



**QORTI TA' L-APPELL
ONOR. IMHALLEF
MARK CHETCUTI**

Seduta tas-26 ta' Marzu, 2014
Appell Civili Numru. 74/2013

Gregory **Brincat f'isem u in rapprezentanza ta'**
Brincat's Holdings Limited

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Brincat's Holdings Limited tas-16 ta' Dicembru 2013 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-28 ta' Novembru 2013 rigward PA 2656/07 'addition of two penthouse units and alterations/extension at one floor to approved permit PA 5444/06);

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 ghall-Kontroll ta' l-Izvilupp, fis-27 ta' Novembru 2009, irrifjutat l-applikazzjoni ghall-permess tal-izvilupp PA 2656/07 – 23, 'Rolando

Court, Triq il-Kbira, Sliema: Proposed addition of two penthouse units and alterations/extension at one floor (to approved permit PA 5444/06).

Ir-ragunijiet ghar-rifjut kienu s-segwenti:

“1. The proposal exceeds the height limitation of the area as stipulated by the North Harbours Local Plan (Map SJ 3). The proposal also fails to meet the criteria of policy 16.1 of the Policy and Design Guidance 2007, which allows development in excess of the height limitation if the two buildings adjoining the site (that are exceeding the height limitation) are duly covered by permits.

2. The proposed penthouse level runs counter to Policy 10.6 of the Policy and Design Guidance, which only permits the construction of penthouses over buildings which do not exceed the overall permissible height as set out in the Local Plan.”

B. In-nota tal-Avukat Dott. Franco Vassallo ghall-Appellant nomine, ipprezentata fil-31 ta' Dicembru 2009, senjatament il-punti segwenti:

“L-izvilupp huwa kopert bil-permess numru PA 4247/97 waqt li l-permess PA 5444/06 ppermetta li r-raba sular li originarjament kien penthouse jinbidel f'appartament u jinbew zewg penthouses fuqu.

Huwa koncess li l-izvilupp propost jaqbez l-gholi permessibbli ghaz-zona b'sular b'dan illi pero' huwa ezatt bhal izviluppli jmiss mieghu lejn in-nofsinar tas-sit.

Raguni tal-Appell

1. Applikazzjoni u interpretazzjoni hazina tal-artikolu 16.1. mill-Kummissjoni ghall-Kontroll tal-izvilupp;

2. Minghajr pregudizzju l-Kummissjoni ghall-Kontroll tal-izvilupp kellha tapplika principji ohra stabbiliti minnha stess meta approvat applikazzjonijiet simili. Il-fatti tal-kaz tenut kont is-sit jimmeritaw l-hrug tal-permess;

1. Applikazzjoni u intepretazzjoni hazina tal-Artikolu 16.1. [...] L-elementi tal-klawsola fuq citata huma is-segwenti:

- Zvilupp li jeccedi l-gholi permessibbli jista' jigi accettat basta l-izvilupp ikun bejn zewg binjiet li jeccedu l-gholi liema gholi jikun kopert b'permess,
- L-infill m'ghandux jeccedi 9 metri ghalkemm dan ir-rekwizit jista' jigi relaxes jekk il-viwalita' tat-triq tiggustifikah;
- L-izvilupp m'ghandux jeccedi sular ghalkemm dan ir-rekwizit jista ukoll jigi relaxed

A. Qabel xejn jinghad li kwalunkwe regolament ghandu jigi nterpretat b'mod li jaghmel sens. Hawnhekk l-MEPA riedet tippermetti infill development meta

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se jkun committed. Is-sit mertu tal-applikazzjoni jinsab fi triq fejn hemm diversi binjiet li jeccedu l-gholi permessibbli;

Il-Kummissjoni qed itenni erronjament li sabiex tigi applikata din il-klawsola l-infill site trid tkun tmiss u mhux bejn zewg binjiet li jeccedu l-gholi u li huma koperti bil-permess. Ghalhekk f'dan il-kaz peress li l-bini tan-naha ta' nofsinhar huwa kopert b'permess imma dak tat-tramuntana mhuwiex skond il-Kummissjoni ma jistax johrog permess.

Dan huwa argument zbaljat ghaliex jekk il-kriterji tas-subinciz jigu applikati wiehed bil-fors jinduna li t-triq tiggustifika l-hrug tal-permess tenut kont li fl-istess triq hem mil-car park fuq naha li jeccedi l-gholi l-bini fuq in-nofsinhar kopert b'permess PA 1483/03. il-Bank of Valletta Centre u l-Alborada Complex lejn it-Tramuntana quddiem triq Ghar il-Lembi.

Jekk il-Bord jeccedi fuq is-sit ghandu jittermina li l-vizwalita' tat-trq jiggustifika l-hrug tal-permess.

B. Il-klawsola 16.1 ghandha tigi nterpretata bmod li taghmel sens u mhux b'mod li xxekkel lill-Kummissjoni. Qabel xejn interpretazzjoni korretta tal-klawsola ghadna turi li imkien m'hemm imnizzel li l-bini li jeccedi l-gholi peremssibli ghandu jkun bejn zewgt binjiet imma mhux li jkun miss. Di piu fis-subinciz (ii) u (iii) l-emfazi tal-MEPA huwa car. F'kaz illi l-izvilupp propost 'improved coherent streetscape' u huwa accettabbli 'from an urban design and planning point' dan ghandu jitqies li jissodisfa l-kriterji ta' ippjanar. Fl-ahhar nett huwa car li s-subincizi illi m'humieq mxekkla bil-kelma 'and' u ghalhekk huwa car ghallanqas ghall-appellant li klawsola 16.1 kellha tingara u tigi applikat b'mod li ma jeskludix zvilupp jekk per ezempju proposta tissodisfa is-subinciz i u ii u mhux it-iii.

Fil-kunsiderazzjoni tal-applikazzjoni d-direttorat semplicement sostna li ladarba l-bini lejn it-tramuntana biswit is-sit ma kienx kopert b'permess isegwi li ghalhekk l-artikolu 16.1 ma kienx applikabbli. Bir-rispett dan huwa argument semplicistiku li mhuwiex rifless fl-ghanjiet li kellha f'mohha l-MEPA.[...]

L-applikant gie penalizzat ghaliex il-bini biswit tieghu lejn it-tramuntana gie mibni kwazi ghoxrin zena ilu minghjar il-permessi necessarji u huwa suggett ghall-appell PA 6962/07. Il-MEPA ma hadet ebda azzjoni fuq dan l-izvilupp nonostante li hareg avviz ta' twettiq ECF 1373/97 fl-1997 liema avviz ma giex segwit ghaliex saret applikazzjoni ghaxar snin wara fl-2007.

Illi ghalhekk huwa ragonevoli li wiehed jikkonkludi li l-kunsiderazzjonijiet ta' ippjanar tal-applikazzjoni tal-appellant gew negattivament influwenzati mill-agir tal-gar li qabad u bena sular minghjar ma applika ghalihom. Rejalistikament u legalment stante li l-izvilup sehh qabel 1993 l-istess zvilupp ma jistax jitwaqqa u dana skond regolamenti mahruqa mill-MEPA stess."

C. In-nota risponsiva ta' Lorinda Vella ghall-Awtorita', ipprezentata seduta stante fil-5 ta' Frar 2010, inter alia l-punti segwenti:

“DC2007, Part 16, Policy 16.1

The appellant claims that the refusal decision of this application has resulted from a misinterpretation of the provisions of Policy 16.1. This policy provides for a relaxation to the building heights stipulated by the Local Plan's height limitation designations, however subject that a site qualifies for such a relaxation by meeting the parameters set out in this policy.

The appellant firstly states that the aim of Policy 16.1 is to allow for infill development where a site qualifies as committed. On this, the appellant states that the car park development, the adjacent site covered by permit PA 1483/03, the Bank of Valletta building, and the Alborada Complexes (the latter fronting Triq Ghar il-Lembi) commit the area, as they all consist of buildings reaching a height in excess of the height limitation set out by the Local Plan.

In accordance with several decisions by the Court of Appeal, the Authority and the Planning Appeals Board are obliged to take into consideration these commitments and determine whether they merit favourable consideration to the proposed development. The authority has recognized that there are developments of a certain height but the area cannot be considered as committed with that height. Moreover, these developments were also considered in the Local Plan, but were not recognized as committing the area to merit it with a higher height limitation. Nevertheless, the Authority devised the parameters against which a concession to the height limitation could be given through the formulation of DC2007 Policy 16.1.

When considering the commitments present along the site's streetscape, in terms of their location and legal status, it has been concluded that the proposal does not qualify for a concession under the provisions of DC2007 Policy 16.1, on the grounds of the following:

As can be evidenced in the photographs submitted for this application, although the site for development is located between two buildings with a height in excess of the height limitation, only the development to the left hand side of the site is covered by development permission, whereas the excessive height of the building to the site's right is illegal. Hence the proposed development is not located between two developments, duly covered with permits, whose existing height exceeds the building height for the streetscape, as required by (i) of this policy.

While there are other buildings, as indicated by the appellant, located along the same streetscape which exceed the height limitation set by the Local Plan, only one building is located within 9 metres to one of the sides of the site, while there is no building with an excessive height within a 9 metre distance to the site's other side, as required by (ii). As the appellant states, it is not a requirement of this policy provision for higher buildings to be contiguous to the site, however the policy clearly states that the distance from either side of the site is to be 9 metres. In addition, the number of buildings in excess of the building height limitation are not the predominant

building form along this streetscape, and hence the requirements of (ii) does not merit to be relaxed as the Authority does not perceive that an improved coherent streetscape would be achieved through the proposal.

This application proposes the addition of two floors, whereas (iii) clearly limits the concession to only one additional floor or penthouse level. Again, the predominant height along this streetscape does not merit favourable consideration for this limitation to be relaxed.

The appellant also states that the fact that there is no 'and' between each parameter of Policy 16.1 entails that it is not a requisite for the development to comply with each parameter. This argument is unfounded, as the text of Policy 16.1 clearly shows that each parameter is linked to each other. In fact these parameters do not make sense if read separately, and hence if one parameter was to be considered in isolation from the others this would be out of context of the policy. It is clear that the provisions of (ii) are directly linked to the text in (i), while the provisions of (iii) set a limitation in the case that (i) and (ii) are met. In any case, as already outlined in this section of the report, the proposed development does not comply with any one of the provisions of this policy.

5.4 Other issues and merits

The appellant claims that the proposed development was also negatively considered due to the illegal development present on the adjacent site. The Authority would like to point out that this is not the case. The illegal excessive height on the adjacent site was considered by MEPA in its decision and assessment of this application as factual information, as DC 2007 Policy 16.1 requires that it is confirmed whether any adjacent building exceeding the height limitation is duly covered by permits. Hence, it is a requisite of this policy that the legal and illegal commitments along the same streetscape are identified.

Moreover, the sanctioning of the adjacent illegal building is subject to separate refusals in PA 3032/96 and PA 6962/07, which are both subject to appeals in PAB 216/04 and PAB 233/09 respectively. Whether this site is subject to enforcement action and whether direct action may be taken on this site is the merit to be considered in these appeals, rather than in this present appeal."

D. Il-verbal tal-access fuq il-post mizmuma fil-11 ta' Marzu 2011, precizament il-punti segwenti:

"Il-fond jikkonsisti fi plot appartamenti go High Street bejn zewg blokko ohrajn. Fuq il-lemin tieghu hemm zvilupp ghola minnu xi zewg sulari li r-rapprezentanti tal-Awtorita' ikkonfermaw illi hemm appell dwaru billi qeghdin jghidu li s-sulari ta' fuq m'humix awtorizat bil-permess. Fuq in-naha tax-xellug tal-istess block mertu tal-appell, hemm zvilupp iehor ghola zewg sulari mill-izvilupp mertu tal-appell li l-appellant ddikjara, lid an il-bini huwa skond il-permessi approvati u allura qed jikkontendi li l-bini minnu propost ghandu jigi approvat "

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Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda proposta sabiex f' font konsistenti minn blokka appartamenti li jinsab fiz-zona residenzjali f' tas-Sliema, jsiru xi modifiki f' sular minnhom u jinbnew xewg penthouses sovrastanti.

Precedentement kien inhareg permess (PA 4247/97) sabiex titwaqqa binja antika u minflok tinbena blokka appartamenti, penthouses u zewg livelli ta' garaxxijiet sottostanti. Sussegwentement inhareg permess iehor (PA 5444/06) li japprova li r-raba sular li originarjament kien penthouse, jinbidel f' apartment, u jinbew zewg penthouses ohra fuq dan il-livell.

Qabel xejn tajjeb li jigi osservat li apparti l-appell odjern, illum qed jigu decizi wkoll l-applikazzjonijiet PA 3032/96 (appell 216/04) u PA 6962/07 (appell 233/09), fuq sit biswit dan in ezami.

Ir-raguni ghar-rifjut de quo jistrieħu fuq il-fatt li l-gholi tal-bini propost huwa in excess tal-overall height limitation ta' hames sulari u semi-basement kif indikat fil-mappa SL 3 tal-Pjan Lokali (NHLP). Għalhekk, is-sulari addizzjonali li qed jintalbu huma in kontravvenzjoni tal-policy 16.1 tad-Development Control Policy and Design Guidance (DC 2007), b' mod partikolari tal-ewwl subinciz ta' din il-policy.

In oltre, il-policy 10.6 tippermetti biss il-kostruzzjoni ta' penthouses fuq siti li ma jaqbzux l-gholi limitu stabbilit mill-Pjanijiet Lokali.

L-aggravji tal-Appellant nomine huma li prezentement l-izvilupp hu kopert bil-permess. Din il-parti tat-triq hi kkaratterizzata minn bini għoli li jeccedi l-limitu stabbilit mill-Pjan Lokali (dakinhar il-BOV Centre, Alborada Mansions, Sliema Car Park, etc.), u peress li illum hemm diversi binjiet fl-istess arja illi jikkompromettu l-gholi tal-istreetscape, l-applikazzjoni tieghu kellha tigi approvata bl-istess mod.

Jissokta l-argumenti tieghu billi jispjega kif fl-interpretazzjoni tal-policies sucitati – in kwantu li sabiex tigi kkunsidrata height relaxation, is-sit irid ikun maqbud bejn zewg siti ohra li nbew oghla minnu (bil-permess) - l-Awtorita' kienet qeda tippenalizzah semplicement ghaliex il-bini biswit tieghu, mibni kwazi ghoxrin zena ilu, mgħandux il-permessi necessarji.

Fil-fatt il-bini biswit dan in ezami huwa kopert b' avviz biex tiegaf u ta' twettieq ECF 1373/97 u huwa suggett għall-appelli 233/09 u 216/04, li wkoll qed jigu deciz illum, kif gja' rilevat.

L-Awtorita' zammet ferm l-oggezzjoni tagħha u ddikjarat li għar-rigward tal-argument ta' height relaxation in linja mal-policy 16.1, l-izvilupp in ezami ma jirrispetta l-ebda wahda mill-kundizzjonijiet elenkati.

Oltre minn hekk, illum japplika l-ewwel proviso tat-tieni subinciz tal-Artikolu 69 tal-Att X tal-2010 (Kap. 504), li għoli fil-bini ma jistax jigi kkunsidrat bhala

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commitment. Il-parti rilevanti ta' dan l-Artikolu li japplika fil-kaz in ezami huwa kif gej:

“(2) Fid-determinazzjoni tagħha fuq applikazzjoni l-Awtorita' għandha ukoll tqis:

(a) kull haga oħra ta' sustanza, komprizi konsiderazzjonijiet ambjentali, estetici u sanitarji li l-Awtorita' tista' tikkunsidra rilevanti: Izda ebda konsiderazzjoni materjali inkluza konsiderazzjoni bbazata fuq l-ezistenza ta' binjiet fil madwar ma tista' tigi interpretata jew tintuza sabiex iżzid l-limitazzjoni tal-gholi stabbilita fil-pjan.”

Minn dan isegwi li għal din ir-raguni biss, it-talba in ezami ma tistax tigi milqugha.

Għalhekk, in vista tal-konsiderazzjonijiet kollha hawn fuq magħmula, 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 ir-rifjut għall-PA 2656/07 kif mahrug mill-Kummissjoni għall-Kontroll ta' l-Izvilupp, fis-27 ta' Novembru 2009.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal naqas li jikkunsidra l-aggravju illi l-Kummissjoni applikat u interpretat hazin il-policy 16.1 tal-Policy and Design Guidance 2007;
2. L-applikazzjoni tal-ewwel proviso tat-tieni subinciz tal-artikolu 69 tal-Att X tal-2010 qatt ma kien trattat quddiem it-Tribunal.

L-aggravji meħudin flimkien

Tajjeb li biex jigi trattat dan l-aggravju l-Qorti tqis ir-ragunijiet ta' rifjut tal-Awtorita u l-appell interpost quddiem it-Tribunal.

Ir-ragunijiet ta' rifjut quddiem l-Awtorita kineu li l-izvilupp jivvjola l-height limitation fil-North Harbour Local Plan; u ma jsibx applikazzjoni fil-kriterji tal-policy 16.1 tal-Policy and Design Guidance 2007 li jippermetti zvilupp oghla mill-height limitation jekk hemm zewg binjiet biswit dik in kwistjoni oghla minn dak permess u huma koperti b'permess. Jivvjola wkoll l-policy 10.6 tal-Policy and Design Guidance li jippermetti penthouses fuq bini li ma jeccediex il-height limitation fil-local plan.

L-appell quddiem it-Tribunal kien jikkontjeni l-aggravji segwenti cioe li avolja l-izvilupp hu sular oghla minn dak permess fiz-zona hemm diversi biniet fiz-zona li jeccedu l-gholi permess u ghalhekk ghandu jitqies bhala 'infill' f'sit kompromess. In oltre l-Awtorita applikat u interpretat il-policy 16.1 b'mod hazin fic-cirkostanzi tal-kaz. L-applikant gie penalizzat ghax bini biswit inbena xi 20 sena qabel bla permess u li realistikament u legalment peress li dan sehh qabel l-1993 l-izvilupp ma jistax jitwaqqa'.

L-appellant qed jikkontendi li t-Tribunal ma kkonsidrax l-aggravju dwar l-applikazzjoni u interpretazzjoni hazina tal-policy 16.1 tal-Policy and Design Guidance 2007. Ghal kompletezza din il-policy tghid hekk:

16.1 Building Height Relaxation

Applications for development which exceed the height limitation of 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.

Harsa lejn l-argumenti mressqa mill-appellant u l-Awtorita dwar il-portata tal-policy 16.1 ta' Policy and Design Guidance 2007 juri bic-car illi kien hemm kontestazzjoni shuna fuq din il-kwistjoni, liema kwistjoni kienet importanti biex twassal lit-Tribunal li jikkonsidraha bid-debitu serjeta u jiddeciedi kif kellha tigi applikata din il-policy b'mod generali u b'referenza ghall-izvilupp in kwistjoni hemm kienet applikabbli favur jew kontra l-izvilupp. It-Tribunal infatti jaghmel riassunt dupplici tal-argumenti tal-partijiet kemm fil-parti fejn gew riportati l-argumenti u hemm fil-parti tal-konsiderazzjonijiet. Pero, u dan hu dak li jhalli l-Qorti perplessa, fl-ebda hin it-Tribunal ma jaghmel l-argumenti tieghu, u jaghti piz lill-argumenti ta' parti jew ohra.

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Minflok it-Tribunal ghazel li jiehu triq ohra cioe li jqis l-aggravju bhala wiehed ibbazat fuq commitment li skond l-artikolu 69(2) tal-Kap. 504 ma jistax jittiehed in konsiderazzjoni bhala kwistjoni ta' sustanza meta qed jitqies applikazzjoni zvilupp fejn jirrigwarda ezistenza ta' bini fil-madwar li jeccedi l-limitazzjoni tal-gholi stabbilit fil-pjan.

Il-Qorti ma taqbilx mal-appellant illi dan l-argument ma giex trattat quddiem it-Tribunal. It-Tribunal ghandu kull dritt japplika kwalunkwe provvedimenti tal-ligi biex jissostanzja argument. Il-fatt li l-argument ma jkunx tressaq ma jfissirx li t-Tribunal ma jistax juzah sakemm l-argument u l-ligi msemmija tkun tirispekkja u hi inkluzo fit-talba ghall-izvilupp. Certament il-kwistjoni ta' commitment hi inkluzo f'dan l-izvilupp.

Pero l-Qorti tqis illi t-Tribunal argumenta b'mod zbaljat mill-punto di vista legali illi l-artikolu 69(2) tal-Kap. 504 hu applikabbli ghal kaz. Dan l-artikolu mehud b'mod generiku hu applikabbli li kieku ma kienx hemm policy specifika li tirregola zviluppi simili u fejn l-istess policy cioe l-Policy and Design Guidance 2007 fil-policy 16.1 tikkreja hi eccezzjoni ghar-regola u l-mod kif ghandha tigi applikata r-regola.

It-Tribunal kellu u messu investiga l-lanzanza mill-punto di vista dibattut cioe l-portata u l-effett tal-policy 16.1 mehud fit-termini generici tieghu u kif din il-policy kellhiex issib jew ma issibx applikazzjoni ghal dan l-izvilupp tenut kont tac-cirkostanzi tal-kaz.

F'dan l-aspett it-Tribunal abdika mill-obbligi tieghu u billi tali aggravju kien wiehed li seta' effettwa materjalment l-ezitu tal-appell jisthoqq li jigi milqugh. Ghandu wkoll jigi milqugh it-tieni aggravju tal-appellant fis-sens illi l-artikolu 69(2) tal-Kap. 504 ma setghax jigi applikat billi policy specifika kienet tippermetti eccezzjoni ta' 'commitment' fis-sens provdut fil-Policy and Design Guidance 2007 policy 16.1.

Ovvjament jekk l-appellant ghandux ragun jew le fis-sustanza hi kwistjoni li jrid jigi deciz mit-Tribunal pero l-Qorti ma tistax ma tirrimarkax illi l-appell li l-istess Tribunal ghamel referenza ghalih cioe dik tal-binja biswit dan in kwistjoni li kellu sulari bla permess gie milqugh fis-sens li t-Tribunal irrikmanda l-Awtorita tirrevedi l-policy a rigward tal-height limitation fiz-zona billi rrizulta li l-bicca l-kbira tal-izvilupp ezistenti

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fiz-zona jeccedi l-height limitation. Din hi decizjoni minn appell 233/09 tat-28 ta' Novembru 2013.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tilqa' l-appell ta' Brincat's Holdings Limited, u tirrevoka d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-28 ta' Novembru 2013, u tirrinviija l-atti quddiem it-Tribunal biex jgħidha l-appell in linea ma' dak deciz. Bi-ispejjez kontra l-Awtorita.

< Sentenza Finali >

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