Owners' consent in planning applications

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1 Legal overview

Article 32 (3) of the original Development and Planning Act **(Chapter 356 of the Laws of Malta),** required an applicant for a development permission to certify that he was either the owner of the site in question or that he had otherwise *'notified the owner of his intention to apply by registered letter of which a copy ha[d] been received by the Authority.'* The question as to whether an applicant was also required to obtain consent from the owner after giving notification was, at the time, open to interpretation.

In the judgment in the names **Jane Cini vs Il-Kummissjoni ghall-Kontroll tal-Izvilupp** [1] the Court of Appeal (Inferior Jurisdiction) declared the appeal as vexatious after it found

[1] Jane Cini vs Il-Kummissjoni ghall-Kontroll tal-Izvilupp decided on 27th March 2003 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 2/2001/1].

that the appellant, in this case a lessee, had not only failed to obtain consent from the land owner, as per **Article 32 (3)** of **Chapter 356**, but in this case the said owner was also opposing the development. The Court held:

> *"Illi jidher car li anke kieku tapplika ghall-kaz odjern id-definizzjoni hekk emendata xorta wahda l-istess rikorrenti ma tapplikax bhala sid, ghaliex mhux biss ma hemmx dak rikjest fl-artikolu 32 (3) izda talli hemm l-opposizjoni tas-sid stess, u ghalhekk anke f'dan il-kaz l-appell tal-istess rikorrenti mhux biss huwa infondat fid-dritt izda addirittura vessatorju, w il-fatt li l-istess applikanta w appellanti odjerna ssostni li hija ghandha l-istess art jew bini b'titolu ta' kera huwa ghal kollox immaterjali ghall-pendenza odjerna."*

The same Court took a different approach in a later judgment in the names **Catherine Ripard vs l-Awtorita' ta' Malta dwar l- Ambjent u l- Ippjanar u l- kjamat in kawza Philip Farrugia.**[2] The appellant Catherine Ripard was formally notified by the applicant Philip Farrugia that he had submitted a planning application to construct a boundary wall and a store in her property. Despite Ms Ripard's objections to the application being processed, the Authority issued the permit. The decision was later confirmed by the Planning Appeals Board and Ms Ripard went all the way to the Court of Appeal (Inferior Jurisdiction), insisting that the application could not be processed without her consent. In its reasoning, the Court deemed it fit to remind the parties that planning permits are issued 'saving third party rights' and thus owners' consent would be necessary prior to the undertaking of physical works. Nevertheless, the Court concluded that it was

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[2] Catherine Ripard vs l-Awtorita' ta' Malta dwar l- Ambjent u l- Ippjanar u l- kjamat in kawza Philip Farrugia decided on 26th February 2009 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 11/2007].

indispensable for the applicants to inform the relative site owners with their intention to apply for development though obtaining consent *per se* was not an *a priori sine qua non* requirement. The court held:

> *"Illi dan l-aggravju wkoll ma huwiex gustifikat u dan peress li ma jirrizultax mil-ligi li l-hrug ta' permess ghall-izvilupp mill-Awtorita' huwa marbut mal-ghoti tal-kunsens tas-sid ta' l-art de quo ghal tali zvilupp. Fil-fatt dan ma jirrizultax mill-Kap 356. Fil-fatt l-ghoti tal-kunsens tas-sid jista' jkun relevanti f'relazzjoniijiet dwar drittijiet ta' natura civili, izda mhux fi proceduri hrug ta' permessi ta' zvilupp, tant li l-istess permessi, u dan in partikolari hargu dejjem "saving third party rights" u f'dan il-kaz jinghad specifikatament ukoll li:-*
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> *"This development does not remove or replace the need to obtain the consent of the land/owner to this development before it is carried out……."*.

Article 32 (3) was eventually replaced by **Article 68 (3)** in the following Environment and Planning Development Act **(Chapter 504 of the Laws of Malta).** That time round, the legislator made it all clear that an applicant who was not the sole property owner had to obtain the owners' consent prior to submitting a planning application with the exception of '*a leaseholder in possession of a site under a title of agricultural lease or the works to be undertaken qualified 'under a scheme of a Government entity'.* Lagniappe, *'the Government of Malta, or any department, agency, authority or other body corporate wholly owned by the Government'* were equally identified as exempt from obtaining such consent.

The current legal situation (under the Development Planning Act 2016 enacted on the 4th April, 2016) remains unchanged notwithstanding an attempt was made by the

legislator to do away with the owners' consent in the proposed Bill. Indeed, the Bill had provoked strong criticism even though the Authority would have been exempt from dealing with third party civil disputes falling outside its competence. Perit Simone Vella Lenicker [3] described '*the direction being taken by the Bill to not require the owner's consent when submitting an application'* as '*an undesirable proposal.'* In her reaction to the Bill, Vella Lenicker declared that '*the current system whereby the applicant must declare that he has obtained the owner's consent to submit an application for development permission has cut out a significant amount of abuse and should be retained.'* Moreover, the opposition spokesperson for Planning and Simplification of Administrative Processes, the Hon. Ryan Callus, was led to believe that the Bill was doing away with the need for the owners' consent prior to the commencement of the works pursuant to the permit:

> *"Ma kien fl-interess ta' ħadd li jien immur naqbad u nibni fuq l-art ta' xi ħadd mingħajr ma jkolli l-kunsens tiegħu."*

Really and truly, Callus' assessment is manifestly unfounded, more so since the Bill planned to introduce a specific clause providing the opposite, that is that : *'Any development permission approved shall be without prejudice to third party rights and shall not in any manner constitute or be construed as a guarantee in favour of the applicant as to the title to the property'.* [4]

In a move to address the mounting criticism, government finally decided to disregard its previous intentions. The Hon. Dr Michael Falzon [5] explained that applicants would still be required to obtain the owners' consent prior to the filing of a planning application:

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[3] Reactions to the proposed MEPA Demerger from Perit Simone Vella Lenicker downloadable from http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf - August 2015.

[4] Eventually, the provision made it as proposed in the Bill through Article 72 (1) of the current Development Planning Act

[5] Sitting No. 336 held in December 2015 - House of Representatives, Malta.

"Sur President, kien hawn diskussjoni dwar jekk għandux ikun hemm il-kunsens jew le. Hawnhekk qegħdin ngħidu li se nħallu dak li hemm illum fil-Liġi llum. Ma kien hemm ebda d'intendere li nikkumplikaw l-affarijiet. Jidher li kien hemm min ħass li kif inhuma l-affarijiet wieħed jiċċertifika li jkollu l-kunsens; allura nħalluha kif inhi u niċċaraw aħjar il-pożizzjoni."

Dr Falzon [6] however later on admitted that maintaining the *status quo* was not the best legal solution since the Authority has no competence and remains under no obligation to scrutinize ownership disputes arising during the application process:

"Bħala awtorità, l-Awtorità mhijiex f'pożizzjoni u lanqas ma huwa l-obbligu tagħha u lanqas ma għandu jkun, li tidħol fil-kwestjonijiet ta' ownership. L-Awtorità qatt ma tidħol. L-Awtorità is a planning authority, ma tidħolx f' kwestjonijiet ċivili ta' min hija l-propjetà."

Moreover, the Hon. Dr. Michael Falzon [7] explained that the Planning Authority is in no position to certify that the person giving his consent is indeed the property owner and reiterated that at best planning permits are issued subject to a clause 'saving third party rights'. Even so, it should be left in the hands of the Courts to investigate allegations of false declarations:

"Ejja nagħmluha ċara u nkunu skjetti: ma jfissirx li l-Awtorità b'xi mod jew ieħor tista' tiċċertifika li dak li qed jgħidlek li ġab il-kunsens mingħandu huwa s-sid! Fil-fatt kull permess joħroġ saving third party rights….. Sakemm l-applikant jagħmel dikjarazzjoni, r-responsabilità taqa' fuqu. Jekk dik id-dikjarazzjoni hija falza, żleali jew għarrieqa,

[6] Sitting No. 336 held in December 2015 - House of Representatives, Malta.
[7] Sitting No. 336 held in December 2015 - House of Representatives, Malta.

imbagħad tiskatta dik il-klawsola fil-permess fejn hemm subject to third party rights."

Ultimately, **Article 71 (4)** of the current Development Planning Act was enacted as follows:

"An applicant for development permission shall certify to the Authority that:

(i) he is the owner of the site or that he has notified the owner of his intention to apply by registered letter of which a copy has been received by the Authority and that the owner has granted his consent to such a proposal; or
(ii) he is authorised to carry out such proposed development under any other law or through an agreement with the owner."

Article 71 (5) of the current Development Planning Act then provides that:

"Where:

(i) the applicant is the Government of Malta, or any department, agency, authority or other body corporate wholly owned by the Government;
or
(ii) the applicant is not the owner of the site, but he holds the site under title of agricultural lease, or holds the premises under a title of lease and he is carrying out the works under a scheme of a Government entity, the applicant must still notify the owner of his intention to apply by registered letter of which a copy has been

received by the Authority, but need not certify that the owner has granted his consent to such a proposal."

From the above articles, it transpires that, in principle, applicants who are not the sole owners are required to obtain the relative consent prior to submitting an application. On the other hand, applicants holding a site under title of agricultural lease are exempt from such requirement, regardless as to whether the land is private or government owned. However, shortly after the promulgation of the new Planning Act, the Authority issued a circular addressed to all architects [8] indicating that all applications [9] relating to government owned sites *'due to be decided on or after the 30th May 2016'* were to be supported by an *a priori* additional document indicating clearance from the Government Property Division (GPD). Such clearance should certify that the Division *'finds no objection in principle to the submission of an application on the site in question for the proposed development'.* Failure to adhere to this request would lead to the application being considered as *'incomplete'*. For this reason, leaseholders of government owned agricultural land are now also required to obtain prior owners' consent notwithstanding that **Article 71 (5)** does not necessitate it.

To this effect, the definition of an 'owner' found in the Development Planning Act 2016 is also worth analyzing. As rightly observed by the Court of Appeal in **Eucharist Bajada vs L-Awtorita' ta' l-Ippjanar**, the definition of an '*owner*' in planning legislation holds a different meaning to the traditional definition found in the Civil Code:

"Jidher car li l-kelma "sid" inghatat tifsira ferm iktar wiesgha mit-tifsira li l-Kodici Civili jaghti lil din l-istess kelma."

[8] PA CIRCULAR 2/16 issued by the Planning Authority. May 2016.

[9] Application includes Development Planning Applications, Screening Request and notifications in terms of the Development Notification Order

Invariably, the traditional definition of an *'owner'* in planning legislation included a person falling under any of the groupings:

- ' *a person who in his own right or as a duly authorised agent for another, is entitled to receive the rent of the land or, where the land is not let, would be so entitled if it were let, but does not include a person who holds the land under title of an agricultural lease'*
- *'where the land is subject to usufruct, the bare owner or the usufructuary'*
- *'an emphyteuta'*
- *'any one of the co-owners of the land on which development takes place'.*

Under the current legislation, the definition of an 'owner' was extended even further to incorporate the following two categories of persons:

- '*any one of the spouses, where the land to which the development relates forms part of the community of acquests'*
- '*the director or directors of the company duly authorised to appear and represent the company which owns the land to which the development relates'*

2 Scenarios dealt with by the Court

Since the Planning Authority's inception in 1992, the Maltese Courts had various occasions to deal with ownership related issues in the context of planning applications and permits. The following scenarios have already been subjected to the judgment of the Courts:

- Whether the Planning Authority is authorised to process a planning application in the absence the owners' consent;

- When the Authority is faced with a dispute concerning an applicant and a third party who are both claiming to have a legal title on the property;
- What happens when third party property enters into the decision equation;
- Whether a 'by definition' owner of a co-owned property is required to obtain consent from the co-owners nonetheless;

2.1 The Court's approach

This sub-section will give an account of the Court's response to the above mentioned scenarios.

A common situation occurs when an applicant who is not the sole owner fails to send the certificate of ownership to the owners. What is his situation at law? In **Saviour Falzon vs l- Awtorita` ta' L-ippjanar** [10] the Court was very clear. It held that failure to notify the owner with applicants' intention of submitting an application was to be considered as a ground for the nullity of the application:

> *"Elementi konsidrati bhala essenzjali fl-applikazzjoni tal-permess sottomess lill- Awtorita` ghandhom jigu sewwa osservati anke taht piena ta' nullita` ghaliex il-ligi meta tistipula dawn l-elementi u tesigihom tkun qed taghmel hekk mhux biss biex tipprotegi s-serjeta' tal-proceduri imma wkoll l-interessi kemm ta' l-applikant kif ukoll ta' terzi interessati."*

The Court took a similar approach in **Michael Abela vs Il- Kummissjoni ghall-Kontroll ta' l-Izvilupp:** [11]

[10] Saviour Falzon vs L-Awtorita ta' l-Ippjanar decided on the 31st May 1996 by the Court of Appeal (Superior Jurisdiction)
[11] Michael Abela vs L-Awtorita ta' l-Ippjanar decided on the 11th May 1998 by the Court of Appeal (Superior Jurisdiction)

"din il-Qorti jidhrilha li din id-disposizzjoni cara tal-ligi ma tistax tigi njorata impunement".

One consequently asks whether it is possible for an applicant to rectify a wrong notificationor what happens should the notification reach the applicant after the validation date?

In **Anthony u Carmela konjugi Cefai vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar u kjamat in kawza Brian Azzopardi,** [12] appellant Cefai appealed against a development on a neighbouring site, insisting that the permit should be revoked since applicant had served the ownership certificate following the validation date. In this case, the Government Property Division had been indeed notified about the application only after the first Commission hearing. The Court did not feel that failure to notify at the inception could not be rectified, basing its argument on the premise that, in effect, the notification reached the owners before the final decision was given:

"Ghalkemm il-ligi tghid li l-applikant ghandu javza lis-sid bl-intenzjoni li japplika, ma jfissirx b'daqshekk li l-fatt wahdu li n-notifika issir fi stadju ulterjuri, qabel ma tinghata decizjoni, u fejn il-persuna interessata jkollha jedd turi fehmitha, igib fix-xejn l-ispirtu tal-ligi li hi intiza ghal skop ta' pubblicita. Il-ligi stess fil-fatt ma tghidx li n-nuqqas ta' notifika fi stadju bikri iggib in-nullita ex lege, u ghalhekk hemm certu element ta' diskrezzjoni fdata f'idejn l-Awtorita u t-Tribunal li f'dan il-kaz giet ezercitata b'mod kawt u fl-ispirtu tal-ligi."

[12] Anthony u Carmela konjugi Cefai vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar u kjamat in kawza Brian Azzopardi decided on the 5th November 2015 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 18/15.].

In **Emanuel Grima vs Il-Kummissjoni ghall-Kontroll tal- Izvilupp** [13] the Court however noted that the applicant could not rectify such a defect once the Authority's decision is taken:

> *"Pero', din il-Qorti jidhrilha li jekk il-kwistjoni dwar dan id-difett tqum wara li l-Awtorita' ta' l-Ippjanar tkun iddecidiet il-meritu tal-applikazzjoni, f'dan l-istadju inoltrat tal-proceduri, tali difett ma jibqax aktar sanabbli, wisq u wisq aktar meta l-Awtorita' tkun qieghda topponi li dan isir."*

Naturally, the situation in the **Cefai** case would have been different had the owner failed to give his consent once being served with the notice.

What is the situation if the applicant sends a notification by registered post and the owner does not get notified? This matter is dealt with in the case in the names of **Joseph Cortis u martu Andreana Cortis ghal kull interess illi jista' jkollha vs L-Awtorita` ta' l-Ippjanar kif rapprezentata mic- Chairman taghha Alfred Fabri.** [14] Here, the applicant had admitted of failing to take any action after the registered letter was referred back to him. The Court found that the Planning Appeals Board acted correctly in dismissing the application since it transpired that the site owners were not officially served with the ownership certificate:

> *"Illi anzi rrizulta anki mill-affidavit ta' l-appellant illi l-ittra li kellu jibghat lil proprjetarji ma waslitx u b'dan kien jaf ghaliex kien gie infurmat, izda ma kienx ha ebda passi ohra biex jissodisfa dina l-istruzzjoni li kien tah il-Perit fir-rigward."*

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[13] Emanuel Grima vs Il-Kummissjoni ghall-Kontroll tal- Izvilupp decided on 15th July 2002 by the Court of Appeal (Superior Jurisdiction) - [Ap. No. 389/00.].

[14] Joseph Cortis u martu Andreana Cortis ghal kull interess illi jista' jkollha vs L-Awtorita` ta' l- Ippjanar kif rapprezentata mic- Chairman taghha Alfred Fabri decided on 19th June 2001 by the Court of Appeal (Superior Jurisdiction) - [Ap. No. 386/96.].

Another relative issue could arise when an applicant serves the owner with a certificate and the latter withholds his consent. Today the situation is very clear, even though it took a number of years before the Authority and the Tribunal came to terms with what the law provided. In **Franco Debono vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Carmelo Borg** [15] applicant had initially declared that he was the sole owner of the property subject to the application. Later, during the process, applicant submitted an amended certificate of ownership, even if '*without prejudice*', describing the yard where the column foundations were to be built as 'common property'. [16] Eventually, the permit was issued 'subject to third party rights' and the co-owner decided to appeal the decision before the Tribunal, insisting that he had not released his consent to the application being processed. The Tribunal decided that the permit's validity should be upheld given the permit was issued 'subject to third party rights'. Subsequently, the co-owner went all the way to the Court of Appeal (Inferior Jurisdiction), reiterating that the application could not be processed without his consent. The Court still went on to revoke the Tribunal's decision, despite applicant's second declaration having been submitted 'without prejudice'. The Tribunal was thus ordered to investigate whether applicant's amended ownership declaration was in violation of **Article 68 (3)** since the consent of the co-owner was missing:

> *"It-Tribunal ma setax f'dan il-kaz jelimina l-problema billi jiddikjara li l-permess hu soggett ghal third party rights. Kellu invece jara jekk il-parti li fuqha hemm id-dikjarazzjoni ta' koproprjeta hux qed tigi vjolata b'talba ghal zvilupp kontra r-rieda tal-koproprjetarju ai termini tal-artikolu 68(3)."*

[15] Franco Debono vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Carmelo Borg decided on 5th November 2015 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 42/12.].

[16] Applicant made it very clear to the Tribunal that *'t-tieni 'certificate of ownership' gie prezentat da parti tal-applikant 'minghajr pregudizzju' u ghalhekk bl-ebda mod ma jista' jigi accettat dak li qed jissottometti l-appellant u cioe' li b'xi mod kien hemm xi ammissjoni.'*

The Court took a similar approach in **Joseph Apap et. vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar et.** [17] Once again, **Article 68 (3)** was interpreted in the sense that an applicant, not being the sole owner, is obliged to obtain the relative consent from all the other co-owners. In default, the Authority is obliged not to proceed with the assessment of the application:

> *"Pero l-Qorti tqis illi ghandha tippreciza illi l-artikolu 68(3) hu intiz biex applikant li qed jissottometti proposta ta' zvilupp fuq art (jew proprjeta) ta' terzi jrid ikollu l-permess tas-sid ghal proposta. Fin-nuqqas il-Qorti tqisha l-obbligu tal-Awtorita li ma tintratjeniex ebda applikazzjoni ta' zvilupp meta ma hemmx dubju jew kontestazzjoni dwar il-fatt li l-applikant mhux sid l-art u fejn is-sid qieghed joggezzjona."*

What is the situation if the Authority is faced with a dispute concerning an applicant and a third party who are both claiming to have a legal title on the property? The answer is also given in **Joseph Apap et. vs L-Awtorita ta' Malta dwar l- Ambjent u l-Ippjanar et.** [18] Essentially, according to this judgement, the Authority should determine the application even though the title is still under contestation:

> *"Madankollu fejn hemm kontestazzjoni dwar it-titolu fuq il-proprjeta jew xi dritt reali jew anki personali fuq l-istess proprjeta li fuqha tkun mibnija l-proposta, l-Awtorita ma hix fdata tiddetermina l-kwistjoni ta' natura civili hi, izda ghandha tindirizza l-applikazzjoni biss mill-lat ta' ippjanar u kull permess li talvolta jista' jigi approvat, hu attwabbli*

[17] Joseph Apap, Carmelo Zammit, John Attard, Rita Fenech vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Maria Debattista ghan-nom ta' Tourist Services Limited Franco Debono vs l-Awtorita' ta' Malta dwar l-Ambjent decided on 9th July 2015 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 16/15.].

[18] Joseph Apap, Carmelo Zammit, John Attard, Rita Fenech vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Maria Debattista ghan-nom ta' Tourist Services Limited Franco Debono vs l-Awtorita' ta' Malta dwar l-Ambjent decided on 9th July 2015 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 16/15.].

biss fin-nuqqas ta' oppozizzjoni minn min ikun qed jivvanta dritt fuq il-proprjeta li fuqha jkun inhareg il-permess ta' zvilupp."

The same line of reasoning was adopted by the Court of Appeal (Inferior Jurisdiction) in **Brian Bajada et. vs L-Awtorita ta' Malta dwar l- Ambjent u l-Ippjanar et.** [19] In this case, appellant Bajada believed that he owned the airspace where applicant was proposing to build a penthouse. Bajada alleged that applicant had falsely declared to be the owner and thus contended that the permit was illegal and should thus be revoked. Nonetheless, the Court of Appeal (Inferior Jurisdiction) opined that the Authority was not expected to determine the title of the applicant or that of the appellant:

"Ma jistghux pero l-appellanti fuq kwistjoni purament ta' natura legali civili jippretendu li l- Awtorita jew it-Tribunal jikkunsidraw drittijiet ta' titolu u jew servitujiet bejn partijiet peress li din mhix il-mansjoni tal- Awtorita jew it-Tribunal….l-appellanti ghandhom id-dritt jiehdu l-mizuri li jidhrilhom xierqa quddiem il-Qrati ordinarji ghal protezzjoni tad-drittijiet taghhom, ighid x'ighid il-permess tal-bini".

It is also worth analyzing whether applicants who are not considered to be the sole owners in terms of the Civil Code should qualify 'as such' once their status falls within the ambit of an 'owner' under planning legislation. For a long number of years, there was no clear and definite answer to this question. In **Aurelio Schembri vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar u l-kamata in kawza Mary Rose Schembri,** [20] applicant held a co-owned property under a title of usufruct and thus contended that he was an 'owner' in terms of **Article 2 (1)** of the Environment and Development Planning

[19] Brian Bajada ghan-nom u in rapprezentanza tar-residenti ta' Blocks A, B, C, u D, Triq is-Sur Fons, San Giljan vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Joseph Barbara, f'ismu u in rapprezentanza ta' Patricia Anastasi, Alma Saddemi, Josephine Azzopardi u Greta Bartolo Parnis decided on 9th October 2013 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 52/12.].

[20] Aurelio Schembri vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar u l-kamata in kawza Mary Rose Schembri decided on 17th February 2016 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 49/15.].

Act. Indeed, the Authority issued the permit regardless of the co-owner's objections. Subsequently, the decision was confirmed by the Tribunal after it confirmed that a usufructuary is tantamount to an 'owner' for the purpose of a planning application (as per Article 2 (1)). The Tribunal's decision was subsequently overturned by the Court of Appeal (Inferior Jurisdiction) and held that a usufructuary, despite being an 'owner' for the purposes of a planning application, still should not be exempt from obtaining consent from the other co owners:

> *"Il-Qorti ma taqbilx mas-sottomissjoni tal-Awtorita li ladarba l-artikolu 2(1) tal-Kap. 504 tinkludi lil uzufruttwarju bi kwalifika ta' sid ghal finijiet ta' tifsira ta' sid, b'daqshekk gie solvolat dak li jrid l-artikolu 68(3) tal-Kap. 504. Dan l-artikolu jehtieg il-kunsens tas-sidien l-ohra wkoll."*

Nevertheless, the Superior Court of Appeal had taken a different approach in an earlier judgment in the names **Eucharist Bajada vs L-Awtorita ta' l-Ippjanar.** [21] In this case, appellant Bajada was being challenged for having certified that nobody apart from him was the owner '*of any part of the land to which the application relates*' even though he was acting as an agent on behalf of a company Stipend Limited. The Court held that Bajada still had to be considered as an '*owner*' once he was clearly '*entitled to receive the rent of the land or would be so entitled if it were let'* as provided in the definition of 'owner' in the Act. Indeed, Bajada was authorized by way of a Board resolution whereby he could *'sell, lease, transfer or apply for necessary permits for construction on a plot of land belonging to the Company situated in Bordino Street, St. Paul's Bay.'* Consequently, the Court found nothing wrong in Bajada's declaration that '*nobody except the applicant is the owner.':*

[21] Eucharist Bajada vs L-Awtorita ta' l-Ippjanar decided on 31 st May 2002 by the Court of Appeal (Superior Jurisdiction) - [Ap. No. 118/99.].

"Pero', la darba l-legislatur ghogbu jaghti din it-tifsira lill-kelma "sid" ghal fini ta' din il-ligi specjali din il-Qorti m'ghandha l-ebda xelta hlief li tapplika ghal din ilkelma t-tifsira li l-legislatur espressament ta fl-istess ligi specjali."

Despite the evident inconsistency, it is likely that the legislator wanted to consider all categories of 'owners' defined in the Development Planning Act as '*sole owners'* for the purpose of a planning application (as held in the **Bajada** judgment). Why would the legislator otherwise have defined *'any one of the co-owners of the land on which development takes place'* as an 'owner' if not for an individual co-owner to act independently of the other co-owners? Why would '*any one of the spouses, where the land to which the development relates forms part of the community of acquests'* qualify as an 'owner' if not to reduce the act of submitting a planning application from an act of extraordinary administration to one of ordinary administration as defined in the Civil Code?

More recently, the Planning Authority was challenged for having issued permissions on the basis that third party parking space was available on that same site, without the third parties being informed. In **Davina Anne Borg vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar,** [22] the appellant was denied permission for the conversion of a garage to a commercial outlet. The Authority (and the Tribunal) both concluded that a third party overlying dwelling was approved on condition that parking remained available in this garage. The decision was eventually appealed and the Court went on to observe that the Tribunal had failed to determine whether the garage owner (the appellant) had given her prior consent, either implicitly or explicitly, to having her garage linked to the third party dwelling application. In conclusion, the Court highlighted that appellant's application should be determined independently of the dwelling

[22] Davina Anne Borg vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar decided on 8th October 2014 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 22/14.].

application were it to result that the dwelling application was determined without her prior consent:

> *"..t-Tribunal kellu jevaluwa l-kwistjoni purament legali jekk il-fatti jwasslux lit-Tribunal jiddeciedi li l-appellant tat il-kunsens esplicitu taghha biex il-garage jintuza ghal finijiet ta' permess ta' zvilupp ta' terzi biex jinhareg il-permess, jew jekk dan il-kunsens esplicitu ma jezistix, hemmx ir-rekwiziti gurisprudenzjali stabbiliti ghal prova tal-kunsens implicitu tal-appellant li tfisser rinunzja ta' drittijiet tal-proprjetarju li juza l-proprjeta tieghu kif irid u jixtieq, bid-dritt li japplika ghal kull zvilupp permissibbli skond il-ligijiet ta' ippjanar vigenti. F'kaz li l-Qorti ma ssibx il-kunsens moghti esplicitament jew implicitament allura tinsorgi l-konsiderazzjoni dwar id-dritt tal-appellant li tinghata permess ghal dak mitlub skond il-ligijiet ta' ippjanar vigenti minghajr ebda referenza jew rabta ma' permessi gia moghtija lil terzi."*

The same line of reasoning was followed in **George Muscat vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar.** [23] Once again, the appellant was denied a permit to convert his garage to a shop since a third party had obtained a permit to build a dwelling in the above air space. The dwelling was approved in 2008, assuming that a parking space was available in appellant's ground floor garage. Before the Tribunal, the appellant contended that he did not consent to his garage being 'linked' to the dwelling application. The Authority however argued that *'on-site parking requirements is always calculated on the number of apartments (or any other uses for that matter) existing or proposed in that particular block, irrespective of the ownership.'* The Court of Appeal (Inferior Jurisdiction) eventually decided that the Tribunal should establish whether

[23] George Muscat vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar decided on 14th January 2015 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 41/14.].

appellant had ever released his consent to his garage being linked to the dwelling application:

> *"It-Tribunal kellu jaghmel accertamenti biex jistabilixxi jekk fil-fatt l-applikant qattx ta l-kunsens tieghu ghall-applikazzjoni ta' terzi bil-mod li saret wara li jkun ikkonsidra jekk l-appellant kienx gia ssid tal-garage qabel saret l-applikazzjoni ta' terzi."*

2.2 Recommended action

As illustrated above, ownership issues within the context of planning applications constitute a bone of contention, particularly since the law may be subject to various interpretations. Nevertheless, the following Court pronouncements should serve as a point of reference, whenever the following situations arise:

- When an applicant is not the sole owner, notification to the owners (or co-owners) by registered post and subsequent consent are considered to be *ad validatem* requirements;
- Late notifications are not a ground for nullity, provided that the owners are duly informed in due time prior to the Authority's decision;
- The Authority (or the Tribunal) cannot simply choose to ignore the lack of consent and issue a permit on the premise of specifically '*saving third party rights'*;
- When a title is under dispute, the Authority (or the Tribunal) cannot hold itself competent to decide the matter thus giving itself jurisdiction which appertains solely to the Civil Courts;
- An applicant who is a co-owner is still legally bound to obtain consent from the other co-owners, despite being an 'owner' in terms of the definition found in the Planning Act;

However, in the humble opinion of the author, the following *lacunae* still need to be addressed:

- Whether consent should be in writing;
- The consequences of consent being withdrawn during the process of an application;
- The repercussions of a false declaration when its falsehood is discovered after a permit is issued;
- The exemption of co-owners from the obtainment of consent.

2.3 Form of consent

The current law is silent with regards to the required form of consent. In **Davina Anne Borg vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar [24],** the Court held that consent may either be '*explicit or implicit'*. This means that consent need not take the written form. The Planning Authority is therefore correct in considering a simple declaration on the application form as sufficient. For all intents and purposes, however, the words '*and that the owner has granted his consent to such a proposal'* in **Article 71 (4) (i)** could be made more clear if it were to be replaced with the following: '*and that the owner has either explicitly or implicitly granted his consent to such a proposal'.*

2.4 Withdrawal of consent

The law does not elaborate on the possibility of an owner withdrawing his initial consent during the course of the application. **Article 71 (4)** simply requires *' An applicant for development permission shall certify to the Authority that …… the owner has granted his consent to such a proposal'.* To date, there is no case law to confirm that consent has to subsist during the entire course of the application process. **Article 71 (4)** may be taken

[24] Davina Anne Borg vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar decided on 8th October 2014 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 22/14.].

to suggest that it is sufficient for the applicant to obtain consent at the onset of the application. In practice, however should the owner change his mind, it could be difficult for the applicant to convince the Authority that consent was indeed granted in the first place unless he is in a position to furnish some form of written evidence. As a minimum requirement the law should state in no unclear terms whether consent could be eventually withdrawn during the application process and if so by what means. The author opines that were it be possible for a consent to be withdrawn, such withdrawal should be notified in writing to the Authority.

2.5 Discovery of a false declaration

The situation regarding the discovery of a false declaration is very unclear. One could assume that the owner could eventually request the Authority to revoke the permit on the basis of '*fraud*' in terms of **Article 80** of the Act. However, as held in **Brian Bajada et. vs L-Awtorita ta' Malta dwar l- Ambjent u l-Ippjanar et.** [25] **,** the Authority cannot simply entertain such an allegation if the applicant continues to persists that he is the sole owner. To counter this uncertainty, the permit should only be revoked once an owner furnishes a Court declaration to substantiate his allegations.

2.6 The current definition of an 'owner'

Another clear challenge is the definition of 'owner' as currently provided in the Development Planning Act. As seen in **Aurelio Schembri,** all co-owners should be served with a notification and release their consent. This means that an *emphytueta* is to send a registered letter and obtain consent from the *dominus*. Likewise, a spouse is to give notice to the other spouse and obtain *a priori* his/her consent. A lessee and a director

[25] Brian Bajada ghan-nom u in rapprezentanza tar-residenti ta' Blocks A, B, C, u D, Triq is-Sur Fons, San Giljan vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Joseph Barbara, f'ismu u in rapprezentanza ta' Patricia Anastasi, Alma Saddemi, Josephine Azzopardi u Greta Bartolo Parnis decided on 9th October 2013 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 52/12.].

of a company are also in a similar situation. The author is not convinced that the reasoning adopted by the Court in these cases is in line with what the legislator intended or indeed with the spirit of the law.

In conclusion, it is the opinion of the author that in cases where the applicant falls under the definition of an 'owner' under the Development Planning Act, he should be exempt from having to obtain the relative consent to a development planning application. This unless the initial consent is done away with altogether given that the law already prescribes that *'any development permission approved shall be without prejudice to third party rights and shall not in any manner constitute or be construed as a guarantee in favour of the applicant as to the title to the property'.* [26]

[26] Article 72 (1) of the current Development Planning Act