



MALTA

**QORTI TA' L-APPELL**

**ONOR. IMHALLEF**

**MARK CHETCUTI**

Seduta tal-11 ta' Frar, 2015

Appell Civili Numru. 53/2014

**Carmelo Cortis**

**vs**

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

**Il-Qorti,**

Rat ir-rikors tal-appell ta' Carmelo Cortis tat-30 ta' Settembru 2014 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-16 ta' Settembru 2014 li sostniet l-enforcement notice tas-7 ta' Marzu 2009 fejn intqal 'ghandek gnien, sit vojt jew art ohra fil-berah li dehra jew kondizzjoni taghha qeda thassar il-gmiel jew siwi taz-zona li qeda fiha minhabba:

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ghandek depozitu u zamma ta' vetturi, ingenji u partijiet minnhom metall, scrap, travi u blokki tal-konkos u materjal iehor u dan kollu minghajr permess';

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:

Dan huwa Appell maghmul minn Carmelo Cortis kontra l-hrug ta' enforcement notice datat 7 ta Marzu 2009 fejn intqal:

"Ghandek gnien, sit vojt jew art ohra fil-berah bid-ehra jew kundizzjoni taghha qeghda thassar il-gmiel jew siwi taz-zona li qeghda fiha minhabba :

Ghandek depozitu u zamma ta' vetturi, ingenji u partijiet minnhom, metal, scrap, travi u blokki tal-konkos u materjal iehor u dan kollu minghajr permess".

Fl-Appell presentat fl-14 ta' April 2009 l-Appellanti spjega:

"It is pertinent to point out that, although the enforcement notice is dated 17th March 2009, it was only received by my client after the 9th of April as can be attested by the postal stamp on the envelope which is dated 7th April 2009 (copy of envelope is attached). We are therefore amply in time to file the appeal.

A brief history of the development of the area is to be considered. My client's family have been living in this area for more than 150 years. In fact, when the 'original Mtarfa hospital was built in 1890, my client's ancestors were moved from ,the site where the hospital was actually built. A farmhouse to act as their residence was built further west of the site and an encroachment was given on the lands north of the hospital site and the shifted residence.

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During 1890 military barracks were built. Later a hospital to cater for the First World War injured personnel from the Dardanelles was also built. Work on the [hospital started in 1915 and completed by 1920. As Mtarfa became a hive of activity and several locally engaged workmen had to make it to the village by the very limited means of transport available at the time, in 1883 the railway was extended to the limits of Mtarfa. The site on which the enforcement was issued was used as a scrap yard since the British Period.

When the British took over Mtarfa to build their barracks, the ancestors of Mr. Cortis had to leave the farmhouse that they lived in. This was located where the Mtarfa Old People's Home today stands. This building was originally built as a military hospital. As compensation, the British Military built a new farmhouse for Mr. Cortis's ancestors on another parcel of land just below the ridge and also granted the use of the parcel of land falling within the area of enforcement.

The farmhouse was built and, from the construction methods used, it can be verified that the British Military erected this building. When the hospital was built, passages were left between the several buildings of the hospital leading from Mtarfa center towards the farmhouse which are still in existence today. Mr. Cortis's grandfather, George Cortis, used to live in this building and enjoyed an encroachment with the Military Forces to use the land which is marked under this enforcement. Mr. Cortis's father, Giuseppe, later built another farmhouse below that of his father George's farmhouse, My client, Mr. Carmelo Cortis, used to live with his father till he got married and had his ID card address registered at the same place. During the British period extensions of several garages took place - this as attested in the aerial shots attached. Furthermore, for more than 50 years, a gate restricting entrance to the general public could be found.

After the Second World War, parts of military airplanes, trucks, wagons and other pieces of surplus equipment and other building materials no longer used and/or stored by the British Military were placed on the site covered by the enforcement in caption. The British also created a surface quarry and the excavated pit known as "Il-Barriera" was used as a coal depot. Although most of the coal was removed traces of this can still be found today. It is pertinent to point out also that barbed wire used to be thrown on another location on the site. Some of this can still be found there today.

Apart from the Military, Mr. Cortis and his ancestors used also to use the area as a yard where fanning and building equipment as well as vehicles used to be parked.

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This activity originated by the depositary of surplus equipment which can be traced back to the end of the Second World War is clearly attested by aerial shots dating back from 1957 to date. Kindly note that the activity remained uninterrupted up to today. Consequently, the enforcement issued is unfounded since the same use of land has been persistent over the last 50 years. Claims that my client is now contravening Article 55 of Act 1 of 1992 are unfounded since the activity on site commenced prior to 1957 - this as attested in the various aerial shots presented with this documentation.

For the above reasons, we believe that the enforcement in caption should be dropped and my client allowed to continue with his activity.”;

L-Awtorita' irrispondiet:

“Illi l-avviz inhareg taht l-artikolu 55 meta il-kundizzjoni ta' sit vojta jew art tkun qed tkerrah l-ambjent. Tali avviz inhareg kontra l-Housing Authority bhala sid u kontra Karmenu Cortis, l-okkupant, talli fl-art kien qed jinzamm metal, scrap, blokki tal-konkos, vetturi w partijiet ta' vetturi w imbarazz iehor fuq is-sit;

Illi l-istorja li giet ipprezentata fl-appell hi interessanti pero' kompletament irrilevanti ghall-appell de quo stante li l-istess appellant fl-ahhar qed jikkontendi li ghandu dritt li jkompli l-attivita' tieghu (presumibilment scrap dealer) meta l-istess m'ghandu ebda permessi fuq is-sit. Ta' min wiehed jaghmel referenza ghall-kazistika tal-Qorti, partikolarment Angelo Farrugia vs l-Awtorita', fejn l-istess Qorti ghamlet referenza ghal scrapyard illegali li kienet ilha topera ghal madwar 80 sena, ma ggib ebda dritt li tibqa' fejn hi;

Illi l-istess art hi art agrikola tal-Housing u l-parti fejn hemm l-art bhala sit vojta m'hi koperta b'ebda permess ghal xi attivita';

Ghaldaqstant l-appell ghandu jigi michud u l-avviz ikkonfermat.”

Fin-nota ta' sottomissjonijiet datata 15 ta' Gunju 2009 l-Appellant zied:

“It is pertinent to point out that use became material consideration for development with the enactment of the 1992 act. Prior to this time use did not constitute development and, therefore, did not fall under the development act. Kindly note that

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the British military instituted the use as a yard where surplus machinery, including trucks and heavy plant, were stored after the Second World War. This use persisted up to today in an uninterrupted manner. The requirement that the government obtains permits from the authority and/or any other licensed planning authority came into force with the enactment of Act 1 of 1992. Prior to this date, government did not require any development permits in order to institute any activity and/or development. Arguing that the property is without permit therefore is unfounded. In fact, at the time when the activity commenced, government did not have to ask for any permits from within its own echelons and therefore, the use of the area as a surplus yard where trucks, heavy plant and other machinery are stored can be considered to have a valid development permit since government itself commenced the activity. Furthermore, kindly note that, as already indicated in the aerial shots submitted with our earlier correspondence, heavy plant and building equipment was actually stored on site prior to 1957.

Considering Clause 53 of the Planning Development Act an enforcement notice can only be issued on the proviso that anything "prohibited or restricted or subject to a condition by or under any of the provisions of article 46, 48 or 49 is being done or carried on or has been done or carried on in contravention of any such prohibition, restriction or condition or without any permission or other requirement, or without compliance with any condition, mentioned in those articles or any orders made thereunder." Consequently this enforcement should be rendered null and void since the development is a permitted development since it was instituted by the government prior to 1957 and therefore, it had a de facto permit for the use of the area as continued till today.

Mr. Carmelo Cortis has been involved in the building trade since the late 60's. Building equipment used to be stored on site prior to Mr. Cortis's building activity since his uncle also used the area as a storage yard where heavy plant and building equipment were actually stored. This activity was ongoing and uninterrupted since it followed the same activities instituted by the British Military.

Reference is here made to the case Angelo Farrugia vs. l-Awtorita'. It is pertinent to point out that quoting from Charles Polidano vs Kummissarju ghall-Kontroll tal-Izvilupp Appeal No. 216A199 and Albert Satariano vs. l-Awtorita' tal-Ippjanar Appeal No. 14A100 where, during the proceedings of the Appeals Court (sittings of March 2001 and 23rd April 2001 respectively) reference to the aforementioned case Angelo Farrugia vs. l-Awtorita' was actually made. In both cases the Authority and the Courts argued the following:

In Satariano's case the Planning Authority argued that "il-policies applikabbli huma daww vigenti fiz-zmien meta tigi deciza l-applikazzjoni u mhux daww operattivi fiz-

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zmien meta tkun giet sottomessa l-applikazzjoni" This was further agreed to by the courts since "din il-Qorti taqbel mas-sottomissjonijet li ghamlet l-Awtorita' u m'ghandhiex ghalfejn tamplifika xejn ghaliex is-sentenzi citati mill-istess Awtorita' kienu verament dahlu f'din il-kwistjoni funditus u ghalhekk ikun inutili li din il-Qorti tiddilunga aktar fuq il-kwistjoni."

In Polidano's case Polidano's representatives argued that in the above case and others "jl-appell in dizamina, ma hemm ebda punt ta' Dritt deciz mill-Bord .

Ezami tas-sentenza jindika illi essenzjalment din tikkonsisti f'enunzjazzjoni u applikazzjoni ta' Planning Policies illi huma barra ji kliem il-Qorti "il-gurisdizzjoni limitattissima taghha."

Furthermore the Court of Appeal stated that it did revoke decisions of the Board of Appeal when these were ultra vires. The cases indicated do not include the one between Angelo Farrugia vs. l-Awtorita', It can therefore be deduced and corroborated that the Board of Appeal applied current Planning Policies on the basis that the application being considered was not a permitted activity and therefore any sanctioning application would have been assessed with the current Planning Policies.

It is believed that we are here missing the wood for the trees. What is being argued is that:

The area was used as a storage yard by the British Military and the Malta Government pre and post World War 11.

This activity continued to take place both by the British Military and later on by the ancestors of my client.

This activity remained uninterrupted since the early 1950's and before up till today.

The Government of Malta at that time did not require any development permits for the application of a use and/or development which was utilised by the Malta Government since this requirement for development/use was implicitly granted to government once it decided to act in that manner.

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My client has been using the area prior to 1967 without changing the use of the said area from the previous users of the area.

Use became a material concern for development since the enactment of Act 1 of 1992 and, prior to that date, change of use was not a material development.

For all the above reasons we believe that enforcement in caption is null and void and should therefore be withdrawn.”;

Fl-24 ta'April 2013 l-appellanti esebixxa pjanta li biha wera reference plan biex juri the owners of the materials/obhects/vehicles.

Fis-seduta tas-26 ta' Settembru 2013 l-enforcement officer Ray Scicluna esebixxa l-pjanta RSX u kkonferma li l-materjal kollu ta' terzi persuni ndikati fil-pjanti presnetati mill-Appellanti gie imnehhi minn dawn it-terzi persuni u mill-materjal miftuh fis-sit tal-appellant markat bl-isfar fil pjanta RSX. Thalla pero tower crane u xi planki.

Ghal kull bwon fini giet esibita wkoll kopja legali ta' sentenza moghtija mill-Qorti tal-Magistrati (Malta) bhala Qorti ta' Gudikatura Kriminali. B'din is-Sentenza Carmelo Cortis gie liberat billi l-akuza fil-konfront tieghu ma gietx pruvata. L-akuza relattiva kienet illi Cortis, flimkien ma'ohrajn, talli nhar is-27 ta'Awissu 2008 ghal habta tal-4.30pm u fix-xhur ta' qabel din id-dat, gewwa Triq San Alessju u Imtarfa Ridge, imtarfa bi ksur tal-artiklu 85 tal-Kap 9 tal-Ligijiet ta' Malta, bla hsieb li jisirwu izda biss biex jezercitaw dritt li jippretendu li ghandhom illegslment okkupaw art proprjeta' tal-Awtorita' tad-Djar b'ingenji u materjal iehor.

Sussegwentement, wara li giet ordnata s-sospensjoni tal-prolazzjoni tas-sentenza, fis-seduta tal-20 ta' Mejju 2014 gie ulterjorment konfermat li fuq il-post baqa biss tower crane zarmat u zewg planki. F'din l-istess seduta Carmelo Vella in rappresentanza tal-Awtorita' tad-Djar ikkonferma zewg fatti:

- i. Li l-art tinsab trasferita lil Awtorita' tad-Djar.
- ii. Li fil-files relattivi ma sab ebda konnessjoni li giet trasferita lil xi had iehor.

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iii. Fil-kaz tal-art in kwistjoni fil-kaz tal-Imtarfa peress li kien hemm progetta hafna zvilupp, kien intefa konfini fejn l-art bodily giet trasferita lill-Awtorita' tad-Djar, inkluz toroq, il-bini u l-istrutturi li kien hemm.

Il-konsiderazzjoni ta' dan it-Tribunal, huwa relattivament semplici: huwa minnu dak li hemm imnizel fl avviz ta twettiq relattiv? Ir risposta relattiva trid tasal naturalment mill provi prodotti, hekk kif gej:

i. Fil-verbal tas 26 ta' Settembru 2013 issir distinzjoni bejn proprjeta ta terzi persuni u proprjeta tal-appellanti. Finalment kien ghad fadal biss Tower Crane u xi planki.

ii. Izda it-Tribunal ma jistax jinjora d-dikjarazzjoni maghmula mill-Awtorita' fin-nota tan-nota tat-12 ta' Mejju 2009 li l-Avviz inhareg kontra l-Housing Authority bhala sid l-art u l-Appellanti bhala occupier.

iii. IZDA is-sentenza tal-Qorti taghmilha cara li ma giex pruvat li Cortis ghamel ir reati li bihom gie akkuzat - akkuzi li huma sa certu punt riflessjoni kriminali tal avviz ta twettiq (ghalkemm ghal dati antecedenti) - li kien illegalment okkupa art proprjeta' tal-Awtorita tad-Djar b'ingenji u materjal iehor.

Irid jizdied jinghad pero' li l-Appellanti jibbaza l-Appell tieghu fuq dawn il-punti:

i. Use became a material consideration for development with the enactment of the 1992 Act. Prior to this time use did nto constitute development and therefore did not fall under the Development Act.

ii. The Area was used as a storage yard by the British Military and the Malta Government pre and post World War II.

iii. The Appellant has been using the area prior to 1967 without changing the use of the said area from the previous users (British Military and Government) of the area.

Il-punti li qajjem l-appellanti jistghu jkunu validi izda, irid jinghad, li ma saret ebda prova in rigward. L-unika prova li saret hija permezz ta' l-uzu ta' aerial photographs – li ma tantx jaghtu stampa cara ta' dak li kien hemm fuq is-sit tul iz-zmien.

Dak li hareg bic-car u bic-cert mix-xhieda tar-rappresentant tal-Awtorita' tad-Djar huwa li l-Art in kwistjoni hija issa certament proprjeta' tal-Awtorita' tad-Djar u li l-appellanti ma ghandu ebda konnessjoni mas-sit. Prova xort'ohra ma ngabix.

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Ghalhekk u ghal motivi fuq indikati, it-Tribunal qed jichad dan l-Appell u jikkonferma l-avviz ta' twettiq in mertu.

### Ikkunsidrat

L-aggravju tal-appellant hu s-segwenti:

1. L-art kellha uzu ta' scrap yard qabel ma dahlet in vigore l-ligi tal-ippjanar fl-1992 u ghalhekk l-artikolu 55 tal-Kap. 356 li tahtu inhareg l-enforcement ma japplikax. L-uzu kien gie stabbilit u kwindi ma hemmx il-bzonn ta' permess.

Dan l-appell ma jimmeritax ezitu favorevoli. Infatti lanqas jimmerita li jigi ezaminat peress illi dak li qed jitlob l-appellant hu biss revizjoni tal-istess aggravju mressaq quddiem it-Tribunal fuq evalwazzjoni ta' fatti, liema fatti gew ezaminati, kunsidrati u decizi mit-Tribunal. L-artikolu 41(b) jghamilha tassattiva li appelli jistghu jsiru biss fuq punti ta' ligi decizi mit-Tribunal. L-appellant qed jitlob lil Qorti ma tiddecidix punt ta' ligi izda rikonsiderazzjoni mill-gdid tal-fatti biex il-Qorti tasal ghal konkluzzjoni differenti. Din mhix kwistjoni sindakabbli mill-Qorti u l-fatt li t-Tribunal ma accettax il-tezi (fattwali) tal-appellant minhabba nuqqas ta' konvincement tat-tezi tal-appellant ma jwassalx ghal ebda konsiderazzjoni legali bazata fuq applikazzjoni tal-ligi kif applikati ghal fatti accertati mit-Tribunal. Dan mhux kaz fejn sar xi zball grossolan fl-elenku tal-fatti li ikkunsidra t-Tribunal jew nuqqas ta' apprezzament tal-fatti izda biss divergenza ta' opinjoni ta' kif wiehed ihares lejn il-fatti, kwistjoni li mhix appellabbli fil-poteri moghtija lil din il-Qorti. Il-Qorti ma tistax u ma ghandhiex tiddisturba l-apprezzament tal-fatti f'cirkostanzi simili ghal kaz in ezami, liema apprezzament iwassal ghal konkluzjoni illi l-artikolu 55 tal-Kap. 356 kien aplikabbli ghal kaz.

### Decide

Ghal dawn ir-ragunijiet il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Carmelo Cortis u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-ippjanar tas-16 ta' Settembru 2014, bl-ispejjez kontra l-appellant.

**< Sentenza Finali >**

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