AZZOPARDI BORG & ASSOCIATES
ADVOCATES

FROM THE BENCH SERIES 2021

FROM THE BENCH

2021

Produced and published in 2022 by Azzopardi, Borg & Associates. All chapters first appeared as weekly articles on the Times of Malta.

Correspondence in relation to the publication should be forwarded to:

Azzopardi, Borg & Associates
First Floor, Victoria Building
Triq l-Għenieq, Naxxar, Malta
or
info@abalegal.eu

Editor: Clive Gerada
Editorial Team: Jacob Magri, Celine Cuschieri Debono, Analise Magri
Cover Design: David Mallia

FROM THE BENCH
2021

Of Justice: a narrative of selected decisions of the Courts in Malta

2022
Published by Azzopardi, Borg & Associates

Contents

Photo by: Ekaterina Bolovtsova

Foreword
by Dr Keith Borg

Practising law is a privilege; it involves constant thought, study, and critical analysis, for the law does not lie still, it evolves, and so too must we, as men and women of the law, evolve with it.

For the past three and a half years we have tried our very best to keep our readers abreast of this evolution, to share with you the decisions of our Courts of Justice, to explain the law through its application and interpretation.

And in so doing, we too have learned. Mostly we have learned that the law remains above all a reflection of the day-to-day workings of society, a phenomenon that finds its way in the slightest everyday workings of what we do. Legal rules and decisions must be understood in the context of social interaction.

It is properly this that we try to convey here. How the law affects us all, how the law happens in plain sight. Through our articles in the Times of Malta, every Monday we have tried to render 'visible' to non-lawyers the otherwise 'less visible', yet mundane, workings of the law.

The Courts of Justice decisions reported herein are, perhaps simplistically stated, the solution to issues experienced by the people, by you and me.

Our articles, these solutions, have often been met by our readers with constructive feedback or harsh criticism. We however remain open to public scrutiny, from which, like the Courts whose decisions we report, we are not exempt.

I urge our readers to put forward their evaluative criticism, for it is only through such that we may, as authors, as conveyors of the decisions of our Courts of Justice, continue to evolve in our work. Let us all think critically, let us all place more emphasis on the argument, let us all create new perspectives for interpretation. It is, amongst others, through such critical thinking that the law is allowed to evolve.

Special thanks go to all contributors to this third edition of 'From the Bench', whose time and dedication have made this publication possible. You have truly been successful in making our reporting a staple.

This third edition of 'From the Bench' remains testimony to our passion for the law.

Note from the Editor
by Dr Clive Gerada

"Whereas the law is passionless, passion must ever sway the heart of man." – Aristotle

"I wholly disapprove of what you say, but I will defend to the death your right to say it." – S.G. Tallentyre, The Friends of Voltaire

"It may be true that the law cannot make a man love me, but it can stop him from lynching me, and I think that's pretty important." – Martin Luther King, Jr.

"The study of law is sublime, and its practice vulgar." – Oscar Wilde

"Our defense is not in our armaments, nor in science, nor in going underground. Our defense is in law and order." – Albert Einstein

"If you laid all of our laws end to end, there would be no end." -Mark Twain

"It is a pleasant world we live in, sir, a very pleasant world. There are bad people in it, Mr. Richard, but if there were no bad people, there would be no good lawyers." – Charles Dickens, The Old Curiosity Shop

"Courage is the most important attribute of a lawyer. It is more important than competence or vision. It can never be an elective in any law school. It can never be de-limited, dated or outworn, and it should pervade the heart, the halls of justice and the chambers of the mind." – Robert F. Kennedy

"A jury consists of twelve persons chosen to decide who has the better lawyer." – Robert Frost

"I tell law students… if you are going to be a lawyer and just practice your profession, you have a skill—very much like a plumber. But if you want to be a true professional, you will do something outside yourself… something that makes life a little better for people less fortunate than you." - Judge Bader Ginsberg

I opted to start this short note with the thoughts of several important people from different walks of life, who for different reasons, left their mark within the global community. These thoughts grasp the essence of why law is important and how it brings change within a society. As we know the World is an intertwining web of different languages, cultures, diverse races, a multitude of political and religious views and the list goes on - but one thing is common: people sought laws to regulate behaviour in a society, to

ensure that everyone is equal.

As Aristotle once said, "The only stable state is the one in which all men are equal before the law". In my humble opinion, there exists any equally important principle, that is the gargantuan courage that a society should have to move forward, change, and embody the ever changing realities in its rules. One would hope that a society would be brave enough to live by the saying of 'out with the old and in with the new.' We do wish that this years edition 'From the Bench' gives you the latest insight and latest updates into the conundrums of how law is applied in our shores.

On behalf of our firm, I would like to thank Times of Malta for giving us such a platform to reach out to their readers and share our knowledge. I want to thank my team, Jacob Magri, Celine Cuschieri Debono, and Analise Magri for their love of the law. Last but not least, I would like to thank Dr Arthur Azzopardi and Dr Keith Borg for trusting me with this project and welcoming me within the firm.

I wish you a great read!

Administrative La
& EU

w, Consumer Law
J Law

Photo by: Guillaume Meurice

Administrative Boards & Judicial Review

by Dr Edric Micallef Figallo

On the 11th November 2021 the First Hall of the Civil Court gave a partial judgement on two preliminary pleas raised by the State in the case 315/17 JRM. The action filed in this case is according to article 469A of our Code of Organization and Civil Procedure, which is aptly noted in the margins as "Judicial review of administrative action". This partial judgment was on a very central point in contesting administrative action, i.e., what constitutes administrative action and the exercise of the Court's judicious discretion in determining the same.

This 469A action was filed by the plaintiff after her position in the public service was terminated. The plaintiff's engagement had been terminated following the appointment of an internal administrative board by the defendant Permanent Secretary within the then Ministry for Education and Employment. This board was not established through legislation and according to the defendant it was tasked with investigating the operations of the Agency, while the plaintiff also stated that she was not given the "terms of remit" of the same board or the complaints it had received. The plaintiff was informally informed through the chairperson of the board that her position as CEO was being terminated and she was also informed in writing on the same day. Having requested a copy of the deliberations of the board as affecting her termination, the plaintiff only received a summary thereof after complaining with the Information and Data Protection Commissioner and following the intervention of said Commissioner.

What constitutes an administrative action under this article 469A underpins or undermines whether this type of action can be exercised at all or not and could well spell the end of an action before delving into the merits of the case. Since its addition in the statute book back in 1995 this type of action according to article 469A has been central in contesting administrative action, even though it is definitely not the only course of action to contest anything done by the State or the public administration.

There are numerous court judgements which have delved into the nature, purposes and limits of this action, as the action is a relatively common one whenever a person has to challenge the State acting administratively. As an important side note, readers should keep in mind that any case commentary does not offer a one size fits all legal solution to any particular case, and the said nature, purposes and limits cannot be exposed adequately and even less so in full in the limits of a short article on these pages.

So, determining whether the action complained of is an administrative is often a fundamental issue for the Court, and this is most often than not prompted by pleas filed by the State acting as defendant. The State often attempts to undermine such actions at the start through preliminary pleas, and it did exactly so in this case, but without success.

As concisely and elegantly summarised by the Court, two preliminary pleas by the State essentially would have amounted to denying the Court the exercise of its power to review the complaint of the plaintiff. The Court stated that said two preliminary pleas were similar, and as pleaded by the defendant these were that the appointment of the board was an initiative dealing with matters involving the internal administration of the State (which would be excluded from review according to art. 469A), and the other stating that the end results of such board did not involve a decision or a refusal of a request but merely the preparation of a report and the making of recommendations to the Minister. If this were so, the action would fail because that is not considered as "administrative action" for the purposes of art. 469A. On the other hand, the plaintiff countered that what happened in that case led to the negation of her rights with all the consequences that this led to.

The Court proceeded to say that the legislation is lacking in defining what constitutes "internal organization or administration" and this on its own was enough to lead it to conclude that it should exercise its powers to determine whatever the facts complained of fall under the same exception to an art. 469A action as provided by law. The Court proceeded in stating that through time what falls under "internal organization or administration" has been scrutinized and defined, and the Court proceeded to give its own interpretation. While the very learned Court did not appear at first sight to elaborate extensively on the same, it hit the point directly and one could say that it did so with an equitable interpretation fitting the legislation itself.

Even if the Court stated that in this case the demarcation line case was not so clear, it referenced Brown, Bell & Galabert's French Administrative Law and stated that if any act which at first sight seemed intended for the internal organization or administration of a public authority ended up affecting the rights of persons then that constitued administrative action for the purposes of article 469A and the Courts can exercise their powers of review.

While the Court considered that it was limited to the precise parameters of the legislation, it added that the Court should exercise its powers of review to the point where this was not excluded by the law. It should interpret the scope of any restriction imposed on exercising its powers of review in a manner which would allow it to consider a complaint rather than not.

Obviously, considering the complaint does not automatically lead to accepting the merits of the complaint, far from it. The Court favoured doubt with respect to the merits of the case of the plaintiff and refused to decline the exercise of its powers of judicial review on the basis of the pleas by the State. The case goes on and the merits of the same are still subject to the Court's final judgement, and any applicable rights of appeal.

Delayed flights and remedies

by Dr Edric Micallef Figallo

On the 24th August 2021, the Small Claims Tribunal (SCT) delivered its judgement on application 1/19 CZ. The matter as to the facts is simple, and is of concern to most of us who leave Maltese shores. The case involved a flight the departure of which was delayed for four hours, said departure being from the Malta International Airport. The operator concerned was Ryanair DAC, called upon as defendant. The flight was FR 5227 from Malta to Poznań in Poland on the 1st September 2017.

Plaintiffs filed this action according to the Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, which applies for claims the value of which does not exceed €2,000.

Being an EU Regulation, this has direct affect and application in the Maltese legal order. It is appropriate to point out to the reader that one has to consider which judicial organ is competent according to the nature of the claim and Maltese procedural law. As explained in a separate judgement on application 12/2020 KCX, delivered by the SCT as presided by a different adjudicator, "in line with Art. 19 of Regulation (EC) no. 861/2007,"Subject to the provisions of this Regulation, the European Small Claims Procedure shall be governed by the procedural law of the Member State in which the procedure is conducted." This signifies that the procedural rules and principles applicable to this case are those found under Maltese domestic law since Malta is "the Member State in which the procedure is conducted.""

In the judgement under review there was no issue of competence, as the matter was a monetary claim of less than €2,000, which when considered in light of the provisions of Malta's Small Claims Tribunal Act, Chapter 380 of the Laws of Malta, falls within the competence of the said tribunal. In actual fact, the competence of the SCT under Cap. 380 is for monetary claims up to €5,000, but Regulation 861/2007 is limited to claims the value of which does not exceed €2,000. Combined with the fact that art. 56A of our Code of Organization and Civil Procedure limits such cases to the SCT, the plaintiffs in this case were right in filing the case with the SCT. These points are of no small importance, as they could well spell the failure of a claim. In this case, the claim by the two plaintiffs was a monetary one of €400 each.

Due to the nature of the case, being delayed flights and the rights of passengers, the SCT also considered Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Text with EEA relevance). Remedies

to delayed flights are expressly provided under Article 6 of Regulation 261/2004, and the SCT determined that the relevant provision is specifically that of Article 6(1)(b), given that the delay was for four hours and said provision refers to intra-EU flights of 1,500 kilometres or more. Regulation 261/2004 also provides for remedies to be afforded to passengers, and in this case the SCT exclaimed that the legislative text of the same Regulation refers to the remedies provided according to Article 9(1)(a) and 9(2). In short, these remedies refer to the provision of reasonable food and drink for the period of the delay, and to two telephone calls, telex or fax messages, or e-mails, free of charge. The SCT rightly considered this problematic as the claim by plaintiffs was for a compensation of €400 each. The referred provisions of Regulation 261/2004 would seem to preclude such a remedy. Indeed, the SCT rightly pointed that compensation as claimed by plaintiffs does not seem applicable as that compensation in the legislative text is limited to the cancellation of flights, and not to their delay. That is how the interplay of provisions in Regulation 261/2004 seems to apply, as appropriated explained by the SCT. The SCT went on to state that this appears so at first glance.

This leads us to the consideration that law is not just the legislative text, but it also includes the jurisprudence produced by the relevant Courts and, or judicial organs, as well as other sources of law. The SCT thus proceeded to consider the interprepation given by the Court of Justice of European Union (CJEU) in the cases Christopher Sturgeon et vs. Condor Flugdiens GmbH (C-402/07) u Stefan Böck et vs. Air France SA (C-432/07) in which the CJEU. In these cases, the CJEU proceeded towards a teleological interpretation of the EU legislative instruments. The CJEU stated that as it "made clear in its case-law, it is necessary, in interpreting a provision of Community law, to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part (see, inter alia, Case C-156/98 Germany v Commission [2000] ECR I-6857, paragraph 50, and Case C-306/05 SGAE [2006] ECR I-11519, paragraph 34)."

In the case of delayed flight we thus have an absolute departure from the actual legislative text under Regulation 261/2004, with the CJEU stating that the detriment suffered by passengers of delayed and cancelled flights are the same and both irreversible, and that there is no justifiable objective reason for any difference in treatment. In deference to the legislative text, the CJEU, and the SCT in this Maltese case, stated that Regulation 261/2004 does provide that this assimilation would not be applicable if the operator proves extraordinary circumstances, but in this case Ryanair DAC remained mute. In light of the above, the SCT proceeded to accept the claims of the plaintiffs, and thus ordered Ryanair DAC to compensate them €400 each, with all costs of the proceedings against Ryanair DAC.

(You Gotta) Fight for Your Right (To Party!)

by Dr Edric Micallef Figallo

The iconic 1987 song by The Beastie Boys has lent this article its title, while the Court of Appeal (Superior Jurisdiction) gave to Malta its judgement on the 21st July 2021 on appeal application 94/09/1 JPG. This case contested the actions of our Dwana (Customs) which had, immediately upon importation, temporarily retained an amount of alcohol imported from Sicily and meant for a private party (festin privat). The applicant also sought damages for the related actions by Customs. This appeal judgement confirmed the first instance judgement delivered on the 6th April 2016 by the First Hall of the Civil Court, save for altering the apportionment of judicial expenses for the parties in litigation.

As to the facts, the applicant had sought to import a quantity of alcohol for a private party from Sicily, part of an EU country, and this is highly relevant as the judgement touches on fundamental principles in EU law, namely the free movement of goods within the Union. The Court of Appeal aptly noted that the aims of the original action were not solely limited to the interests affected by the particular circumstances of the case (though those interests were indeed affected), but the original action essentially sought to attack the system itself as adopted by Customs in performing inspections and the criteria used to decide which importer was importing for personal use and which was importing for commercial purposes.

Customs was trying to justify its behaviour upon importation on the basis of curbing abuse by importers who declared an importation for personal use, while it could well be that in reality it was a commercial activity masked as a personal one to benefit from particular fiscal exemptions under Maltese and EU law. Sounds sensible upon first thought, but it is not fairly so and it is probably borne out of a lack of proper resources and a desire for an easy and workable way out to stem abuse. Fairness demands that the end does not justify the means and the Court of Appeal trashed this administrative attitude in no uncertain terms. It stressed that it can never agree to an argument that a priori determines action for all, including for those within their rights, on the basis of actions by wrongdoers.

Citing EU jurisprudence, it moreover stressed that departing from the fundamental principle of the free movement of goods within the EU can only be allowed in extraordinary circumstances, of which in this case there were none to be seen. To add insult to injury, it resulted that the whole impasse was due to administrative misunderstandings on the part of Customs alone. Turning to the specifics of the case - what was Customs doing? In essence it subjected all imports from an EU country, or more specifically from Sicily by catamaran, to inspections upon arrival. The applicant had contented that this

amounted to what is known under EU law as a Measure Equivalent to Quantitative Restriction (MEQR) and referred to Rewe Zentralfinanz (Case 4/75 decided by the Court of Justice of the European Union) case in which plant products were subjected to compulsory inspections upon entry into Germany, as provided by German legislation. The first instance court aptly stated that the said case was different, as the actions performed by Customs in Malta were not provided by legislation and thus the first court disagreed with the applicant in making reference to the aforesaid case. However, it proceeded to analyse the evidence as to the actions performed by Customs officers and found that in the end, by administrative practice and behaviour, the actions performed amounted to a system of mandatory inspections upon arrival.

It expressed itself as disconcerted by the same actions, in so far as to import alcohol for personal use from an EU country one needed to make a prior request to Customs for so doing, and if such a request is not made the alcohol would be seized automatically. In this case the first court went further and said that it was even worse that while the applicant had accordingly made the said request, he was still subjected to an inspection and interrogation by seven Customs officers and members of the Executive Police. The first court felt disconcerted further by the fact that the Customs officer leading the inspection did not bother to contact his superior, who was actually on duty, but had no qualm to have the applicant interrogated for an hour together with six other Customs officers and the police. This is also being referred to as the applicant had initiated the action against Customs, as a body, and against the particular Customs officer in his personal capacity. The Customs officer got away with it because it was found that he was following departemental practice, but the first court nonetheless chastised the same as a Customs officer, and thus as representing Customs Department in the field.

The first court had found that the actions by Customs constituted a MEQR, and as such was in violation of EU law as there were no reasons to depart from the fundamental principle of the free movement of goods. Indeed, the Court of Appeal stated that in the end only one thing could result: that lacking sufficiently good reasons justifying any restrictions on the free movement of goods, such movements must be totally unshackled. Pointing out that customs and fiscal legislation required a restrictive interpretation under our law, the Court of Appeal found that there were certainly no such sufficiently good reasons.

It must be said that in fact the alcohol was released by Customs within a day from retention, but this did not alter the fact that a violation of rights was still found. However, due to the latter circumstance and lack of evidence as to the damages caused, no compensation was accorded to the applicant. Nonetheless, in the end, the applicant obtained an important victory through the declaration by our highest Courts finding the system and administrative practice adopted by Customs as being totally unfit for purpose.

Photo by: Pixabay

lic Procurement Law

How and when may one rescind a contract of sale?

by Dr Keith Borg

Consumer Law affords the purchaser a myriad of rights. Likewise, it imposes various obligations on the seller, which need to be satisfied. In the absence of this, the sale will be liable to be rescinded. In simpler terms, this means that the consumer can, in certain scenarios, 'cancel' the contract completely. Under the Consumer Affairs Act, the seller is obliged to deliver the object sold in a manner conformant with the description and specifications in the contract of sale itself. The seller must also ensure that the thing sold is adequate for the intended use of the end consumer, and ensure that the product in question is installed correctly.

If any of these conditions is not met, the seller must provide a remedy to the consumer, one of which is in fact the rescission of the contract. For rescission to take place, however, it needs to be proportionate to the 'flaw' in the product.

These considerations were at the forefront of the Civil Court First Hall's considerations in the judgment in the names of Marco Garaffa vs Gasan Enterprises Limited (378/2012AF), delivered on the 23rd of June 2021. This case concerned the sale of a vehicle with the mark 'Ford Kuga' which took place back on the 17th of December 2008. The plaintiff alleged that after the vehicle was delivered to him, huge quantities of water started to percolate from the windscreen and sunroof of the vehicle.

Despite several attempts on the part of the defendant company to remedy this fault, things got progressively worse. The consumer stated that during the repairs, the silicone was applied incorrectly, which resulted in the problem never being solved. It is for this reason that he argued that the rescission of the contract of sale was proportionate. The plaintiff even engaged a technical expert who explained that the water percolation can result in a short circuit and other ancillary damage to the vehicle.

The defendant company disagreed, and categorically stated that the car was delivered in a good condition. The company did not contest the fact that the silicone sealer on the passenger's side of the car was perforated, but it argued that such issue could have been easily resolved without the need of resorting to the court. The defendant company also drew attention to the fact that on the 23rd of June 2009, it had repaired the windscreen of the vehicle following a car accident involving the vehicle in question. It emphasised that it was only after this car accident happened that the water percolation issue surfaced.

The Civil Court First Hall took all the above into consideration and also analysed the relevant provisions of the Consumer Affairs Act. The Court noted that when one alleges that there is a discrepancy between the description and specification of the product and

the actual product delivered to the consumer, what is crucial is the state of the product at the time of delivery. Without any reservations, the Court noted that the plaintiff himself does not contest that at the moment of delivery, all was well. The Court also noted the car accident which took place, and that it was only after repairs were affected following such accident, that the plaintiff started encountering problems.

The Court observed that when the plaintiff took the vehicle for repair to the defendant company following the car accident, a contract of works was created. It added that it was because the works by the defendant company were not executed according to good craftsmanship (mhux skont is-sengħa u l-arti), that the plaintiff's vehicle encountered water percolation. The Court stated that this issue is separate and distinct from the sale of the vehicle, which took place months before the incident occured. It explained that the contract of sale and the contract of works (appalt) give rise to two different and distinct juridical facts and the plaintiff cannot use the action for the rescission of sale to enforce a remedy which should have been sought on the basis of the contract of works.

The Court held that the appropriate action in such case would have been to sue the defendant on the basis of the contract of works, and not the contract of sale and concluded that the provisions cited by the plaintiff from the Consumer Affairs Act were not applicable to the case in question. The Court rejected the claims brought by the plaintiff in their entirety. This judgment is still open to appeal.

Mandate: Rendering of Accounts

by Dr Mary Rose Micallef

Mandate appointment is a common tool that is used between persons in order to facilitate a transaction on behalf of others. By example, such powers are at times conferred through the medium of a power of attorney (in Maltese referred to as 'prokura').

The obligations that are imposed by law when a mandate is resorted to is sometimes underestimated. For a mandate is not to be deemed as a mere act performed on behalf of others.

A mandate is a contract between a mandator (the person who grants the mandate powers) and a mandatary (the person who accepts such powers). The word of the law – article 1856 of the Civil Code – states that a mandate is a contract whereby a person gives to another the power to do something for him.

Granting power to others to act on your behalf – especially when such power is of general nature – has significant effects. By effect, the mandator is granted the power to represent the mandator and perform acts on his behalf, without the physical presence of the mandator.

A Mandate is therefore a fiduciary obligation where a person places his trust in another to act on his behalf, and in his interest. The law acknowledges the fiduciary feature and to this effect, it imposes various obligations and limitations upon the person being appointed to represent another – the mandatary. As a general legal commandment, the mandatary must not act in excess of the powers conferred unto him.

The law acknowledges two types of mandates – the general mandate and the special mandate. General mandate refers to the instance where the mandator appoints his attorney to perform general acts of administration which can vary from a mere alienation of property to the hypothecation of property that is owned by the mandator.

Special mandate on the other hand is only granted to administer one or specific matters on behalf of the mandator. The power granted on such mandate is only limited to the performance of a specific act.

The mandate commences as soon as the mandatary accepts his role to become a representative of the mandator. As to the obligations of the mandatary – the person who has been vested with the powers to act on behalf of others – the mandatary is bound to commit the obligations (the acts) that he has been appointed to do. He shall be answerable to damages and interest in case of non-performance. The mandatary is also answerable for

fraud or negligence that may result from his acts or omissions.

More importantly, and unless the mandatary has been exempted, the mandatary is duty-bound to render accounts – statements representing a description of his administration and of everything that he received by virtue of the mandate.

Rendering of accounts is an important measure which the law imposes in order to keep a mandatary in check. Mandate or power of attorney abuse is not something unheard of – hence this obligation that is placed upon the mandatary is a safety valve, attempting to ensure that the executing of these powers is being done in a correct manner, according to law, and in the interest of the mandator.

This obligation to render accounts featured in a recent judgment, delivered by the Court of Appeal, on May 26th 2021, bearing the names of 'Manduca noe vs. Vella Zarb'.

Plaintiffs (the mandators) had appointed the defendant to administer their estate which administration involved the collection of ground-rent and leases, together with the alienation of some of their properties. They claimed that their appointed mandatary – defendant – had failed to render accounts of the estate that he was entrusted to manage and administer.

The First Hall Civil Court had found defendant in default and ordered the mandatary to render the requested estate's accounts. Defendant appealed, and in a nutshell, he claimed that he had correctly executed his powers, in terms of the law.

It emerged that respondent had provided two types of accounts – one that listed the properties that he had sold on the claimant's behalf, and a list containing amounts that were due to mandators following such sale of property. Respondent claimed that these forms of accounts, demonstrated that he had sufficiently executed his duty to render administration statements.

The First Court disagreed. It cited an old judgment, bearing the names of 'Demarco vs Demarco', delivered in 1963, which judgment determined that such accounts must be rendered in a manner that show the true financial position of the immovable estates. Therefore, figures or descriptions of events on their own, without any proper backing do not entail proper or sufficient rendering of accounts.

Therefore, the court's task was to examine whether the statements that were rendered by defendant, demonstrated a true and fair view of the financial situation of the mandator's estate. These statements were found to be fragmentary. The court deemed that these lacked those elements that were necessary in order to understand the financial position of plaintiff's estate. By way of example, there was no explanation of by who and how the

ground-rents were being paid. This resulted in the mandators not being able to certify that these payments were up-to-date and that no emphyteuta was defaulting. Moreover, these accounts gave no exact explanation of the source of payments, and who was paying it – one of the statements was a simple note containing numerical figures and was undated.

The Court of Appeal held the general rule that – as a second instance court – it should not disturb the findings of the first court, unless such findings contained unreasonable conclusions in light of the evidence produced. The court re- assessed the evidence that was brought before the first court and concluded that the appellant had indeed failed to render proper accounts and was found to be in breach of his fiduciary obligations.

In conclusion, the Court of Appeal confirmed the first judgment and ordered the appellant – the mandatary – to render proper accounts in terms of law within six weeks from date of judgment.

Of Risky Advice
by Dr Edric Micallef Figallo

On the 15th September 2021 the Court of Appeal (Civil, Inferior) pronounced its judgement in case 62/2019 LM involving two investors as plaintiffs against the investment company Crystal Finance Investments Ltd. This judgement was given upon an appeal application by said company as it disagreed with the first instance judgement given on the 12th June 2019 by the Arbiter for Financial Services. Initially there were two separate cases against the investment company in front of the arbiter, by which the investors claimed that they lost two separate amounts of €16,000 and €12,000. The investors asked the arbiter to declare the investment company responsible for such a loss and to refund said amounts by way of compensation. The compensation decided for by the arbiter and confirmed on appeal was of €8,920.27 (for the investor claiming €16,000) and €6,933.81 (for the investor claiming €12,000).

The arbiter had found in favour of the investors, and the Court of Appeal confirmed such a finding in full, stressing that the investors had acted on the basis of advice sought from and given by the investment company. This advisory relationship is central to the arguments and findings of the arbiter, as confirmed in full by the Court of Appeal. Given the advisory relationship, a resulting central notion is the suitability of the investors for the particular investments made. This had to be determined by the investment company.

All defensive pleas raised by the investment company failed in front of the arbiter, as confirmed in full by the Court of Appeal. The most salient ones were that the (i) the arbiter had no competence to decide the dispute between the parties as the parties had expressly contractually agreed that the Courts of Malta are so competent, that (ii) the choices made by the plaintiffs were not on the basis of advice by the investment company and so much so that they signed Standard Warning Forms; that (iii) the losses resulted from events beyond the control of the investment company; that (iv) the investments were done by the investors following various risk warnings and the investors could not expect the investment company to make good for losses due to events which were unforeseeable at the moment of the investment; that (v) the investors knew that the investments were performing badly and they failed to make other choices; that (vi) there was no guarantee on returns, or that the capital invested might yield profits or be returned.

The arbiter dismissed the plea on the lack of competence to consider and decide the complaint, even though it could have seemed contractually stipulated between the parties. This was because upon concluding the contract the same Arbiter for Financial Services did not exist under Maltese legislation. This line of argumentation had been confirmed by our Court of Appeal in other cases involving such a plea.

Of note is that a reference was made to the remedy of complaining to the arbiter and that agreements excluding it are concluded by a party (investor) with weaker bargaining strength. However, there was no determination that this renders such agreements inapplicable as this was not relevant to the case under comment. A point of central importance is that legislation such as the Arbiter for Financial Services Act often seeks to provide for less formalistic and supposedly more expeditious avenues for aggrieved weaker parties, in this case investors versus investment companies. That is commendable and in fact said Act explicitly allows for the Arbiter to determine and adjudge a complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case. This is in fact what the arbiter did in the case being commented.

Against the position of the investment company the arbiter and the Court of Appeal concluded that the investors sought and never stopped seeking investment advice from the investment company, and the investment company failed in providing evidence to the contrary. The investments were diverse and changed during the investment relationship between the parties and for some of these the investment company made the investors sign Standard Warning Forms. This was allegedly in situations in which the investors acted against the advice of the company, particularly when certain information on the investors was not collected by the investment company. Significantly the Investment Services Standard Licence Conditions as issued by the MFSA and as applicable at the relevant time, required that if the service provider does not acquire relevant information from prospective clients (as was this case) then the service provider must refuse to provide any advisory service. As said, the relationship was an advisory one and rather than refusing to provide the service the investment company went for the previously mentioned Standard Warning Forms, which were found to be inapplicable for this case.

Furthermore, in the context of providing investment advice, the EU's MiFID Directive on financial instruments provides that when offering a financial service, the service provider must perform a Suitability Test to ensure that the advice given fits the best interests of the client. Said Suitability Test had to be performed to assess whether the investments concerned reached the goals of the investors, whether the investors had adequate knowledge and experience to assess the risks involved in the transaction, and whether the investors where in a position to absorb the risks involved in the investments concerned. Through this test the investment company had to determine the best advice to give to the particular investors. In considering these three criteria, the arbiter found that when considering the evidence and submissions by the parties, the investment company satisfied none. The result of all this is that the investment company had to refuse to give advice, and if it did give advice, as it did, it could not advise the investors to invest in the investment products they invested in. In the end the investors proved their case and were granted compensation. This was confirmed in full on appeal.

Penalties & the Law
by Dr Mary Rose Micallef

Penalties in agreements are a common clause, especially in typical contracts of works (appalt) or where the parties agree on a specific performance, especially when such performance is assigned a due date. The law allows the imposition of penalties but seeks to create a fair balance in the sense, that such remains in check to reflect the obligation in question and the monetary value. Indeed, obligations with a penalty clause are regulated by 1118 et seq of the Civil Code. Per definition, and according to law, "a penalty clause is a clause whereby a person, for the purpose of securing the fulfilment of an agreement, binds himself to something in case of non-fulfilment."

The intention of having such clauses is to safeguard oneself, that was it being agreed upon is effectively honoured. It creates a deterrent, to any potential non-fulfilment of an obligation. One may also assimilate these to future pre-liquidated damages, which are triggered in cases of default. In fact, the letter of the law, states that penalties represent a compensatory amount in connection to the damage that is sustained as a result of default. Furthermore, the law stipulates that a penalty clause would be null if it results that the principal obligation agreed is also null. However, the nullity of a penalty clause does not bring about the nullity of the principal obligation (the agreement). Notwithstanding the imposition of a penalty, a contracting party may always sue for the performance of an obligation, but he cannot sue for both performance and for the payment of the penalty imposed unless such penalty shall have been agreed upon in event of delays.

But what if, for one reason or another, the obligation agreed cannot be executed? The law foresaw this instance and provides that the penalty is immediately incurred as soon that the obligation can be feasibly executed (and naturally if the performance is still not honoured) – this unless another agreement conditions regulate the triggering of the penalties. In other cases, the penalty is triggered once the debtor is put in default – usually through the issuance of an explanatory judicial letter, which is addressed to the defaulting party, which letter ought to explain the contravention that would have been committed by the defaulting party.

Penalties can be mitigated by the court in two specific scenarios (article 1122, of the Civil Code). The first being in cases where the performer executed in part the obligation assumed by him, and the counter-party accepted, without any complaints the executed acts. The second instance is similar to the first – in cases of partial executions – and the court considered that what has been performed, has been performed correctly. However – and as usual when it comes to the law – this instance is subject to an underlying exception. Should the defaulting party, a priori – in the agreement itself - waive his rights to have the penalty mitigated or abated, the penalty remains the same, notwithstanding

any partial compliance. But, past judgements, sought to 'water down' the legal effects of this provision. It has been held, that even in the presence of such waiver, judicial bodies are allowed to measure the fairness, or otherwise of the imposed penalty.

A recent judgment, delivered by the Small Claims Tribunal, bearing the names of 'Cauchi vs Seychell', presided over by Dr Kevin Camilleri Xuereb, studiously discussed the principles of penalty clauses. Facts related to an agreement that was entered into between plaintiff and respondent, wherein respondent undertook to repair a rubble wall, within a timeframe, that was set out in the same said agreement. An imposition of a penalty was entered, which penalty as contingent upon the event of delay. Respondent did not manage to execute the repair works by the agreed deadline date. Claimant sought to seek payment of the agreed penalties, which were set out at EUR10, per day of delay.

Defendant contested the claim, mainly on grounds that the delay was caused by circumstances that he could not predict and had no control over. He also demanded penalty mitigation, in terms of article 1122 (highlighted above) of Chapter 16. The Tribunal, whist citing numerous case-law, explained in detail, the legal and jurisprudential features of penalty clauses, in light of the claim, and the pleas at hand. In its explanation, the Tribunal held that the spirit of a penalty clause has a two-fold function – a) it caps and quantifies the damages (financially) and b) it liquidates a priori the damage that can potentially ensue, on grounds of default as set out by the agreement in question. This judgment also highlighted the very fine line (and the fundamental difference) that exists between a mere penalty clause and an earnest (kapparra). Both concepts are made of 'similar' features, as in the case of earnest, a typical 'penalty clause', that would be triggered in cases of default is always existent. But their legal effects differ from one another. In cases of earnest, the contravener cannot be sued for performance, but in turn, he will end up paying the 'penalty' imposed. Penalty clauses, offer alternatives – one may opt to sue for performance or demand the penalty.

In continuance of this explanation, the Tribunal explained that (unlike contractual damages lawsuits) when it comes to penalty enforcement cases, the quantum sum of the damage need not be proven; this is because the formulation – the quantum (the financial penalty) – would have already been set out a priori in the agreement between the parties. In the 'ordinary' cases of contractual damages – where no penalty clause is set out – claimant needs to evidence the sum that represents the damage (by for instance exhibiting receipts for tasks/works that had to be undertaken to rectify the damage ensued).

In this case, defendant failed to bring up evidence, and after considering the evidence that was submitted by plaintiff the Tribunal found default on respondent's part and consequently ordered the payment of penalties as agreed between the parties in question. Finally, the Tribunal rejected the penalty mitigation demand, as it deemed it to be fair in light of the contractual obligations at hand.

Public Procurement Mishaps

by Dr Edric Micallef Figallo

The Court of Appeal (Superior Jurisdiction) delivered its judgement on the 30th June 2021 on appeal application 95/21/1. The realm of public procurement is an often-controversial matter due to the obvious public interest related to it. This field is quite regulated and subject to legislation which often finds its source or legislative higher calling in the law of the European Union. In this case the recommended contract value of the tender (exclusive of VAT) was a mere pittance of €901,904, as set by the contracting authority.

The Ministry for Finance and Employment (the Ministry) had resorted to a negotiated procedure for the the "procurement of card services". Subsidiary Legislation 601.03, the Public Procurement Regulations (PPR) define negotiated procedures as "those procedures whereby contracting authorities consult the economic operators of their choice and negotiate the terms of a contract with one or more of these". Negotiated procedures should be exceptional and their use is restricted to specific instances according to the Public Procurement Regulations. As will be seen, their use could become quite controversial.

This appeal to the Court of Appeal was filed by Truevo Payments Limited against the decision of the Public Contracts Review Board (PCRB) dated 18th March 2021. In this negotiated procedure the offer by the appellant company had actually been recommended for acceptance and the contract awarded. Said recommendation and award were contested by appealed company Credorax Bank Limited in front of the PCRB.

The whole case in fact kicked off with Credorax Bank Limited filing its suit in front of the PCRB against the contracting authority, which in this case was the Ministry, and against Truevo Payments Limited. Credorax Bank Limited filed said suit after the lapse of the publication period of the tender and after the actual tender award to Truevo Payments Limited. In submissions in front of the PCRB, the Ministry had submitted that an invitation was issued to several parties to participate in the negotiated procedure. Credorax Bank Limited had not participated, and the Director of Contracts verified that this was not due to any failure on the part of the Electronic Public Procurement system.

Credorax Bank Limited sought the cancellation of the procedure and the revocation of the tender award. The Ministry submitted that this contestation in front of the PCRB was not admissible as Credorax Bank Limited had no juridical interest as it had decided not to submit a bid. The Ministry submitted that article 270 of the PPR clearly states that the right of appeal is limited to a tenderer or bidder. The PCRB decision and the Court of Appeal judgement are in fact on preliminary pleas raised by the defendants in front of the PCRB.

Central to this the issue was the article of the PPR which Credorax Bank Limited acted upon. The PCRB held that the parties seemed to agree that the application in front of the PCRB was filed according to the referred article 270. However, the Ministry had argued that Credorax Bank Limited could not avail itself of an article 270 action after failing to make use of an article 262 action (which is a remedy available before the closing date of a tender), and this argument would prove successful in the end. The PCRB determined that the applicability of article 270 of the PPR is not excluded by what article 262 of the PPR dictates. It also noted that the first request of Credorax Bank Limited is that of revoking the Ministry's decision to recommend the award to Truevo Payments Limited, and the PCRB held that this is definitely not a request which could in any way or by any stretch of imagination be made in terms of article 262 of the PPR. This is where the Court of Appeal has significantly differed.

Both the PCRB and the Court of Appeal agreed that Credorax Bank Limited had the required juridical interest to file an article 270 action in front of the PCRB, the Court of Appeal importantly noting that this notion is not the classic notion of juridical interest under Maltese law but was based on the wording of article 270 and of the EU Directive which is at its basis. The PCRB in fact decided that Credorax Bank Limited was fully entitled to propose its action in front of the PCRB according to article 270 of the PPR. For the PCRB the action could proceed towards the determination of all the merits of the case. Appellant company Truevo Payments Limited appealed this PCRB decision by application to the Court of Appeal, and successfully so.

Truevo Payments Limited appealed on the basis that Credorax Bank Limited was not a participant in the tender proceedings and that it could have made use of an article 262 action. The Court of Appeal squarely focused the matter it reviewed on whether Credorax Bank Limited could contest the procedure used for this contract award in front of the PCRB. As stated, the matter of the required interest under article 270 was considered by the Court of Appeal and it confirmed that Credorax Bank Limited held such interest. However, in a determining twist it accepted Truevo Payment Limited's argument that such an action was actually inadmissible due to Credorax Bank Limited having failed to propose an article 262 action.

The Court of Appeal pointed out that Credorax Bank Limited's action was clearly intended to attack the negotiated procedure itself and not the substance of the offer by Truevo Payments Limited. The facts complained of existed prior to episodes which would have allowed an article 262 action, and thus Court of Appeal stated that such complaints had to be raised before the closing date for the calls for application.

Therefore, the Court of Appeal acceded to the appeal by Truevo Payments Limited and declared the PCRB decision revoked and the contestation by Credorax Bank Limited in front of the PCRB as null and inadmissible, which is basically saying that it acted to no avail.

Constitutional Hu

Photo by: Sander Dalhuisen

uman Rights Law

The enjoyment of a private property vs public interest

by Dr Clive Gerada

On 17th December 2021, the First Hall Civil Court (Constitutional Jursidiction) presided by the Honourable Judge Lawrence Mintoff, cited James and Other v. UK (decided by the European Court of Human Rights in Strasbourg on 21st February 1986), in relation to the use of the ground of public interest in depriving the owner of the enjoyment of his property:

"The taking of property effected in pursuance of legitimate social, economic or other policies may be "in the public interest" even if the community at large has no direct use or enjoyment of the property taken".

The case presided by Judge Mintoff related to an agricultural lease (qbiela) of a land having the size of around 2,910m2 . According to the lease agreement (protected by Chapter 199 of the Laws of Malta), the farmer of the land was obliged to pay the owner of the land the sum of €24 every two years.
Both the farmer and the land owner were in agreement that the lease was cheap and not reflective of today's realities and consequently they entered into negotiations to revise the lease.

At first, the land owner requested that the farmer pays an annual lease of around €2000. However, the farmer was not in a position to pay such a high amount and following further negotiations, the land owner reduced the requested amount to €600. However, the second offer of €600 was nontheless regarded as a steep figure by the farmer.

As a result of this impasse, the farmer deposited the agricultural lease (€24) in Court, and the owner of the land instituted a court case before the First Hall Civil Court (Constitutional Jurisdiction) alleging that the provisions of Chapter 199 of the Laws of Malta (Agricultural Leases (Reletting) Act) breached its fundamental human rights under Article 37 of the Constitution of Malta ((Protection from deprivation of property without compensation) and Article 1 (Protection of property) of Protocol No. 1 of the European Convention of Human Rights.

The land owner claimed that as a result of the provisions of Chapter 199 of the Laws of Malta it was impossible for the owner to have effective possession of the agricultural land because the agricultural lease could be inherited by the farmer's successors without any limitation. In addition, the land owner, alleged that according to Chapter 199 of the Laws of Malta, the agricultural lease was fixed and it was not possible that the amount is increased in an effective manner to reflect today's market prices.
On the other hand, the State Advocate argued that with respect to Article 1 of the First

Protocol of the European Convention of Human rights, the State had the right to enact those laws that control the use of property according to the general interest and as a result the state has wide discretion with respect to the applicability of the general interest and the requirements thereof.

The State advocate argued that Chapter 199 of the Laws of Malta (i) has a legitimate objective (ii) protects the general interest given that the Agricultural Leases (Reletting) Act is designed to encourage and protect the growing of agricultural products, flowers and fruit trees that are essential for human beings; and (iii) finds a just and equitable balance between the rights of the land owner, the farmer and the general population.
In addition, the State Advocate argued that the land owner had the possibility to make use of Article 3 sub-article c of Chapter 199 of the Laws of Malta and request the Rural Leases Control Board to change the conditions of the lease in accordance with the conditions of other agricultural land, including the value of the lease itself.

The First Hall Civil Court considered that the period (1967) within which Chapter 199 of the Laws of Malta was enacted , the duty of the State was more onerous as a result of the economic and financial state of the country at that time.

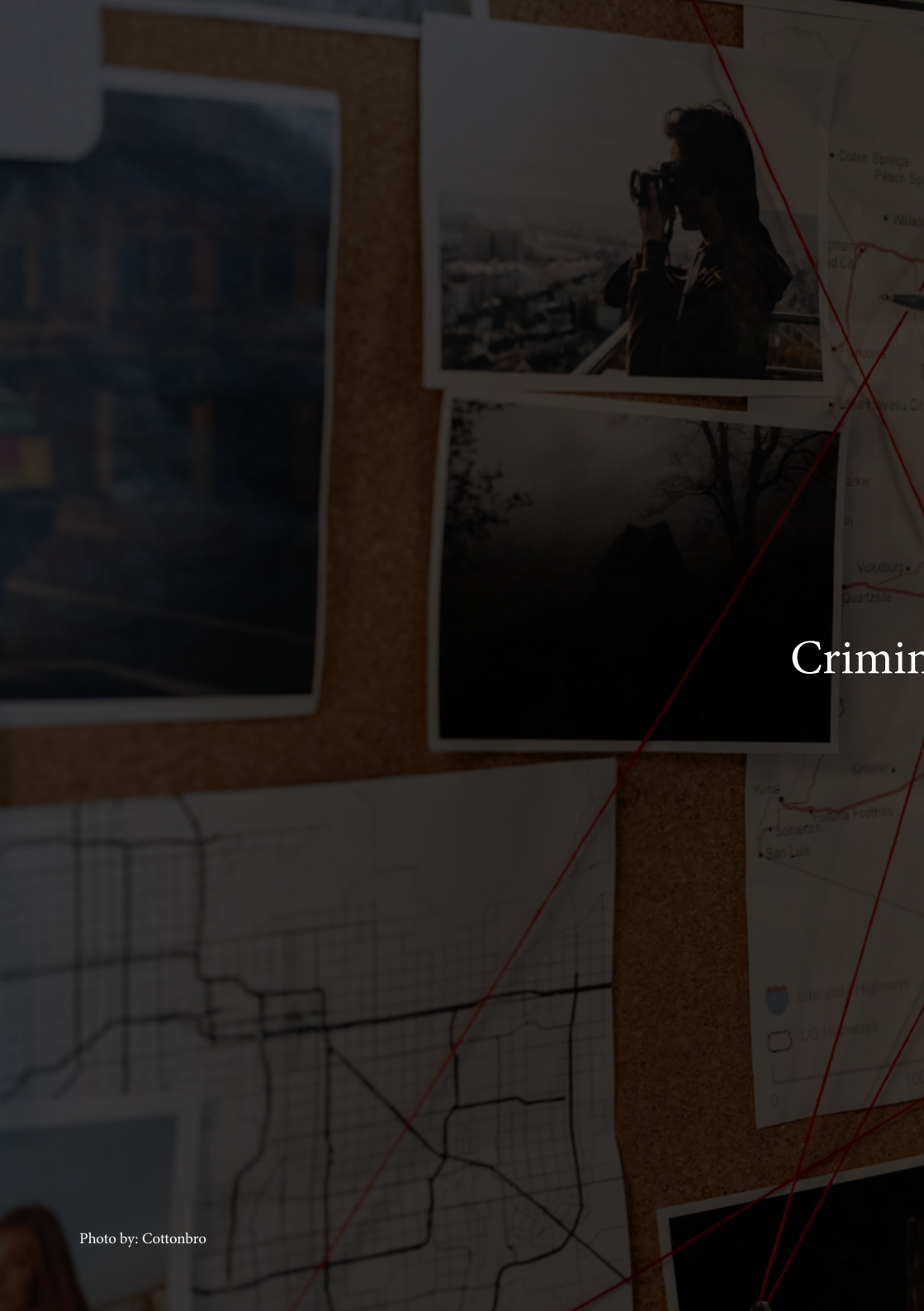
Today, as a result of the free market it is possible to import agricultural products in order to meet the demand. However, the Court argued that the fact remains that the state has a strong responsibility to ensure that the country does not rely entirely on imports, as this could be detrimental for the state in cases of force majeure.

In fact, the Court mentioned today's realties whereby in the last two years, due to the pandemic, the country has become more conscious of the fact that Malta is strongly dependent on sea and air transport. On this basis the Court held that the State has a very wide discretion to ensure that the agricultural sector does not fail at any time.
On the other hand, the Court also recognised that the State's discretion has its limits circumscribed through the fundamental rights of the citizen. Contrary to what was argued by the State Advocate, the Court mentioned that although the State is in a position to recognize the needs of society, such disrection is not absolute to the extent that it hinders the owner of the land in the enjoyment of his property.

Therefore, the principle of proportionality has to be applied in order to ensure that there is no breach of the rights of the owner of the land. In this regard, the Court, in quoting Bradshaw and Others v. Malta, held that it has to examine the conditions of rent not only from lease-market perspective but also ensure that such conditions do not impact the landlord's property rights in an arbitrary or unforseeable manner. Indeed, the European Court held, the element of uncertainty – in any way, shape or form – 'is a factor to be taken into account in assessing the State's conduct.'

In its decision, the First Hall Civil Court presided by Judge Mintoff, failed to agree with the figures provided by the court technical expert claiming that it cannot envisage a situation where a landowner finds a farmer who is prepared to pay €130,950 for the purchase of the land in question, or to enter into a lease agreement of € 1,964.00 per annum. Nevertheless, the Court held that it was evident that the owner of the land had not resorted to the Rural Leases Control Board to seek an increase in the value of the agricultural lease.

Therefore, on the basis of the above considerations, the First Hall Civil Court found that the fundamental human rights of the owner as established under Article 37 of the Constitution of Malta (Protection from deprivation of property without compensation) and Article 1 (Protection of property) of the First Protocol of the European Convention of Human Rights were not breached. The judgement may still be appealed.



Crimin

Photo by: Cottonbro

nal Law

Taking matters into one's own hands

by Dr Rene Darmanin

Imagine a scenario where you are returning to your matrimonial home after a fight with your partner and all of a sudden you find that the door locks have been changed and you are now deprived from entering the premises; or else walking down the path to your field and noticing that someone took matters into their own hands, installed a gate and you can no longer reach your fieId.

The concept of people 'taking the law into their own hands' or resorting to 'self-help' is quite common before our courts of criminal judicature. This whole notion is more commonly referred to by legal practitioners as the crime of 'ragion fattasi'.

The crime of ragion fattasi, or in layman's terms 'taking matters into one's own hands' was introduced in Malta back in 1842 when the first draft of Criminal Laws was being formulated. In fact, the offence of ragion fattasi has been known to exist for several years. lt is worth mentioning that Malta's legal provision regulating the offence of ragion fattasi was derived from the Neapolitan Code of 1819.

It is worth noting that Maltese law regulating this crime differs from that of the Italian Penal Code. The latter requires violence and threats as essential elements of the offence, while the Maltese law does not require that violence should be proven for the offence to subsist. The difference is due to the fact that the sources from which the provision is derived are different. Back in 1972, Maltese legal jurists had already established the four indispensable elements making up the offence of ragion fattasi.

For an offence of ragion fattasi to transpire, the prosecution is legally bound to prove that an external act performed by the accused deprives another person of a right or a thing which he or she enjoys and such act is carried out in spite of the express or implied opposition of such other person. It must also be proven beyond reasonable doubt that such external act was performed by the perpetrator in the belief that he or she is exercising his or her right and that he or she is acting rightfully. This belief should be accompanied by the knowledge in the mind of the perpetrator of doing of his or her own authority that which should be done through the lawful authority. Last but not least, it is up to the prosecution to prove that the alleged external act does not constitute a more serious offence.

This was the matter at hand in the case of 'll·Pulizija vs Maria Carmela Mallia' decided by the Court of Criminal Appeal on January 28. Mallia was charged of having in the exercise of a pretended right, by her own authority, disturbed Gusieppi Vella from the enjoyment of his possessions. To put things into context, the accused owned a property

comprising of a number of apartments. Vella had been renting one of the apartments from Mallia for a number of years. At a point in time, the accused noticed that there was structural damage on the roof of the said property at the exact place where Vella's metal poles and clothes line were situated.

From the evidence produced by the parties, it was ascertained that Mallia had, in fact, consulted with Vella on the matter, to which he gave his consent for the objects to be removed and the works to proceed on the basis that he had not made use of such poles for more than 18 months.

The Court of Appeal delved into the prerequisites had to be satisfied in order for the act of ragion fattasi to subsist. The court held that such prerequisites are: In relation to Mallia 's external act and Vella's dissent, the court provided that, the accused together with the tenant had discussed this matter whereby the latter claimed that he had not used the metal rods in over a year-and-a-half.

This ultimately meant that the accused was not preventing the enjoyment of a right since the said poles were not being utilised in the first place. Furthermore, the court propounded that, in fact, Mallia had offered Vella another space on the roof in order hang his clothes until the work is completed.

The court then delved into the second element which constitutes the belief that the person has a right to commit the particular act. Here it was held that the appellant's act was indeed done by the tenant's consent and thus, Mallia's actions could not be considered to be done without Vella's knowledge just because she thought she had a right to do so.

The court emphasised that Article 85 of the Criminal Code, regulating the crime of ragion fattasi, is intended to impede a person from taking the law into his/her own hands. The position between co-possessors, as was the case in question, is that all the Co-possessors should have equal right of enjoyment, unless it has been provided differently by an agreement between the co-possessors or by an order of a competent authority or a law.

The Court of Appeal, after making the aforementioned considerations, concluded that Mallia's actions were not performed with the intention to distubing Vella from the enjoyment of his possessions, especially due to the fact that Mallia had consulted with him prior to the removal of the metal poles in question and consequently acquitted the appellant from all charges brought against the accused.

Employm

Photo by: Fauxels

ment Law

Claiming damages with no prior termination

by Dr Rebecca Mercieca

A contract of works between a contractor and his clients/employers need not be in writing to be valid, however a clear contract in writing undoubtably serves its part in avoiding conflict between masons and their clients when things turn sour. In a case decided last week, the court delved into the do's and don'ts when terminating a contract of works, whether it is in writing or not.

Plaintiffs (clients) engaged the defendant (contractor) to carry out construction works in their Salini property, the parties had initially agreed that works had to be finalised by August 2017. They had agreed on all prices regarding the works and materials and the parties further agreed that the mason was to be paid for each floor once finalised and certified by the plaintiffs' respective architect.

The clients and the mason had several disagreements, and they definitely spent their fair share of time in several different court rooms in the Courts of Justice building in Malta. In total, they spun their web with four different cases.

The clients filed an application before the First Hall Civil Court, against their contractor, whereby they stated that the mason's actions caused them a lot of anxiety, loss of time and extra expenses which had not been anticipated, and so they asked the court to liquidate damages in their favour.

The clients alleged that the mason did not follow the plans and the instructions given to him by them and the architect and even left out parts of the basement. Inter alia, the clients claimed that the mason failed to observe the health and safety laws and regulations and that the mason, had postponed the works to continue works on a different site and that he had eventually abandoned the site and refused to continue working for them.

Notwithstanding the clients' claims and statements as to how displeased they were with the mason's works, the clients did not choose to resort to their remedies at law, such as that spelt out in the Civil code, which specifically provides a remedy to clients when a mason fails to carry out his contractual obligations. The law clearly states that upon having valid reason for the dissolution, the employer is to pay the contractor only such sum which shall not exceed the expenses and work of the contractor, after taking into consideration the usefulness of such expenses and work to the employer as well as any damages which the employer may have suffered. In this case it was the mason who stated that he wanted to stop working for the clients, and such was in November 2017, three months after the agreed deadline.

The mason claimed that the lawsuit for damages before the First Hall Civil Court was filed against him as a ploy for the clients to avoid paying him, and also confirmed that he had filed another lawsuit himself again them in the Court of Magistrates (Malta) for payment in relation to the works he carried out for them, which he had stopped when the clients refused to pay him. This case was adjourned 'sine die' and thus to date, no judgement was delivered in relation to it.

The clients had also claimed that the mason had arbitrarily taken their generator and subsequently filed a police report, which led to the mason being accused of 'ragion fattasi' before the Court of Magistrates (Malta). Such arbitrary exercise, in this case supposedly being for disturbing the possession of the generator enjoyed by the clients, carries a punishment of imprisoned for a term of one to three months, or to a fine (multa), however mason was not found guilty.

Client's father also got involved personally and started proceedings against the same mason before the Small Claims Tribunal. He claimed loss of rent of the same generator, which he claimed he had leased to his daughter at €30 daily, and thus claimed a total of €4,230 from the mason. The father lost the claim before the Small Claims Tribunal as the Tribunal stated that had the father really leased the generator to his daughter, it should have been his daughter to file these proceedings, and not her father himself.

The final case decided between the parties (to date) was the one delivered by the First Hall, Civil Court case number 380/18TA on the 15th June 2021, which judgement has not yet become final.

In its judgement, the court considered that the clients had not asked the court to authorise them to finish and remedy the works themselves, and that they engaged a third party to continue the works for them, without first terminating the contract of works and without insisting that the mason finishes and/or remedies the works commissioned to him.

The court confirmed that damages can be claimed, however not without the judicial termination of the contract of works or before attempting to have the mason finalise the works. Indeed, the court found that there was no legal basis for the clients' claim of damages since this was not made ancillary with the request to terminate the contract of works or for the execution of the contract of works. The court declared that by unilaterally engaging the third party to continue the clients' works they were not abiding by the law, and thus all the plaintiff's requests were rejected, with expenses against them. Whether the plaintiffs' journey in court with their contractor ends in such a sour taste, one is yet to see.

Good and sufficient cause for dismissal

by Dr Rebecca Mercieca

In a judgement delivered by the Industrial Tribunal and confirmed on appeal on the 13th October 2021 (70/2020 LM), the Industrial Tribunal declared: "The principle of natural justice, which in this case translates into giving the employee due, formal, written notices of risking dismissal unless the employee corrects her attitude and behaviour, and giving the employee the opportunity to defend herself with the assistance of a person of her trust when faced with prospective dismissal, overrides whatever provisions there may be in an Employment Agreement."

Facts were as follows: Employee was engaged with the employer on a full-time basis for an indefinite period as a Customer Service Agent, which relationship was regulated by an employment contract signed in 2014. Nineteen months later, the employee was informed that her employment with said employer was being terminated on the basis of redundancy.
The employee contested such termination, stating that her termination was not justified, and the company reacted by changing the employee's termination notice initially based on redundancy to that based on disciplinary reasons within two days from receipt of the employee's objection to dismissal. The Tribunal noted that the employer had been guided by the provisions of the employment contract when dismissing the employee; specifically the clause stating: "In the event that the Employee … habitually neglects the duties to be performed under this agreement … such circumstances shall constitute a good and sufficient cause for dismissal and for the ipso facto termination of this contract of service …."

The employee filed proceedings before the Industrial Tribunal and claimed that her termination of employment was unjust, based on reasons which were not sufficient in law. Employee further demanded that she be compensated adequately for the alleged unjust dismissal. Employer disagreed and further stated that if the Industrial Tribunal was to find that termination was indeed unjust, compensation be minimal based on the short period for which the employee had been engaged with the employer.

The Industrial Tribunal was convinced that the employer 'had had enough of the employee', and recognised that to the company, redundancy, although not reflecting the actual situation seemed to be the 'smoothest reason' safeguarding the employee's possible future prospects with that particular industry; and so it initially issued a letter of termination on grounds of redundancy. When the employer learnt that the employee wasn't going to settle for it, the employer changed the reason for termination to one of discipline and registered it as such with Jobsplus. The Tribunal established that legally and officially there existed only one reason for dismissal – a disciplinary one. The

Tribunal pointed out that initially declaring the reason of termination as being one of redundancy is not extraordinary in employee relations, albeit normally the fudging of the actual reason of termination results from a request by the employee; the Tribunal condemned such practice, it declared that it is illegal to give a reason that is untruthful to Jobsplus, however there is nothing in the law that prohibits the changing of the reason of termination.

The Tribunal then moved on to establish whether the disciplinary grounds claimed by the employer (poor timekeeping, abuse of sick leave, substandard quality of work, disruptive behaviour and damaging of company property due to negligence) did actually exist and whether they constituted a good and sufficient cause for dismissal. It further had to establish whether the processing of the dismissal was fair.
It found that the employer's claim of employee's abuse of sick leave was proven, including by evidence that while the employee was on sick leave she had gone out for lunch with the director of the same company, on which occasion employee ironically complained about the rejection of her request for optional leave.
The Industrial Tribunal was also satisfied of the employee's substandard quality of work; her disruptive attitude towards her superiors and negative attitude in how she chose to deal with issues she had with her superiors.

The Tribunal was also satisfied that the employee had damaged company property due to negligence when she damaged three company laptops, by cracking the back of the screen of one after dropping it, dropping a glass of water over another, and damaging an HDMI port of another.

The employee herself did not contest the fact that she was late on some occasions and that she also had an agreement with her superiors to leave twenty minutes early from work; which time she was due to make up for later. The Tribunal declared that poor timekeeping was proven by the employer.

Moreover, the employer tried to accommodate the employee as much as it could, including by issuing a request asking the employee to choose between her changing her working times and not being paid for the time that she did not work. The employer considered that such a request had not been replied to by the employee, however from the evidence produced, the Tribunal found that employee could not be validly accused of ignoring the request since at the time when the request was sent to the employee, she was on vacation leave and was not aware of it. Based on such, the Tribunal described the employer's reaction as being too hasty in considering the employee's failure to reply to the request while on vacation leave and shortly prior to being dismissed.

In its deliberations, the Industrial Tribunal confirmed that the employee's proven misconduct would normally constitute sufficient grounds for dismissal, however it also considered that this case in particular is not normal because it violates natural justice where at no point in time was the employee made fully aware that her behaviour and attitude were leading to her being dismissed from her employment, and moreover she received mixed signals from her employer especially shown by the exceptional lenient attitude taken towards the employee's unacceptable behaviour.

In its award, the Tribunal considered the employee's age at dismissal, 32, as being young enough to pursue a long working life and also that she had only worked for the company for nineteen months prior to dismissal. It further considered that by her attitude and behaviour she contributed to the company's decision, and for this she had to assume responsibility, thus affecting the Tribunal's compensatory award. Dismissed employee was awarded €4,200 as compensation for her dismissal by the company.
Employer's appeal was quashed and declared null.

Pregnant on probabtion

by Dr Rebecca Mercieca

During the period of probation, an employer may dismiss an employee without justified cause, given that if the employee has been in employment for at least one month, the employer gives the employee one week's notice prior to the termination. The Protection of Maternity (Employment) Regulations establish the minimum requirements to safeguard the employment rights of pregnant employees, the right of employees who have recently given birth and those employees who are breastfeeding, with the scope of improving the health and safety of pregnant employees.

On the 9th July 2020, the Industrial Tribunal decided that a pregnant employee's dismissal during her probation period was in breach of the Protection of Maternity (Employment) Regulations and liquidated damages to the dismissed pregnant employee for €10,000 payable by the accounting firm that had dismissed her while she was on maternity leave. The Tribunal's decision was overturned on appeal by a Judgement delivered on 12th May 2021 by Judge Lawrence Mintoff (case ref number 28/2020 LM). The facts were as follows: In April 2018, the employee attended an interview with an accounting firm. She was chosen and it was agreed that she was to start her employment with the firm in October of the same year.

She was employed on an indefinite basis with 6 months' probation. A few weeks into her employment as an Audit Supervisor with the firm, while she was on maternity leave, the employee was informed that a decision was taken to terminate her based on performance during the said probatory period. This gave birth to the industrial claim which she pursued against the employer who had dismissed her during her maternity leave The employee claimed that the real reason for her dismissal was related to pressure from third parties which was related to her partner and that the employer had further fabricated the allegations about her performance being poor. It transpired that one of the firm's clients, a good client, had a falling out with the employee's partner. Indeed, the employer's client had presented an ultimatum to the employer, whereby it threatened to stop supplying work to the firm, unless it terminated the (pregnant) employee's employment with the firm.

The employer presented a different version of facts and argued that an employee may be dismissed on sufficient and just cause; even if said employee happens to be pregnant or if said employee would have just given birth. The employer stated that the decision to dismiss the pregnant employee was principally because she had made a series of material errors at her new workplace as well as the possibility of a conflict of interest which arose between the pregnant employee's partner and one of the firm's clients. Based on such, the employer decided that the employee was to be dismissed during the probation

period, and indeed she was. The Industrial Tribunal found that the employee did not do any work which would have caused a conflict of interest, however it did note that the employee's mistakes could have had very serious consequences for the firm.

Notwithstanding, the Tribunal was not convinced that the employee's errors reached the sufficient level required by the law to justify the termination of employment.
On appeal, the employer claimed that the fact that the employee had not presented her employer with a medical certificate issued by her doctor meant that she could not benefit from the protection awarded to women in terms of such Protection of Maternity (Employment) Regulations as she could not be effectively considered to be a pregnant person and enjoy the protection offered by the law; even though she was evidently seven months pregnant when she started working for the firm.

The employer further sustained that the employer is only bound to prove that it dismissed the pregnant employee for just and sufficient cause if the employee showed that there were facts from which one could presume that there was direct or indirect discrimination related the employee's condition – her pregnancy. The employer successfully argued that the employee failed to do this, and she did not claim that her employment was terminated because of her pregnancy or because of the birth of her child.
On the other hand, the employee argued that the terms of a probation period are different for a pregnant employee in that the probation period for a pregnant employee is 'frozen'. She claimed that there was no just cause for her dismissal, which happened a few weeks into her employment, after she had started her maternity leave on agreement with her new employer.

The Court of Appeal decided that the employer was correct in stating that a pregnant employee is bound to give written notice signed by her doctor to the employer confirming the pregnancy and containing the expected due date. It declared that informing the employer of the pregnancy or simply stating that her pregnancy was clearly evident by looking at her was not sufficient and did not offer the expected protection to the pregnant employee since she had not abided by the same regulation and had failed to provide her employer with notice of her pregnancy in writing.

The Court of Appeal further agreed with the employer's argument that the employee's complaint before the Industrial Tribunal was not based on dismissal because of her pregnancy; but rather, she had based her application before the Tribunal on the external pressure for her dismissal caused by the third party; being the firm's client.
Taking the above into consideration, the Court of Appeal declared that the pregnant employee who was still on probation could be dismissed without being given reason for her dismissal, as long as she was given notice of one week. No compensation was awarded to the dismissed pregnant employee by the Court of Appeal.

Unfair or Fair Dismissal

by Dr Mary Rose Micallef

Employment law (Chapter 452 of the Laws of Malta – Employment and Industrial Relations Act) seeks amongst others to regulate employment dismissal. The spirit of the law attempts to create a safety net that shrouds the employee – being the weaker party in terms of the employment contract – from being dismissed arbitrarily and unjustly. It must be said that the law does not stipulate a specific procedure as to how dismissal is to be affected. Perhaps, a popular belief is that before dismissal the employer must undergo a series of written warnings.

This is not so, and the appropriate procedure to be adopted when it comes to dismissal depends really and truly on the underlying employment relationship circumstances. An employee may be considered fairly dismissed, without being handed prior warning (whether written or otherwise) if for instance he is found thieving his employer. On the other hand, outright dismissal following an employee's misdemeanour may be tantamount to unfair dismissal. Really and truly, the fairness or otherwise of dismissal depends on the circumstances of the case. What is considered fair or unfair is subjective.

Unfair dismissal is termed as the termination by the employer of a contract of employment contracted for an indefinite period; being a termination that is not made on grounds of a 'good and sufficient cause', or when the termination is made on grounds of redundancy which is found out to be discriminatory against the employee, or the termination by the employer in respect of that employee of a contract of employment for a fixed term. A parallel concept to unfair dismissal is the concept of constructive dismissal. This term is not defined or even mentioned in Chapter 452.

Constructive dismissal results when the employee forcefully dismisses himself from work, because of an employer's belligerent conduct. Even though Chapter 452 misses this concept, such concept has been time and again recognised as another form of a potential unfair dismissal by the Industrial Tribunal. This concept of constructive dismissal featured in a recent judgment delivered by the Court of Appeal on July 30, bearing the names of 'Lopez vs Jet Magic Air Personnel Limited'.

The plaintiff was an employee of the defendant company as a flight attendant. The applicant executed her work in Spain (plaintiff's country of residence) where she boarded chartered aircraft and travelled with the company's customers to their destinations. Some years back, she became pregnant and for this reason, she informed her employer company that she was to be grounded. In this regard, it was claimed that the employer company had to offer her an alternative duty. Jet Magic Air Personnel Limited offered its employee an alternative job, which job required the plaintiff to station herself in Malta,

but the same wage and conditions were being retained. A few days after this offer the appellant/plaintiff informed her employer that she could not relocate to Malta due to her health condition, on her doctor's instructions and advice.

Moreover, and whilst this communication was taking place, it resulted that claimant expected her employer to support all extra costs which covered her relocation to Malta, thereby including residential costs, day-to-day costs, and medical costs. Respondent denied such requests and insisted that plaintiff was being handed an alternative job, with the same conditions and that she was to expect equal treatment to other employees who had identical roles.

It also became apparent from the evidence gathered that the employee tried to negotiate her working hours in such a way that she would be able to return to Spain during weekends. The parties clashed and claimant resigned. Consequently, she filed this case on grounds that she was forced to terminate her employment due to her employer's conduct. Plaintiff expected and demanded the court to declare that her employment was terminated on discriminatory grounds. On these grounds, claimant demanded compensation from her ex-employers.

The Industrial Tribunal found that Jet Magic Air Personnel Limited was obliged to provide claimant with an alternative job (given her medical condition) with the same conditions and wage. It considered that Jet Magic Air Personnel Limited had honoured its contractual and legal obligations towards its employee. Resultantly no unfair/constructive dismissal was found, and therefore no compensatory sum was awarded to plaintiff.

Plaintiff disagreed with the first instance judgment and tendered an appeal. She claimed that the Tribunal did not take any cognisance of the Maternity Protection (Employment) Regulations. Incidentally, the purposes of these regulations stipulate the minimum requirements that are designed to safeguard and protect the jobs of pregnant employees.

Secondly, Appellant complained that the Tribunal failed to correctly imply the interpretation of the concept of 'discriminatory treatment'. In this regard, appellant argued that her discriminatory complaint was not linked so much to the fact that she was treated differently from other employees, but to the fact that pregnant flight attendants were being asked to relocate to Malta and leave their country of residence.

Appellant argued that she would not have done the alternative duties she was being offered because this essentially involved a drastic change in her residence. Therefore, appellant argued that she had no option but to decline the offer and resign from her post. The Court of Appeal disagreed.

It noted that appellant had failed to explain this discriminatory ground – indeed her employer had offered her an alternative job, whilst retaining the same conditions and wages. The court also noted that no other viable job could be offered by the appellate company. It noted that Jet Magic Air Personnel Limited had done its best to retain its employee in employment, and therefore that it was compliant with the imposed legal obligations. The second instance court found that the first judgment was correct to find that no unfair/constructive dismissal occurred. To this effect, no compensation was awarded to the employee party.

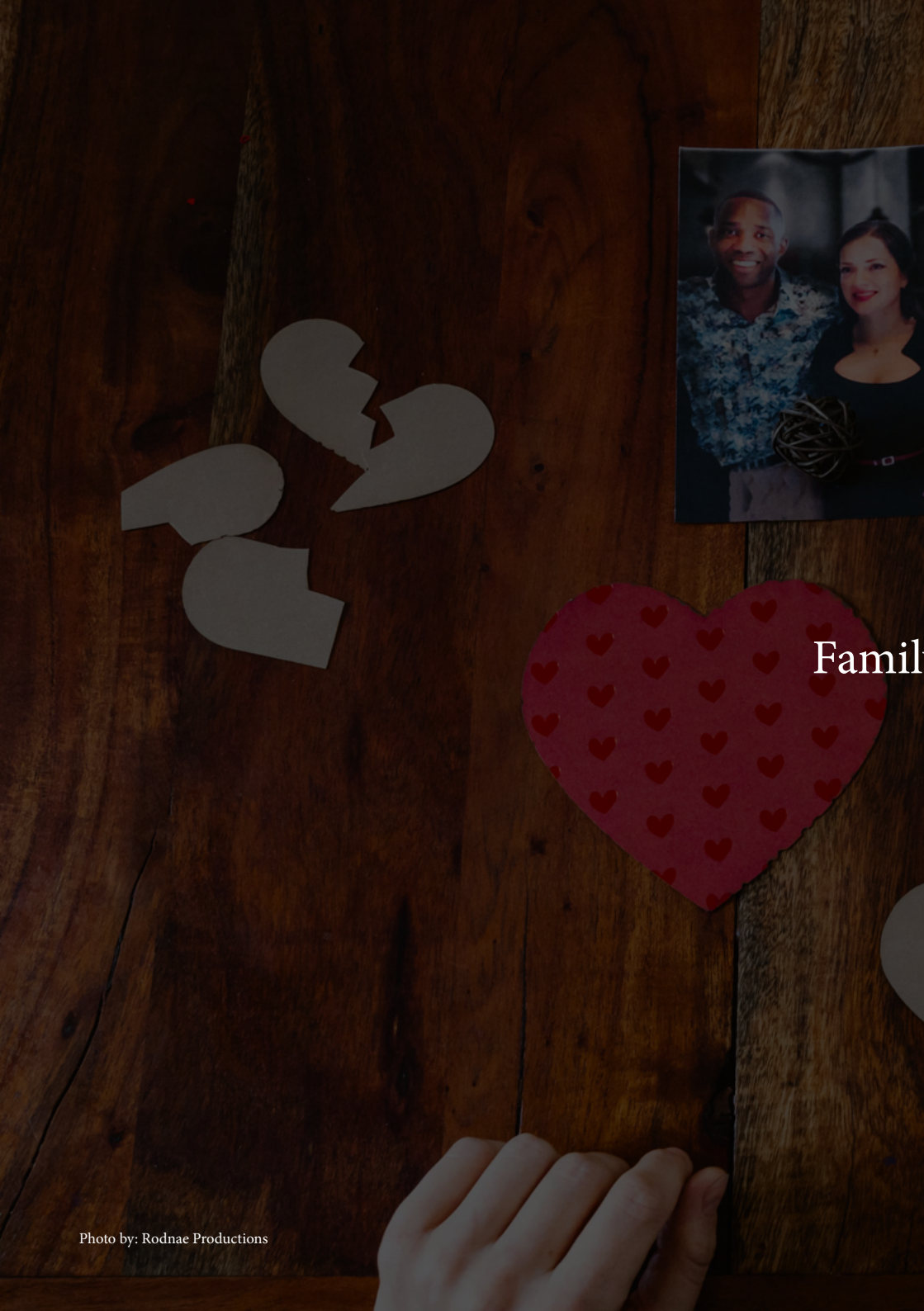


Photo by: Rodnae Productions

y Law

Visitation rights; at the child's discretion?

by Dr Rebecca Mercieca

Being in default of paying maintenance following a court order or after signing a contract may result in prison, however do visitation rights carry the same weight as a maintenance order does? Failure to pay maintenance within fifteen (15) days from the day on which such maintenance is due is a contravention against public order. Similarly, is the refusal by a child's custodian (without just cause) to give the other parent access to the child when ordered by a court or bound by a contract. The non-observation of visitation rights undoubtably result in hardship on the other parent at the expense of the child. For such reason, the law aims to discourage non-observation of visitation rights due to a capricious reason or a reason attributed to pique.

The corridors and halls of the Family Court have on too many occasions heard and witnessed one parent or another alleging that it is the child who refuses to be with the other parent, and that the parent vested with custody does not physically have the power to force the child and to give access to the other parent. This was the reasoning brought by the mother who was accused of repeatedly refusing to give the child's father access to their child. The court did not find that mother had 'just cause' for not giving the father access to the child, and on 14th September 2020, the accused was found guilty by the Court of Magistrates as a Court of Criminal Judicature and subsequently condemned to one (1) month of effective imprisonment for each case against her, thus a total of eight (8) months imprisonment for not giving the father access to their 10-year-old son.

Mother appealed and argued once again that it was the child who refused to be with the father and that the child's refusal should not result in an offence committed by his mother. Such an argument was compared by the Court to the statement she had previously given to the police, whereby she had stated that it was the father who had expelled the child after a fight and after seeking advice, she stopped giving the father access to the child. The accused further argued that recent case law regarding the obligation by one parent to give access the other parent was heading towards a different direction and thus such a contravention should not be punishable by imprisonment. The Court of Appeal disagreed. The Court stated it was the mother's obligation to give the father access to the child and that it should not be the child who declares and dictates whether visitation happens or not. The Court further considered that the mother did not do anything to persuade the child to attend visitation with the father and neither did she make any effort to ensure that access did happen. On the contrary, she arbitrarily decided to stop giving the father access to the minor.

The Court of Appeal referred to the same judgement cited by the accused herself and clarified that such cited judgement dealt with different facts than those of the accused. Contrary to what AB did in this case, in the case cited by her, the father had done everything in his power to ensure the child's visitation with the mother. Indeed, in the cited case, the court had considered that after the court-marshal failed to succeed in his order to physically take the child to Appoġġ to meet the mother, the father did not stop there. He not only encouraged the child to obey the court order, but he also invited the mother into his apartment and left the mother and the child together, until the child physically pushed the mother out of the apartment. Acknowledging that each case presents its own particular facts, the Court expressed that unlike the case cited by the accused herself, AB made no effort to ensure that visitation happened. Subsequently, the Court of Appeal presided by the Hon. Judge Giovanni M Grixti on 15th April 2021 confirmed the first judgements against the mother in 'Il-Pulizija v AB' (173, 174, 175, 176, 177, 178, 179, 180 of 2020) and found the mother guilty of Article 338 (ll) of the Criminal Code.

When considering the punishment, the Court of Appeal acknowledged that actions such as those by the accused cause trauma to the child and the other parent, which trauma is not easily resolved and at times may even cause irreconcilable hatred. Apart from the undisputed importance of obeying a court order, it is for such reason that a parent is condemned to a prison sentence when he or she refuses to give access to the other parent following a court order or contract.

Notwithstanding such, in its judgement(s) the Court of Appeal, declared that the mother required help to recognise her wrongdoings and rectify her mistakes which were causing prejudice to the child and the child's father in an irreparable manner.
The Court was further satisfied that supervision of the offender (by a probation officer) was desirable and was in the interest of securing rehabilitation of the offender, preventing the commission of further offences. Consequently, the Court of Appeal substituted the punishment of imprisonment by placing the offender under a probation order for eighteen (18) months in accordance with the probation act.

Being placed under probation does not mean that the accused was not found guilty. A probation order is an alternative to a prison sentence, whereby the offender is placed under the supervision of a probation officer, in this case, for eighteen (18) months. Should the offender fail to comply with the conditions of the probation order therewith or commits another offence, she will then be liable to be sentenced for the original offence.

You are the Father
by Dr Keith Borg

Our law, like many other Continental frameworks, provides its own set of rules for the impeachment or confirmation of biological parentage. These rules do not lend themselves to straight forward interpretation and are often complex in their differentiation of various possible base scenarios leading to judicial action.

In the proceedings in the names AB v. CD pro et noe and the Director of Public Registry (application number 44/18/2 AGV) plaintiff had originally brought a claim for disavowal of paternity of a minor. Ordered by the court in first instance, plaintiff rooted his claim in terms of Articles 99, 77(b) and 70 (1d) of the Civil Code. Naturally, defendants contested the claim.

Article 99 provides for the possibility of impeachment of an acknowledgment of a child conceived and born out of wedlock. Artcile 70 (1d), then provides the possibility to any spouse (except of course for the spouse who gave birth to the child), to bring an action to repudiate a child born in wedlock if such spouse proves that during the said time the spouse who gave birth had committed adultery or that, that spouse had concealed the pregnancy and the birth of the child. Artcile 77 (b) provides that the filiation of a child born in wedlock may also be impeached by any person interested if said person proves that, during the said time, the wife had committed adultery, and furthermore produces evidence of any other fact which may also be genetic and scientific tests and data that tends to exclude the husband as the natural father of the child.

Proceedings were conducted in the English language. The plaintiff's claims were rejected in first instance. The Court noted, with respect to the application of Article 99 that the English language version of the law and the Maltese language version of the same provision are not identical. The English language version, the Court noted, speaks of the impeachment of an acknowledgment of a child conceived or born in wedlock, whereas the Maltese version refers to the right of impeaching the acknowledgement of a child "imnissel u mwieled barra miz-zwieg" This, the Court argued, created an anomaly as the English version is speaking of a "legitimate child", whereas the Maltese version refers to an "illegitimate child".

The Court noted that the Maltese language version is the one that should prevail. Essentially, this meant that plaintiff brought forward his action for disavowal of paternity, attempting to impeach an acknowledged "illegtimate child". The Court agreed with both defendants that Article 99 could not apply to plaintiff's claim, as from the facts of the case it had transpired that the minor child was born outside wedlock, after defendant had a relationship with another man and later, plaintiff and defendant (who had previ-

ously been in a relationship together) decided to reconcile, get married and legitimate the child through the subsequent marriage. Having legitimated the child through marriage, the Court argued, the child cannot be conceived as an "illegitimate child" any longer and the presumption is that he/she was always conceived and born in wedlock.

The plaintiff's claim, as based on Artcile 70 (1d) was rejected as from the evidence produced throughout the case, it resulted the parties got married two years after the minor was born, so essentially there could have never been any adultery committed by the defendant – as adultery of itself can only occur within a marriage.

Moreover, the plaintiff's claim in terms of Article 77 (b) was also rejected. The Court argued that for a plaintiff to proceed under Article 77 (b), the Court must first and foremost ensure that by proceeding with such an action, no prejudice would be caused to the minor. By creating such presumption at law, the legislator wanted to uphold the social and legal interests of the child, more than the biological interests at stake, in the sense that it would be more detrimental to a child to find himself suddenly declared to be "illegitimate" once again, when he was legitimated for all intents and purposes at law. One cannot simply overturn a child's life upside down after having brought him up within a family structure, with a person who he always considered as his parent, the Court noted.

The Court highlighted the safeguards offered by the law to the rights of a minor child, which rights are ultimately supreme. It was insufficient for the plaintiff to produce genetic tests that confirm that he is not the child's biological father, as these alone, the Court noted, do not suffice for the purposes of Article 77 (b). Plaintiff brought his complaints to the Court of Appeal; his demands were however rejected once more, with costs, on appeal by judgment of the 25th March 2021. Among the complaints brought forward, plaintiff noted that with its decision, the first Court condoned a situation which does not reflect the truth, with all the legal consequences that this brings with it, meaning also that in effect, neither the scientific proof of paternity, nor defendant's admission, had sufficient legal strength for plaintiff's demands to be upheld. He complained that the interpretation of Article 81 of the Civil Code, given by the first Court meant that no action he could have lodged would have been successful.

Article 81 lays down that: "No person may claim a status contrary to that which is attributed to him by the act of birth as a child conceived or born in wedlock and the possession of a status in conformity therewith." and that "Likewise, it shall not be lawful to contest the status of achild conceived or born in wedlock in respect of a person who possesses a status in conformity with his act of birth." The Court of Appeal however rejected this greivance underlining that the first court did not consider Article 81 since it concluded that Article 77(b) did not apply because there was no adultery, since the parties married when the child was already two years old.

The Court of Appeal continued to note the plaintiff had failed to contest the conclusion of the first Court that Article 77(b) was not applicable to his case - this was the relevant issue which the plaintiff should have addressed, however, no such ground of appeal was included in the plaintiff's appeal application.

The Court concluded by ordering its Registrar to notify the State Advocate with a copy of the judgement in view of the discrepancy between the Maltese language version and English language version of Article 99 of the Civil Code. As I see it there are two lines at the bottom of all this: the first relates to the contunied differentiation between children born in or out of wedlock; the second relates to whether a minor's social and legal interests should outweigh biological interests. I for one will reserve my position, waiting to see whether this particular case will find itself in the docket of a Court of Constitutional jurisdiction.

The child remains in Malta

by Dr Rebecca Mercieca

Maltese law does not provide the legal tools for a person to stop another from travelling outside Malta, however it does provide for a restrain on any person from taking any minor outside Malta.

Such is by a warrant of prohibitory injunction against another person, enjoining such person not to take or allow anybody to take a minor out of Malta. The warrant shall be served on the person or persons having, or who might have, the legal or actual custody of the minor enjoining them not to take, or allow anyone to take, the minor out of Malta. The result which this warrant aims to achieve is a level of protection of the minor child, stopping the child from being taken outside Malta, since such departure would cause the other parent to suffer an irremediable prejudice and not mere difficulty, discomfort or concern. In such procedures, the court seeks to protect one of the parents from being arbitrarily deprived of a relationship with the minor. This in itself is based on the principle of the best interests of the child, since a child needs the presence of both parents in his life in order to have the possibility to develop a good and strong relationship with both, and not to hold the other parent hostage in a particular country.

A warrant of the sort is usually a legal tool which one parent uses against the other when applicant feels that there is a real fear that the other parent or other person may leave the country with the minor child arbitrarily and it is also served on the Commissioner of Police enjoining him not to allow such minor to leave Malta, as well as the officer charged with the issue of passports enjoining him not to issue, and or deliver, any passport in respect of the minor and not to include the name of the minor in the passport of the minor's legal representatives or in the passport of any other person. Since injunctions of the sort are considered to be of an urgent manner, if everything is in order, the court normally accedes to the warrant immediately, then gives the defendant a short period of time to file a reply and also gives the parties the opportunity to testify before it.

In a recent court decree, following a warrant of prohibitory injunction (warrant number 188/2021/2 JPG, decided by the Family Court on 5th November 2021) a minor' father filed a warrant of prohibitory injunction against the minor's mother, asking the court order that the mother, or any other person shall not be allowed to travel outside of Malta with the child. Such a warrant is also applicable to the applicant father himself.

The child's father highlighted that the mother was from a country outside the EU, yet which is a signatory to the 1980 Hague Convention on the Civil Aspects of Child Abduction. The parties presented two diametrically opposed versions; the applicant was adamant that defendant was about to abscond with the child to her homeland, while

defendant denied it and stated that she had established herself in Malta both professionally and socially.

The applicant claimed that the child's mother expressed her wish to return to her country of origin, that she was allegedly fed up with Malta, was facing legal custody proceedings and also had financial problems - all of which raised red flags to the applicant. The mother had also previously filed an application asking the court to waive the necessity of the father's signature for the renewal of the minor's passport.

The child's father also confirmed that the child had asked him for a passport for her birthday and that she has even wished for a passport at a wishing well. Furthermore, the applicant was worried that had the child to be taken to the mother's country of origin, he had no control over whether the minor would be granted a foreign passport or travel document (even through unconventional matters), and that it would be way easier for the defendant to disappear with the child, and deprive the applicant of the possibility of having a relationship with his child.

On the other hand, defendant (mother) affirmed that even though it is her general wish to travel and for the child to have a relationship with her side of the family, outside of Malta, she however rejected any claims that she was looking to leave Malta with the child permanently and also confirmed that she was contractually bound to work in Malta for the next five years. The child's mother further confirmed that she felt uncomfortable having the minor undergo multiple swab tests (since the minor is not yet vaccinated against COVID-19), and thus did not intend to travel with the minor. Moreover, the child's passport had expired four years back and that it had been submitted to the Inspector of Immigration Police according to the Court's first decree in the acts of this warrant.

The court however further noted that the mother's country of origin, albeit being a signatory to the 1980 Hague Convention on the Civil Aspects of Child Abduction had reported a significant number of court delays on the part of the Judicial Authorities which has negatively affected cases in 2020, and thus should mother abscond with the child to her country of origin, such judicial delays may cause irremediable harm to parent-child relationship, especially since the child is very young.

Moreover, the court considered that such country is at present a level 4 Country; and thus Covid-19 poses a significant threat where even fully vaccinated travellers may be at risk for contracting and spreading COVID-19 variants. Based on the above, the Court considered that the essential elements of the warrant of Prohibitory Injunction concur and ordered that the mother be prohibited from taking or allowing anybody to take the child out of the Maltese Islands, while the said child's passport would remain deposited under the authority of the same Court.

Teaching; dreaming of a chance at redemption

by Dr Rebecca Mercieca

Decisions such as the issuing or suspension of professional warrants are administrative acts, consequently when a member of the public does not agree with an administrative act issued by the government of Malta, the aggrieved party may file an application for the review of the said administrative act before the Administrative Review Tribunal.

Applications from teachers seeking to obtain a warrant to practice the teaching profession in Malta are received by the Council for the Teaching Profession (the Council), which in turn makes its recommendation to the Minister for Education for the issue or otherwise of a teaching warrant.

Not every person may obtain a warrant to join the teaching profession. Among the requirements set out in the Education Act, one finds that persons convicted of a crime liable to imprisonment for a term exceeding one year; persons having abused students' trust and having used violence in students' regard are not eligible to obtain a warrant. Moreover, the Council is given a degree of discretion in deciding the faith of persons who have been convicted of any crime. The Council's opinion of a convicted person on whether such person is fit to practise the teaching profession in a school is also recognised in the law, thus the Council's discretion may result in a teacher losing their warrant or for their application to be dismissed in the first place.

Teaching, practising the teaching profession or carrying out any educational practice without a warrant (or temporary warrant) is considered an offence which on conviction results in a person to be liable to a maximum fine of €1,164.69 and/or 3 months imprisonment and to the daily fine of €11.65 for each day which the offence continues (until a maximum of €4,658.75). John Borg* was a warranted teacher when he was found guilty of violent indecent assault against a minor by the court of Magistrates as a court of criminal judicature (Gozo) back in 2017. He was sentenced to 12 months imprisonment suspended for 3 years. The Council had considered that due to the nature and circumstances of the offence committed, John was no longer qualified to hold a permanent teacher's warrant and thus his warrant was suspended.

Following the lapse of the 3-year period of his suspended sentence, John applied to have his warrant reinstated. The Council recommended that the teacher's application be refused, and subsequently, the Council's recommendation was confirmed by the Minister for Education. The Council based its decision on article 30 (1) (a) of the Education Act, which states that a person shall not be qualified to retain a warrant if such person has been convicted by any court of criminal jurisdiction for any crime liable to imprisonment for a term exceeding one year.

The Council further argued that a person must be of good conduct to qualify for the said teaching warrant and thus according to it, the applicant in this case did not qualify.

John argued that the Council's reasoning was incorrect. Clinging onto a chance at redemption and the possibility of being reinstated to the teaching profession he filed an application before the Administrative Review Tribunal to declare that the Council's decision not to reintegrate his teaching warrant was null and ineffective. To no surprise, the Council objected to the appeal, and defended its' recommendation to the Minister regarding this teacher's warrant.

When contemplating the loss of a warrant for teaching, the Tribunal gave more weight to the penalty linked to the crime which the teacher was found guilty of and gave little importance to the penalty awarded to the teacher. This means that had the maximum punishment been 7 years at the time, the Tribunal, for the purposes of a decision based on the facts it had before it, would have considered 7 as the number of years for which the teacher was imprisoned, and not the actual punishment awarded.

The Tribunal considered that John's sentencing to 1 year imprisonment (albeit it being suspended by 3 years, thus resulting in him not actually spending a day in prison), was, at the time, the maximum he could be punished to. Consequently article 30(1)(a) could not be considered to be applicable to this case since it referred to crimes liable to a term exceeding 1 year. Based on such, the teacher was correct in challenging the Council's decision. The Tribunal considered that the requisites for one to be eligible for a teacher's warrant, including that of having good conduct should be present throughout a teacher's career and not simply upon submitting the application to obtain the warrant.

When testifying, the Council's representative emphasised that the Council did not simply base its decision on sub-article 'a' as indicated above, however it considered all of article 30, including the one giving weight to the Council's opinion on a person being fit to practice the teaching profession. The witness testifying on behalf of the Council made it clear that the Council did not consider John to be fit to practice the teaching profession and stated that had John breached the code of ethics other than be found guilty of this crime, the Council would have still reached the same conclusion and recommended against the reinstatement of the teacher's warrant. In other words, as long as the Council was making the recommendation, John's dream would remain so.

Her testimony convinced the Tribunal that the decision was not solely based on Article 30(1)(a) and so the Tribunal dismissed the teacher's application and left John without his warrant. This judgement was delivered by the Administrative Review Tribunal on the 9th August 2021 (RK Nru 10/2020 SG) John Borg[1] vs Kunsill Dwar il-Professjoni tal-Għalliema f'Malta and has to date not been appealed.

1 *for the purposes of this article a fictitious name is being used for the applicant*

Notari

Photo by: Ivo Rainha


al Law

Of Professional Responsibility

by Dr Mary Rose Micallef

According to local law, specifically the Notarial Profession and Notarial Archives Act, notaries are public officers. They are charged to receive acts inter vivos and wills, and to attribute public faith thereto. Notaries are empowered to draft private writings containing agreements that purport to create legal rights and obligations between third parties. Unprofessional conduct counter to the decorum of the profession, negligence and/or abuse in the exercise of the profession or in connection with professional matters are all contemplated in this legislation.

Indeed there exist instances when a professional fails to perform his/her duties to the required standard or breaches a duty of care, in handling or mishandling such duty, possibly resulting in financial loss to the client or to a third party. The judgment delivered by the Court of Appeal on the 28 April 2021 in the names Joseph Mamo u b'digriet tal-1 ta' Novembru, 2018 stante l-mewt ta' Joseph Mamo l-atti ġew trasfużi f'isem il-mara tiegħu Ludgarda Mamo v. Nutar Rachelle Farrugia Buhagiar LL.D. properly dealt with one such instance.

The plaintiff brought a claim with respect to a public deed entered into in August 2004, by virtue of which the plaintiff had lent a third party a sum of money. The debtor had pledged to repay the debt within three (3) months. The debt was secured by a special hypothec on an immovable property in Birkirkara. It so happened, however, that the debtor did not appear personally on the said public deed, instead his son appeared by virtue of a power of attorney which was purported to have been made in his favor by his father in January 2003.

The power of attorney showed that it had been entered into and concluded before the defendant. When the plaintiff proceeded to demand the payment of the loan and showed the power of attorney to the debtor, the latter stated that he had not borrowed any monies from the plaintiff and that the signature on the power of attorney allegedly granted to his son was not his own! The debtor in fact proceeded to suit against his son and against the plaintiff and was successful in obtaining a declaration of nullity of the aforesaid public deed and any judicial acts filed pursuant thereto and on the strength of same.

It resulted in said proceedings instituted by the debtor that when the defendant had counter-signed the power of attorney she had done so before ensuring the principal's signature on the document. The court in first instance, after observing that through a power of attorney a third party is deliberately declared to be able to act on behalf of his/her principal, and after observing that it is the professional's obligation to ensure that the signatures thereon are effectively tendered in his/her presence condemned the

defendant to pay the plaintiff the sum of €186,349.87 (the amount loaned) in damages together with interest from the 5 October 2009. The defendant was found to have acted with recklessness and imprudence in the exercise of her profession.

The court based itself also on the general principles at law that every person is liable for the damage which occurs through his/her fault and that a person shall be deemed to be in fault if, in his/her own acts, he/she does not use the prudence, diligence, and attention of a bonus paterfamilias (good father of the family). Quoting from jurisprudence as far back as the 1960s, it considered that it could not be doubted that a professional who neglects indispensable formalities, or shows negligence in the exercise of his/her profession or is otherwise responsible of an unfathomable act or omission in his/her professional capacity, is bound to his/her acts.

The defendant lodged an appeal from the judgment in first instance. The Court of Appeal, after brushing aside the defendant's plea of prescription and her request to have the sum awarded in damages reduced, found a direct causal link between the invalidity of the power of attorney and the damage suffered by the plaintiff. It quoted Quoting P. Cane affirming that:

"In a tort action, the defendant cannot be held liable to pay damages for injury or damage suffered by the plaintiff unless that injury or damage was caused by that defendant's tort. This is true of strict tort liability as it is of fault-based tort liability. Causation of harm is essential to tort liability because tort law is a set of principles of personal responsibility for conduct. Tort law compensates the injured, but only if someone else was responsible for those injuries; and normally being responsible for injuries requires having caused them. In other words, the tort system is a 'cause-based' compensation system. .. .. .. Generally speaking a person cannot be held liable in tort unless it can be said that 'but for' that person's tort, the plaintiff's loss would not have occurred; or, in other words, that the defendant's conduct was a necessary condition for the plaintiff's loss; or, differently again, that the defendant's conduct caused or contributed to the plaintiff's damage."

The Court of Appeal stated in no uncertain terms that it was also by virtue of the power of attorney (if it had been properly issued) that the plaintiff had been given security for the payment of the money he had lent. The Court found it very clear that the power of attorney was pivotal to the publishing of the public deed which was subsequently declared null on the basis that the power of attorney was not valid due to the irregular way in which it was done. The defendant's appeal was therefore dismissed and the judgment in first instance confirmed.

Procedu

Photo by: Ekaterina Bolovtsova

ural Law

Silence in Bahrain

by Dr Keith Borg

During his last sitting in the Superior Courts of Malta on the 18th March 2021, Mr Justice Joseph Zammit McKeon delivered his last judgements, among which was one concerning the enforceability of a foreign judgement in Malta. Judgements delivered by courts and tribunals in non-EU countries are not automatically enforceable in Malta and require a specific procedure to be recognized as such. The judgement delivered by the First Hall, Civil Court in the names 'Avukat Dottor Carl Grech Et v.HSBC Bank Malta p.l.c' delved into this matter further.

The foreign judgement brought before the Maltese court was that delivered by the Supreme Fifth Civil Court in Bahrain on 30th April 2019 whereby the court (in Bahrain) ordered that a specific letter of credit issued by Standard Chartered Bank for the amount of 952,600 USD in favour of HSBC was declared null. The judgement delivered by the court in Bahrain was not appealed and thus plaintiff sought enforceability in Malta.

Respondent bank (HSBC) opposed the plaintiff's request whereby it stated that the court in Bahrain was not the competent court and had no jurisdiction to decide such a case against HSBC, since HSBC is not domiciled in Bahrain and was never present in Bahrain. Moreover, it raised a plea concerning the plaintiff's (Standard Chartered Bank) juridical interest in the case since effectively it had nothing to gain from the judgement in question.

Respondent also argued that it could never have a fair hearing before the court in Bahrain and that the judgement delivered by the Bahrain court is contrary to local public policy or to the internal public law of Malta. This plea was tied to the way that the judiciary is appointed in Bahrain. A Bahrain-practising lawyer testified during the proceedings of this case before Mr Justice Zammit McKeon and confirmed that the members of the judiciary in Bahrain are directly appointed by the Monarchy and that due to the lack of members of the judiciary, at times the State employs members of the judiciary from foreign countries for a definite period. A system which is completely alien to Malta.

HSBC's representative testified that the legal advice he was given regarding the proceedings in Bahrain, was not to participate in the foreign proceedings, to remain in default and to refrain from contacting a lawyer in Bahrain to assist the bank with the matter. Such advice was given to the bank in order to assert that it was not accepting the jurisdiction of the court of Bahrain, thus the bank chose to remain silent in the proceedings.

Choosing the remain silent in proceedings is not a position often chosen by a respondent during proceedings in Malta. A party who is in default during proceedings is unable

to present any evidence in the on-going case against him, possibly, but not necessarily resulting in a higher chance of losing the case. Indeed, HSBC lost the case in Bahrain and the Bahrain-practising lawyer confirmed that no pleas concerning the Bahrain's court jurisdiction were submitted by HSBC during the relative foreign proceedings, even though HSBC had the opportunity to do so.

Although the Bahrain court may have adjudged upon a plea to its jurisdiction by reason of domicile or residence, the Maltese court, recognised that HSBC's choice to remain in default was one based on legal strategy. The court confirmed that notification of the bank was not enough to result in acceptance of such foreign jurisdiction and that HSBC had not voluntarily submitted to the jurisdiction of the Bahrain court by remaining in default, doing everything in its power to avoid the possibility of accepting the Bahrain court's jurisdiction.

Agreeing with the respondent, the Maltese court upheld HSBC's first plea that the Bahrain court had no jurisdiction to decide the case since HSBC was not domiciled, and neither was it represented in Bahrain. The secret was silence.

This results from the rule contained in Article 827 of the Code of Organisation and Civil Procedure, which provides that whenever a respondent in a cross-border claim refrains from participating in the proceedings before the foreign court in any way whatsoever, such judgment, even if it has become res judicata, cannot be enforced in Malta. This stems from the fact that participation in the proceedings would result in the respondent submitting to that foreign court's jurisdiction. Therefore, in the absence of this participation, it cannot be said that the respondent accepted such jurisdiction. Apart from being enshrined in the Code of Organisation and Civil Procedure, this rule is also widely accepted as a basic principle in cross-border claims. Thus, in cases with a cross border element, such as Avukat Dottor Carl Grech Et v. HSBC Bank Malta p.l.c, the key is silence.

The matter would have had to be dealt with in a completely different manner had the case concerned the enforcement of a judgement delivered by a court in a European Union member state and concerned a 'civil or commercial matter'. While Maltese rules apply with regard to countries outside the EU, similar situations to the above-mentioned case would be governed by EU Regulations. Such Regulations stipulate that judgments originating from Member States are automatically enforceable in other EU Member States.

Therefore, while the respondent's silence would render him to be in default and thus be of prejudice to him, silence in a cross-border claim before a non-EU court, is not only an appropriate remedy to stop the judgment from being enforced in Malta, but it is the best remedy. Indeed, silence in Bahrain is exactly what rendered the judgment unenforceable in Malta. This judgment is still open to appeal.

Conflicting Judgements
by Dr Carlos Bugeja

Court cases are not just law in motion; they are the product of human behavior moulded into a situation experienced by quarrelling humans, which necessitates a human's intervention in order for it to be resolved. Without humans, there is no law and no disputes to be decided. Moreover, if cases were capable of automated arithmetic resolution, we would have Al-driven robots blindly deciding cases. That is why lawyers and judges always repeat the same old mantra: 'It depends on the circumstances of the case'.

'It depends' is a legal advice that has recently reached an almost meme-level stature in the world of lawyer jokes. For it is a phrase repeatedly uttered by many lawyers, to the quizzed look of clients at the receiving end. And while it is understandably frustrating to be faced with such inconclusive advice, truth be told, many times this would actually be correct counsel. Because they deal with human behaviour and decided by humans, several cases ostensibly similar in nature are decided differently. Furthermore, many times, those that at face value are identical cases are indeed not identical at all. To the untrained eye a case might be the exact replica of another case but often contains small differences which brings about a different conclusion.

As a result, seemingly conflicting judgments are not rare. Conflicting judgments are possible and acceptable, especially if the circumstances of each case are distinct from each other. In the case in the names of 'Rosaria Borg Busuttil vs Malta', published by the European Court of Human Rights (ECtHR) on January 21 (application no. 2468/20), the applicant complained about a number of decisions she was party to, in which the local courts of constitutional jurisdiction rejected her constitutional claim due to the fact that prior to going to the constitutional courts, she had not exhausted the ordinary remedies.

At law, one can only resort to the constitutional courts (which is in itself an extraordinary remedy) once he or she would have exhausted ordinary remedies afforded by law. Before the ECtHR, the applicant stated that these decisions from which she was complaining breached the years-old principle of legal certainty as they had been in conflict with other decisions of the same courts. Basically, she said that there had been a breach of her fundamental rights because the decisions she had received were in conflict with others delivered by the same courts.

The ECtHR stated that the principle of legal certainty is very important: this principle guarantees a certain stability in legal situations and contributes to public confidence in the courts. The persistence of conflicting court decisions can create a state of legal uncertainty likely to reduce public confidence in the judicial system (and one must

add, that such situations mystify the lawyer who is entrusted with giving legal advice). However, conflicts are part and parcel of the legal system - and it is not excluded for conflicts to occur even within the same courts.

The ECtHR reiterated that a case on its own cannot be considered to be contrary to the guarantees afforded under the European Convention of Human Rights. The requirement of legal certainty does not confer an acquired right to the consistency of judgments. To this end, it is best to cite the decision word-by-word, for the court's elegant words can seldom be better put: "case-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement".

In this sense, discourse between the courts is positively encouraged for it leads to the evolution of law and its understanding. In its decision, the ECtHR further acknowledged the value of the human element, stating that deciding two disputes differently is not in itself wrong when this is justified by a difference in the factual situations at issue. This last part is vital since, on the other hand, obvious unexplainable anomalies and inconsistencies are undesired, if not dangerous. In its considerations, the court carefully analysed all the other cases cited by the applicant and noted that the great majority of the cases referred to by the applicant did not concern the same factual circumstances or the same issues emerging from her case or were generally in line with the decision in hers.

As a result, the ECtHR dismissed the applicant's claim. There was no dissenting opinion (which is not unheard of in this forum), meaning that this decision was unanimously agreed to by all three members of the court (including Judge L. Schembri Orland, the Maltese judge of the ECtHR).

Incidentally, a few days later (on January 27), the Constitutional Court in Malta (in the case of 'Raymond Sammut vs il-Ministru tal-Gustizzja, Kultura u Gvern Lokali et - 50/17/1) gave a judgment, which had nothing to do with that decided by the ECtHR, but which similarly decided that conflicting judgements are possible and acceptable, especially if the cicumstances between cases are distinct from each other. The court stated that the fact that a judgment conflicts with another does not necessarily render that last judgment discriminatory. In this case as well, the Constitutional Court dismissed the appeal.

Special summary proceedings
by Dr Carlos Bugeja

Under Maltese law, we have the procedure commonly known among lawyers as the gil-jottina (formally called 'trial by special summary proceedings').

This procedure is reserved for those cases which the law considers to be straightforward. It allows the plaintiff to seek a judgment at first instance, meaning that if he pleads successfully, the respondent would not be allowed to raise a formal defence, the trial will be dispensed of and the plaintiff may obtain a decision promptly during the first sitting. However, not all cases can be decided by means of a trial by special summary proceedings.

Human rights law, dictates that every person should be afforded "the right to fair hearing"- which establishes without fail, that except in very special circumstances, no person should be judged unless he is given the opportunity to respond to the evidence against him. This right is, in fact, quite a big deal and cannot be dispensed of haphazardly.

The law only allows for the use of special summary proceedings in two instances:
(i) for the recovery of a debt, certain, liquidated and due, not consisting in the performance of an act; or
(ii) for the eviction of any person from any urban or rural tenement.

For the plaintiff to demand that the case is dealt with summarily, in his sworn application he must declare on oath that in his belief that is no defence to the action. The sworn application is then served to the respondent, who is ordered by the court to appear before it on a stated day and time.

And here comes that part of the law that was crux to the matter before the court in the case of 'Ludovico Ausano Filotto v Hi Sky Ltd', decided by the Civil Court, First Hall on December 10. Article 170 (1) of the Code of Organisation and Civil Procedure states that if the defendant fails to appear before it, or if he appears and does not manage to impugn the proceedings taken by the plaintiff, on the ground of irregularity or inapplicability, or otherwise by satisfying the court that he has a prima face defence, the court shall forthwith give judgment, allowing the plaintiff's claim. Therefore, it is crucial for the respondent to appear in court on the date and time of the sitting. Failure to appear may (or rather, will) have devastating effects. Therefore, the respondent must do two things:

(i) first, he has to appear in court on the appointed date; and
(ii) he has to successfully convince the court at first sight that he has valid pleas to make.

This does not mean that that respondent needs to show the court that he is right, but only that he may be right, if he is given the opportunity to for mally present his defence. What usually happens is that the lawyer assisting the respondent would explain to the court the pleas he is prepared to bring forward, if given the chance. If the court is satisfied at prima face level that there is indeed a defence to be made, then it will allow the respondent to formally file his sworn reply and the case will then take its normal course as a proper lawsuit.

Our courts are usually very cautious when dealing with these kinds of procedures and, more often than not, they do give the respondents the benefit of the doubt. Very few are the cases decided summarily. Now the question is: what does the law mean when it says that the court shall give the judgment forthwith "if the defendant fails to appear to the sworn application"(in the Maltese version: "jekk il-konvenut jibqa 'kontumaci ')?

This was a case in which the plaintiff was asking the court to order the respondent to pay the sum of €1,320,000 (plus interests) on account of an unrepaid loan. Believing that the respondent had no pleas to make against his demand, he utilised the special summary proceedings. On the date of the hearing, the lawyer assisting the company appeared alone in court, telling the court that the company's Maltese director could not attend (for an undisclosed reason), while the others in Italy, in the circumstances (and by 'circumstances' one must presume it was due to thecurrent COVID-19 restrictions) could not come to Malta. In its judgment , the court stated that while it is true that a procedure of this kind has to be considered restrictively, the procedural requisites must nonetheless be followed.

One of the rules of procedure necessitates the physical presence of the respondent (in this case, since it was a company - one of its directors). No explanation was given as to why the Maltese director did not attend the sitting, and the law is very clear: Article 167(2) of the Code of Organisation and Civil Procedure states that the sworn application is to contain "an order to the defendant to appear before the court", while according to Article 170, the defendant must appea1:

It was not enough for only the lawyer to be present at the sitting., The legislator specifically required that the respondent himself had to physically appear.The procedure bil-giljottina,is different from a normal lawsuit in the sense that it places the respondent into two disadvantages: (i) he has to personally appear; and (ii) he has to convince the court that he has a prima face defence for him to be allowed to further contest the case. The law requires the court to decide the case in favour of the plaintiff if the respondent fails to appear.. As a result, the court acceded to the plaintiff's demand and ordered the respondent to pay the sum of €1,320,000 plus interests. This judgment has since been appealed from.

Striking the balance of probabilities

by Dr Keith Borg

A fundamental rule that ensues from court proceedings – being criminal or civil in nature – is evidence. Proving what you claim is essential for the success rate of a lawsuit. Notwithstanding that all this seems logical, rules of evidence have been engraved into our Civil Code (as per article 562) ever since the Code's own conception. Article 562 contemplates that "… the burden of proving a fact shall, in all cases, rest on the party alleging it" echoes the spirit of justice in that one must substantiate what he claims with evidence.

But what is this burden, and how does one get to successfully prove what he claims? Simply put, every case has its own storyline, and therefore evidence gathering, from one case to another varies as does its success rate to strike the balance that is required by law. Speaking of balance - yes – the law does impose yet another piece of fundamental rule that determines the standard of proof that must be achieved in order to substantiate one's claims. This essentially is the notorious balance of probabilities, that is employed in Civil law spectrum. In theory, such standard is struck if the allegations are found more to have had occurred than not, especially when considered in light of the events of a case. This standard is met by producing suitable and sufficient evidence in support of the claims or allegations. From a mathematical perspective, the likelihood of events must transpire to have happened on a 51% basis and not on a fifty-fifty basis.

In other words, proving the probability of the veracity of events, through clear and unequivocal evidence, is what is required to jump the evidence hurdle. In truth, our courts remain a doubting Thomas – they must see to believe. More importantly, they must also believe what they are seeing, or rather, hearing. Such rules are further qualified by yet another norm – the moral conviction of the judge.

In principle, one must not only strike the standard of proof of balance of probabilities but must also convince the sitting adjudication that the events he claims to have happened did really happen or that they are based on true events. Moreover, the best evidence ('l-aqwa prova') must always be brought when producing evidence in lawsuits.

By means of an example, testifying in your own words (known as 'viva voce' testimony) before an adjudicator might not (in certain instances) be enough to entertain the legal requirements of bringing sufficient evidence. If for instance the case involves a written agreement, then the original copy or a true copy of such must be exhibited, during the tenure of the lawsuit. Testifying about such document does not prove the existence thereof.

These fundamental rules of evidence – as always – played their part in determining a recent judgment, delivered by the Civil Court, First Hall, bearing the names 'Farrugia vs Cassar' delivered on May 5th 2021. In a nutshell, plaintiff and defendant were in a long-term relationship. Plaintiff claimed to have asked defendant to deposit some of his monies in her personal bank account – which she had initially accepted. Allegedly the sum being trusted into the banking accounts of defendant run into thousands – EUR73,000. Additionally, claimant held that, he had also entrusted her with three golden boxes.

Plaintiff was loaded with the burden to prove these allegations in accordance to law. Parties broke off their relationship and plaintiff sued for the return of these assets. Defendant pleaded that what was initially given by plaintiff had been returned to him following their breakup. Hence, according to her, nothing was owed to the plaintiff.

The evidence brought centred around the production of bank representatives who were summoned to testify regarding the respective financial records of the parties. This is a clear example of the best evidence rule. Both parties testified their own version of events. Plaintiff contended that defendant had withdrawn large sums of monies from his bank accounts, by using a power of attorney that was issued in her favour. The power of attorney was later revoked. Defendant contested this. This judgment is a typical for it contains two different conflicting versions of events. In such cases the courts face the moral conviction dilemma.

The court noted that plaintiff failed to identify or quantify the monies that according to him were withdrawn by virtue of the power of attorney. Evidence of substantial withdrawals was produced, but such did not contain the identity of the actual person who had withdrawn the sums. Hence, on its own such evidence had no weight. Moreover, plaintiff failed to substantiate or rather explain with clarity which of those withdrawals he was contending to have occurred without his authorisation.

The court held that evidence demonstrating that the defendant's bank deposits had increased substantially during the years in which the parties were in a relationship, did not sufficiently prove that defendant had illicitly withdrawn funds.

Clearly, the plaintiff needed much more proof in order to substantiate his claims and be refunded the €73,000. Having said that, the court did acknowledge the fact that defendant did not justify the substantial increase that occurred in her bank accounts as defendant argued that she inherited assets and that this resulted in financial growth. Ultimately the court determined that plaintiff failed to prove his case. It deemed that it was plaintiff who was in the first place burdened with the weight to prove what he was alleging. Evidence produced by him was not deemed as clear and unequivocal to prove the probable veracity of the events he was claiming. The rule envisaged in article 562 was not entertained, and resultantly the court dismissed the plaintiff's claims.

Judicial Service
by Dr Mary Rose Micallef

What if the defendant does not answer to my claim or does not turn up in court? This is a common question that a potential plaintiff would query about before instituting a lawsuit. Perhaps the obvious thinking of such party, who is not familiar with judicial proceedings, is that his case would be stalled because either defendant decides not to answer his claims or because defendant does not turn up in court.

The lawsuit does not get stalled if the judicial acts (the lawsuit papers) are legally served upon the defendant. As a matter of fact, the procedural code prescribes how a judicial service is to be affected – this is provided in article 187 of the Code of Organization and Civil Procedure. Service may be legally affected through several ways. A copy of the acts may be directly left in the hand of the defendant, whenever such person is found. Such judicial paperwork may also be left at the defendant's residence, place or work or at the postal address with a family or household member, or with his mandatary. Nonetheless, such paperwork cannot be left with children under the age of fourteen years or with persons who suffer from mental conditions.

When it comes to lawsuits, such paperwork is not delivered through a postal mode, but the officer charged with the service ('il-marixxall') would physically deliver the papers to the defendant's address that has been indicated in the lawsuit.

Where the first attempt of service fails and therefore the legal paperwork does not reach its intended addressee, the officer charged with the service shall make two other attempts to serve the copies of the lawsuit to the defendant. The last attempt would be affected after judicial hours. Records of the service proceedings are stamped at the back of the lawsuit paperwork.

If one of these attempts is successful, defendant's time to enter a judicial reply is triggered. This timeframe is usually twenty days that starts to run from when service is affected in terms of the above. What if the defendant refuses to accept the lawsuit papers? The law punishes such attitude, and if such refusal is noted by the executive officer, on application of plaintiff, the court may determine that the judicial paperwork had been legally served. This decree triggers the twenty-day time-period mentioned above.

If all the above-mentioned attempts fail and the defendant is consequently unreachable, the court may order that service is affected by affixing a copy of lawsuit to the door that leads to defendant's residence. This mode of service is known as 'il-proċedura tal-affissjoni u l-pubblikazzjoni'. A copy of these judicial acts is also affixed on public notice boards at local police stations and local council premises. Summary details of the law-

suit are also published in the Government gazette and in the daily newspapers. Where this procedure is adopted, notification shall be deemed to have been made on the third working date from the posting of the latest publication. Hence, the twenty-day period would start to run thereafter.

This modality of service of judicial act featured in a recent judgment in the names of Spiteri et vs Chetcuti et - delivered by the Court of Appeal on the 9th of June 2021. Claimants had initiated, eviction proceedings against defendants before the Rent Regulation Board. The proceedings initiated by said party were the so-called special summary proceedings (commonly known as 'il-proċeduri bil-giljottina"). When these proceedings are adopted, claimants demand the court to give judgment without proceeding to trial. Therefore, if the giljottina is successfully instituted the court would deliver judgment on same date of hearing (following positive notification of defendant) without adopting the normal norm of hearing evidence from both sides.

Claimants were successful before the Rent Regulation Board in securing the eviction of the defendant from a shop and a store situated in two different localities. At first instance, the Board had proceeded to delve into the merits and decide the case after it was satisfied that the defendant was duly notified of the judicial acts lodged against by the so-called 'proċedura tal-affissjoni'.

The defendant later filed an appeal and contended that he was at no point served with the judicial act instituting the case against him. His argument was that if the first two attempts of service are unsuccessful, the Rent Regulation Board could not immediately proceed to order that service is to be affected by the 'proċedura tal-affissjoni'. Therefore, he argued, the Board was unable to proceed with the hearing of the case. The claimants counter-argued that the 'proċedura tal-affissjoni', as contemplated under article 187(3) of the Code of Organisation and Civil Procedure, was correctly employed and it was only resorted to after all previous attempts of service were not successful.

The Court of Appeal considered that the officer charged with effecting the service after judicial hours was unable to locate the address indicated, following which the Board ordered that service is affected by affixing a copy of lawsuit to the door that leads to defendant's residence in terms of article 187(3). It resulted that the Court officer tasked with the affissjoni (a different officer) was again unable to locate the residence indicated.

The Court of Appeal moreover considered that the defendant failed to furnish proof that contradicts the Court officers' declaration, i.e. that the residence in question could not be found. It proceeded to hold that contrary to what the appellant seemed to suggest, article 187(3) of the COCP in no way contemplates that in these kinds of scenarios. It held that nowhere does article 187(3) provide that when a specified residence could not be located, two additional attempts at service should be affected before the Court (or in

this case the Board) proceeds to order that the 'proċedura tal-affissjoni'.

Article 187(3) is clear and unequivocal and leaves no room for any sort of ambiguities. In this regard, the Court of Appeal concluded that the Rent Regulation Board had resorted to the proċedura tal-affissjoni according to law. As a result, the Court of Appeal turned down the appellant's claims and confirmed the decision delivered by the Board in its entirety.

Erasing Errors

by Dr Rebecca Mercieca

In civil proceedings it is necessary for a person to show that it has valid legal interest in the case filed. Such interest must be direct, personal and legitimate, while subsisting from the beginning until the end. On the other hand, the defendant may argue that it has no interest in the case, and that is not the legitimate person to be defending the case.

A joinder (kjamat in kawża) is not an original party to the suit, but is one that is later ordered by the court to join the proceedings.

Old jurisprudence suggests that the joinder of a third party in a lawsuit is entertained only in limited circumstances such as when the identity of a party is unknown to the plaintiff prior to filing the lawsuit. Along the years such restrictions became more lenient, especially with the introduction of the power of court to order or permit amendments of written pleadings made by either of the parties to the suit. Such powers were introduced to our law by article 175 of the Code of Organisation and Civil Procedure.

This provision provides for the possibility of alterations to a lawsuit as long as such changes are made prior to the delivery of judgment and given that such alterations do not affect the merits of the ongoing case proceedings. The possibility of an addition or removal of a party in a suit, as well as the possibility of correcting either of the parties' names introduced a significant change to cases filed with such errors. Such introduction allows for more practicality in ongoing cases and their eventual judgements, with the much desired effect of avoiding identical or multiple lawsuits being filed based on the same merits.

The law also provides the possibility of an intervention by any person who shows to the satisfaction of the court that he is interested in any suit already pending between other parties. Why would anyone voluntarily opt to be admitted into an ongoing lawsuit? For example, if someone has legitimate interest in the outcome of a particular case, even though that party is not included as a plaintiff or defendant, that party may want to get involved in the case in order to be heard by the court, in light of the facts that the final judgment might affect his legal position too.

The intervenor is not to be mixed with the joinder (kjamat) – a joinder becomes an added defendant to a lawsuit and participates in the same manner as would the original defendant. On the other hand should an intervention occur, the intervenor may not challenge what happened in the lawsuit before his admission into suit. Indeed, an intervener must accept the state of the judicial proceedings as they are at the time of intervention.

Nevertheless, the institute of the joinder ensures that all interested persons may be included in a lawsuit as parties in the suit. Such an institute thus provides the third party with the opportunity to adequately protect their interests after being served with the application. Furthermore, it allows the joinder to be considered as a defendant with the same rights as an original defendant in the suit, including the right of filing any written pleadings, submitting any pleas and evidence.

For the sake of practicality and to avoid forcing a plaintiff to initiate fresh proceedings against a third party based on identical acts and facts, the courts have by time loosened such restrictions and further established that the joinder of a third parties in a lawsuit should always be allowed in cases which would otherwise risk leading to similar or identical proceedings on the same merits. In turn this also limits the possibility of duplication and conflicting judgements. The First Hall Civil Court delved into the above in a similar case filed before it, in the names: 'Linda Theresa Isabel Grima v Daren Micallef u Merchant Shipping Directorate' (129/2021 GM). The plaintiff, Ms Grima, filed a lawsuit against two defendants; namely Mr Micallef, who she claimed had her yacht illicitly transferred into his name using a falsified signature and against a second defendant, the Merchant Shipping Directorate.

At this stage of the proceedings the court has not yet delved into the merits of the case, however it tackled the plea raised by the Merchant Shipping Directorate whereby it claimed that the plaintiff's application was null since it (the Merchant Shipping Directorate) is not vested with the juridical personality to counter this suit. The Merchant Shipping Directorate indicated that the Authority for Transport in Malta should have been the one defending the case instead of it. In light of this, the plaintiff demanded that the Authority for Transport in Malta be admitted into suit as a joinder – such a request was challenged by the Merchant Shipping Directorate.

In challenging this request the Directorate argued that the institute of the joinder should not be used as an eraser to delete plaintiff's mistake in a lawsuit, and that it would be giving the plaintiff the right to fix the error, only after it was brought to her attention by the same defendant in his pleadings. The Court disagreed with this argument.

Following this and by virtue of a decree delivered on July 15th 2021 the Court declared that the case as filed was not a stillborn; but rather suffered from a disability which could be operated on. In its decree, the court made reference to Article 175(1) of the Code of Organisation and Civil Procedure, which specifically allows for the addition and substitution of a party in a suit, in this case leading the to fixing of the error, and the addition of the Authority for Transport in Malta as a defendant to the suit. It is now the plaintiff's responsibility to notify the Authority with the acts of the case which in turn has the right to file a reply and defend its position based on the merits of the case. The case continues in September.

Cease and Desist
by Dr Keith Borg

Any person, without the necessity of any previous judgment, in order to secure his of her rights may file precautionary acts, commonly known as precautionary warrants (mandati kawtelatorji). Such acts are issued and carried into effect on the responsibility of the person suing out the act, provided he or she shall have complied with the conditions prescribed by law for the issuance of the specific warrant.

Following the obtainment of such precautionary warrant the applicant is bound to bring an action in respect of the right stated therein within twenty days from the issue of the warrant. Unless rescinded by the Court or withdrawn, all precautionary warrants remain in force for a period of fifteen days after the cause is definitively decided. One such warrant is the warrant of prohibitory injunction. In broad terms, the object of a warrant of prohibitory injunction is essentially to restrain a person from doing anything whatsoever which might be prejudicial to the person suing out the warrant.

A warrant of prohibitory injunction may also be demanded by a creditor to secure a debt or any other claim amounting to not less Euro 11,647.00, with the object of such warrant being to restrain a debtor from transferring or disposing of property. It may also be issued to restrain any person from taking any minor outside Malta and in the ambit of a suit for personal separation, where a spouse may request the Court to issue a warrant of prohibitory injunction against the other spouse restraining him or her from transferring or disposing any shareholding in any commercial partnership if such shareholding is comprised in the community of acquests, or against any commercial partnership in which the others spouse has a majority shareholding which pertains to the community of acquests or against such other spouse from contracting any debt or suretyship which is a charge on the community of acquests.

In respect of the issuance of such warrants the law is clear in that the court is not to issue any such warrant unless it is satisfied of the existence of two cardinal and cumulative principles, that is, that such warrant is necessary in order to preserve any right of the person suing out the warrant, and that prima facie (therefore based on first impression) such person appears to possess such right. These principles have been subject to copious court decrees wherein Judges have elaborated on the interpretation thereof.

In one such decree dated 12 August 2021, the First Hall of the Civil Court, presided by Mr. Justice Neville Camilleri in the names Emmanuel Zammit vs. Awtorita' għat-Trasport f'Malta, applicant Emmanuel Zammit requested the issuance of one such injunction seeking to restrain the respondent Authority from dismissing or terminating the applicant's employment.

By letter dated 21 July 2021, applicant had been informed that "By means of the present you are hereby being informed for all effects and purposes at law that your employment with the Authority for Transport in Malta is being terminated with immediate effect/ with effect from the 1st. August, 2021 and this for good and sufficient cause as contemplated in terms of law".

Applicant was employed on an indefinite contract as an Enforcement Manager within the Authority's Enforcement Directorate; he contended that as an Enforcement Manager he occupied a senior post within the Authority. Due to what the applicant identified as changes in the operational structure of the Authority, the latter sought to unilaterally amend his employment contract. Applicant's resistance to such amendments, he argued, led to disciplinary action being instituted against him with the sole aim of having his employment terminated.

On the other hand, the Authority argued that the applicant had no right to seek such a restraining order as the termination of his employment had already taken effect by virtue of the letter dated 21 July 2021. It also argued that with the present action, the applicant was effectively requesting the Court to enter into the legitimacy or otherwise of the termination of employment, a matter which, the Authority argued, fell squarely within the competence of the Industrial Tribunal and not of the said Court.

Making reference to previous jurisprudence on the matter, the Court considered that, in addition to the necessary elements as aforementioned, in cases where the issuance of such injunction is requested against the Government of Malta or an authority established by the Constitution or any person holding a public office in his official capacity, the Court is to be satisfied that the authority or person against whom the warrant is demanded confirms in open court that the matter sought to be restrained is in fact intended to occur and that unless the warrant is issued, the prejudice that would be caused to the person suing out the warrant would be disproportionate when compared with the actual occurrence of the matter sought to be restrained.

The Court after receiving confirmation under oath that the Authority intended to steam on with applicant's termination of employment, disagreed with the Authority that the applicant's employment had already been terminated. In this respect, the Court noted the ambiguity of the letter dated 21 July 2021 wherein it was stated that applicant's employment was being terminated with "immediate effect/ with effect from the 1st August, 2021" . The Court also disagreed with the secondary argument proposed by the Authority relating to its competence to determine this specific issue; it noted that with its decree, the Court was not effectively entering into the merits of the termination proper but solely determining whether the constitutive elements for the issuance of the injunction were present.

However, the Court found that prima facie, there existed no irremediable prejudice in that applicant could always resort to the Industrial Tribunal for the latter to determine whether his termination was justified and request due remedy should said justification not result. It also concluded that the applicant has failed to satisfy the proportionality test. The Court therefore proceeded to reject the injunction.

The Cautionary Tale of Precautionary Acts

by Dr Mary Rose Micallef

The foundation of a healthy judicial system is ensuring that each person's rights are protected. Apart from the institution of proceedings by Person A against Person B, which proceedings typically stretch over a number of years, there are other ways and means through which one's rights and/or claims may be safeguarded. A crucial tool in this regard is the precautionary act. A precautionary act may exist in different forms, the most popular being the precautionary garnishee order (mandat ta' sekwestru kawtelatorju).

In a nutshell, a precautionary act is used when the creditor predicts a risk that the assets of the alleged creditor will deteriorate over time. Even though the creditor may eventually 'win' the case, such success would be virtually useless to her or him if the judgement itself cannot be executed. In such a case, the only thing the successful creditor can do with the judgement is frame it!

Indeed, this is why the precautionary garnishee order can be viewed as an essential cog in the machinery of justice. However, as the name suggests, such procedure must be exercised with caution. The decree delivered by the Court of Magistrates (Civil Jurisdiction) (Malta) on the 13th of July 2021 in the names of Jonathan Muscat Baron vs Maxime Charles Veillet La Valle, is essentially a (pre)cautionary tale, shedding light on the responsibility and diligence with which such acts must be filed.

One of the fundamental rules when filing a precautionary act such as the garnishee order is that it must necessarily be followed by the institution of a case on the same merits. The case, as per Article 833A of the Code of Organisation and Civil Procedure (COCP), must be filed within 20 days from the filing of the precautionary act. The above mentioned case dealt precisely with this. The applicant debtor argued that since no case was instituted within 20 days from the filing of the garnishee order, then the order should be revoked. Moreover, the applicant argued that due to this, a penalty should be imposed on the creditor.

The law is clear on the 20-day rule. If the case is not filed, the warrant is liable to be revoked. No buts; no ifs. It is equally unequivocal in regard to the penalty. Should the case not be filed within the stipulated time, the creditor is liable to a penalty ranging between €1,164.69 and €6,988.12. This means that really and truly, the Court's discretion lies in the amount of the penalty imposed, and not in the imposition of the penalty itself.

The case in question concerned a precautionary garnishee order in the amount of €9,125 regarding an alleged non-payment of rent to the creditor on the part of the debtor. No case was filed within the stipulated time. The Court noted that the creditor himself agreed that no case was filed. In no uncertain terms, the Court held that the result of this is that the precautionary act was no longer in effect and that it had no option other than to order its formal revocation.

The Court of Magistrates also delved into the issue of the penalty. The non-institution of a case within the 20-day window is one of the grounds upon which the debtor may ask the court to impose a penalty on the creditor. The Court noted that the 'justification' of the creditor for not filing the case was that he did not wish to further aggravate the situation. The creditor also argued that if the debtor wanted the garnishee order to be gone, he should have deposited in Court the amount in question.

He continued that just because no case was filed, it did not mean that the debtor should escape responsibility. After all, the creditor argued, there was no bad faith on the part of the creditor. In examining the above, the Court held that this was not a good enough reason and in no way justified the non-filing of the court application. It also emphasised that the basis of the debtor's application for revocation of the warrant was not that the filing of the warrant was done in bad faith or in a frivolous manner. The issue in the eyes of the court was simple: no case was filed in the 20-day window, and thus the penalty should be imposed.

Some other important considerations were made by the Court. It held that in the circumstances of the issue at hand, there was a clear breach of procedure and abuse of the procedural tool bestowed by the legislator to the creditor. It highlighted that the procedure concerning precautionary acts should be used prudently and in good faith, and not in a lenient and indifferent manner without any respect to the spirit and letter of the law.

It also noted that if the true reason for not filing the court application was that the creditor did not wish to aggravate the situation, he could have simply filed a counter-warrant on his own motion, without prejudice to his rights on the merits. But he did not file such counter-warrant and is precisely what prompted the Court to revoke the garnishee order and to impose a penalty of €1,164.69 on the alleged creditor.

The essence of this decree is therefore that while precautionary acts are an efficient tool to safeguard the creditor's rights and to ensure that the assets of the alleged debtor are preserved over time, they must be used and exercised with caution and diligence.
Such decree, as per Article 836(5), is final and irrevocable.

Which court is competent?

by Dr Mary Rose Micallef

The Maltese judicial system is composed of different fora. In general, our courts are mainly split into two – the superior and the inferior courts. The superior section is comprised of the Civil Courts (both the First Hall of the Civil Court, including the Family Court and the Court of Voluntary Jurisdiction, known as is-Sekond'Awla), the Court of Appeal, and the Constitutional Court. The Courts of Magistrates are the inferior courts. In addition to this, our Maltese legal system has created other special fora such as the notable Rent Regulation Board, which strictly speaking has the exclusive jurisdiction and competence to deal with lease disputes.

The Code of Organization and Civil Procedure attempts to create a demarcation line between the different competences of our fora. For example, the Courts of Magistrates are competent to deal with monetary claims ranging from €5,000 plus to €15,000. Any credit going beyond this threshold would fall in the remit of the competence of the First Hall, Civil Court. The First Hall, Civil Court is the default court – it is competent to take cognisance of all matters that cannot be dealt with by the other judicial bodies. However, the concept of competence may at times be problematic even for the courts to address. This question of competence may either be raised by the respondent party as a preliminary plea or even by the court out of its own motion (the legal term is known as 'ex ufficio' intervention).

When it comes to pleas, the general norm is that the courts do not raise pleas themselves – because pleas are tantamount to favour respondent's end (because these are legal defences). But similar to other many instances, the law allows for exceptions. Indeed, and on certain occasions, such as when the issue of competence crops up, the courts are allowed to raise this as a plea – even if not highlighted by the defendant. The first task that lawyers must address when filing lawsuits is the question of where to file the case i.e. before which court. It would be the written application (the lawsuit), that determines the court chosen. Usually, this is not too challenging to determine, but there might be cases wherein choosing the correct court is not a clear-cut answer. Such an instance featured in a recent appeal, bearing the names of 'Galea et vs. Vella' decided on 21 October 2021.

The matter at hand related to the occupation of agricultural land. Plaintiffs filed an eviction lawsuit in the Civil Court, First Hall, against the defendant – their pretension was that the respondent was occupying the land without a valid title at law, and against their blessing. The defendant pleaded that the First Hall, Civil Court was not competent to take cognisance of this lawsuit. According to respondent – he was occupying the land under the title of an agricultural lease, and therefore in terms of law, the competent judicial body to determine this dispute was the Rural Leases Control Board.

The Rural Leases Control Board is a judicial body established by Chapter 199 of the Laws of Malta. This Board has the exclusive jurisdiction and competence to hear matters that are related to agricultural leases (qbiela).

In light of the plea of competence, the First Hall, Civil Court, had – before delving directly into the merits of the case in hand – to examine whether it had jurisdiction to hear the case. Defendant's alleged title was inspected. Plaintiffs' claimed that defendant was possessing the lands by mere sufferance (mere sufferance is a title that enables the possessors to occupy the lands with the landowner's consent [bil-barka tas-sid]). This title can be easily withdrawn by the landowners', and in this event, the occupants would end up possessing a land, without a valid title.

The scenario here was similar. Originally the landowner's father had leased two fields to defendant's father. Defendant's father (the original lessee) split the leased land between his children, amongst them was defendant. Meanwhile, defendant's brother fell ill, and the lease title was converted unto his wife. Following his passing, defendant's sister-in-law (who became the new lessee) allowed defendant Vella to farm the fields, on the condition that the possession is returned to her upon her request. This agreement was laid down in writing. Afterwards, respondent's sister-in-law decided to renounce her lease title and return the land to the owners. However, and against the owner's wishes, Vella remained in occupation of this land.

The first instance court determined that defendant was a lease titleholder. This was principally determined on two grounds: a) that by law, defendant had inherited the lease from his late brother and b) that defendant had at an instance, paid the lease. On these grounds, the First Hall, Civil Court, upheld the competence plea and decided that it was Rural Leases Bord, which had the competence to hear this dispute. Plaintiffs – at this stage appellants appealed. Appellants claimed that defendant was never recognised as a leaseholder of the portion of land. Appellants argued that the lease title was inherited by defendant's sister-in-law, and not by Vella. It also resulted that Vella was paying the agricultural rent (qbiela) which pertained to his potion (that was originally assigned to him by his late father).

The Court of Appeal disagreed with this initial judgement – this, by basing itself on the fact that Vella had agreed to occupy the land in question under the title of mere sufferance, which had been favoured to him by his sister-in-law. The court also agreed that whenever Vella paid the lease, he was paying for his part and not for the part that was assigned to his late brother. Therefore, it declared that Vella was no leaseholder and that the First Hall, Civil Court (not the Rural Leases Bord) was competent to hear this dispute. The Court of Appeal ordered the continuation of the lawsuit before the First Hall.

Retaxing of Judicial Costs

by Dr Edric Micallef Figallo

The case we shall be dealing with should lead all those considering contesting an inheritance to question whether that project is an economically worthwhile one if it means contesting other claimants through litigation in Court.

The judgement in question was delivered on the 9th December 2021 by the Court of Appeal (Superior Jurisdiction) upon application number 403/16/1 MCH. The actual judgement and judicial action concerned is one initiated upon what is known as a rikors ta' ritassa.

Judicial actions in civil law generate what are known as judicial costs, which are "taxed and levied" according to specific provisions in our laws once the judicial action terminates. This all boils down to what someone will have to pay in judicial costs after litigation is over. The actual apportionment of the costs is decided by the Court upon pronouncing judgement, but the costs are determined by the Court registrar according to law, particularly the provisions of the Code of Organisation and Civil Procedure.

The figure of the Court registrar is often lost to the public. Court registrars are public officers who head the registries of courts and tribunals and these play a fundamental and essential role in the functioning of the Courts. Besides the legal professionals assisting their clients, it is through the Court registries that the parties and the adjudicator communicate in a given case, and this is so even when such communications happen verbally, publicly and in open Court. There is always someone registering what happens in a given case. Also, once litigation is over and said litigious communication ends, the registrar will also proceed to tax the judicial costs for that litigation. The action filed by the plaintiff in this case aimed to have the same judicial costs recalculated. This is known by the Courts and legal professionals as an action for the ritassa, i.e. the retaxing of judicial costs. We have mostly come to understand "tax" as something else, but as used in this context it aligns with another sense found in the original Latin verb taxare, which also means to "evaluate, estimate, assess".

The action on application 403/16/1 MCH was one such case. This is actually an appeal to the Court of Appeal on the first judgement on such an action, which was determined by the First Hall of the Civil Court. This judicial meander can disorient, and one has to keep in mind that the original litigation was an altogether different action. In the case being commented the Court of Appeal finally determined the judicial costs associated with that original litigation and who is burdened with it and to what extent, however this latter determination is grounded in the original litigation itself.

What is being termed original litigation in this case was an action filed by a son to claim the reserved portion (what is mostly still referred to colloquially as the leġittima) from the inheritance of his father. The reserved portion is that part of the estate of the deceased which must by force of law devolve onto the descendants and the surviving spouse of the deceased, no matter the will of the deceased. The father had not declared this son as an heir in his will, and he also disinherited the same son.

These are not the same, and for the purposes of this article we should keep in mind that the reserved portion is lost in case that person is disinherited. In fact, the action of disinheriting someone is essentially intended for that purpose and is limited to particular situations only. In short, the son actually won the action based on his claim to receive the reserved portion from the estate of the deceased, as due to him by the heirs of the same. The heirs, acting as defendants in that original action, lost that case and the Court decided that they were to bear the judicial costs of that case.

The matter seemed to have ended there, but once the Court registrar proceeded to tax the judicial costs the heirs got bit hard and supposedly unexpectedly. Their consternation came about as the judicial costs for that original action came to be significantly higher than the reserved portion they were due to pay to the son to whom the reserved portion was now due. The heirs contended that said reserved portion was the central economical issue in the original action filed by the son against them. The heirs thus proceeded with their rikors ta' ritassa.

Most judicial costs are taxed according to the values contested and, or determined in a given judicial action. The heirs' contestation was based on the fact that the Court registrar did not limit his taxing to the value of the reserved portion of the estate as due to the plaintiff in the original action, but rather fulfilled his role by taxing judicial costs according to the value of the whole estate of the deceased. The heirs found this unacceptable, filed a rikors ta' ritassa in the First Hall of the Civil Court and, not happy with its judgement, appealed to the Court of Appeal.

To no avail, as both courts agreed that as shown in the acts of the proceedings there was no other course to take by the Court registrar besides taxing judicial costs according to the whole value of estate of the deceased as estimated by the Court and this was so because it was one of the specific requests made by the son, it was also pleaded upon by the heirs, and the Court in its work considered and determined the value of the whole estate and calculated thereon the reserved portion due according to law.

This is a situation in which settling out of Court would have been more than ideal, albeit reality is often very far from the ideal for a number of reasons. Reality means that the heirs, who claimed the reserved portion was not due, end up paying more than €30,000 in judicial costs and the reserved portion estimated at more than €20,000.

The Guillotine
by Dr Keith Borg

We all know what this is don't we? The infamous machine used for cutting off people's heads by means of a heavy blade that slides down in the grooves made in two posts. Generally used during the French Revolution, the term, albeit not referring to the actual machine, is still popular in the courtroom today. Article 167 of the Code of Organisation and Civil Procedure deals with special summary proceedings, better known in common courtroom parlance as "kawża bil-giljottina".

In actions within the jurisdiction of the superior courts of Malta, where the demand is solely: (a) for the recovery of a debt, certain, liquidated and due, not consisting in the performance of an act; or (b) for the eviction of any person from any urban or rural tenement, with or without a claim for ground rent, rent or any other consideration due or by way of damages for any compensation, up to the date of the surrender of the tenement, or (c) for the eviction of an operator, lessee or other occupants, including any members of their staff from seagoing vessels or aircrafts, this article provides that it shall be lawful for the plaintiff to pray in the sworn application that the court gives judgment allowing his demand, without proceeding to trial.

Wait though. Not so fast. The plaintiff, when bringing an action in terms of this article must state that in his/her belief there is no defense to the action. In such cases provided for in this article, the sworn application is to contain an order to the defendant to appear before the court, on an appointed day and at a stated time not earlier than fifteen days and not later than thirty days from the date of service.

If the defendant fails to appear to the hearing so appointed, or if he appears and does not impugn the proceedings taken by the plaintiff, on the ground of irregularity or inapplicability, or, having unsuccessfully raised such plea, does not by his own sworn evidence, or otherwise, satisfy the court that he has a prima facie defense, in law or in fact, to the action on the merits, or otherwise discloses such facts or issues of law as may be deemed sufficient to entitle him to defend the action or to set up a counter-claim, the court shall forthwith give judgment, allowing the plaintiff's claim.

Where leave to defend is given, the action shall be tried and determined in the ordinary course. In it's judgment of the 21 June 2021, in the names Executive Security Services Limited v. Cavendish Hotels Limited, the First Hall of the Civil Court, presided by Mr. Justice Christian Falzon Scerri was tasked with determining judicial proceedings in terms of article 167 wherein plaintiff was requesting the sum of €43,334.37 by way of payment for services rendered.

At the hearing held on the 21 June 2021, despite the defendant not having yet been notified, the court drew plaintiff's attention to the fact that it had failed to accompany its sworn application, with a statement that in its belief there was no defense to the action. Plaintiff accepted that this statement was indeed missing but argued that in the sworn application it was clearly stated that its claim had never been contested by the defendant.

In delivering judgment the court noted the exceptional nature of proceedings brought in terms of article 167; such proceedings, the court stated, move away from the general principle of law that a case should be decided after the court has taken into account the evidence and submissions of the parties to the case. The court further noted that such proceedings already place the defendant at a disadvantage by not giving him an automatic right to reply to the case brought against him, and even requiring him to be physically present on the day of the hearing to try to convince the court that he has a prima facie defense to bring forward. In such circumstances, the court noted, it must be careful not to go beyond what the law says and therefore bring the defendant at a further disadvantage than that already placed upon him by article 167. The articles of the law pertaining to special summary proceedings, the court observed are to be observed ad unguem. This meant that before a court proceeds with the dispensation of the hearing, it must be convinced that the action brought by the plaintiff complies with the law.

The court, argued Mr. Justice Falzon Scerri, should not hesitate or refrain from rejecting a request for summary proceedings, if it realises that the action brought by the plaintiff does not fully comply with the requirements of the law. It is the duty of the court to set aside the summary procedure and order that a case take its ordinary course, if it finds any lack of mandatory procedural requirements in the sworn application by which the dispensation of the hearing is requested. The right to be heard is not to be so easily set aside.

Describing the plaintiff's failure to accompany its sworn application with a statement that in its belief there was no defense to the action as a sin – "dnub kbir" – the plaintiff's argument that in the sworn application it was clearly stated that the its claim had never been contested by defendant was insufficient. Such lack of contestation merely meant that the defendant remained passive and did nothing. Silence on the part of a defendant was not tantamount to admission or lack of potential arguments by way of defense to the claim.

The law, the court stated, is very clear about what kind of statement must be tendered by the plaintiff – one that in his/her belief there is no defense to the action – whatever the reason, in this case, this specific statement was not made by the plaintiff; plaintiff therefore denied itself from resorting to special summary proceedings in terms of article 167. The court proceeded to refute the request for the case to be treated in terms of article 167 and ordered instead that this case be conducted in the ordinary manner.

Proper

Photo by: Polina Kovaleva

ty Law

Protected Leases & Compensation

by Dr Edric Micallef Figallo

In case 119/2018/1 LM, the Constitutional Court delivered its appeal judgement on the 28th April 2021 following appeal applications by the tenant of a protected lease and the State Advocate. The lease in question was protected under the terms of the Reletting of Urban Property (Regulation) Ordinance, Chapter 69 of the Laws of Malta, and article 1531C of our Civil Code. By way of background, the protected lease burdened the property which was bought by the plaintiffs in 2010 with full knowledge of the protected lease. The relevance of this will come to light further on.

The first instance judgement was given by the First Hall of the Civil Court (Constitutional Jurisdiction) on the 4th of November 2020. The appeal was initially filed by the tenant, upon which the State Advocate replied and filed what is called a cross appeal. The appeal by the tenant was rejected in full, although a particular point of interest from said appeal will be referred to further on. However, the cross appeal by the State Advocate was partially acceded to and the first instance judgement was reformed by the Constitutional Court.

In general, and in relation to protected leases, recent jurisprudence has established a general situation highlighting the disproportionate detriment suffered by property owners in order to satisfy a public purpose. This disproportionality violates fundamental rights and is deemed legally unacceptable, as the satisfaction of a public purpose and the burden thereof should be suffered by the State and not private persons. All this is generally settled but it risks leading the inattentive to assume victories and wonder on claims of compensations for fundamental rights violations in possibly similar cases that are factually and legally different.

Recent jurisprudence has practically established that Cap. 69 and the protection it affords tenants is at odds with the European Convention Act (Chapter 319 of the Laws of Malta), which is the domestic legislation which applies the European Convention on Human Rights in the Maltese legal order. However, as held by the Constitutional Court, when it comes to the Constitution the situation is different. The first court had found a violation of article 37 of the Constitution, which provides for the protection from deprivation of property without compensation. The State Advocate appealed this on the basis that Cap. 69 came into force before the 3rd March 1962 and thus Cap. 69 was protected from the application of article 37 of the Constitution by virtue of art. 47(9) of the Constitution, which with certain restrictions basically excludes Cap. 69 from being reviewed under the terms of article 37 of the Constitution. The Constitutional Court reformed the judgement in the above sense and added that the practical situation is basically unaltered, as there is still a violation under our European Convention Act in relation to the

fundamental right to the enjoyment of private possessions.

The Constitutional Court also rectified an apparent error by the first court, as the latter found a violation of article 14 of the European Convention on Human Rights in the operative part of the judgement while in the reasoning it stated the contrary. Said article 14 is a prohibition of discrimination in relation to the Convention rights in like with like situations. There was none of it in this case. The tenant unsuccessfully challenged the first instance judgement by which it was declared that she could no longer avail herself of the provisions of Cap. 69. This was confirmed by the Constitutional Court.

The tenant suggested an innovative alternative remedy to be afforded to the owners and proposed that her rent be increased up to 25% of her income or more if she could call to her favour assistance that could allegedly be granted by the Housing Authority. In the opinion of the tenant this could have given an adequate remedy to the claims of the owners, but the latter rightly submitted that such a remedy is not contemplated by law. In rejecting said proposal, the Constitutional Court called upon its function to order the inapplicability of a violating law and referred to the notion of the separation of powers between the legislative and judicial organs and the fact that these should not take over each other's functions so as to assure the rule of law.

The Constitutional Court also reformed the first instance judgement whereby it agreed with the State Advocate that the first court was wrong in granting compensation according to article 41 of the European Convention on Human Rights, but that the proper legal basis was in fact article 4(2) of the European Convention Act. This is inconsequential as a legal basis to award damages was still available and the Constitutional Court resorted to it. However, the Constitutional Court, in agreement with the State Advocate's submissions that the amount of compensation set by the first court was too high, decreased the same.

The Constitutional Court made the reduction in compensation after considering all relevant factors, inclusive but not only the fact that the owners were denied an adequate and proportionate income from their property; that they were denied the possibility of regaining its possession; the length of time of fundamental rights violation; the fact that the rent received on the market is not necessarily as much as that estimated by the technical experts; the fact that in this case the owners had acquired their title at a beneficial low price as a result of the protected lease itself; the fact that in the first years after their acquisition the rental income was not as disproportionate as in later years; the social purposes of the law being challenged; and the need that the element of proportionality is also taken into account when liquidating the compensation due. Therefore, the Constitutional Court deemed it fit to reduce the €20,000 granted by the first court to €7,000 in pecuniary damages and €1,000 in moral damages, without forgetting that the protection afforded by Cap. 69 can no longer be availed of by the tenant.

Remedies to expropriation

by Dr Edric Micallef Figallo

In a case dealing with fundamental rights affecting private property, expropriation, intervening legislative amendments and administrative action, the Constitutional Court delivered its appeal judgement on the 25th February 2021 on application 76/16/1 RGM as filed by B & B. Property Development Co. Ltd (C1329) against the Lands Authority and the State Advocate. The State Advocate was eventually declared as not being an adequate party to the suit, and the action continued as against the Lands Authority. This was a judgement on two appeals filed by the aforesaid company and by the Lands Authority, upon the judgement delivered on the 20th June 2020 by the First Hall of the Civil Court in its Constitutional Jurisdiction.

In the end, the Constitutional Court rejected both appeals and confirmed in full the first instance judgement of the 20th June 2020. This case dealt with an expropriation of property belonging to the plaintiff company and going back to 1977. By a 1977 Presidential declaration the property of circa 5474 square metres was apparently expropriated. Then, by declaration dated 28th April 1987 and published in the Government Gazette, part of the previously expropriated land was released back to the plaintiff company. However, the plaintiff company successfully claimed that part of the released land had actually remained occupied by the State and is used as a road, gardens and for other purposes determined by the Lands Authority.

The plaintiff company complained that it was never adequately compensated for all the land expropriated way back in the 1970s, inclusive of the land released in 1987 as this remained occupied by the State. Through the evidence in the proceedings, it was actually concluded that the State did not complete the expropriation process and no compensation had been settled. In fact, the expropriation process was concluded following the filing of the constitutional application by the plaintiff company by virtue of a new declaration issued according to article 44 of Chapter 573 of the Laws of Malta, known as the Government Lands Act.

This latter law was enacted in 2017 and amounted to the major complication in this case as it was introduced in our statute book during the course of the proceedings being commented upon, and significantly affected them. In fact, following the enactment of this law the Lands Authority proceeded to issue two declarations by which it acquired by absolute title the land previously requisitioned in 1977 and part of the land so requisitioned and subsequently released in 1987. In accordance with article 39 of said legislation, the Lands Authority also proposed a total compensation amounting to €24,764. Following such declarations, the plaintiff company actually filed actions according to said Chapter 573 in front of the Arbitration Board therein established so as to contest the declarations of the Lands Authority.

In the end Chapter 573, the remedies offered afforded according to it were central to this case from a procedural perspective. That is because it partially allowed the State to successfully plead in front of the first court that it should not exercise its discretion and determine the fundamental rights application filed by the plaintiff company, because the latter at law is deemed to be an extraordinary remedy which should not be used if there exists another alternative ordinary remedy (such as those provided under Chapter 573) at law. In relation to a fundamental rights action the first instance court reminded that according to settled jurisprudence another alternative ordinary remedy that would allow it to decline the exercise of its fundamenal rights jurisdiction is one that is accessible, fair, effective and adequate in relation to the alleged fundamental rights violation or threat thereto.

Also, it is not required that the plaintiff be guaranteed success in his action, but the remedy available has to be one that is practical, efficient and capable of producing effects in relation to the claims made. In this regard, the State was successful in pleading exactly that in light of the new provisions of Chapter 573. Unsurprisingly, the plaintiff company complained that such remedies did not exist when it filed its fundamental rights application, and that its case should be determined according to the law as in force when it filed its fundamental rights application. That seems reasonable as a general rule, but in the end both courts disagreed.

The Constitutional Court sustained this by quoting a good list of judgements by the European Court of Human Rights according to which an exception to this general rule could be made, meaning that a plaintiff could be called upon to exhaust all ordinary remedies, even those introduced and available after the filing of his fundamental rights action. The Lands Authority had actually submitted that Chapter 573 inter alia came to be so as to fairly address cases such as those brought forward by the plaintiff company. In the end the courts seemed to agree that the new intervening remedies afforded by Cap. 573 could be called upon to adequately consider the claims by the plaintiff company. In fact, the plaintiff company actually filed actions according to Cap. 573 in front of the Arbitration Board therein established.

The courts likewise deemed the new remedies provided under Cap. 573 as being capable of satisfying all fundamental rights claims by the plaintiff company, excluding those related to the alleged occupation without title by the State, which affected only a part of the property of the plaintiff company. This was so as that occupation preceeded the enactment of Cap. 573. As such, the First Hall of the Civil Court (Constitutional Jurisdiction) proceeded to consider the fundamental rights claim in relation thereto, found a violation and provided for damages in favour of the plaintiff company. It liquidated the same to a total of €65,000 consisting of €50,000 in pecuniary damages and €15,000 in non-pecuniary damages.

The above was confirmed on appeal by the Constitutional Court. The plaintiff company is still contesting the expropriation and proposed compensation by the Lands Authority in front of the Arbitration Board established under the Government Lands Act.

Sale of a thing belonging to another

by Dr Edric Micallef Figallo

In a very interesting case involving several legal issues, our highest civil court, the Court of Appeal (Superior Jurisdiction), delivered its judgment on application 2440/00/2 MCH on January12 in the names of 'L-Agent Direttur tal-Uffiċċju Konġunt v Vellul Limited (C9828) et'. The plaintiff, being the Joint Office, sought the rescission of a deed of sale pertaining to a piece of land in Mriehel, which was sold by defendants Cassar to the other defendants Vellul Limited, by public deed on November 12,1990.

The Joint Office based its action on the principle that the said land did not belong to the vendors, Cassar, but to itself. The Joint Office invoked the application of article 1372 of the Civil Code which, among other things, provides that "the sale of a thing belonging to another person is void".

This principle made law is the central issue in the action brought forward by the plaintiff, and besides requiring an enforceable law to give force to the obvious, many would think that this provision is just stating the obvious. Yet, through established, sound and just legal institutes, the passage of centuries and after numerous transactions at various levels, the situation gets tricky and legal minds get hard pressed to come through with a viable solution and/or litigate in the best interest of their respective clients. In such cases, it all boils down to the legal title claimed and proven to be held by the parties. The matter of the title held by the parties and the degree of proof required to confirm the title are both fundamental. .

This being an action based on article 1372 of the Civil Code, as stated by the First Hall of the Civil Court in the first instance judgment given on April 27, 2015, the proof required "ma tridx tkun wahda konklussiva u inattakkabbli izda biss waħda komparattiva bejn it-titolu vantat bejn il-partijiet". Thus, this action required a comparative evaluation by the court as to the respective titles claimed by the parties to the case. Essentially, the court needed to determine who had the better title.

The Court of Appeal confirmed this after it was unsuccessfully attacked by the defendants. The latter insisted that the action brought forward by the plaintiff was the actio rei vindicatoria, meaning the proof required was the so called prova diabolica. This would have required evidence on the validity of all transfers of title down to proving the original title on the immovable goods and its own validity. In this case, proof is extremely arduous, and it often ends favouring the defendant. Cassar sought to prove their title and, as such, the validity of the sale made to the other defendants (Vellul Limited, in occupation of the land involved), by pleading the acquisitive prescription of the title of perpetual emphyteusis on the land, the latter being the declared title on the deed of sale

dated 1990. This plea failed due to the facts of the case, which showed that Cassar held a title of agricultural lease on the land in question and not one of perpetual emphyteusis, which was held by the Capuchin Friars of Floriana.

This land came to the friars through the pious foundation Calderone dei Poveri set up according to the will of Vincenzo Attard in the 19th century. Evidence was brought forward that the said Friars actually paid ground rent (ċens) to the owners of the land for a period of 50 years or more. Hence, through this evidence, the courts held that, if anything, it was the said friars who held a title of perpetual emphyteusis by acquisitive prescription, not Cassar. Moreover, evidence was brought forward that Cassar actually paid qbiela (rent for an agricultural lease) to the friars themselves and he even declared as much with the Department of Agriculture.

Considering the applicable degree of proof, and as held by the Court of Appeal, the Joint Office as plaintiff still had to prove that it owned the title on the land involved. It did so both through evidence negating the defendants' (Cassar) claim to title and by providing evidence which proved itself as the owner of a better title. Said negation resulted through evidence showing that Cassar held, as even declared by themselves, a title of agricultural lease. As such, the plea of acquisitive prescription could never succeed as, per Article 2118 of Civil Code, persons "who hold a thing in the name of others or the heirs of such persons, cannot prescribe in their own favour: such are tenants, depositaries, usufructuaries and, generally, persons who hold the thing not as their own".

In truth, had there been no such evidence, the situation would have been far more complicated, and this, most probably, to Cassar's benefit. As implied by law courts, Cassar did not have the possibility of acquisitive prescription according to law. Delving deeper the courts reasserted that acquisitive prescription is also not a mode of acquisition of title that applies merely through the passage of time but has other fundamental elements required. The passage of time needs to be coupled with the possession of the title itself and said possession must be exercised as owner of the title in a manner which is continuous, uninterrupted, peaceful (meaning no acts or claims against it are made), public and unequivocal. Cassar's own actions and evidence hereon negated this, while it was the friars who, if needed, could claim it successfully.

The Joint Office was successful for the above reasons and due to the agreement signed on November 28, 1991 between the Holy See and Malta relative to the transfer to the State of such immovable property in Malta as is not required by the Catholic Church for pastoral purposes and on the determination of certain issues pertaining to the relations between the Church and the State as regards matters of patrimony - according to which the title held by the friars was transferred to the Republic of Malta.

Drawing the Line
by Dr Carlos Bugeja

It is not rare for two people to each own a tenement (often a parcel of land) next to each other and not knowing exactly where one's ends and the other's begins. When it comes to buildings, this is not as big of a problem, for they have walls. But with parcels of lands, the parameter of lands is usually imprecisely indicated by the position of decade-old trees or old rubble walls, and therefore, the problem of boundaries is much more common. And as the saying goes: for every problem, there is a lawsuit. This is not just a problem of our time. Since Roman times, there existed an action at law for situations where the boundaries of contiguous estates were uncertain. For many of us, a border is simply the notion of separation between two spaces, but for ancient Romans, it was much more than that.

It is enough to state that in one of the stories, Rome is said to have been built on a quarrel over boundary;legend has it that when shaping the city, two brothers (Romulus and Remus) took two oxens and dug the ditch that was later to hold the walls that confined the city. On creating this very first boundary, Romulus is said to have uttered the very first concept of legal possession,uttering that "no body shall go beyond this sacred line", not even the army. In the ultimate act of insult and mockery Romulus jumped over the boundary wall. Remus did not quite take it well, getting enraged and punishing his brother with death.

This anecdote says a lot about the frame of thought of Ancient Romans when creating and protecting frontiers. In a way, boundary lines were a geographical representation of pride and power and it, therefore, comes as no surprise that later, when Uu owingaspade at one's head was no longer con sidered as a feasible (and a legallyjustifiable) solution, the protection of one'spossessions through the establishment of parameters became legally protectable by law, through the action that came to be known as the 'actio finium regundorum'. Through this action, either party interested in the re-establishment of the boundaries could file an action against the other for that very purpose. This action has not changed much since Roman times, and it found its way to the continental civil codes, including the Maltese Civil Code, chapter 16 of the Laws of Malta.

Today, article 325 states that "every owner may compel his neighbour to fix, at joint expense, by visible and permanent marks, the boundaries of their adjoining tenements", we still refer to this action as the 'actio finium regundorum', true to its Roman origin. In the case of 'Tamarac Ltd et vs Cutrico Services Ltd' (first decided by the Civil Court, First Hall, and then finally by the Court of Appeal on January 28, 2021), the plaintiffs requested the court to establish the boundaries between their tenement and that belonging to respondents, and to order the respondents to evict from that part which they were

occupying, but which was found not to be theirs. The respondents did not object to the request but highlighted the fact that the parties were not in agreement as to the exact parameters between them. For this reason, they made a counterclaim demanding the same exact thing, but in the inverse.

In these cases, the first thing that a court does is to appoint a technical expert (normally an architect by profession) who would be able to examine each party's contract of acquisition, plans attached thereto, official aerial photographs, and other documents in order to determine the exact position of the respective tenements.

The problem in this case was that there were many different opinions, by different architects, so there was no one obvious solution. lndeed, in this case, even the architects nominated by the court disagreed.

During the proceedings before the first court, following the publication of the court expert's (in the law, he is referred to as the 'referee') report, one of the parties had filed a request under article 677 of the Code of Organisation and Civil Procedure (chapter 12 of the Laws of Malta), demanding the appointment of additional referees (three is the number). The second set of referees disagreed with the first.

In its judgment ,the first court had opted to adopt the report of the additional referees and designate the parameters as suggested by them and put away the conclusions reached by the first referee.

The plaintiffs disagreed and appealed to the Court of Appeal, stating that the first court should not have relied on the report filed by the additional referees, for it contained a number of obvious defects and missing considerations. The Court of Appeal agreed with the appellants, noticing that the additional referees failed to take account of a number of factors, most particularly of the plan attached to both parties' contract of acquisition, which albeit defective and not perfectly clear, was very indicative of the parameters between the parties' respective tenements.

There is nothing in the law that binds the court to accept and implement that most recent report and, therefore, the Court of Appeal chose to abandon the conclusions of the additional referees and instead adopt an earlier report, that is the parameters prepared by a certain Perit Andrew Ellul, which the court felt to have been the most consistent, just , and concrete. As a result, the first court acceded to the appeal, revoked the first judgment and ordered that the parameters are to be considered in the manner established by the architect referenced to above. Since this was a judgment delivered by the Court of Appeal, it is considered to be final and can no longer be appealed.

Inheriting Old Rent Rights

by Dr Mary Rose Micallef

What if a child opts to reside with his elder parents, when such parents enjoy the benefits of the old leases' regime? This is the major preoccupation of every owner who has a property rented out under the pre-1995 leases' laws. Indeed, lease inheritance, in favour of a lessee's relative and the generation after that, as secured by the pre-1995 lease laws, is a further lifeline of an old lease that dates back generations - naturally to the disadvantage to the leased premises' owners. As a point of fact, this is one of the reasons why such leases have become a recent major controversy, leading to a wave of constitutional lawsuits.

The legal norm is that when the tenant dies the lease dies with him. But this (as always in law) is subject to exceptions, amongst of which is the continuance of the lease by descendant of a tenant. In such cases the lessor, would be compelled to accept the new younger tenant, under the same conditions that were enjoyed by his deceased parent(s). Inheriting an old lease is not automatic. Several criteria must be fulfilled, by a lessee when inheriting his parents' rights of the old lease.

Indeed, by exception to the abovementioned norm, article 1531F of the Civil Code, stipulates that a person may continue the lease, after the death of the tenants, if on the 1st June, 2008, the new tenant is the natural or legal child of the deceased tenant who had lived with his parent for four out of the last five years, and after 1st June, 2008 continues to live with the said tenant until his death.

Additionally, for the child to qualify as a legal tenant of a pre-1995 lease, such child must not fulfil the income and capital criteria of the means test. In such litigious cases, it would be up to such child to prove that he does not fulfil the monetary and asset criteria that is set out by the law. Such criteria have featured in a very recent judgment bearing the names of 'Anna Mizzi et vs. Edwin Camilleri', delivered by the Rent Regulation Board, on April 7th, 2021. Claimants were the owners of a Birgu property that was being leased to the defendant's mother. The lease in question pre-dated 1995, hence it, was regulated by the pre-1995 regime – the old leases' regime.

Claimants sought the eviction of defendant – a shop owner - on grounds that he did not fulfil the abovementioned asset criteria. Plaintiffs further claimed that he had no right to inherit the lease from his deceased mother, because before her death, his parent was not residing in the Birgu property.

The premises in question, had been originally leased to defendant's parents and was under the regime of the pre-1995 leases. The surviving parent – the mother – was actually admitted to an elderly home and thus was no longer residing in the premises, prior to her death. Consequently, claimants held that defendant was not entitled to live in the leased premises because the Birgu property no longer served as the sole residence to the parent mother. Indeed, defendant's mother spent her last living years (three years) in a care home and never did return to the Birgu home.

As a matter of fact, in cases where the lessee does not use the leased premises for a period exceeding a year, the law allows for the termination of the lease. Therefore, given the circumstances at hand, claimants tried to argue that the lease in question had terminated, once the original lessee (the mother) was permanently admitted to a care home. In cases of admittance to care homes, article 1555A of the Civil Code, stipulates that the lease agreement would not terminate, amongst others, if it resulted that the lessee was temporarily residing elsewhere due to a medical condition. In cases where elders were admitted to elderly homes (due to their frail conditions), our courts have triggered this article, and safeguarded these old regime leases.

However and in terms of the same article 1555A(2) of the Civil Code, the law states that the lease agreement would be terminated if the lessee becomes permanently dependent on the medical institution that he is admitted to and by effect, the leased premises would no longer be utilised by the (original) lessee as his residential quarters.

Besides this, the Rent Regulation Board examined whether the lessee's descendant fulfilled the criteria that was set out by article 1531F mentioned above.

In light of the evidence produced, the Board found that defendant did not effectively prove that he had resided in the leased premises on a permanent basis. Utility bills, in connection to the leased premises showed bare consumption, leading the said forum to believe that the premises were not being habituated, prior to the original tenant's death. Evidence gathered suggested that defendant barely made use of the premises in question and therefore he did not fulfil the residing criteria as set out in article 1531F of the Civil Code.

Additionally, the Rent Regulation Board noted that respondent never did submit any evidence in connection to the means test criteria and resultantly deemed that defendant was not entitled to inherit the rental rights that his parents had enjoyed in terms of the pre-1995 law. Consequently, the Rent Regulation Board ordered the eviction of respondent from the leased property.

Stumping Evicition

by Dr Mary Rose Micallef

Judgments – legally speaking also known as executive titles – are enforceable through executive acts – warrants. It would not be the role of the judiciary to ascertain that its judgments are being executed accordingly. It would be up to the winning side to execute the same, through the means of, the various executive acts that are provided for in our procedural Code.

By way of example, a creditor who has obtained a judgment in his favour would need to follow such judgment by instituting an executive garnishee order (for instance) against the party cast – being the debtor in suit. The court does not execute its decisions on its own motion – the court simply delivers its verdict and authorises its execution thereof. Indeed, any of the executive warrants or the order may be issued by the court on the demand of the party suing out the execution of a judgment.

On same terms, an owner obtaining an 'eviction' judgment against his tenant may enforce the same through the means of a warrant of ejection or eviction from immovable property.

This execution stage scenario featured in a recent court decision, that was given in the ambit of a prohibitory injunction. Having said that, this kind of warrant is cautionary – meaning that it cannot be used to execute a judgment. The injunction is sought before or during the pendency of a judgment. The injunction is sought when a party seeks to prevent the counterparty from doing anything whatsoever which might be prejudicial to the person suing out the warrant. Unlike executive acts, this warrant (which is a cautionary act) cannot be upheld in perpetuity – essentially it must co-exist with a fully-fledged lawsuit until such litigation is determined by the court.

This injunction bears the names of 'J.L. Tobacco Company Limited vs Bernardette Licari et' – decreed by the First Hall Civil Court, as presided by Mr Justice Ian Spiteri Bailey on September 2nd. The background that conceived this case involved an execution of a judgment wherein an eviction was ordered in favour of defendant Licari. Initially, Licari obtained an eviction judgment against a third-party company – Combined Industries Limited. During the pendency of such an initial lawsuit, it emerged that Combined Industries Limited had assigned a leased property, in Cospicua to J.L. Tobacco Company Limited, without Licari's consent who owned the said leased immovable. J.L. Tobacco Company Limited had not been involved in this lawsuit.

Licari requested the execution of the eviction judgment – she issued a warrant of ejection against Combined Industries Limited.

J.L. Tobacco Company Limited, who was still in possession of the leased premises, reacted by filing a prohibitory injunction, against Licari, demanding the prohibition of the execution of the said eviction warrant. J.L. Tobacco Company Limited was never admitted as a party in the main lawsuit, whilst it was still in physical possession of the leased premises. Given these grounds, the company held that such judgment (as in the warrant of eviction) ought not to be executed, because the court's eviction order was not pertinent to it, being the third party in possession.

Respondents disagreed. Licari countered by referring to a past judgment ('Bernardette Licari vs Combined Industries Limited'), where it was established that an eviction warrant could also be sued against the sub-lessee, who was never a party to the eviction suit. This was quoted by respondents in line with the established jurisprudential doctrine, that whenever the principal lease terminates, so does its subsidiary.

The court argued that the eviction warrant was sought against the principal lessee – against Combined Industries Limited, who was defending the main lawsuit. It remarked that at no point in time was J.L. Tobacco Company Limited (the lease's assignee) brought into suit.

Furthermore, this injunction was countered by the argument that an executive act/warrant can be challenged through a special procedure that is specifically provided for in article 281 of the Procedural Code. Indeed, this legal disposition provides for a mechanism, wherein persons may demand the revocation of an executive warrant for any reason valid at law. The argument brought here was that J.L. Tobacco Company Limited could have sought this ordinary remedy and not the extremity measure of a prohibitory injunction. After all, it was argued, that an injunction may only be sought in extreme circumstances as a last resort measure.

The court dismissed this latter argument. It held that the procedure (as per past judgments) specified in article 281 may be resorted to when it is being alleged that the warrant lacked some legal/procedural requisite. Therefore, this remedy ought not to be used when the issue at hand relates to the underlying merit.

The First Hall Civil Court noted that the judgment had only ordered the eviction of Combined Industries Limited – which eviction was subsequently confirmed at the appeal stage. It noted, specifically, that J.L. Tobacco Company Limited was never admitted in suit – during the pendency of the suit, Licari had every opportunity to demand J.L. Tobacco's admission. Whilst quoting an old judgment (Chatlani vs Grixti), the court held that when a lessee substitutes himself with a third party, that third party cannot, without prior litigious scrutiny, encounter an executive warrant for its eviction.

The warrant in question had not been sought against J.L. Tobacco Company Limited, but only against the initial defendant Combined Industries Limited. Therefore, on these grounds, it was deemed that Licari never obtained an executive title against the third-party in possession, J.L. Tobacco Company Limited.

On a prima facie level, the court found that J.L. Tobacco Company Limited had every right to seek the issuance of the injunction. J.L. Tobacco Company Limited had every right to challenge the enforceability of the judgment, that was being directed against it. Consequently, and on this line of thought the court was satisfied that if the injunction was rejected, the applicant company would suffer a disproportionate and an irremediable prejudice – ultimately if this was the case J.L. Tobacco Company Limited would have been evicted from the premises. Therefore, the court upheld the injunction and stopped the eviction procedure.

The Landlord, Tenant and State Conundrum

by Dr Rebecca Mercieca

It is really no news that the relationship between the Landlord, Tenant and the State has been the subject of a multitude of pronouncements delivered by the Courts of Constitutional Jurisdiction.

Perhaps one might argue that these judgments properly embody the living element of the law with its landscapes changing from judgment to judgment. And when most lawyers thought the issues between Landlord, Tenant and State were, so to say, pretty settled, here comes a judgment delivered by the First Hall of the Civil Court sitting in its Constitutional Jurisdiction that once again changes the landscape drastically.

The judgment in the names of Lorenza Vincenza sive Lora Zarb vs Carmelo sive Charles Caruana, Rita Agius and The State Advocate was delivered on the 25 February 2021.

The facts of the case were as follows: by a contract dated 17 December 1991, defendant Caruana had granted unto a third party, by title of temporary emphyteusis for a period of 21 years, a residential property in Birgu. The temporary grant had to commence on the 15 January 1992 against a consideration of Lm120 (circa €279.52) per annum. By means of another contract dated 14 December 1995, the third party rights emanating from the contract dated 17 December 1991 were assigned to plaintiff Zarb for the period remaining; this assignment was adhered to by defendant Caruana.

At the expiration of the 21-year period, plaintiff Zarb refused to vacate the premises. By a judgment dated 24 February 2020, the Rent Regulation Board declared plaintiff Zarb as tenant of the premises in Birgu and ordered that the rent due be increased to Euro 6,600 per annum which rent was to increase for the consecutive six years, at the expiration of which, the said rent was to be subjected to a fresh revision.

This decision was based on the application of article 12B of Act XXVII of 2018 entitling a landlord to file an application before the Rent Regulation Board demanding that the rent be revised to an amount not exceeding two percent per annum of the open market freehold value of a dwelling house on the first day of January of the year during which the application is filed and that new conditions be established in respect of a lease.

Plaintiff Zarb then petitioned the First Hall of the Civil Court sitting in its Constituional Jurisdiction and requested it to declare that the legislation forming the basis for the aforestated decision of the Rent Regulation Board (article 12B of Act XXVII of 2018) breached her rights under article 1 of the First Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms and under article 37 of the Consti-

tution of Malta in that the said decision undermined her legitimate expectation to continue in the occupancy of the property in Birgu under the same conditions, including the rent, as per the contract she had signed in 1995.

Article 1 of the First Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms states that "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

The Court, presided by Mr. Justice Grazio Mercieca, had the following consideration to make.

Article 1 of the First Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms, does not provide a definition of the term 'possessions'; referring to jurisprudence the Court however noted that the term, or concept, is to be interpreted in a wide manner, inclusive also of interests of an economic value.

The Court in fact referred to judgments of the European Court of Human Rights wherein it was stated that "the issue that needs to be examined is whether the circumstances of the case, considered as a whole, may be regarded as having conferred on the applicant title to a substantive interest protected by that provision."

Financial rights and interests having an economic value, the Court observed, fell well within the purview of Article 1 of the First Protocol of the Convention.

Similarly according to the Convention, the concept of 'possessions' extends to legitimate expectations in that according to constant case law, the Court observed, 'possessions' can be either existing possessions or assets, including claims, in respect of which plaintiff Zarb could argue that she has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right.

Then honing in on article 37 of the Constitution, the Court noted that this specific article relates to "property of any description" and "interest in or right over property of any description" concluding therefore that even this specific provision of the law should embrace the notion of legitimate expectation.

The Court concluded that it could well declare that the law conferred upon the plaintiff Zarb a legitimate expectation relating to the continued enjoyment of the property in Birgu. It further stated that new ideas give rise to new relationships, and the legal order cannot but change and develop to keep up with this progress. In the Court's words, justice needs to be an indispensable ingredient of such development. When laws intro-

duce new relationships between people, or change existing ones, the Court opined, they must give advantage to society and the individual at the same time upholding also the consideration that these new laws must cater for existing rights that have not yet been developed. Just as the landlord enjoys the fundamental right to enjoy his/her property, so too does the tenant.

After noting an urgent need for the State to intervene in order to protect the vulnerable section of Maltese society, the Court: declared that plaintiff Zarb had and has a legitimate expectation and / or possession that is protected and sanctioned under article 1 of the First Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms and under article 37 of the Constitution of Malta, declared that the application of article 12B of Act XXVII of 2018 constitutes a violation of the fundamental rights of plaintiff Zarb and ordered the State Attorney to pay tenant Zarb compensation in the sum of €120,000, with interest from the date of judgment and with costs against the State Attorney. This judgment is subject to appeal. Open the flood gates.

Boathouse to restaurant, who has the final say?

by Dr Rebecca Mercieca

The Lands Authority's function to administer in the amplest of manners and make best use of all the land of the government and all land that forms part of the public domain. One of the ways by which the authority may transfer government land is by granting an encroachment (by payment or gratuitously) to any person occupying government land for temporary and specific use.

On June 12, 2020, the Lands Authority refused Steve Aquilina's application for the change of use of a Senglea boathouse to a class ill restaurant and the placing of tables, chairs and umbrellas on the Senglea promenade as well asalong the boathouse's facade. The reasons given to the ap plicant were that this would cause high risk for pedestrians and clients in the event of a traffic accident. In addition, the authority mentioned that there was a high risk of visibility to drivers, lack of parking spaces and lack of pedestrian safety while crossing the pavement.

Aquilina appealed the authority's decision before the Administrative Review Tribunal, which is the forum having jurisdiction to review the administrative act on points of law and points of fact.

The Administrative Review Tribunal in 'Steve Aquilina v L-Awtorita tal-Artijiet' decided on January 6, 2021, confirmed that the Lands Authority has the power to ensure that the land administered by it does not create danger; aswell as to ensure that the best use is made of such government land. The Lands Authority had also consulted with Transport Malta, which had objected to the issuing of this specific permit since, according to Transport Malta, Aquilina's Senglea boathouse proposals created security problems.

The tribunal acknowledged that even though one letter of refusal had been sent by the Lands Authority to Aquilina, the plaintiff had requested encroachment on two sites within the same street. The two sites are the pavement outside the boathouse itself and the promenade across the street, adjacent to the sea at the Senglea waterfront.

From the evidence submitted, it resulted that the Lands Authority's decision was based on the recommendations given to it by the authority for transport. In turn, Transport Malta's objection was based on the vicinity or lack thereof of a pedestrian crossing to the proposed site. In fact the applicant himself had failed to indicate that there had been a pedestrian crossing nearby.

Moreover, the tribunal considered that it was more likely for any staff member of the proposed restaurant to cross from the nearest point, other than walk towards the pedestrian crossing and cross from that point, and this could create a dangerous scenario for both staff and potential clients.

The tribunal further considered the potential danger to any customers sitting at the tables and chairs on the side of the boathouse turned restaurant who would be in great danger in case of a traffic accident, yet this danger would not apply to those sitting at the second proposed encroachment site, across the road on the promenade. The tribunal dismissed the authority's submissions regarding the loss of parking spaces and considered that the Lands Authority had failed to give the appropriate reasoning according to the specific proposed sites, while blindly following the recommendations given by Transport Malta. In its decision, the tribunal delved into the nature of an encroachment and highlighted that such a temporary permit may be revoked at any time by the authority. This means that even though similar permits to the ones requested in this case may have been awarded by the Lands Authority's predecessor, prior to 2016, and the authority had the right to revise them.

The tribunal did not agree with Aquilina in so far as he argued that by refusing his application for the requested encroachment, the Lands Authority was discriminating against him. However, the tribunal itself highlighted that the authority should regularise its position regarding the number of permits that are renewed from year to year.

The Administrative Review Tribunal is only competent to decide on the appeal at hand: to accede to the appeal lodged by Aquilina and revoke the decision taken by the authority or refuse the appeal.

It is not within its power to order the issuing of the permit for the change of use of the boathouse to a restaurant, since this would go beyond simply 'reviewing' the issuing by the public administration of any order; licence, warrant, permit, concession, refusal, decision, authorisation to any demand by the public. On January 6, the Administrative Review Tribunal revoked the authority's decision whereby it refused Aquilina's permit application and stated that such an application should be decided a fresh, this time considering both sites separately.

This author anticipates that this judgment should nudge the Lands Authority in so far as it concerns the renewal of enchroachment permits granted prior to 2016. Surely, the authority is aware of the powers it has when it comes to the renewal of temporary permits of encroachment and, following this judgment, it could be harder for it to point its fin gers at its predecessor, especially if such permits are not in line with the Current policies and, more so, if they put people's lives in danger.

Either party to the proceedings before the Administrative Review Tribunal who feels aggrieved by its decision may appeal to the Court of Appeal within 20 days from the date of the decision of the same tribunal.

In turn, the Court of Appeal has the power to confirm, revoke or alter the decision appealed against and to give such decisions as it may deem appropriate.

Photo by: Ekaterina Bolovtsova

- Damages

Damages *turpis causa*

by Dr Keith Borg

The Latin term *turpis causa* is oft defined as a cause that is base, vile or immoral; a consideration forbidden by law and therefore not sufficient to support an obligation. Borrowing the words of the learned Lord Ashquith (presiding over National Coal Board v England [1954] AC 403): If two burglars, A and B, agree to open a safe by means of explosives, and A so negligently handles the explosive charge as to injure B, B might find some difficulty in maintaining an action for negligence against A.

This doctrine is founded in the general principles of policy. The principle of public policy is that no action arises from deceit. No court of law will lend its help to a person who founds his cause of action upon an immoral or an illegal act. In it's judgment of the 25 November 2021, in the names Raymond Brincat v. the Commissioner of Police and the Attorney General, the First Hall of the Civil Court was called upon to determine a very particular claim.

Plaintiff had been charged with criminal offenses related to illegal gambling. Proceedings before the courts of criminal jurisdiction began in 2006 and were drawn to a close on the 18 November 2016 when the Court of Magistrates refrained from taking further cognisance of the case due to delays solely attributable to the prosecution. During the investigation stage leading to the aforementioned proceedings several amusement machines allegedly forming part of the corpus delicti (concrete evidence of a crime) were seized by the police.

Applicant therefore brought an action in damages against defendants claiming that the amusement machines, which in view of his acquittal, he argued should not have been seized, were now worthless. He also claimed loss of earnings from the use of said machines.

Defendants rebutted claiming, amongst other lines of defense, that the amusement machines operated licensed gambling games and were therefore illegal. With such machinery being in contravention of the law, defendants argued, plaintiff could not lawfully profit from such machinery. In its rebuttal however, defendant did not adduce evidence to this effect; on the contrary, the court noted, the machines did not give money to the players in case of a win.

Noting the delay in the determination of the criminal proceedings, the court served a stern warning on the defendants. It described their actions as negligent, unacceptable, in breach of the plaintiff's fundamental rights and constituting a serious abuse of power.

Quoting the applicable law at the time of the initiation of the criminal proceedings, namely the Use of Amusement Machines (Restriction) Regulations, 1988 (later revoked on the 15th day of March 2011), the Court noted that at the time no person was allowed to maintain or operate, or permit the maintenance or operation of any amusement machines in any premises without the written authority of the Commissioner of Police. Furthermore, the Commissioner of Police was not to authorise the maintenance and operation of more than three amusement machines in any premises.

Plaintiff, strangely, alleged that he had four amusement machines in his premises, therefore in excess of the statutory limit. These therefore, the Court noted, could not be kept in the shop legally.

Despite claiming to be in possession of the necessary permits, plaintiff failed to produce same in evidence; neither did plaintiff request the Commissioner of Police to exhibit such permits. On this sole basis and citing article 559 of the Code of Organization and Civil Procedure lying down that in all cases the court shall require the best evidence that the party may be able to produce, and despite the negligence shown by the defendants during the criminal proceedings, the Court, presided by Mr. Justice Grazio Mercieca decided it could not award damages to the plaintiff, as it cannot award damages *turpis causa*.

This judgment remains subject to appeal, or perhaps the subject of separate proceedings before the Constitutional Court based on the Court's declaration that the actions of the defendants in the criminal proceedings were in breach of the plaintiff's fundamental rights.

"It's not my fault, it's his!"

by Dr Mary Rose Micallef

It is a well-received and understood fact that in order for a case to be successfully instituted, the claiming party must hold sufficient interest to give rise to the proceedings and to file the court case. The formal wording of this notion is "juridical interest." What is often underestimated in litigious proceedings is the interest of the defendant – the person against whom the case is being instituted. This is no less important than that of the Plaintiff's as it must necessarily be shown that the defendant in the case is the correct party to respond to the suit. There must always be a link between the Plaintiff's claim and the defendant. In Maltese legal jargon, this foundational principle has been termed as the "legittimu kontradittur".

In a similar fashion to the interest held by the Plaintiff, the correct defendant must satisfy four essential criteria which collectively determine whether the person is the correct defendant or not. The defendant's interest in the proceedings must be judicial, personal, direct and actual. It is only on the satisfaction of these requisites that a particular defendant will be deemed as the correct defendant to reply to the Plaintiff's demands.

This notion came into play in a recently delivered and well-pronounced judgment by Dr Kevin Camilleri Xuereb presiding over the Small Claims Tribunal in the names of Romina Mifsud v. Gżira Local Council and the Malta Transport Authority on the 30th of November 2021.

The facts of the case were quite straightforward; The Plaintiff, Romina Mifsud formed part of a cycling team which was undergoing training for an international competition. As part of their training, the cyclists planned a route on Sunday 23rd April 2017 from Sliema direction to Ta' Xbiex. During the route, when the cyclist Mifsud arrived at Triq ix-Xatt in Gżira, her bike hit a pothole. Absolutely this event caused immediate damages both on the Plaintiff's person as well to her bike. Having seen that the damages endured tallied to the sum of €2,707.50, the Plaintiff proceeded to file a case before the Small Claims Tribunal against the Gżira Local Council as well as The Malta Transport Authority.

In a quasi-identical way, both the Local Council as well as the Malta Transport Authority respectively raised a preliminary plea that they were not the correct defendant to respond to the suit. On the Local Council's part, their plea was directed towards the lack of juridical relationship between the cyclist and the local council whilst on their part, the Malta Transport Authority held that they were not the correct defendant since the road where the accident occurred does not fall within the competence of the same Authority.

These pleas begged one question: Who was responsible for the proper maintenance and upkeep of the road Triq ix-Xatt, Gżira? The Tribunal did not take this task with a pinch of salt.

In the first place, the Tribunal analysed the existence of a juridical relationship between the Local Council and the Plaintiff with a great deal of insight. It was an evident fact that there was no existing contractual relationship between the parties. Their relationship was not born out of some written agreement. But, in the Tribunal's words, "hu l-event dannuz in se li jwelled, prima facie, relazzjoni bejn min allegatament subieh (danneggjat) ma' min allegatament ikkagunah (danneggjant)" (it is the harmful event in itself that gives birth, prima facie, to a relationship between the victim and the alleged perpetrator). This is fundamental. The Tribunal, making extensive reference to local case law, determined that the existing relationship between the parties, though not dependent on any agreement, arose by virtue of the social relationships encountered daily and by living in a society with other individuals. As a result, the Tribunal concluded that the defendant Local Council was in fact a correct defendant.

On the other hand, the exercise determining whether the Malta Transport Authority was the correct defendant proved more pragmatic. In this regard, the Tribunal undertook an exercise and considered whether the road in which the accident took place was a main road or a side road with the former characterized by a dual-carriageway, and the latter symbolic with providing access to main roads. Documentation submitted by the Malta Transport Authority proved indispensable here since this showed that the road Triq ix-Xatt in Gżira is neither classified as a main road nor as a side road. Moreover, the Authority also presented the Tribunal with a list of names of the roads which fall under its competence and responsibility. Triq ix-Xatt was nowhere to be found on this list.

The Tribunal's in-depth reasoning and aim towards leaving no stone unturned led to a very well pronounced judgment. Referencing Regulation 3 of Legal Notice 29 of 2010 on New Roads and Road Works, the Tribunal concluded that where the road is not classified as a main road nor as a side road, responsibility for its upkeep and maintenance rests with the respective Local Council. This principle is also enshrined within article 33 of the Local Council Act. This was another reason as to why the Small Claims Tribunal found the Local Council to be a "leġittimu kuntradittur."

As a result, the Tribunal acceded to the plea raised by the Malta Transport Authority holding that it was not the correct defendant to respond to these claims, exonerating it from all sort of liability for the damages suffered by the Plaintiff, whilst the Tribunal rejected the plea raised by the Gżira Local Council and consequently proceeded to hold the Local Council responsible and liable to pay the sum of €2,707.50 to the Plaintiff.

A New Year's Eve Brawl

by Dr Mary Rose Micallef

A New Year's Eve brawl costed a defendant the sum of EUR109,609.60, including court costs. The dynamics of the case lead to tort proceedings. Tort proceedings feature in article 1030 and the following, in the Civil Code, Chapter 16 of the Laws of Malta. Essentially the law states that every person shall be liable for the damage which occurs through his fault. In other words, the concept of tort, means a legal liability for the person who commits a fault against a claimant who proves to have suffered damages, because of such misdemeanour.

The legal concept of tort (or delict) dates to Roman Law. This concept allowed persons to claim damages, when such damages ensued from an event not having a contractual basis – theft, assaults, or other criminal actions (not having a contractual background), motor-vehicle accidents are usually the typical cases that feature in such lawsuits. Civil liability, having a contractual basis, is to be distinguished from such events, because in tort, no contractual basis, between the tort-feasor (the guy who committed the fault) and the victim, would have existed. On the other hand, contractual liability features, when an agreement, between parties ensues, and either of party defaults the a priori arrangements. The judgment bearing the names Ellul Sullivan vs Vella, delivered by the First Hall, Civil Court on September 29th dealt which such classic tortious scenario involving a New Year's Eve nasty brawl.

Claimant, Ellul Sullivan, contended that he was maliciously attacked by respondent Vella. Vella answered that Ellul Sullivan, was to blame for the brawl incident. In such cases, it is normal for the courts to face conflicting evidence and testimony of events. In fact, and in this case, the court dealt with a different and subjective interpretation of events. In a nutshell, plaintiff testified that respondent abruptly attacked him in the face for no reason (għal xejn b'xejn) to the extent that several teeth were knocked out. Vella held that plaintiff was drunk and provoked a fight, to the extent that he (defendant) had to self-defend himself by punching away plaintiff also – according to defendant – in attempt to halt the brawl.

Our courts have time and again commented on the principles that the judicial fora must follow in such cases. Same did this judgment; citing two hierarchical rules – the first being that the courts must essentially attempt and identify the most credible of versions, and should this exercise prove futile or too difficult to ascertain the true events, it must apply the maxim actore non probante, reus absolvitor – should plaintiff fail to prove his case, the defendant is absolved. At the end of the day the court also commented that, in such suits, and when it comes to evidence, quality supersedes the quantity.

The court tested the credibility of both sides. It noted that, plaintiff's testimony, over the years (as the incident occurred in 2012) slightly changed. On the other hand, discrepancies were noticed in the respondent's testimony – the court went into comparing the testimony that was released by same in previous criminal proceedings and the respondent's testimony in the civil suit. Therefore, the court believed the version that was submitted by Ellul Sullivan. Altogether with this, the criminal proceedings, that followed such events, found Vella guilty to have caused grievous bodily harm.

Part two of this judgment deals with the quantification of damages. In tort, fault must be first established, if this is then the consideration of the monetary compensation would follow, if the damage ensued is satisfactorily proven. Damages may be qualified into two parts – the immediate and actual damages/expenses (damnum emergens) and the future losses (lucrum cessans). The former, are practically easy to quantify, for these kinds of damages are merely those immediate expenses that the victim had to undertake, by example, any medical expenses. The latter – the lucrum cessans – is usually calculated on a formula that our courts, though jurisprudence had established.

Though the court-appointed expert, the court determined that plaintiff did suffer damage to his teeth. In this case, plaintiff also claimed psychological (not moral) damages – his engaged psychiatrist attributed a 30% permanent psychological disability. On the other hand, the court appointed psychologist, attributed a 24% psychological damage. When it comes to court appointed experts, the courts are never bound by their conclusions i.e. they may determine different conclusions. This is if – and only if – the courts seriously feel that their appointed expert failed to critically address the merit at hand. In addition to the physical damage, the court found that plaintiff suffered as well from psychological harm.

The First Hall, proceeded to liquidate the damages – EUR11,270, were awarded in total as damnum emergens, which consisted of medical and legal expenses. With respect to the quantification of the lucrum cessans (loss of future earnings), the court awarded the sum of EUR102,009.60. By the word of the law, lucrum cessans damages are defined as loss of future earnings arising from any permanent incapacity, total or partial, which the tortious act may have caused.

The Court arrived at this amount by considering the plaintiff's percentage of disability, the number of years between the incident and pensionable age (known as the multiplier), the earnings of the plaintiff, and the lump sum deduction. After referring to previous jurisprudence, the Court held that it would not be considering the 24% of psychological disability as established by the medical expert but reduced it to 18%. The reasoning of the Court was that a few months after the incident, the plaintiff was in gainful employment in the gross amount of €14,400.

With regards to the multiplier, the Court also reduced this – from 49 to 40 years. The reduction was due to the 'uncertainties of life and the possibility that the victim does not reach pensionable age'. When the Court came to considering the earnings, it considered the gross and not the net-pay of the victim. Finally, with regards to the lump sum deduction, as opposed to the usual 20% reduction, the Court reduced it to merely 8%, given that any delay in the case was not attributable to any of the parties.

The global sum of damages awarded was €109,609.60. This judgment has not yet been appealed.

Not My Fault But Yours!

by Dr Mary Rose Micallef

The institute of contributory negligence features in tort law (in legal parlance 'culpa aquiliana') – the law of fault. This institute features mostly in cases involving road accidents.

Contributory negligence essentially refers to the scenario where the injured party's own conduct contributes to the damage that he has suffered. Strictly speaking, this kind of negligence is not exactly defined by our Civil laws, but it is implied through the general tort maxim that every person shall be liable for the damage which occurs through his fault (article 1031 of the Civil Code).

Naturally, people pretend to be compensated whenever they feel they are suffering a damage but, the mere sufferance of a damage would not automatically trigger compensatory rights. One must always prove the element of fault which is the general requisite in a typical tort damages lawsuit. In general, the elements of tort comprise the fault (the act that caused the incidence), the cause between the fault and the damage. As always – in lawsuits – all these elements must be satisfactorily proven by the claimant injured party.

Contributory negligence counters the tortfeasor's fault. This occurs when a person pleads that one brought the damage through his own contribution – the saying goes that "it-tort ġabu b'idejh". This kind of negligence defined the outcome of the case bearing the names Busuttil vs Abela, that was delivered by the Court of Appeal on 30th June 2021. Plaintiff, being an injured party, submitted that he was hit by defendant's vehicle whilst crossing a road. He contended that defendant had failed to keep a proper lookout, and therefore though her fault the accident occurred. Consequently, he claimed damages in court. The defendant countered by claiming that it was through the plaintiff's fault that the accident occurred – she pleaded contributory negligence.

It resulted that the plaintiff had opted to make way across a road without utilising the zebra crossing. It was found that the claimant opted to cross whilst being too close and in front of the defendant's vehicle, and at that moment, the defendant drove forward and struck the claimant. The First Hall Civil Court noted that the plaintiff opted to make his way across a busy road without considering that his mode of passage was not the safest option. The plaintiff argued that the defendant should have kept a proper look-out and foresaw that he was about to make his way across.

The court highlighted the important principle that any road user – being a driver or a pedestrian – must always maintain proper look-out whilst traversing the roads.

Moreover, a pedestrian has no right to substitute the driver's perspective, for such driver might not necessarily have the same judgment or perspective. The court found that the pedestrian had indeed exposed himself to danger, especially when he opted to cross the road whilst being too close to a halted vehicle. This increased the danger of him being hit, for the driver had no chance to avoid the collision.

In addition, the court acknowledged that some form of fault was to be attributed to the driver. It argued that even though plaintiff did expose himself to danger, defendant had failed to keep a proper look-out on the way ahead. The defendant admitted that she did not notice the pedestrian because she had her focus on the right-hand side of the road, which road was sourcing the vehicle traffic. Had the defendant looked ahead before opting to drive ahead, she would have noticed that a pedestrian was attempting to cross the road. After all, the driver was still bound to observe and be aware of his surroundings, especially in his close vicinity. The defendant defaulted this obligation and therefore, a grade of fault was attributed to her.

The plaintiff therefore was found to have negligently contributed to the road accident in question. His liability was quantified in three-fourths part, whilst the remaining one fourth was attributed to defendant. The plaintiff was also awarded the sum of EUR1,825.03 in damages, based on a 15% disability and the defendant's decree of fault. Additionally, the plaintiff was condemned to pay three fourths of the court costs.

The plaintiff appealed. According to him the first instance court was erroneous when it decided that he had negligently contributed to the road accident. He also questioned the quantum awarded. The defendant – appellate, objected and held that the first court's judgment merited confirmation.

The court of appeal considered that plaintiff – now appellant - had a) unilaterally decided that he had the right to cross the road because according to him defendant had to stay put until the side traffic cleared, b) failed to notice a zebra crossing nearby the accident spot c) that no eye contact was made between the parties before the hit, and d) that he opted to proceed his way across whilst being very close (less than a metre away) to the car. In consideration of the latter, the Court of Appeal confirmed the first judgment, on grounds that appellant did, negligently contribute to the damages suffered.

Real Damages
by Dr Carlos Bugeja

A traumatic experience may not always leave any visible physical traces, and to the inattentive observer, a victim of crime may not be seen as having suffered much unless he has body scars to show. In the past, our society has largely been guilty of placing unnecessary emphasis on physical disability caused by a crime, and not so much on the rest. Fortunately, we have evolved and so did our courts.

We have finally started to legitimise mental health as a real concern and to care for it accordingly. We have begun to understand that psychological damage is real and our law of tort has started to take small steps to free itself from its past desensitisation of psychological harm, and to allow the courts to grant compensation for moral and psychological damages.

In 2018, our ordinary law formally introduced (through an amendment of article 1045 of the Civil Code) moral and psychological damages. Nowadays, in the case of damages arising from a certain class of criminal offences, the damage to be made good by the ordinary courts shall also include any moral harm and/or psychological harm caused to the claimant. However, the amount to be awarded as moral or psychological harm may not exceed the figure of €10,000. It is unclear why the legislator opted to place this limit and how it can be justified to those whose pain and suffering far exceeds what can be restored through the payment of this sum. This law offers something but not nearly enough.

Furthermore, the law (as well intentioned as it was) inadvertently created a legal problem that our courts are yet to face. Before this law was introduced, our courts started to acknowledge psychological damages as real harm capable of being quantified in a percentage of disability (on the advice of a court expert), similar to that relating tobody disability (the formula is: Percentage of Disability x Average salary x Work·Life Expectancy x Further Considerations, on a case by case basis).

Whereas prior to the law of 2018, we had starting seeing a new trend whereby courts awarded psychiatric damages based on a percentage of disability formula, sometimes to the tune of thousands of euro exceeding the figure of €10,000, even if the harm did not arise from a criminal offence, now, under the new 2018 law, psychological and moral damages may only be awarded if they arise out of a certain class of criminal offences and only up to the sum of €10,000. This means that a law that sought to allow the courts to award more damages may ultimately force them to award less, as the law places limits.

This brings us to the judgment of 'A vs B et' (names are being omitted due to the sensitivity of the facts of the case), delivered by the Civil Court, First Hall on January 12 (373/2008/GM). The plaintiff recounted that when she was still a minor, she had engaged into a sexual act with one of the respondents, which was recorded on tape.

The video clip made its way to a DVD shop and ultimately was extensively circulted. She said that because of this, she suffered permanent psychological damages but no 'body' damage. As a result, she asked the court to order the respondents to pay damages. The facts of the case preceded the enactment of the 2018 law, and thus, the 'new formula' was not applicable.

Thus, notwithstanding that the facts preceded the 2018 law, did the plaintiff have the right to claim psychological damages? The respondents said 'no'. The court disagreed. The Court traced the history of our law of tort and stated that since the very beginning, the law did not express any exclusion to the awarding of moral damages from our legal system. The law speaks about "the actual loss which the act shall have directly caused to the injured party, in the expenses which the lauer may have been compelled to incur in consequence of the damage, in the loss of actual wages or other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial , which the act may have caused".

The key phrase is "actual loss". The court stated that the law does not define actual loss, but our courts often stated that a loss is actual if it is economic or material, a loss that can be quantified or verified. This is due to the fact that our courts have often interpreted the law in a restrictive manner.

Moral damages are relatively abstract because they cannot be understood in terms of a pecuniary loss. The few judgments that admitted 'moral damages' were those that considered the psychological effects of an incident as affecting the working capability of the person injured, that is, damages that are really and truly physical, albeit psychological.

Such an exercise was often conducted with a sense of justice towards the harmed, which considered that psychic harm may lead to a loss of future earnings as much as physical harm. In this sense, the logic is that psychological harm is physical harm nevertheless. In short, psychological harm is real (or actual) loss. In this case, the plaintiff had managed to overcome the tremendous trauma afflicted but still suffered from a psychological disability of six per cent. Applying the usual formula, the court ordered two of the respondents to pay the plaintiff the sum of €32,656, with interest.

Trademark &


& Patent Law

Mind your (patent) language

by Dr Edric Micallef Figallo

The Court of Appeal (Inferior Jurisdiction) delivered its judgement on the 28th May 2021 on appeal application 71/2020 LM. The appeal was filed by the German company Leonhard Kurz Stiftung & Co. KG (the "applicant") against the decision of the Comptroller of Industrial Property under the Patents and Designs Act, Chapter 417 of the Laws of Malta. The decision of the Comptroller had been given on the 24th September 2020. The appeal application to the Court of Appeal was filed on the 23rd October 2020, according to the provisions of article 58 of the Patents and Designs Act.

There are different and specific possibilities of recourse under the Patents and Designs Act, but this case deals specifically about issues related to article 46 of the Patents and Designs Act. On appeal to the Court of Appeal, the applicant unsuccessfully contended that their application to the Comptroller according to said article 46 was about the existence of rights and the termination of the same.

The applicant company had first sought recourse through a request according to the provisions of article 46 of the Patents and Designs Act, which calls upon the Comptroller to give a decision on said request. This provision refers to a right of restitutio in integrum which generally means restoration to an original condition and in this particular case is specifically defined by article 46(1), which provides that "the applicant for or proprietor of a patent who, notwithstanding having taken all due care required by the circumstances, was unable to observe a time limit set by the Comptroller shall, upon his request, have his rights re-established if the non-observance in question has the direct consequence of causing the refusal of the patent application, or the refusal of a request, or the lapse of the patent, or the loss of any other right or means of redress."

In his administrative decision upon the above request, the Comptroller had decided against the applicant, as "...it is not possible to reinstate rights to a patent which was deemed void ab initio as such rights could not accrue if the patent was void in the first place. In this regard, the office is not in a position to accept your request.". In effect, what the Comptroller did was go beyond the specific request so to speak, and analyse the validity of the rights claimed in Malta by the applicant. This is correct, as any invalidity would render recourse under article 46 of the Patents and Designs Act futile or even worse it could risk validating something which was not valid, the latter being beyond the powers afforded according to said article 46.

The central issue in this case is the existence or otherwise of a valid patent in Malta (privattiva in Maltese). This case centered about language requirements. Indeed, the applicant had filed for a patent with the European Patents Office on the 15th December 2014, using the German language. Indeed, originally we are dealing with what is known as a "European patent", which is a patent granted by the European Patent Office in accordance with the Convention on the Grant of European Patents, to which Malta is a party. A European patent according to the same can designate various jurisdiction within which it may apply, and in this case Malta was one of those jurisdictions. This Convention is implemented in Malta through the European Patent Convention Regulations (S.L. 417.05), which is legislation subsidiary to the Patents and Designs Act. For the application and enforceability of a European patent in Malta, compliance with S.L. 417.05 is necessary.

The applicant had sought to get the patent protected in Malta by virtue of the mention of its grant by the European Patent Office, which would be in accordance with regulation 7(1) of S.L. 417.05. This which mean that said grant would be equivalent to a grant being granted directly by the Maltese competent authority. However, regulation 7(1) of S.L. 417.05 does not stand alone in absolute fashion and other provisions limit it accordingly.

In fact, the patent nullity issue centred around the fact that no English language translation was provided to the Maltese competent authority within the time periods provided under S.L. 417.05, i.e. three months according to the Convention, starting from the mention of the grant of a European Patent by the European Patent Office. Said three month period can be extended by a further two months as per regulation 7(2)(b) of S.L. 417.05, in fact the Comptroller submitted that the applicant could have had a period of five months to provide the required English translation. This translation requirement is no small thing, as a translation into English (no need for Maltese for certain public entities in Malta) is absolutely required under said Maltese legislation as per regulation 7(2) of S.L. 417.05, otherwise "the European patent shall be deemed to be void ab initio." Ab initio meaning from the start. This nullity is according to regulation 7(4) of S.L. 417.05.

Much to the displeasure of the applicant, it is to be said that provisions in one and the same legislative instrument are to be read organically, in full and in case of apparent conflict interpreted harmoniously in line with the aims sought by the legislation. It is even more to the chastisement of whoever attempts otherwise that if the wording of the legislative instrument is crystal clear and in no way equivocal (as in this case), then one should stick to it inequivocally. In the end, this is what the Comptroller did and fulfilled his duties, with the Court of Appeal confirming the same and dismissing the appeal of the German company.

Use your mark!

by Dr Edric Micallef Figallo

In case 253/2019/1 MCH, the Court of Appeal (Superior Jurisdiction) delivered its judgement on the 25th March 2021 following an appeal application by the defendant company. The first court had delivered its judgement on the 17th June 2020, which the Court of Appeal confirmed in full last month.

In this case, the plaintiff company has successfully claimed for the deregistration from Malta's Trademark Register of the trademark registered by the defendant. In this case we are dealing with the tobacco trade and the defendant company had registered the trademark Business Royals Premium with registration number TM52531.

A registered trademark is liable to deregistration if following registration, it is not genuinely used at all for a period of five years following registration or for any continuous period of five years following said registration. The plaintiff company claimed that the defendant company had not in fact made any genuine use at all for the said period. This claim has important procedural repercussions. In fact, generally speaking, he who claims something must provide evidence thereof, but in cases such as those under review it is the defendant that has to provide evidence that it made genuine use of the trademark concerned, as per the Trademarks Act.

Of note, as it very much relates to this appeal case, is that there is another pending case at first instance between the parties (1287/2018 MCH). In it the roles of plaintiff and defendant between the parties are inverted, for the defendant company in the case under review turned plaintiff and claimed that the plaintiff company in the case under review imported products allegedly bearing the defendant's company registered trademark, with the latter thus seeking the protection thereof. That case is currently awaiting information on the findings in the case under our review.

By way of background the Court of Appeal stated that by promoting its action the plaintiff company was exercising a suitable defence, rather than instituting a malicious action as claimed by the defendant company in its appeal. This seems to tie up the scenario, but for obvious reasons we will humbly not venture to conclusions on the other case prior to any actual judgement being given. However, in this case under the review the Court of Appeal did indicate that, if anything, the fact of deregistration or otherwise of a trademark could impact the rights to its protection as sought in the pending case initiated by the defendant company against the plaintiff company.

Returning to this appeal case, 253/2019/1 MCH, the defendant company also sought the revocation of a decree which closed off the evidence stage because it alleged that it was agreed that in this case the evidence in the pending case (1287/2018 MCH) was to be considered as part of the evidence in the case under review. The Court of Appeal decisively threw this out by highlighting that any evidence relevant to the case under review could have been filed in the same case, adding that the parties at first instance had declared to the court that they had submitted all their evidence, thus closing that stage.

In appealing, the defendant company also claimed that the case between the parties also required the presence of the Comptroller of Industrial Property. Indeed, the latter would be called upon to execute the judgement and given his central role under the Trademarks Act could have his own views on the matter. However, the Court of Appeal stated that said Comptroller is not required as a party to the proceedings for he does not have a juridical interest, specifying that the interest of the Comptroller is limited to the execution of the judgement and not to the contestation of the case between the parties. Indeed, this pronouncement could be relevant in other cases involving the public sector.

Moreover, in its appeal the defendant company tried to bank on the fact that it has numerous registered trademarks in 37 countries around the world, 25 of which being EU Member States. This did not hold sway, for the case determined by the court involves and is limited to the registration in Malta and whether genuine use has been made in Malta, meaning that registration elsewhere is essentially irrelevant. Likewise discarded as essentially irrelevant at law are the allegations that the plaintiff company has no such trademarks registered elsewhere and that it is barely trading.

As to the central notions of genuine use, non-use and proper reasons for non-use, as applicable to this case, the Court of Appeal made extensive reference to the judgement of the Court of Justice of the European in the Viridis case (C-338/17). In this case, the appealing defendant company tried to claim that required clinical trials prior to marketing the product and distribution agreements reached with Maltese resellers amount to proper reasons for non-use or to the genuine use of the trademarks.

The Viridis judgement, as highlighted by the Court of Appeal, basically stressed that the genuine use of a trademark requires that it be used in relation to consumers "to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark". Moreover, it further stressed that "although there may be genuine use before any marketing of the goods covered by a mark, this is the case only if the marketing is imminent."

On considering the evidence submitted, the Court of Appeal confirmed the judgement of the First Hall of the Civil Court, holding that no genuine use was made of the trademark, that the non-use was proven accordingly and there were no proper reasons for it, thus leading to a successful claim for deregistration of the trademark. In one's trade, one must use his mark.

INDEX PAGE

www.abalegal.eu

978-9918-0-0263-4