



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta ta' l-20 ta' Gunju, 2013

Appell Civili Numru. 49/2012

Reno Baldacchino

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Reno Baldacchino tas-17 ta' April 2012 minn kundizzjoni ta' hlas ta' planning gain ghal hrug ta' permess minn applikazzjoni tieghu ghal sanzjonar ta' varjazzjonijiet minn permess PA 8031/06 deciz mit-Tribunal ta' Revizjoni ghall-Ambjent u l-Ippjanar tad-29 ta' Marzu 2012;

Rat ir-risposta tal-Awtorita fejn issottomettiet illi ma hemm appell minn interpretazzjoni ta' policy u illi t-Tribunal mexa fuq il-ligi. In oltre ssottometta li ma tistax tigi attakkata kundizzjoni ghal hrug ta' permess wara lib l-agir tieghu l-

Kopja Informali ta' Sentenza

applikant ikun accetta il-hrug tal-permess bl-accettazzjoni tal-kondizzjoni bla pregudizzju;

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

Rat id-decizjoni tat-Tribunal li tghid hekk:
It-Tribunal ikkunsidra :-

Dan huwa appell minn kundizzjoni fil-permess tal-24 ta' Jannar, 2011, PA 2212/09, "To sanction variations from permission PA 8031/06 - demolition of structures and reconstruction of dwelling", liema kundizzjoni tghid - "This permission is subject to a planning gain to the value of €11,500 (eleven thousand five hundred euro) towards the Environmental Initiatives in Partnership Programme (EIPP). The funds raised from the planning gain shall be used to fund environmental improvement projects in the locality of the site. The planning gain is not refundable and funds shall be utilized as required and directed by the Malta Environment and Planning Authority. ".

Fl-appell ipprezentat mill-Avukat Dr. Franco Vassallo ghan-nom tal-appellant, Reno Baldacchino, huwa jispjega r-ragunijiet li ghalhom qed jaghmel dan l-appell:

"L-appellant hallas il-multa fit-23 ta' Lulju, 2010 'bi protesta u minghajr pregudizzju ghad-dritt ta' appell' Dokument B u l-hlas gie accettat u nharget ricevuta fis-27 ta' Lulju 2010 Dokument C.

L-appell huwa bbazat fuq l-aggravju segwenti:

Id-decizjonijiet tad-DCC iridu jkunu skond il-ligi, Il-ligi f'dan il-kaz hi l-att tal-ippjanar tal-1992 kif emendat bl-att XXI tal-2001. L-artikolu 33(2) jistipula li meta ssir decizjoni d-DCC ghandha d-dritt timponi kwalunkwe kundizzjoni.

"L-Awtorita jkollha s-setgha li taghti jew li tirrifjuta permess ghall-izvilupp, u fl-ghoti ta' dak il-permess l-Awtorita ikollha jedd timponi kull kundizzjoni li jidhrilha xierqa."

Kopja Informali ta' Sentenza

Madankollu l-impozizzjoni tal-multa bhala kundizzjoni ghall-hrug tal-permess trid tkun ibbazata fuq raguni:

Izda mar-rifjut jew ma l-impozizzjoni ta' kundizzjonijiet partikolari, l-Awtorita, jew il-Kummissjoni, skond kif ikun il-kaz, ghandhom jaghtu ragunijiet specifici bbazati fuq pjanijiet ta' zvilupp u policies ta' ppjanar ezistenti ghal dak ir-rifjut jew ghal xi kundizzjonijiet partikolari li jkunu gew imposti.

F'dan il-kaz id-Direttorat u mhux id-DCC semma bhala raguni l-fatt (mhux ikkontestat) li l-appellant waqqa' u bena il-proprjeta tieghu u ghalhekk kellu jsir deterrent sabiex haddiehor ma jithajjarx jiehu l-ligi f'idejh u jaqbad u jwaqqa' proprjeta minghajr il-permess necessarji.

Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp ma tghat ebda ragunijiet specifici kif rikjest mill-ligi u ghalhekk l-impozizzjoni ta' multa hija ultra vires u legalment irregolari.

Barra d-dritt ta' appell mghoti mill-artikolu 37 tal-Kap. 356, il-ligi tghid li sahansitra tista' tappella minn kundizzjoni specifika bhalma hu il-kaz. Dan id-dritt jinghata wkoll mill-artikolu 40 tal-Kap. 356.

L-appellant jirrizerva li jaghmel sottomissjonijiet ulterjuri waqt l-andament tal-appell.

Ghal dawn ir-ragunijiet l-appellant jitlob it-thassir tal-impozizzjoni tal-multa ghar-ragunijiet premessi."

Fin-nota taghha prezentata fit-12 ta' Marzu 2010 l-Awtorita inter alia, tirrileva is-segwenti:

5.2. 1 Preliminary Plea

On a preliminary point, this Board cannot hear and decide on the merits of this appeal since the applicant has already accepted the imposition of a fine as a condition of acquiring development permission. This is being said, as the fine has already been settled by the applicant. The Authority considers that no appeal against the fine may be

made on this basis and this is in line with the Court of Appeal Decision of Wayne Chetcuti, which was also followed by this Board of Appeals in the appeal of Tyrone Galea vs. MEPA of 15th June 2007.

5.2.2 The proposal in brief

The building which has been sanctioned in this permit has a similar footprint of the previously existing building. However it is evident that most of the building, and not only the facade as implied by the appellant, was demolished and re-constructed. All features, such as arches and kileb, which were to be retained according to previous permits, were demolished. The drawing at document 11A in PA 8031/06 establishes that the demolished part of the building, which was to be retained, had an area of approximately 140m². The demolition of a UCA Category B building conflicts with Policy GZ-URCO-1 of the Gozo and Comino Local Plan. A planning gain was thus recommended by the Planning Directorate as a safeguard from the practice of illegal demolition of buildings. The value of the planning gain is based upon the approximate calculation of the amount required to rebuild the same amount of floor space that was demolished. The total floor area on two floors amounts to 140m². The suggested amount of the planning gain is €11,500.

5.2.3 The nature and mechanism of the Planning Gain

The idea behind the Planning Gain mechanism is that if by way of a permit the community is set to lose a cultural or environmental asset that forms part of its context and identity, a sum of money established to be equivalent to asset being lost is made of available to the Authority so that they may be utilised in projects that favour the community in compensation of that lost asset.

Article 40(1) of the Development Planning Act allowed MEPA to impose payments 'where the Authority considers that it would be in the interest of the proper planning of the area. The Authority shall seek to obtain these benefits or gains by means of conditions attached to a grant of development permission '. Similar provisions have been

laid in the new legislation - Article 76(1) and (2) of the Environment and Planning Development Act (2010).

Article 40(3) refers how 'the Minister may, in consultation with the Authority, make regulations for giving better effect to the provisions of this article and [...] (a) prescribe the procedure how a planning obligation may be entered into, [...] (b) establish any restrictions, conditions or the payment of any sums of money which may be imposed in such planning obligations; and (c) regulate appeals to the Appeals Board'. Similar provision has been laid in the new legislation - Article 76(3) of the Environment and Planning Development Act (2010).

The regulations and procedures referred to in Article 40(3) have been laid down in Legal Notice 28 of 2002 - Development Planning (Planning Obligations) Regulations.

The subsequent Legal Notice 347 of 2009 lists developments on which a planning obligation cannot be imposed. These are mainly developments of national or strategic significance or developments affecting national security.

Article 40 and the Legal Notices do not refer to the Environment Initiative Partnership Programme (EIPP). The EIPP is a MEPA fund where such payments arising from planning obligations are usually deposited. The fund is also used where forfeited bank guarantees or other means of income are deposited for subsequent use in environmental initiatives promoted by MEPA.

5.2.4 The Planning Gain mechanism vis-a-vis this permit
As already, it is evident that the whole building was demolished and re-constructed. All features, such as arches and kileb, which were to be retained, were demolished. A planning gain is thus being suggested to safeguard from the practice of illegal demolition of buildings. The value of the planning gain is based upon the approximate calculation of the amount required to

rebuild the same amount of floor space that was demolished.

In this particular case, the development is not of national or strategic significance or development affecting national security. Therefore the provisions of Legal Notice 347 of 2009 do not apply. On the other hand, the provisions of Article 40 and Legal Notice 28 of 2002 apply.

5.2.5 The Directorate's position vis-a-vis the Appellant's arguments

The appellant's main argument is that the DCC Board did not respect the established regulations when it imposed the Planning Gain because it did not justify its position as required by law.

The Directorate refute this argument on two grounds:

(a) the DCC Board did justify its imposition of the Planning Gain as can be seen from minute 75 of the PA file. The DCC Board stated that A fine is being imposed as per condition 2. This fine covers the sanctioning of the application. Condition 2 refers to condition recommended by the Directorate for the imposition of the Planning Gain;

(b) the Planning Directorate is the technical arm of the DCC Board; i.e. the Planning Directorate is the body that advises to the DCC Board. Likewise this means that the DCC Board acts on the Directorate's recommendation. Thus even if the DCC Board had not put down in writing its justification for imposing the Planning Gain (which anyway it did unlike as claimed by the appellant), the moment that the DCC Board took the decision, the reasons that the Directorate put forward for its recommendation were made official and naturally form the basis of the DCC Board's decision."

Ikkunsidra ulteljorment:-

Dan huwa appell kontra kundizzjoni li harget fil-permess PA 2212/09 li tobbliga lill-appellant biex ihallas somma to €15,500 bhala planning gain.

"This permission is subject to a planning gain to the value of €11,500 (eleven thousand five hundred euro) towards the Environmental Initiatives in Partnership Programme (EIPP). The funds raised from the planning gain shall be used to fund environmental improvement projects in the locality of the site. The planning gain is not refundable and funds shall be utilized as required and directed by the Malta Environment and Planning Authority."

Il-permess PA 2212/09 hareg ghas-sanzjonar ta' tibdil li sar fil-permess PA 5962/07. It-tibdil jikkonsisti fid-demolizzjoni ta' bini ezistenti skedat bhala Category B building u l-bini mil-gdid ta' residenza. Skond il-Gozo and Comino Local Plan, Map n14.10-A, is-sit in ezami jinsab fl-UCA taz-Zebbug.

In sintesi, l-appellant fl-appell tieghu kontra l-imposizzjoni ta' din il-kundizzjoni qed jghid is-segwenti:

- L-appellant kien hallas il-planning gain 'under protest';
- L-imposizzjoni tal-planning gain mid-DCC kien kontra l-ligi peress li ma inghatawx ragunijiet specifici bbazati fuq argumenti ta' ippjanar kif mitlub fl-artikolu 33(2), tad-Development Planning Act; u
- Kien id-Direttorat u mhux id-DCC li indika li ghandha tigi imposta planning gain u ghalhekk id-DCC mar ultra vires meta impona il-planning gain.

Fin-nota taghha l-Awtorita tibda biex taghmel eccezzjoni preliminari fis-sens li it-Tribunal ma jistax jiddeciedi fuq il-mertu ta' dan il-kaz peress li:

- Il hrug tal-permess kien marbut mal-obbligu li l-appellant kellu li qabel ma johrog il-permess kellha tithallas is-somma kollha dovuta bhala planning gain;
- L-appellant hallas is-somma kollha. Dan ifisser li l-appellant accetta din il-kundizzjoni u ghalhekk hareg il-permess;
- Peress li din kienet kundizzjoni vinkolanti tal-permess issa l-appellant ma jistax jittenta jiehu lura l-ammont li hall as minghajr ma tigi effettwata il-validita ta' dan il-permess; u
- Id-decizjoni tal-Qorti tal-Appell, Tyrone Galea vs MEPA tal-15 ta' Gunju, 2007, tikkonferma dan.

Fil-mertu l-Awtorita rrispondiet ukoll ghal dak li qal l-appellant billi, in sintesi qalet li gej:

- Il-bini li kien jezisti qabel twaqqqa kwazi kollu biex minn floku inbena bini gdid li qed jigi ssanzjonat b'dan il-permess ;
- Il-features kollha li kellhom jigu ppreservati bhala kundizzjonijiet ta' permessi precedendi twaqqaw biex sar dan;
- It-twaqqieh ta' bini fil-UCA ikklassifikat bhala Category B jikser il-policy GZ-URCO-1 tal-Gozo and Comino Local Plan;
- Ir-rakkomandazzjoni minn naha tad-Direttorat tal-impozizzjoni tal-planning gain saret biex jigi issalvagwardjat it-twaqqieh illegali ta' dan it-tip ta' bini ;
- L-ammont dovut bhala planning gain gie ikkalkulat a bazi ta' kemm iqum flus biex tibni bini ta' l-istess daqs;
- Dan sar a bazi tal-artikolu 40(3) tad-Development Planning Act, illum l-artikolu 76(1) u (2) tal-Environment and Planning Act (2010);
- Kontra ghal dak li qed jghid l-appellant, id-DCC iggustifika l-impozizzjoni tal-planning gain kif jidher car f'minute 75 tal-PA file;
- Id-Direttorat hija it-technical arm tad-DCC u xogholha hu li taghti pariri lid-DCC kif ghamlet f'dan il-kaz.

Dan it-Tribunal jaqbel mal-Awtorita li la l-appellant hallas il-planning gain u b'rizultat ha l-permess, dan effettivament iffisser li accetta il-kundizzjonijiet kollha li kien hemm fil-permess. Kieku kullhadd jaddotta it-tattika li jibbenefika mill-permess li ittieh l-Awtorita u fl-istess hin jikkuntesta ghal snin shah xi kundizzjoni li jkun fih il-permess bl-intenzjoni li forsi jirnexxielu johrcg minnu kieku jkun hawn kaos shih.

Applikant iffaccjat b'din is-sitwazzjoni cioe l-ghoti ta' permess kondizzjonat ghall-hlas, ghandu zewg alternattivi, jew li joggezzjona ghall-kundizzjoni u jibqa jinsisti li din m'ghandiex tigi imposta b'dan illi jekk ikollu rifjut ikollu il-fakulta li jappella mill-istess rifjut. L-alternattiva l-ohra, dik li f'dan il-kas ghazell-appellant, hi li jaccetta l-kundizzjoni biex johrog il-permess u wara

jappella mill-kundizzjoni ta' hlas imposta fil-permess. Ghalkemm din l-ahhar alternattiva hija possibli f'it tista tkun ta' success ghar-raguni li l-permess kien ikkundizzjonat ghal dik il-kundizzjoni u una volta accettata dik il-kundizzjoni mill appellat dan ma' jistax ibiddel il-pozizzjoni tieghu diametrikament wara li hareg tali permess billi jikkuntesta l-impozizzjoni tal-istess kundizzjoni.

Dan apparti l-konsiderazzjoni importanti li jekk f'dan it-tip ta' permess ser ikun hemm hafna appelli simili din tohloq instabilita fis-sistema tal-ippjanar li hija haga li ghandha tigi evitata. F'dawn ic-cirkustanzi ghalhekk anki ghal dik li hi konsistenza, jekk l-applikant joggezzjona minn kundizzjoni imposta mill-Awtorita dana ghandu jaghmlu minn meta' jsir jaf bl-impozizzjoni taghha u jibqa jzomm din it-tezi sakemm tigi deciza din il-kundizzjoni u jekk hemm bzonn jappella.

It-Tribunal jaqbel mal-analizi li ghamlet l-Awtorita biex tiddetermina kemm ghandujkun l-amrnon ta' planning gain li ghandu jithallas f'dan il-kaz. It-Tribunal jaqbel ukoll li l-Awtorita kellha id-dritt u l-obbligu li taghmel dan skond Section 40 tad-Development Planning Act (illum l-artikolu 76(1) u (2) tal-Environment and Planning Act (2010).

Ghal dawn ir-ragunijiet dan it-Tribunal qieghed jichad dan l-appell u jikkonferma il-kundizzjoni fil-permess tal-24 ta' Jannar, 2011, PA 2212/09, "To sanction variations from permission PA 8031/06 - demolition of structures and reconstruction of dwelling", liema kundizzjoni tghid:

"This permission is subject to a planning gain to the value of €11,500 (eleven thousand five hundred euro) towards the Environmental Initiatives in Partnership Programme (EIPP). The funds raised from the planning gain shall be used to fund environmental improvement projects in the locality of the site. The planning gain is not refundable and funds shall be utilized as required and directed by the Malta Environment and Planning Authority."

Ikkunsidrat

L-aggravju tal-appellant huma s-segwenti:

1. It-Tribunal interpreta hazin l-artikolu 33(2), 37(1) u 40(4) tal-Kap. 356 meta impona l-kondizzjoni ta' planning gain ghal hrug tal-permess in kwistjoni, u amplifika kif gej:

a. It-Tribunal ma setax jaccetta l-argument li l-Kummissjoni ghal Kontroll ta' Zvilupp jaghmel tieghu r-ragunijiet tad-Direttorat meta skond l-artikolu 33(2) l-Awtorita jew il-Kummissjoni ghandha taghti ragunijiet specifici ghal rifjut jew kondizzjonijiet imposti. Din l-obbligazzjoni ma tistax tigi abdikata kif sehħ f'dan il-kaz;

b. L-artikolu 40(4) jaghti d-dritt lil applikant jappella quddiem il-Bord tal-Appell minn obbligazzjoni dwar l-lppjanar u skond l-artikolu 37(1) dan id-dritt jezisti anki jekk ma ssirx talba ta' rikonsiderazzjoni quddiem l-Awtorita jew il-Kummissjoni u ghalhekk it-Tribunal ma jistax jiskartah jew jimponi procedura meta jista' jsir appell minnu, jekk il-ligi ma tipprovdi xejn a rigward;

c. L-artikolu 40(1) jittellem dwar obbligazzjoni ta' ppjanar li skond is-subartiklu (b) tista' tikkonsisti f'pagament jew jinghata xi dritt jew beneficju estraneju mentri t-Tribunal impona planning gain kontra zvilupp illegali cioe multa li mhix inkwadrata fl-artikolu 40(1) u anqas fl-Avviz Legali 28 tal-2002. In oltre t-Tribunal ma spjegax fuq liema regolament giet kkalkolata l-multa u ebda multa ma tista' tigi mposta bla mekkanizmu ghat-thaddim taghha.

L-Awtorita irrispondiet fost affarijiet ohra illi l-appellant ma jistax jappella minn kondizzjoni imposta bhala dipendenti ghal hrug tal-permess billi jottempera ruhu mal kondizzjoni ghalkemm bil-caveat 'bla pregudizzju' u mbaghad jappella mill-kundizzjoni wara l-hrug tal-permess.

Il-Qorti ser tissoferma ruhha fuq din ir-risposta ghax jekk fondata twaqqa' l-appell tal-appellant. L-appellant isostni illi hu ghandu dritt ta' appell skond l-artikolu 40 tal-kap. 356 illum artikolu 76 tal-Kap. 504 li ma biddel xejn minn dak li kien regolat bl-artikolu 40 tal-Kap. 356.

It-Tribunal accetta s-sottomissjoni tal-Awtorita bbazata fuq is-sentenzi **Wayne Chetcuti noe vs Kummissjoni ghal Kontroll tal-lzvilupp** (App Civ 06/10/2000) u **Emanuela**

Psaila vs Kummissjoni ghal Kontrol tal-Izvilupp (App Civ 30/03/2006). Fl-ewwel kawza t-talba kienet ghal sanzjonar ta' zvilupp u flok giet imposta planning gain giet imposta garanzija bankarja. Fit-tieni kawza t-talba kienet ghal zvilupp u l-Awtorita imponiet commuted parking fee li pero sakemm tigi ffissata giet imposta garanzija bankarja. Fiz-zewg kawzi saru l-garanzija

Fiz-zewg kawzi, kif argumenta wkoll it-Tribunal f'din il-kwistjoni, intqal illi la darba l-kundizzjoni kienet ir-raguni li fuqha inhareg il-permess, l-applikant ma jistax jottepera ruhu 'bla pregudizzju' ghal dik il-kundizzjoni sabiex jinhareg il-permess u mbaghad fl-istess nifs jappella mill-kundizzjoni biss. It-Tribunal bhal Qorti fil-kawzi citati argumenta illi la darba accettata l-kundizzjoni implicitament gie accettata il-hrug tal-permess bil-kundizzjoni u ma jistax imur lura minnha billi jappella biss fuq il-kundizzjoni wara li jkun inhareg il-permess bl-ottemperanza mal-kundizzjoni. Skond is-sentenza ta' Wayne Chetcuti l-principju regolatur hu 'selecta una via non datum recursus ad alteram' (ara pagna 12 ta' dik is-sentenza).

L-appellant isostni illi skond l-artikolu 40 hu kellu dan id-dritt. Il-Qorti tqis li l-appellant igawdi ragun sa certu punt.

L-artikolu 40(1) ighid illi l-Awtorita ghandha dritt biex meta tigi biex taghti permess ghall-izvilupp timponi obligazzjoni fuq l-applikant li skond is-subinciz (b) jista' jikkonsisti f'illi jaghmel xi pagament (kif inhu dan il-kaz) li jigi inkluz f'permess ghall-izvilupp. L-artikolu 40(4) imbaghad jaghti d-dritt lil aplikant li jappella mill-obbligazzjoni imposta.

Qari ta' dan l-artikolu juri illi ghalkemm l-applikant ghandu dritt li jappella minn obligazzjoni dwar l-ippjanar ma jfissirx b'daqshekk illi jista' jottjeni l-hrug tal-permess billi jottepera ruhu mal-obbligazzjoni bla pregudizzju. Il-kelma bla pregudizzju f'din ic-cirkostanza ma tfisser xejn ghaliex mhix fid-diskrezzjoni tal-applikant li jaghzel li jaccetta l-hrug tal-permess minghajr pregudizzju ghal dak li jidhirlu mhix kondizzjoni idonea ghal hrug tal-istess

permess. Il-hrug tal-permess hu marbut mal-kundizzjonijiet imposti ghal hrug tieghu. L-artikolu 40(1) infatti juza' l-kliem 'meta (l-Awtorita – kliem tal-Qorti) tigi biex taghti permess ghall-izvilupp taghzel li timponi fuq l-applikant ... obligazzjoni". L-obbligazzjoni u l-permess huma interkonnessi fejn wahda tiddependi mill-ohra u mhix fl-ghazla tal-applikant li jaghzel li jissepara l-hrug tal-permess mill-obbligazzjoni kif jidher li pprova jaghmel f'dan il-kaz.

Hi l-fehma tal-Qorti illi l-appellant qua aplikant kellu ghazla quddiemu b'applikazzjoni diretta tal-artikolu 40 cioe li jaghzel li jappella mill-kundizzjoni imposta permezz tal-artikolu 40 bhala kundizzjoni ghal hrug tal-permess gabel ma jpoggi lilu nnifsu fil-pozizzjoni li bl-agir tieghu stess rrinunzja ghad-dritt ta' appell billi jottempera ruhu mal-kondizzjoni u awtomatikament accetta l-hrug tal-permess favorih, kif fil-fatt gara.

Il-Qorti tqis li bil-hlas tal-obbligazzjoni tal-ippjanar u l-konsegwenti hrug tal-permess hu abdika mid-dritt tieghu li jappella mill-kundizzjonijiet li fuqha nhareg il-permess. It-triq tieghu kienet li jappella mill-kundizzjoni tal-hlas ta' obligazzjoni ta' ippjanar imposta mill-Awtorita u f'kaz ta' rifjut ta' appell jibqa' miftuh lilu li jaccetta li jottempera ruhu mal-obbligazzjoni u jakkwista l-permess jew li ma jinghatax il-permess billi ma jaccettax l-obbligazzjoni. Zgur pero li ma kienx dritt tieghu li jiddeciedi hu unilateralment li jaccetta l-hrug tal-permess u jappella biss mill-kundizzjoni tal-obbligazzjoni ta' ippjanar qishom distinti u awtonomi minn xulxin.

Ghalhekk f'dan is-sens il-Qorti tqis illi l-appell tal-appellant ma jstax jirnexxi fuq din il-bazi u ghandu jigi michud billi infondat legalment.

Decide

Ghalhekk il-Qorti qed tichad l-appell ta' Reno Baldacchino u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-ippjanar tad-29 ta' Marzu 2012. L-ispejjez jithallsu mill-appellant.

Kopja Informali ta' Sentenza

< Sentenza Finali >

-----TMIEM-----