



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta ta' l-14 ta' Novembru, 2013

Appell Civili Numru. 86/2012

Anton Camilleri

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Anton Camilleri tat-28 ta' Mejju 2012 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-10 ta' Mejju 2012 rigward PA 2693/02;

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

Rat l-atti kollha, in-nota ta' sottomissjonijiet tal-appellant u semghet lid-difensuri tal-partijiet;

Rat id-decizjoni tat-Tribunal li tghid hekk:

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Ikkunsidra:

B'applikazzjoni tad-9 ta' Mejju 2002 – Full Development Permission / 01 – PA 02693/02 fejn l-appellant, f' Grounds at Villa Preziosi, Triq Bugibba, San Pawl il-Bahar, talab:

“Amended development permission to construct apartments, private and public car parking spaces. Rehabilitation of Villa Preziosi.”

Illi l-Awtorita' laqghet it-talba għall-hrug tal-permess kif mitlub prevja l-ottemporanza ma' numru ta' kundizzjonijiet fosthom s-segwent:

“15. Prior to the issue of development permission, the applicant shall pay the sum of Lm50,000 (fifty thousand Malta Liri) to the Malta Environment and Planning Authority in lieu of the non-provision of 50 CPPS car-parking spaces on site.

16. Prior to the issue of development permission, the applicant shall deposit the sum of Lm49,000 (forty nine thousand Malta Liri) to the Malta Environment and Planning Authority. These funds shall be used by MEPA in conjunction with the Local Council or any other governmental or non-governmental organization to provide environmental improvements for the area.”

Illi l-Professur Ian Refalo pprezenta l-aggravji tal-appellant kif gej:

“I am instructed by Mr. Anton Camilleri to state the reasons for his appeal from the above permit. My client has accepted the issue of the permit and is solely appealing from the conditions at clauses 15 and 16 of the said permit. The reasons for his appeal are that the said conditions were imposed without due and legal authority by the Malta Environment and Planning Authority. Moreover not only is there not authority in law to impose such conditions but the amount was arrived at in a wholly arbitrary fashion. It is a principle of law that no tax or penalty may be imposed except under authority of law

and with due process. The arbitrary manner in which the figures were arrived at belise the existence of any such authority.

Moreover the amounts fixed were excessive considering the facts in question. This is a subsidiary reason for appeal. If the matter really centered round the provision of Commuted Car Parking Spaces then he should at most have been charged the normally charge on individuals failing to provide garage space. In the present case my client had not only sufficient garage space to satisfy the requirements of the authority but garage spaced in excess. If the authority was not and did not want to avail itself of the extra garage spaces this was no reason for penalizing the developer. If the argument on the other hand is that the developer failed to apply with the permit conditions then the argument fails because it was generally accepted during the discussion that such failure was not due to any fault on his part but to unforeseeable conditions cropping up in the course of the development and amounting to force majeure. In the circumstances therefore no penalty was rightly imposable on him.

These reasons are being brought forward without any prejudice to the generality of my client's appeal and to the bringing forward of further arguments to sustain his appeal.”

Illi l-Perit Alex Bezzina ressaq appell fejn stqarr illi il-kundizzjonijiet 15 u 16 gravanti l-permess numru PA 2693/02 huma kontestati.

Illi permezz ta' risposta, l-Awtorita' wiegbet inter alia kif gej:

“Preliminarjament l-appell hu null stante li l-istess applikant kien gie notifikat fis-16 ta' Mejju, 2003 bid-decizjoni biex ihallas ic-CPPS, multa u planning gain, u l-istess fil-fatt hallashom;

Il-permess li nhareg, bil-kundizzjonijiet 15 u 16 (li qabel ma jinhareg il-permess irid jithallas ic-CPPS w il-planning

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gain) kienu biss deskrittivi ghax diga' mhallisa w l-istess ma setghux jappellaw issa minnhom ghax naqsu fis-16 ta' Mejju li jaghmlu hekk (l-appell tal-19/06/03 hu wkoll ghalhekk fuori termine);

Illi minghajr pregudizzju ghas-suespost, l-istess CPPS hu regolat bil-ligi kif ukoll l-istess planning gain w intra vires il-poteri ta' l-Awtorita';

Stante li l-appell sar ukoll fuq ragunijiet ohrajn li se jingiebu iktar 'il quddiem, l-Awtorita' tiriserva se mai li tirispondi ghalihom f'dak l-istadju;

Ghaldaqstant l-appell ghandu jigi michud bl-ispejjez kontra l-appellant.”

Illi permezz ta' nota l-Awtorita' rrilevat kif gej:

“Li biha taghmel referenza ghad-decizjoni tal-Qorti ta' l-Appell Wayne Chetcuti ghan-nom tas-socjeta' Leisure Holdings Ltd. vs il-Kummissjoni ghall-Kontroll ta' l-Izvilupp li ssemmiet fis-seduta tat-22 ta' Ottubru, 2004. Il-Qorti ta' l-Appell kien ta zewg decizjonijiet fuq dan l-appell tal-Bord, izda d-decizjoni li kkonfermat li wiehed ma setax jappella wara l-hrug tal-permess mill-hlas meta kien hu stess qabel li accettahom, anzi accettahom bla pregudizzju, kienet mhux l-4 ta' Gunju, 2002 kif tnizzel fil-verbal izda s-6 ta' Ottubru, 2000.

Kopja ta' din in-nota qed tintbaghat ukoll lill-avukat ta' l-appellant.”

Illi l-Perit Alexander Bezzina ressaq kummenti responsivi inter alia kif gej:

“Reference is made to the Appeal in caption. The following are the reasons which substantiate this appeal that was submitted in connection with permit PA 2693/02.

The permit under consideration was issued against a payment which amounted to one hundred thousand maltese liri (Lm100,000) (vide copy of letter dated 20th

May 2003). This payment was affected by the applicant under protest. According to MEPA this amount was apportioned as follows: (vide MEPA letter dated 9th May 2003, a copy of which is being attached).

- Lm50,000 in lieu of fifty CPPS car parking spaces,
- Lm49,000 as Planning Gain,
- Lm1,000 as a Fine

The payment for the indicated amount of Lm100,000 was presumably imposed by MEPA to comply with the proposed conditions 15 and 16 of the DPA report. It is amply clear that the amounts imposed have been decided upon arbitrarily and without justification.

For example a Lm50,000 has been imposed "in lieu of 50 CPPS car parking spaces". Normally such a contribution is imposed to cater for the shortfall of car parking spaces which are to be provided within the site of the development. It is pertinent to point out that the number of apartments forming part of the development amount to 51. For such a development an on-site provision of two car spaces per apartment - i.e. a total of 102 car spaces - is normally required.

The project incorporates 194 car spaces in total which implies that there is an over provision of 92 car spaces. The argument which MEPA might have used to impose such a contribution towards the CPPS, is that the site in question was earmarked as a CPPS Zone.

As indicated in our response to the DPA report, the final objective of the CPPS is to provide parking spaces to reduce the on-street car parking. The project as approved is still fulfilling this objective, since as indicated earlier the development has an over provision of 92 car spaces (which is substantially more than the 50 car spaces for which payment was solicited).

In addition may we point out that the site was earmarked by MEPA as a CPPS Zone in October 1998 well after the date of submission of the original application which was

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5th February 1997. The latter information regarding this zoning was communicated to Architects via circular PA 1/99 (copy of which is being enclosed).

Such zoning, was decided upon without consulting the applicant/owner of the property. Naturally establishing zones for CPPS in this fashion is not justifiable and may lead - such as the case in question - to the abusive imposition of illegitimate fines.

In the same circular the levy per commuted parking space was established, with that for St Paul's Bay being Lm500 per space. Even here, in establishing the amount for the claimed CPPS, MEPA chose to ignore its own directive by opting to charge Lm1,000 per car space, for the claimed shortfall, instead of Lm500.

The above goes to show that there are no valid reasons for imposing any amount whatsoever in connection with the CPPS and that the decision by MEPA to impose the payment for the amount of Lm50,000 is unfounded.

The imposed payment of Lm49,000 towards planning gain is also considered to be exorbitant. Here again the amount appears to have been chosen arbitrarily and is not based on any rationale. In addition no reasons have been submitted for the application of Lm 1,000 "as a fine".

In view of the above may we kindly request the Planning Appeals Board to consider reimbursing the global amount by Lm50,000 since the CPPS does not feature in the planning application/permit and to consider reducing the amount of what is being turned as "planning gain" to a more reasonable figure."

Illi permezz tar-rapport taghha l-Awtorita' ikkummentat inter alia kif gej:

"1. Introduction

This note is being presented following the receipt of the appellant's submissions dated is" March 2009. This note

shall enter into the merits of this appeal, although this is being done without prejudice to MEPA's preliminary plea already presented for this appeal in the note of 1 st July 2003.

2. Approved Development & Appeal Against Conditions

This appeal has been presented against Conditions 15 & 16 issued with permit PA 2693/02. This development permission approved amendments to a previous permit PA 0624197. which was issued for the construction of 50 apartments, 3 commercial units. private and public car parking spaces, and the rehabilitation of a scheduled Level 2 Building (Villa Preziosi).

The amendments to the original permit, mainly consist of:

1. the reduction in size of the footprint of the building and the increase in height of the building by four floors;
2. the introduction of a landscaped area at the back of the site, adjacent to Triq il-Konverzjoni;
3. the change of one basement level from public car parking spaces to private car garages; and
4. the removal of four commercial units at semi basement level.

A comparison of the approved uses with the resultant uses proposed through these amendments is as follows:

Uses	PA 0624/97	PA 2693/02
Car Parking	Total 187 parking spaces, consisting of: <ul style="list-style-type: none">• 61 public spaces;• 126 private residential spaces	194 lock-up garages for private use;
Residential Units	50 residential units	51 residential units

Commercial Units	3 commercial units	-
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As can be noted, the main difference between the original permit and this amended application is the complete removal of public parking spaces. In the original permit a number of public spaces were approved as part of St. Paul's Bay CPPS, however in the amended application these have all been removed and converted into private lock-up garages.

As a consequence of these amendments, development permission was issued, with conditions, including (and which are being contested by the appellant):

Condition 15

Prior to the issue of development permission, the applicant shall pay the sum of Lm50,000 (fifty thousand Malta Liri) to the Malta Environment and Planning Authority in lieu of the non-provision of 50 CPPS car-parking spaces on site.

Condition 16

Prior to the issue of development permission, the applicant shall deposit the sum of Lm49,000 (forty nine thousand Malta Liri) to the Malta Environment and planning Authority. These funds shall be used by MEPA in conjunction with the Local Councilor any other governmental or non-governmental organization to provide environmental improvements for the area.

The appellant is contesting these conditions and claims that there is no justification for MEPA to require the Lm50,000 towards CPPS, and that the planning gain of Lm49,000 is excessive. In his submissions of 16th March 2009, the appellant further states that the fine of Lm1,000 is also not justified. The appellant concludes that MEPA has lacked to provide adequate justification in their decision for requesting such an amount, and claims that a total global amount of Lm50,000 would have been more appropriate.

3. Reply on Merits of Appeal

In the original permit PA 0624/97, a development which exceeded the height limitation was permitted. Two extra receded floors were permitted by MEPA, however the approval of this was justified on the following:

- i. a smaller site area was built to respect the existing building alignment of the adjacent building and enhance the urban context of the Grade 2 listed Villa Preziosi;
- ii. a buffer zone of 17 feet surrounding the Villa was maintained and made accessible to the public;
- iii. the applicant would conserve and rehabilitate Villa Preziosi;
- iv. one of the car parking areas was to be made available for the public as part of the CPPS scheme for St. Paul's Bay.

It is to be pointed out that although the Villa Preziosi building was rehabilitated and conserved at the applicant's expense, the Villa is the property of the applicant and has been approved for use of commercial purposes. Therefore, the restrictions imposed by the Authority on Villa Preziosi did not limit the applicant from using or obtaining financial gains from this Grade 2 Listed Building.

In addition, the site was also designated by MEPA for the provision of a public car park in the CPPS scheme adopted for St. Paul's Bay. Yet the Authority allowed the applicant to integrate both a public car park and residential and commercial development on this same site in PA 0624/07. The authority even conceded to allowing an extended building height which exceeded the height limitation, on the grounds that this project was offering several benefits and gains to the community through public car parking provision and the restoration of the Villa. The DPAR in PA 0624/07 indicates that these issues were agreed upon by the applicant and the Authority, and hence it is incorrect for the appellant to claim that they were not consulted on the designation of their site as a CPPS parking area. This is even more so valid when considering that the appellant did not request a reconsideration or

appeal against the CPPS designation or the permit issued in PA 0624/97.

The appellant had bound himself to provide for CPPS parking in accordance with the site's zoning designation, and instead constructed private car garages which increased the applicant's revenue from this site. The latter was made at the cost of not providing any parking for the community. The CPPS and Planning Gain requested by MEPA did not concern car parking requirements in terms of the uses approved on this particular site, but to compensate for the lack of community gain that the developer failed to provide in this project.

The Authority is legally entitled to imply such conditions under Section 40 of the Development Planning Act, especially when considering that the applicant has sought to benefit from his advantageous development permit while lacking to respect his obligation towards the local community.

4. Conclusion

On the grounds of the arguments presented in section 3, MEPA considers that the imposition of Conditions 15 & 16 have been justly and appropriately imposed as requisites of development permission.

Notwithstanding this, MEPA re-iterates that this submission is being presented without prejudice to its preliminary plea of 1st July 2003.”

Illi permezz ta' nota ta' sottomissjonijiet il-Professur Ian Refalo rrileva kif gej:

“Illi l-ewwel pregjudizjali mqajjma mill-appellat hija li l-appell huwa null. Fin-nota tieghu l-appellat jghid li l-kondizzjonijiet numri 15 u 16 kienu biss deskrittivi ghalix l-ammont in kwistjoni kien diga thallas. Dan certament mhux korrett. Il-fatt li l-awtorita inistiet li l-hlas jsir qabel ma jinhareg il-permess huwa mhux sinjifikanti biex tigi argumentata in-nullita tal-appell anzi huwa sinjifikanti

favur il-validita tal-appell. Id-dritt tal-appell huwa moghti lill-applikant ghall-permess mill-ligi u huwa dritt sija mill-hrug tal-permess jew nuqqas ta' hrug minnhu sija ukoll minn kull kondizzjoni imposta fl-istess permess. It-terminu ghall-dak l-appell jibda jghaddi mid-data tan-notifika tal-permess lill-applikant u ghallhekk la darba l-appellant osserva dawk it-termini l-argument li l-appell tieghu huwa null jew barra it-terminu huwa bla bazi fil-ligi. Inltre l-appellant josserva li l-argument li l-kondizzjoni kienet biss deskrittiva ghaliex il-hlas kien gia sar hija bla bazi fil-ligi. Kieku dan kien minnhu l-hlas kien jkun sar minnghajr gusta kawza u l-ammont kien korrettement irid jigi rifus lill-applikant. L-unika raguni legali li taghti dritt ghar-ricezzjoni tal-flus mill-awtorita hija l-kondizzjoni fil-permess. Minnghjar dik il-kondizzjoni fil-permess dak il-pagament jkun null u rifondibili ghaliex minnghajr gusta kawza. Naturalment l-awtorita ma hijiex awtorizzata tircevi flus jew tesigi l-hlas ta' flus minnghajr gusta kawza. L-unika gusta kawza ghall-hlas maghmul hija d-dhul tal-kondizzjoni fil-permess; minnghajr dik il-kondizzjoni il-pagament kien ikun null. Ghallhekk huwa car li l-kondizzjoni ma hijiex wahda deskrittiva imma hija kondizzjoni ta' permess mill-liema appell jista jsir. L-argument tal-appellat li kieku ma sarx il-pagament ma kienx jinhareg il-permess u li allura la darba l-appellant ghamel il-pagament gie irrevokabilment accetta il-kondizzjoni u irrinunzja ghall-effett taghha. Huwa car fil-ligi li d-dritt ta' appell jitwieled man-notifika tal-permess bil-kondizzjonijiet tieghu jew tar-rifjut lill-applikant. Ghallhekk l-appell seta biss jsir minn permess mahrug. Huwa abbondantement car li l-awtorita hadet il-posizzjoni li ma tefetwax din in-notifika jekk qabel il-pagament ma jsirx u l-esponent ghamel il-pagament u fl-istess nifs irriserva d-dritt tieghu biex jappella mill-kondizzjoni jekk tigi imposta fil-permess lillhu mahrug. Ghallhekk il-pagament ma jistax jigi mifhum bhala li jwassal ghar-rinunzja tad-dritt ta' appell; ir-rinunzja huma ta' stretto diritto u ma jistax jinqraw fejn l-azzjoni ta' minn jkun qieghed jigi allegat li ghamel dik ir-rinunzja testwalment u espressament jirriserva dak id-dritt ta' appell. L-awtorita ma setghetx b' l-agir taghha stess tipprovoka sitwazzjoni fejn l-applikant jkollu jirrinunzja ghad-dritt moghti lillhu mill-ligi li jappella billi dan

huwa dritt li jitwieled mill-ligi u mhux koncessjoni tal-awtorita. Kieku l-awtorita harget il-permess bil-kondizzjoni minnghajr ma nsistiet li qabel kien isir il-hlas l-applikant kien jappella minn dak il-permess qabel ma jaghmel il-hlas. Kienet biss l-insistenza ingustifikata tal-awtorita li jsir il-pagament qabel ma jinhareg il-permess li pprovoka is-sitwazzjoni presenti. Ghallhekk l-appell huwa wiehed validu. F' l-istess sens kienet id-decizjoni fil-kaz Paul Camilleri vs Awtorita ta' Malta dwar l-Ambjent u l-Ippjannar moghtija minn dan il-Bord fls-26 ta' Ottubru, 2007 li rritjenit li l-hlas ma jnehix u ma jivvanifikax id-dritt ta' appell tal-applikant.

L-appellant jaghmel ukoll riferenza ghall-osservazzjonijiet fuq il-meritu u b'zieda ma dak gia sottomess mill-periti tieghu fin-noti taghhom jzid is-segwenti. L-argument li isib il-gustifikazzjoni fil-fatt li Villa Preziosi baqghet tieghu u li CPPS scheme ma sarx ma jincidux fuq u ma jiggustifikawx l-imposizzjoni tal-kondizzjoni. L-awtorita donnha tippretendi li lis-skema ta' ipparkjar pubbliku kellha tinghata ghav-vantagg tal-kunsill minnghajr hlas. Dan certament mhux il-kaz ghaliex ghallkemm l-awtorita ghandha dritt timponi kondizzjonijiet dwar svilupp ma ghandha l-ebda dritt li permezz ta' dawk il-kondizzjonijiet twassal ghall-espropriu ta' proprjeta li hija privata. Jekk l-awtorita xtaqet li parkegg jigi riservat ghall-pubbliku, haga li l-applikant kien kuntent li jaghmel, dan naturalment kellu jsir kontra pagament ghaliex il-proprjeta tibqa dejjem ta' l-applikant. Kien il-kunsill lokali stess li ddecida li jopponi sistema ta' CPPS f'din il-lokalita. L-istess ragunament japplika ghat-tizzin u rijabilitazzjoni ta' Villa Preziosi; ghallkemm il-proprjeta tibqa privata il-pubbliku jibbenefika mill-fatt innifsu li tkun saret dik ir-rijabilitazzjoni u mhux gustifikazzjoni li r-rijabilitazzjoni tkun saret ta' proprejeta privata li allura tigi gustifikata li tigi imposta hlas ta' somma. Dan daqs li kieku tghid li timponi multa talli l-applikant irranga kif suppost il-proprjeta tieghu, li huwa kuncett certament insostenibbili.

L-awtorita setghet timponi hlas fil-parametri ta' linji gwida cari li hija kellha ghaliex had ma jista jimponi hlas minnghajr is-sanzjoni parlamentari u li tkun tirrizulta minn

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ligi specifika li timponi dak il-pagament. L-awtorita ma kienitx f'posizzjoni tiggustifika din il-kondizzjoni ta' pagament u ghallhekk huwa car li l-kondizzjoni hija eccessiva u irregolari. D-dritt li wiehed jaghmel svilup jittiveled mid-dritt ta' proprjeta u mhuwiex koncessjoni tal-awtorita: il-funzjoni tal-awtorita mhux li tgbigh il-permessi imma li tassigura svilup razzjonali fir-rispett tad-drittiejjiet ta' proprjeta tal-applikanti.

Tant l-esponent xtaq jissottometti ghas-savju gudizzju ta' dan l-Onotrabbli Bord.

Illi responsivament, l-Awtorita' ghamlet Second Statement fejn tghid, inter alia, s-segwenti:

“The elimination of Commuted Parking Payment Scheme

Permit PA 624197 included the construction of a public car park having 61 parking spaces. One of the main conditions obliged the developers to enter into a legal agreement with MEPA within a year of issue of permit for the operation of the CPPS car park.

The Planning Directorate, having considered the findings of the report, has formulated the following opinion.

a) The construction of the fin walls, which are to all effects a departure from the approved plans, was a necessary measure brought about by the expedient need to stabilize the exposed rock face, in the most cost effective method.

b) As a consequence of this, the internal layout of the car-parking level, previously designated as a CPPS car-park for a minimum of 50 cps, has changed to the extent that this can no longer function as a public car-parking space. This is primarily due to the fact that the fin-walls restrict maneuverability, impair visibility, and the space is therefore unable to provide the required levels of safety and operational viability of a public car parking area as outline in current approved Design Guidelines.

c) A second, and more serious consequence, of the adopted construction methodology, is that the CPPS strategy for St. Paul's Bay has been compromised to the extent of the loss of 50 public cps. Granted the fact that this is a privately owned site, and that it was designated for the provision of the facility by MEPA, one must however consider the negotiation process which resulted in both the designation of the site for a CPPS car-park, and the approval of the original permit.

The existing permit concedes a building that is effectively 2 floors higher than the planned height limitation for the area. In addition to this. The approved development included more than double the required amount of CPPS for the residential aspect of the development. This would normally be considered as overdevelopment of the site. Both concessions were made in the light of the fact that:

- i) the development was lending itself to the satisfaction of a wider traffic management strategy that would serve the St. Paul's Bay area
- ii) the proposed re-alignment of the building line. which now coincides with the neighbouring buildings. was reflecting a better standard of urban design

It is therefore clear that the provision of a CPPS car-park on this site was linked to other planning considerations. in a comprehensive deal which was deemed acceptable by both parties.

d) The CPPS scheme for St. Paul's Bay has therefore suffered a set-back for which remedial action will not be an easy task. It must also be mentioned that this is the first time that the MEPA has endeavored to establish a CPPS car-park on a privately owned site, and that the failure of the scheme, albeit a consequence of structural deficiencies, will inevitably put a damper on future attempts at this sort of agreement.

Another factor that can be taken into consideration is that the level originally designed as an open-plan public car-

park, has now been constructed as 37 single-car garages and 12 double-car garages. all of which can be sold on the open market.

Having established the fact that the provision of the CPPS car-park is no longer a viable and feasible option on this site, the Planning Directorate is requesting a compensatory settlement in the form of a financial contribution sufficient to provide the required 50 public car parking spaces on other sites.

The Planning Directorate has estimated the cost of the construction of one public car parking space on any given site at LM 2,500. Given that the CPPS scheme already provides for a contribution of LM 500 for each cps not provided on site for any given development. the balance of LM2,000 for each CPPS car-parking space not provided on this site, shall be paid by the developer.

Notwithstanding the fact that a total of 61 public cps were approved on this site as part of the original permit, the CPPS scheme had planned for a minimum of 50 cps. It therefore follows that the developer shall pay the amount of LM100,000 as compensation for the loss of the CPPS car-park.“

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The recommended payment of Lm 100,000 in lieu of the CPPS car-park is considered to be an adequate solution to disengage both the Authority and the developer from previous commitments which can no longer be satisfied.“

“C) Reference is also made to the Authority's technical reply dated 15th October 2009 (Blue 73) and which forwarded further technical information I explanation to inform the Board the rationale of justification for Condition 15 and Condition 16 - ie. the two conditions under appeal.

As regards to paragraph 2 of this appeal, the issue of ownership of the structure of the approved car park area is not disputed but if the use of such a space was initially intended for public use as part of a negotiation process

between appellant and the Authority and changed to one of private use (ie could be sold to third parties as individual car parking garages), then such a loss from the public amenity (through the use of a public car park) cannot be achieved without proper financial compensation for the benefit of the public (to be noted that the San Pawl Local Council had requested that the funds are to be invested in projects within the locality - Letter dated 24th March 2004 - Blue 43) but the Authority had replied that since there is an appeal against the funds pending, the Authority is not in a position to commit these funds (letter dated 23rd June 2004 - Red 56).“

D) “The Authority also disagrees with the last paragraph of the latest submissions since the Authority did not impose condition 15 and 16 in an unjustified manner since these were imposed only after appellant requested an amended application (ie the one under appeal) in which appellant requested the change of use of an approved public car park into a space which was built as a private garage due to structural problems during excavations. Hence, in view that this space had justified a departure from the 'normal' development of a block of flats of 4 floors as per Local Plan but was a complex Major Project which, since it included this large public car park, was permitted to be developed beyond the normal massing in normal circumstances. The Tribunal is invited to analyse the whole file to understand the Directorate and the MEPA Board considerations which led to the acceptance by the Authority of the removal of the large public car park which was not constructed as originally agreed upon by both parties due to structural difficulties which were encountered during excavations of the basement level.“

E) “Conclusion. If this appeal was to be accepted as being requested by appellant, ie the removal of the already paid planning gain and CPPS payment, then, the end result would be a development which was granted special concessions on the bases that the community would benefit from a public car park but, which is now not

available as originally planned and approved, and in addition, no compensation whatsoever for this lack of public provision and the public interest would be defeated in: a) a massing which would not have been permitted and b) no public car park for this area and c) no financial contribution for the lack of the agreed public car park which could be used for the benefit of this particular community.

In view of the above arguments the Authority states that the decision as taken by the DCC was taken in conformity with the relative policies and hence, respectfully requests the Environment and Planning Review Tribunal to confirm the decision as issued by the DCC with all the included conditions, whereby an approval for development permission was issued (with all conditions). The Authority reserves the right to forward further submissions during the appeals process as necessary.”

Ikkunsidra ulterjorment:

Wara li kkonsidra il-premess u minn ezami tad-dokumenti fil-files PAB 154/03 u PA 2693/02, it-Tribunal jikkumenta kif gej.

Il-mertu ta' dan l-Appell jirrigwarda talba biex il-kundizzjonijiet 15 u 16 tal-permess PA 2693/02 fejn l-applikant gie ordnat ihallas l-ammont ta' Lm50,000 in vista tan-nuqqas ta' hamsin (50) spazju ta' parkegg CPPS u Lm49,000 sabiex tintuza mill-Awtorita' mal-Kunsill Lokali ghal miljoramenti ambjentali qabel ma' jinhareg il-permess, jigu rikunsidrati.

Il-permess in kwistjoni jikkonsisti f' numru ta' tibdiliet mill-permess originali PA 0624/97 li kien hareg ghal bini ta' 50 appartament, tliet units kummercjali, parking publiku u privat u ir-riabilitazzjoni ta' Villa Preziosi.

Il-kundizzjonijiet in ezami huma s-segwenti:

“15. Prior to the issue of development permission, the applicant shall pay the sum of Lm50,000 (fifty thousand

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Malta Liri) to the Malta Environment and Planning Authority in lieu of the non-provision of 50 CPPS car-parking spaces on site.

16. Prior to the issue of development permission, the applicant shall deposit the sum of Lm49,000 (forty nine thousand Malta Liri) to the Malta Environment and Planning Authority. These funds shall be used by MEPA in conjunction with the Local Council or any other governmental or non-governmental organization to provide environmental improvements for the area.”

L-argumenti li tqajmu mill-partijiet fil-kors tas-smiegh ta' dan l-appell jistghu jigu migburin fil-qosor kif gej.

Fl-appell tieghu, l-appellant jghid li l-ammonti mitluba mill-Awtorita' huma eccessivi u li gew komputati minghajr l-awtorita' necessarja u b'mod kompletament arbitrarju.

L-appellant izid li l-progett kellu bizzejjed car parking spaces u fil-fatt kellu z-zejjed. Jekk l-Awtorita' ma' riditx tuza dawn l-ispazji din ma' kienitx raguni biex tippenalizza lill-izviluppatur.

Skond l-appellant il-progett:

- Kien ser jipprovdi surplus ta' parkegg fil-parametri tal-permess u ghalhekk is-CPPS ma' tapplikax f' dan il-kas;
- Is-surplus huwa ta' 92 car spaces u ghalhekk izjed mill-50 li qed titlob l-Awtorita';
- Is-sit gie immarkat mill-MEPA bhala CPPS Zone wara li kienet saret l-ewwel applikazzjoni ghal dan il-progett u dan iz-zoning kien sar minghajr ma' gie ikkonsultat is-sid ta' l-art in kwistjoni;
- L-Awtorita' imponiet varjazzjoni fil-valur stabbilit ghall-parkegg skond l-iskema tas-CPPS;
- L-ammont tal-planning gain ta' Lm49,000 kien ezorbitanti; u
- Il-multa ta' Lm1000 ma gietx spjegata.

Jekk l-Awtorita' qed targumenta li l-appellant ma' osservax il-kondizzjonijiet tal-permess originali, dan sar minhabba force majeure u mhux ghax kien hemm xi nuqqas minn

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naha ta' l-izviluppatur. Ghalhekk ma' ghandiex tigi applikata penali.

L-appellant irrileva ulterjorment illi kien il-kunsill lokali stess li ddecida li jimponi sistema ta' CPPS f'din il-lokalita biex, ghalkemm il-proprjeta tibqa privata, l-pubbliku jibbenefika mir-rijabilitazzjoni tas-sit. Mhux gustifikazzjoni li ghax r-rijabilitazzjoni ta' proprejeta privata tkun approvata allura tigi gustifikata li tigi imposta hlas ta' somma.

Skond l-appellant l-awtorita ma kienitx f'posizzjoni tiggustifika din il-kondizzjoni ta' pagament u li l-kondizzjoni hija eccessiva u irregolari. Id-dritt li wiehed jaghmel sviluppi jittiwel mid-dritt ta' proprjeta u mhuwix koncessjoni tal-Awtorita. Il-funzjoni tal-awtorita mhux li tbiegh il-permessi imma li tassigura sviluppi razzjonali fir-rispett tad-drittijiet ta' proprjeta tal-applikanti.

L-appellant kien hallas il-somma ta' Lm100,000 "under protest".

Fil-ewwel risposta taghha, l-Awtorita' irrispondiet illi l-appell kien null stante li sar fuori termine u dan peress li l-appell ma' sarx meta l-applikant kien gie notifikat fis-16 ta' Mejju, 2003 bid-decizjoni biex ihallas is-CPPS, multa u planning gain, u anzi fil-fatt hallashom.

L-Awtorita' tikkwota minn wahda mis-sentenzi tal-Qorti tal-Appell Wayne Chetcuti ghan-nom tas-socjeta' Leisure Holdings Ltd. vs il-Kummissjoni ghal-Kontroll ta' l-Izvilupp fejn hija tghid li "...din id-decizjoni ikkonfermat li wiehed ma setax jappella wara l-hrug tal-permess mill-hlas meta kien hu stess qabel li accettahom, anzi accettahom bla pregudizzju...".

Fil-mertu, l-argumenti ta' l-Awtorita' huma li t-tibdiliet approvati f' dan il-permess (PA 2693/02) jinkludu li l-public carpark f' wiehed mill-basement levels li kien approvat, fil-permessi originali, gie koncess li jinqaleb f' serje ta' garages privati b'dan li intilfu 61 parking spaces ghal publiku.

L-Awtorita' ghalhekk tghid li s-CPPS u planning gain mitlub mill-Awtorita' ma kienx marbut ma bzonnijiet ta' parkegg fl-ambitu tal-uzu approvat fuq is-sit relattiv, izda sabiex jaghmel tajjeb ghan-nuqqas ta' community gain li l-appellant naqas milli jipprovdi f'dan il-progett skond kif kien maqbul li kellu jaghmel fl-ewwel permess jigifieri l-permess PA 0624/97.

Is-silta li gejja mit-tieni rapport tal-Awtorita' tispjega l-pozizzjoni ta' l-Awtorita' b'mod mill-izjed car:

"... the site [is-sit in ezami] was also designated by MEPA for the provision of a public car park in the CPPS scheme adopted for St. Paul's Bay. Yet [fil-permess originali, PA 0624/97] the Authority allowed the applicant to integrate both a public car park and residential and commercial development on this same site in PA 0624/97. The authority even conceded to allowing an extended building height which exceeded the height limitation, on the grounds that this project was offering several benefits and gains to the community through public car parking provision and the restoration of the Villa. The DPAR in PA 0624/97 indicates that these issues were agreed upon by the applicant and the Authority, and hence it is incorrect for the appellant to claim that they were not consulted on the designation of their site as a CPPS parking area. This is even more so valid when considering that the appellant did not request a reconsideration or appeal against the CPPS designation or the permit issued in PA 0624/97.

The appellant had bound himself to provide for CPPS [fil-permess originali, PA 0624/97] parking in accordance with the site's zoning designation, and instead constructed private car garages which increased the applicant's revenue from this site. The latter was made at the cost of not providing any parking for the community. The CPPS and Planning Gain requested by MEPA did not concern car parking requirements in terms of the uses approved on this particular site, but to compensate for the lack of community gain that the developer failed to provide in this project.

The Authority is legally entitled to imply such conditions under Section 40 of the Development Planning Act, especially when considering that the applicant has sought to benefit from his advantageous development permit while lacking to respect his obligation towards the local community.”

Ikkunsidra ulterjorment:

Dan it-Tribunal jaqbel mal-Awtorita' li la l-appellant hallas is-sommom mitluba skond il-kundizzjonijiet 15 u 16 tal-permess 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 johrog 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 ghazel l-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 ftit tista tkun ta' success ghar-raguni li l-permess kien ikkundizzjonat ghal dik il-kundizzjoni u una volta accettata dik il-kundizzjoni mill appellant dan ma' jstax 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 kudizzjoni imposta mill-Awtorita' dana ghandu jaghmlu minn meta' jsir jaf bl-impozizzjoni taghha u jibqa jzomm din it-tezi sakemm tigi deciza din il-kudizzjoni u jekk hemm bzonn jappella.

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Fil-fehma kunsidrata ta' dan it-Tribunal il-pozizzjoni tal-Awtorita' fuq ir-ragunijiet ghaliex kien hemm bzonn li jiddahhlu il-kondizzjonijiet 15 u 16 fil-permess hija wahda soda u ragonevoli. L-appellant kien qabel mal-permess originali ghax ma' appellax minnu u ghalhekk huwa accetta li is-sit kien immarkat bhala CPPS Zone u ikkommetta ruhu awtomatikament li jipprovdi carpark ta' 61 car space ghall-uzu tal-pubbliku fuq is-sit tal-progett. Din hija parti integrali mill-pakkett li a bazi tieghu kien hareg l-ewwel permess. Bil-permess PA 2693/02, kien gie maqbul li dawn l-ispazzji jigu maqluha mill-progett bil-kundizzjoni li jithallas il-prezz necessarju biex dawn jinbnew post iehor.

Il-kalkolu li ghamlet l-Awtorita' ta' Lm2,500 ghal kull parking space huwa ragonevoli u konsistenti ma' kemm normalment jiswa kull wiehed minn dawn l-ispazzji biex jinbena.

Fis-sottomisjonijiet tieghu l-appellant ma' gabx ragunijiet validi u ibbazati fuq principji ta' ippjanar biex jikkonvinci lit-Tribunal li l-61 parking space ghall-pubbliku li kien wieghed li ser jipprovdi fil-permess originali ma' kienx hemm izjed bzonnhom bl-emendi li talab fil-permess originali. L-argument li bl-emendi approvati l-progett kien ser jipprovdi 92 spazju gdid mhux validu ghaliex dawn l-ispazzji huma fil-forma ta' 92 lock-up garages privati intenzjonati biex jinbieghu. Dan zgur mhux fl-ispirtu tal-arrangement li kien sar fil-permess originali u li kien accetta l-appellant.

Kif jidher mill-fatti li hargu fil-kors tas-smieh ta' dan l-appell billi jirrizulta li l-aggravji mressqa mill-appellant mhumiex fondati dan l-appell ma jimmeritax kunsiderazzjoni favorevoli.

Ghalhekk dan it-Tribunal qieghed jichad dan l-appell u jikkonferma il kundizzjonijiet 15 u 16 fil-permess PA 2693/02 li jghidu:

“15. Prior to the issue of development permission, the applicant shall pay the sum of Lm50,000 (fifty thousand Malta Liri) to the Malta Environment and Planning

Authority in lieu of the non-provision of 50 CPPS car-parking spaces on site.

16. Prior to the issue of development permission, the applicant shall deposit the sum of Lm49,000 (forty nine thousand Malta Liri) to the Malta Environment and Planning Authority. These funds shall be used by MEPA in conjunction with the Local Council or any other governmental or non-governmental organization to provide environmental improvements for the area.”

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal inkorra zball ta' ligi meta ddecieda li appell minn kundizzjoni ma kienx ammissibbli ghax l-appellant hallas is-somma imposta fl-obbligazzjoni u mbaghad appella mill-kundizzjoni. L-appellant isostni li kieku ma hallasx l-obbligazzjoni t-terminu tal-appell ma kienx jibda jiddekorri biex jappella ghax it-terminu jibda jiddekorri mill-hrug jew mir-rifjut tal-permess, u kieku ma hallasx l-obbligazzjoni imposta ma kienx ikollu hrug jew rifjut. Ghalhekk l-obbligazzjoni saret taht protesta bex jig preservat id-dritt tal-appell;

2. Fil-mertu l-appellant isostni illi ma saret ebda spjegazzjoni gustifikata ghaliex giet imposta l-obbligazzjoni meta l-appellant kien lest li jipprovdi parkegg taht pagament u gie rifjutat mill-Kunsill. L-izvilupp kien moghni b'parkegg sufficjenti u tnehha mill-Awtorita u minfloku impona pagament.

L-ewwel aggravju

Dan l-aggravju ma fihx mis-sewwa. L-iter kien is-segwenti. Fid-9 ta' Mejju 2003 l-Awtorita approvat l-applikazzjoni b'dan illi imponiet planning gain ghal nuqqas ta' parkegg. Il-hrug tal-permess kien kundizzjonat ghal hlas ta' din il-planning gain.

L-appellant hallas taht protest dan il-planning gain fl-20 ta' Mejju 2003.

Fit-30 ta' Meju 2003 inhareg il-permess u fid-9 ta' Gunju 3003 l-appellant appella mill-kundizzjoni tal-impozizzjoni tal-planning gain.

Din il-Qorti tirrelewa illi ghandhom jigi applikati l-artikolu rilevanti tal-Kap. 356 li kienu jirregolaw il-materja fiz-zmien li sar l-appell. Tirreferi ghas-sentenza **Wayne Chetcuti noe vs Kummissjoni ghal Kontroll tal-Izvilupp** (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-garanziji.

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 jottempera 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 accettat 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-artikolu 40(1) ighid illi l-Awtorita ghandha dritt biex meta tigi biex taghti permess ghall-izvilupp timponi obbligazzjoni 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 obbligazzjoni dwar l-ippjanar ma

jfissirx b'daqshekk illi jista' jottjeni l-hrug tal-permess billi jottempera 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 ... obbligazzjoni". 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 qabel ma jpoggi lillu nnifsu fil-pozizzjoni li bl-agir tieghu stess rinunzja ghad-dritt ta' appell billi jottempera ruhu mal-kundizzjoni u awtomatikament accetta l-hrug tal-permess favorih, kif fil-fatt gara.

Mhux minnu kif qal l-appellant illi kieku ma ottemperax ruhu mal-kundizzjoni t-terminu tal-appell ma kienx jibda jiddekorri. L-artikolu 37 tal-Kap. 356 jaghmel referenza ghal appell minn kundizzjoni jew rikonsiderazzjoni ta' kundizzjoni, f'liema kazijiet japplika l-appell skond ma jipprovdi l-Kap. 356 f'artikolu 15 tal-Att u artikolu 15 tat-Tielet Skeda tal-istess Att, li jitkellem dwar persuna li thossha aggravata minn decizjoni tal-Awtorita u mhux minn hrug jew rifjut ta' permess. L-impozizzjoni ta' kundizzjoni ta' planning gain kienet decizjoni tal-Awtorita li minnha l-appellant kellu dritt ta' appell u ma hadux izda ottempera ruhu maghha.

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'

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obbligazzjoni 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 jistax jirnexxi fuq din il-bazi u ghandu jigi michud billi infondat legalment.

It-tieni aggravju

Dan l-aggravju tenut kont tad-decizjoni fuq l-ewwel aggravju ma ghandux jigi trattat billi d-dritt tal-appell fuq il-mertu gie rinunzjat implicitament mill-appellant bil-hlas tal-planning gain.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Anton Camilleri u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-ippjanar tal-10 ta' Mejju 2012. Bl-ispejjez ghall-appellant.

< Sentenza Finali >

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