



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta tas-26 ta' Gunju, 2014

Appell Civili Numru. 3/2013

Pierre Debono

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Pierre Debono tat-18 ta' Frar 2013 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-31 ta' Jannar 2013 dwar PA 5488/10 'to construct 1 residential dwelling (receded floor level) over approved block originally approved in PA 2011/09;

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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 tal-Ambjent u l-Ippjanar, fl-14 t' Ottubru 2011, irrifjutat l-applikazzjoni ghall-permess tal-izvilupp PA 5488/10 – 47, St Francis Street, Qormi: To construct 1 n[umber] residential dwelling (receded floor level) over approved block originally approved in PA 2011/09.

Ir-ragunijiet ghar-rifjut kienu s-segwenti:

“1. Proposed development does not comply with policy 10.5 of Policy and Design Guidelines 2007.

2. The proposed external changes at ground floor are incompatible with the urban design and environmental characteristics of the Urban Conservation Area. It would not maintain the visual integrity of the area and so does not comply with Structure Plan policy BEN 2.

3. The proposed development would detract from the overall objectives of the Structure Plan for the preservation and enhancement of buildings, spaces and townscapes within Urban Conservation Areas and so does not comply with Structure Plan policy UCO 6.

4. The proposed development runs counter to Structure Plan policy UCO 10 in that it would adversely affect views of the Urban Conservation Area and detract from the traditional urban skyline.”

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B. In-nota tal-Perit Tancred Mifsud ghall-Appellant, ipprezentata fl-20 t' Ottubru 2011, senjatament il-punti segwenti:

"I would like to quote PA 5728/09, site is adjacent to my client's site was approved with a building envelope similar to the proposal as submitted [...].

MEPA has approved in 28/06/11 at second floor level on PA 5728/09 and a penthouse above. [sic.]

Please note that the front part of the structure at second floor level is approved by PA 2011/09.

The back part of the proposed structure is back to back to an area zoned for three floors and a penthouse as per CMLP map QOM 3.

The resultant building envelope is of less impact than [recte than] the one approved in PA 5728/09 since we are not proposing any penthouse at roof level over the recessed floor."

C. In-nota risponsiva ta' Mario Scicluna ghall-Awtorita', ipprezentata fit-22 ta' Novembru 2011, inter alia l-punti segwenti:

"4. Preliminary Plea

The arguments raised in the appeal submission have already been submitted by the appellant during the processing of this application (refer to doc 25 in the PA File) and since the Environment and Planning Commission has already taken cognisance of such, the Malta Environment and Planning Authority has no further comments to add at this stage of this appeal in relation to the merits of this appeal other than those already mentioned in the DPA report.

6. As regards to cited permit PA 5728/09, it is to be stated that this site also abuts Triq il-Wied, which is not UCA and thus a penthouse could have been permitted. On the other hand, the site under appeal abuts only St. Francis Street and the entire

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site under appeal is within the UCA of Qormi. Thus, the planning considerations of both applications differ substantially.”

D. In-nota ta' sottomissjonijiet tal-Perit Tancred Mifsud ghall-Appellant, ipprezentata fil-21 ta' Dicembru 2011, inter alia l-punti segwenti:

“To elaborate further, the EPC board, in application PA 5728/09 approved a second floor development, part of which is located within DCA and part of which is located within scheme. [...]

The proposal under this application has the same building envelope, i.e. a setback at second floor level similar to the setback approved in PA 5728/09.

[...] When the property at the back of our site will be developed, with a height limitation of three floors and a penthouse, the resultant building envelope will be identical to the one approved in PA 5728/09.

To add insult to injury, a penthouse was approved over the receded second floor of PA 5728/09, the terrace of which is within the DCA boundaries.

The development we are proposing will be limited solely to a receded floor at second floor level with no structures above (except for standard services as per policy).

The same approved permit PA 5728/09/63b approved not only a second floor within an area zoned for two floors, but also part of the structure at penthouse level is within DCA as per approved drawing PA 5728/09/63b [...].

The proposal in this application is not this massive, since no structures are being proposed above the receded floor.”

E. In-nota second statement ta' Mario Scicluna ghall-Awtorita', ipprezentata waqt is-Seduta numru 25 mizmuma fl-20 ta' Marzu 2012, inter alia l-punti segwenti:

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“In order to justify this development, the appellant is referring to permit PA 5728/09 issued for the construction of garages, shops, flats and penthouses.

However, this permit does not have identical planning considerations to the case under appeal [...]. The cited permit's facade abuts a different road from that under appeal (i.e. site fronts both Triq il-Wied as well as St. Francis Street, Qormi) and this part of Qormi is not UCA and has a height limitation of 3 floors plus penthouse as opposed to the 2 floor height limitation (without penthouse of this appeal (in view that it is UCA).

Area A: Footprint of cited 2nd floor (units which fronts Triq il-Wied)

Area B: Footprint of proposed receded floor under appeal (i.e. totally within UCA)

[...] Site A denotes the second floor level abutting the other street. One must emphasize that the units approved at this level (re site A) are units which abut the other street and hence, only some rooms at the back of these flats protrude on the UCA part. On the other hand, one has to note that all of the site (footprint) of the application under appeal is within the UCA part.

[...] plan Red 63C of the cited development [... shows the] approved building vis-a-vis the two roads with a height limitation of 2 floors (LHS) and 3 floors (RHS). [...] The] 'best fit line' [...] derived by taking into account the maximum number of floors on both streets and the resultant intersection between the back part of the approved second floor (i.e. from the other street)[...] is actually at half of the floor's height. Hence, the depth of this level was considered to be an acceptable compromise between the permitted 3 floor height and the 2 floor height of the UCA part of this development in this particular situation.

As regards to the cited penthouse level of the [...] permit, [...] only parts of the ensuite rooms protrude on the UCA [... The] penthouse level is according to policy as regard its intrusion onto the UCA part and one cannot cite this approved penthouse to justify a new residential unit (setback floor [...]) which is totally within the UCA boundary of Qormi.

In addition to the above, the Authority makes reference to Article 69 (2)(i) proviso [of Act X of 2010, Chapter 504] which clearly states that one can no longer cite developments in the area on grounds of commitment as regards the issue of height. [...]"

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F. In-nota ta' sottomissjonijiet tal-Perit Tancred Mifsud ghall-Appellant, ipprezentata f' fis-6 ta' Gunju 2012, inter alia l-punti segwenti:

“How can MEPA explain to my client that his application cannot be favorably considered, whilst an adjacent site, have same height limitations and constraints as approved in local plan, has been approved by the same MEPA.

[...] the court sentence Michael Attard f' isem Attard Brothers Ltd vs MEPA (PA 2508/06) [...] confirms that [...] one cannot exclude any recent approval adjacent to my clients property.

To elaborate further, the EPC board, in application PA 5728/09 approved a second floor development, part of which is located within UCA and part of which is located within scheme.

The back part of the proposed structure in this application is back to back to an area zoned for three floors and a penthouse as per CMLP map QOM 3. When the property at the back of our site will be developed, with a height limitation of three floors and a penthouse, the resultant building envelope will be identical to the one approved in PA 5728/09.

To add insult to injury, a penthouse was approved over the receded second floor of PA 5728/09, the terrace of which is within the UCA boundaries.

The development we are proposing will be limited solely to a receded floor at second floor level with no structures above (except for standard services as per policy).

Part of approved drawing of PA 5728/09/63b showing the UCA on the right hand side and schemed area on left side.

From this approved drawing, there are strong commitments at second floor level within a 2 floor UCA area.

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The same approved permit PA 5728/09/63b approved not only a second floor within an area zoned for two floors, but also part of the structure at penthouse level is within UCA as per approved drawing P A 5728/09/63b seen above.”

G. In-nota third statement ta' Darren Fava ghall-Awtorita', ipprezentata fid-9 ta' Lulju 2012, inter alia l-punt segwenti:

“1.2.1 [...] The appellant is insisting that the quoted permitted adjacent development has the same height limitations and constraints as that in concern. Notwithstanding this, [...] the planning considerations of the two cases are not identical, and therefore the appellant's claims for *cerimus paribus* are frivolous and misleading.”

H. In-nota ulterjuri tal-Perit Tancred Mifsud ghall-Appellant, ipprezentata fit-13 ta' Lulju 2012, inter alia l-punti segwenti:

“The DPAR [for PA 5728/09] was recommended for refusal on the grounds that the proposed setback floor and overlying penthouse are within the two floor height limitation.

This confirms my statement that the adjacent development was approved over the height limitation, and that the proposal subject to this appeal is proposing half what was approved in PA 5728/09 (since only a setback is being proposed and no structures over the setback is being proposed). [...]

The EPC approved the development counter to the CMLP height limitation with two floors, i.e. a recessed floor and a penthouse above.”

J. In-nota fourth statement ta' Edward Borg u Jeffrey Vella ghall-Awtorita', ipprezentata fl-4 ta' Jannar 2013, inter alia l-punt segwenti:

1.2 In the fourth statement the appellant is again quoting permit PA 5728/09 of the site adjacent to that under appeal. [...]

However the Tribunal is notified that the highlighted Paragraph 4.7.2 in appellant[‘s] letter regarding the height limitation refers to original drawings 1D to 1F/16B and the

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highlighted part in NTC 3.3 in same letter refers to drawings 48A to 48E in this cited application which were superseded by the approved drawings. Hence it does not relate to approved drawings 63A/63B/63C/63D/63E and thus appellant's claim for *cerimus paribus* is still misleading.

Below is the Board minute text of meeting as noted in the discussion which led to grant the decision of cited permit PA 5728/09 by the EPC Board. [...]

'Reason for overturning: Height limitation issues have been addressed through recent submissions.

Parking layout to be amended: Design issues resolved through fresh elevation.

Approved subject that the perit shall within 20 days submit fresh plans which address the following issues:

1. Parking layout
2. Balconies in St Francis Street to be narrower.
3. Also to provide flood risk report endorsed by Civil Protection Department. Any other alterations to the plans and which do not address the said matters indicated above shall not be considered and shall not be construed as approved.'

In addition to the above, unlike case under appeal, the approved building has a frontage on two streets. As already stated in the second report the best fit line was taken into account [...]. The resultant intersection between the back parts of the approved 2nd floor with the best fit line, the resultant is actually at half of the floor's height and thus considered acceptable. With regards to penthouse level, only parts of the ensuite rooms protrude on the UCA part and thus are according to policy regarding intrusion. Contrary to case under appeal, one notes that the entire site (footprint) of the application under appeal is within the UCA part. Thus this permit does not have identical planning considerations to case under appeal."

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda talba sabiex ikun jista jinbena receded floor sovrastanti blokkja appartamenti li tinsab gewwa z-zona edifikabbli ta' Hal Qormi. Il-blokkja hi koperta bil-permess PA 2011/09/.

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Ir-raguni ghar-rifjut jistrieħu fuq il-presmessa li l-proposta hi in kontravvenzjoni tal-policy 10.5 tal-Policy and Design Guidance tal-2007. In oltre, peress li hawn si tratta minn urban conservation area (UCA), l-izvilupp propost ser jgharraq l-amenities kif ukoll l-aspett viziv u ambjentali tal-madwar. Għalhekk it-talba hi wkoll f' kunflitt mal-policies BEN 2, UCO 6 u UCO 10 tal_pjan ta' Struttura.

L-Aggravji tal-Appellant huma bbazati fuq il-fatt li biswit dan il-font gie permess zvilupp simili hafna għat-talba tieghu (PA 5728/09). In oltre jirriveva li l-permess PA 2011/09 kien approva parti minn dan i-tieni sulari. Imbagħad bil-permess PA 5728/09, inbena' t-tieni sular (kollhu) u l-penthouse sovrastanti. Jirriveva wkoll li l-parti ta' fuq wara tal-izvilupp propost taqa' gewwa zona indikata permezz tal-mappa QOM 3 tal-Pjan Lokali bhala arja li tista' tinbena sa' tlett sulari u penthouses. In oltre peress li mhux qed jipproponi zvilupp konsistenti minn penthouse sovrastanti ir-receded floor (prezenti), allura għal kul effettii, l-proposta tieghu tirrizulta ferm inqas intensiva minn dik approvata biswit il-font in ezami, kif rilevat supra.

L-Awtorita' tirribatti l-argumenti kollha mressq mill-Appellant u tispjega li fil-kaz ta' PA 5728/09, il-font imiss ma' triq li mhix inkluzza fil-UCA, u li kien għalhekk li setghet tigi approvata penthouse - kif fil-fatt gara. Ir-residential units li kienu gew approvati f'dak il-kaz kienu jharsu fuq it-triq li tinsab barra l-UCA – u għalkemm gew permessi xi kmamar (cjoe' ensuites) li jirfsu fil-UCA, dan kien gie permess wara li giet ikkunsidrata l-best fit line - sabiex ikun jista' jinhloq kompromess soddisfacenti bejn iz-zoni għal zewg u tlett sulari.

Ezaminati fid-dettal is-sottomissjonijiet tal-partijiet, johrog car li s-sit in ezami jinsab pjenament fil-UCA u di konsegwenza il-policies li jirregolw zvilupp hawnhekk huma għaldaqstant differenti minn dawk ta' zoni ohra. L-istess ma jistax jingħad għas-sit kopert nbil-permess PA 5728/09 u għalhekk f' ic-cirkostanzi ma jistax jigi invokat il-principju ta' cerimus paribus. Anke semmaj dan seta' kien il-kaz, l-Awtorita' tirriveva li meta' l-applikazzjoni PA 5728/09 kien rakommandata għar-rifjut - abbazi tal fatt li s-setback floor u l-penthouse kienu qedin fuq il-parti tal-font li kienet taqa' fil-UCA - madankollu l-proposta giet riveduta u gew sottomessi pjanti godda, tant li din l-oggezzjoni giet sorvolata. Kien għalhekk li imbagħad l-Awtorita' imxiet sabiex tohrog il-permess relattiv.

Fl-ahharnett irid jigi osservat li fir-rigward ta' commitments in kwantu height limitation, illum japplika t-tieni subinciz tal-Artikolu 69 tal-Att X tal-2010 (Kap. 504).

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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 ir-rifjut ghall-PA 5488/10 kif mahrug mill-Kummissjoni ghall-Kontroll tal-Ambjent u l-ippjanar, fl-14 t' Ottubru 2011.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. Illi t-Tribunal erronjament applika l-artikolu 69(2) tal-Kap. 504 peress li meta saret l-applikazzjoni ta' zvilupp ma kienux jezisti r-regolament li jeskludi l-commitment dwar gholi ta' bini fil-madwar biex izzid il-limitazzjoni tal-gholi stabbilita fil-pjan regolatur taz-zona u dan kien argument principali f'din l-applikazzjoni;

2. Anki jekk l-artikolu 69(2) kien applikabbli, it-Tribunal applika hazin l-artikolu in kwistjoni billi sostna li l-appellant ma setax jinvoka l-principju ta' cerimus paribus meta hu car illi f-applikazzjoni ohra PA 5728/09 biswit il-fond in kwistjoni l-Awtorita ma sabitx diffikulta li tissupera l-livell permess meta l-artikolu 69(2) kien gia promulgat. In ogni kaz l-appellant ma talabx li jzid l-gholi massimu indikat fil-pjan lokali izda biss li l-bini ta' ma' genbu hu gia xi sulari oghola minn tieghu u fuq wara tas-sit hu permess gholi ta' tlett sulari u penthouse. L-appellant talab estensjoni tal-washrooms gia ezistenti u mhux li jzid sular iehor.

L-ewwel aggravju

Dan l-aggravju gia tqajjem f'appelli ohra u gie michud ghas-semplici raguni illi din mhix kwistjoni ta' aplikazzjoni retroattiva ta' ligi izda ta' aplikazzjoni tal-ligi in vigore fil-mument li ttiehed decizjoni peress illi sa dak il-mument l-applikant ikun biss talab li jizviluppa sit li ma jmurx kontra l-pjanijiet u ligijiet fil-mument li tittiehed id-decizjoni dwaru. Ma hemm ebda dritt kwezit sa dak il-mument u ebda fatt stabbilit li minnu jista' jigi dezunt li l-ligi applikabbli hi dik li fil-mument tal-fatt stabbilit u kompjut hi in vigore. Aplikazzjoni hi biss xewqa ta' zvilupp li trid issegwi l-pjanijiet u policies applikabbli ghal komunita kollha fil-mument tat-tehid tad-decizjoni finali kemm jekk tiffavorixxi jew tolqot hazin lil aplikant. Il-ligijiet ta' ppjanar huma intizi ghal beneficju u salvagwardja tal-ambjent u c-cittadin in generali u ma jstghux u ma

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għandhomx jigu subordinati għal eccezzjonijiet unitarji fejn l-istess ligi, pjan jew policy ma tippermettix jew l-istess jagħtu diskrezzjoni mod iehor lil Awtorita jew it-Tribunal.

F'dan il-kaz irrizulta illi s-sit tal-applikant kien jaqa' f'urban conservation area, fejn it-tibdil minn washroom għal residenza b'zieda fl-envelope tal-bini, kien ser imur kontra l-gholi permess stabbilit fil-policy and design guidance tal-2007. Dan apparti li l-izvilupp innifsu kien imur kontra l-policies BEN 2, UCO 6 u UCO 10 tal-pjan ta' struttura f'dak li hu l-preservazzjoni tal-amenities u l-aspett viziv u ambjentali tal-madwar.

Jigi rilevat in oltre illi kuntrarjament għal dak sottomess mill-appellant, it-Tribunal tratta l-kwistjoni tal-permess fuq il-fond biswit dak tal-appellant u kkonkluda illi ma setghax japplikaw l-istess regoli billi l-fond vicin kien jaffaccja zewg toroq, fejn wahda minnhom ma kinitx taqa' f'UCA u għalhekk l-izvilupp kellu jigi trattat b'mod differenti għalkemm xorta wahda dan l-izvilupp gie limitat biex ma jkunx ta' pregudizzju ghaz-zona.

Għalhekk dan l-aggravju ma jistax jintlaqa'.

It-tieni aggravju

Dan l-aggravju jkompli mal-ewwel wiehed u ma fihx mertu. Fl-ewwel lok dan l-aggravju gie trattat u deciz mit-Tribunal u dak li qed jitlob l-appellant hu għalhekk revizjoni ta' dak deciz fuq bazi fattwali u ta' planning li din il-Qorti ma għandhiex għurisdizzjoni tissindika. In ogni kaz, it-Tribunal wasal għal konkuzjoni li z-zewg zviluppi ma kellhomx l-istess mertu ta' planning u l-kwistjoni ta' cerimus paribus ma kienx applikabbli. Pero dan intqal biex jigi trattat l-aggravju innifsu tal-appellant u jigi sodisfatt il-principju li aggravju għandu jigi kunsidrat mit-Tribunal. Dan jingħad peress illi fl-ewwel aggravju kien gia gie deciz illi l-izvilupp tal-appellant ma kienx permissibbli mhux ghax kwistjonijiet ta' commitment dwar għoli ta' bini ma jistax jitqajjem biex jizdied l-gholi kontra dak stabbilit fil-pjan lokali kontra dak li kif gie allegat li sehh fis-sit ta' ma' genb dan in kwistjoni izda għaliex l-istess planning policy kienet tipprekludi f'zona UCA zieda ta' residential unit kif propost bl-izvilupp. Din kienet is-sustanza tad-decizjoni u t-Tribunal ma applikax hazin il-principju ta' cerimus paribus izda iddecieda li

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f'dan il-kaz, meta komparat mal-izvilupp ta' ma' genbu, ma kienx applikabbli ghax l-izviluppi kellhom konsiderazzjonijiet ta' planning differenti. Pero dan kollu kien akkademiku u subordinat ghal fattur principali illi l-planning policy f'UCA kienet tivjeta l-izvilupp propost, u cioe z-zieda ta' building envelope ta' washroom fuq bejt biex issir sular adebit ghal residenza kontra l-Planning and Design Guidance f'UCA fejn hu stabbilit li dan is-sit.

Ghalhekk dan l-aggravju qed jigi michud.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Pierre Debono u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-31 ta' Jannar 2013. Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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