



MALTA

**QORTI TA' L-APPELL**

**ONOR. IMHALLEF**

**MARK CHETCUTI**

Seduta tal-11 ta' Frar, 2015

Appell Civili Numru. 60/2014

**Perit Joe Cassar f'isem CWG plc**

**vs**

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

**Il-Qorti,**

Rat ir-rikors tal-appell ta' CWG plc tal-10 ta' Dicembru 2014 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-27 ta' Novembru 2014 mill-kundizzjoni imposta fil-hrug tal-permess PA 1238/07 'to construct a Thalasso Therapy Health Farm';

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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 ta' l-Izvilupp, fil-5 ta' Jannar 2012, approvat l-applikazzjoni ghall-permess tal-izvilupp PA 1238/07 – Thalasso Therapy Centre, Fortizza Sant' Anglu, Vittoriosa (Birgu): To dismantle and build masonry ...

Il-kundizzjoni numru 2, taqra' s-segwenti:

"2. Prior to the issue of this permission a planning gain to the value of EUR €55,685.00 shall be made towards the Environmental Initiatives in Partnership Programme (EIPP). The funds raised from the planning gain shall be used to fund environmental improvement projects in the locality of the site. The planning gain is not refundable and funds shall be utilized as required and directed by the Malta and Environment and Planning Authority (see attached letter)"

B. In-nota tal-Perit Edward Bencini ghall-Appellant nomine, ipprezentata fil-31 ta' Jannar 2012, senjatament il-punti segwenti:

"3. First Development Permit Application Report

3.1 The Development Permit Application Report prepared prior to MEPA Board session of the is" October 2011 referred at Clause 3.2 to illegal works on site and recommended five planning gain contributions amounting to €35,285.

3.2 The same report refers at 'Clause 4.6 - Consultations' under 'Heritage Planning Unit', at the 10th and 11th paragraphs as follows:

'The additional storey at level 5 is problematic since it has encroached onto the bastion wall, covering part of the fort that was never covered previously thus can be termed as an accretion. The roof embedded into the bastion wall at level 5 damaged this part of the fortification and should be rectified and the bastion restored as detailed in the monitoring report. Additionally the windows of the lower floor are mostly obstructed by the fortification wall, thus the room is not habitable from a sanitary point of view. The fortification wall at level 4 may not be modified in any way apart from carefully removing the layer of cement current extant on it. This is to be removed without damaging the original fabric. Revised plans removing this level have been submitted.'

Additionally, the freelance monitor engaged to oversee works permitted by PA 3831/99 and PA 4918/00 did not notice or did not report the infringement as required by the terms of reference. As a general point, it was also noted that in most places, rendering (especially in external areas) appears to contain cement as also stated in the monitoring report. This is not acceptable in these areas since damages to the stone through the use of cement in these areas will be accelerated owing to the proximity to the sea. Hence, it is also recommended that any additional monitoring to works at Fort St. Angelo are seen to by MEPA at the expense of the applicants.

3.3 The report also states at 'Clause 4.7 - Discussion' under '4.7.5 The Additional Floor at Level 5':

'A major issue was the additional floor at levels which was not indicated in the approved sections and the plans which were not a faithful representation of the actual situation on site, especially with regards the bastion wall overlooking Kalkara Creek.

Its construction included embedded beams in the actual bastion wall which did not follow the works as indicated in the RMS and were considered invasive.

After discussion with the architect and applicant it was agreed that this level be removed from the plans and demolished on site and the bastion wall reinstated. Considering the sensitivity of the site and to ensure compliance it is being recommended that prior to the issue of this permission, under the monitoring of the Heritage Planning Unit, the works carried out at level 5 are to be completely removed and the damage incurred to the bastion walls repaired and restored.

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The works at the level of gun battery No. 2 includes changes to the internal partition wall layout to accommodate the change noted above and the addition of one accommodation unit.'

3.5 We replied to the DPAR by our letter dated 27th September 2011, copy attached at Appendix 3.

In this letter we exhibited plans and sections approved by PA 4918/00 showing incontrovertibly that contrary to what was stated in the DPAR the MEPA Board had approved the construction of the room at level 5. We also attached a letter dated 13th January 2011 where I confirmed on behalf of the developers their readiness to remove the room at level 5 and to relinquish their rights once the enclosed plans are approved.

We therefore proposed in our response to the DPAR at 3.1.3 that 'In relinquishing the vested rights granted to it by permit PA 4918/00 with regards to the level 5 structures and in committing itself to demolish the said structures and make good accordingly, the company has directed me to advise MEPA that the cost of construction of the structures permitted by PA 4918/00, and the cost of demolition of said structures and making good amounts to well over € 50,000 as will be evidenced on demand.'

## 4. 2nd Development Permit Application Report

4.1 Following the MEPA Board sessions of the 13th October 2011, which adjourned the discussion of PA 01238/07 to a later date to be advised, we received a 2nd DPAR from the MEPA Planning Directorate.

4.2 This second report recommended an increased planning gain contribution of € 55,685 instead of the € 35,285 of the original DPAR. A copy of this report is attached at Appendix 4.

## 5. MEPA Board session of 10th November 2011.

5.1 During the MEPA Board Session we explained and demonstrated that the level 5 room was constructed in terms of PA 4918/00 and according to drawings approved by MEPA. Indeed during the construction of this room, following articles

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appearing in the press querying whether this level 5 room was authorized by MEPA, enforcement officers visited the site and confirmed that the construction work at level 5 was in terms of the permit and no enforcement orders were ever issued.

5.2 We insisted therefore that our clients are prepared to give up their vested rights related to level 5 and to demolish this room provided that the proposed € 55,685 planning gains condition is withdrawn and cancelled from the permit conditions.

5.3 During the debate, some MEPA Board members spoke favourably towards our proposal but the MEPA CEO insisted that the Planning gains should be retained. Eventually the Board resolved by a split decision to retain the € 55,685 planning gain conditions.

### 6. Evaluation of level 5.

6.1 The Thalasso Therapy Centre is planned as a superior quality health and heritage oriented hotel with related facilities which will include Thalasso Therapy treatment, a SPA with mud-baths, sauna, and so on.

The plans approved by PA 4918/00 included 15 apartments including the level 5 duplex. Removal of level 5 reduces the number of apartments to 14, and consequently the operational turnover capacity is reduced by 1/15th or 6.67%. This will clearly have considerable impact to the profitability of this venture to the operator.

Actual direct cost impact to the developers, apart from loss of operational revenue, arises from the costs incurred so far in the construction of the level 5 duplex, the costs of demolition of the duplex, and the cost to alter apartments 8 & 9 into one single apartment.

These costs include the structural and finishing works, and are estimated to cost the developers approximately €96,000 after the demolition and reconstruction of the level 4 part of the duplex. This amount excludes the consequential loss of operational revenue.

In view of the foregoing, on behalf of the developers, we respectfully request the Tribunal to instruct MEPA to cancel the € 55,685 planning gain condition and to

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issue PA 1238/07 without -this condition, after the developers have fulfilled the requirements of other conditions included in the MEPA letter of the 5th January 2012, attached at Appendix 1.”

C. In-nota responsiva ta' Jonathan Borg għall-Awtorita', ipprezentata waqt is-Seduta numru 29 mizmumz fit-3 t' April 2012, inter alia l-punti segwenti:

“5.2.1 The proposal in brief:

The health and relaxation spa with related accommodation within the envelope of the distillation plant (the building at sea level) and at the upper gun battery have been approved in the previous permit PA 4918/2000.

This application seeks amendments in the layout of this permit and the sanctioning of works carried out without a permit. The main changes include redesign of the reception area/board room at the lower level to accommodate a multi-purpose hall and an additional apartment unit at

gun battery no.2 level (to a total of 15 units).

5.2.2 The nature and mechanism of the Planning Gain:

The idea behind the Planning Gain mechanism is that if by way of a permit the community is set to lose a cultural or environmental asset that forms part of its context and identity, a sum of money established to be equivalent to asset being lost, is made of available to the Authority so that they may be utilised in projects that favour the community in compensation of that lost asset.

Articles 76(1b) of the Environment and Planning Development Act (2010) allows MEPA to impose payments '[...] where the Authority considers it to be more appropriate. The Authority shall seek to obtain these benefits or gains by means of conditions attached to a grant of the licence or development permission [...]’.

The regulations and procedures referred to in Article 76 have been laid down in Legal Notice 28 of 2002 - Development Planning (Planning Obligations) Regulations.

Article 76 and the Legal Notices do not refer to the Environment Initiative Partnership Programme (EIPP). The EIPP is a MEPA fund where such payments

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arising from planning obligations are usually deposited. The fund is also used where forfeited bank guarantees or other means of income are deposited for subsequent use in environmental initiatives promoted by MEPA.

### 5.2.3 The Planning Gain mechanism vis-à-vis this permit:

The part of the fort managed by the appellant has been subject to various illegal works. The Authority calculated how much the appellant would have been requested to deposit in the form of a bank guarantee had these works have not already been executed but would have been subjected to a monitoring condition. The amount calculated has been used to determine the planning gain.

The following is the calculation details:

#### No. 2 Battery

€3785.00 for trench ca. 1.5m deep x 60cm wide x 60-70metres long trench was excavated without permit and without archaeological monitoring. Such works required a permit, consultation with the Superintendence of Cultural Heritage and this office and permit conditions for monitoring and a bank guarantee for compliance.

€20,000.00 for excavation works carried out in two of the three casemates (at a rate of €100/m<sup>2</sup>). Such works if applied for would not have been recommended due to the adverse impact on an integral part of the Fort.

€9,300 for the replacement of roofs without permit (31 x 3m at the rate of €100 per square metre);

€1,500 for the clearing of the trench abutting the stairs leading to the sally port (a nominal fee);

€1000.00 nominal fine for the introduction of beading on facade without permit.

€500.00 for the reinstatement carried out without prior notice of the works and thus without monitoring.

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### Sea level Battery

€ 10,000.00 excavation of trench on two sides of desalination plant and alongside battery (through gun platforms) – 100m long by approximately 1m wide (at a rate of 100/m<sup>2</sup>)

€9,600 for excavation at sally port level.

Total: € 55685.00

The specific details of these illegalities are explained thoroughly in the DPAR

The site subject to the appeal forms an integral part of Fort St. Angelo which is currently undergoing major rehabilitation works. The appellant's site makes use of the infrastructure of the fort and benefits also from the upgrading and rehabilitation of the fort in general. Therefore it was deemed opportune to oblige the appellant to contribute towards a planning gain in view of the various illegalities carried out throughout the site which impact on the fort in general.

#### 5.2.4 The Authority's position vis-à-vis the Appellant's arguments:

The Authority does not agree with the appellant that he should be compensated for relinquishing the apartment at level 5. The Authority maintains that this apartment was built without a permit.

The appellant is arguing that this apartment was covered by permit since it was shown in the approved plans in PA4918/2000. However the Authority would like to highlight that this unit was not visible in the approved section drawings in the same application. Moreover the plans submitted in PA4918/2000 were not a faithful representation of the actual situation on site, especially with regards the bastion wall overlooking Kalkara Creek. This bastion wall was simply not shown on plan but instead the drawings depicted the terrace of the apartment at level 5. Therefore the only way the apartment at level 5 could have been executed as shown in the plans was by gutting and removing 8m of the bastion wall which of course the Authority would have never considered let alone permitted given the Grade 1 status of the fort. Indeed the apartment at level 5 is not shown at all in the section drawings which are more explanatory to identify the position and existence of this bastion wall.



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Furthermore, contrary to what has been stated by the appellant, the approved permit in the current application (PA 1238/07) still consists of 15 apartments (as per original permit) and therefore there was no loss in the number of apartments available on this site. There are four (4) apartments at level 1 (two of which are duplex), two (2) apartments at level 2 and nine (9) apartments at level 4.

The appellant is giving the impression that there was no general agreement on the decision of the planning gain and that this was only resolved by a split decision. The minutes of the MEPA Board indicate otherwise and that the decision for the planning gain to be kept in entirety was agreed by a vote of 12 -1. All other votes taken in relation to this application were unanimously taken.”

D. In-nota ta' sottomissjonijiet tal-Avukat Dott. Massimo Vella ghall-Appellant nomine, ipprezentata fl-4 t' Ottubru 2012, precizament il-punti segwenti:

“[...] dan il-permess inhareg biss a bazi ta' numru ta' kundizzjonijiet, fosthom li:

(i) jitnehhew ix-xoghlijiet kollha li saru fil-Pjan 5 ta' dan il-fond, tigi rimedjata 1-hsara li saret fil-hitan tas-swar ujsir ukoll xoghol ta' restawr fl-istess hitan;

(ii) tithallas planning gain ta' hamsa u hamsin elf sitt mija u hamsa u tmenin euro (€55,685.00) pagabbli lill-Environment Initiatives Partnership Programme (EIPP);

L-appellant qed joggezzjona ghall-imposizzjoni tal-planning gain surriferita ghaliex inghatat minghajr gustifikazzjoni, hija irragjonevoli, u fi kwalsijasi kaz l-ammont mitlub huwa eccessiv u irregolari.

L-esponenti interpona dan l-appell mill-imsemmija planning gain u dan ghas-segwenti ragunijiet:

1. Fl-ewwel lok, meta l-Awtorita appellata imponiet dan il-hlas, hija ma tat l-ebda motivazzjoni il-ghala dan ghandu jigi impost. Ghalhekk ladarba ma inghatatx raguni, din l-impozizzjoni ta' hlas ma tista' bl-ebda mod tigi kkunsidrata bhala legittima jew ragjonevoli, u konsegwentement hija bla bazi legali. Dan gie kkonfermat mill-Planning Appeals Board f'appell fl-ismijiet Raymond Magri kontra l-Awtorita ta' Malta ghall-Ambjent u l-Ippjanar, liema bord laqa' l-oggezzjoni ta' l-appellant fir-rigward ta' l-impozizzjoni ta' planning gain, filwaqt li sahaq illi:

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'Mhux bizzzejjed li tghid kif ghandu jintuza dan il-hlas. Impozizzjoni ta' hlas Mal dan minghajr ebda raguni Jew motivazzjoni tirrendi l-azzjoni ta' l-Awtorita minghajr bazi legali oltre li tirrendiha irragjonevoli. Ghalhekk, dan il-Bord ma jistax jikkonferma l-impozizzjoni ta' tali hlas Mala planning gain. Ghalhekk l-impozizzjoni ta' tali hlas hija ukoll kompletament bla bazi legali.'

Kif intqal mill-Planning Appeals Board fl-appell fl-ismijiet Paul Camilleri fisem Micallef and Zammit kontra l-Awtorita ta' Malta ghall-Ambjent u l-Ippjanar: id-diskrezzjon tal-Awtorita fl-imposizzjoni ta' planning gain contribution ' ... ghandha tintuza h'diligenza, attenzjoni u motivazzjoni.'

Dawn il-kwalitajiet ma jirrizultawx mill-mod kif giet imposta l-kundizzjoni de quo mill-Awtorita appellata, li mhux biss ma pprovdiet l-ebda raguni ghall-hlas ta' din il-planning gain, izda lanqas ma spjegat kif ikkalkulat il-quantum ta' din is-somma.

L-appellant jirrileva ukoll illi d-diskrezzjoni ta' l-Awtorita, 'kemm fl-impozizzjoni u kif ukoll fil-quantum li jista' jigi impost - hija dejjem suggetta ghall-iskrutinju ta' dan il-Bord', u dan kif rite nut fl-appell surriferit ta' Paul Camilleri fisem Micallef & Zammit kontra l-Awtorita ta' Malta ghall-Ambjent u l-Ippjanar. Fl-istess appell, l-Bord ikkonkluda illi:

'l-Awtorita ghandha dejjem tara u tassigura meta timponi l-planning gain, illi tesprimi car u minghajr ekwivoci, ir-ragunijiet u l-motivazzjonijiet taghha ghar-raguni fa' l-impozizzjoni tal-planning gain fil-principju u l-quantum impost - l-ezercizzju nsomma tad-diskrezzjoni taghha. Propju ghax huwa diskrezzjonali dan id-dritt ta' l-Awtorita, illi ghandu jithaddan b/-akbar trasparenza.'

2. Minghajr pregudizzju ghas-suespost, skont l-Att dwar l-Ambjent u l-Ippjanar tal-lzvilupp (Kap. 504), kundizzjoni imposta fuq perness tista' tigi appellata jekk l-appellant jidhirlu li din mhix 'ragonevoli' (Art. 74). F'decizjoni tal-House of Lords, fl-ismijiet *Newbury DC vs Secretary of State for the Environment* / gew diskussi l-kriterji li ghandhorn jigu sodisfatti sabiex planning gain titqies bhala wahda legittima. Wiehed minn dawn il-kriterji hu sewwasew illi: 'as with the exercise of all public law powers, the power has to be exercised reasonably in accordance with *Wednesbury principles* ', Dan il-kriterju jindirizza l-legittimita ta' planning gain mill-lat tal-ligi amministrattiva Ingliza, li kif inhu ben risaput, hija l-pedament tal-ligi amministrattiva nostrana. Ghalhekk, planning gain ghandha dejjem tissodisfa l-kriterju tar-ragonevolezza.

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L-appellant umilment jissottometti illi planning gain ta' hamsa u hamsin elf sitt mija u hamsa u tmenin euro (€55,685.00) m'hix ragonevoli, u dan mhux biss ghaliex ma inghatat l-ebda spjegazzjoni ghalfejn giet imposta jew kif giet ikkwantifikata din is-somma, izda ukoll ghaliex l-appellant intalab inehhi x-xoghlijiet kollha li saru fil-Pjan 5 tal-fond in kwistjoni meta tali xogholijiet kienu gewa approvati permezz tal-permess PA 04918/00.

It-tnehhija tal-Pjan 5 ser tirrizulta f'nuggas f'dak li jista' jigi zviluppat telf ta' profitt ta' cirka hamsa u erbghin elf euro (€45,000) fis-sena, liema somma tammonta ghal zero punt disgha (0.9) miljun euro meta tigi kkapitalizzata b'rata ta' hamsa fil-mija (5%). Dawn il-figuri gew mahduma mill-appellant a bazi ta' rati kkonfermati ta' stabbilimenti simili, fil-waqt li l-appellant jirriveva ukoll illi dawn huma stimi kemmxejn konservattivi. L-appellant ghalhekk isostni illi planning gain ta' hamsa u hamsin elf sitt mija u hamsa u tmenin euro (€55,685.00) m'hix ragonevoli fid-dawl tal-fatt illi kundizzjoni ohra imposta fl-istess permess ser tirrizulta ftelf konsiderevoli ta' kwazi miljun Euro. Ghalhekk, ladarba il-planning gain imposta mhix ragonevoli, l-appellant jissottometti illi din m'hix wahda legittima.

3. Minghajr pregudizzju ghas-suespost, u dato ma non concesso illi i-planning gain imposta hija wahda legittima, l-appellant jissottometti ukoll illi l-ammont mitlub huwa wiehed eccessiv u irregolari. Issir riferenza ghar-rapport tal-Case Officer dwar l-applikazzjoni datat 23 ta' April 2011 (anness u mmarkat bhala Dok. A), liema rapport jirrakkomanda planning gain ta' somma ferm anqas, cioe' ta' hamsa u tletin elf mitejn u hamsa u tmenin euro (€35,285.00). Din id-diskrepanza sostanzjali ta' cirka ghoxrin elf euro bejn ir-rakkomandazzjoni tal-Case Officer u l-ammont finalment mitlub mill-Awtorita qatt ma giet spjegata lill-appellant.

Ma hemm l-ebda gustifikazzjoni ghall- ammont impost permezz tal-kundizzjoni de quo u konsegwentement ghandu jirrizulta li din hija palezement ingustifikata.

Ghaldaqstant, ghar-ragunijiet premissi, l-esponenti jissottometti bir-rispett li l-appell tieghu ghandu jigi milqugh u l-kondizzjoni fil-permess numru PA 01238/07 li biha giet imposta planning gain contribution fl-ammont ta' €55,685.00 ghandha tigi revokata."

E. In-nota second statement ta' Jonathan Borg ghall-Awtorita', ipprezentata waqt is-Seduta numru 5 mizmuma fit-8 ta' Frar 2013, senjatament il-punti segwenti:

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“2.1 Re: Appellant's argument that MEPA failed to motivate the planning gain:

[...] The Authority calculated how much the appellant would have been requested to deposit in the form of a bank guarantee had these works have not already been executed but would have been subjected to a monitoring condition. The amount calculated has been used to determine the planning gain. The site subject to the appeal forms an integral part of Fort St. Angelo which is currently undergoing major rehabilitation works. The appellant's site makes use of the infrastructure of the fort and benefits also from the upgrading and rehabilitation of the fort in general. Therefore it was deemed opportune to oblige the appellant to contribute towards a planning gain in view of the various illegalities carried out throughout the site which impact on the fort in general.

2.2 Re: Appellant's argument that MEPA did not explain how it calculated the planning gain:

The Authority has already given a detailed breakdown of the calculation of the planning gain in paragraph 5.2.3 in the initial report to the Tribunal, which calculation was also included in the DPAR. Therefore the appellant, contrary to the impression he is trying to convey, was most aware of how the planning gain was calculated.

2.3 Re: Appellant's argument that the Planning Gain is unreasonable because MEPA requested the removal of approved works at Level 5:

The [...] appellant cannot pretend to be compensated for the loss of something that should not exist in the first place. Furthermore, contrary to what has been stated by the appellant, the approved permit in the current application (PA 1238/07) still consists of 15 apartments (as per original permit) and therefore there is no loss in the number of apartments available on this site. There are four (4) apartments at level 1 (two of which are duplex), two (2) apartments at level 2 and nine (9) apartments at level 4.”

F. Il-verbal tas-Seduta numru 27, mizmuma fit-23 t' April 2013, inter alia l-punti segwenti:

“Dr. Massimo Vella jiddikjara illi l-Prof. Edward Scicluna m'ghadux iktar Direttur tal-Kumpanija appellanti u ghalhekk r-rapprezentanza illum qeghda tivvesti l-perit Joe Cassar u ghalhekk jitlob il-korrezzjoni opportuna; it-Tribunal jilqa' t-talba u jordna tali korrezzjoni.

Il-perit Bencini wera lit-Tribunal l-pjanti tal-permess PA 5418/00 li juru l-kamra in kwistjoni, partikolarment il-mapep 15F u 15Q.

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Dr. De Gaetano, b'referenza ghall-pjanti msemija mill-perit Bencini, jiddikjara illi l-kamra hemm imsemija sussegwentement giet imnehhija mill-pjanti emendati billi l-izvilupp kif originarjament propost ma setax isir billi kienet gos-swar u ma tidhirx fis-sectional drawings.

Il-konsulenti tal-appellant jiddikjaraw illi proponew illi l-kamra originarjament approvata titneha u tigi traded off mal-ammonti pretizi mill-Awtorita' li x-xogholijiet saru minghajr ma kien sar monitoring."

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda talba sabiex tigi revokata l-kundizzjoni numru 2 fil-permess PA 1238/07, li timponi lill-Appellant nomine jikkontribwixxi s-somma ta' Euro 55,685 ghall-Environmental Initiatives in Partnership Programme (EIP).

L-izvilupp jirrigwarda xoghlijiet estensivi f' Forti Sant' Anglu, il-Birgu. Originarjament, is-sit kien inhariglu permess (PA 4918/00) ghal facilita' terapewtika (thalassotherapy). Imbaghad inhareg outline development permit (PA 3831/99) sabiex il-forti jigi zviluppat bhala parti mill-Cottonera urban regeneration project, li gie segwit minn permess (PA 3531/99).

L-aggravji tal-Appellant nomine jistrieu fuq il-premessa li skond il-klawsola 3.2 tad-DPAR, gie rikamdat li jhallas is-somma ta' Euro 35,285 minhabba xi zvilupp legali li kien bena u ghamel fuq is-sit in ezami. Fid-dettal, dawn ix-xoghlijiet jirrigwardaw il-kostruzzjoni ta' struttura invaziva fil-hames sular, li nbriet fil-hxuna tas-sur u li ma tirrispettax il-ligijiet sanitarji, kif ukoll xi xoghol tal-kisi li sar bis-cement. L-Appellant nomine jikkontendi li huwa kien wasal ghal ftehim mal-Awtorita' sabiex jirrinunzja ghal din il-kamra u jhallas multa ta' Euro 35,285 sabiex jinariglu l-permess.

L-Awtorita' zammet ferm l-oggezzjoni taghha u rilevat li l-planning gain fil-konfront tal-EIP in ezami, gie ikkalkolat abbazi tal-ammont li l-Appellant nomine kien ikun obligat li jiddepozita bhala garanzija bankarja, inkluzi l-ispejjez ta' monitoragg, li kieku x-xoghlijiet illegali kienu koperti bil-permess, bhallikieku saru hazin u ntilfet il-garanzija bankarja.

Qabel xejn, tajjeb li jigi osservat li il-legalita' ta' din il-kamra hi kontestata bejn il-partijiet. L-Appellant nomine jiddikjara li din tiffurma parti mil-permess PA 4918/00, mentre l-Awtorita' tirrileva li qatt ma dehret fil-pjanti sottomessi. In oltre, l-Appellant

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nomine jargumenta li konferma tal-illegalita' tal-kamra hu l-fatt li s-sit qatt ma ntlaqat b' avviz biex tieqaf u ta' twettieq, mentre l-istess DPAR jispjega li fil-livell sottostanti, l-kamra ghandha twieqi li l-maggor parti taghhom huma mblukkati bis-sur u ghalhekk mhumiex konformi mal-ligi sanitarja (viz. l-ewwel pagna tas-sottomissjoni tal-Appellant nomine tal-31 ta' Jannar 2012).

In oltre, jigi nutat li din il-parti tal-izvilupp kif rapprezentata fil-pjanti approvati bil-permess PA 4918/00 hi wahda ambigwa, u caso mai it-tezi tal-Appellant nomine hi wahda attendibbli, kieku bil-mod kif gew rapprezentati l-imsemmija struttura u s-sur, kien jinhtieg li jsir tqattiegh fis-sur sa fond ta' madwar tmien metri. Hawn si tratta minn fortizza, iklassifikata u listed bhala Grade 1.

Zgur li f' cirkostanzi normali, l-Awtorita' qatt ma kienet qatt ser tapprova li s-sur jigi sfregjat b' dan il-mod, madankollu, anke jekk ghal-grazzja tal-argument dan kien il-kaz, jibqa' l-argument tal-Appellant nomine li s-somma ta' planning gain kif riveduta, qatt ma kienet spjegata jew motivata, u "ladarba ma nghatax raguni, din l-impozizzjoni ta' hlas ma tista' bl-ebda mod tigi kkunsidrata bhala legittima jew ragjonevoli, u konsegwentement hija bla bazi legali." (sottomissjoni tal-4 t' Ottubru 2012).

Jigi nutat pero' li dan l-ahhar argument huwa wiehed kontradittorju ghax gja' fis-sottomissjonijiet precedenti tieghu, l-Appellant nomine ex admissis spjega kif din is-somma giet imposta meta gie ppublikat it-tieni DPAR (kopja ipprezentata f'Appendix 4 anness mal-appell). Ghalhekk, mhux minnu li dan l-ammont huwa bla bazi, ghax it-tieni DPAR (ippublikat fit-23 April 2011) jelenka b' mod car u konciz liema kienu x-xoghlijiet abbuzevi u jispjega sewwa kif ghandha tigi ikkalkolata s-somma tal-planning gain. Fil-fatt, din l-updated version tad-DPAR tissostitwixxa l-klawsola 3.2 originali ta' Euro 35,285 f' planning gain (kif sucitat) bil-klawsola 3.3, fejn il-planning gain jammonta ghal Euro 55, 680. Dan kollu sar wara li l-Awtorita' hadet konjizzjoni ulterjuri tal-hsara u x-xoghlijiet illegali li precedentment ma kienitx konsapevoli dwarhom.

Fl-ahharnett, fil-konfront tal-agravju tal-Appellant nomine li t-twaqqiegh ta' din l-istruttura ser jirrizulta f' "consequential loss of operational revenue" huwa nfondata ghax kif rilevat mill-Awtorita' fis-second statement, l-ammont t' appartamenti baqa' l-istess. Ghal kull buon fine, irid jinghad ukoll li ghar-rigward tal-istruttura fil-hames livell, il-pjanti kienu gew approvati mis-Sanita' fis-27 t' Ottubru 2006 (kopja ipprezentata f' Appendix 3 anness mal-appell). Madankollu, l-pjanti juru biss il-arti li ser tinbena (bl-ahmar) mentre l-parti tas-sur intiza li titqatta jew tinhatt, mhiex indikata (Bl-isfar). Dan mhux korett u l-Awtorita' kellha ragun tghid li l-pjanti prezentati semmaj kienu ambigwi. Li missha ghamlet l-Awtorita' kien li tistudja l-propost bir-reqqa sabiex jigu evitati sitwazzjonijiet bhal dawn.

## Kopja Informali ta' Sentenza

Ghalhekk, in vista tal-konsiderazzjonijiet kollha hawn fuq maghmula, dan il-Tribunal qed jiddisponi minn dan l-appell billi jichad l-istess u jikkonferma in toto il-kundizzjoni numru 2 fil-permess PA 1238/07, kif mahrug mill-Kummissjoni ghall-Kontroll ta' l-Izvilupp, fil-5 ta' Jannar 2012.

### Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. Il-parti decisiva tad-decizjoni tat-Tribunal hi affetta minn zball insanabbli billi d-data tal-hrug tal-permess hi indikata bhala l-5 ta' Jannar 2012 mentri hi 10 ta' Novembru 2011;
2. It-Tribunal naqas li jittratta l-aggravju promoss cioe li l-planning gain imposta ma gietx motivata fid-decizjoni tal-Kummissjoni. Invece t-Tribunal skarta l-aggravju ghax qal li l-motivazzjoni qeghda fir-rapport tad-DPAR pero dan hu rapport ta' case officer.

### I-ewwel aggravju

Dan l-aggravju hu wiehed fieragh. L-appell quddiem it-Tribunal sar mill-impozizzjoni ta' kundizzjoni ta' planning gain inkluza fl-ittra mibghuta lil mill-Awtorita fil-5 ta' Jannar 2012. Dan hu rifless kemm fl-istess ittra ta' appell tal-appellant quddiem it-Tribunal u anke fl-istess decizjoni tat-Tribunal li irrefera specifikament ghal tali data fil-parti dispozittiva tad-decizjoni biex jikkonferma l-kundizzjoni 2 tal-permess PA 1238/07 mahruqa mill-Kummissjoni f'ittra li ggib dik id-data, u mhux biex jikkonferma l-approvazzjoni tal-applikazzjoni li saret fl-10 ta' Novembru 2011 u lanqas ma jghid li l-kundizzjoni giet imposta f' Jannar 2012.

Id-decizjoni tal-10 ta' Novembru 2011 ma kinitx soggetta ghall-appell, izda l-appell sar biss dwar wahda mill-kundizzjonijiet imsemmija fl-ittra tal-5 ta' Jannar 2012 mibghuta mill-Awtorita lil applikant liema data hi imsemmija specifikament mill-istess appellant. Il-Qorti kienet tiehu veduta differenti li kieku l-appell kien qed isir mill-approvazzjoni jew ir-rifjut innifsu li jkun sar f'data specifika antecedenti ghal hrug tal-ittra formali tal-permess. Il-Qorti kienet tkun aktar serena li kieku t-Tribunal specifika fil-part decisiva li qed jikkonferma d-

## Kopja Informali ta' Sentenza

decizjoni tal-approvazzjoni tal-10 ta' Novembru 2011 kif konfermata b'ittra fil-5 ta' Jannar 2012. Pero f'dan il-kaz il-kontestazzjoni kienet cara u intiza biss ghal kundizzjoni fil-ittra ta' Jannar 2012 filwaqt li l-approvazzjoni cioe d-decizjoni ta' rifjut jew approvazzjoni ma gietx bl-ebda mod kontestata. Is-sentenza ta' din il-Qorti ikkwotata mill-appellant (George Attard vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar, App 27/2011) biex jiggustifika l-ilment tieghu ma fihx somiljanza ghax f'dak il-kaz it-Tribunal zbalja d-data tad-decizjoni ta' rifjut u kwindi l-konferma tad-decizjoni kellha tirrifletti d-data tad-decizjoni u ebda data ohra.

Ghalhekk dan l-aggravju qed jigi michud.

### **It-tieni aggravju**

Dan l-aggravju ma fihx mis-sewwa ghaliex fl-ewwel lok kif inhu impostat l-aggravju cioe li t-Tribunal ma ikkunsidrax li l-Kummissjoni ma immotivatx l-impozizzjoni ta' planning gain ma jidhirx li kien aggravju quddiem it-Tribunal u ghalhekk l-appellant ma jistax issa jipprova jattakka d-decizjoni tal-Kummissjoni quddiem din il-Qorti minghajr ma qajjem l-istess ilment quddiem it-Tribunal. Bhala aggunta l-Qorti issib is-sottomissjoni infisha bla bazi billi l-Kummissjoni ghandha kull jedd tapprova rapport u taghmel taghha l-konkluzzjonijiet raggunti u rakkomandazzjonijiet mid-direttorat taghha stess.

Jekk l-aggravju ghandu jigi intiz illi t-Tribunal ma immotivax sew id-decizjoni izda strah fuq rapport tad-DPAR, il-Qorti tqis li dan ma jirrizultax ezatt minn qari tad-decizjoni. It-Tribunal ikkunsidra kemm l-argumenti imressqa mill-appellant fil-merti tal-aggravju dwar l-impozizzjoni tal-planning gain u l-argumenti tal-Awtorita li strahet fuq rapport u rakkomandazzjonijiet tad-DPAR. In oltre a pagna 12 u 13 jirrizultaw il-kunsiderazzjonijiet li ghamel l-istess Tribunal a bazi tas-sottomissjonijiet tal-partijiet ghaliex dehrlu li l-impozizzjoni tal-planning gain kienet gusta. It-Tribunal ghandu jaghti decizjoni motivata pero dan ma jfissirx li ghandu jikteb volumi jew jifli kull sottomissjoni singolarment biex jiggustifika l-konkluzzjonijiet tieghu basta li jkun ta widen u risposta ghas-sustanza tal-aggravju maghmul, b'mod konkret fuq bazi ta' ippjanar in konformita mal-ligijiet, pjanijiet u policies b'tali mod li jolqot l-ilment u jaghti risposta ghalih. L-appellant fil-fatt ma jilmenta minn ebda punt sostanzjali fil-mertu li ma giex kunsidrat u dan wahdu hu bizzejjed biex iwaqqa' l-aggravju.



**Decide**

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' CWG plc u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-27 ta' Novembru 2014, bl-ispejjez kontra l-appellant.

**< Sentenza Finali >**

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