



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta tad-9 ta' Ottubru, 2013

Appell Civili Numru. 68/2011

**Amalia Cefai ghan-nom u
in rapprezentanza ta' Gozo Caterers Limited u
Emanuel George Cefai**

vs

Awtorita' Maltija dwar l-Ambjent u l-Ippjanar

Il-Qorti,

Rat ir-rikors tal-appell ta' Gozo Caterers Limited u ta' Emanuel George Cefai tal-15 ta' Dicembru 2011 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' Novembru 2011 wara r-rifjut tal-applikazzjoni PA 1863/05 konsistenti f'amendments to permission PA 2363/93 and alterationa to garages;

Rat ir-risposta tal-Awtorita li ssottomettiet li d-decizjoni tat-Tribunal ghandha tigi konfermata u l-appell michud;

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Rat l-atti kollha u noti ta' sottomissjonijiet u semghet id-difensuri tal-partijiet;

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

Dan huwa appell minn rifjut ta' l-Awtorita ta' l-applikazzjoni PA 1863/05 'Amendments to permission PA2376/93 and alterations to garages', b' decizjoni tad-9 ta' Ottubru, 2007 wara reconsideration.

Ir-ragunijiet li ghalihom l-Awtorita' irrifjutat l-applikazzjoni PA 1863/05 kienu s-segwent:

"1. The proposal runs counter to Circular PA 2/96 which states that "when existing building development on a site is wholly or partly illegal the DCC will not consider a development permit application relating to new development on that site, unless the development is regularised". The illegal development includes the variations from the previous permission.

2. The proposed development is unacceptable since it does not comply with Policy 10.3 of Development Control Policy & Design Guidance 2005. The proposal therefore does not comply with the Temporary Provisions Schemes for the area nor with the conditions that apply to that scheme and so is counter to Structure Plan policies BEN 4 and SET 8 which endorse the Temporary Provisions Schemes.

3. The height of the proposed building exceeds the maximum height limitation for this area of Ghasri. It is therefore incompatible with the characteristics of the area and with the Temporary Provisions Scheme for the area, which seeks to limit height in order to safeguard the general amenity of the area. The proposed development runs counter to Structure Plan Policy SET 8, which requires that the layouts and other provisions of the Schemes will only be reviewed as part of the Local Plans

to be prepared for the areas in which the schemes are located.

4. The proposed development is incompatible with the urban design and environmental characteristics of the area. It would not maintain the visual integrity of the area and so does not comply with Structure Plan policy BEN 2.”

Fl-appell tieghu ppresentat fis-7 ta' Novembru, 2007, l-appellanta, permezz tal-Perit Grech, taghti r-ragunijiet tieghha ghal dan l-appell billi tghid:

“1. The works proposed are at first floor level, and therefore at a level not higher than two floors; within the limits as defined by the approved Gozo and Comino Local Plan, and thus the conclusion reached by the DCC in its decision that the works exceed the building height limitation does not hold.

2. In coming to its decision the DCC took into consideration part or parts of the adjacent properties that are irrelevant to the aforementioned application as will be explained in more detail during the appeal; therefore the DCC decision is based on wrong considerations and should be overturned.

3. Without prejudice to the above and even if the reasoning of the DCC were found to be acceptable, a permit PA 257/03 was still issued to a third party in the same block and circular PA 2/96 was not even mentioned. Notwithstanding the DCC decided to treat the applicant in a 6910/06 the DCC allowed a building height of 8.5m for a site in the same street as this proposal; the spirit of which decision was not followed by the DCC in respect of appellants' proposal; the spirit of which decision was not followed by the DCC in respect of appellants' proposal.

4. Moreover the case officer reasoned that the proposed amendments to the original permit were acceptable.

5. Therefore considering that the proposed amendments are of minor nature, and comply with all MEPA policies and guidelines and that the rest of the works have been already authorized by the Planning Appeals Board in its decision in 9th February 2000 (PA 2376/93), this decision must have been respected by the DCC since it constitutes res judicata and must be followed.”

Fir-risposta tieghu tas-27 ta' Frar, 2008, David Cassar ghall-Awtorita' jaghti r-ragunijiet ghaliex fl-opinjoni ta' l-Awtorita dan l-appell ghandu jigi michud. Is-seguenti huma siltiet minn dan ir-rapport li t-Tribunal jhoss ghandhom jigu ssottolineati:

“SITE

The site is located within the development zone and fronts the Urban Conservation Area of Ghasri – see site plan red 1A. Photos at red 1E show the site and streetscape.

SITE HISTORY

Permission PB2451/82/1064/82 – To erect dwellings – was issued on 22nd July 1982, and covered the construction of one unit at ground floor and one unit at first floor.

Permission PB2453/52/1065/82 – To erect dwellings – was issued on 22nd July 1982, on the site adjacent to the site covered by permission PB2451/82/1064/82 and also covered the construction of one unit at ground floor and one unit at first floor.

Permission PB4328/91/4806/90 – To carry out alterations and additions [consisting of the construction of four garages at the back of the site and addition of 6 washrooms at roof level] – was issued on 6th November 1991. The site covered half the width of the site relative to permission PB2451/82/1064/82 and the entire site relative to permission PB2453/52/1065/82. The drawings submitted with the application showed the ground floor

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split into 3 separate units whilst no details of the first floor level were included.

Permission PA4307/93 – To carry out alterations and additions – renewed permission PB4806/90 on 15th December 1995 [valid until 15th December 1997].

Meanwhile application PA2376/93 – To carry out additions – was originally refused by DCC on 15th December 1995 but a subsequent request for appeal was upheld by the Planning Appeals Board (PAB ref: 39/96 SMS) and permission issued on 15th April 2000. The permission covered the construction of an extension to one of the first floor apartments over the existing garages at the back. The approved section clearly showed that the development fronting Triq Ta' Ghammar comprised of two floors and overlying washrooms. This permission relates directly to the site relative to the current application (PA1863/05).

Application PA6508/96 – To erect three (3) flats at second floor and washrooms – was withdrawn by the Planning Directorate, prior to validation, in view of lack of payment.

Outline Application PA0597/02 – Construction of flats at second floor – was refused by DCC, decision confirmed at reconsideration stage and finally also refused by the Planning Appeals Board on 5th May 2007 (PAB224/2004 ISB).

Permission PA0257/03 – Biex isiru hnejjiet fuq il-faccata – was issued on 17th March 2003 and related to the central part of the site covered by permission PB4328/91/4806/90, relating only to ground and first floor levels, which are shown as one, internally linked, dwelling. This part of the site is indicated as third party property in the current application (PA1863/05).”

“DIRECTORATE'S COMMENTS ON GROUNDS FOR APPEAL

The proposal is not acceptable since illegal development on site is not sought to be sanctioned, and indeed would not be sanctionable.

Proposed alterations

The alterations indicated on the proposed drawings are mainly acceptable, although "Proposed Ground Floor Plan" – red 1C – needs to be amended to tally with "Ground Floor Plan" – red 9A – as regards the link between "bedroom 1" and the rest of the apartment. Nonetheless, the application cannot be considered favourably, in line with the provisions of Circular PA2/96, in view of illegal development on site that is not sought to be sanctioned. During the processing of the application, the applicant and architect were informed of the illegal stairwell and gate, and were requested to effect the necessary amendments, however the architect stated – see red 9 in file PA1863/05 – that the application did not include the staircase at roof level and that the gate would be removed once the apartment is finished. Whilst some illegalities, if applied for, could prima facie be considered, subject to payments of fines/UIF contributions, other illegalities are not sanctionable, as detailed below.

Stairwell at roof level

The original permission on site – PB2453/82/1065/82 – did not provide for a stairwell at roof level – see drawing red 7 in file PB1065/82. The vertical extension to stairwells at roof level was approved in permission PB4328/91/4806/90, however the approved drawings clearly indicated that such stairwells were to be setback by 1.8 metres from the façade of the stairwell at lower levels – see approved drawing PAPB4806/90/1A. A clear section through the building, showing the stairwell, was later approved in permission PA2376/93 – drawing 3J. Photos submitted with the application – see red 1E in file PA1863/05 – clearly show that the stairwell was instead constructed with no setbacks appearing as a part second floor level. The development as existing on site does not conform to the requirements of Policy 10.3 of DC2005 and thus is regarded as a part floor, which exceeds the 2 floors height limitation for the area, set out in Gozo and

Comino Local Plan Map 14.4-C. The development on site thus conflicts with Policy GZ-HTLM-1 of the Local Plan.

Height of party wall

Photo 3 at red 1E in file PA1863/05 clearly shows that the height of the party roof parapet wall, along the rear half of its length has been raised by six courses. Approved drawing PAPB4806/90/1A had been clearly amended by the Planning Area Permits Board such that washrooms would be setback from the side party wall. The increase in the height of this wall also exceeds the height limitation for the area, in conflict with Gozo and Comino Local Plan Policy GZ-HTLM-1. The extent of the wall also gives the impression that the washrooms may have been extended further towards the rear of the site.

Design

The gate at ground floor overlooking the public street – see photos at red 1E in file PA1863/05 – and the stairwell as constructed renders the design of the façade unacceptable and both are not an improvement on the approved design. Any proposed sanctioning of such works would thus conflict with Structure Plan Policy BEN2 and Gozo and Comino Local Plan Policy GZ-URCO-2.

Subdivision/creation of dwelling units

The site as delineated in the current application PA1863/05 comprises the entire width of the site relative to permission PB2453/52/1065/82 and half the width of the site relative to permission PB2451/82/1064/82. Both these permissions covered the construction of a dwelling at ground floor and a dwelling at first floor. Therefore the permitted development on the current site would be that of a dwelling and a half at ground floor level and a dwelling and a half at first floor level. Instead, the site (as delineated in the current application PA1863/05) has clearly been divided into three segments. The Westernmost segment consists of the two apartments whose internal layout is shown in the current application; the central segment consists of a two storey, internally connected dwelling, belonging to third parties; and the Easternmost segment relates to, at least, two separate

units, although the number of letterboxes visible on photo 1 in file PA0257/03 suggest that at least 3 units exist. As aforementioned these changes could prima facie be considered further, subject to Sanitary Laws, Development Control policy, payments of fines/UIF contributions, if such development were applied for.

Circular PA2/98

In his request for appeal, the architect pointed out that in the case of permission PA0257/03, the provisions of Circular PA2/96 were not applied, unlike in the current application PA1863/05. Indeed, the provisions of Circular PA2/96 were not applied in the former case, as the provisions of Circular PA2/98 applied. In case PA0257/03, the applicants were different from the owners of the illegal parts of the block, they had no control over the illegal parts, and allowing the proposed alterations on façade did not prevent enforcement action from being taken. On the other hand, in the current case (PA1863/05) the applicants are the same as all the other applications mentioned in the SITE HISTORY section above (except for PA0257/03). It is understood therefore that the current applicant was involved in the illegal development and has control over it and the provisions of Circular PA2/98 do not apply in this case. The provisions of Circular PA2/96 thus prevail.

Commitments

The issue of allowing extra height on site can only be considered through a separate application for development permission which includes sanctioning of such increase in height. The current application does not seek to sanction such illegal development. Notwithstanding the above, the Planning Appeals Board may wish to note that the Development Control Policy and Design Guidance, 2007, makes provisions for those sites where a change in height limitation has been brought about by the Local Plan for the area. Policy 16.1 sets out that:

“Applications for development which exceed the height limitation for a street may be permitted provided that:

- i) The proposed development is located between two developments, duly covered with permits, whose existing height exceeds the building height for the streetscape
- ii) The distance between the two developments which exceed the height limitation of the street does not exceed 9 metres (although this requirement may be relaxed if MEPA is satisfied that an improved coherent streetscape justifies such a relaxation).
- iii) The height in excess of the maximum height limitation of the street is limited to one floor (or one penthouse level as the case may be). However there might be cases that from an urban design and planning point of view this limit may be exceeded.”

In this case, the site is not located between two developments covered by permission for three floors. Therefore the increase in the permitted height of two floors is not allowable under the provisions of this policy.

DC2007 also sets out, in Part 17, a transitory policy applicable to those applications submitted on or before 3rd August 2006. The first part of (b) therein, states that:

“With the introduction of local plans, the height relaxation policy is no longer applicable. For applications submitted prior to the local plans, however, the height relaxation policy is applicable provided that

- (i) there are commitments in the immediate vicinity and within the same street which have been permitted as three floors on the basis of that policy.
- (ii) the resultant development is compatible with its immediate surroundings and that the additional floor will result in an improved streetscape.”

In the case under consideration, no permits for three storey development were issued in the immediate vicinity and within the same street. Indeed, permission PA6910/06 only allowed a higher-than-normal ground floor, however the approved building still remains a two storey building. Moreover the resultant second floor on the site subject of the current application (PA1863/05), if applied for and allowed, would result in a deteriorated

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streetscape, as can be clearly seen in the submitted photographs. This is particularly the case in view of the site's location within a Design Priority Area, surrounded by an Urban Conservation Area.”

Il-punti li jitqajmu fin-nota tal-Avukat Dr Leslie Cuschieri, ghall-appellanta ppresentata fl-1 ta' Settembru, 2010, li tittratta zewg appelli jigfieri PAB 224/04 u PAB 279/07, huma migburin fil-qosor izjed l-isfel.

Ir-risposti ghall-dawn il-punti fin-nota addizzjonali ta' Mario Scicluna ghall-Awtorita' ippresentata fis-26 ta' Ottubru, 2010, li tittratta zewg appelli jigfieri PAB 224/04 u PAB 279/07, huma migburin fil-qosor izjed l-isfel.

Ikkunsidra:

Il-mertu ta' dan l-appell jirrigwarda talba biex isiru fil-permess PA2376/93 kif ukoll tibdiliet fil-garages. Din l-applikazzjoni hija full development application u mhux application for renewal of permit. Is-sit mertu ta' dan l-appell huwa fiz-zona tal-bini ta' Ghasri u jinsab quddiem il-UCA ta' dan ir-rahel.

L-argumenti, fil-mertu, li tqajmu fid-diversi stadji ta' dan l-appell jistghu jigu elenkati fil-qosor kif gej:

Fl-appell tieghu, l-appellant isostni li:

- It-talba hija biex isir xoghol fil-first floor u ghalhekk il-building height limitation mhux applikabbli f'dan il-kas;
- Id-DCC ikkonsidra partijiet minn propjetajiet adjacenti li ma' jiformawx parti mis-sit in ezami;
- Il-case officer qabel li t-tibdiliet mitluba huma accettabbli;

L-Awtorita irrispondiet li:

- It-tibdil mitlub huwa generalment accettabbli imma peress li hemm zvilupp illegali fis-sit in ezami tapplika il-PA Circular 2/96;
- It-tarag li inbena fil-livell tal-bejt inbena minghajr setbacks u ghalhekk jitqies bhala parti mis-second floor u ghalhekk jikser il-height limitation taz-zona fejn jinsab is-sit in ezami.

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- L-appellant mhux korrett meta jghid li t-tarag fil-livell tal-bejt mhux parti mill-applikazzjoni in ezami;
- L-gholi tal-party roof parapet gie mizjud u ghalhekk jikser il-height limitation taz-zona fejn jinsab is-sit in ezami;
- Il-gate fil-ground floor mhix accettabbli;
- Policy 16.1 u Part 17 of Policy and Design Guidance, 2007 ma' japplikawx f'dan il-kas;

Fin-nota tal-Avukat Dr Leslie Cuschieri ta' l-1 ta' Settembru, 2010, li tittratta zewg appelli jigfieri PAB 224/04 u PAB 279/07:

- Bil-permess PA 2376/93 hemm vested right fuq dan is-sit. Dan anke ghaliex meta l-PAB hareg il-permess dan ghamlu wara li ghamel site visit fis-sit in ezami;
- Jekk l-applikazzjoni PA 597/02 tigi approvata fl-istadju tal-appell din l-applikazzjoni awtomatikament tissanzjona l-illegalitajiet li hemm fuq is-sit;
- L-illegalitajiet li hemm fuq is-sit huma 'minimi';
- L-Awtorita m'ghandiex gurdizzjoni fuq l-illegalitajiet peress li dawn saru qabel is-sena 1992;
- Inghataw numru ta' permessi b'mertu simili ghal dan il-kas;
- Il-punt krucjali f'dan il-kas huwa li l-appellant huwa intitolat ghat-tielet sular in vista tal-fatt li l-Height Relaxation Policy ghada tapplika;
- Is-sit relativ ghall-permess PA 2210/95 jinsab ftit metri boghod mis-sit in ezami u jikkostitwixxi commitment car;
- Fuq l-issue tal-commitments, is-sentenzi tal-Qorti ta' l-Appell jemfasizzaw l-importanza li dawn ghandhom jittihdu in konsiderazzjoni minkejja kull konsiderazzjoni kuntrarja ohra;
- Il-kas in esami jikkonsisti f'renewal ta' permess diga mahrug b'differenzi zaghar mill-permess originali;

Fin-nota addizzjonali ta' Mario Scicluna tas-26 ta' Ottubru, 2010, li tittratta zewg appelli jigfieri PAB 224/04 u PAB 279/07:

- M'hemmx vested right fuq dan is-sit li jirrizulta mill-permess PA 2376/93 kif qed jikkontendi l-appellant. Dan ghaliex il-PAB hareg dan il-permess skond it-talba ta' l-appellant kif kienet tirrizulta mill-files relattivi u mhux skond dak li seta ra meta ghamel is-site visit;

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- Peress li l-applikazzjoni PA 597/02 hija outline application, anki kieku kellha tigi approvata fl-istadju tal-appell din l-applikazzjoni, xorta ma' tissanzjonax l-illegalitajiet li hemm fuq is-sit u dan peress li f' outline permit ma jigux approvati pjanti dettaljati. Fi kwalinque kas l-applikazzjoni PA 597/02 ma' tinkludix talba ghas-sanzjonar ta' l-illegalitajiet li jezistu fuq is-sit;
- Is-siti li jikkorrispondu ghall-PA 1863/05 u PA 597/02 ma' jinkludux talba ghas-sanzjonar ta' l-illegalitajiet li saru.
- L-illegalitajiet m'humix 'minimi';
- L-ezempji ta' permessi li gab l-appellant ma' japplikawx ghal dan il-kas;
- Fuq l-issue tal-commitments, is-sentenzi tal-Qorti ta' l-Appell jemfasizzaw l-importanza li f'kull kas, ic-cirkostanzi partikolari kollha tal-kas ghandhom jigu ikkonsidrati meta tkun qed issir id-decizjoni. Ma' jghidux li l-pjan lokali jew xi pian jew policy ohra ghandu jigi injorat;
- L-ebda wahda miz-zewg applikazzjonijiet, PA 1863/05 u PA 597/02, ma' hija ghal renewal;
- L-Awtorita harget ECF 500/08 fuq l-illegalitajiet, liema enforcement ma' giex appellata mill-appellant juri li l-appellant jaqbel li l-Awtorita' ghandha gurisdizzjoni fuq illegalitajiet li saru qabel is-sena 1992;

Fis-seduta tal-24 ta' Mejju, 2011, l-Avukat Dr Anthony DeGaetano, ivverbalizza li:

- Skond l-Artiklu 69, sub-artiklu 2(i) proviso, commitments ta- gholi li jkun oghla dak fil-pjan lokali ma' jisrux jigi kunsidrat bhala material consideration li l-Awtorita' jew it-Tribunal jikkonsidra fid-decizjoni taghhom.

Ikkonsidra ulterjorment:

Wara li kkonsidra il-premess u minn ezami tal-pjanti, ritratti u dokumenti li hemm fil-files PAB 279/07, PA 1863/05, PAB 224/05 u PA 0597/02 it-Tribunal jikkumenta kif gej:

Il-fatt li Bord ta' l-Appell ghamel access fuq is-sit waqt il-process ta' l-appell PAB 39/96 ma' jfissirx li meta laqa' dan l-appell kien qed awtomatikament jissanzjona l-illegalitajiet li seta kien hemm fuq is-sit. Dan certament

m'ghandu xejn x'jaqsam mar-rwol li ghandu l-PAB fil-process ta' l-ippjanar. It-Tribunal ghalhekk jaqbel ma' l-Awtorita' li meta laqa' dan l-appell il-PAB ma' kien bl-ebda mod qed jissanzjona xi illegalitajiet li seta kien hemm fis-sit in ezami. Il-PAB hareg dan il-permess skond it-talba ta' l-appellant kif kienet tirrizulta mill-files relattivi u mhux skond dak liseta ra meta ghamel is-site visit.

In oltre, hija contradiction in terms li tghid li outline permit jista b'xi mod jissanzjona xi illegalitajiet li jkun hemm fis-sit li fuqu qed tapplika. Dan it-tip ta' permess jintalab meta l-applikant ikun irid jesplora, minghajr ma' jithol f'hafna spejjes, jekk il-proposta li jkollu f'mohhu tkunx accettabbli fil-principju cioe qabel ma' jsir kull tip ta' xoghol fuq il-progett.

Ghal dak li ghandu x'jaqsam l-argument dwar jekk l-applikant hux eliggibli ghat-tielet sular jew le, jigi ssottolinijat li illum il-Gozo and Comino Local Plan (Map M14.4-C) jikkonferma 'two floors' ghas-sit in ezami. L-gholi li qed jippretendi l-appellant ta' tlett sulari hu ghalhekk in kontravvenzjoni tal-height limitation approvata ghal din il-lokalita', u tal-Gozo and Comino Local Plan, Policy HTML-1. Dwar il-Part 17 tal-Policy and Design Guidance, 2007, it-Tribunal jaqbel ma' l-Awtorita' li dan is-sit ma' jikkwalifikax peress li PA 2210/95 mhix fl-'immediate vicinity' izda 'within the same street' u anke ghaliex l-izvilupp propost mhux 'compatible with its immediate surroundings' u il-sular addizzjonali ma' jirrizultax f' 'improved streetscape'. Illum dahal fis-sehh l-proviso tal-Artiklu 69 (2) (i) tal-Kap. 504, li jghid li l-commitment tal-gholi tal-bini fil-vicinanze ma jistax jigi interpretat li jgholli l-height limitation indikat fil-Plan.

It-Tribunal jaqbel ma' l-Awtorita' li f'kull wiehed mill-kazi kkwotati mill-appellant fil-kors tas-smieh ta' dan l-appell issib differenzi mill-kaz in ezami bhal:

- Iz-zmien meta tkun saret l-applikazzjoni peress li f'kull zmien dejjem japplika regime ta' plans and policies specifiku ghal dak iz-zmien;
- Il-lokalita geografika tas-sit;
- Il-kuntest tas-sit;

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- It-talbiet li jkunu saru fl-applikazzjoni; u
- L-istorja f'termini ta' zvilupp tas-sit.

F'wahda mis-sottomissjonijiet tieghu l-appellant issottometta li l-applikazzjoni tieghu ghandha tigi deciza skond il-ligijiet, plans u policies vigenti meta saret l-applikazzjoni.

Il-kwistjoni dwar liema ligi hi applikabbli giet deciza mill-Onorabbli Qrati tal-Appell fil-kawza fl-ismijiet 'Angelo Farrugia vs Awtorita' tal-Ippjanar' deciza fl-24 ta' April 1996; kif ukoll fil-kas fl-ismijiet 'Emanuel Mifsud vs Kummissjoni ghal Kontroll tal-Izvilupp' deciza mill-istess Qorti fil-31 ta' Mejju 1996.

Dawn id-decizjonijiet stabillew l-principju li l-applikazzjonijiet jigu decizi skond il-pjanijiet u l-policies in vigore fiz-zmien li tittiehed id-decizjoni u mhux dawk in vigore meta saret l-applikazzjoni.

In konkluzjoni, kif jidher mill-fatti li hargu fil-kors tas-smiegh ta' dan l-appell, billi jirrizulta li l-applikazzjoni PA 1863/05 ma' tinkludix talba ghas-sanzjonar ta' l-illegalitajiet li jezistu fuq is-sit, din tmur kontra is-Circular 2/96 u ghalhekk l-appell ma jirrizultax fondat u ma jimmeritax kunsiderazzjoni favorevoli.

It-Tribunal, ghalhekk, qieghed jichad dan l-appell u jikkonferma ir-rifjut mahrug mill-Awtorita' ta' l-applikazzjoni PA 1863/05 'Amendments to permission PA2376/93 and alterations to garages', b' decizjoni tad-9 ta' Ottubru, 2007 wara reconsideration.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal illeda d-dritt tal-audi alteram partem billi ma tax l-istess piz lill-argumenti tal-appellant kif ghamel mal-Awtorita;
2. It-Tribunal naqas li jaghti l-istess trattament lill-appellant u applika b'mod retroattiv ligi fis-sens illi commitemnt dwar building height ma japplikax, u ghandu jibqa' japplika l-

principju tal-commitemnt kif kien meta l-kaz kien differit ghad-decizjoni;

3. Id-decizjoni tat-Tribunal mhix korretta jew gusta ghax:

a. L-applikazzjoni kienet ghal estensjoni ta' permess u xogholijiet addizzjonali minuri u ghalhekk it-Tribunal ma setghax jirrevoka l-permess mahrug validament;

b. Kieku applika l-policies kif mitlub mill-appellant f'dak izmien ma kienx ikun hemm bzonn ta' sanzjonar;

c. Il-kwistjoni ta' sanzjonar ta' irregolaritajiet qatt ma giet spjegata sew fid-dawl tal-policies vigenti u cahhad lill-esponenti milli jirribatti l-akkuza. Anki kieku ezistew irregolaritajiet dawn kienu de minimis;

d. Jekk tezisti irregolarita qatt ma gie pruvat lil min jappartjenu l-irregolaritajiet meta tqis li fl-istess blokk hemm terza persuna li applikat u inhargilha permess;

e. Fil-kaz tat-terz ma tqajmitx il-kwistjoni ta' irregolarita;

f. L-irregolaritajiet cioe grada u liftwell setghu ingiebu ghall-attenzjoni tal-applikant fir-reconsideration u mhux ingiebu bhala skuza ghal rifjut;

g. In ogni kaz il-grada u liftwell saru fis-snin tmenin u ghalhekk ma kienux jaqghu fil-gurisdizzjoni tal-MEPA Circular 2/96 ma tapplikax ghalihom u messha intlqghet l-applikazzjoni bhal ma ntlqghet tat-terz;

4. Id-decizjoni tat-Tribunal ma osservatx il-principju tad-dritt vestit;

5. Permessi moghtijin precedentement fl-2000 fuq l-istess sit b'decizjoni tal-istess Bord, jorbtu lit-Tribunal u jikkostitwixxu res judicata.

L-ewwel aggravju

Dan l-aggravju ma fihx mertu. Qari tal-atti u decizjoni tat-Tribunal juri illi l-partijiet inghataw kull opportunita li jressqu l-argumenti taghhom b'mod liberu u miftuh u l-istess verbali quddiem it-Tribunal juru illi l-appellant ripetutament f'diversi seduti talab u inghata l-fakolta li jexamina applikazzjonijiet ohra biex jissostanzja l-pretensjoni tieghu fl-appell u dan minghajr ebda xkiel u b'ghoti ta' terminu ragonevoli biex jivverifika dak li ried.

Id-decizjoni fiha sintesi dettaljata tal-argumentazzjoni kollha tal-partijiet, u t-Tribunal wizen dawn l-argumenti. Il-

fatt wahdu li t-Tribunal attribwixxa aktar sahha lill-certi argumenti tal-Awtorita minn dawk tal-appellant ma jfissirx li nkiser xi dritt kif qed jippretendi l-appellant fit-termini ta' dan l-aggravju cioe l-lezjoni tal-principju tal-audi alteram partem.

Kwindi dan l-aggravju qed jigi michud.

It-tieni aggravju

Dan l-aggravju fih kwistjoni legali interessanti u cioe jekk ghandux l-artikolu 69(2) li gie introdott fl-2011 ghandux japplika bi pregudizzju ghall-appellant billi sa dakinhar, l-gholi tal-binjiet fiz-zona kienet argument li seta' jitqajjem minn applikant bhala kwistjoni ta' sustanza li t-Tribunal kellu obbligu li jqis. Bl-introduzzjoni tal-proviso ghall-artikolu 69(2) dan l-argument li seta' jintuza a favur applikant fl-argumentazzjoni tieghu ghal ezitu favorevoli ghall-applikazzjoni tieghu gie eskluż specifikament bil-ligi.

Il-Qorti kienet tkun propensa li tidhol fil-mertu ta' dan l-aggravju kieku d-decizjoni tat-Tribunal giet ibbazata biss jew principalment fuq il-kwistjoni tal-'commitment' b'referenza ghal height limitations bhala r-raguni li ghalih gie michud l-appell. Pero dan mhux il-kaz.

Hu minnu illi t-Tribunal ikkonsidrah bhala wiehed mill-elementi li jmur kontra l-argumentazzjoni tal-appellant, pero xorta wahda dahal fil-kwistjoni dwar il-permessi mressqa mill-appellant u ta' aditu ghall-argumenti tal-Awtorita mhux tal-appellant. Aktar minn hekk pero, it-Tribunal fil-parti decisiva tieghu ghamilha cara li oltre l-policies u pjan lokali li l-izvilupp kien qed jivvjola, l-applikazzjoni infisha ma kienitx tinkludi talba ghal sanzjonar skond ic-crkulari 2/96, ezistenti meta saret l-applikazzjoni u ghalhekk fi kwalunkwe kaz it-talba ghall-izvilupp ma setghet qatt tigi approvata. Dan kien il-punt kardinali li wassal ghad-decizjoni tat-Tribunal u ghalhekk il-kwistjoni legali tar-retroattivita tal-ligi, ghalkemm interessanti mill-punto di vista legali, hi akkademika ghall-fattispecie ta' dan l-appell u kwindi dan l-aggravju ghandu jigi michud.

It-tielet aggravju

L-appellant isostni illi d-decizjoni mhix gusta fil-konfront tieghu. Strettament dan l-aggravju lanqas jikkostitwixxi punt ta' ligi determinat mit-Tribunal. Madankollu harsa lejn il-punti msemmija mill-appellant f'dan l-aggravju jirrizulta dan li gej.

L-appellant qed jassumi illi fic-cahda ghal hrug tal-permess it-Tribunal kien qed jirrevoka permess mahrug fuq l-istess sit. Dan ma hu minnu xejn. Kull ma ddecieda t-Tribunal hu illi l-applikazzjoni mertu ta' dan l-appell kienet qed tigi michuda ghax irrizultaw nuqqasijiet lejn dak li kellu jigi zviluppat bil-permess PA 2376/93 u dak ezistenti fattwalment meta ntab li jsiru emendi ghall-istess permess u alterazzjonijiet. Il-permess PA 2376/93 ma kienx minsus b'din id-decizjoni.

It-tieni u t-tielet lanjanza hi wahda fis-sens li kieku gew applikati l-policies fi zmien l-applikazzjoni u mhux dawk fiz-zmien tad-decizjoni, l-appellant ma kienx ikollu bzonn jissanzjona xejn. Dan mhux minnu ghax kif gia intqal f'din is-sentenza t-Tribunal ibbaza primarjament id-decizjoni tieghu fuq in-nuqqas li jigu sanzjonati jew jintalbu li jigu sanzjonati illegalitajiet ezistenti mill-permess 2376/93 qabel saret jew flimkien mal-prezentata ta' din l-applikazzjoni. It-Tribunal in oltre applika cirkolari 2/96 ezistenti fiz-zmien tal-applikazzjoni u kienet kwistjoni li giet imqajma mhux mit-Tribunal fid-decizjoni tieghu izda mill-bidu nett fid-decizjoni tal-Awtorita. Il-kwistjoni jekk dawn l-irregolitajiet kienux de minimis hi kwistjoni ta' fatt u mhix sindakabbli mill-Qorti. Ma hemmx bzonn li t-Tribunal jispjega l-kontenut tac-cirkolari biex ikun car ghax il-fatt stess li din il-kwistjoni kienet qamet ab initio, il-partijiet kienu ben konxji tal-portata ta' tali cirkolari.

Ir-raba, hames u sitt ilmenti huma kwistjonijiet ta' fatt li din il-Qorti ma tistax tissindaka u del resto t-Tribunal fid-decizjoni tieghu jidher car li kien fi qbil mal-Awtorita illi fil-fatt kien hemm illegalitajiet li skond il-ligi kellhom jigu sanzjonati qabel issir applikazzjoni ohra. L-istess Awtorita

fis-sottomissjonijiet taghha tirreferi ghal enforcement notice li hareg fuq l-irregolaritajiet ECF 500/08 kontra l-appellant u li l-appellant ma agixxiex kontra din in-notice. Din tindika li kontra dak li qed jissottometti l-appellant f'dan l-istadju, ma taqment ebda kwistjoni ta' nuqqas ta' gurdizzjoni fiz-zmien appozitu u fis-seda idonea ghal tali oggezzjoni.

In kwantu ghal lanjanza illi l-appellant ma nghatax l-istess trattament bhall-applikanti ohra t-Tribunal qabel mal-argumenti tal-Awtorita kontra dan l-argument u sostanzjah. Kien ikun hemm dritt ta' appell kieku l-appellant gie injorat pero t-Tribunal ha konjizzjoni tal-argument tal-partijiet kif riportati fl-istess decizjoni u ghal ragunijiet msemija minnu kkonkluda li dan il-kaz kien fih differenzi li ma jimmeritawx l-istess trattament. Darba li l-kwistjoni tkun giet trattata u motivata din il-Qorti ma ghandhiex tassumi rwol ta' appell mill-gdid fuq il-fatti.

Ghalhekk dan l-aggravju ma jistax jigi milqugh.

Ir-raba aggravju

L-appellant jikkontendi li t-Tribunal ma osservax il-principju li ghandu dritt vestit. Dan l-aggravju ma tantx jiftiehem. Il-permess mahrug lill-appellant PA 2376/93 kien jikkostitwixxi dritt vestit fl-appellant li jizviluppa l-binja tieghu skond il-permess. Dan l-appell ma mess xejn minn dak il-permess. Dan pero ma jfissirx illi jekk il-binja mhix konformi mal-permess, allura qed jigi minsus xi dritt li l-applikant qatt ma jista' jivvanta li ghandu. In oltre kull zvilupp sussegwenti irid isir fil-parametri ta' dak permess originarjament u qabel jigi sanat dak kontravvenzjonali ebda zvilupp sussegwenti ma jista' jigi permess. Ghalhekk il-Qorti ma tifhimx liema dritt vestit gie vjolat lill-appellant.

Jekk l-appellant qed jalludi ghal xi dritt li jinghata permess jizviluppa skond policies ezistenti fiz-zmien tal-applikazzjoni, il-Qorti tirrileva illi applikazzjoni tikkostitwixxi talba jew xewqa u l-applikazzjoni per se ma jikkostitwixxi ebda dritt fl-applikant. Id-dritt vestit jinsorgi meta tittiehed id-decizjoni a bazi tal-ligi, pjanijiet u policies kif ikunu fis-

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sehħ fiz-zmien tad-decizjoni, u hu l-permess li jikkostitwixxi d-dritt.

Għalhekk dan l-aggravju qed jigi michud.

Il-hames aggravju

Ftit hemm x'ingħad fuq dan l-aggravju. It-Tribunal bħal Qrati mhumiex marbutin bil-precedent u ebda precedent ma jikkostitwixxi res judicata jekk ma jissodisfawx l-elementi tar-res judicata, cioe eadem res, eadam personam u eadem causa petendi. F'dan il-kaz l-appelleant ma gab ebda prova li ingħata gudikat fil-konfront tieghu fuq is-sit in kwistjoni hliel il-permess 2376/93 u hu fuq dan il-permess biss li jista' jivvanta dritt. Permessi ohra, simili jew mhux, ma jikkostitwux rabta fil-konfront tat-Tribunal u l-Qorti u sta għat Tribunal wara li jezamina kaz minn iehor biex fic-cirkostanzi partikolari tal-kaz li jkun qed jiddetermina japplika l-pjanijiet u policies ezistenti għal kaz partikolari kif inhu l-obbligu mandatarju tieghu filwaqt li f'din id-determinazzjoni iqis ukoll kwistjonijiet ta' sustanza li jistghu jeffettwaw id-decizjoni purche din ma tmurx kontra l-pjanijiet u policies applikabbli meta dawn ma jhallu ebda diskrezzjoni f'idejn it-Tribunal. F'dan il-kaz l-appellant beda mill-premessa zbaljata li t-Tribunal hassar il-permess li kellu l-appellant u dan hu zbaljat għax il-permess ma intmiss għalkemm jidher li hemm irregolaritajiet f'dak zviluppat ma' dak awtorizzat. Pero din hi kwistjoni regolata mill-ligi stess.

Għalhekk dan l-aggravju ma fihx mertu.

Decide

Il-Qorti għalhekk taqta' u tiddeciedi billi tichad l-appell ta' Gozo Caterers Limited u Emanuel George Cefai u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' Novembru 2011. Bl-ispejjez kontra l-appellanti.

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