



QORTI TAL-APPELL

(KOMPETENZA INFERJURI)

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

S.T.O. PRIM IMHALLEF MARK CHETCUTI

Illum L-Erbgha, 12 ta' Lulju, 2023

Numru 13

Appell Nru. 17/2023

Dr Reuben Farrugia

vs

**L-Awtorita tal-Ippjanar u
I-kjamat in kawza Polidano Holdings**

Il-Qorti,

Rat ir-rikors tal-appell ta' Charles Polidano (li b'din is-sentenza qed jigi koregut bhala Polidano Holdings) tat-3 ta' April 2023 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-14 ta' Marzu 2023 li biha laqa' l-appell tat-terz Dr Reuben Farrugia u irrevoka l-permess PA2802/13;

Rat ir-risposta tal-Awtorita li ssottomettiet li l-appell ghandu jigi milqugh;

Rat ir-risposta ta' Dr Reuben Farrugia li ssottometta fl-ewwel lok li l-appell hu null ghax Charles Polidano mhux parti izda hi Polidano Holdings u fil-mertu sostna 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 safejn rilevanti ghall-appell tghid hekk:

Ikkunsidra:

It-Tieni Aggravju

Illi dan l-aggravju jirrigwarda l-illegalitajiet fuq is-sit, bl-appellant jindika li l-proposta ma' tindirizzax dawn ixxogholijiet bi ksur ta' Artiklu 86(10) tal-Kapitolu 504 u Artiklu 14 tal-legislazzjoni sussidjarja 504.103.

Illi huwa inkontestat bejn il-partijiet li s-sit huwa kolpit b'zewg Avvizi ta' Nfuzzar EC403/04 u EC47/12, kif ukoll Emergency Conservation Order ppublikata fin-Notifika tal-Gvern 636 tal-2011, u hekk kif gie ndikat precedentament, saru proceduri kriminali kontra Charles Polidano fejn dan kien gie ordnat li jhallas multa ta 100,000 euro u li jikkonforma mal- Emergency Conservation Order u l-iskedar fi zmien tlett xhur.

It-Tribunal josserva li fl-evalwazzjoni tal-proposta odjerna l-Awtorita ndikat hekk kif gej firrigward tal-izvilupp illegali fuq is-sit odjern:

“Illegalities:

As previously described in the site history, two enforcement notices have been issued on this site, one in 2004 and another one in 2012. The first notice was issued in view of the demolition of part of building, part of walls and other structures in back gardens without permit of premises 57 and is still active. Then on 12 July 2011, an Emergency Conservation Order was issued and a number of conditions were imposed, including the submission of a Method statements and conducting of remedial works. The HPU had indicated that the clearing and reconstruction works are in line with the ECO however it was noted that some changes were carried out After failing to proceed with the ECO timeframes for carrying out restoration works, the applicant was instructed by MEPA on 1 August 2012 to resume restoration works as required by the ECO and Conservation Order requirements. He was also informed that failing to comply would result in direct action as per article 81(8) of Chapter 54. This is listed in the report of ECF 403/14.

Although remedial works did not respect the time frames imposed in the ECO, a number of remedial works were carried out on the property including:

- Dismantling and reconstruction of alley wall by reusing original stones but with the introduction of new materials, new apertures and widening of doorway
- Cleaning of mill room, dismantling of roof and reconstruction (partially in new materials)
- Dismantling of pigeon loft roof and reconstruction, replacement of balustrades and finials and restoration of external facades
- Clearing of vegetation on roofs and treatment of cracks
- Repair of dangerous sections of party walls (including removal of vegetation)
- Dismantling and reconstruction of elevated passageway
- Reconstruction of pergola columns and passageways
- Repair and replacement of masonry cordons around flowerbeds and water channels
- Repairs to two small surface reservoirs (vaski)
- Clearing of debris in reservoirs
- Repairs to pond around Norfolk Island Pine Tree
- Planting of shrubs and trees

The departures from the original design which were noted during monitoring were to be included in the application in order that a single decision would be taken on the entire property. The Directorate is of the opinion that when one balances the minor departures as compared to the proposed additions and alterations to the properties, and the recuperation of these three properties that have been left in state of disrepair for more than a decade, the discrepancies are relatively minor.

The proposal as submitted also seeks to regularize the other illegalities as listed in the respective enforcement cases, although this has not been listed in the development proposal.

Hence in the opinion of the Directorate, the provision of Sixth Schedule is not considered to be applicable.” [Skont sezzjoni 4.7 tal-case officer report a fol 128 fl-inkartament tal-PA02802/13]

Illi skont l-estratt supra-cittat jirrizulta li saru diversi xogholijiet ta' rimedju fuq il-proprjeta intizi sabiex jigu ndirizzati l-illegalitajiet kolpiti bl-avvizi ta' nfurzar u Emergency Conservation Order, filwaqt li illegalitajiet l-ohra gew inkluzi ghal regolarizzazzjoni fl-applikazzjoni odjerna. It-Tribunal josserva ulterjorment li mill-minuti tas-seduta tal-MEPA Bord tat-13 ta' Novembru tal-2014 li fiha l-applikazzjoni oderna giet approvata, il-kwistjoni dwar xogholijiet illegali u kif dawn qed jigu ndirizzati wkoll giet diskussa, kif segwenti:

“13808. Dr Ruben Farrugia, a representee, referred to the 1998 aerial photographs which show the site in pristine condition and then asked the Planning Directorate to show a recent photo to show the extent of the interventions carried out by the applicant.

Dr Farrugia went through the various illegal works carried out (covered by Enforcement Notices) and noted that though the project description does not indicate it, the proposal includes sanctioning of works. An approval of this application would promote abusive interventions on historic buildings to be followed by applications to sanction presented as restoration projects.

13809. Dr Farrugia noted that article 86(10) of the main act states that an application to regularise a development shall be dismissed forthwith if the Enforcement Notice is not adhered to. In this case the enforcement issues have not been addressed and the ECO requirements have not been carried out.

[...]

13810 The Chairman requested Dr Farrugia to put forward his proposal as a way forward considering the circumstances.

Dr Farrugia noted that MEPA should ensure that the ECO is complied with and if it is not the legislation allows it to carry out itself at the expense of the owner. The Chairman noted that if a permit is issued, the required restoration works will be carried out.

13811. Dr Antonio Tiffignio confirmed the arguments brought forward by Dr Farrugia and concluded by adding that the illegalities carried out on site considerably compromised the site and as per article 86 (10) a permit cannot be issued.

13812. Dr Jean Paul Sammut for the applicant noted that Dr Farrugia's complaints stem from the fact that the applicant had refused the offer of the former to buy part of the gardens to extend the garden of his residence.

Furthermore Dr Farrugia had sent the applicant a draft contract in which it was being proposed that all objections will be withdrawn the former and in turn the latter was to abide by conditions such as not installing a pool, not accessing one of the roofs, etc. A copy of the draft contract was presented to the Board.

Dr Sammut referred to the aerial photograph of the site and noted that Dr Farrugia had removed his garden to accommodate a pool.

Dr Farrugia stated that the draft contract presented was the result of a mediator who was trying to bring the two parties together.

13813. Prof Axiak referred to the fact that the previous discussion was personal in nature and its content was not relevant to the discussion being held by the Board. The Planning

Directorate was queried on whether there are outstanding illegalities that still had not been addressed.

Furthermore the Planning Directorate was asked to confirm if there are still any pending illegalities on site and whether the Board was in a legal position to determine this application. 13814. Mr Rene Attard noted that the illegalities still present on site were the breach in the back boundary wall which is being proposed to be realigned and reconstructed in a straight line and the apertures in the reconstructed façade (which had previously collapsed due to bad weather).

13815. Mr Buttigieg noted that after the ECO and after insistence from MEPA remedial works were taken in hand and were verified to be satisfactory.

Prof Axiak enquired whether all the requirements of the ECO were satisfied.

Mr Buttigieg replied that the works stopped where there would have been a divergence from what is being proposed in this application. If the proposal is approved restoration works will continue and if the proposal is not approved or amended the applicant will be requested to carry out the outstanding parts of the ECO.

13816. Dr Gambin noted that the additions proposed in the garden, particularly of the main residence, were excessive and the proposed parking within the enclave would have a negative impact.

Mr Buttigieg noted that the alternative to the proposed parking layout was either no parking provision on site or the provision of parking in each unit by opening up a garage opening on each of the facades. The provision of parking is considered beneficial as it would alleviate the parking situation in the village core.

13817. Perit Zammit noted that notwithstanding what has been stated by Dr Farrugia the proposed additions amount to some 400m² and not half a tumolo and this is to be considered within the context of the site area, i.e. 4000m². Furthermore this 400m² include the access road and the parking area finished in gravel.

On a query by the Board on the actual size of the main residence Perit Zammit noted that this had around 10 rooms distributed over two floors.

13818. Dr Gambin asked Dr Ian Borg, MEPA's legal advisor, whether the board, given the circumstances of the case, can proceed with this application.

Dr Borg confirmed that the article 86(10) of the legislation would prohibit the approval of this application, however another article of the same legislation allows a permit to be issued on a site even if a separate part is covered by an enforcement notice. This without prejudice to an eventual enforcement action.

This is especially the case when the scope of the proposal is to reach the aims of the ECO.

13819. Dr Farrugia stated that it is not true that the Enforcement Notice covers only the wall at the back of the site.

Mr Buttigieg asked Dr Farrugia to confirm whether the works were carried out prior to the coming into force of the sixth schedule.

Dr Farrugia replied by referring to Article 86(10).” [Skont il-minuti waqt il-laqgħa tal-Bord tal-MEPA A 080-13/14 kopja a fol 160 fl-inkartament PA02802/13]

Illi mis-suespost jirrizulta li d-decizjoni tal-Awtorita kienet intiza sabiex ikun hemm rimedju tax-xogħolijiet illegali u lbqija tax-xogħolijiet jigu regolarizzati. Illi madankollu l-appellant qed jindika li dan kollu sar bi ksur tal-Artikolu 86 (10) tal-Kapitolu 504 u Artikolu 14 tal-legislazzjoni sussidjarja 504.103.

Illi l-Artikolu 86(10) tal-Kapitolu 504 jiddisponi hekk kif gej:

“(10) Kull applikazzjoni biex tirregolarizza l-attività jew l-iżvilupp għandha tiġi miċhuda minnufih jekk rekwiżit fl-ordni jew avviz ikun iwaqqaf jew jipprojbixxi aktar attività, xogħol jew żvilupp, jew li jkun jeħtieġ il-waqfien ta’ xi użu, ma jkunx, kemm qabel jew waqt li tkun għadha qegħda tiġi trattata l-applikazzjoni, ġie mħares jew jekk xi penali jew fhas ieħor li persuna tkun wehlet taħt dan l-Att fir-rigward ta’ l-attività rilevanti jew żvilupp ma jkunx

tħallsu jew jekk l-applikazzjoni ssir biex tirregolarizza żvilupp elenkat fis-Sitt Skeda li tinsab ma' l-Att.”

Illi ghalkemm is-sit odjern huwa kolpit b'zewg Avvizi ta' Nfurar EC403/04 u EC47/12, u l-applikazzjoni odjerna hija ntiza għal regolarizzazzjoni ta' żvilupp illegali, l-appellant ma' ressaqx provi li waqt li kienet qed tigi pprocessata l-applikazzjoni sar xi ksur tal-imsemmija avvizi, filwaqt li fir-rigward tal-penali dawn kienu soġġett għal proceduri kriminali quddiem il-Qorti li eventwalment gew kkonfermati fis-sentenza mogħtija fl-appell numru 338/13, u għaldaqstant ma' jirrizultax li l-proposta hija bi ksur tal-Artikolu 86(10).

Illi r-regolament 14 ta' legislazzjoni sussidjarja 504.103 jirrigwarda illegalitajiet waqt l-iprocessar ta' applikazzjonijiet, bis-subregolamenti min (1) sa (5) jiddisponu hekk kif gej:

“(1) Without prejudice to article 70 and the Sixth Schedule to the Act, when existing development on a site is wholly or partly illegal, the Authority shall refuse a development application relating to new development on that site, unless the illegal development is included for sanctioning and the illegal development complies with current policies:

Provided that for the purposes of this regulation, a development falling under Category B of the Eight Schedule of the Act shall not be construed as illegal development.(2) The illegal development may either be regularised through a specific development application solely for that purpose or through a development application which includes the sanctioning of illegal development as well as proposed new development.

(3) Where sanctioning of illegal development is being requested in a development application, the proposal description and the drawings shall clearly indicate the development which is to be sanctioned so as to ensure that the unauthorised development forms part of the development application.

(4) The proposal description of a development application and the drawings submitted shall not propose the removal of illegal development from the site. The development application shall include only illegal development which is proposed to be sanctioned.

(5) Any illegal development which is not indicated for sanctioning in a development application shall be removed prior to the submission of the development application or, without prejudice to sub-regulation (4), prior to the issue of a development permission, provided that where the application is determined by the Authority, the Commission, or the Tribunal subject to the removal of the illegal development prior to the issue of the development permission, such illegal development shall be removed within six months or within a period specified by the Authority, the Commission, or the Tribunal, failing which, the application shall be automatically deemed as dismissed by the Authority, the Commission, or the Tribunal, as the case may be.”

Illi mis-suespost huwa car li f'kaz li jkun hemm illegalitajiet fejn tkun qed issir l-applikazzjoni, il-proposta tista' biss tigi milqugha f'kaz li dawn l-illegalitajiet jigu ndirizzati, u dan jew billi jitnehhew l-illegalitajiet, jew billi l-illegalitajiet jigu inkluzi għal sanzjonar fil-proposta. Jirrizulta wkoll li skont id-dispożizzjonijiet, l-illegalitajiet jistaw biss jigu sanzjonati f'kaz li dawn ikunu konformi mal-policies, u meta dawk jigu nkluz bħala parti mill-proposta, ossia jkunu riflessi kemm fid-deskrizzjoni tal-proposta kif ukoll fil-pjanti approvati.

Illi fl-isfond ta' dan, it-Tribunal josserva li ghalkemm fir-risposta tagħha l-Awtorita tindika li l-proposta tinkludi sanzjonar, hekk kif sar accenn mill-appellant waqt is-smiegh quddiem il-Bord tal-MEPA kif ukoll fir-rikors ta' dan l'appell, id-deskrizzjoni tal-proposta odjerna ma' tindikax sanzjonar [Id-deskrizzjoni tal-proposta taqra “Additions, alterations & restoration to properties 57-60 and adjoining gardens.” hekk kif indikat fin-notifika tal-permess odjern a fol 172 fl-inkartament PA02802/13], filwaqt li m'hemm l-ebda sanzjonar indikat fuq il-pjanti approvati [Skont il-pjanti elenkati man-notifika tal-permess odjern a fol 172 fl-inkartament PA02802/13]. Barra min hekk, il-kundizzjoni 1(b) tal-permess odjern li għaliha jagħmel referenza l-appellant taqra hekk kif gej:

“This permission relates only to the development as specifically indicated on the approved drawings. This permission does not sanction any other illegal development that may exist on the site.”

In vista ta' dan kollu, ladarba l-illegalitajiet fuq is-sit ma' gewx riflessi fil-proposta, jirrizulta li din l-applikazzjoni ma giex iprocessata u approvata in konformita mad-dispozizzjonijiet tar-regolament 14 tal-legislazzjoni sussidjarja 504.103. Ghaldaqstant, gialadarba l-procedura addottata mill-Awtorita fir-rigward ta' kif qed jigu ndirizzati lillegalitajiet prezenti fuq is-sit ma' kienetx wahda konformi mal-procedura stabbilita, jirrizulta li l-approvazzjoni tal-applikazzjoni odjerna kienet wahda monka, u konsewwentament it-Tribunal qed jilqa dan l-aggravju.

Decide:

Ghal dawn il-motivi, dan it-Tribunal qed jilqa' dan l-appell u jhassar il-permess PA002802/13.

Ikkunsidrat

L-appellat isostni li l-appellant mhux l-applikant u mhux parti fil-proceduri ta' zvilupp lanqas bhala terz interessat u ghalhekk l-appell tieghu hu null. Fil-mori tal-appell Charles Polidano ressaq rikors fejn talab korrezzjoni fl-okkju fir-rikors tal-appell peress illi kien hemm zball tal-pinna meta gie redatt l-appell u flok tnizzel Polidano Holdings bhala appellant, tnizzel Charles Polidano u ghalhekk talab korrezzjoni ai termini tal-artikolu 175 tal-Kap. 12.

Din il-Qorti tqis li t-talba hi gustifikata fic-cirkostanzi tal-kaz sa certu punt biss. L-artikolu 175(1) tal-Kap. 12 jippermetti t-tibdil ta' isem ma' iehor basta li ma jinbidilx is-sustanza tal-azzjoni jew eccezzjoni fuq il-mertu. L-okkju tad-decizjoni appellata ma issemmix lil Charles Polidano izda biss lil Polidano Holdings (Limited) li taghha Charles Polidano ghandu rapprezentanza pero xorta distinta mill-persuna fizika tieghu. Madankollu f'dan il-kaz ma hemm ebda pregudizzju ghall-appellat ghax l-korrezzjoni tal-isem tal-appellant minn wahda personali ghal wahda legali skont l-atti quddiem it-Tribunal ma jbidel xejn mis-sustanza tal-kaz quddiem il-Qorti. Ghalhekk il-Qorti tilqa' it-talba u tordna l-korrezzjoni fir-rikors tal-appell, filwaqt li tichad l-eccezzjoni tan-nullita.

L-aggravju fil-mertu tal-appellant hu illi l-permess kien fost affarijiet ohra jissana kwalsiasi illegalita. L-appellant jissottometti illi meta inizjalment nieda x-xoghlijiet kien hemm element ta' sanzjonar da parti tas-Sovrintendenza tal-Patrimonju Kulturali billi diversi illegalitajiet ma gewx indirizzati izda dawn gew indirizzati u b'hekk sorvolati. Ghalhekk it-Tribunal kien skorrett meta qal li l-applikazzjoni ma inkludietx is-

sanzjonar tal-illegalitajiet prezenti, u li l-pjanti sottomessi ma kinux cari li fil-fatt qed jigi sanzjonat il-ksur. It-Tribunal f'kull kaz ma setax jasal ghal konkluzjoni li l-applikazzjoni li waslet ghal hrug tal-permess hi minnha ghax anki jekk ghal grazzja tal-argument kien hemm xi nuqqas procedurali, il-ligi ma tqis li l-applikazzjoni titqies nulla ipso iure. It-Tribunal qies il-ligi b'mod strett wisq meta l-applikant mexa b'korrettezza u wera l-intenzjoni mill-bidu li kull illegalita tigi sanata skont regolament 17 tal-Avviz Legali 162/2016 u dan permezz tal-pjanti annessi mal-applikazzjoni u ritratti li qed jigu esebiti mal-appell li juru restawr estensiv u li l-illegalitajiet kienu qed jigu indirizzati.

L-aggravju tal-appellant ma fihx mis-sewwa. Jibda biex jinghad illi t-Tribunal applika u interpreta r-regolament 14 tal-Legislazzjoni Sussidjarja 504.103 b'mod korrett u bhala r-regolament applikabbli ghal kaz u mhux kif isostni l-appellant ir-regolament 17 tal-Avviz Legali 162/2016. Ma jistax jinghad li applikah b'mod strett ghax il-kliem tal-ligi huma cari fl-intenzjoni tal-legislatur. Aderenza stretta ma' dak li jrid ir-regolament 14 hu rifless fil-konsiderazzjoni tat-Tribunal fuq dak li jesigi r-regolament.

Fil-mertu tal-aggravju l-appellant iressaq argumenti ta' fatt fejn ma jaqbilx mat-Tribunal li strettament mhumieq komputu ta' din il-Qorti li tikkonsidrahom billi l-Qorti tikkunsidra biss punti ta' ligi. Madankollu l-appellant jissottometti illi l-illegalitajiet gew indirizzati u li f'kull kaz il-pjanti tal-izvilupp kienu cari u jindikaw is-sanzjoni. It-Tribunal ma qabilx u qies li kemm id-deskrizzjoni ma tinkludix sanzjonar u lanqas hemm indikat xi sanzjonar fuq il-pjanti. Il-Qorti ma tiddesturbax konsiderazzjonijiet ta' fatt u ta' natura teknika kif kunsidrati u decizi mit-Tribunal.

Skont il-paragrafu 3 tar-regolament 14 tal-Legislazzjoni Sussidjarja la darba, kif jissottometti l-appellant stess, is-sanzjonar ta' zvilupp illegali kien qed jigi inkluz fl-applikazzjoni, dan irid u ghandu jigi deskritt u indikat fil-pjanta b'mod car fejn ser isir is-sanzjonar biex l-izvilupp mhux awtorizzat jifforma parti mill-applikazzjoni. Billi t-Tribunal ikkonkluda li l-illegalitajiet li kienu qed jigu sanzjonati mhux riflessi fil-proposta u fil-pjanti, il-proposta qatt ma setghet tigi ipprocessata u approvata. Din hi applikazzjoni korretta tal-ligi bir-revoka tal-permess, mehud kont ghal fatti li kellu quddiemu t-Tribunal. Din hi diskrezzjoni fdata lit-Tribunal dwar l-evalwazzjoni tal-fatti

li din il-Qorti ma ghandhiex il-vires tiddisturba specjalment meta iddur ma fatturi teknici.

Decide

Ghal dawn ir-ragunijiet il-Qorti taqa' u tiddeciedi billi tichad l-eccezzjoni ta' Dr Reuben Farrugia dwar in-nullita tar-rikors tal-appell u filwaqt li tichad l-appell tal-appellant tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-14 ta' Marzu 2023. Spejjez ghall-appellant.

Mark Chetcuti

Prim Imhallel

Anne Xuereb

Deputat Registratur