MRA
MALTA RESOURCES AUTHORITY

Decision 03/ED of 24th June 2005
in virtue of Malta Resource Authority Act (Cap. 423)
on the Complaint of Verdala Mansions Limited against Enemalta Corporation
with regard to the funding of the new sub-station at Rabat, Malta

I. Determination

Whereas

(a) Verdala Mansions Limited, as represented by Mr Angelo Xuereb, has filed a complaint to the Malta Resources Authority ("MRA") on the 21st of March 2005 requesting MRA to issue a ruling on the matters raised in the complaint as stated in Section II. of this Decision;

(b) MRA has taken note of the complaint and has thoroughly investigated the matters raised in the complaint whereby the parties were given the opportunity to present and explain their respective positions during meetings held on the 11th May 2005 and on the 20th May 2005.

Now, therefore, on the basis of the facts provided and for the reasons stated in Section II of this Decision, the Malta Resources Authority hereby determines as follows:

1. Having considered such factors as marketing, ownership, permits and time-frame of the development this Authority determines that the Verdala Mansions Ltd. development is separate and distinct to the Grand Hotel Verdala Ltd. development and should be treated as such for the purposes of determining the applicable articles under the Electricity Supply Regulations and Rules of 1939 ('G.N 223 of 1940') in relation to the application by the aforementioned Verdala Mansions Ltd. for the extension of electricity supply to said development consisting of thirty-six apartments.

2. As to whether Enemalta would be acting in a discriminatory fashion if it chose to consider the Verdala Mansions Ltd. development separate to the Grand Hotel Verdala Ltd. development in light of its stance vis-a-vis other 'similar' projects, this Authority is of the opinion that the other projects referred to by Enemalta are not in fact similar to that at issue in the current dispute and consequently notes that it is equally discriminatory to treat dissimilar situations as though they were the same.

3. With regard, therefore, to whether the Verdala Mansions Ltd. development is to be deemed 'multiple consumer' or 'bulk' supply this Authority makes reference to art. 11.2 which provides for the technical specifications for a multiple consumer supply and concludes that the Verdala Mansions Ltd. apartment block development satisfies these criteria and thus is to be deemed a 'multiple consumer' situation.

4. The Authority, consequently, and in accordance with art. 12(c1), directs the parties to negotiate in good faith in order for Enemalta to set up and take over the operation of the new substation with the aim of supplying electricity to the new development of thirty-six apartments without further delay and directs Enemalta in so doing to consider Verdala Mansions Ltd. as a separate development unconnected to any developments already existing at the site.

II. Considerations

1. FACTS OF THE CASE

1.1. Following construction by the company, Verdala Mansions Limited, of thirty-six apartments and a building intended to house a new substation at Rabat, Malta in the area adjacent to the Grand Hotel Verdala, the same company approached Enemalta for the latter to take over the said building and commence the operation of the substation.

1.2. AX Holdings' understanding in approaching Enemalta was based on their contention that agreement had already been reached with Enemalta even before the substation had been completed that the development was one falling within the definition of Article 11.2 of the Electricity Supply Regulations and Rules of 1939 ("GN 223 of 1940") on the *Extension of Services to Multiple Consumers within One Development* and that therefore Articles 11.2(e) and 12(c1) were applicable.

1.3. Article 11.2(e) provides: *A new substation subject to regulation VIIIB (12.c.1) below, would be required to provide the supply to a development with multiple consumers, if the criteria in 11.2(b1) and 11.2(b2) above are not satisfied.*

1.4. Article 12(c1) states that: *In the case of a development with multiple consumers which requires a substation as in 11(2e), the applicant /applicants must provide a suitable substation room within the development in question. Enemalta would compensate the applicant/applicants with a maximum amount of Lm10,000 for providing the substation land civil works and/or any structural alterations. Enemalta would then complete the substation thereby bearing the whole cost. Enemalta will however retain the right to extend supplies from the substation to applicants outside the development without making any additional compensation to the applicant/applicants.*

1.5. Enemalta replied to the request made by AX Holdings Ltd. in a letter dated 25th August 2003 wherein Mr Angelo Xuereb, on behalf of AX Holding, was offered Enemalta's services at the sum of Lm41,728 (Lm34,378 in equipment and labour costs and Lm7,350 for the low voltage feeder), following which, provided that the land and distribution centre conditions met with Enemalta requirements, that the substation would be accessible to Enemalta employees on a 24-hour basis and that the outstanding balance of Lm14,469 referring to the Capua Palace Health Centre was settled Enemalta would connect the supply lines.

1.6. This as, in Enemalta's view, the development at Rabat did not fall within the provisions of Art. 11.2 of G.N 223 of 1940 but rather, as the apartments formed part of a larger development encompassing the hotel, the electricity supply requested was more akin to a bulk supply and thus within the purview of Article 11.3. Consequently, the applicable article with regard to financing was 12(b1)(i) which provides for financing by the applicant and not by Enemalta. Moreover, Enemalta disagreed with the contention that any agreement to the contrary had previously been made with Verdala Mansions Ltd.

1.7. Mr Angelo Xuereb by letter dated 3rd September 2003 registered his objection to Enemalta's offer stating as follows:

'First of all, we strongly object to the inclusion of condition no. 2 concerning the balance of Lm14,469 due on the substation at Capua Palace Health Centre. We contend that this condition is unlawful and ultra vires, particularly since the case is sub judice … Moreover, the amount in question is secured by a bank guarantee …[This condition was, however, subsequently withdrawn by Enemalta]

The main point at issue, however, is that we are being asked to pay the sum of Lm41, 728 in advance, when this goes contrary to the provisions of the Electricity Supply Regulations.

The substation is required for the extension of the electricity supply to the 34 separately-metered apartments at Verdala Mansions, which is a development managed by Verdala mansions Limited. This is an entirely separate entity from the Verdala Hotel, which is owned by Royal Hotels Limited, a company with different shareholding.'

1.8. By letter of the 5th April 2004 from Mr Angelo Xuereb to Ing. Ronnie Vella at Enemalta, the former furthermore contends that Verdala Mansions Ltd. only owns the 3,218 square metres of land on which the apartments are constructed and has no judicial or physical relation to the other property, namely the Grand Hotel Verdala, belonging to Royal Hotels Limited. In addition, reference is made to the MEPA building permit of the 17th October 2001 (Ref. PA02787/01) with regard to the Verdala Mansions which is separate to the hotel permit.

1.9. On the 11th May 2005 Mr Angelo Xuereb wrote to the Ombudsman, Mr Joseph Sammut, requesting his intervention in this matter on the basis of being 'unfairly treated' by Enemalta reiterating, in support of their argument, as follows:

'… Enemalta is overlooking the fact that the substation in question will only be servicing the multiple consumers at Verdala Mansions and will have nothing to do with the Verdala Hotel or any of the other developments at the Verdala complex.

It has to be emphasised that the company Verdala Mansions Limited (formerly Sunny Homes Limited) is totally independent of Royal Hotels Limited (which owns the Grand Hotel Verdala). Although both the site of Verdala Mansions and the site of the Hotel Verdala were purchased from the Malta Development

Corporation, these two were separate deeds of transfer, and the purchasers were two separate entities. The two projects are covered by entirely different MEPA development permits.

Enemalta Corporation have verbally tried to put Verdala Mansions on the same footing as other major developments such as MIDI, Cottonera, VISET and Town Square. However, in reality there is absolutely no comparison. These are multi-use developments involving retail, residential and other commercial activities. Verdala Mansions, on the other hand, is a standalone development similar to countless other residential developments in Malta which have never been required to finance the cost of any substation.'

1.10. The Ombudsman forwarded his preliminary opinion on the matter to both parties on the 12th October 2004, wherein having had regard to the provisions of G.N 223 of 1940, the Ombudsman, while recommending that the parties negotiate an expenses-sharing agreement and, on failure of such refer the matter to arbitration, concluded:

"on balance, the strict interpretation of the Regulations are in favour of the complainant. However, in the absence of clear-cut provisions and the special factors involved, it is fair to expect the developer and his customers to contribute their part towards expenses."

1.11. By their letter of 27th October 2004 Enemalta submitted their objections to the preliminary opinion stating that:

"The issue is truly one of classification and with all due respect the reasoning leading to the 'conclusion' of the preliminary opinion is defective as such an exercise can never be one of 'strict interpretation' as defined since the interpretation should encompass all the relevant factors, inclusive of technical and social elements intrinsic to this issue.

Moreover the conclusion is incompatible with the Enemalta Act, Chapter 272 of the Laws of Malta, section 20 … the Corporation cannot negotiate terms for an agreement with Verdala once similar cases such as the Portomaso and the Midi projects were dealt with in a specific manner.

As stated in the Corporation's previous correspondence it is clear that the residential block and the hotel are one and the same project and that they should be regulated as a bulk supply. …

Furthermore it is highly pertinent to note that a fundamental principle of Commercial Law establishes that in the absence of specific legislation an issue should be regulated by Usage. Thus, should one conclude that the issue is not regulated by statute, it is a universally accepted norm that regulating commercial matters that one would have to refer to Usage in the particular activity to regulate the matter.

Consequently, in this particular case, should one conclude that the ESRs do not regulate the situation adequately, an interpretation that is unsustainable in the

Corporation's view, the next step would be to refer to similar cases, such as the Portomaso and the MIDI case, to establish usage in these cases."

1.12. The Ombudsman rebutted the above-cited objections in his letter of the 15th November 2004 and confirmed his preliminary opinion as being final save for recommending a referral, in the absence of agreement between the parties, to the MRA, as the regulator of the sector, as opposed to arbitration as originally suggested.

1.13. By letter dated 21st March 2005 Verdala Mansions Limited submitted the dispute to the MRA on the basis of the Ombudsman's recommendation as the parties, despite having engaged in negotiations in the interim, had failed to reach agreement.

2. THE COMPLAINT

2.1. On the basis of Enemalta's submissions to the Authority, in particular as mentioned in 1.6 of this Decision, the complainant submits that:

2.1.1. The Verdala Mansions development is a separate development to the Grand Hotel Verdala and hence any electricity supply should be deemed an extension of services to multiple consumers within one development as in Art. 11.2 of G.N. 223 of 1940 and not an extension of bulk supplies as in Art. 11.3 of same.

2.1.2. Enemalta's offer based on the payment of Lm41,728 for the provision of electricity supplies to the new substation were unfair and contrary to the provisions of Art. 12 (c1) of G.N. 223 of 1940 which provides for a Lm10,000 refund in favour of the applicant and completion of the substation at the expense of Enemalta.

3. ASSESSMENT OF LEGAL POSITION

3.1. General Considerations

3.1.1. The dispute under consideration is essentially based on whether the extension of electricity supply services to the new substation at Rabat, Malta being requested by Verdala Mansions Ltd. is one to Multiple Consumers or of Bulk Supply in terms of G.N. 223 of 1940:

3.1.1.1. Enemalta maintains that the newly constructed apartments known as Verdala Mansions are in fact one development with the Grand Hotel Verdala primarily due to the fact that, despite being registered in the name of two different companies, these companies have the same majority shareholding. Taken as one development the necessary electricity supply conforms with the definition of 'bulk supply' and consequently the substation is to be funded by the applicant in this case Verdala Mansions Ltd.

3.1.1.2. On the other hand, Verdala Mansions Ltd. maintains that the apartments are a separate development to the Hotel, so much so that they belong to separate companies, with different shareholders and are subject to separate planning permits. As a mere block of thirty-six apartments, the Verdala Mansions should be considered as any other block of apartments as a multiple consumer supply and hence the substation should be funded by Enemalta, with Verdala Mansions Ltd. receiving Lm10,000 by way of compensation for expenses incurred in the building.

3.1.2. In the MRA's view the secondary issue of funding of the substation will be largely resolved as a natural consequence of the resolution of the first issue. And this in terms of G.N. 223 of 1940 which clearly stipulates that in the case of a development with multiple consumers the responsibility for financing rests with Enemalta in that Enemalta would compensate Lm10,000 in addition to completing the substation at its own expense. Whereas in cases of bulk supply -provided that Enemalta would not require utilisation of the new substation in which case costs would be shared- the new substation is to be financed by the applicant (*vide* Art. 12(c1) and 12(b3) respectively).

3.1.3. Similarly, this issue of 'multiple consumer' as opposed to 'bulk' supply is inherently resolved by reference to clearly stipulated amperage in terms of G.N. 223 of 1940 (*vide* art. 11.2 (b1) and (b2) with reference to multiple consumer supply and art. 11.3 (b3) with reference to bulk supply) and as such is easily assessable in mathematical terms once it has been determined whether the apartments are or are not to be considered as an intrinsic component of the existing hotel development.

3.1.4. Thus what has to be determined in seeking resolution to this dispute is the criteria to be adopted in defining a 'development', in particular for our purposes whether the apartments in question form part and parcel of the larger hotel development or whether they stand alone. In the absence of a definition of 'development' in the regulations as provided for by G.N 223 of 1940, Enemalta rightfully contends that the concept has to be defined with reference to various factors and must go beyond a strict interpretation of the word. On the other hand Enemalta cannot be allowed to use the absence of legal definition to its advantage in order to avail itself of an entirely flexible definition which can be utilised to capture all scenarios as falling within it.

3.2. What can be considered to be a 'development' in terms of G.N. 223 of 1940?

3.2.1. The interpretation clause of G.N. 223 of 1940 does not provide a definition for the term 'development'.

3.2.2. In dictionary terms[1] the noun 'development' is defined as: *'a new stage in a changing situation; an area of land with new buildings on it'*, which former phrase could encompass both hotel and apartments while the latter can be limited exclusively to the apartment buildings.

3.2.3. Enemalta's contention in it's objections to the Ombudsman's ruling to the effect that it is settled law in the absence of an express statutory provision to refer to Usage in matters of commercial law is correct, and consequently they are also correct in pointing to factors, utilised in past situations by Enemalta, such as permits, marketing, time and ownership of the various entities involved in assessing whether such entities are in fact one development or otherwise.

3.2.4. With regard to permits the Planning Application as submitted made reference to the following description of works: *'Amended development to the Grand Hotel Verdala, duplex suites, landscaping and outdoor leisure areas, Grand Masters Place apartments and garage'*, while the submitted plans were termed *'Grand Hotel Verdala Complex Verdala Apartments'*, both of which may be indicative of a linking of entities consistent with a single development.

3.2.5. As far as marketing is concerned reference is made to the promotional web site www.verdalamansions.com as at the 16th of June 2003 wherein it was stated: *'that AX Holdings' 25 years of experience in quality development has been invaluable in creating this prestigious development which will incorporate Malta's only 200 all-suite luxury hotel…'*, with the implication that the apartments are 'incorporated' into the hotel development.

3.2.6. On the other hand with reference to the time frame of the developments, the matter is somewhat different as in our opinion there is no justification for classifying the hotel and the apartments as one development. The hotel was constructed a number of years ago and had been in operation for a considerable period of time prior to the application for the construction of apartments. To this end it cannot be said that the projects were linked in any way either during planning or during construction or since then, as it is clear that the apartments are being sold off to private individuals who would be charged for access to the hotel and are not being run as part of the hotel complex despite the collective marketing, which as misleading as it may have been is not within the competence of the MRA to condemn on these grounds.

3.2.7. Enemalta furthermore points to the fact that Royal Hotels Ltd. is contemplating further developments at the same site at Rabat which should also be taken into account when defining 'development' and as such can also be considered as one with the existing hotel and the apartments as currently being developed. Without prejudice to the parties right to redress this issue should it arise, the MRA, for its present

[1] Compact Oxford English Dictionary (Oxford University Press, 2005)

purposes, is consciously overlooking this matter as it retains that it cannot allow future projections which may or may not in fact occur to form the basis of a decision on a present and factual dispute.

3.2.8. Having regard then to ownership, here too, as pointed out by Mr Angelo Xuereb in his submissions, it emerges clearly that Verdala Mansions Ltd. and Grand Verdala Hotel are separate entities and consequently the respective developments are to be deemed similarly separate. While the apartments belong to Verdala Mansions Ltd., the Grand Hotel Verdala is owned by Royal Hotels Ltd. This in itself is sufficient, even *prima facie*, to establish that the entities are in effect separately owned and hence separate entities not a single development at all on the basis of the legal concept of 'separate juridical personality'.

3.2.9. A limited liability company in terms of Maltese Law[2] has a legal personality distinct from that of its members which continues as long as the company's name appears on the Register of Companies.

3.2.10. This concept is firmly established in Maltese jurisprudence to the extent that it has been held that: *'Le societa, specialmente quelle commerciali, ed in modo partculare le societa anonime, sono delle persone giuridiche distinte ed independenti da quelli dei singoli soci che le compongono'*[3].

3.2.11. Furthermore, the Courts have stated that: *'Skond il-ligi kummercjali ma hemmx dubju li s-socjetajiet kummercjali regolarment kostitwiti jikkostitwixxu personalita legali diversa mill-personalita individwali tal-membri li jikkomponuha …,*[4]and: *'Illi l-azzjonist li ghandu sehem mill-kumpanija m'ghandux propjeta fl-assi tas-socjeta ghaliex dawn jibqghu propjeta taghha in vista tal-personalita guridika differenti taghha'*.[5]

3.2.12. Moreover, notwithstanding that this is not a situation which justifies a lifting of the 'corporate veil', a brief look into the shareholding of the Verdala Mansions Ltd. and Royal Hotels Ltd. reveals that, although the companies share the same majority shareholder, they do not in fact have the same shareholding. However, even if the two companies did share the same shareholder or were in a principal-subsidiary relationship, nonetheless, the principle of separate juridical personality would have to be applied. It has been held by our courts that a company has: *'personalita guridika differenti minn kumpaniji ohra anke jekk sussidjarji taghha …xorta jibqa japplika l-fatt guridiku li in stricto jure z-zewg socjetajiet huma legalment entitajiet separati u distinti minn xulxin'*.[6]

3.2.13. On the basis of the aforementioned criteria of ownership and time scale of development, which take precedence over the criteria of marketing

[2] Art. 4(4) of the Companies Act (Cap. 386)
[3] Aristide Psaila et nomine–v- Claude Michaud nominee (Vol. XXVIII.iii)
[4] J.Fallav-v-John H. Sorotos (Vol.XXXII.iii)
[5] Cecil Pace propju et vs Emanuel E. Bonello propju et nominee (Vol. LXXX.ii)
[6] Degiorgio –v- Pizza Operations Ltd., Prim' Awla tal-Qorti Civili (dec. 28.04.04)

and permits particularly in view of the strict and consistent approach of the courts with regard to the separate juridical personality of companies, therefore this Authority is of the opinion that in this particular case the applicant Verdala Mansions Ltd. is to be considered as a separate applicant to the hotel. Consequently, the apartment development is to be deemed separate to the already developed hotel. Moreover, by their own admission, Enemalta would be willing to consider the apartments as separate to the hotel if they were located in any other place, thus, the MRA maintains that Verdala Mansions Ltd. cannot be penalised solely on the basis of proximity.

3.3. **Would Enemalta's contention that it would be acting discriminatorily be valid?**

3.3.1. Enemalta, in rebuttal of the Verdala Mansions Ltd. stance, point to established Usage and contend that they are prevented from discriminating in their dealings with applicants not only in terms of general principles but, more specifically in terms of the Enemalta Act. In establishing such Usage Enemalta then goes on to refer to other developments, which it argues were of a similar type and in which, Enemalta states, any initial objections of the applicant to having to self-fund a necessary and new substation were swiftly dealt with, consequently in all other similar cases the applicant has been billed by Enemalta for the new substation.

3.3.2. The MRA disagrees with Enemalta's stand in this regard, initially due to the fact that although Enemalta has acted so in all other cases this does not necessarily mean that a just Usage has been established but may simply mean that Enemalta has in the past gone unchallenged. More importantly however prior to talking of discrimination one would have to examine whether the Verdala Mansions Ltd. development is indeed 'like' other developments previously dealt with by Enemalta as it would be equally discriminatory for Enemalta to treat the former like the latter if they were not in fact the same.

3.3.3. The principle is that: '*discrimination can arise only through the application of different rules to comparable situations or the application of the same rules to different situations*'.[7] Enemalta contend that this is a case of comparable situations which it is pre-empted therefore from treating differently.

3.3.4. The MRA on the other hand is satisfied, on the basis of the information supplied by the parties to the MRA with regard to other 'similar' developments that these are in fact different and this for two main reasons:

3.3.4.1. Firstly, with regard to other developments Enemalta had concluded an *a priori* written agreement with the applicant to

[7] Case C-279/93 *Finanzamt Koln-Altstadt v Schumacher* [1995] ECR I-225

the effect that the funding of the substation was to be at the applicant's expense. Whereas in this case Verdala Mansions Ltd. contend that an *a priori* verbal agreement had been reached with Enemalta that they would be refunded Lm10,000, Enemalta contest this submission but even if it were not so no written *a priori* agreement to the contrary was in fact signed between the parties.

3.3.4.2. Secondly, whereas other projects were clearly one major development having regard to the fact that apartments, hotels and commercial outlets were all being constructed within the same time frame as an on-going work, in this case, as already explained in 3.2, the MRA maintains that the development of a solely residential apartment block cannot be considered to be one and the same development with a hotel which has been in operation for a number of years.

3.3.5. Consequently, as the electricity supply being requested by the Verdala Mansions Ltd. is different from that as requested and supplied to third party developments there is no 'like with like' comparison and, hence, were Enemalta to treat the two situations similarly it would be tantamount to discrimination which as Enemalta correctly states it is precluded by its governing statute from doing.

3.4. Is the electricity supply to the new Rabat substation as requested by Verdala Mansions a case of 'multiple consumer', and consequently should Enemalta refund Lm10,000 or is it 'bulk' supply and should the cost be borne by the applicant?

3.4.1. The Authority notes that both parties point to the Electricity Supply Regulations as enacted in G.N. 223 of 1940 which is clear in its provisions with regard to the technical criteria to be adopted in determining whether a supply is to be considered 'mutiple consumer' or 'bulk' (vide articles 11.2 and 11.3 respectively).

3.4.2. The parties furthermore agree that if the Verdala Mansions Ltd. were to be considered as one development with the Grand Verdala Hotel the situation would be one satisfying the criteria of 'bulk supply' in which case, in accordance with art. 12(b1), the new substation would have to be financed by the applicant. Whereas if the Verdala Mansions Ltd. development is treated as separate to that of the Grand Verdala Hotel, the former as a mere apartment complex falls squarely within the legal definition of an extension of services to multiple consumers within one development as stipulated by art. 11.2(b2). This being the case the applicant must provide a suitable substation room within the development and Enemalta would compensate the applicant with a maximum amount of Lm10,000 for providing same while then going on to complete the substation at its own expense, and this as provided for in art. 12(c1).

3.4.3. As the MRA is of the opinion that, for the reasons as propounded in 3.2 and 3.3 above, the Verdala Mansions Ltd. development is in fact a separate entity to the Grand Verdala Hotel it follows that in an application of art. 11.2 and art. 12(c1) of G.N. 223 of 1940 as they stand today the development is a development with multiple consumers which requires a substation and Enemalta is unjustified in requesting the *a priori* payment of Lm41,728. Furthermore Verdala Mansions Ltd. is justified in seeking a refund on the basis of art. 12(c1).

3.4.4. The Authority, therefore, without prejudice to all other modes of legal redress available to the parties, and without prejudice to Enemalta's rights with regard to further developments at the same site, directs the parties to negotiate in good faith in order to set up and take over the operation of the new substation with the aim of supplying electricity to the new development of thirty-six apartments without further delay and directs Enemalta in so doing to consider Verdala Mansions Ltd. as a separate development unconnected to any developments already existing on the site.

A J Walker
Chairman