



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta ta' l-14 ta' Novembru, 2013

Appell Civili Numru. 91/2012

Henry Cassar f'isem is-socjeta HJC Ventures Ltd

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Henry Cassar nomine tad-29 ta' Mejju 2012 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-10 ta' Mejju 2012 kontra l-ewwel kondizzjoni imposta fil-hrug tal-permess PA 1598/04;

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

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

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra:

A. Il-Kummissjoni għall-Kontroll tal-Ambjent u l-Ippjanar, fl-20 ta' Frar 2011, laqgħet u approvat limitament l-applikazzjoni għall-permess outline development PA 1598/04 "Chateau Wardija, Triq il-Wardija, San Pawl il-Bahar: To consolidate chateau & administration quarters, commenced as approved in PB 4992/70/3464/65 into existing vineyard."

Wahda mill-kundizzjonijiet approvati kienet is-segwent:

"1. This outline permission is only for the lower ground floor and upper ground floor."

B. In-nota tal-Perit Anthony Fenech Vella għall-Appellant nomine, ipprezentata fit-23 ta' Marzu 2011, senjatament il-punti segwenti:

"1. First of all, in discarding the entrenched commitment with this application has in the proposed continuation and completion of a project approved in 1970 with PB 4992/70/3464/65 [...] including the carefully studied height limitation to ensure that the completed 2 floor building would not exceed the existing wall along the street and thus not be visible from there.

2. And secondly, the negative and unfair effect, which MEPA's laid back and unjustified delay in processing this application had on it, in that it has been hit by the revision of related policies or the emanation of the new ones, whereas other applications of a similar nature, which were applied for at the same time and later, avoided and, as a result they were approved with quite different criteria and results. The latest episode in the iter of this application is the time lapse of 5 months simply required to issue this permit from the day it was approved, the 22nd September 2010.

Completion of a dream

We claim that our application should have a stronger claim for approval in its entirety because it purports to

complete a building dreamt of in the 1960s approved by PAPB permit PB 4992/70/3464/65 in 1971, and unfortunately completed to only about 50% as the works had to be discontinued due to circumstantial reasons beyond the developer's control.

This estate formed part of a vaster programme of Marsovin Ltd, [...] although the building was discontinued, essence of project, the planting of the vines was immediately implemented along with the large scale rehabilitation of the of the field and the walls necessary to retain the soil on this sloping terrain [... The] concept behind this investment [is] the Chateau styled building [...] conceived to be an integral part of the project to produce grapes for the production of a top quality sparkling wine [...] using the champeneuse [sic.] method. [... The] whole concept revolving around a champagne type wine can only be twinned with the original concept of a chateau style, building with its 'cantina' and accompanying halls, reception rooms, imposing staircases, etc. As the tourist industry on these islands is also seeking to invest more heavily in the sectors of specialised tourism, including also agro-tourism, the need for what would be normally expected, proportionately related amenity cannot be further argued.

This was also recognised by the Planning Directorate in assessing the parallel application in PA 1416/06, where after quoting from the Architect's report that:

'A chateau in wine production context can be defined as a country, domestic dwelling, a castle or manor house.'

Concludes that:

'What tips the balance the favour of a new classic Baroque chateau in the middle of the rural landscape is the very essence of the project itself, i.e. providing an iconic building that serves both the image of the wine producing function and the tourism attraction function. Since the building itself is of a type which has not been constructed for hundreds of years, it can easily be

deducted that its very construction constitutes an attraction per se'

Certainly not a rural dwelling of the farmhouse typology with its low key profile, as the present limitation purports to achieve.

Application history

The iter of this application began with a pre-submission meeting on the 4th April 2001, which was followed by a Short History and Update of the Present Status of the Estate and the Buildings that included also an Aerial photo of the site where the fields under cultivation and all the buildings and structures on the site were evident. This effectively indicates that, when the application was eventually placed on the 3rd April 2004, MEPA had all the information it normally required for such an application already well in hand.

There is no excuse, therefore, why this application should not have been processed within the time farmers ranging from 6 to 9 months of the others indicated in the table below [...]

PA ref	Site	Description	Validation Date	Permit Date
2505/04	Monte Cristo Winery	Demolish pig farm & construct winery.	20-10-04	23-05-05
1416/06	Monte Cristo Winery	Sanction building and extensions and tourist attraction.	30-03-06	21-12-06
1334/06	Meridiana Winery	Alter and sanction increase 28% floor	03-03-06	16-10-06

		area.		
--	--	-------	--	--

Had these time frames been respected the process of our application, it can, by default, be assumed that the parameters for our decision would have been the same as theirs and the requested overall area of about 800 sq. m of floor space and the height of 2 floors would not have been raised as issues at all.

Our arguments on MEPA's laissez affaire are also clear, even from the situation occurring when the Directorate wrote to us on the 5th May 2004 and asked us to confirm: "whether we wanted to keep this application on hold until the emerging agro-tourism is finalised or whether we wanted to proceed to the DCC with a recommendation"

And we had clearly instructed MEPA in our letter of the 19th May 2004 to follow the latter. MEPA was thus obliged to assess this application on the basis of the only existing Policies at the time, i.e., the 1993 "Farmhouse & Agriculture Buildings" and the 1995 PLP 20 – "Development in ODZ", which are those used in relation to the other applications and, not take on a different route.

It is also relevant that the same approach has also been adopted in the approval of the Meridiana Winery permit PA 4820/90 [...] which indicates that these were not ad hoc policies, but ones which were the norm of the day."

Ma n-nota giet anessa kopja tal-permess precedenti tal-15 ta' Dicembru 1970 kif indikat supra, cjoe' P.4992/70/3464/65.

C. In-nota ta' Mario Scicluna ghall-Awtorita', ipprezentata waqt is-Seduta numru 56, mizmuma fil-21 ta' Lulju 2011, precizament il-punti segwenti:

"3.1 The development under appeal [...] runs counter to ODZ policies of the Approved Document Policy and Design Guidance, Agriculture, Farm Diversification and

Stables, (December 2007) and the PLP 20 (January 1995). [...]

Policies regarding Visual Impact:

The visual impact of the new development, particularly its scale and massing, must be acceptable in the wider landscape setting of the site. If new development would be prominent in attractive or important views and cannot be adequately screened by landscaping, it will not be acceptable.

3.2 It is to be noted that the alleged 'unfair treatment' and 'unnecessary delays', do not result in the Documents in file. Furthermore, alternative remedies in order to rectify this alleged unfair treatment could have been sought at that time by the applicant."

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda kundizzjoni f' outline development permit sabiex binja abbandunata, f' vinja li tinsab il-barra miz-zona tal-zvilupp (ODZ) ta' San Pawl il-Bahar; titkomplu sa tlett sulari u titlesta bhala 'chateau' u 'administration quarters'.

Il-proposta in ezami tkopri floorspace ta' madwar 400 metri kwadri fuq tlett sulari. Diga kien inhareg permess ghall-istess proposta (PB 3464/65), izda x-xoghlijiet kienu waqfu ftit wara li ssaqqaf l-ewwel livell, u l-kostruzzjoni sfiat abbandunata. Sussegwentement giet intavolata din l-applikazzjoni sabiex ikunu jistghu jissoktaw ix-xoghlijiet. Jigi rilevati li l-Kummissjoni laqghet limitament it-talba li saritilha, bil-kundizzjoni li jinbnew biss zewg sulari, cjoe' lower u upper ground floors, bhallikieku is-sular li prezentement huwa nofsu mibni, ikun jista jtkompla izda minghajr ma jizdiedu sulari ulterjuri.

L-aggravji tal-Appellant nomine jistrieħu fuq il-fatt li wara li nhareg il-permess originali fl-1971 u kienu bdew ix-xoghlijiet, għal xi raguni jew oħra kellhom jieqfu. Jirrileva li din il-vinja tagħmel parti mill-azjenda tas-socjeta' Marsovin Ltd, u li t-talba hi li jinbena bħal speci ta' chateau (komplut b' kantina, swali għar-ricivimenti, turgien imponenti, etc.) u

centru amministrattiv minn fejn jista' jibda jigi prodott u servit sparkling wine lokali ta' l-ifjen kwalita' (simili ghal methode champenoise).

Minbarra li jispjega li l-isparkling wine hu sinonimu ma' t-tipologija ta' chateau – u allura l-bzonn li l-produzzjoni (u l-marketing) ta' dan it-tip ta' nbid ghandu jigi abbinat ma' bini mponenti - l-Appellant nomine jirrileva li sahsitra l-Awtorita', meta kienet qeda tivvaluta applikazzjoni simili (PA 1416/06), ikkummentat favur zvilupp ta' bini konsistenti ma' stil li sejjhet 'new classic Baroque', bl-ghan li jservi ta' 'image' ghal produzzjoni ta' l-istess inbid. Ir-rapport kien ikompli jghid li billi binjiet bhal dawn ilhom mijiet ta' snin ma jinbnew, allura anke l-arkitettura per se, kienet ser iservi ta' attrazzjoni.

L-Appellant nomine jirrileva li fil-permess li nhariglu, dan mhux ser ikun aktar possibbli ghaliex binja 'low key profile' mibnijja fuq zewg sulari kif giet imposta, tixbah aktar 'farmhouse typology', milli chateau. In oltre, jargumenta li l-Awtorita' damet hafna tiddelibera sabiex tasal ghal decizjoni, u gja' fl-2004 (meta kienet staqsiet lill-Appellant jekk iridx izomm l-applikazzjoni on hold sakemm jigu ppublikati policies li jirrigwardaw l-agroturizmu, u dan irrisponda fin-negattiv), kien imissha waslet ghal-decizjoni bbazata fuq il-policy PLP 20 li dakinhar kienet l-unika policy in vigore fuq bini fl-ODZ.

L-Awtorita' tirribatti l-argumenti kollha mressqa mill-Appellant u tirrileva li l-proposta in ezami hi predominantement in kunflitt ma' almenu zewg policies, cjo' il-policy 2.8A (4) tal-Policy and Design Guidance, Agriculture, Farm Diversification and Stables, u l-policy 8.2 tal-PLP 20, kif diga' gie rilevat supra.

Il-partijiet ta' dawn iz-zewg policies rilevanti ghal kaz in ezami huma kif gej:

“Policy 2.8A (4)

[...] where the proposal entails the erection of an extension to [...] the operation of the winery [...] the extension shall not exceed 25% of the footprint area (measured externally) of the existing building [...] provided

that the resultant total floorspace (measured externally) of the existing building together with the proposed extension does not exceed 150 square metres (150m²). No extension will be permitted to existing buildings having a total floorspace (measured externally) of 150 square metres or more.”

Kif ukoll;

“Policy 8.2 - Extensions to buildings in rural areas

(iii.) Extensions to existing buildings must not create a total floorspace which exceeds 150 sq. m. (ground floor area of existing building plus extension).

Dan ifisser, li hemm konsistenza netta bejn il-policy PLP 20 (ippublikata fl-1995), u l-Policy and Design Guidance, Agriculture, Farm Diversification and Stables (tal-2007), u ghalhekk, l-aggravju tal-Appellant li l-policy tal-1995 kienet aktar favorevoli ghal-proposta tieghu milli dik tal-2007, hi nfondata ghax it-tnejn ma jippermettux bini fl-ODZ li jaqbez il-150 metru kwadru. F' ic-cirkostanzi ghalhekk, dan l-appell ma jimmeritax li jigi milqugh.

Fir-rigward tad-disinn fejn qed jigi propost chateau jew meno, ma' jkunx opportun li kieku dan it-Tribunal jikkumenta fuq l-adattabilita' ta' stil jew tip ta' bini li jixraq inbid partikolari. Madankollu, ghandu jigi osservat x' tip ta' bini jixraq fil-kampanja lokali; wara kollox ghaliex wiehed mill-aggravji tal-Appellant hu propju minhabba l-fatt li gie kostrett inaqgas sular sabiex izomm a low key profile. Certament, ikun superfluwu li jigi nutat li f' pajjizna la hawn, u wisq anqas qatt ma' nbriet tipologija ta' bini konsistenti ma' chateaux, u f' ic-cirkostanzi ikun wisq aktar xieraq li kwalsiasi struttura li tinbena tkun tirrispekkja l-bini vernakolari u t-tradizzjoni tal-kostruzzjoni Maltija – u mhux xi binja kitsch bla sustanza. Ghal grazzja tal-argument, anke t-terminu paradossali; 'new classic Baroque' hu monk ghax stil li hu ntrinsikament 'klassiku', qatt ma jista jkun 'gdid' fl-istess hin.

Ghalhekk, in vista tal-konsiderazzjonijiet kollha hawn fuq maghmula, u fuq kollox sabiex ikun konformi mal-policies tal-ippjanar vigenti, dan il-Tribunal qed jiddisponi minn dan

L-appell billi jichad l-istess u jikkonferma l-permess għall-PA 1598/04 in toto; bl-istess kundizzjonijiet kif mahruga mill-Kummissjoni għall-Kontroll tal-Ambjent u l-Ippjanar, fl-20 ta' Frar 2011.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. Illi l-Awtorita damet ma ddecidiet l-applikazzjoni u lahqet dahlet il-Policy and Design Guidance, Agriculture, Farm Diversification and Stables 207 li giet applikata a pregudizzju tal-applikant billi l-policies prezistenti cioe dik tal-1983 u l-policy dwar Development Outside Built Up Areas tal-1985 kienu aktar favorevoli u meta l-Awtorita kienet kitbet lil applikant fil-5 ta' Mejju 2004 u staqsitu rridx jkompli bl-iprocessar jew jissospendiha u jistenna li jidhol fi-sehh policies ohra li kienu qed isiru u l-applikant b'risposta tad-19 ta' Mejju 2004 talab lil Awtorita tkompli tipprocessa l-applikazzjoni. In oltre t-Tribunal ddecieda hazin meta qal illi z-zewg policies kienu konsistenti f'dak li hu kobor permess meta fil-fatt hemm distinzjoni netta kif jigi kalkolat il-floorspace;
2. It-Tribunal naqas li jikkonsidra l-element ta' diskriminazzjoni li saret mieghu meta gew approvati applikazzjonijiet simili li dahlu wara din il-kwistjoni.

L-ewwel aggravju

Dan l-aggravju jixraqlu jigi milqugh. It-Tribunal ma fehmx il-principju involut wara l-aggravju li gie maghmul b'mod car fl-appell promotur quddiem it-Tribunal. It-Tribunal kellu jistharreg qabel xejn jekk l-ittri tal-5 ta' Mejju 2004 tal-Awtorita u r-risposta tal-Awtorita tad-19 ta' Mejju 2004 ikkrejx ftehim bejn il-partijiet li rabat lil Awtorita tiddeciedi a bazi tal-policies ezistenti f'dak il-mument u jekk allura id-dewmien fl-iprocessar kienx ta' pregudizzju għall-appellant billi, jekk jinstab li kien hemm ftehim, allura l-Awtorita agixxiet hazin billi damet ma ddecidiet u di piu ddecidiet fuq policies li ma kienux miftehma bejn il-partijiet. Irid jittiehed in konsiderazzjoni mit-Tribunal jekk l-Awtorita tistax skond il-ligi tidhol f'dan it-tip ta' ftehim li

Kopja Informali ta' Sentenza

jeskludi l-applikazzjoni ta' ligijiet li jidhlu fis-sehh qabel ma tkun iddecidiet l-applikazzjoni.

Din kienet il-pern tal-kwistjoni u fuq din l-ewwel decizjoni li jsegwu argumenti u kostatazzjonijiet ohra. Dan kollu gie kompletament injorat mit-Tribunal.

Il-Qorti ma tqis li ghandha hi tidhol fil-portata tal-kontenut tal-ittra biex ma ttellifx lill-partijiet mill-opportunita li jiddibattu kif imiss il-punt u jkollhom l-opportunita ghad-doppio esame. Ghalhekk dan l-aggravju qed jigi milqugh, b'dan li qed tastjeni milli tidhol fil-mertu tad-distinzjoni bejn il-kobor permess fiz-zewg policies imsemmija mit-Tribunal billi din hi kwistjoni sussidjarja ghal dak li jrid jiddeciedi l-ewwel it-Tribunal.

It-tieni aggravju

Dan l-aggravju ma jistax jintlaqa' ghax kwistjonijiet ta' diskriminazzjoni mhumiex punti ta' ligi izda kwistjonijiet ta' abbuz amministrattiv li ghandhom jingiebu fil-forum pertinenti.

Ghalhekk dan l-aggravju qed jigi michud.

Decide

Ghalhekk in linea ma' dak fuq deciz, il-Qorti qed tilqa' l-appell ta' Henry Cassar f'isem is-socjeta HJC Ventures Ltd, tirrevoka u thassar id-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-10 ta' Mejju 2012, u tirmetti l-atti quddiem it-Tribunal biex jerga' jiddeciedi l-appell mill-gdid. Bl-ispejjez ghall-Awtorita.

< Sentenza Finali >

-----TMIEM-----