



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta tas-27 ta' Gunju, 2013

Appell Civili Numru. 73/2011

Emanuel Bonnici

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Emanuel Bonnici tad-19 ta' Dicembru 2011 kontra d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' Novembru 2011 għall-applikazzjoni 'to sanction room constructed in Gnejna Bay';

Rat ir-risposta tal-Awtorita li sottomettiet li l-appell kellu jigi michud u d-decizjoni tat-Tribunal tigi konfermata;

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

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

A. Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp, fil-21 ta' Mejju 2005, irrifjutat l-applikazzjoni ghall-permess tal-izvilupp PA 1007/04 "Site at il-Gnejna, Mgarr (Malta).
Sanction room constructed in Gnejna Bay. "

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

"1. The room proposed for sanctioning does not fall within one of the categories of development that may be considered within a Level 2 Area of Ecological Importance, as defined by paragraph 15.38 of the Structure Plan Explanatory Memorandum. It is neither directly connected with or necessary to the management of the Special Area of Conservation as per Article 13.1 (a) and (b) of LN 257 of 2003. The proposal therefore runs counter to the objectives of Structure Plan policies REC 9, RCO 10, RCO 12 and, to the provisions of the Flora, Fauna and Natural Habitats Regulations L.N. 257/03."

B. In-nota tal-Perit Ruben Aquilina ghall-Appellant, ipprezentata fis-17 ta' Gunju 2004, senjatament il-hames punti segwenti:

"The room is constructed from rubble masonry and so it blends with the surrounding environment of rubble walls and vegetation.

The room is situated beneath a small hill and as such this development is partially covered by the thick vegetation situated in the same area.

only the elevations (... constructed from rubble masonry) is visible since also the side of this room is covered by the vegetation and the surrounding rocky landscape.

This room is approximately 30 years old and ... was built on the same site where an older partially demolished similar room was situated.

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In view of the above it is clear that this room is not creating a disturbance to surrounding environment at Gnejna Bay since it is situated in an area covered by the existing rocky landscape and vegetation."

C. In-nota tal-Perit Joseph Bezzina ghall-Awtorita, ipprezentata fl-1 ta' Awwissu 2005, inter alia iz-zewg punti segwenti:

"The development is not considered as an acceptable form of development ODZ since it lacks sound planning justification in the context of current Structure Plan policy. To the contrary, the existing development is directly contrary to Structure Plan Policy REC 9, which requires that such illegal development be removed and land restored to its natural environmental character.

L-istess nota taghmel ukoll riferenza ghar-rapport ambjentali, ippreparat minn Nature Protection Unit u r-Resource Management Unit fi hdan l-Awtorita (black 9 fil-file PA 1007/04), konsistenti mal-fatt li l-izvilupp hu inaccettabbli in kwantu hu in kontravvenzjoni tal-Pjan ta' Struttura kif ukoll l-Avviz Legali 257 tal-2003.

D. Il-verbal tal-access tas-Seduta numru 14 tal-Bord ta' l-Appell dwar l-Ippjanar, mizmuma fit-3 ta' Mejju 2006, precizament il-punti segwenti:

"Il-Bord ra s-sit konsistenti minn boat house cladded [recte miksija] bil-gagazza. Ma' genb is-sit l-Bord ra boat house ohra simili li skond l-Awtorita giet rifjutata.

Is-sit jinsab xi ftit metri boghod mill-bajja."

E. In-nota tal-Perit Ruben Aquilina ghall-Appellant, ipprezentata fit-30 t'Ottubru 2006. Ma n-nota gew ipprezentati kopji ta' permessi fil-madwar tas-sit in ezami u allegatament konsistenti ma svilupp simili ghall-appell odjern, jgifieri PA 5907/00 u PA 2198/05.

F. In-nota second statement ta' Mario Scicluna ghall-Awtorita, ipprezentata fis-7 ta' Mejju 2007, inter alia il-punti segwenti:

"Further clarifications were made with the Local Planning Unit so as to clarify the exact areas referred in the policy as "the Western Foreshore" and the "Eastern Foreshore" as cited in the policy. It was established that the dividing datum which divides the western and eastern foreshore is the sandy beach itself. Therefore, all the foreshore on the west which starts from Gnejna (sandy) beach is considered to be the western foreshore while all the foreshore which starts from the beach and extends eastwards is considered as the eastern foreshore.

In this respect, the room in question is considered to be located in the western side of Gnejna Bay.

Additionally, it was highlighted that for a boathouse to be considered as acceptable in this area, it must be eligible to all the criteria as included in Policy NWGN 7 ... the room ... breaches the following criteria:

i. Applicant is not a bona fide full / part time registered fisherman.

iii. The room does not have direct access to an existing slipway. In fact it is located circa 45m from the sea shore and has a relatively large parking area in between.

vi. the room has a narrow front door, a small "front garden area" with a small steel gate and a [three courses high] parapet wall. This layout shows that it is impractical to store a "fishing" boat inside and thus it is clear that its intended use is for other purposes.

vii. This policy specifically excludes any holiday home, any form of residential use and any commercial use.

Policy NWGN 7 specifically states that all existing structures in the western foreshore that do not qualify to

these criteria 'will be demolished' and the area 'restored to its natural state'."

G. In-nota tal-Perit Ruben Aquilina ghall-Appellant, ipprezentata seduta stante waqt is-Seduta numru 25 tal-Bard ta' l-Appell dwar l-Ippjanar, mizmuma fis-17 t'Ottubru 2007, senjatament id-disa' punti segwenti:

“1. The applicant must be a bona fide full or part time registered fisherman for at least two years prior to application.

2. The structure/building does not restrict or hinder pedestrian use of coastline. Comment: The discussed structure is situated away from any passages or accesses in the area.

3. The structure/building must have access to an existing slipway. Comment: The access from the structure to the sea is unhindered and existing slipways can be used.

4. The structure must be a single storey structure height and maintained to a stone coloured standard. Comment. The structure covered in this application is one storey high and finished partially in stone colour and partially in rubble wall.

5. The provision of services will not be permitted. Comment: No services including draining, water or electricity re provided in this boathouse.

6. The purpose of the structure is for the storage of boats and or fishing equipment. Comment: This structure is used for the storage of a small fishing boat and fishing equipment.

7. The structure must not be used as a holiday home, nor for any form of residential or commercial use. Comment: This structure is not used for any of the above uses.

8. Any encroachment that restrict public access to the foreshore shall be removed prior to the submission of a development application. Comment: There is no existing encroachment that restrict access to the foreshore.

9. The submission and approval of a development application. Comment: This application covers the call for approval for this boathouse from my clients. "

Man-nota gie pprezentat kopja ta'ritratt bid-data tad-9 ta' April 2007 fejn qed jigi muri parti mill-interni tal-istess boathouse. L-art tidher li hi mqeghda bil-madum ta-ceramika. Fl-ispazju ristrett, a parti bramel u tankijiet, jidhru wkoll kenura u tender zghira.

H. In-nota tal-Perit Ruben Aquilina ghall-Appellant, ipprezentata fit-30 ta' Jannar 2008. Man-nota gew ipprezentati kopji ta' Registrazzjoni Temporanja, Licence of Fishing Vessel u rcevuta tal-hlas konsistenti ma' dawn, mahruga mit-Taqsima ta' l-Affarijiet Veterinarji u tas-Sajd u ta l-Akwakultura, fi hdan il-Ministeru ghall-Affarijiet Rurali u l-Ambjent. L-istess registrazzjoni u licenzja huma ghas-sena 2008, ghall-kajjik bin-numru ta' registrazzjoni MFC 6530, f'isem Emanuel Bonnici.

J. Il-verbal tal-access tas-Seduta numru 17 tal-Bord ta' l-Appell dwar l-Ippjanar, mizmuma fl-4 ta' Gunju 2008, inter alia il-punti segwenti:

"Il-Bord innota li dan il-fond huwa l-boghod mill-bahar xi sebghin metru. Il-Bord ikkonferma il-verbal ta' l-access tat-3 ta' Mejju 2006. Fuq gewwa, il-post kellu dghajsa b' xi armar tas-sajd."

K. Il-verbal tas-Seduta numru 2 tal-Bord ta' l-Appell dwar l-Ippjanar, mizmuma fl-4 ta' Frar 2009, inter alia il-punt segwenti:

"Il-perit tal-appellant qed jipprezenta kopja tal-licenzja tal-appellant li ggib in-numru VRFCC 2009 li tiskadi fl-ahhar tas-sena kurrenti li qed tigi markata bhala Dok AP 2."

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L. In-nota third statement ta' Mario Scicluna ghall-Awtorita, ipprezentata fit-3 ta' Marzu 2009, precizament il-punti segwenti:

"[Policy NWGN 7 of the North West Local Plan] specifies that:

i. the applicant must be a bona fide full or part time registered fisherman for at least two years prior to the application.

In this regard it is to be stated that whilst this application under appeal was submitted on 24th February 2004, [however the] licence dates 14th January 2008. This is circa 6 years after the date of the required registration date which a genuine fisherman had to be registered so as to be considered eligible for a room to store his fishing boat.

Additionally, the same licence states that the boat's dimensions are:

Width: 1.83m; Overall length: 4.64m; Height: 0.83m.

However the submitted plans show that the room to be sanctioned:

has its front door which is not designed as a store for storing boats but is only 1m wide,

abuts a 'front garden' area which is accessed from the beach through 3 steps and a gate 1m wide.

the room to be sanctioned is located circa 70 metres away from the sea. No hard surfacing connects this room to the sea.

It is located adjacent to an identical room which is also illegal and served with an enforcement notice."

M. Il-kontro-ezami ta' l-Awtorita ghall-affidavit tal-Appellant, moghtija bil-gurament waqt tas-Seduta nurnru 15 tal-Bord ta' l-Appell dwar l-Ippjanar, mizmuma fid-9 ta' Gunju 2010.

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Meta mistoqsi inter alia, biex jikkonferma li sar registered part-time fisherman fl-2008 u ghalxiex kien juza il-kamra qabel din id-data, irrisponda hekk:

"Iva, nikkonferma [li sirt sajjied part-time fl-2008].

Kelli dghajsa zghira qabel u konna npogguha hemmhekk.

N. Il-verbal tas-Seduta numru 23 tal-Bord ta' l-Appell dwar l-Ippjanar, mizmuma fl-20 t' Ottubru 2010, senjatament il-punti segwenti:

"L-appellant qed jipprezenta nota b' ritratti tal-bicca tal-bahar ... L-appellant jinforma lill-Bord illi, din id-dghajsa ma jdahhalliex fl-istore in kwistjoni pero tkun marbuta fil-bajja."

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda s-sanar ta' karma konsistenti ma' boathouse fl-arja tal-bajja tal-Gnejna.

Skond l-Awtorita, tali zvilupp mhux permessibbli f'level 2 - Area of Ecological Importance, kif indikat permezz tal-paragrafu 15.38 tal-memorandum tal-Pjan ta' Struttura, kif ukoll il-policies REC 9, RCO 10 u RCO 12 tal-istess Pjan ta' Struttura. In oltre skond l-Artikoli 13.1(a) u (b) tal-Avviz Legali 257 tal-2003, mhix integra ghall-harsien ta' Special Area of Conservation, u hi in kontravvenzjoni tal-Avviz Legali 257 tal-2003.

L-aggravji tal-Appellant kontra r-rifjut jistrieħu fuq il-fatt li hu munit b'licenzja ta' part-time fisherman; li l-kamra għanda almenu tletin sena - sahansitra tissostiwixxi ohra simili għaliha li twaqqgħet meta nbriet din; li sprovvista mis servizzi tad-dawl u l-ilma (b'konsegwneza ma tisra' tigi qatt uzata għall-skop residenzjali); li bil-mod u kif inhi mibnijja, tinheba sew fl-ambjent cirkostanti (u għalhekk mhix kagun ta' intrusjoni viziva); u li fug kollox mhix ta' ngombru u għalhekk tippermetti lill pubbliku, access liberu ghax-xatt tal-bajja.

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Jigi rilevat mill-mori tal-appell (diversi sottomissjonijiet tal-partijiet, access fug is-sit u xhieda tal-istess Appellant) li il-licenzja tas-sajjed part-time inharget fl-2008, erba' snin wara li giet intavolata l-applikazzjoni mentre skond il-policy, l-Appellant kellu jkun registrat almenu sentejn qabel din id-data. Dan il-fatt mhux ikkonestat mill-Appellant (vide il-punt numru 1 tan-nota ipprezentata mill-konsulenti tieghu waqt is-Seduta numru 25 tal-Bord ta' l-Appell dwar l-Ippjanar, mizmuma fis-17 t'Ottubru 2007, kif indikata supra).

In oltre, parti sostanzjali tal-kamra li mibnijja bil-gagazza minflok (per ezempju) gebel tas-sejjieh, altro che kostruzzjoni tradizzjonali li ssib posta fl-ambjent outside development zone. Jidher ukoll li nonostante il-fatt li skond l-Appellant, il-kamra m'ghandhix uzu residenzjali, tqieghed madum tac-ceramika - ghazla ta' finish bizzarra u inkonsistenti mal-uzu ta' post intenzjonat biss ghall-hazna ta' dghalles jew taghmir tas-sajd.

Permezz tal-kopja tal-licenzja (VRFCC 2009) jigi nutat li l-Appellant ghandu kajjiek irregistrat f'ismu u li (anke meta ma jigix ikkunsidrat il-karru tieghu), jissupera d-dawl tal-bieb tal-istess boat house. Jigi rilevat ukolli l-istess kamra hi mibnijja xi sebgħin metru il-boghod mix-xatt - fattur li hu certament konsistenti mad-dikjarazzjoni tal-istess Appellant li l-karma mhix ta' ostaklu għall pubbliku li juza l-bajja, izda li hi ferm in kontradizzjoni ta' l-iskop ta' boathouse - li tkun relattivament vicin ix-xatt halli wiehed ikun jista facilment ivara d-dghajasa tieghu.

Madankollu, jigi rilevat li l-foreshore (ta' quddiem il-kamra) lanqas hu fformat bl-ebda tip ta' hard surface, u li terga' tghid, l-access għall-kamra hu permezz ta' tlett targiet u speci ta' front garden b' rixtellu li ukoll hu idjaq mill-istess kajjiek - cjoe dak registrat f'isem l-Appellant.

Fil-fatt, fl-ahhar seduta utili li kienet saret (inkluz diferimenti, saru ben tmintax il-seduta, tnejn minnhom accessi fuq l-istess sit, u gew skambjati tal-inqas tlett statements mill-Awtorita, f'appelli dam sejjer sitt snin u

nofs shah), l-Appellant iddikjara li hu ma kienx idahhal id-dghajsa fil-kamra izda jhalliha marbuta mal-bajja.

Altro che boathouse; b'din id-dikjarazzjoni, l-Appellant qed indirettament jikkonferma id-decizjoni originali tal-Awtorita; agir oggezzjonabbli ferm, li jrendi l-appell manifestament infondat u li jirrazzenta' l-imposizzjoni tas-sanzjoni fit-termini tal-Artikolu 14 tat-tieni skeda tal-Att X ta' l-2010, Kap. 504.

Ghalhekk, in vista tal-konsiderazzjonijiet kollha hawn fuq maghmula, u fuq kollox sabiex ikun konformi mal-policies tal-ippjanar vigenti, dan it-Tribunal qed jiddisponi minn dan l-appell billi jichad l-istess u jikkonferma ir-rifjut ghall-PA 1007/04 mahrug mill-Kummissjoni ghall-Kontroll ta' l-Izvilupp, fil-21 ta' Mejju 2005.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal ssoferma ruhu fuq il-policy li zvilupp fiz-zona mhux permess ghalkemm id-divjet mhux assolut minghajr ma ta kaz policies ohra applikabbli ghal kaz;
2. It-Tribunal zbalja l-argumentazzjoni fuq il-kamra billi din il-kamra tintuza ghal dghajsa biex biha l-appellant johrog ghal kajikk u mhix kif argumenta t-Tribunal biex ipoggi l-kajikk fil-kamra li hi zghira ghal kajjik. In ogni kaz il-kamra tintuza ghas-sajd u ilha tintuza ghal dan l-iskop ghal 30 sena li hu rilevanti ghal kaz u hu fattur li kellu jittiehed in kunsiderazzjoni. L-appellant zied lil l-fatt li l-appellant rregistra ruhu recentement bhala part time fisherman ma ghandux jittiehed wahdu izda fl-isfond tal-kaz.

L-ewwel aggravju

Il-Qorti ma taqbilx mal-appellant li t-Tribunal strieh biss fuq il-fatt li l-boathouse inbniet outside development zone. It-Tribunal irrefera ghal vjolazzjonijiet f'policies ohra fis-sens tal-mod u materjal li bih inbniet li mhux konsonu ma' boathouse, id-distanza mill-bajja li tikkontradixxi l-uzu ta' boathouse biex ittella' u tvara dghajsa u minghajr ebda hard surfacing bejn il-bahar u l-boathouse, distanza ta'

circa sebghin metri, l-access ghal kamra minn tlett targiet, rixtelli u speci ta' front garden dojq. In oltre t-Tribunal ha konjizzjoni tal-fatt illi l-kajikk ma jidholx ghax akbar mill-fetha ghal kamra u d-dghajsa skond l-istess appellant ma kienx idahhalha fil-kamra izda jhalliha marbuta mal-bajja. It-Tribunal fil-fatt irrefera wkoll ghal policies vjolati, imsemmija mill-Awtorita cioe policy REC9, Avviz Legali 251/2003, RCO10 u RCO12 u li z-zona hi wahda ta' importanza ekologika.

Kwindi ma jistax jinghad illi t-Tribunal ma dahalx fil-mertu ta' policies ohra applikabbli u del resto l-istess appellant imkien ma jiggustifika l-izvilupp taht xi policy ohra.

Ghalhekk dan l-aggravju qed jigi michud.

It-tieni aggravju

Dan l-aggravju wkoll ma fihx mertu. It-Tribunal ma ghamel ebda enfasi fuq l-uzu tal-kajikk ghal kamra kif il-Qorti rrelevant fl-ewwel aggravju u apparti dan it-Tribunal ukoll semma' diversi nuqqasijiet ohra li fl-assiem kienu jmorru kontra l-policies vigenti. In kwantu ghas-sottomissjoni li l-kamra tintuza ghas-sajd u illi hu part time fisherman din hi kwistjoni ta' evalwazzjoni ta' fatt, li t-Tribunal evalwa bhala wahda mic-cirkostanzi u ghamel l-osservazzjonijiet tieghu u din il-Qorti ma ghandhiex tissindaka l-apprezzament tal-fatti maghmula mit-Tribunal.

In kwantu ghas-sottomissjoni li l-kamra kienet ilha tintuza ghal 30 sena ghas-sajd, it-Tribunal ukoll innota li fil-fatt il-kamra ezistenti twaqqghet u nbriet ohra li kien qed jintalab is-sanzjoni taghha liema talba t-Tribunal dehrlu li ma ghandhiex tintlaqa' ghal tibdiliet, zidiet u nuqqasijiet kollha elenkati minnu u in oltre anki fuq l-allegazzjoni li l-kamra ghalkemm allegatament tintuza ghas-sajd it-Tribunal ikkonkluda li l-appellant stess stqarr li ma jdahhalx dghajjes fiha. Dawn huma wkoll kostatazzjonijiet fattwali, ta' ippjanar u natura teknika li la darba evaluati mit-Tribunal mhux sindakabbli mill-Qorti qua revizjoni tal-apprezzament tal-fatti li fuqhom ibbaza d-decizjoni tieghu t-Tribunal sakemm ma jirrizultax illi t-Tribunal ghamel zball

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fl-enuncjazzjoni ta' fatti li fuqhom serraħ principalment id-decizjoni tieghu, li mhux il-kaz.

Ghalhekk dan l-aggravju qed jigi michud.

Decide

Ghalhekk il-Qorti qed tichad l-appell ta' Emanuel Bonnici u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' Novembru 2011. Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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