints the whole application process.
2. The application as resubmitted still does not satisfy Section 68(3) of the Environment and Development Planning Act, with regard to the obligation on the applicant to obtain the owner's permission for an application to be submitted.

Merits

3. On the merits, the column which Borg is seeking to sanction was not covered by PA 07013/2006 since that application envisaged a cantilevered balcony specifically to avoid the building of a column.
4. In relation to the "minor alterations" to plans approved in terms of the application, the appellant notes that the latest plans submitted by Carmelo Borg to MEPA on the 27th July, 2013 prior to publication of the approval, indicate 2 steps which lead to the area overlying the garage belonging to applicant. These steps did not appear in earlier plans. Appellant notes that one of the conditions of a previous permit ((07013/2006) was that the roof of Borg's garage should not be accessed and used - in particular, in the past there have been enforcement procedures against Borg for using the area as a roof garden. It is submitted that the plans should not have been approved as they are as they contradict previous (and still applicable) conditions imposed by MEPA in the context of other permits.

The said grounds of appeal will now be considered individually

2.1 Irregularities in the application as submitted

PA 00164/2013 includes the sanctioning of structures [column and balcony] built by Mr Carmelo Borg partly in areas exclusively owned by Mr Franco Debono [specifically the back yard] and partly in areas which are, at best, co-owned by Mr Debono and Mr Borg. These structures were built abusively and without clients' permission.

This notwithstanding, application PA 00164/2013 was not filed in terms of article 68(3) and the form used stated that the area where the development was planned belonged to Mr Borg. Therefore, the application is irregular and in breach of MEPA regulations, particularly with regard to "declaration of ownership" and the procedure applicable where the proposed development is over third party property.

In this regard, reference is made to the other application filed by Carmelo Borg with respect to the same property [PA 01976/09] where our client has raised similar objections, supplying also copies of relevant contracts. This related application is currently pending before the Environment and Planning Review Tribunal.

Appellant contends that the declaration as originally submitted was based on a false declaration of ownership which, we submit, taints the whole application process. It is clear that, given the history of the matter, this was not an issue of a "mere mistake" on the part of applicant. The applicant knowingly submitted a false declaration and this behaviour cannot be accepted and rewarded.

In this regard, Appellant reserves all his available remedies at law.

2.2 Irregularities in the application as resubmitted.

Faced with the objection raised by appellant, when the application was still pending Carmelo Borg, attempted to regularise his position by serving appellant Franco Debono with a notice under section 68(3) of the Environment and Development Planning Act, 2010.

It is submitted first of all that this notice is a recognition by Carmelo Borg of Mr Debono's property rights, and in itself confirms that the application as originally submitted was based on a false declaration. This notice cannot legitimise what was in clear breach of the law.

Without prejudice to the above, the notice as sent still does not satisfy the requirements of Section 68(3) of the Act. Appellant submits as follows:

- The notice has been sent to Mr Debono as an owner. For correctness's sake, Mr Debono points out that insofar as the backyard of the block is concerned, Mr Debono has consistently contended that he is the sole owner not a co-owner.
- The notice has been sent under Section 68(3) of the Environment and Development Planning Act 2010. This section however not only imposes an

obligation to notify but also an obligation to show that the owner (or eo-owner) has given his consent:

(3) An applicant for development permission shall certify to the Authority that:

- (a) he is the owner of the site or that he has notified the owner of his intention to apply by registered letter of which a copy has been received by the Authority and that the owner has granted his consent to such a proposal, or
- (b) he is authorised to carry out such proposed development under any other law or through an agreement with the owner ... [emphasis added]

- In the present case, Mr Debono has been very clear that the works were carried out and the application to sanction was filed without his consent. The requirements of Section 68(3) have therefore not been met and cannot be met as long as Mr Debono does not grant his consent.

- Mr Borg cannot raise the argument that the permit would be granted "saving third party rights". Since he has recognised Mr Debono's property rights, he is bound to obtain Mr Debono's consent in terms of Section 68(3).

Appellant therefore submits that the application should be rejected also on these grounds.

4.3 Sanctioning of Column

Without prejudice to the above, appellant observes that, contrary to the impression which Borg might have given in the application and in submissions before the EPC, the column which applicant is seeking to sanction was not covered by PA 07013/2006. On the contrary, that application envisaged a cantilevered balcony specifically to avoid the building of a column. It is contradictory for Borg now to claim that the cantilevered balcony requires a column to sustain it.

2.4 Steps leading to roof

The application contains a request for approval of "minor alterations" to plans. The latest plans submitted by Carmelo Borg to MEPA prior to the issuing of the permit (on the 26th July, 2013) indicate 2 steps which lead to the area overlying the garage belonging to applicant. Significantly, these steps were not visible in the plans previously submitted on the 20th May, 2013 [Plan A and B attached for ease of reference]

Appellant notes that one of the conditions of previous permit (Condition Number 4 in PA07013/2006) was that Borg would not create any permanent structure to access the roof of his garage. In fact, MEPA instituted enforcement procedures against Borg after he started using the area as a roof garden. After the enforcement procedures, Borg removed the bridge and moved aluminium railings to the outside part of the wall by means of spacers, thus creating a passage [Picture 1 attached]. Borg also built 2 steps to access the garage roof [Pictures 2 and 3]. It is submitted that the plans as

presented in fact provide access to the roof of the garage and indicate Borg's intention to keep making use of the roof in clear breach of PA 07013/2006. In fact Picture 4 [attached] shows that the roof of the garage is still being used in breach of condition 4 of PA 07013/2006.

In view of the above, the latest plans submitted should not have been approved as they contradict previous (and still applicable) conditions imposed by MEPA in the context of other permits.

3.0 Conclusion

In view of the above, in virtue of the present appeal, appellant Franco Debono is requesting a revocation of the permit issued to Mr Carmelo Borg following application PA 00164/2013.”

Ra r-risposta tal-Awtorita' li giet prezentata fit-3 ta' Marzu 2014 li taqra' kif gej:

“6.0 COMMENTS ON APPELLANT’S ARGUMENTS & REFUSAL NOTICE

6.1 The appellant submitted arguments against the reasons for refusal in letter dated 24th April, 2012 (Doc 40).

6.2 The Directorate has the following comments to make:

6.2.1 Introduction

The development now under appeal was submitted to the Authority in relation to another permit application on site, namely PA 1976/09; which was refused by the EPC Board on 3rd October, 2012 and was pending a separate appeal process in PAB 365/12. During the course of that appeal it was brought to the attention of the Tribunal that the further illegalities were present on site other than those requested for sanctioning in the form of the height of both the ground floor garage and basement garage (both subject to ECF 909/09). To address this preliminary plea in PAB 365/12 the appellant (Mr. Carmelo Borg) submitted a fresh application (namely PA 164/13) which incorporated the development subject to the previous refusal and included the additional illegalities noted by MEPA.

During the processing stages of the application the Planning Directorate assessed the proposed development similarly to PA 1976/09 and in fact recommended a refusal of the proposal on similar merits to that in previous decision. Notwithstanding this recommendation, the EPC Board (in sitting dated 7th May, 2013 – Minute 66 in PA File) identified that the proposed development is acceptable from a planning point of view, subject that:

“the perit shall, within 5 days, submit fresh plans which address the following issues: labelling window to be blocked and garage height to be reduced to 3m. Any other alterations to the plans which do not address the said matters indicated above shall not be considered and shall not be construed as

approved. L.N. 514/10 – Article 14(5) applies with reference to the lowering of garage door. Photo evidence to be provided and Enforcement to confirm.”

Following the decision fresh plans were submitted by the applicant in Doc 89B which EPC Board confirmed as per request made in decision. A site inspection was carried out by Enforcement Officer in view of Article 14(5) and it was confirmed in Minute 92 dated 29th July, 2013 that the window was now closed and the opramorta closed. Since the requests made at decision were now fully complied with the permit was issued (published on 21st September, 2013).

6.2.2 Principle of Appeal

The appellant is opening grounds for appeal by contesting the declaration of ownership made to the Authority in the application form. Whilst the applicant Mr. Carmelo Borg is declaring that he is the sole owner of the courtyard at the back of the block, the appellant (Mr. Franco Debono) is stating that the ownership is jointly shared between the two. The appellant is arguing that the permit does not satisfy the requirements of Section 68(3) of Act X of 2010 in that an obligation exists where the applicant must obtain the owner’s permission for an application to be submitted. In reply to this argument and as indicated in copy of approved plan submitted to the Authority, the applicant is clearly indicating that he is the sole owner of the ground floor level whereas the basement level is indicated as Third Party property.

As there is contestation on ownership, both MEPA and the Tribunal are not Courts of Law; and the purpose of submitting an application to the Authority is to assess the matter solely on planning grounds. All permit approvals by MEPA are issued saving Third Party Rights. Moreover, it is strange to say the least that the appellant in this case (PAB 244/13) is appearing as an objector in PAB 365/12, quoting illegal development on site which is the subject of this appeal. While the applicant (Mr. Borg) is rightly so sanctioning his level, the real illegality was the result of the basement level owned by the appellant (Mr. Debono) since it is the illegality at the lower level which is affecting the floors above.

7.0 REQUEST

7.1 For the above-mentioned reasons, the Malta Environment & Planning Authority respectfully requests the Environmental and Planning Review Tribunal to dismiss this appeal.”

Ra r-risposta ghal dan l-appell tal-Avukat Dottor Joanne Vella Cuschieri ghall-applikant prezentata fit-12 ta’ Novembru 2013 hekk kif gej:

“Nikteb ghan-nom ta' l-applikant appellat Carmelo Borg ta' Dolphin Haven 1130, Triq Dawret in-Nawfragju, Xemxija, San Pawl il-Bahar u b'referenza ghall-appell tat-terz prezentat quddiem dan it-Tribunal ninsab diretta sabiex niprezenta l-eccezzjonijiet segwenti:

1. Illi l-aggravji kollha tal-appellant huma nfondati fil-fatt u fid-dritt u ghaldaqstant ghandhom jigu michuda;

2. Illi minghajr pregudizzju ghas-suespost, l-gurisdizzjoni ta' dan it-Tribunal hija limitata ghall-aggravji relatati ma' kwistjonijiet ta' policies ta' ppjanar u xejn aktar u ghaldaqstant stante li l-aggravji mqajjma mill-appellant jirrigwardaw unikament kwistjonijiet civili bejn il-partijiet cioe' kwistjonijiet dwar min hu is-sid ta' fejn, dan it-Tribunal ma ghandu l-ebda gurisdizzjoni fuq l-istess u ghaldaqstant l-appell ghandu jigi michud;

3. Illi minghajr pregudizzju ghas-suespost, b'referenza ghall-appell odjem ghal dak li jirrigwarda s-sanzjonar tal-garaxx, bizzejjed issir referenza ghal dak li jissottometti 1-istess appellant fl-appell tieghu cioe':

'Whilst the building of the garages was carried out with our client's knowledge and consent'

Ghalhekk huwa ironiku ghall-ahhar kif issa l-appellant qed jappella l-issanzjonar tal-istess garaxx li sar bil-kunsens tieghu u li fuq kollox gie sanzjonat sabiex jirrispekkja dak li originarjament kien approvat fl-applikazzjoni 7013/06. Ghalhekk l-aggravji kollha relatati mal-garaxx ghandhom jigu michuda;

4. Illi minghajr pregudizzju ghas-suespost, anki semplici referenza ghall-preliminari fl-appell wiehed jinduna li l-ilmenti tal-appellant huma ta' natura civili u mhux ta' ppjanar. Fil-fatt il-kwistjoni jekk persuna ghandhiex id-dritt tibni kolonna jew tkabbar gallarija bil-kunsens jew le ta' xi terza persuna hija kompletament kwistjoni civili li l-Awtorita' ma tidholx fiha wisq anqas jidhol fiha t-Tribunal;

5. Illi minghajr pregudizzju ghas-suespost, b'referenza ghall-aggravju li jaqra 'irregularities in the application as submitted' jigi sottomess illi mill-ewwel paragrafu tal-istess wiehed jinduna li l-aggravju huwa wiehed civili mhux ta' ppjanar. Fil-fatt Franco Debono jissottometti li l-post fejn hemm il-kolonna u l-gallarija huma proprjeta' tieghu jew fl-ahjar ipotezi l-applikant u l-appellant huma ko-proprjetarji. Dan gia jqajjem dubji serji dwar il-pretensjonijiet civili tieghu. Ovvjament l-appellant qed jikkontendi mod iehor. Izda dawn il-kwistjonijiet dan it-Tribunal kif gia inghad ma ghandux gurisdizzjoni jidhol fihom.

Illi fil-fatt dwar din il-kolonna u l-gallarija t-Tribunal ghandu biss il-gurisdizzjoni sabiex jgharbel jekk skond policies tal-MEPA dawn setghux jigu approvati jew le. Jirrizulta li dak propost kien skond il-'policies' u b'hekk gew approvati.

Illi dwar il-kwistjoni tad-'declaration of ownership' wiehed irid jispjega li mhumiex daqshekk semplici u ghalhekk fil-fatt kienet l-Awtorita' cioe' l-EPC li talab li c-'certificate of ownership' jigi emendat. Fil-fatt jigi spjegat li fil-waqt li l-garaxx ta' taht huwa proprjeta' tal-appellant dak ta' fuqu huwa proprjeta' tal-applikant. Jirrizulta li l-garaxx ta' taht (proprjeta' tal-appellant) inbena ghola minn kif approvat. Rizultat ta' dan il-garaxx tal-applikant ghalkemm mibni fl-gholi skond il-permess originali, sab ruhu illegali minhabba l-gholi tal-garaxx

ta' tahtu. L-applikant applika biex jissanzjona 1-garaxx tieghu apparti affarijiet ohra izda bil-fors b'xi mod kellu jigi muri l-gholi tal-garaxx ta' taht. Kien ghalhekk li l-EPC wara li rat il-problema x'kienet talbet li jigi emendat ic-'certificate of ownership'. Dan fil-fatt sar minghajr pregudizzju ghad-drittijiet civili tal-applikant u gie notifikat bih l-appellant li kellu kull dritt li jressaq 1-oggezzjonijiet tieghu kif fil-fatt ghamel. Nonostante l-oggezzjonijiet tieghu izda l-applikazzjoni giet approvata u dan stante li mill-lat ta' ppjanar ma kien hemm l-ebda raguni valida ghar-rifjut. Issa f'dan l-istadju l-appellant qed jittanta jaghmel appell sabiex dan it-Tribunal jiddeciedi dwar il-kwistjonijiet civili ta' bejniethom u xejn aktar. Mhux minnu li kien hemm xi irregolarita bi ksur tal-artikolu 68 (3) tal-Kap. 504 kif qed jallega l-appellant.

6. Illi minghajr pregudizzju ghas-suespost u b'referenza ghall-aggravju intitolat 'irregularities in the application as resubmitted' dan l-aggravju wkoll ma ghandu l-ebda bazi legali. Jigi fl-ewwel lok ikkjarifikat li t-tieni 'certificate of ownership' gie prezentat da parti tal-applikant 'minghajr pregudizzju' u ghalhekk bl-ebda mod ma jista' jigi accettat dak li qed jissottometti l-appellant u cioe' li b'xi mod kien hemm xi ammissjoni. L-EPC talab li dan jigi prezentat u l-applikant hekk ghamel sabiex l-applikazzjoni tkun tista tiprocedi. L-appellant jikkontendi li huwa s-sid ta' fejn sar l-izvilupp, minn naha 1-ohra l-applikant jikkontendi li huwa s-sid. In vista li l-appellant u l-applikant mhux qed jaqblu min huwa s-sid allura zgur li ma setax ikun hemm xi kunsens bejniethom izda dan ma jfissirx li dan it-Tribunal ghandu jidhol f'analizi ta' provi sabiex jiddeciedi nun hu s-sid u liema sid kellu jaghti l-kunsens tieghu! Ghalhekk kull permess ta' zvilupp johrog salvi d-drittijiet ta' terzi. Dawn huma kollha kwistjonijiet civili u mhux kif qed jipprova jdawwarhom l-appellant.

7. Illi minghajr pregudizzju ghas-suespost, l-aggravju relatat mal-issanzjonar tal-kolonna ma jaghmel l-ebda sens. L-appellant isostni li din il-kolonna ma kinitx koperta mill-permess originali. Fil-fatt ghandu raguni ghaliex kieku kienet koperta l-applikant ma kienx ikollu ghalfejn japplika biex jissanzjonaha. Dan izda ma jfissirx li hemm raguni ghall-appell kif qed jikkontendi l-appellant stante li aggravji ai termini ta' ppjanar ma hemmx.

7. Illi minghajr pregudizzju ghas-suespost, l-aggravji relatati mat-twieqi ma ghandhom 1-ebda validita stante li t-twieqi fil-garaxx imsemmi tnehhew fuqta l-EPC;

8. Illi minghajr pregudizzju ghas-suespost, fl-ahhar aggravju tieghu l-appellant qed jappella kontra xi haga li tista tigrigi fil-futur cioe' l-possibilita' li l-applikant jaccedi ghal fuq il-bejt tal-garaxx. Huwa evidenti li dak li jista' jigrigi fil-futur u li mhux inkluz fl-applikazzjoni li giet approvata ma jistax jigi appellat. Fil-fatt l-istess appellant jammetti li kwalunkwe uzu li kien hemm precedentement tnehha wara l-hrug tal-'enforcement notice'. L-appellant prezenta ritratti b'xi pjanti fuq il-bejt tal-garaxx. Apparti l-fatt li dawn ir-ritratti ma jurux meta ttehd, bir-rispett kollu l-pjanti huma xi haga mobbli u fuqhom ma ghandha l-ebda gurusidzzjoni l-Awtorita'. Fuq kollox wiehed jistaqsi taht liema ligi huwa projbit li tinzamm pjanta fuq bejt?

Ghaldaqstant in vista tas-suespost, l-applikant jitlob li dan it-Tribunal joghgbu jichad 1-appell odjern.”

Ra l-affidavit tal-appellant Franco Debono prezentat fit-23 t'Ottubru 2014;

Ra l-affidavit tal-applikant Carmelo Borg prezentat fis-16 ta' Jannar 2015;

Ra l-PA files bin-numru 164/13, 1976/09 u 7013/06;

Ra l-atti kollha ta' dan l-appell.

Ikkunsidra ulterjorment:

Illi d-diversi aggravji mressqa f'dan l-appell jistghu jigu migbura hekk kif gej:

1. Dikjarazzjoni ta' ownership fl-applikazzjoni hazina u nuqqas ta' kunsens mis-sid skont l-Artikolu 68(3) tal-Kap 504;
2. Il-pilastru fil-bitha;
3. L-access fuq il-bejt tal-garaxx;

L-ewwel aggravju:

Dan l-aggravju jikkoncerna dikjarazzjoni ta' ownership fl-applikazzjoni li skont l-appellanti din hija skorretta ghax l-applikant ma setax jiddikjara sole ownership, anzi kellhu jgib il-kunsens tas-sid, ossia l-appellant bhala s-sid ta' parti mill-fond mertu ta' dan l-appell, b'mod partikolari tal-bitha sottostanti l-gallerija fejn gie mpoggi pilastru li jaghmel parti mill-proposta ta' sanzjonar.

Illi l-Artikolu 68(3) tal-Kap 504 jipprovdi illi “min japplika għal permess għall-iżvilupp għandu jiċċertifika lill-Awtorità: (a) li huwa s-sid tal-art jew li avża lis-sid bl-intenzjoni li japplika b'ittra registrata li l-Awtorità tkun irċeviet kopja u li s-sid ikun ta' l-kunsens tiegħu għal dik il-proposta; jew (b) li huwa awtorizzat li jaghmel dak ix-xogħol propost permezz ta' xi ligi oħra jew ftehim mas-sid.”

Illi fil-process tal-applikazzjoni l-applikant ikkorega d-dikjarazzjoni tas-sid billi gie rikonoxxut il-fatt li hemm co-ownership f'parti mill-propjeta mertu ta' dan l-appell. Mill-evidenza migjuba fil-process ta' dan l-appell johrog car illi f'din il-propjeta inezami hemm partijiet indivizi u komuni bejn l-appellant u l-appellat detentur ta' dan il-permess odjern.

Illi filwaqt li mix-xiehda u dokumenti esebiti kien hemm ftehim ta' qasma skont kuntratt notarili tat-3 t'Awissu 2007, johrog evidenti ukoll illi hemm kontestazzjoni bejn dawn iz-zewg partijiet dwar il-porzjonijiet komuni u l-partizzjoni tat-titolu fil-propjeta rispettiva.

Illi f'dan il-kaz, dan it-Tribunal mhux ser jidhol hu bhala l-Qorti jew arbitru bejn dawn iz-zewg partijiet sabiex jirrizolvi l-kwistjoni ta' titolu, hekk illi l-aggravji relatati ma kwistjonijiet ta' ownership u kunsens tas-sid huma ben garantiti mill-fatt li l-ligi stess timponi li kull permess huwa suggett ghad-drittijiet ta' terzi. Dan ifisser illi kullhadd ghandu dritt li jattakka kwalunkwe permess li johrog ai finijiet tal-Ligijiet Civili u dana billi jirrikorri għall-Qrati

taghna. F'dan ir-rigward dan it-Tribunal qed jastjeni milli jiehu konjizzjoni ulterjuri ta' dan l-aggravju.

It-tieni aggravju:

Rigward il-bini tal-pilastru fil-bitha, l-appellant ma jaghmel ebda lment rigward din l-istruttura, cioe kif din ser taffettwah jew liema policy ta' ippjanar din l-istruttura tista tkun qed tikser. Johrog evidenti illi din l-istruttura ma kienix parti mill-applikazzjoni originali PA 7013/06 hekk kif din giet inkluzja bhala parti mill-applikazzjoni mertu ta' dan l-appell li hija ntiza sabiex jigi ssanat zvilupp li ma kienx gie segwit skont l-ahhar permess sucitat. F'dan ir-rigward, dan l-aggravju ma fiehx mertu u qed jigi michud.

It-tielet aggravju:

Illi l-appellant qed jilmenta illi l-pjanti approvati jindikaw passagg u turgien ghall-fuq il-livell tal-bejt tal-garaxx li ghaldaqstant dan imur kontra l-kondizzjoni numru 4 fil-permess origianli ghal bini tal-garaxx, PA 7013/06, li teskludi 'permanent means of access to the roof of the garage'.

Illi dan it-Tribunal mhux tal-fehma li l-hxuna ta' hajt jista' jigi nterpretat jew meqjus li qed iservi bhala passagg adegwat u permanenti ghall-fuq il-bejt tal-garaxx. Ta' minn jinnota ukoll illi l-kondizzjoni fil-permess originali ma kienix intiza li teskludi access ghall-fuq il-bejt, imma qed teskludi 'permanent means of access' biss. F'dan ir-rigward hija l-fehma ta' dan it-Tribunal ukoll li dan l-aggravju ma fihx mertu u qed jigi michud.

Konkluzzjoni:

Ghal dawn il-motivi dan it-Tribunal qed jiddisponi minn dan l-appell billi jichad l-istess u jikkonferma l-permess PA 164/13.

Ikkunsidrat

L-aggravju tal-appellant hu s-segwent:

1. It-Tribunal irrikonoxxa li l-applikazzjoni originali kif saret kienet saret b'mod zbaljat ghax imsejsa fuq dikjarazzjoni errata jekk mhux addirittura malizjozament falza fis-sens li l-ewwel gie dikjarat li l-bitha kienet proprjeta assoluta tal-applikant u imbaghad inbidlet fi dritt ta' koproprieta. Tali zball ma jistax jigi sanat iktar meta l-appellant isostni li hu proprjetarju assolut tal-bitha. L-applikazzjoni kellha tigi dikjarata bhala nulla u tal-inqas kellu japplika l-artikolu 68(3) tal-Kap. 504 fejn ma hemmx l-adezjoni tas-sid. Il-kliem 'saving third party rights' ma jezonerax lit-Tribunal milli jaghmel forma ta' ezami hu prima facie ta' dritt ta' proprjeta.

Din il-Qorti ġia kellha l-opportunita li tindirizza l-kwistjoni tat-tifsira tal-artikolu 68(3) Kap. 504 fil-kawza **Joseph Apap et u L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar et** deciz fid-9 ta' Lulju 2015. L-artikolu 68(3) iġhid hekk:

Min japplika għal permess għall-izvilupp għandu jiccertifika lill-Awtorita:

- (a) li huwa s-sid tal-art jew li avza lis-sid bl-intenzjoni li japplika b'ittra registrata li l-Awtorita tkun irceviet kopja u li s-sid ikun ta l-kunsens tiegħu għal dik il-proposta; jew
- (b) li huwa awtorizzat li jagħmel dak ix-xogħol propost permezz ta' xi ligi oħra jew ftehim mas-sid.

Il-Qorti qalet hekk f'dik il-kawza:

Pero l-Qorti tqis illi għandha tippreciza illi l-artikolu 68(3) hu intiz biex applikant li qed jissottometti proposta ta' żvilupp fuq art (jew proprjeta) ta' terzi jrid ikollu l-permess tas-sid għal proposta. Fin-nuqqas il-Qorti tqisha l-obbligu tal-Awtorita li ma tintratjenix ebda applikazzjoni ta' żvilupp meta ma hemmx dubju jew kontestazzjoni dwar il-fatt li l-applikant mhux sid l-art u fejn is-sid qieghed joggezzjona.

Madankollu fejn hemm kontestazzjoni dwar it-titolu fuq il-proprjeta jew xi dritt reali jew anki personali fuq l-istess proprjeta li fuqha tkun mibnija l-proposta, l-Awtorita ma hix fdata tiddetermina l-kwistjoni ta' natura civili hi, izda għandha tindirizza l-applikazzjoni biss mill-lat ta' ipplanar u kull permess li talvolta jista' jigi approvat, hu attwabbli biss fin-nuqqas ta' oppozizzjoni minn min ikun qed jivvanta dritt fuq il-proprjeta li fuqha jkun inhareg il-permess ta' żvilupp. Altrimenti kull min irid ifixkel lil Awtorita milli taqdi d-dover primarju li tikkonsidra proposti ta' żvilupp mill-lat tal-ligijiet ta' ipplanar u jista' facilment jistultifika l-process billi jivvanta dritt fuq is-sit u jwaqqaf il-procedura ta' ipplanar. Dan ma huix l-iskop tal-legislatur. L-obbligu tal-Awtorita hi li f'kaz car ta' nuqqas ta' disputa fuq it-titolu tas-sit, jekk jirrizulta li l-izvilupp qed jintalab fuq sit ta' terz li qed joggezzjona għall-izvilupp, l-Awtorita ma għandhiex tintratjeni applikazzjoni fuq il-bazi teoretika biss ta' dak li jista' jigi żviluppat. Il-kwistjoni pero hi differenti meta l-partijiet mhix konkordi fuq it-titolu jew xi limitazzjoni fuqu u ma hemmx prova cara dwaru. F'dan il-kaz l-Awtorita hi libera li tiddeciedi x'inhu fattibbli u sta għal partijiet li jirregolaw ruhhom fuq kwistjonijiet purament ta' natura civili.

Wara kollox il-legislatur fl-artikolu 68(3) kien pjutost car fil-kliem uzat cioe li jekk mhux sid ikun avza lis-sid u s-sid ta l-kunsens għal proposta magħmula ta' żvilupp minn terzi fuq proprjeta tiegħu.

Dan ir-ragunament għandu jigi applikat għal kaz in kwistjoni. F'dan il-kaz irrizulta b'mod car illi l-applikant iddikjara f'korrezzjoni magħmula fl-applikazzjoni illi fuq parti mill-izvilupp ma kienx proprjetarju assolut izda koproprietarju. Dan gie rikonoxxut mill-istess Tribunal li qal li mill-evidenza irrizulta car li fil-proprjeta in ezami hemm partijiet indivizi u komuni bejn l-appellant u l-applikant. Għal kompletezza izid pero li

mix-xieħda u dokumenti kien hemm fteħim ta' qasma tat-3 ta' Awwissu 2007 u hemm kontestazzjoni bejniethom fuq il-porzjonijiet komuni u l-partizzjoni tat-titolu fil-proprjeta rispettiva tagħhom.

Hi l-feħma tal-Qorti illi ladarba, nonostante l-kontestazzjoni li semma t-Tribunal, l-istess applikant għogbu jiddikjara kemm bi jew mingħajr pregudizzju, li mhix l-uniku proprjetarju ta' almenu parti mis-sit li fuqu qed jintalab l-izvilupp, it-Tribunal kellu jsegwi l-precetti tal-artikolu 68(3) ad litteram. Ma hemmx il-permess tal-koproprjetarju li l-istess applikant ex admissis jirrikonoxxi. Din mhix semplici kontestazzjoni fuq titolu jew aspett ta' titolu izda ammissjoni tal-applikant li hemm haddiehor li hu sid mieghu u illi jirrizulta mill-atti li dan il-koproprjetarju fil-persuna tal-appellant qed joggezzjona għall-izvilupp.

It-Tribunal ma setax f'dan il-kaz jelimina l-problema billi jiddikjara li l-permess hu soggett għal third party rights. Kellu invece jara jekk il-parti li fuqha hemm iddikjarazzjoni ta' kopropjeta hux qed tigi vjolata b'talba għal zvilupp kontra r-rieda tal-koproprjetarju ai termini tal-artikolu 68(3). Dan ma sarx mit-Tribunal u għal din irraguni biss, l-appell jisthoqqlu jigi milqugh.

Decide

Għalhekk il-Qorti taqta' u tiddeciedi billi tilqa' l-appell ta' Franco Debono, u tirrevoka d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-2 ta' Lulju 2015, u tirrinvoja l-atti lura lit-Tribunal biex jgħid jiddeciedi l-kaz skond il-ligi. Spejjez għall-applikant u l-Awtorita.

Onor. Mark Chetcuti LL.D.

Imhalled

Anne Xuereb

Deputat Registratur