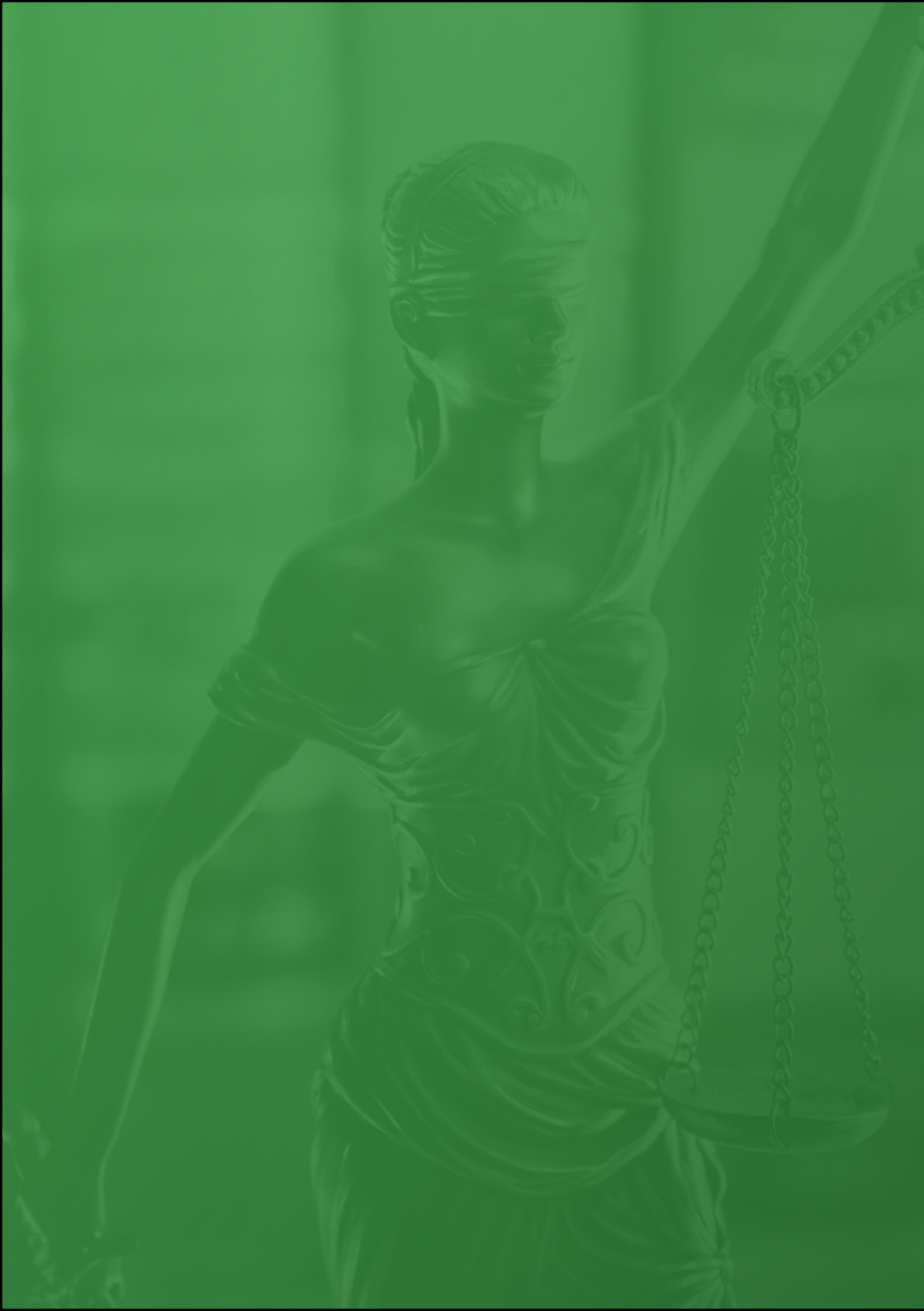
AZZOPARDI
BORG &
ASSOCIATES
ADVOCATES

FROM THE BENCH

SERIES
2022



AZZOPARDI
BORG &
ASSOCIATES
ADVOCATES

FROM THE BENCH
2022

Produced and published in 2023 by Azzopardi, Borg & Associates Advocates. 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 Advocates
First Floor, Victoria Building
Triq l-Għenieq, Naxxar, Malta
or
info@abalegal.eu

ISBN: 978-9918-0-0564-2

Editor: Celine Cuschieri Debono
Editorial Team: Frank A. Tabone, Jacob Magri, Analise Magri and Nicole Vassallo
Cover and Publication Design: Matthew Charles Zammit

FROM THE BENCH

SERIES 2022

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

2023
Published by

AZZOPARDI BORG & ASSOCIATES
ADVOCATES

CONTENTS

CONTENTS

CONTENTS

CIVIL LAW continued

CONTENTS

FOREWORD

Keith Borg

Dear Readers,

In the ever-dynamic tapestry of our society, one thing remains constant - the thrill of unraveling the intricate dance between the law and our daily lives. As we present the 2022 edition of 'From the Bench', we do so with an air of anticipation, for the practice of law is a privilege that beckons us to embrace the evolving rhythm of life.

Over the past years, we've embarked on a shared journey, venturing into the heart of the ever-shifting world of legal complexities. We've endeavored to make the law not just visible but a vivid tableau that comes alive for all. Through our weekly articles in the Times of Malta, we've attempted to transform the seemingly arcane into a vibrant narrative that mirrors your everyday experiences.

Our mission has been to make the law accessible to all. We've tried to show that the law isn't confined to dusty books - it's an ever-present force that influences how we navigate our world. Each Court decision we share in these pages is a solution, a resolution to real-life quandaries that impact us all. The Court decisions we share in these pages are, at their core, solutions to real-world problems - your problems, our problems.

We've always welcomed your feedback, whether constructive or critical, because it's through your insights that we, as authors and interpreters of the law, continue to grow. Your voices are an integral part of the legal discourse, and we invite you to continue engaging with us in this shared pursuit of understanding.

The law, much like society itself, thrives on dialogue and fresh perspectives. Let us, as a community, embrace the elegance of thoughtful analysis and the vivacity of open dialogue. Together, let us contribute to fresh perspectives, interpretations, and solutions, fostering the ongoing evolution of the law in step with the evolving society it serves.

We extend our heartfelt appreciation to all the contributors who have made this edition of 'From the Bench' possible. Your dedication has elevated our reporting, making it a reliable resource and a staple in the legal landscape.

As we present this 2022 edition of 'From the Bench,' we do so with flair, for the law is not merely a static code – it's a living, breathing testament to the dynamic spirit of society. It's a dance of order in the midst of chaos, and we invite you to take the stage with us.

Welcome to another year of discovery within these pages.

Sincerely,

Dr Keith Borg
Partner
Azzopardi, Borg & Associates Advocates

INTRODUCTION

Celine Cuschieri Debono
Editor, From the Bench 2022

Dear Readers,

I am honoured to present to you the 2022 edition of the From the Bench series. It was my pleasure to edit the analyses of my esteemed colleagues, which writing aims at bringing the law closer to the public. Indeed, the law and its application is not simply to be felt and experienced in the law courts but the law affects every single aspect of our lives. How we live, what we eat, how we drive, and most importantly: how we relate to one another.

Indeed, the thing that makes this series very close to my heart is its sense of relatability. In our pieces, we are not preaching from high above but rather simply re-telling the stories of a myriad of individuals as already told by our Courts. For what is a court judgment if not a story? Granted, it is a story rooted in legal application and analysis as well as various intricate principles, but the essence is one. The law helps us survive in a society with people from different backgrounds, different characters, perspectives and experiences.

In fact, in the same way that law affects our lives, I believe that our lives affect the law. As can be seen in the articles you are about to read, the Courts are often faced with difficulty in applying laws and principles devoloped long ago to current times. Whilst the effort to ensure that the law reflects the present is there, our Courts often need to be creative in providing a practical solution while at the same time complying with the law at hand.

We have strived to make this edition as far-reaching and comprehensive as possible. It covers a plethora of areas, ranging from property law, family law, criminal law, contract law, administrative law and more. Each area affects and covers a different aspect of our lives.

A big thank you must go to my peers who helped me edit this edition and made its publication possible: Dr Analise Magri, Dr Frank A. Tabone, Dr Jacob Magri, and Dr Nicole Vassallo.

I would also like to extend my gratitude to Times of Malta for hosting our series for another year and in turn helping us reach our aim of bringing the law closer to the masses.

Thus, we invite you into our world of stories, as grounded by the law, in the hopes of continuing to cultivate an environment of understanding not just of the law but of our society as shaped by the law. This is exactly what we strive to do in yet another edition of our yearly legal narration.

Happy reading!

Dr Celine Cuschieri Debono
Associate
Azzopardi, Borg & Associates Advocates

xvi

AZZOPARDI BORG & ASSOCIATES
ADVOCATES

Commercial Law

STRIKING OFF THE REGISTER – 'ILLEGALITY OF A MATERIAL NATURE' AS A GROUND FOR COMPANY RESTORATION

Nicole Vassallo

The companies 'Agrico Limited' (C-9758) and 'Marsovin Limited' (C-115) were ordered to pay jointly and severally the sum of €240,525.33 in damages to Vassallo Builders Group Limited (C-2448) by a judgment of the Civil Court, First Hall, pronounced on 7 May 2019. Incidentally, the judgment that ordered payment of damages was delivered four months after the company Agrico Limited was dissolved and struck off the register on the request of its directors through the voluntary winding-up procedure. The judgment was subsequently appealed by Marsovin Limited before the Court of Appeal in its Superior Jurisdiction.

The fact that the judgment ordering damages of €240,525.33 was appealed by Marsovin Limited and not by Agrico Limited, and that the two companies are joint and several debtors, meant that Vassallo Builders Group Limited had the right to collect the awarded sum, solely from Agrico Limited.

A company may be dissolved and consequently wound-up either by the Court or voluntarily, following an extraordinary resolution to that effect. A voluntary winding up may be conducted in two ways; by its members, i.e. a "members' voluntary winding up" or by its creditors, i.e. "a creditors' voluntary winding up".

On the one hand, where the dissolution and winding up takes place voluntarily by its members (i.e. by a members' voluntary winding up), the directors of the company shall make a declaration, known as a declaration of solvency, stating that they have made a full inquiry into the affairs of the company and that in their opinion, which opinion must be reasonably substantiated, the company will be able to pay its debts in full within the period specified by law. A winding up in relation to which a declaration of solvency has not been made, on the other hand, shall be tantamount to a creditors' voluntary winding up.

The declaration of solvency carries a lot of weight, for where the opinion formed by the directors on whether the company will be able to pay its debts is unaccompanied by reasonable grounds, the directors shall be guilty of an offence, and liable to a fine (*multa*) not exceeding €46,587.47 or to imprisonment for a period not exceeding three years, or to both such fine and imprisonment.

The Companies' Act caters for the revival of a company (art. 300B), where the winding-up and striking off of the company has been obtained by fraud or results from an illegality of a material nature. In such situations, following an application by any interested person, the Court may order that the name of the company be restored to the register and the winding up be reopened for a time and a purpose specified by the Court in its decision. The application may not be filed following the expiration of five years from the date of striking off.

Two and a half years following the decision of 7 May 2019, a recent judgment dated 4 November 2022 presided by Hon. Judge Ian Spiteri Bailey has ordered the restoration of the company 'Agrico Limited' (C-9758) to the Register and the reopening of the winding-up procedure due to the directors' failure to inform the liquidator (*stralċarju*) of contentious proceedings against the company, which proceedings had not yet been concluded at the time of its dissolution and striking off. Vassallo Builders Group Limited, which was also the plaintiff in the proceedings for the restoration of the company name, argued that it would have been seriously prejudiced had it been unable to enforce the credit of €240,525.33 against Agrico Limited, the struck off company.

The Court considered the directors' failure, whether resulting from negligence or otherwise, to fall within the ambit of an 'illegality of a material nature' in terms of law, capable of restoring the company and reopening the winding up procedure in terms of article 300B of the Act.

The dissolution and winding up of a company requires the appointment of a liquidator to conduct the administration of the company's affairs in the course of winding up. In fact, on the liquidator's appointment, unless otherwise provided by law, all the powers of the directors and of the company secretary cease. However, the court went far from holding the liquidator responsible for the failure to take into account the contentious proceedings against the company, seeing as said failure primarily resulted from the non-disclosure by the company directors who were aware of the proceedings –

"Il-Qorti tqis illi dan huwa aġir deplorabbli da parti tad-direttur ta' Agrico Limited. Il-Qorti trid tfakkar ukoll illi [...] taħt piena ta' penali, direttur/i għandhom l-obbligu illi jagħtu lill-istralċarju l-informazzjoni kollha permezz ta' dikjarazzjoni sħiħa tal-qagħda finanzjarja tal-kumpanija, flimkien ma' lista tal-kredituri tal-kumpanija u l-ammont stmat tat-talbiet tagħhom. Huwa evidenti mill-atti illi d-direttur ta' Agrico Limited dan ma għamluhx."

In the 2022 judgment, the presiding Judge put forward a number of propositions aimed at ensuring the smooth running of the voluntary winding up procedure. Amongst other propositions, liquidators were advised to seek a written declaration signed by the directors confirming that all information in relation to the company has been disclosed in terms of law and to conduct their own verifications, independent from the declarations mentioned above, such as ordering searches pertaining to the company from the Public Registry and liaising with the Registrar of Courts to determine whether the company is involved in legal proceedings prior to dissolution. The Court also proposed the issuance of guidelines aimed at assisting professionals acting as liquidators in the performance of their duties.

While also having considered that the present remedy was the only remedy available to the plaintiff company, the Court proceeded to order the restoration of the company name 'Agrico Limited' (C-9758) to the Register and the reopening of the winding-up procedure at the expense of the same company. It also ordered the Registrar of Court to deliver the judgment to the attention of the Chamber of Advocates, the Malta Institute of Accountants, the Malta Business Registry, the Malta Financial Services Authority and the CEO of the Court Services Agency, for the due implementation of the measures mentioned in its recommendations.

WHAT?!
NO FOOTBALL?!

Keith A. Borg

It's Sunday, it's been a long long week and all we're looking forward to is really nothing but the football game. Whether your team is about to win the league, fighting for a top four finish or struggling with relagation, all we're looking forward to is really nothing but the football game, because, as one wise manager once said "Football is the most important of the less important things in the world."

For some, the whistle won't blow in the coming days though.

In its judgment of 13 April 2022, the First Hall of the Civil Court presided by Mr. Justice Ian Spiteri Bailey delivered a decree in the case between **Dr. Jacqueline Mallia acting for and on behalf of Infront Sports & Media AG vs Epic Communications Limited, Melita Limited and GO plc**.

Applicant proposed an application in terms of article 8 of the Enforcement of Intellectual Property Rights (Regulation) Act. Essentially this article allows any person who is the holder of, or is authorised to use, an intellectual property right, in particular, any person who is a licensee of such right, to request the Court to issue, against an alleged infringer of such right, a decree intended to prevent any imminent infringement, or to forbid, on a provisional basis the continuation of the alleged infringement of that right. This injunction may also be issued, under the same conditions, against an intermediary whose services are being used by a third party to infringe an intellectual property right.

Applicant submitted that it holds the international audiovisual rights of the matches of the Italian Serie A for the seasons 2021/2022, 2022/2023 and 2023/2024; it therefore enjoyed the exclusive right to transmit, communicate and make available to the public the said audiovisual content, in the territory of Malta.

From an exercise carried out by PriceWaterhouseCoopers in Malta, it transpired that there existed a number of IP Addresses giving online access to the aforestated audiovisual content; this was being illegally streamed without the due license and / or authorisation of the applicant.

Such illegal streaming could be accessed in Malta through websites, mobile device apps, or other software accessed, included or listed in set-top boxes, media players, computers and / or other electronic devices, through the services provided by the respondent companies, which operate, amongst others, as Internet Service Providers (ISPs) and were therefore responsible for the traffic on their platforms of digital content from various sources.

Whilst acknowledging that respondent companies were not themselves infringing the applicant's rights, the services provided by them could, and apparently were, nevertheless being used to commit such infringement as their clients could gain access to the illegally transmitted audiovisual content.

Applicant therefore sought to block the access to the streaming servers that were illegally transmitting the audiovisual content on which it held rights.

In determining the issue, the Court placed particular emphasis on the fact that any delay in such a delicate sector as the digital sector can only cause irreperable harm to the right holder; it therefore moved to acceed to the request without hearing the respondent companies. Unusual one might say. A gratuitous penalty kick in the ninetieth minute of a stalemate perhaps. And yet, the Court was well within the parameters of article 8 of the Enforcement of Intellectual Property Rights (Regulation) Act which contemplates that in appropriate cases, and particularly where it deems that any delay would cause irreparable harm to the right holder, the Court is to (shall) apply the injunctive measures without first hearing the respondent.

The Court ordered the respondent companies to ensure that their services not be used to infringe the intellectual property rights of the applicant. It furthermore ordered the respondent companies to suspend access to the audiovisual content of the matches of the Italian Serie A which were being illegally streamed by blocking access to all IP Addresses indicated by the applicant.

The Court further ordered the immediate service upon respondent companies of its decision and the records of the suit. Respondent companies now have the right to request the Court to review its decision with a view to deciding, within a reasonable time after service, whether such measures should be modified, revoked or confirmed.

For some, the whistle won't blow this Sunday.

COFFEE ANYONE?

Keith A. Borg

Who would have ever thought that your first coffee of the day could be subject to controversy and even judicial proceedings? Well, everything these days seems to be.

United States giant Starbucks Corporation initiated proceedings in Malta against Strabuono Coffee International Limited. The former ascertained to be the owner of rights to the international coffeehouse chain called 'STARBUCKS' / 'STARBUCKS COFFEE' which has been in existence in most European Union member states for about nine years, with the sale of various of its trademarked products including the sale in Malta of coffee products bearing its trademark, since 1 April 2015, with all various relevant trademarks (including figurative trademarks) enjoying an enormous reputation and goodwill in connection with the coffeehouse chain and the its related products.

It claimed that the defendant, without its consent commenced the management and operation of a coffeehouse in Malta including the advertising of the same, using, in the course of its trade, various signs, including figurative signs, consisting of the expressions 'STRABUONO' or 'Strabuono,' and 'STRABUONO COFFEE' or 'Strabuono Coffee,' alone and/or combined with other elements, all of which were all too obviously inspired and copied from its relevant trademarks.

It sued for unlawful competition requesting an order for the defendant company to pay by way of penalty not less than €465.87 and not more than €4,658.75 as prescirbed by law for each violation. It also requested that the defendant be permanently prohibited from making any use in its business in connection with the operation of a coffeehouse or other similar establishment, of any kind of name, mark and distinctive sign in breach of its rights.

The defendant agrued that there existed no similarity between the name, mark or distinctive sign it used and those indicated by the plaintiff and consequently there resulted absolutely no abuse and/or prejudice to the palintiff.

Here are a few of the questioned marks:

The Court, presided by Chief Justice Mark Chetcuti opined that what the law wanted to punish was the theft of customers by means of speculation on the confusion of competing products; the legislator wanted no trader to conduct its business in a way that induces customers to confuse its own goods, or its business, with the goods or business of others. The Court further noted that whether the deception is fraudulent, or simply accidental, or due to error, made no difference. Malice, the Court argued, had an influence only in determining the penalty. The rights of traders in such matters were rooted in the general right to property. A trader, the Court noted, has the right to use all legal means to defend itself against the usurpation of its property by a claim based on unfair competition.

In such cases, for the action to be successful, the trader must prove that it was the first in the open market to adopt such distinctive name, sign or mark and that the similarity between the name, mark or a disputed sign is such that there is a likelihood of confusion on the market. It must also be proven that there is a similarity between the marks in dispute and that this similarity is such that there is a likelihood of confusion in the eyes of the public.

The Court further noted that a likelihood of confusion must be appreciated globally, taking account of all relevant factors; the matter must be judged through the eyes of the average consumer, of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant – but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind (a concept known as imperfect recollection).

The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impression created by the marks bearing in mind their distinctive and dominant components. A lesser degree of similarity between the marks may be offset by a greater similarity between the goods or services, and vice versa, there being a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either *per se*, or because of the use that has been made of it.

Noting that the core services and goods offered by the parties were virtually identical from the perspective of the consumer, it was clear to the Court that the marks utilised by the defendant were similar in comparison to those utilised by the plaintiff. There was indeed a mimicking of the "look and feel" of famous brands without using the same word mark or primary device feature. In the Court's view, the defendant's use of marks and names similar to those of the plaintiff created confusion and unfair competition; a consumer may indeed be confused and incorrectly assume that there is a broad economic connection between the plaintiff and the defendant. The defendant's conduct did exceed the limits of competition.

The Court, in its judgment of the January 2022 decided the case by upholding all the plaintiff's claims and ordered the defendant to pay a penalty of €2000; it further ordered that within one month the defendant was to destroy any material in its possession or under its control containing a distinctive name, mark or sign with the words 'Strabuono' and 'Strabuono Coffee'.

Shall we discuss this over a coffee?

SHIPPING: SECURING SPECIFIC DEBTS UPON A VESSEL

Clive Gerada

In the Merchant Shipping Act (Chapter 234 of the Laws of Malta) the legislator wanted to provide a tool to creditors to secure specific debts by a special privilege upon the vessel, as well as any proceeds from any indemnity arising from collisions and other mishaps as well as any insurance proceeds. Amongst the secured debts, the legislator, listed expenses incurred for the preservation of the ship and of her tackle including supplies and provisions to her crew incurred after her last entry into port.

The case in the names of **Dr Ann Fenech as a special mandator of the foreign Deutsche Bank Luxembourg S.A. vs Il-Bastiment Golden Odyssey** decided by First Hall Civil Court, as presided by Hon. Judge Dr Spiteri Bailey on 7 November 2022 dealt precisely with this matter.

Deutsche Bank was a hypothecary creditor of the ship Golden Odyssey and had a motgage (*ipoteka navali*) registered in its favour on the mentioned ship. It happened that the owners of the ship (a foreign company) were not paying their dues in relation to the said mortgage and on this basis, the bank sought to arrest the ship in Malta and enforce its mortgage through a sale by licitation (s*ubbasta* – Court approved sale). On 14 October 2022, the Court authorised the sale of the ship to a prospective buyer against an identified price. However, it happens that in the months before the arrest ship and during the arrest of the ship, the owners of the ship failed to honour their obligations towards the crew and other creditors.

The ship owners failed to pay invoices due by the ship, other administration fees including fees due to the registered flag authorities and wages of the crew. As a result, Deutche bank had to intervene inorder to safeguard the maintenance and preservation of the ship and to ensure that the crew does not end up in a state of abbandonment in Malta. The ship and its owners had failed to pay the wages, salaries and other expenses due to the captain and his crew in accordance with the Seafarer Employment Agreements and in accordance with the obligations of the ship owners resulting from the law of the flag state and in accordance with the rules of the Maritime Labour Convention 2006.

In light of this situation, the bank paid the dues owed to the captain and crew so that they would be able to return back to their country and not end up stranded in Malta. The bank even covered the repatriation expenses of the crew and in turn the bank was subrogated in the position of the crew members against the ship and its owners.

The captain and crew also forked out expenses themselves so that the ship could continue to operate and the crew does not find itself in a perlious state onboard the ship. Given that these debts related to claims *in rem* (actions against the vessel) and all of these claims were covered by a special privilege in accordance with Article 50 (g) of Chapter 234 of the Laws of Malta, the bank decided to pay off these expenses and in turn was subrogated (put in the place of another) in the rights of the crew against the ship.

Once at port, the Ship had to order supplies such as fuel, food supplies and beverages for the crew. The ship owners also defaulted in paying these dues. Moreover, the ship owners had also failed to pay the insurance policies of the ship. This meant that without a valid insurance policy the vessel would be in a state of illegality and in serious danger that it would be de-registered from its flag state of Bermuda.

Once again the Bank entered the fray and covered the debts. These debts were deemed to fall under the category of expenses incurred for the preservation of the ship and of her tackle (equipment) including supplies and provisions to her crew incurred after her last entry into port. Meaning that these debts were covered by a special privilege.

The bank argued that all these dues (amounting to €3,221,733.95) paid by itself on behalf of the ship owners were claims i*n rem* (claims against the vessel) and that the debts were certain, liquid and due. In fact, the bank had instituted these proceedings via a summary procedure in terms of the law, where it requests the court to decide the matter without entering the merits of the case, given that the ship owners did not have any defence to raise. Indeed, the ship and its owners did not raise any defence and accepted all of the claims raised by the bank.

After taking into consideration the matters above, the Court decided in favour of the Bank without the need to enter the merits of the case and condemned the ship to pay the total amount of €3,221,733.95.

COUNTERFEITS AT THE AIRPORT

Rebecca Mercieca

The branding of one's product or service can be defined as the words, phrases, symbols, designs, or a combination of such which distinguish and communicate the differences between one product from another. A trademark is a unique element which directs the consumer towards a specific product or service, helping one differentiate between similar products and identify the difference between them while simplifying the choice of the consumer towards what he truly desires. In most cases, an identifiable trademark also allows trust to develop between the person offering the product/service and the consumer based on the product/service's good repute.

Trademark protection is territorial in scope. The protection conferred by a Maltese trademark is limited to Malta's territorial confines, however European Trademarks also exist, and such confer protection through one unitary trademark across all European countries.

The concept of unregistered trademark rights is also present under Maltese Law and derive from general principles of Maltese Law in the Commercial Code. In this respect, the Commercial Code provides that regardless of whether a name, mark or distinctive device has been registered as a trademark in terms of the Trademarks Act, traders may not make use of any name, mark or distinctive device capable of creating confusion with any other name, mark or distinctive device lawfully used by others. Consequently, one's primary rights to a trademark are establishing by use. Registering a trademark allows for greater resiliency to the mark one uses to identify his/her brand for an initial period of 10 years which may be renewed.

At their core, trademark rights prevent unfair competition between traders, and deceit of consumers when encountered with two or more products or services which seem identical, or which may easily be associated together. Trademark rights also prevent producers of counterfeit goods from gaining an unfair advantage in trade, which may be detrimental to the repute of the 'original' distinctive EU trademark.

Proprietors of EU trademarks are entitled to prevent all third parties from using, in the course of trade, signs which are identical with the EU trademark or those similar to it, in relation to goods or services which are identical to theirs. Such applies in the absence of proprietors' authorisation for such towards third parties.

Counterfeits, or 'dupes' are considered to be goods infringing intellectual property rights in Malta. These include goods (and their packaging) bearing a trademark which is identical to a validly registered trademark in respect of the same type of goods. The entry of such goods is prohibited from entering Malta, as is their exportation, re-exportations, release for circulation and their placement in a free zone or free warehouse of goods.

The First Hall of the Civil Court, and the Court of Appeal are the competent courts in Malta concerning the protection of intellectual property rights. On 11 May 2022 the First Hall of the Civil Court presided over by Mr Justice Mark Chetcuti delivered two judgments related to such: bearing case number **1019/2020** concerning dupe Nike shoes, and case number **990/2021** regarding the 'Adidas' brand.

In both cases involving the 'Adidas' and the 'Nike' trademarks, the plaintiff companies sought a court declaration that the products withheld at customs were 'fakes' and thus were in breach of both local and EU law. With regard to case number **990/2021**, in its judgments, the court declared that the plaintiff companies were, amongst others, owners of the marks knowns as 'three stripes device', 'three stripes device on footwear', 'trefoil device', 'adidas' and 'ADIDAS' which marks feature on several products of theirs, including shoes, sandals, flip-flops, clothing garments and caps and such marks had been registered as EU Trade Marks with their own distinctive numbers.

It further resulted that back in August 2021 customs officers at the freeport in Marsaxlokk had found a total of 7,752 pairs of shoes, unloaded from the 'Yantian Express' which raised suspicion as to the authenticity of such products. The suspected products were indeed found to be counterfeits after having been tested.

As a result of such findings, the court ordered the destruction of the products within 90 days from date of judgment, at the expense of the shipper, and without any compensation due to the same defendant for the same destruction.

Similarly in case number **1019/2021**, the plaintiff 'Nike Innovative C.V.' sufficiently proved that it was the owner of 'NIKE' and other marks such as the 'Swoosh Design' used on several products by the plaintiff company and such trademarks had been registered as EU Trademarks. The court found that on 17 May 2021 a total of 2,400 pairs of 'nike' shoe dupes had been unloaded at the Marsaxlokk freeport, and they too were found to be counterfeits following tests conducted by a representative of the plaintiff company. As in the Adidas case, the court also ordered the destruction of the shoes within 90 days from date of judgment at the expense of the shipper: being the defendant company.

Notwithstanding the demand made by the plaintiffs in both Adidas and Nike cases for the court to declare any further remedy in terms of law in favour of the plaintiffs, no such remedies were delved into, and the court subsequently abstained from taking further cognisance of such demands in both respective judgments.

THE TALE OF INVESTMENT SERVICE PROVIDERS AND DISCLAIMERS

Edric Micallef Figallo

On 17 February 2022, the Court of Appeal (Superior Jurisdiction) pronounced its judgment on application **963/2015/1 MCH**, confirming the first instance judgment in full. The first instance judgment decided on the lack of justification of the procedural state of absence (*kontumaċja*) by the defendant company, and the merits of the case as filed by the plaintiffs. This appeal was brought forward by the defendant company, which had succumbed at first instance.

We will not delve on the relevant aspects on the *kontumaċja* of the defendant, besides stating that the Courts found that sending an email to one's lawyer and failing to follow-up the matter with the same is not a reasonable excuse for the default in filing one's reply in the proceedings, and the defendant company (i.e. the lawyer's client) was found to be solely responsible for said failing.

As to the merits, we have had the opportunity to comment on similar ones in previous articles published in this column. These relate to investment services as affecting the common person, specifically in relation to the responsibilities pertaining to investment services providers. In this case the plaintiffs alleged and proved that they had invested and lost their life savings.

It is important that trust is laid on entities regulated by law and through the Malta Financial Services Authority, and any person interested in investing should approach someone else only if these are authorised, licensed, and regulated by the MFSA. Indeed, this was the situation in this case and that significantly strengthened redress or made it possible to start with.

Amongst the failed justifications for the loss incurred by the plaintiffs was a disclaimer which held no value in this case. This is fit to quote for readers as these types of disclaimers are probably prevalent and might deceive investors into thinking that they are bound by them: "Value of these investments and the income derived can go down as well as up and you may get back less than the amount invested. Also, if the investment in the Fund is sold before maturity you may get back less than the amount originally invested." Investors who contract knowing of such disclaimers should not assume that successful redress against investment services providers is not possible.

Disclaimers, often an alien importation borne of an English-speaking culture ill-suited for our legal tradition, have often been rubbished by our Courts and rightly so. The grounds for so doing generally lie in our notions of diligence and negligence. In this case the plaintiffs successfully laid emphasis on these central notions of our Civil Code and combined them with the alleged and proven failure to adhere to sector-specific law applicable for investment service providers in Malta.

Indeed, our highest civil court stressed that due to the EU'S MiFID Directive and the rules issued thereunder by the MFSA, the investment service provider had to fulfil certain obligations. Foremost of which is the adequate fulfilment of the client's suitability test if the investment service provider was to give advice towards investing in a certain manner. Said advice was provided in this case and therefore the suitability test had to be adequately performed by the investment service provider.

The Court of Appeal (Superior Jurisdiction) agreed with the first instance court in stating that this case had little evidence to be examined, presumably owing to the state of *kontumaċja* of the appealing company, however it confirmed from the evidence filed by the plaintiffs that there was no doubt that they were investing on the advice of the defendant company.

The Court of Appeal (Superior Jurisdiction) also held that the defendant company was obliged to perform the suitability test required under the rules issued by the MFSA. This was not performed by the defendant company, at least this is what could result according to the acts of the proceedings and here it is fit to make reference to a major procedural principle, *quod non est in actis non est in mundo*. That is a Latin legal maxim meaning that what's not in the acts of the proceedings does not exist in this world, for the Court at least.

The Court of Appeal (Superior Jurisdiction) also made a positive reference to a final and binding decision by the Arbiter of Financial Services given in case 448/2016. In that case the Arbiter had rubbished attempts by the relevant investment service provider to shift fault on the investor by relying on the actual brochures for the relevant investments.

It stressed that if professional advisors could not determine the adequate level of risk then this was not to be expected from investors who had to be appropriately classified as retail investors. Likewise in this case.

Our highest court also touched upon another matter plaguing consumers in general, so-called standard form contracts. The appealing company attempted to rely on the fact that the plaintiffs had read the file notes for the investment in the brochure provided, but our highest court dismissed these as standard forms and highly technical in nature and as such could not be held to be understood by retail investors. It also appeared that said reading did not happen and the only explanation that the investors were given was that the security and suitability of the fund was evident because "*ismu miegħu*" (it's name says it all).

Our highest Court made it absolutely clear that this is not the way to give investment advice to retail investors without experience. Plaintiffs are to recover around €150,000, with interest and judicial expenses against the investment service provider.

This judgment follows other judgments by the Arbiter for Financial Services and the Court of Appeal (Inferior Jurisdiction) which had lambasted investment service providers for failing in their obligations towards investors. The importance of this judgment is that it was given by the Court of Appeal (Superior Jurisdiction), and it further consolidates the principles involved. It is to be said that the first instance judgment, as confirmed on appeal, was given by the Hon. Chief Justice. Clear jurisprudence.

AZZOPARDI BORG & ASSOCIATES
ADVOCATES

Constitutional Law & Human Rights

TIME TO SELL

Rebecca Mercieca

The remedy of a forceful sale of a property co-owned by persons who disagree with their property's fate as provided for by article with article 495A of the Civil Code is not new to this series. Today's article delves into further actions available to co-owners who feel that such judgments in favour of major co-owners impinge on their right to property.

Most co-owners in cases like the one discussed here end up in a state of co-ownership through inheritance. In a judgment delivered on 1 February 2022 **(349/15/1 RGM)** the Court of Appeal stated that there is no doubt that such a law had been promulgated specifically to address and target situations relating to properties owned by co-owners who disagree about the fate of their property and who wish to terminate their state of co-ownership.

On 15 July 2021 the First Hall of the Civil Court decided in favour of the sale as desired by the co-owners who owned six undivided parts of seven of properties in Marsascala which they had inherited, and thus co-owned. Defendant, who owned the remaining one part of the seven of the undivided shares opposed the sale stating that it had been her parents' wish that the properties remain in the family. The plaintiffs declared that they had been in a state of co-ownership for more than ten years and were willing to sell the property for €1,050,000 to an interested buyer, however the defendant had not appeared for the promise of sale back in 2016.

The defendant claimed that the parties were still undergoing procedures regarding the division of their inheritance and that the parties were still in the process of attempting to find an amicable solution to dividing their property. It transpired that only a private writing had been agreed to by the parties several years prior, and no public deed had been finalised between them, thus no division could be considered to have been legally finalised. The minority co-owner further claimed that she was not aware that the other co-owners had been attempting to sell the property and had she known, she would have offered an additional €10,000 than the agreed price in order to keep it herself.

In a judgment delivered in 2021, the First Court declared that the plaintiffs, being the major co-owners satisfied the requisites of the law and subsequently ordered the sale of the properties in question. The defendant appealed, yet the judgment was also confirmed on appeal.

The minority co-owner in this case went a step further and filed an application on 6 January 2022 whereby she sought a constitutional reference based on her argument that the forced sale of her share of the properties amounted to the illegitimate taking of property which was not necessary in a democratic society. The Court of Appeal disagreed. In its deliberations, the Court stated that it is not legally required for each sale of property which is concluded by virtue of the procedures as in this case to serve the general public.

She subsequently claimed that she had suffered a violation of her fundamental right to property and that such a judgment ordering for the sale to be finalised was not in the public interest, and just in the private economical interest.

She argued that by such a forceful sale, the minority co-owner would be unjustly denied her own property, and such would prejudice her legitimate expectation to her share as agreed to in the private writing.

The rest of the co-owners successfully argued that Article 37 of the Constitution regulating the protection from deprivation of property without compensation was only applicable in cases when there was the forceful taking of property without payment of fair compensation. This did not apply in this case since fair compensation was offered to the minor co-owner.

The Court considered that the defendant's request for a constitutional reference was frivolous whereby she claimed that the First Court did not consider that the sale of the property would cause her grave prejudice. It was observed that she did not complain that this procedure did not reach the required proportionality between the interests of all the co-owners, including her own as a minority co-owner. The defendant was also receiving adequate compensation for her share of the property, thus no prejudice existed.

The Court of Appeal further observed that the minority co-owner had not resorted to the ordinary remedies available to her by law to enforce the private agreement and seek the enforcement of the same which they had voluntarily signed, and so this was not a constitutional issue which the state was due to respond to.

Based on the reasoning above, the Court of Appeal found that the request for a constitutional reference made by the minority co-owner was frivolous and vexatious in the circumstances, and so dismissed it with expenses against her.

The sale will finally take place, whether the minority co-owner shows up on the date set for the final deed of sale or not.

YOU'RE OUT

Celine Cuschieri Debono

Every person has the fundamental right to enjoy his or her property and possessions. Every person has the fundamental right to enjoy private family life. In recent years, we have seen these two human rights clash in a myriad of constitutional and property cases. The issue is: pre-1995 leases are protected under 'the old law' – Chapter 69 and Chapter 158 of the Laws of Malta. This means that properties rented before the cut-off date are renewed in perpetuity at rates of rent that are negligible compared to current market value. Such situation forces the landlord to lease the premises against his or her will with a payment of rent that is set in stone.

So, what is the remedy for the landlord in such situation? The answer to this question involves somewhat of a ping-pong game between the Constitutional Court and the Rent Regulation Board. The first step is for the landlord to obtain a declaration from the court of constitutional jurisdiction that the tenant can no longer rest on the protection that the ordinary law affords him. Then, upon obtaining such declaration, the landlord goes before the Rent Regulation Board and asks the Board to evict the tenant.

The matter, however, is not that simple. What about remedies provided in the ordinary law itself? Can these be bypassed? Can you go straight to the constitutional route before resorting to them first? This was dealt with by the Court of Appeal in the judgment bearing reference number **72/2021LM**, decided on 4 May 2022 – an appeal from a judgment delivered by the Rent Regulation Board. In this case, the plaintiffs were the owners of a property in Isla, and they sufficiently proved their title over the property.

On 10 July 1979, the property was requisitioned by the Home Secretary so that it may be leased to the father of the defendant's husband, against the rent of LM15 per year. By virtue of Chapter 69 of the laws of Malta, the tenants could stay in the property even after the property was de-requisitioned. Only two rent increases took place – in the 2009, the rent was increased to €185 annually, and in January 2019, it was increased to €209 annually.

The plaintiffs argued that this breached their fundamental right to the enjoyment of property protected under the Constitution of Malta and the European Convention on Human Rights, because they were forced to keep leasing the property at a rate that is so much lower than its market value.

Before the plaintiffs had filed their case before the Rent Regulation Board, they had already instituted proceedings before the Civil Court First Hall (Constitutional Jurisdiction) and won. The Court had declared that the tenant could no longer rely on the protection afforded by Chapter 69 of the Laws of Malta. What they sought before the Rent Regulation Board was the tenant's eviction. In fact, the Rent Regulation Board ordered the eviction of the tenant within 90 days.

The tenant appealed. The Court of Appeal was faced with one unprecedented matter. When the case was still pending before the Rent Regulation Board, the law was amended. An ordinary remedy was inserted into Chapter 69. Essentially, upon the conduction of a means test of the tenant, the Rent Regulation Board would either increase the rent due up to 2% of the value of the property, or else, if it is determined that the tenant has enough means, order the tenant to evict the premises within two years from the judgment. This meant that the landlord had a remedy at his disposal other than the constitutional route.

However, the Court of Appeal noted that the Rent Regulation Board proceedings had been filed *before* the amendments came into force (June 2021). Therefore, when the case was filed, there was no ordinary remedy. Keeping in mind the need to ascertain legal certainty as to under which legal regime the landlord's rights would be safeguarded, the Court of Appeal could not steer away from the declaration made by the First Hall of the Civil Court (Constitutional Jurisdiction).

Therefore, the Court of Appeal, rejected the appeal of the tenants and confirmed the appealed judgment in its entirety. This meant that the tenants had to be out of the property within 90 days of the Court of Appeal's judgment.

The question that comes to mind is, what will happen in cases filed in the Rent Regulation Board well *after* the coming into force of the amendments? In such case, the Courts would be faced with a scenario in which an ordinary remedy (the means test and 2% increase) does exist. Is this remedy enough? How does this remedy fare in safeguarding the fundamental right to property of the landlord? Only time will tell. I, for one, will be following.

IS THE ABSENCE OF A PROSECUTION WITNESS FROM MALTA TANTAMOUNT TO A BREACH OF THE ACCUSED'S RIGHT OF FAIR HEARING?

Clive Gerada

Witnesses shall always be examined in court and *viva voce*, subject to some exceptions. This is what Article 646 of our Criminal Code stipulates and was the matter of the Constitutional Court decision of 22 June 2022, in the names of **Osama Ebeid vs Avukat tal-Istat** (276/2021/1).

In 2018, Mr Ebeid, was charged with complicity in human trafficking and before the Criminal Court, he had raised the argument that foreign witnesses that had testified during the inquiry stage via letters of request (letters rogatory) should be brought to testify *viva voce* before the Criminal Court. The legal question that arose related to the first proviso of sub-paragraph 2 of Article 646 of the Criminal code, whereby, it mentions that:

> *"The deposition of witnesses, whether against or in favour of the person charged or accused, if taken on oath in the course of the inquiry according to law, shall be admissible as evidence:*
>
> *Provided that the witness is also produced in Court to be examined viva voce as provided in subarticle (1)* ***unless the witness is dead, absent from Malta or cannot be found*** *and saving the provisions of subarticle (8)"*

The accused lamented that this proviso is incompatible with his right to a fair hearing (article 39 (6) (d) of the Consistitution) as he is being impeded from cross-examining a witness of the prosecution. Furthermore, the accused held that his right to a fair hearing is absolute and there should be no exception to this right. Consequently, Mr Ebeid requested the First Hall of the Civil Court (Constitutional Jurisdiction) to declare that the words "**unless the witness is dead, absent from Malta or cannot be found**" violates Article 39(6)(d) of the Constitution of Malta.

Article 39 (6) (d) of the Constitution of Malta states that every person who is charged with a criminal offence shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses subject to the payment of their reasonable expenses, and carry out the examination of witnesses to testify on his behalf before

the court on the same conditions as those applying to witnesses called by the prosecution.

In its decision of 27 January 2022, the First Hall of the Civil Court (Constitutional Jurisdiction), upheld the request of the accused and declared that the first proviso in sub-article 2 of Article 646 of the Criminal Code, with respect to the part which reads: "**unless the witness is dead, absent from Malta or cannot be found**" violated Article 39(6) (d) of the Constitution of Malta and requested that its decision is communicated to the Hon. Speaker of the House of Representatives.

The State Advocate filed his appeal on 15 February 2022 and asked the Constitutional Court to revoke the judgment of the First Hall of the Civil Court and reject the claims of a breach of fair hearing made by the accused. In his appeal, the State Advocate lamented that the argument raised by the accused in relation to fair hearing was untimely given that the criminal proceedings against him were not yet concluded. Therefore, the First Hall could have never been in a position to analyse such a claim before the conclusion of the criminal proceedings.

However, the Constitutional Court held that the accused was not lamenting about the interpretation and application of Article 646(2) of the Criminal Code with respect to his case, but was lamenting about the incompatability and unconstitutionality of the abovementioned proviso *vis-a-vis* Article 39(6)(d) of the Constitution of Malta.

Therefore, the Court held that this is not a case whereby it has to wait for the criminal proceedings to be concluded so that it can properly examine the proceedings *in toto* and determine whether the same proceedings violated the right to a fair hearing of the accused. Consequently, the Constitutional Court, discarded the State Advocate's argument relating to untimeliness of the action.

The second argument raised by the State Advocate in its appeal related to the fact that the First Hall of the Civil Court decided erroneously when it held that the first proviso of Article 646(2) of the Criminal Code violated Article 39(6)(d) of the Constitution of Malta. In his reasoning, the State Advocate held that although Article 646(1) of the Criminal Code states that witnesses should always be examined in Court and *viva voce,* however, this is subject to a number of exceptions

in Article 646 of the Criminal Code. The State advocate went on to stay that the Criminal Code already provides for the "facilities" required under Article 39(6)(d) of the Constitution of Malta which allows the accused to conduct cross-examination.

In fact, the State Advocate mentioned the effects of Article 647A of the Criminal Code whereby the law allows the possibility to record a witness on audio or audio-visual means, and allows that a witness is given via video-conference or teleconference. On this basis the State Advocate argued that the same proviso that the First Hall of the Civil Court had declared unconstitutional, should not be interpreted as to say that the cross-examination of a witness, who does not reside in Malta, cannot take place. However, it should be read as to say that the testimony of such a witness could be gathered in any one of the ways mentioned above other than physically being examined *viva voce* in court. Therefore, on this line of reasoning the First Hall of the Civil Court should have never found that the first proviso of Article 646(2) breaches the Constitution of Malta.

On this particular point, the Constitutional Court held that Article 39(6)(d) of the Constitution of Malta, does not guarantee the accused's right of cross-examining a witness. However, it ensures that the accused is afforded the facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses subject to the payment of their reasonable expenses, and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution.

Therefore, Article 39(6)(d) does not guarantee a result. It does not guarantee at all costs that the accused should conduct the cross-examination of that particular witness but this article affords means to the accused, i.e. the accused is given the facilities to examine the witness under the same conditions applicable to witnesses brought by the prosecution.

In this regard, the Constitutional Court made reference to the decision of the European Court of Human Rights (ECtHR) in Strasbourg of 20 November 1989 in Kostovski v. Netherlands whereby the ECtHR held that:

> *"In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs (3)(d) and (1) of Article 6, provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage in the proceedings."*

With respect to Letters Rogatory, the Court argued that the law permits the accused to submit additional questions to be made to the witness. Thus, the Constitutional Court held that the law affords different facilities so that the accused would be able to examine the witnesses of the prosecution.

Consequently, the Constitutional Court agreed with the line of argumentation put forward by the State Advocate and held that the first proviso of Article 646(2) of the Criminal Code is not incompatible with Article 39(6)(d) of the Constitution of Malta. Thus, the Constitutional Court revoked the decision of the First Hall of the Civil Court (Constitutional Jurisdiction).

THE LIVELIHOOD OF A PERSON VS LENGTHY CRIMINAL PROCEEDINGS

Clive Gerada

On 26 January 2022, the First Hall of the Civil Court (Constitutional Jurisdiction) established that the damages due to a person, who was subjected to 19 years of delayed criminal proceedings (through no fault of his own), amounted to €1,000 for every year of delay.

Together with other co-accuseds, the applicant was charged with drug trafficking offences on 21 July 2001 and the Court of Magistrates (Criminal Inquiry) imposed a freezing order on all the assets, monies immovable property of the applicant and any transfers thereof. The applicant was a business owner and director of two companies – one of the companies was concerned with real-estate dealings.

Consequent to the lengthy imposition of the freezing order, the business carried out by the applicant went belly up. Due to this situation, the applicant defaulted in payments with the bank which led to foregoing property to the bank and also failing to make VAT payments. In fact, the Court of Magistrates (Criminal Judicature) found the applicant guilty of defaulting in VAT payments and was handed down a prison sentence.

In addition to the freezing order, for a total of 19 years, the applicant had to sign the bail book every week and had to request permission from Court in order to travel abroad. The applicant was also restricted to live off circa €14,000, annually.

The criminal proceedings against the applicant were concluded on 25 June 2020 when the Court handed down its judgment. After a total of 19 years of delayed criminal proceedings, the Court found that the applicant was not guilty of the charges brought against him.

On this basis, the applicant instituted proceedings before the First Hall of the Civil Court (Constitutional jurisdiction) against the state authorities, alleging that he was not given a fair hearing within a reasonable time because of (i) the lengthy proceedings and (ii) the applicant was not given the right to be interrogated in the presence of a lawyer.

The First Hall of the Civil Court (Constitutional Jurisdiction) noted that the delay in criminal proceedings resulted from three deteriming factors, namely:

(i) change of Magistrates during the proceedings;

(ii) incident in the chamber of the presiding Magistrate whereby all the acts relating to the applicants case were burnt down and the acts had to be reconstructed all over again; and finally;

(iii) the Attorney General's (AG) decision to summon the co-accuseds to testify against the applicant. The latter decision of the AG meant that the applicant had to first wait for the outcome of the criminal proceedings against the other co-accuseds before proceeding with the case against the applicant.

As a result of this decision, the prosecution took nearly 18 years to declare that they had no further evidence to produce and this situation was only triggered following a Constitutional reference grounded upon the alleged violation of the applicants right to a fair trial within in a reasonable time as enshrined in article 39 of the Constitution of Malta and article 6(1) of the European Convention on Human Rights.

The First Hall of the Civil Court (Constitutional Jurisdiction), after taking into consideration the facts of the case and applying the criteria established by the Constitutional Court in Raymond Urry et vs Avukat Ġenerali (decided on 27 February 2015) namely:

(a) the unreasonable delay in proceedings;

(b) nature of the criminal proceedings;

(c) the extent of uncertainty, frustration and anxiety caused on the accused;

(d) the inability of the accused to actively raise an action to expidite proceedings; and

(e) the extent of of the delay in proceedings that is attributable to the accused;

found a breach of the applicants right to a fair trial within in a reasonable time as enshrined in article 39 of the Constitution of Malta and article 6(1) of the European Convention on Human Right.

On this basis, the Court awarded the applicant the sum of €19,000 in damages. This judgment may still be appealed before the Constitutional Court and thereafter one could potentially also apply to the Strasbourg Court provided all remedies in Malta have been exhausted.

THE GENERAL INTERESTS OF THE COMMUNITY VS. THE INDIVIDUAL'S RIGHT TO PROPERTY: A CONSTANT BATTLE FOR COMPENSATION

Rebecca Mercieca

Property owners suffering a breach to their fundamental human rights find themselves continually instituting judicial proceedings against the Maltese State for compensation resulting from our state's failure to strike a fair balance between the general interests of the community and the protection of property owners' right to property.

The underlying tone of such cases is the cause of disproportionate and excessive burdens imposed on property owners who are till today, and despite relatively recent legal amendments, made to bear most of the social and financial costs of supplying housing accommodation.

The European Court of Human Rights has found a plurality of cases against Malta concerning the same subject matter, despite its due consideration towards the discretion of the State in deciding the form and extent of control over the use of such properties, the low rental value received by the property owners, hooked with their state of uncertainty as to whether they would ever recover possession of the property, the lack of procedural safeguards in the application of the law and the rise in the standard of living in Malta over the past decades.

The judgment delivered by the First Hall of the Civil Court (Constitutional Jurisdiction) on 22 March 2022 **(149/2019 TA)** mirrors the situation and procedures available to such property owners who find themselves deprived of the enjoyment of their own property due to the burden imposed on them by the State to supply social housing for others. In the above-cited case, the court declared that owners of such properties suffered pecuniary damages as well as moral damages and liquidated them at €20,000.

The court further declared that Article 12 of Chapter 158 of the Laws of Malta was in breach of the owners' (plaintiffs) fundamental human rights, specifically such rights emanating from article 37 of the Constitution of Malta, and article 1 of Protocol No.1 of the European Convention. Such because it controls the use of property without fair compensation and in an unproportionate manner almost completely withholding the owner from the right to possess his property within a definite period.

The plaintiffs in the above-cited case claimed that fair compensation was to be calculated by reducing the sum which had been paid to them by way of rent from the actual rental value of their property as established by the technical court expert appointed. Indeed, the court considered the rental value indicated by the technical expert which was valued at €410 per month in 2009 and which increased to €655 per month in 2019. However, it also considered that the plaintiffs would not have necessarily found tenants for the whole duration of the indicated period based on the same conditions.

Being a constitutional court, the court may only award damages for a breach of a fundamental human rights payable by the State and does not liquidate civil damages by way of deducting the paid-up rent from the actual rental value of the property. Finally, the liquidated sum of €20,000 was calculated by the court by considering compensation covering the period staring from when the emphyteutical deed had expired (in 2009), until the introduction of article 12B in the law (2018).

The merits of the case were as follows; Plaintiffs' father had entered into an agreement with a third party, regarding his property in Birgu, whereby he conceded the same property to the third party by a contract of temporary emphyteusis for a period of twenty-one years starting from June 1988 against the payment of LM 100 per annum. The agreement had expired, the original contracting parties had passed away and the deceased tenant's daughter, continued living there with her husband and daughter, even after the contractual term had expired back in 2009.

This was possible because of the amendments to Chapter 158 of the Laws of Malta; specifically, article 12, which states that where a dwelling-house has been granted on temporary emphyteusis for any period on or after 1979 (as is the case) on expiration of such emphyteusis, where the emphyteuta is a citizen of Malta and occupies the house as his ordinary residence, the emphyteuta is entitled to continue occupying the house under a lease from the *directus dominus*.

The plaintiffs refused to accept the rent as had been converted in accordance with article 12 of Chapter 158 and so the tenant started depositing the rent in court.

By means of this lawsuit, plaintiffs (siblings who had inherited the property previously owned by their father) alleged a breach of their fundamental right to enjoy their own Birgu property. They challenged both articles 12 and 12A of Chapter 158 of the Laws of Malta and claimed that such laws have the effect of imposing a lease against their will and without their permission, even after the expiration of the emphyteutical concession.

They claimed that such was against an insignificant amount of rent payment in no way representing fair and appropriate compensation in favour of the property owners, and thus depriving them of enjoyment of their own property. Even by the increased rent according to the 2009, and subsequently the 2010 amendments, the rent received did not come close to reflect the rental value of their property throughout the years following the expiration of the emphyteutical concession agreement.

In its legal considerations the court gave weight to the interpretations of The European Court of Human Rights of article 1 of Protocol No.1 whereby the European Court established that rental control and restrictions on the termination of the contract of lease, although legal and made for a legitimate scope and in the public interest, constitute control on the use of an individual's property. However, it remarked, that such an intervention is only in conformity with the law when it strikes a fair balance between the demands of the general community and the protections and requirements of an individual's fundamental rights.

WRITE THEM BACK UP

Edric Micallef Figallo

On 28 September 2022, the Civil Court (Commercial Section) pronounced its judgment on case **94/2021 ISB**. In substance the case involved issues on debts, or obligations, as against a debtor company and the action was filed by a creditor against the Registrar of Companies for striking off the debtor company from the Registry of Companies. Alarm bells should ring whenever this happens to a company with outstanding creditors.

The case centred around a company with whom the plaintiff had entered a number of private writings according to which his rights were unfulfilled.

Of note is that this action is not filed against the debtor company. It was filed by the plaintiff against the Registrar of Companies on the basis of article 325(4) of the Companies Act, Chapter 386 of the Laws of Malta.

The debtor company was struck off by the Registrar on the basis of article 325 of the Companies Act. This particular article relates to "defunct companies" ("*kumpaniji li ma joperawx*" in the Maltese text is more precise). This is important to empower the Registrar of Companies to clean up our registry from companies "not carrying on business" or "not in operation".

In replying to the action the Registrar submitted that the company concerned failed in submittings its annual returns since 2007 and its annual accounts since 2005. The Registrar of Companies submitted that this was an adequately sufficient basis to exercise its powers under article 325, for starters by assuming that the company was not in operation or carrying on business. Therefore, as required by article 325, the Registrar of Companies communicated with the company by virtue of two letters sent to the registered address of the company and informed it of the above and the intent of proceeding to strike off the company on the basis of article 325 of the Companies Act.

Over and above that, the Registrar of Companies had published a notice on The Times of Malta on 27 March 2020 listing the company with a number of others that were to be struck off if no objection was raised thereto within three months.

To counter the action filed against it the Registrar of Companies submitted that the plaintiff had never raised any objection to this *modus operandi* by the Registrar of Companies. Keep in mind that the actual court case here is between the plaintiff and the Registrar of Companies, not against the struck off company itself.

In a commendable manner, the Registrar of Companies declared that the action filed against it by the plaintiff was within the prescribed term of five years. The Registrar proceeded to point out that following a striking off under article 325, sub-article (6) thereof provides that the liability of every director or other officer of the company and of every member of the company shall continue and may be enforced as if the name of the company had not been struck off the register. Rightly said, but that does not mean that article 325(4) does not apply.

The Registrar acted correctly and stressed that it expected that should the Court order the restoration of the struck off company within the register, then it is to be expected that it fulfilled its obligations as against the Registrar, being the submission of the relevant financial documentation and payment of penalties due by law. Having covered its interests, the Registrar ultimately submitted that it left it in the Court's discretion and the proof in the acts of the proceedings to decide whether the struck off company should be restored, adding that it did not object to the same so that the plaintiff could exercise any of his claimed rights against the company.

These type of declarations could seem redundant. However, they are very important in allowing the Court to assess an adequate and fair solution to the action that was filed with it, and so to speak relax the litigatory tension between the parties to the suit. In this sense, the position taken by the Registrar was commendable, in the public interest and fair towards the plaintiff.

So, was this essentially a walk over for the plaintiff? Yes and no. Yes, because essentially the Court acceded to the claims of the action, which were very broad and allowed the Court wide discretion to provide a remedy. No, but only in a certain sense, because choosing the right action to file is never a consideration to take lightly. Indeed, the right action was filed in a proper way to arrive to the required scenario allowed by law.

With their behaviour in litigation the parties opened the way for the Court to accede to the plaintiff's claims. In such apparently plain sailing proceedings, the Court does not merely say yes. The Court still has to consider the acts of the proceedings and the law.

In so doing the Court exercised the ample discretion it was allowed by the action and at law, and observed that the plaintiff had substantial credits to exercise against the struck off company, resulting in an adequate interest to apply article 325(4) (this applies for "any member or creditor of the company, or any other person who appears to the Court to have an interest"). The Court considered a lack of objection towards the claims of the plaintiff, ordered the restoring of the debtor company with a clear warning to the plaintiff that should that company be struck off again this remedy might not be available again. In fact, the Court ordered said restoring for a five year term.

Of note, the Court also stated that it is to be deemed that the debtor company was never struck off from the register in the first place. However, expenses for the proceedings and for the restorartion of the debtor company were to be borne by the plaintiff, and this is probably because the Court rightly considered that the defendant Registrar acted fully within its prerogatives when it struck off the debtor company.

AZZOPARDI BORG & ASSOCIATES
ADVOCATES

Civil Law

INTERPRETING INTENTIONS

Celine Cuschieri Debono

There are different types of agreements into which one can enter; contract of sale, lease, works, and the list goes on. These agreements bring forth specific rights and obligations. In certain areas, the law specifies that a particular contract needs to be done in writing or else it is considered invalid. In sale, for example, this requirement is even more onerous since the contract needs to be made by public deed before a Notary and must be duly registered in the Public Registry according to law.

Whenever a contract is made in writing – and better yet – by public deed, it is unlikely that there will be doubt as to the nature of the contractual relationship. Indeed, oftentimes, the type of contract is listed in the margin of the contract itself. While this designation might not be the be-all and end-all of defining what type of contract one is dealing with, it does provide more certainty as to the nature of the contract.

So, what happens when an agreement is made verbally? How is one to determine what type of contract this is? These questions were tackled by the First Hall of the Civil Court in the judgment delivered on 5 April 2022 **(167/2017AF)**. The lawsuit was filed by the parents of their deceased daughter who had passed away a few weeks before. It was filed against the daughter's partner, with whom she had co-habited for eleven years prior to her death.

The case was filed against him because the daughter had named him as her sole universal heir. Therefore, as the heir, he stepped into the shoes his deceased partner, or what is better known as 'legal personality'. This means that any claim which would have originally been brought against the deceased now needed to be brought against him.

The plaintiffs claimed the sum of €30,000 and gold objects from the respondent. They claimed that when their daughter was still alive they had *loaned* her the sum of €30,000 and the gold objects, which objects the plaintiffs claimed had sentimental value. On the other hand, the respondent alleged that while the sum of money was indeed transferred to his partner's (the plaintiff's daughter's) bank account, this was not a loan but a donation. He also explained that he had never seen the gold objects with his own eyes.

Essentially, the crux of the matter was whether the transfer of the sum of €30,000 to the daughter's account was a loan or a donation. This was the ultimate determination to be made by the Court.

The First Hall of the Civil Court noted that this was not the first time that the plaintiffs had helped their daughter financially, just as they had helped their other daughter. Notwithstanding this, the plaintiffs insisted that the agreement was for their daughter to give them back the money once she settles her home loan.

As regards the gold objects, the Court noted that the day after the daughter's funeral, the plaintiffs had gone into the home that their daughter had with her partner (the respondent) with the intention of getting back their objects. The plaintiffs were then accused before the Court of Magistrates (Criminal Judicature) and were found guilty of taking the law into their own hands (*ragion fattasi*). The respondent was found guilty of causing one of the plaintiffs slight bodily harm, which judgment was confirmed on appeal.

Turning its attention back to the issue concerning the €30,000, the Court referred to jurisprudence of our Courts dealing precisely with the constituting elements of donation. It must be noted that in the case of gifts which are passed on personally from one person to another, money, and other movables – whenever their value is small – the donation does not need to happen via a public deed. It does not even need to be in writing at all. This is a derogation from the general rule that a donation must be made by public deed (article 1753(2) of the Civil Code). Of course, in the absence of writing, it becomes more difficult for the Court to determine whether the intention of the person giving the sum was to donate the sum completely or to eventually get it back.

Referring to previous judgments, the Court explained that in the case of doubt as to the intention of the person/s giving the money, the doubt needs to be decided in such person's favour. It was further noted that the general rule provided in article 1753(1) of the Civil Code stipulating that donations need to be made through a public deed was there for a reason. Indeed, having this rule in place ensured that any doubts as to the nature of the contract would be eliminated.

In any case, regard must be given to (1) the proportionality (or lack thereof) between the 'gift' given and the economic position of the donator, (2) whether the 'gift' is accompanied with tradition such that once it's given such transfer is deemed irrevocable, and (3) whether the donator had the intention and will to donate the thing and to completely and irrevocably become deprived of such thing.

Applying these principles to the case at hand, the Court noted that before such transfer was made, the plaintiffs had already financially helped their daughter. For example, they had helped her purchase furniture for her home and financed trips abroad. It was only these last €30,000 that were sent to her via bank transfer. The Court also remarked that the plaintiffs had also advanced a substantial amount of money to their other daughter of which moneys only €2,500 were given back – and only a short while before the case was filed. The version of the plaintiffs was that they had loaned their daughter the money because their daughter was ill and was worried that she would not manage to keep working till pensionable age and thus satisfy her home loan.

However, the Court considered that only part of the €30,000 was used by their daughter for this purpose. Therefore, the Court held that the plaintiff's version of events was not tenable. For this reason, the Court concluded that the sum had been irrevocably donated by the plaintiffs to their daughter. Furthermore, the Court held that the allegation that gold objects were loaned to the deceased and that these were in her possession at the time of her death, was not satisfactorily proven by the plaintiffs.

For these reasons, the Court rejected the claims of the plaintiffs in their entirety. This judgment may still be appealed.

ON FREEDOM OF CONTRACT

Edric Micallef Figallo

The notion of the freedom to contract is hard to condense in a legal article. On 18 July 2022 the Court of Appeal (Superior Jurisdiction) pronounced its judgment on a first instance partial judgment by the First Hall of the Civil Court given on 14 December 2016 on application number **66/15/1 LM**.

This judgment provides valuable insights on the freedom to contract under Maltese law. There are many attempts to justify a limitation to the freedom to contract and these limitations must be justified morally, politically and legally. Two generally broad ways immediately come to mind when challenging a notion of the absolute freedom to contract.

The first would be an explicit and direct legislative limitation which is relateively recent in the public understanding, and is most often than not grounded in public policy (such as in environmental law and national heritage law) and the protection of weaker contractual parties (such as in consumer law). The second, albeit less direct, is limitations according to law in its broader sense and is touched upon in the commented judgment.

Most often than not parties to a contract draft and agree to terms and conditions which they voluntarily accepted and expected themselves to be bound by them through deference to common reason and the fundamental principle *pacta sunt servanda* (agreements must be respected). Parties are often oblivious to higher notions of legal understanding, and professionals may act likewise without negligence.

This commented case involves a scenario in which the wording adopted by the parties, as clear as can be linguistically speaking, is far from it in its legal ramifications and the courts had to depart from the apparent agreement of the parties to apply, at least to part of it, a higher law than the parties' clear contractual will.

In this given case we are delving into the ancient legal realm of emphyteusis, a notion stemming back to Ancient Greece and consolidated by the Ancient Romans in their Roman law. In Malta we know it as *enfitewsi*, from Italian *enfiteusi*, although most colloquially (and erroneously) know it as "*ċens*", which in reality is just the payment given for the contract of emphyteusis.

Of note is that in emphyteusis the *utilista* can transfer his title, and even subdivide his title, and can basically act as the actual owner of the property given to him under title of emphyteusis. The *utilista* is the person who gains hold of the property and for all intents and purposes acts as if the actual owner of the same for as long as his emphyteutical title perdures. Emphyteusis grants the *utilista* very wide flexibility and freedom to contract on immovable property. The notions of the freedom to contract thus come to the fore with greater possible emphasis.

Turning back to our case, the parties involved were the *directus dominus*, being the real bare owner of the land who constituted the original emphyteusis, and somebody who had acquired an apartment built on such a land from the previous owners of the apartment itself. The latter were the *utilisti* in the original emphyteusis as constituted by the bare owner. The acquisition of the apartment by the defendants was from the *utilisti* and not from the *directus dominus* (bare owner).

However, the deed of sale contained a provision reserving the terms and conditions of the original emphyteusis constituted by the bare owner. The condition which led the parties at odds stated that "The building on the said land cannot be higher than two storeys from road level, and may not exceed the height of twenty seven feet." As linguistically clear as can be and without room for interpretation.

However, the law failed in allowing the straightforward explicitness of that text. How so?

The First Hall of the Civil Court had accepted the plea of the defendants that the contractual provision involved the creation of an easement (*servitù*) of *altius non tollendi*, simply put an easement which does not allow the owner from doing something involving the raising of higher structures. The plaintiffs, who appealed to the Court of Appeal, held instead that this was a simple contractual obligation and apparently nothing more, and that it had to be respected. The Court of Appeal disagreed with the plaintiffs and held that the contractual provision amounted to *altius non tollendi*.

It quoted from an appeal judgment Baruni Salvino Testaferrata Moroni Viani et vs Hubert Mifsud given by the Court of Appeal on 22 November 1995 which stated that every obligation, including a contractual one, must have legal worth and that it must not be left in a legal vacuum but classified under a field of law.

Given the case at hand, the Court of Appeal referred to another judgment given in the names Philip Fenech et vs A & R Mercieca Limited on 22 May 2008 so as to indicate how to determine whether a contractual provision amounted to a simple contractual obligation or an easement such as *altius non tollendi*. The main determining factor is whether a tenement holds a relationship of dominance over the other in the way it is situated, and the Court of Appeal held that this was the case and one had an easement of *altius non tollendi*.

The above demonstrates some limitations to the freedom to contract. In reality in the judgment discussed the plaintiffs had appealed and lamented that the first Court had based itself on irrelevant considerations in relation to the first claim the plaintiffs had raised and the appeal judgment was quite of a procedural nature so to speak, however it allowed a highlight on the freedom to contract. Given that this was an appeal on a partial judgment, the case went back to the first Court to be determined in full and according to the judgment of the Court of Appeal.

LIES, DEFAMATORY COMMENTS, MALICE, HONEST OPINION, CRITIQUE, LIBEL. WHERE DO WE DRAW THE LINE?

Rebecca Mercieca

Chapter 570 of the Laws of Malta lays the parameters and provides for damages in cases of defamation because of another's actions. Case number **60/2019 RM** decided on 7 July 2022 dealt with a series of tweets uploaded online by the defendant, which according to the plaintiff, had the aim of disturbing and reducing the plaintiff's personal and professional reputation, integrity and honour based on allegations and insinuations which were untrue and false.

The case concerned tweets published in February 2018, and March 2019. By a preliminary judgment, the court had declared that the action concerning the 2018 publications was time-barred since a year had lapsed from date of publication until date of filing of the defamations suit, which was on 27 of March 2019. Thus, the court thus only considered the March 2019 tweets in its deliberations.

The court observed that for a defamation suit to be successful, there must be an inference drawn to tie the aggrieved person to the publication, as if the aggrieved person is not identified in the publication, one cannot consider that such a person did suffer damage to his or her reputation by consequence of the publication. On this fact, the court quoted and referred to Collins:

> *"A statement can identify a person even though the person is not referred to by name, if it contains material which would lead people acquainted with the person to believe that he or she was the person referred to. Any damages award in such a case needs to take into account that not every person to whom the statement was published will necessarily have understood it to be of and concerning the claimant."*

On this matter, the court concluded that even though the plaintiff's full name were not published, the tweet did include surnames and the profession the plaintiff practised, making the claimant sufficiently identifiable. The plaintiff also proved that there were individuals who had indeed identified him from the tweets.

The gist of these tweets as published by the defendant was that the plaintiff had committed tax fraud, and such fraud could have possibly been the motive behind a homicide of an investigative journalist; followed by a question as to why the plaintiff and his associate had not yet been arrested in relation to these facts (being the tax fraud and not the homicide itself).

On proof of damage to one's reputation, the court quoted Gatley 'On libel and Slander':

> "*Proof that serious harm to reputation has actually occurred will obviously suffice but the claimant need only prove that such harm was likely. The harm need not manifest itself in financial terms, though it may do so: serious harm for the purposes of this provision may also be established by proof that the effect of the libel was to cause others to shun the claimant, or that the claimant was caused serious injury to feelings, distress, hurt and/or humiliation*."

The court further acknowledged that it is generally accepted that alleging that a person is "dishonest or a fraud, a hypocrite, dishonourable, immoral, or actuated by some improper motive, insolvent or unwilling to pay debts or incompetent or otherwise unfit for some role" because of their actions, is considered to be defamatory as once they are identifiable such allegations place one's integrity in bad light and may cause serious prejudice to one's reputation. In this case, such allegations, among other consequences led to the revocation of licenses which the plaintiff enjoyed prior to the tweets.

Defendant, author of the tweets in question, defended the case whereby among others he claimed that the plaintiff had not even been mentioned by name in the tweets in questions. Furthermore, he claimed that this was his honest opinion, that the publication amounted to a fair comment regarding an event of public interest which are reasonable in a democratic society, and that the publications were tantamount to a "privileged statement." The onus of proof of whether a statement can be regarded as a privileged statement or otherwise, is burdened on the person alleging it; in this case, the author of the tweets himself.

A privileged statement can be classified as such if it is a publication on a matter of public interest which has already been given publicity in a manner accessible to a large audience on an established medium; or the publication is a peer-reviewed statement in a scientific or academic journal; or the publication is a report of court proceedings protected by "absolute privilege."

Publications covered by absolute privilege include publications of reports of any proceedings in a court of justice in Malta, any evidence given in good faith and according to law before a court or before a tribunal, publications made in pursuance of an Act of Parliament or by authority of the President of Malta or of the House of Representatives, or publications consisting of communications between public officers, contractors of the public service or officials of public corporations, reports of inquiries held in terms of any law, or statements by public officers that are made in good faith in the public interest including the interests of national security, territorial integrity, public safety, the prevention of disorder or crime or for the protection of health or morals.

The court found by publishing the tweets in question, the defendant was not acting specifically and solely to harm the plaintiff or to create controversy but had based his tweets on a factual basis and such constituted his honest opinion.

Quoting Gatley on the defence of "honest opinion," the court reproduced the following quote:

> "*There are matters on which the public has a legitimate interest or with which it is legitimately concerned, and on such matters it is desirable that any person should be able to comment freely, and even harshly, so long as he does so honestly and without malice" [...] being "lack of belief in the opinion expressed*."

After careful and detailed deliberations, the court declared that the defendant's tweets did refer to the defendant's honest opinion and so the plaintiff's requests were denied with costs against him.

EVICTION FROM GOVERNMENT OWNED PROPERTY - A GAME OF HIDE AND SEEK

Nicole Vassallo

Article 167 and the subsequent provisions of the Code of Organisation and Civil Procedure (Chap. 12 of the Laws of Malta) allow a lessor, interested in demanding the eviction of his lessor from an urban or rural tenement, the faculty of requesting the Court to directly accede to his demand without proceeding to trial, provided that the action is one falling within the competence of the Superior Courts. In actions of this nature, referred to as "Special Summary Proceedings" (in Maltese - "Proċeduri bil-Giljottina"), the defendant is precluded from entering a defence to the action and essentially, from exercising his right to be heard on the merits, unless he is successful in proving the existence of a valid defence to the case or a fault in the procedure adopted by the plaintiff.

In a judgment delivered on 13 May 2021 in the names **Indis Malta Limited (previously known as Malta Industrial Parks Limited) vs Daniel Farrugia and Elton John Zammit**, following a demand by plaintiff as envisaged in Article 167 of Chap. 12 of the Laws of Malta, the First Hall of the Civil Court ordered the defendants to vacate and release from their possession in plaintiff's favour the leased premises, namely the factory 'KKW038' in the Industrial Section situated in Kordin, which premises had been transferred under a title of temporary emphyteusis for a period of 65 years.

This judgment was overturned by the Court of Appeal on 23 June 2022.

The facts of the case date back further, however, to an emphyteutical concession originally made by Malta Industrial Parks Limited (as it was then known) in favour of Dolphin Industrial Services Limited (of which Mr Farrugia and Mr Zammit, the defendants, are Directors), by means of a deed published in the acts of Notary Pierre Attard on 22 July 2004. The emphyteutical deed was made subject to a number of conditions, namely, that the emphyteuta recruits a minimum number of 35 employees in a period of 3 years and maintains the recruitment of said employees throughout the term of the emphyteutical concession and uses the premises exclusively for industrial purposes.

In fact, Dolphin Industrial Services Limited i.e., the emphyteuta, had allegedly stopped making use of the factory, thereby violating the conditions stipulated in the emphyteutical deed.

On 20 November 2019, Malta Industrial Parks Limited filed proceedings against Dolphin Industrial Services Limited, for the purpose of asking the First Hall of the Civil Court to declare the nullity of the emphyteutical concession following a breach of the conditions stipulated therein by the defendant company and consequently, to order the defendant company to return possession of the premises in its favour.

While the proceedings for nullity were still ongoing, on 6 July 2020, the defendant company Dolphin Industrial Services Limited i.e., a party to the proceedings, was struck off the registry. Therefore, the plaintiff company chose to rely on the provisions of Article 325 of the Companies' Act (Chap. 386 of the Laws of Malta) which state that the assets of the company shall devolve upon the Government of Malta and with that reassurance, withdrew the proceedings in their entirety against the company.

Seeing as Mr Farrugia and Mr Zammit as directors of the company Dolphin Industrial Services Limited continued to occupy the premises in the absence of a valid title at law, despite the latter having devolved upon the Government of Malta, Indis Malta Limited instituted proceedings against Mr Farrugia and Mr Zammit in their personal capacity in February 2021, demanding their eviction from the premises (Indis Malta Limited vs Daniel Farrugia and Elton John Zammit). As mentioned above, judgment in this regard was delivered on 13 May 2021.

To the plaintiff's dismay, however, the 'original' defendant company Dolphin Industrial Services Limited was reinstated, and its name placed back on the register following a decision of the Civil Court (Commercial Section) on 18 March 2021 i.e., when the proceedings against Mr Farrugia and Mr Zammit had already been lodged by Indis Malta Limited. Nevertheless, the plaintiff company chose not to alter its demands regarding the illicit possession of the property by individuals Mr Farrugia and Mr Zammit.

The judgment of the First Hall of the Civil Court whereby the defendants Mr Farrugia and Mr Zammit were ordered to vacate the premises on the basis of Article 167, was overturned by the Court of Appeal in its Superior Jurisdiction on 23 June 2022. The Court of Appeal referred to the decision 18 March 2021 which reinstated company Dolphin Industrial Services Limited and effectively, "*il-kumpannija għandha titqies li kompliet bl-eżistenza tagħha daqslikieku isimha ma kienx tħassar*."

The Court of Appeal went on to say that the defendant company must have been treated as never having devolved upon the Government of Malta, owing to its reinstatement, and so the plaintiff company had no right at law to request the eviction of the defendants in their natural capacity without first seeking to annul the emphyteutical concession or waiting until the end of its term.

WHAT'S DONE IS DONE – THE PRINCIPLE OF *RES JUDICATA*

Celine Cuschieri Debono

For the administration of justice to be truly fair and just, there exists the notion of legal certainty. This ensures that when the time limit for appeal elapses after a judgment is delivered by a Court of First Instance or after a judgment is delivered by the Court of Appeal, the matter between those two or more parties stops there. Subject to very limited exceptions in the case of a retrial, the matter is decided (*res judicata*). And no person involved in the proceedings (whether a natural person or a company or any other entity) may file subsequent proceedings against the same person/s, on the same object and on the same juridical fact. In other words, once the case is closed, the matter cannot be opened up again.

There are many reasons for this, the first being that legal certainty must be ensured to give finality and closure, and to ensure that judgments given by Courts are duly executed. Another reason is that without the principle of *res judicata*, parties would be free to litigate and re-litigate lawsuits *ad infinitum*, something which negatively affects the administration of justice not only in principle, but also in practice.

The above was precisely what the First hall of the Civil Court, presided over by Hon. Justice Audrey Demicoli, dealt with in a decree delivered on 14 October 2022 in the names of **Kunsill Lokali Mosta vs WM Environmental Limited**. In this case, the plaintiff claimed the refund of €21,560.14 since it argued that the defendant company was in default of one of the tenders which had been awarded to the defendant company. It argued that the sum of €32,019.75 (the sum due to the defendant company for one of the tenders), had to be reduced to €10,673.25 due to this alleged default under the contract. The plaintiff argued that sixty default notices had been issued against the defendant company and these need to be factored into the final sum owed to the defendant.

The defendant company raised the plea (*eċċezzjoni*) of *res judicata*. It pointed out that the merits of this case had already been decided in a judgment delivered by the First hall of the Civil Court on 9 December 2021. The judgment referred to was between the same parties but it was WM Environmental Limited that was the plaintiff and the Mosta Local Council that was the defendant. In the judgment of 9 December 2021, the Council had been ordered by the Court to pay the sum of €44,251 to WM Environmental Limited, a judgment that had not been appealed. Now, in

the first proceedings – decided on 9 December 2021 – the Mosta Local Council was absent (*kontumaċi*).

This means that the Council failed to appear for the first sitting before the Civil Court. The first case was filed as a special summary proceeding (*giljottina*) and meaning that the defendant (in that case, the Council) *had* to appear during the first sitting to adequately convince the Court that there were enough reasons for the Court to decide the matter via normal procedure and not via special summary proceeding. But alas, the Council did not do so. And this is what led the first Court to acceed to the claims of WM Environmental Limited.

Back to the proceedings filed by the Council against WM Environmental Limited, i.e. the second proceedings filed, the Civil Court First Hall was faced with this factual context and had to determine whether the matter was truly decided or not – whether the matter was *res judicata*. The Civil Court First Hall carefully analysed the three elements that must subsist for the plea of *res judicata* to prevail.

The first element is that both cases need to involve the same parties. This was indeed the case since the only difference was that in the second case, the proceedings had been filed in the inverse, but still, the exact same parties were involved. Therefore, the first element was satisfied.

The second element is that both cases need to be on the same object. Now, the object of the first case was a sum of money that WM Environmental Limited claimed was due from the Mosta Local Council in relation to the two tenders. In this regard, the Court noted that the argument which was raised by the Council in the first case was actually the basis for the second case. Thus, the second element was also satisfied. The third element is the juridical fact upon which the case is filed – i.e. the story, the facts, which led to the case being filed. In this regard, the First Hall of the Civil Court noted that the first Civil Court had already expressed itself on the facts of the case in a clear and inequivocal manner.

The above is what led the First Hall of the Civil Court to decide that the lawsuit was indeed *res judicata* and abstained from taking further cognizance of the case.

WHEN CAN EXECUTIVE ACTS BE CHALLENGED?

Frank A. Tabone

Article 281 of the Code of Organization and Civil Procedure, Chapter 12 of the Laws of Malta regulates the manner on how executive acts may be impugned. It provides that any person against whom an executive act has been issued including any interested party, have the right to request the court to revoke the executive act either totally or partially. Nevertheless, article 281 further provides that for a person to positively challenge an executive act, it can only be done for 'any reason valid at law'.

The question here is what the legislator meant with the phrase by 'any reason valid at law'. The answer is found through several jurisprudence whereby it has been established that executive warrants can only be challenged on a 'mistake or error' in its form. This was reaffirmed in a judgment by the First Hall Civil Court on 6 September 2022 in case **Dr Julian Farrugia noe vs Vista Jet Limited**.

In this case Visa Jet Limited appealed an executive warrant before the court and requested for: (1) the cancellation and revocation of the execution of the executive warrant issued on 27 July 2022. The executive warrant was issued at the request of the executor Michael Pammer in relation to credit due as established by the Declaration of Executability issued under article 18(1) of Regulation 1896/2006 (EC); and (2) the suspension of the execution of same warrant in line with article 44(1) (c) of Regulation 1215/2012 (EU).

Regulation 1896/2006 (EC) which is a legislation of the European Union, and which is a binding legislative act, relates to the enforceability of the European Order for payment which was enacted to simply speed up and reduce the costs of litigation in cross-border cases concerning uncontested claims of a pecuniary nature by creating a European Order for payment procedure.

Article 16 of the latter regulation provides that the defendant can also within thirty days of service of the order, oppose the same order. Article 18 further dictates that if during the thirty days period, no opposition has been filed with the court of origin, the court shall than without undue delay, declare the European Order for payment as being enforceable.

Article 44(1)(c) of Regulation 1215/2012(EU) further provides that in the case of an application for refusal of enforcement of a judgment, the court in the Member State addressed may, on the application of the person against whom enforcement is sought, suspend either wholly or in part, the enforcement proceedings.

In his submissions Vita Jet Limited, raised three heads of grievances and argued that the executive warrant subject to the proceedings should be revoked by the court on the following grounds: (1) applicant alleged that he was not notified by the foreign court, in this case the Austrian court, with the request made by the executor Michael Pammer, thus in violation of article 45(1) and 46 of Regulation 1215/2021(EU); (2) he was not provided with a translation of the order in a language that he can understand as provided in article 21(2)(b) of Regulation 1896/2006(EC) and (3) the order was issued by a court without having jurisdiction to issue same.

The Executor Michael Pammer rebutted the submissions made by Vista Jet Limited by stating that for the revocation of the executive warrant subject to the proceedings, the application should not have been filed under article 281 of Chapter 12 of the Laws of Malta but under the provisions of article 825A *et sequitur* of Chapter 12 of the Laws of Malta, which latter articles regulate the applicability of European Union Regulation and the enforcement of judgments delivered by courts or tribunals outside Malta.

The court after having heard the submissions of the parties and after having analysed the main facts of the case, observed that the action filed by applicant, was a procedure in terms of article 281 of Chapter 12 of the Laws of Malta. The applicant contested the executive act issued following a request made by the executor before a foreign court and enforceable under the European Order for payment.

The court observed that under article 281 of Chapter 12 of the Laws of Malta an executive act can only be challenged if it has been issued by the wrong Court or if there is a defect in its form. It must be shown that there exists a reason considered to be serious and valid to bring about the full or partial revocation of the executive warrant. The Court further remarked that any requests made under article 281 should be made explicitly, to request for the cancellation in whole or in part, of

the executive act and is not intended to halt the execution of a warrant issued by a competent court.

The court in its judgment also commented on the fact that the executive warrant subject to the proceedings was issued following a European Order for payment issued by a competent court and which order was not overturned by a decision given by any other court. Hence, it concluded that the warrant constituted an executive title. It also observed that the reasons brought by the applicant upon which he requested the revocation of the executive act, goes beyond to what the court is expected to do in such proceedings instituted under article 281 of Chapter 12 of the Laws of Malta.

The court also agreed with the arguments made by the executor Michael Pammer and declared that Vista Jet Limited, to attack the warrant subject to the proceedings, should have instituted proceedings envisaged under article 825A *et sequitur* of Chapter 12 of the Laws of Malta and not under the provision specified under article 281 of Chapter 12 of the Laws of Malta.

Finally, the court rejected the request filed by Vista Jet Limited for the revocation of the executive warrant issued following a European Order for payment, with costs to be borne by the applicant.

CONTRACTUAL OBLIGATIONS VS. COVID-19

Celine Cuschieri Debono

The Covid-19 pandemic has reshaped the world as we know it. It is undisputed that people, industries, and entire sectors have been impacted greatly. Granted, the extent of such impact may vary from sector to sector, but no area is truly immune from the pandemic's clasp. The Court of Appeal (Inferior Jurisdiction), in a judgment delivered on 19 January, in the names of **Steve Baldacchino et vs Lands Authority (10/2021 LM)**, has dealt particularly with the effect that the pandemic has had on the performance of contractual or pre-contractual obligations. In a nutshell, the Court inquired: does the Covid-19 pandemic constitute *force majeure*?

In simple terms, *force majeure* in the realm of contract law is invoked successfully when the person bound to perform an obligation is unable to perform it due to a force which is external, unforeseeable, and out of his or her control. This is what the plaintiffs argued at first instance and at appeal stage. The facts of the case were as follows. Plaintiffs Baldacchino had applied with the Lands Authority for the temporary emphyteutical concession (*ċens temporanju*) of a property in Bormla. This was after a notice by the Lands Authority was published in August 2019. Following this, the plaintiffs duly submitted their bid bond as required and awaited news from the Authority regarding their bid. A condition of the tender was that if an applicant fails to sign the relative contract on the date and time stipulated, such applicant would not be refunded the bid bond.

The plaintiffs were informed that their offer had been accepted in September 2019. However, in no way were they informed when, where, and at what time the contract was going to be concluded. A saga of futile attempts at corresponding with Authority ensued. At this stage, the plaintiffs wanted to be informed precisely when and at what time the contract was going to be concluded. The plaintiffs were finally called upon by the Authority to sign the contract in May 2020.

As one may agree, between September 2019 and May 2020 there was a fundamental change. The Covid-19 pandemic had hit. A contract that was initially negotiated in pre-Covid-19 times needed to be concluded in a context as rewarped by the pandemic. The plaintiffs, whose livelihood depended on the hospitality industry, were especially affected.

As one of the plaintiffs explained in her testimony, the plaintiff's financial standing pre-Covid-19 and during the Covid-19 pandemic were two very different things. This is especially so when one notes that the plaintiff's reason for applying for the tender in the first place was so that works on the premises take place, with the intention of hosting tourists.

The Administrative Review Tribunal, at first instance, dealt with this issue of *force majeure*. It referred to several jurists who opined as to what falls within the ambit of *force majeure* and what doesn't. The common thread between these jurists was that for this to ensue, the person needs to be completely and categorically prevented and unable to perform the contractual obligation in question. It is not enough that the obligation is more difficult to perform – it needs to be *impossible* to perform it. The Tribunal likened the pandemic with the global situation following two world wars. Even in such cases, foreign courts distinguished between impossibility of performance of obligations on the one hand and mere increased difficulty on the other.

So, in which category do the facts in question fall into? The Administrative Review Tribunal explained the circumstances which need to be present for *force majeure* to ensue. Firstly, the event needs to be irresistible, resulting in the performance of the obligation being completely impossible. Secondly, the event needs to be unforseeable. Thirdly, the event needs to be external of the will of the person involved. And finally, the person who is to perform the obligation must not be at fault for the happening of said event.

Despite the detailed analysis undertaken by the Tribunal, this still was not enough for it to decide *completely* in the plaintiffs' favour. What the plaintiffs wanted was essentially to be refunded the bid bond. Instead, the Tribunal ordered the Authority to set a new date for the conclusion of the contract. Indeed, the Tribunal held that while the pandemic may have been 'somewhat of an obstacle' to the plaintiffs, it still was not enough to constitute *force majeure*.

The Court of Appeal (Inferior Jurisdiction) begged to differ. The plaintiffs argued that the existence of the pandemic was and is 'notorious, public, and uncontested, in such a way that the impossibility of performance invoked by the plaintiffs should not have been doubted.'

The Court first held that since the plaintiffs were not given a precise date and time for the conclusion of the contract, they should not have to forfeit the bid bond.

The Court then delved into the whats, whens and hows of *force majeure*. It made special reference to the adverse and grave effects that the pandemic had on the hospitality industry. It emphasised that the plaintiffs made a living from this industry and that their finances were severely destabilised by the pandemic. The Court remarked that the plaintiffs 'operate in a sector riddled with uncertainties and cancellations which made it very difficult for investors such as themselves to plan far ahead into the future.'

For these reasons, the Court of Appeal overturned the Tribunal's judgment and acceded to the plaintiff's claims in their entirety.

PROVISIONAL ENFORCEMENT OF JUDGMENTS BY ORDER OF THE COURT

Keith A. Borg

Article 266 of the Code of Organization and Civil Procedure lays down that a judgment which does not constitute a *res judicata* (a cause that has been adjudicated by a competent court and therefore may not be pursued further by the same parties) shall not be enforceable unless, on the demand of the interested party, such judgment is declared by the court to be provisionally enforceable. A demand for such a declaration may also be made to an appellate court at any time prior to the delivery of the judgment on appeal.

The court shall declare a judgment to be provisionally enforceable if it is satisfied that delay in the execution of the judgment is likely to cause greater prejudice to the party demanding the declaration than such execution would cause to the opposite party. However, the party against whom execution of a judgment declared provisionally enforceable under this article is sued out, shall, in case of reversal or variation of such judgment, be entitled to damages and interest.

In its decision of 8 August 2022, the Constitutional Court in the cause of **Dr Naged Megally vs 1. Onor. Ministru tas-Saħħa; u 2. Celia Falzon fil-kwalita` tagħha ta' Kap Eżekuttiv u in rappreżentanza tal-Isptar Mater Dei** dealt with the application of the aforestated article.

By judgment delivered on 23 June 2022, the First Hall of the Civil Court in its Constitutional Jurisdiction, the plaintiff had been declared as having suffered inhuman and degrading treatment in terms of article 36 of the Constitution and article 3 of the European Convention as well as discriminatory treatment due to the applicant's disability in violation of article 45(2) of the Constitution and the article 14 of the European Convention.

The Court in First Instance had also ordered, with immediate effect the removal of plaintiff's suspension from his workplace, his return to the workplace in the same position occupied prior to his suspension as well as the restitution of such part of the plaintiff's salary and other benefits that could have been removed due to the suspension. This judgment was appealed.

Pending appeal, plaintiff moved for the provisional enforcement of the aforestated decision, arguing that any delay in the execution of the judgment in question, would certainly cause a much greater prejudice to him than any prejudice that the defendants may suffer, given that the plaintiff, pending appeal was still suspended from his job and receiving one half of the salary due to him.

The Constitutional Court observed that the plaintiff had filed suit on 11 February 2020; his complaint related to the incident that had occurred on 10 July 2018, during working hours at the ultrasound clinic in Mater Dei hospital. The plaintiff alleged that in that incident Professor Yves Muscat Baron had insisted on the plaintiff leaving immediately from the room where the plaintiff was tending to his patients. The plaintiff alleged that he was manhandled outside the room in the most humiliating and inhuman way and was placed on a chair outside the room. The plaintiff argued that such action was discriminatory against persons who, like him, suffered from a disability.

The plaintiff also alleged that on that very day the Chief Executive Officer of the hospital (Ivan Falzon) had threatened to fire him unless the plaintiff complied with what he was told. Furthermore, by order of the Minister of Health an inquiry was lauched into the incident following the plaintiff's request.

The Court also noted that by means of a letter dated 14 October 2021, sent to the plaintiff by the Public Service Commission, he was informed that the Chief Executive Officer of Mater Dei hospital had made a recommendation for the plaintiff to be temporarily suspended on half salary "[...] for alleged inadequacy of care and major deficiencies in patient care which have put the patients lives at risk." In the letter it was also stated that the Chief Executive Officer of Mater Dei hospital had suspended the plaintiff from work with effect from 12 October 2021, until the suspension on half salary was finally approved.

Then in October 2021 a board of inquiry was set up to investigate the plaintiff with respect to two patients in cases that had occurred in those same months. Subsequently, by letter dated 18 November 2021, the Chief Executive Officer of the hospital informed the plaintiff that disciplinary proceedings would be initiated against him due to "two alleged serious incidents of missed diagnosis." These incidents,

however, were unrelated to the merits of the case at hand.

Zooming in on the application of article 266 of the Code of Organization and Civil Procedure, the Constitutional Court declared itself not to be satisfied that the delay in the execution of the judgment in first instance would cause greater prejudice to the plaintiff than the execution would cause to the opposing party, when then the defendants' appeal was still pending. The Court concluded thus after considering that:

i) the appeal at hand included a plea regarding the appreciation of the evidence made by the court in first instance;

ii) the hearing before it was scheduled for October 2022, thereby forseeing no unreasonable delay to final judgment;

iii) should the appeal be rejected and the judgment of the court in first instance be confirmed, the plaintiff would still be placed in the position that he was in prior to his suspension;

iv) from the documentation submitted to the Court it appeared that there existed a decision that was taken in accordance with the Disciplinary Procedure of the Public Service Commission with a precautionary suspension against the plaintiff being ordered with reference to the two cases of patients who were treated in September and October 2021 and which led to the commencement of disciplinary procedures against the plaintiff.

The Consitutional Court therefore proceeded to dismiss the application of the plaintiff, with costs.

RECENT REMEDIES TO EXPROPRIATION

Edric Micallef Figallo

On 25 May 2022 the Land Arbitration Board delivered its judgment on application number **7/2019 NB**. This board is essentially a judicial organ and is presided by a Magistrate. It is essentially set up in the context of Chapter 573 of the Laws of Malta, the Government Lands Act. This latter Act, which in its original form come about through ACT XVIII of 2017, is relatively recent and was amongst others enacted with the the purpose "to regulate the administration of Government land, land acquisition for public purposes […]"

In the given case we are specifically dealing with the aspect of land acquisition for public purposes and the procedures for compensation for such acquisition.

The action brought forward was according to article 67 of the Government Lands Act. The first sub-article of article 67 essentially provides the substance of an action under the said article:

> *"When land not subject to a Declaration is occupied or administered by a competent authority, anyone who proves to the satisfaction of the Arbitration Board that he is owner of the land by valid title may either request that the land be acquired by absolute purchase by the Lands Authority or else that the land be relinquished free and unencumbered from any occupation."*

The "Declaration" referred means the "Declaration issued by the Governor, Governor General of Malta or by the President of Malta before the entry into force of this Act or from the Chairperson of the Board of Governors of the Lands Authority in accordance with article 38". Essentially, this declaration refers to the well known (in)famous declarations expropriating private land for alleged public purposes. The definition under this recent act of Maltese legislation harks back to a time when Malta was under colonial rule (reference to the "Governor"), clearly showing that issues on expropriated private property could lead back well in the past and may still require a positive and conclusive resolution.

It is to be noted that an officer from the authority testified that no said declaration had been issued in relation to the affected land, so that issue became moot.

The facts of the case pitted the plaintiffs as the private owners by title of temporary emphyteusis on a stretch of land which to this day is used as a street for public purposes. The plaintiffs initially and successfully alleged that the land was expropriated without any declaration. This grounds their action according to article 67 of the Government Lands Act and the defendant in such an action is the Lands Authority.

Amongst the unsuccessful defensive pleas raised by the defendant one held that the plaintiffs had to prove their title, that the Lands Authority never received any request for expropriation (from another public authority), that the praxis of our Courts had always been that the fact that land was "*asfaltata*" does not mean that the title of property thereon passed to the State (*"Gvern"* sic!), as well as pleas against the evaluation of the property submitted by the plaintiffs and that in such an action the plaintiffs are not entitled, and the Lands Authority is not liable for any material or moral damages.

Of interest is the assertion of the plaintiffs that prior to the promulgation of the Government Lands Act there was no ordinary remedy for owners who had their property expropriated without the relevant declaration. An ordinary remedy at law is essentially one not involving constitutional or fundamental rights actions. The plaintiffs in fact referred to numerous courses of action adopted in the past for factual situations akin to those of the plaintiffs, pointing out that the Government Lands Act was amongst others intended to make amends for the failings of Chapter 88 of the Laws of Malta, the repealed Land Acquisition (Public Purposes) Ordinance.

The defendant authority had referred to a score of jurisprudence to sustain its defensive pleas, however the plaintiffs countered that these were inapplicable as they applied to a legal situation in which the Government Lands Act was not in force or even envisaged, and they certainly did not apply to the dynamics of article 67 of the Government Lands Act, under which the plaintiff's action was brought forward.

It is to be said that while the judgment is well reasoned and referenced with applicable jurisprudence, it essentially brought to nought the plea of the Lands Authority that the expropriated land was not a street for a public purposes administered by the State through the Lands Authority. This obliterates the position of the Lands Authority which purports to make it fundamental that an expropriation is formally made by itself upon a request of a competent authority (like Transport Malta or Infrastructure Malta). This is not the case for the action brought forward, as what is central is the private title involved, that a public purpose is present and that administration thereof lies with the Lands Authority or another public competent authority.

The Lands Authority attempted to deviate from the clear and simple wording of article 67 of the Government Lands Act, attempting to introduce requirements not discernible from said wording. The plaintiffs successfully submitted that and the Land Arbitration Board agreed.

Having established that the article 67 requirements that no declaration was issued, that the private ownership of the land was satisfactorily established and that said land is administered by the State for a public purpose, were met, the Land Arbitration Board proceeded to order the remedy envisaged by article 67. This involves that the land in question was to be purchased by absolute title by the Lands Authority and that the latter had to declare within two months the amount of compensation that in its opinion should be due to the plaintiffs. Of note is that under article 67(6) if the parties disagree on the compensation due, then it is the Board that shall set said compensation and this cannot be higher than that requested by the plaintiffs or lower than that declared by the authority.

This judgment is subject to appeal.*

Note by the editor:
The Lands Authority appealed this judgeemnt. The Court of Appeal partially acceded to this appeal. It proceeded to vary the LAB's decision of the 25th of May 2022, by confirming the part where the first claim was acceded, and revoked it with regard to the rest of the claims. The acts were sent back to the LAB, so that it could decide the second and third claims afresh. Date of Judgement: 9th February 2022.

DO I KNOW YOU?

Celine Cuschieri Debono

Can a person not part of a contract still be bound by it? The simple answer to this question is that one is only bound by that to which he or she agrees. However, the matter is not always so clear-cut. This is precisely what the First Hall of the Civil Court had to determine, amongst other things, in the judgment in the names of **Mojca Zammit Briffa vs. Ivan Vella et (1130/2019 CFS)** delivered on 14 March 2022.

The facts of the case were as follows. On 15 June 2016, PSS Holdings Limited (one of the respondents) entered into a promise of sale agreement (*konvenju*) in which it agreed that it would sell to Ivan and Romilda Mary Vella two apartments in St Paul's Bay. The agreement's expiration date was 30 June 2019.

Only two days after signing the promise of sale, Ivan and Romilda Mary Vella entered into *another* promise of sale agreement regarding one of the apartments. However, this time they were not appearing on the contract as prospective buyers but as prospective sellers. They agreed that they would sell one of the apartments to Leonid Segal. The expiration date of the second promise of sale was 30 June 2018.

The second promise of sale (between the Vellas and Leonid Segal) expired on 30 of June 2018. It was however 'revived' through a subsequent private writing dated 16 July 2019. The parties agreed that the new expiry date would be 30 October 2019. It must be highlighted at this point that PSS Holdings Ltd was not part of the second promise of sale. As far as it was concerned, it was bound to sell the properties to Ivan and Romilda Vella, and not to any third party not part of the contract. PSS Holdings Ltd had no contractual relationship or link with Leonid Segal.

On 29 October 2019, Leonid Segal sent a judicial letter to the Vellas and PSS Holdings Limited, calling upon them to appear on the final contract of sale. The matter did not stop there. On 31 October 2019, Leonid Segal gave up his rights (*ċessjoni*) in favour of Mojca Zammit Briffa. On 1 November 2019, Leonid Segal sent a judicial letter to Ivan Vella, Romilda Mary Vella and PSS Holdings Limited to inform them of this.

Subsequently, Mojca Zammit Briffa (plaintiff) filed a suit against the Vellas, Leonid Segal and PSS Holdings Limited so that the final contract of sale can be made and in the absence of this, damages can be liquidated.

PSS Holdings Limited argued that it had no link whatsoever with the plaintiff. The Court agreed and held that PSS Holdings Limited had never promised or bound itself to sell any property to the plaintiff or to Leonid Segal and that the plaintiff cannot force PSS Holdings Limited to honour a promise that it never made. The Court emphasised that the fact that PSS Holdings Limited is the owner of the property mentioned in the second promise of sale (dated 17 June 2016), is irrelevant. What matters is which parties are bound by that second promise of sale – and it surely was not PSS Holdings Limited. The Court therefore released the company from the effects of the judgment (*illiberata mill-osservanza tal-ġudizzju*).

The attention of the Court then diverted onto another matter. Were Ivan and Romilda Mary Vella bound vis-a-vis the plaintiff Zammit Briffa? Leonid Segal – who was the buyer who entered into the second promise of sale with the Vellas – had given up his rights in favour of the plaintiff, but was this valid at law? Did this mean that the plaintiff entered into Segal's shoes properly and fully?

To answer these questions, the Court primarily focused on whether Segal could give up his rights to the plaintiff without the consent of the other party, in this case, the Vellas. The Court held that for this cessation of rights to be valid, it needed to be recognised by the other party. Since the Vellas did not consent to Segal giving up his rights in favour of the plaintiff, the cessation of rights could not be considered as valid. Therefore, the Vellas were not bound towards the plaintiff in any way, nor were they liable in damages. Essentially, the Vellas had no valid juridical relationship with the plaintiff.

Upon evaluating the above and making further considerations, the Court acceded to the pleas of the respondents (PSS Holdings Limited and Ivan and Romilda Mary Vella) and rejected the plaintiff's claims in their entirety.

The judgment may still be appealed.

Note by the editor:
This judgement was confirmed on appeal which was decided on the 26th of October 2022.

THE PLAY OF GUARANTEES

Edric Micallef Figallo

On 29 December 2021, the First Hall of the Civil Court gave a decree *in camera* on application **659/2021 AD**. The application was a request to revoke a precautionary garnishee order. Precautionary acts are intended to safeguard the alleged rights of the person seeking them, which rights are subject to judicial contestation.

The proceedings decreed upon by the Court and upon which we are commenting are in fact proceedings within the greater context of a claim for damages following an accident in which a bus crashed into the private immovable property of various people. Amongst those various people we find the person who successfully sought the issuing of the precautionary garnishee order.

As normal, there are main proceedings involving allegations and claims for damages as allegedly suffered. These main proceedings run separately. By main proceedings, we actually mean a fully-fledged court case aimed at finally determining the facts of the case, the responsibilities thereon, the liabilities involved and, in this case, the damages to be paid up, if any at all according to law. In this case such main proceedings are still ongoing at first instance. These main proceedings are what most laymen understand as a *kawża*.

Through the filing for a precautionary garnishee order and the main proceedings in this case, the plaintiff is seeking alleged damages amounting to around €24,000, for which he successfully sought the ordering of a precautionary garnishee order against the defendants in the main proceedings. Said defendants are the driver of a public transport bus and his employer Malta Public Transport Services (Operations) Ltd.

The decree given in chambers by the First Hall of the Civil Court dealt with an application filed by the defendants and an insurance company to revoke the precautionary garnishee. As can be expected, the law provides for ways to allow for the revocation of such restrictive Court orders, even though such ways are expressly laid down by law and are the only ways possible. The application as filed was based on articles 830(3), 836(1)(c) and 836(1)(e) of our Code of Organization and Civil Procedure.

One of the first elements to require note is that the application for revocation was filed by the aforesaid bus driver and company, and also the insurance company providing insurance cover. As we shall see, the coming into the scene of the insurance company is very relevant to the Court's decree on the application. In fact, the main driving force for the application filed was the provisions of article 830(3) of the Maltese Code of Organization and Civil Procedure.

In short, these provisions apply when an insurance company involves itself and declares that is willing to cover the liability and pay for all sums that may be due for damages, thus paving the way for the rescission of the precautionary act. This is quite an *ad hoc* specific provision, and it is safe to say that the *raison d'être* for such a possibility is the financial solidity of insurance companies as required by insurance law for them to act as insurers.

The applicants, being the defendants in the main proceedings and the insurance company, sought to make use of the strength of the insurance company to have the precautionary garnishee order rescinded by the Court. In that regard, the other bases for the revocation of the same order according to articles 836(1)l and 836(1)(e) were somewhat secondary according to the applicants themselves. Factually, the basis was one, i.e. the existence of an adequate insurance policy providing cover for the damages and supposedly serving as sufficient security for the revocation of the same order.

The plaintiff in the main proceedings deemed it fit to file his applications for the suit and for the precautionary garnishee order against his chosen defendants, amongst which one did not find the insurance company. It could possibly be that the plaintiff did not know of the insurance company concerned, or it could well be a crafty tactic.

In any case, it worked blissfully in favour of the plaintiff as the Court observed that as explicitly written in article 830(3) of the Code of Organization and Civil Procedure, the precautionary act sought must have been against a person liable for damages and his insurance company.

As such, the main thrust of the application based on article 830(3) was negated by the simple reason that it applies when an insurance company is ready to foot the bill if the precautionary act itself was filed against both the insured and the insurance company, and not one or the other.

As to the other bases for requesting the revocation of the precautionary garnishee order, namely those provided by articles 836(1)(c) and 836(1)(e) of the Code of Organization and Civil Procedure, these both seem to provide for when there is adequate or sufficient security to satisfy the Court that the claims of the alleged creditor can be adequately safeguarded. The applicants contended that the declarations filed by the insurance company were enough to satisfy the requirements of these two grounds.

The Court disagreed by citing jurisprudence on these provisions. This clarified that an insurance policy is a contract between the insured and the insurance company and it does not in and of itself establish rights for the creditor of the insured. Therefore, it does not satisfy article 836(1)(c) as according to jurisprudence it requires such adequate security must exist at the time of the filing for the precautionary act and that it is to be certain, clear, and capable of being executed by the alleged creditor.

Similarly, in terms of article 836(1)(e) the security to be provided after the ordering of the precautionary act must be one capable of assuring the alleged creditor seeking to give effect to that security that he will not be subject to any reasonably possible or potential obstacle.

In the end, this attempt to revoke the precautionary garnishee order failed, but it was revoked in separate proceedings upon the deposit of sufficient funds under Court authority.

ONE LICENCE TOO MANY

Keith A. Borg

Article 466 of the Code of Organization and Civil Procedure lays down that where the head of a government department or the person vested with the legal representation of a body corporate established by law or with the legal representation of any company or other body which has been authorised by or under any law to collect any amounts due to a government department or to a body corporate established by law, desires to sue for the recovery of a debt due to a government department or to any administration thereof or to a body corporate established by law, for any services, supplies, penalties, rent, ground rent, other burdens on property, compensation for occupation and/or for any licence or other fee or tax due, he may make a declaration on oath before the registrar, a judge or a magistrate wherein he is to state the nature of the debt and the name of the debtor and confirm that it is due.

The said declaration is to then be served upon the debtor by means of a judicial act, nomally a judicial letter, and has the same effect as a final judgment of the competent court unless the debtor, within a period of twenty days from service upon him of the said declaration, opposes the claim by filing an application demanding that the court declare the claim unfounded. The head of department, is then entitled to file a reply within a period of twenty days.

The court is to appoint the application for hearing and in cases of an urgent nature the court may, upon an application of the creditor or the debtor, shorten any such time limits.

In its decision of 13 October 2022 in the names **L-Awtorita` ta' Malta Dwar il-Loghob vs Doxx Casino Ltd (C-40196)**, the First Hall of the Civil Court, presided by Mr. Justice Grazio Mercieca, the court dealt with an application in terms of Article 466. By means of a judicial letter of the 1 September 2020 filed in terms of Article 466 the Authority called upon Doxx Casino Limited for the settlement of the sum of €16,850 representing the fee due for the latter's licence with the Authority for the year 2018. Doxx Casino Limited asked the Court to declare that the amount claimed was not due or, if due, was indeed incorrect.

The court observed how a new law, which entered into force on 30 June 2018, raised the licence rate with retroactive effect to 1 January 2018. Between 1 January 2018 and 30 June 2018, existing licence holders had to pay, provisionally, the licences according to the previously applicable rates with the necessary adjustment then to be made by no later than 20 October 2018. Under the previous system, the licences were paid at a monthly rate; under the new system, at a rate of €25,000 per annum.

In 2018, Doxx Casino Limited ceased its operation. Through an agreement of 9 April 2018, it sold its licence to Global Gaming Entertainment Group Limited. The licence transfer was approved by the Authority on 31 July 2018. Doxx Casino Limited and Global Gaming Entertainment Group Limited had agreed to be responsible for the payment of the licence proportionally. The Authority agreed to this, so much so that it provided both parties with the apportionment rates, but then insisted that Doxx Casino Limited pay its share to Global Gaming Entertainment Group Limited for the latter to settle the entire amount unto the Authority.

From the evidence brought before the court it resulted that whatever was due by Doxx Casino Limited had been transferred to Global Gaming Entertainment Group Limited. This meant that Doxx Casino Limited had complied with all the instructions of the Authority in relation to the payment of its dues.

The court concluded therefore that since Doxx Casino Limited honored its part of the agreement with the Authority, the Authority could no longer claim the amount due from Doxx Casino Limited because its instructions were for Global Gaming Entertainment Group Limited to settle the amount due in full by after Doxx Casino Limited settles its share to the former.

For these reasons, the court acceeded to Doxx Casino Limited's application by declaring the request of the Authority as unfounded in fact and in law, with costs against the Authority.

HAVE YOU BEEN SERVED?

Keith A. Borg

Article 811 of the Code of Organization and Civil Procedure provides for the new trial of decided causes. An exceptional procedure which foresees a new trial of a cause, already decided by a judgment, such judgment being first set aside. This is only available in a limited number of instances, amongst which such cases where the sworn application initiating proceedings was not served on the party cast, provided that, notwithstanding such omission, such party has not entered an appearance at the trial.

Vira Gatt Butto initiated proceedings for retrial (1164/2019 CFS) explaining that on 30 November 2019 she encountered a difficulty in using her bank cards. She engaged lawyers to find out what the problem was, and upon so doing she found out that her bank accounts had been struck by an executive garnishee order, which was issued as a result of a judgment delivered by the First Hall of the Civil Court on 1 November 2019, in which, to her surprise, she was a party. Vira Gatt Butto claimed that she was unaware of the proceedings and that she had never been notified of same according to law.

Succinctly in proceedings initiated before the First Hall of the Civil Court, Josette Camilleri asked that the The Malta Union Club be condemned to pay her compensation for the injuries she suffered on 12 October 2015, while working as a waitress in The Malta Union Club building. By order given during the said proceedings, the Court ordered that Vira Gatt Butto be also summoned.

According to a statement issued by the bailiff, Vira Gatt Butto was deemed to have been served with the proceedings on 25 May, and was deemed to be in default (*kontumaċi*) on 24 June 2018. A copy of the sworn application was left with the receptionist of the The Malta Union Club, Brian Borg Bonaci. No contestation to the suit was filed by Vira Gatt Butto.

On 1 November 2019, the First Hall of the Civil Court found Vira Gatt Butto liable in damages suffered by Josette Camilleri in the incident of the 12 October 2015 and as a result condemned her to pay the sum of €6,560.64. No appeal was lodged.

In its judgment of 25 February 2022 in the names **Josette Camilleri vs The Malta Union Club and Vira Gatt Butto** the First Hall of the Civil Court dealt with Vira Gatt Butto's request for retrial. The Court set off by noting that the remedy of retrial is of an extraordinary nature and departs from the general principle that a judgment is binding on the parties.

The guiding principle of this institute, the Court noted is that, as far as possible, a judgment which has been delivered and rendered should not be easily overturned, but should only be overturned for grave reasons, such that the existence and maintenance of the said judgment would be contrary to justice and public order.

In considering whether there exist sufficient grounds for setting aside a judgment, the task of the court is to see only if at least one of the circumstances referred to in Article 811 of the Code of Organization and Civil Procedure arises. Retrial, the Court emphasised, is not intended to serve as a form of appeal.

The Court then delved into the validity of the service of the questioned proceedings. It remarked that it has been repeatedly reiterated by local jurisprudence that the requirements of correct service are requirements of public policy and as such must be carefully complied with.

Ample reference was made to Article 187 (1) of of the Code of Organization and Civil Procedure which provides for two methods of service to a natural person: direct to the addressee and indirect to such persons indicated in the same provision of the law. In the case of direct service, this may be done by physically leaving a copy of the judicial act with the person to be served.

Direct service does not need to be affected at a specific location but can be made wherever that person is located, even if out on the street. On the other hand, in the case of indirect service, this shall be deemed to apply only if the copy of the judicial act: (i) is left in the place where the person to be served resides or works; and (ii) is left in the hands of a member of the family or household or in the sole service of that person or in his or her proxy or person authorized by him or her to receive his or her mail.

It was evident that Brian Borg Bonaci was neither a member of the family or household of Vira Gatt Butto, nor was he her employee. Neither had it been established that Brian Borg Bonaci was Vira Gatt Butto's attorney or a person authorised by her to receive her mail. The latter even stated that she had never authorised him to sign any documents on her behalf.

This version of Vira Gatt Butto remained uncontested. It was evident for the Court that in carrying out their duties, the court's bailiffs must abide by the law on the validity of service of judicial acts. This implies that if the bailiff of the court were to serve a person leaving judicial acts in the hands of others, he or she were to make sure that the deeds were left with one of those persons mentioned in article 187 (1) of the Code of Organization and Civil Procedure.

The Court emphasised that the case at hand was testimony to the strong need for amendments in the field of service of judicial acts. It is time, the Court noted, that evidence of service is no longer made with mere stamps and handwritten words by the bailiff, which are often not even recognisable due to unclear writing.

Making reference to Council Regulation (EC) No 1393/2007 and to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, the Court invited the legislator to consider whether evidence of service should be made on a standard form provided by the Registrar of Courts, containing, amongst others, details of (i) the nature, purpose and the reference number of the judicial act to be served; and (ii) the method of service (whether by post, by hand, by posting, etc.); and (iii) the date, time and address of the service; and (iv) name, surname and signature of the person served and, if the document is not served directly unto the person, to whom service was affected, the name, surname and signature of the person to whom it was delivered, together with the relation that such person has with the person to whom the service was to be effected; and (v) the reason why the service was not effected; and (vi) the name, surname and signature of the notifying officer.

In view of the circumstances, the Court, presided by Judge Christian Falzon Scerri, found in favour of Vira Gatt Butto, ordered the retrial of the lawsuit in so far as this affected Josette Camilleri and Vira Gatt Butto and ordered its judgment to be communicated to the Minister responsible for Justice and to the State Advocate for them to verify whether there is a need for change in the way the law regulates the service of judicial acts in civil cases.

Have you been served?

PREVENTING IRREVERSIBLE DAMAGE

Rebecca Mercieca

Property development has become something everybody wants a piece of. Perhaps a piece obtained following the sale and destruction of one's family townhouse in exchange for cash and a penthouse, or an apartment for each child or as an investment. Whatever the modality, everyone wants a piece of the cake, that is development, and everyone wants it today.

The neighbours of that townhouse want to stall, want to protect that afternoon ray of light perfectly entering the kitchen window at three o'clock in the afternoon. The neighbours want to protect and keep on enjoying the sea view from their roof and the church view from their bedroom. They want to continue residing and enjoying their property without having to worry and hassle about potential leaks, the dust, and even the slight possibility of anything going south and ending up with damaged property, or a worse disaster; that is of course until it is their turn to start developing.

The appropriate action for those away from the centre of the development, those who will do anything to have it stop, and specifically those who fear that the execution of a permit will tarnish their rights, have the remedy of attempting to temporarily 'pause' the works until possibly obtaining a court order directly ordering the halt of the works which is obtained by a judgment following a lawsuit.

It is indeed any person's right to proceed against another in the Civil Court if such person feels that their rights are being trumped over by approved development, and such a right remains even if such party would not have initially contested the permit during the relative term, or even if such person would not have filed an appeal following the issuing of a permit. Such stems from the fact that development permits of the sort are issued 'subject to third party rights.' Third party rights are then disputed before the First Hall of the Civil Court.

The act of having the works paused is achieved by the issuance of a warrant of prohibitory injunction with the scope of withholding someone from doing something that can be of damage or prejudice to the person issuing the warrant of prohibitory injunction.

This warrant is one of a precautionary nature, which may be filed and acceded to prior to the established juridical decision regarding the applicant's pretentions; and so it is a restrictive and exceptional one.

For such an application to be successful, a person demanding it must prove to the court that the mentioned warrant is necessary for the applicant's rights to be protected, to an extent that without the warrant, the applicant will suffer prejudice. The applicant must also satisfy the court during the summary proceedings that he does enjoy those rights, on a 'prima facie' level.

It is then the eventual lawsuit yet to follow which is to delve into all the merits of the case after analysing all the evidence produced. These two requirements are cumulative and not mutually exclusive. If the court is not satisfied of either one of the mentioned essential requirements for the survival of the warrant of prohibitory injunction, the warrant is then rejected.

In a decent decree, neighbours of parties developing the property obtained a successful warrant of prohibitory injunction to pause works which had already started, which works were related to the development of common parts of a block of apartments, and such in accordance with the relevant permit issued. The project development included the change in direction of a staircase in the common parts of the apartments.

The parties opposing the development, applicants of the warrant of prohibitory injunction 917/22/1MH based their application on their *ex parte* architect report which reported a reduction on the potential value of their property because of the changes to be carried out by those developing the common space as well as the illegal creation of new servitudes over their property.

The sole fact that the warrant had been acceded did not mean that the applicant's case and pretended right had been proven, but it is an act safeguarding rights which would otherwise be lost forever. The Court noted that no creation of servitude had been identified by it on a prima facie basis, yet it considered that if structural changes were in any way to impact any part of the applicant's property, over and above the common parts, such would on a prima facie level merit delving into

the merits of such a development. Based on this fact, and considering the difficulty in reversing structural changes, the court acceded to the warrant of prohibitory injunction.

The party successfully obtaining the warrant must then proceed to suit to fight the case based on the merits and throughout any point of the proceedings, the respondent has the right to file a counter-warrant, which would reverse the warrant upon a court's decree.

In the acts of separate warrant all together, specifically application **620/2022 CFS** filed in the acts of garnishee order number 825/2022, two out of the three parties against whom a precautionary garnishee order of €500,000 had been issued, filed an application for the revocation of the garnishee order since the applicant had not filed suit within twenty days following the garnishee order.

The applicant had been notified by the demand for revocation yet failed to reply. Indeed, if no action is taken by the party demanding the warrant, the warrant does not stand following the expiration of the twenty days. In practice, however and for respondent to be able to start the process of withdrawing any garnished funds, the warrant would have to be revoked by a counter-warrant.

Warrants cause people stress and at times unfair damages, especially if sought by those who's intention is to cripple the other. In this case the applicant, did that; she filed the warrant (a garnishee order) and took no further action. She did not even attempt to justify her lack of action, and for such she was fined €3,000. The court however ordered that the damages suffered by those who suffered the affects brought about by the garnishee order had to be claimed in a separate suit and could not be awarded within the same decree ordering the revocation of the warrant and the penalty.

Unfortunately, in practice this adds further expenses and delays to the prejudiced party seeking reimbursement for the damages suffered by this very procedure, including the expenses related to the procedure for revocation and the expenses incurred by way of bank fees in relation to the court deposits.

THE PRECAUTIONARY GARNISHEE ORDER: A TOOL TO BE USED WITH CAUTION

Celine Cuschieri Debono

An efficient tool for the creditor to ensure payment is the precautionary garnishee order (*mandat ta' sekwestru kawtelatorju*). This involves the garnishee/s which is typically a bank, depositing the funds of the debtor in court up to the amount claimed by the creditor. These funds may not be withdrawn by the creditor and must remain in court until a court decides the creditor's claim. Such tool may be seen as too good to be true, or that anyone can simply file a precautionary garnishee order at will.

While administratively this is possible, one cannot simply file precautionary warrants without caution. Indeed, if this is done, consequences will ensue upon the supposed creditor. The First Hall of the Civil Court, in a decree delivered on 27 June 2022, in the names of **IAS Limited vs Diane Elizabeth Vella**, dealt precisely with this issue.

On 14 February 2022, Vella was served with a precautionary garnishee order by IAS Limited for the amount of €60,000. The garnishee order was acceded to by the court. Then, on 23 February 2022, Bank of Valletta plc deposited the full amount of €60,000 in court. This meant that the money was taken from Vella's account with BOV and placed in court for safekeeping. Now, by law, the creditor (IAS Limited) was bound to file a lawsuit within twenty days from the date of accession of the garnishee order. Such deadline may only be extended by the agreement of the parties. In this case, there was no such agreement.

So, what are the consequences of not filing the lawsuit within the stipulated time-period? The person who issued the garnishee order may be forced to pay the other party i.e. the party against whom the garnishee order was issued, a penalty. This penalty can range from €1,164.69 to €6,988.12. In the present case, IAS Limited failed to file a lawsuit within the stipulated timeframe and the twenty-day window was not extended in any way whatsoever.

Vella therefore sought – among other things – for IAS Limited to pay her the penalty stipulated by law. She claimed this via an application *(rikors)* filed on 7 April 2022. To make matters worse, IAS Limited failed to file a reply to Vella's application within the deadline stipulated by law, i.e. seven days. The First Hall of the Civil Court explained that the deadline of seven days is a peremptory term, meaning that it cannot be

suspended, interrupted, or extended in any way. If the seven *calendar* days elapse, then that is it. Any reply filed after this date is deemed inadmissible. And that is exactly what happened in this case. The Court could not consider the reply filed by IAS Limited.

The Court delved into why the legislator contemplates a penalty in such case. It held that such penalty exists and is imposed by law as a measure of public order so that it is ensured that the seriousness of the judicial process is respected. It is also a mode of ensuring that the institution of precautionary warrants is not abused of and is not used with the mere intention of bothering the alleged debtor.

It continued that the only defence that the alleged creditor has for filing a precautionary warrant and not following it up with a lawsuit as stipulated by law, is when the deadline for doing so was either expressly or tacitly extended by the consent of the alleged debtor. In no uncertain terms, it was not the case here.

The Court further remarked that not only was no lawsuit filed after twenty days from the accession of the garnishee order, but that in addition to this, IAS Limited had not up until that point filed any lawsuit against Vella *at all*. Notably, this was more than four months from the issuing of the precautionary garnishee order.

This helped the Court conclude that the alleged creditor had not acted with a sense of good will when issuing the garnishee order. Indeed, it was issued with a sense of maliciousness, held the Court. It continued by holding that the fact that no lawsuit was filed goes to show that the alleged creditor did not actually need to file the precautionary garnishee order in the first place.

Therefore, the Court concluded that the penalty stipulated by law was due, and this in the amount of €3,000. One must therefore not file precautionary warrants frivolously and must utilise them diligently and cautiously.

Such decree may not be appealed.

ACT IN DUE TIME

Edric Micallef Figallo

On 30 March 2022, the Court of Appeal (Superior Jurisdiction) pronounced its judgment on application **387/10/1 JA**, confirming the first instance judgment in full. In this case we are dealing with prescription under civil law.

Extinctive prescription refers to the loss of the right to an effective action against the debtor of an obligation. In this case extinctive prescription was raised as a defensive plea by the defendant association.

Three different pleas of extinctive prescription were in fact raised by the defendant in first instance proceedings, but only one of them was successful. That is enough because one successful plea of extinctive prescription results in an alleged debtor being freed from the obligation to satisfy the obligation, e.g. if moneys are due and prescription applies, then the creditor cannot execute the same according to law.

Prescription is ill understood by most people, and possibly, yet wrongly, considered unjust. It follows the notion that a person who does not care to follow up on his rights for a significant period of time, loses the same. This is just, as the execution of obligations should not be possible indefinitely unless the Courts or the law confer upon them an executive title by way of judgment or otherwise. If one holds central in their understanding that any intervention of the Courts or the State in the life of any person is essentially a violation to their personal life, prescription gains a better understanding.

The question of whether that violation is justified according to law or ethics is the crux of the matter. Having the State come after you, through the initiative and for the interest of a lethargic and inattentive party, is not on. This is not damning upon creditors because diligent creditors act upon their rights in due time and prescription holds no bar to the execution of their rights against defaulting and condemnable debtors.

Prescription balances out the obligations and pressure concerned by leading diligent creditors to act accordingly in due time and, all other things constant, enforce their rights against debtors.

On the other hand, it punishes creditors who let matters stand still for long periods of time by freeing debtors. It does this not because of some mere legal technicality but because of the inaction or inappropriate action of the creditors. Really and truly, creditors are generally afforded very generous terms to act on most rights.

In the case at hand, our highest civil court moved to stress particular points on the institute of extinctive prescription and its successful plea in defence. The action was filed by the plaintiff to recover dues to him by way of salary, wage increases, bonuses, and other benefits due to him by the defendant association following an unjust dismissal as determined by the Industrial Tribunal way back in 1998.

The courts explained that it is the defendant pleading prescription who must prove the same and the moment in time in which it started to run and the fact that the applicable period elapsed. Once this is so proven by the defendant, it is up to the plaintiff to prove the suspension, interruption, or renunciation of prescription. The first court, as confirmed on appeal, determined that the right of action by the plaintiff could be exercised as from the judgment of the Industrial Tribunal in 1998 and the applicable prescriptive period was of five years. The plaintiff had acted upon his rights in 2010, a good twelve years after he could have done so.

In an interesting and novel – yet futile – attempt to save his case, the plaintiff referred to another action filed against him by the defendant. This latter action contested the findings of the Industrial Tribunal, and it was filed in 1998 and determined in 2006. Considering the same, the Court of Appeal affirmed that an interruption of prescription though a judicial demand is possible if that judicial demand is filed by the creditor, not if the same is filed by the debtor, as in this case. Moreover, if interrupted, prescription starts running anew and is not suspended as implied by the plaintiff.

A debtor could also possibly renounce prescription. This was pleaded by the plaintiff on appeal. Interestingly, the Court of Appeal stated that a payment by the debtor while the period of prescription is still running results in the interruption and running anew of the applicable prescriptive period, while a payment done after the period of prescription had elapsed results in the renunciation of prescription as a defensive plea. This was not the case here.

The Court of Appeal referred to various applicable criteria for the allegation of a renunciation of prescription to succeed: While prescription is raised by the defendant, its renunciation is raised by the plaintiff and must be proven by the plaintiff. This renunciation should be proven through evidence which is unequivocally clear and not based on vague words or expressions. Interpretation in matters of prescription is restrictive, favouring its denial (and thus the creditor).

In this case, what the defendant association owed to the plaintiff, as per the decision of the Industrial Tribunal, was offered to him but he refused it. Following said refusal, the defendant association deposited the amounts due under the authority of the courts soon after the case determined in 2006. This was not deemed to result in the renunciation of prescription against the claims of the plaintiff. The plaintiff had failed to act to cash the same deposited amounts and he only acted in 2010 to enforce payment of alleged dues, inclusive of the period for which he did not turn up for work after the 1998 judgment by the Industrial Tribunal.

Besides the fact that some of the claims of the plaintiff resulted undue, the rest were subject to prescription. The end result is that through the multiple failures to act by the plaintiff he lost everything which he could have been entitled to. That is how prescription bites those who are lethargic and passive with respect to their rights.

LEGAL REMEDIES FOR THIRD PARTIES TO DAMNING CONSTRUCITON SITES

Rebecca Mercieca

Neighbours of an ongoing development site noticed that excavation works next door in preparation for the construction of three levels of basements, sixteen apartments and three penthouses in Għajnsielem were not being carried out according to the method statement submitted by the architect. After formally notifying the Building and Construction Authority (BCA) and following the submittal of a new method statement by those developing next door, the neighbours noticed that excavation works where carried out swiftly close to the boundary wall and consequently, a hole was made in the same wall which led to their own property.

The neighbours felt that this invaded their privacy, and such works were of serious prejudice to the stability of the boundary wall. The neighbours further alleged that works were still not being done in accordance with the new method statement. They once again reported this to the BCA and also filed a warrant of prohibitory injunction. Following several judicial intimations filed between the parties; the neighbours filed a lawsuit before the Courts of Gozo seeking damages. The defendants contested, the suit, and even contested the forum where it was filed.

The essence of article 20 (2) Subsidiary legislation 623.06 'Avoidance of damage to third party Property Regulations' directs third parties suffering damages from others' development to refer their case to Arbitration.

Indeed, any dispute regarding building construction, not being one in connection with a claim for personal injuries, but being a dispute arising from damage to third party property resulting from construction activity on a contiguous site shall be referred to arbitration, provided that the damage incurred by the third party does not impair the stability of his property nor endangers its users; or the cost of damages being claimed by the third party does not exceed one million euro.

In a preliminary judgment delivered on 28 October 2022, case ref number **105/2021 BS**, the court rejected defendants' preliminary defence, by which most defendants claimed that the court did not have the jurisdiction to decide the case, since according to them, the dispute should be decided in Arbitration. The defendants who brought this preliminary plea, based their argument on article 20 (2) of S.L. 623.06.

The court, being the Court of Magistrates (Gozo) in its superior jurisdiction cited local jurisprudence in its preliminary judgment and specifically noted that mandatory arbitrations are the exception to the rule. The court stated that the competent forum for cases concerning civil rights, are indeed the ordinary courts.

Following a detailed study of S.L.623.06, and the Arbitration Act, the court highlighted that the regulation includes a provision which excludes mandatory arbitration in the following circumstances: where the damage impairs the stability of third-party property, when it endangers users, or where the claim exceeds one million euro.

The court further highlighted that the subsidiary legislation itself made several references to the liquidation of damages by 'a court of law or arbitral award'; and so, the possibility of a judgment being delivered by a court of law was not to be ruled out by mandatory arbitration in cases regarding building construction.

Moreover, the court found that the alleged damage and consequential damages on which the plaintiffs based some of their claims referred to damages caused by all or some of the defendants in the plaintiff's property which weakened the stability of their own property. The plaintiffs also claimed that the works impeded on their enjoyment of their own property.

In terms of the regulation cited by the defendants, the competence of the court to determine this issue cannot be considered as excluded. The court furthermore remarked that a different decision to that taken by it by in this preliminary judgment would also give way to further delays to the issue between the parties, and so the court ordered that the case continues to be heard on the merits.

EXPROPRIATION AND THE TENANT – DON'T I DESERVE COMPENSATION?

Nicole Vassallo

Expropriation is the compulsory acquisition of private property by the state for a public purpose in exchange for compensation to the expropriated owner.

In a judgment decided by the Court of Appeal on 17 March 2022 (**Marianna *sive* Manon Calleja et vs l-Awtorità tal-Artijiet**), heirs of the late Roger Calleja, namely Marianna (known as Manon) Calleja and her sons Ryan Calleja and Troy Calleja ("plaintiffs"), were awarded €89,286.25 in compensation following the expropriation of the restaurant named "The Cottage Restaurant" situated in 'Triq M.A Vassalli, Gzira'.

The facts of the case date back to a lease agreement signed by the late Roger Calleja as lessee, and the late Emmanuele Grech as lessor and owner, on 19 October 1988. Since Roger Calleja's demise, plaintiffs have assumed control over business operations in the restaurant situated in Gzira, Kappara Junction.

Before 25 April 2017, expropriation under Maltese Law was regulated by the Land Acquisition (Public Purposes) Ordinance (Chapter 88 of the Laws of Malta). This legislation was later repealed and substituted by the Government Lands Act (Chapter 573 of the Laws of Malta), which is still in force today.

While the Lands Authority ("Authority") and the owner of the property had agreed on the compensation to be awarded for the expropriation, a similar arrangement with the plaintiffs (i.e., the tenants) was never proposed by the Authority.

Plaintiffs had become aware of the offer made to current owner Eugenio Bartolo of €835,000 in compensation to acquire the property in question. This would effectively bring to an end the plaintiffs' rights under title of lease, and in turn, their business operations and means of income.

In terms of Law, an offer made to a landowner in this context is made by means of a Declaration issued by the Chairperson of the Board of Governors of the Authority, which Declaration must contain information such as the details required to identify the land that is being acquired for a public purpose, the purpose it is being acquired for and the amount

of compensation which the Authority is willing to pay the landowner. Prior to the introduction of the Government Lands Act and at the time of this expropriation, the Declaration used to be issued by the Governor, Governor General of Malta or by the President of Malta.

Plaintiffs were informed by Transport Malta that the Authority was to take possession of the property on 27 February 2016.

Various exchanges followed between plaintiffs, Transport Malta and the Authority, in which plaintiffs requested due compensation in line with the Land Acquisition (Public Purposes) Ordinance. According to the Ordinance, when land (other than rural land) which was subject to a lease had been acquired by a competent authority, no compensation for the termination of the lease was paid to the tenant, provided that notice of one full year was given. Meanwhile, if the notice given was less than one year, compensation may not have exceeded the fair rent of the land for a period of two years.

The Authority offered to compensate plaintiffs the amount of €12,762.

Plaintiffs proceeded to file an application before the Land Arbitration Board ("Board") on 24 November 2016 to challenge the afore-mentioned compensation offered by the Authority and instead demanded the amount of €200,400, calculated in line with the fair rent over a period of two years, as the Ordinance dictates.

As the shift in legislation took place before the outcome of the present proceedings, on 30 January 2018, the plaintiffs requested the Board to deliver judgment in accordance with the provisions of the newly introduced Government Lands Act.

The Government Lands Act establishes a new procedure for opposing the amount of compensation offered, consisting in an application to be filed by not later than five years from the publication date of the Declaration in the Government Gazette and in two daily or Sunday local newspapers. A landowner who fails to do so will be entitled to the sum equivalent to the amount of compensation originally offered in the Declaration drawn up by the Chairperson of the Board of Governors of the Authority.

At first instance, the Board rejected the Authority's pleas and awarded plaintiffs compensation in the amount of €835,000. As expected, the Authority took to the Court of Appeal, requesting it to annul and revoke the Board's decision (limitedly to the amount of compensation awarded). It also invited the Court to liquidate the amount of compensation as it deems fit in the circumstances.

The Court of Appeal agreed with the first argument raised by the Authority, namely, that plaintiffs (in their capacity as tenants) were not entitled to compensation equivalent to the entire value of the property, unlike the owners, and this because compensation must reflect one's right over the property being expropriated. Indeed, the plaintiff's enjoyment of the property was limited to a certain period of time. Moving along to the Authority's second argument on appeal, that the compensation to be awarded should not be based on the value of the lease (*valur lokatizju*), the Court of Appeal reasoned, in agreement with the Authority, that this should be calculated on the loss of profit or damages suffered by plaintiffs because of the expropriation.

However, the Court observed that it could not ignore the minutes of the Board recorded during the sitting of 18 January 2017, which are treated by Maltese jurisprudence as binding in their own right. In the minutes, the parties had agreed, contrarily to the above, that "[…] *l-kwistjoni pendenti tirrigwarda l-valur lokatizju tal-fond u għalhekk talbu differiment sabiex it-tnejn li huma jippreżentaw rapporti tal-periti tagħhom dwar tali valuri*."

The Court of Appeal referred to the plaintiff's request made on 30 January 2018, for their claims to be revised in such a way that the amount of compensation would not be based on the fair rent of a two year period calculated on the value of the property (previously established to be €835,000) and capitalised at a rate of 12% which is usually applied in order to establish the value of a commercial lease, but, in accordance with the provisions of the Government Lands Act.

Therefore, plaintiffs' revised claims were threefold; for compensation to reflect expenses borne by plaintiffs in having to make arrangements for the early vacation of the property, expenses borne by them to lease another property in the period prior to the expiration of the current lease and for loss of profits resulting therefrom.

Notwithstanding the above, the Court of Appeal contended that not enough evidence was brought forward to support plaintiffs' revised claims, and in fact, the evidence that resulted from the proceedings only served to prove the value of the lease of the property in question. The Court of Appeal took into consideration the valuations of the lease of the property brought forward by the parties concerned, that being €30,000 relative to the year 2015 (when the expropriation took place) according to plaintiffs and €6,381 according to the Authority.

The Court decided to rely on the second valuation for the purpose of liquidating the amount of compensation, which was decided as follows; the original lease agreement had a duration of five years against payment of €4,254 a year, with a possibility of renewal for further five-year periods subject to a 50-cent increase, bringing the total to €6,381 a year, which was applicable to the year in which the expropriation took place. It also took into consideration that in terms of Article 1531I of the Civil Code (Chapter 16 of the Laws of Malta), the relative lease agreement was due to expire following the lapse of twenty years commencing on 1 June 2008, which meant that the agreement would have remained valid for an additional thirteen years from the date of expropriation.

That being said, and taking into account the rent increases imposed by the lease agreement, the Court liquidated the compensation as follows:

i) €19,143 (€6,381 every year between the years of 2015 and 2018);

ii) €34,008.85 (€6,801.77 every year between the years of 2018 and 2023);

iii) €36,134.40 (€7,226.88 every year between the years of 2023 and 2028);

Totalling to €89,286.25.

The Court of Appeal overturned the judgment delivered by the Board on 5 October 2021 limitedly to the amount of compensation awarded, and consequently varying the said amount from €835,000 to €89,286.25.

While this judgment brings an interesting change to your typical claim brought forward by a property owner in the context of an expropriation, this is also not surprising, seeing that the Government Lands Act already extends the definition of an "owner" not only to a landowner in the literal sense, but also to "the lessee of that land," including individuals such as the plaintiffs. This was also the case under the pre-2017 Land Acquisition (Public Purposes) Ordinance, which not only included the lessee in the definition of an "owner", just like the Government Lands Act does, but went a step further in catering for "other person[s] having an interest in the land".

PARTLY CLAIMED AND TOTALLY FRIVOLOUS

Edric Micallef Figallo

On 30 November 2022 the Court of Appeal (Superior Jurisdiction), (hereinafter "CoA") delivered its judgment on case **580/11/2 JZM**. This being an appeal judgment, it is first appropriate to describe the general nature of the case at first instance.

The original case dealt with a claim between different companies in relation to a company of which they were shareholders, hereinafter the "company of interest".

The plaintiff company filed an action in the First Hall of the Civil Court requesting a declaration that the defendants (including the other companies being shareholders, and the apparent directors of the company of interest) had failed to appoint, or re-appoint, the directors of the company of interest as per its Memorandum and Articles of Association ("M&AA"). Importantly, the directors called in the suit as defendants were still appearing as the registered directors with the Registrar of Companies.

The plaintiff company claimed that the defendants had failed to re-appoint directors as per article 14 of the M&AA: "The Directors of the Company shall hold office for a period of two years and shall thereafter be eligible for re-appointment" .

Also, paragraph 7 of the M&AA provided that "The Board of Directors of the Company shall consist of four directors, such that Wintrade Ltd and Cnus Ltd shall have the right to appoint one director each. Riza Leisure Complex Ltd shall have the right to appoint two directors." The plaintiff company claimed that on the expiry of the initial period of two years as above, in 1999, the apparent directors were not reappointed appropriately and sought a judicial declaration to that effect.

Two of the defendants replied in quite a simple and straightforward manner, i.e. the claim by the plaintiff company was not true and it had to be rejected. The other defendants did not submit replies. The appeal brought forward was by the same defendants who filed the sworn reply at first instance, while the other defendants declared that they would accept the Court's judgment.

In its considerations, the CoA provided a summary of the movements within the relevant company as a factual background on the relationships between the parties and in relation to the company of interest. It is beyond the purposes of this article to delve into that. What is however important as a question of fact is the observation that no meetings of the Board of Directors or annual or extraordinary general meetings of the company of interest were being held. However, it was standard practice that the auditors of the company of interest would prepare all the necessary documents to be able to compile the audited financial statements of the company of interest.

The CoA noted that the accounts filed with the Registrar of Companies up to 2002 all showed the defendant directors as directors, however no accounts were filed after 2002. A shareholders' resolution dated 29 November 2002 stated that all directors had to retain their roles.

Turning to the (confirmed) reasoning of the First Hall of the Civil Court, it had noted that the appointment of directors is a matter to be regulated by the M&AA distinctly from the Form K submitted with the Registrar of Companies for changes amongst directors *et cetera*. The defendants had argued unsuccessfuly that failing such a Form K no changes were made.

This argument was rejected in favour of what the M&AA actually provided. Besides this, the First Hourt reviewed all the evidence provided and concluded that between the 31 December 1999 and the 29 November 2004 there were *de jure* directors appointed for the company of interest. This conclusion came about with reference to testimony by the interested parties, the auditors involved and the fact that financial documents would not be closed off without the signature of the directors in office and the shareholders. Evidence was submitted to the effect that relevant directors acted as such after 1999.

The First Hall of the Civil Court found that the degree of proof required was satisfied, especially considering the signatures of the shareholders in documents showing the re-appointment of director. However, this proof was limited up to 2004.

In fact, during the proceedings reference was made to meetings held in 2010 which were highly contested in front of the Court, but that Court ultimately concluded that there was no written and signed documentation beyond 2004 that proved the reappointment of directors.

The appeal was actually limited as to its scope. Two of the defendants argued that the First Hall of the Civil Court had awarded something beyond what had been claimed. Appellants claimed that the action brought forward was a declaratory one and that the Court could only accede and declare the requested declaration or deny it *in toto*.

Declaratory actions are common and often required for further purposes or for further actions. In partly accepting the plaintiff's claims, the First Hall of the Civil Court had made an analogy with claims of payment for pecuniary dues, in which the award of a lesser amount than claimed is very often a reality at law. Appellants held that such variations were not possible for declaratory actions.

The CoA was quite concise and straight to the point on the matter. In fact, the choice of words is very telling as the CoA stated that the plaintiff's claim could be acceded as to part thereof and proceeded to state that it makes no difference at all whether the action is purely declaratory or not.

The appellants tried their chances on the use of the word *"qatt"* in relation to the re-appointment of directors following 1999 and tried to interpret this as involving the whole period and nothing but the whole period. The CoA differed and considered that term to include all the time and parts of it. It pointed out that nothing prejudiced the appellants in the proceedings and that they could submit evidence and question evidence accordingly. The appeal was denied and found to be frivolous, and the appellants were penalized by having to pay double the judicial expenses as per article 223(4) of the Code of Organization and Civil Procedure.

THE DOS AND DON'TS OF CONTESTING A GARNISHEE ORDER

Celine Cuschieri Debono

So what happens when a garnishee order is filed against you? Once this is acceeded to by the Court in question, you, along with all entities which hold your funds – for example, a bank – are notified of the existence of the garnishee order. This means that from here onwards, such entities (the garnishees) are obliged at law to deposit funds up to the amount claimed by the plaintiff from you. Up until such deposit is made, your bank accounts will be frozen and if a vehicle is registered under your own name, you will not be able to transfer it to third parties.

Why would such a procedure exist? While on the face of it, this all seems draconian and extreme, it is there to ensure that if a lawsuit renders a positive result for the plaintiff, the judgment would be able to be enforced. It would be wholly unfair and unjust if the plaintiff's claim is accepted by the Court and then there would be no funds at same's disposal to actually obtain what is due. That is why procedures such as the garnishee order exist.

Of course, there are safeguards to this. The most crucial of them all is that the garnishee order *must* be followed by a lawsuit on the merits. If this is not done, consequences in the form of a penalty will ensue upon whoever files a garnishee order carelessly and without any regard for the actual claim.

There is also a counter-procedure for the revocation of the garnishee order. However, this only applies in very particular circumstances. For instance, it may result that the amounts deposited in court are excessive or that another, better guarantee exists. These are all provided for in Article 836 of Chapter 12 of the Laws of Malta. It may also be the case that the garnishee order affects a bank account in which one receives a pension or their salary constituting their only source of income, triggering the possible application of Article 381(1)(j) and Article 382(1) of Chapter 12 of the Laws of Malta.

An application filed under these two articles was dealt with by the First Hall of the Civil Court in a decree in the names of **Hotel San Antonio Limited vs Nik Dee McGowan, Heather Rose McGowan, and Travis McGowan**, delivered on the 20th of December 2022 (revocation application number: 1137/2022AD). On the 24th of October, plantiff company filed an application for the issuance of a precautionary

garnishee order against the respondents so as to caution the amount of €18,906.93. Two of the respondents, Nik Dee McGowan and Heather Rose McGowan, in an application filed on 25 November 2022, invoked Articles 381(1)(j) and Article 382(1), respectively.

With regard to Nik Dee McGowan, it was argued that since he is a pensioner with special needs and the only source of income is his pension, which pension is received in the bank account affected by the garnishee order, he has no other way through which to maintain his daily needs. He argued that any sporadic payments received in same bank account from his daughter amounted to refunds of sums lent to her. He thus asked the Court to release this bank account in terms of Article 381(1)(j) of Chapter 12 of the Laws of Malta.

On the other hand, Heather Rose McGowan argued that her only source of income is her salary and as a consequence of the garnishee order, she has no means with which to maintain her children and her own basic needs. She thus asked the Court to order that the garnishee order in regard to her is limited to an amount exceeding to €698.81 monthly as per Article 382(1) of Chapter 12 of the Laws of Malta. This would mean that the first €698.81 in her account every month would be able to be used by her.

The First Hall of the Civil Court carefully analysed the provisions of Articles 381(1)(j) and 382(1) of Chapter 12 of the Laws of Malta, as well as various jurisprudence in their respect. As regarding the first article, the Court examined the wording of Article 381(1)(j) in that it provides that the bank account in question needs to be used "solely and exclusively" for the reception of the pension or benefit in question. Since in this case the account was also used to receive funds from the respondent's daughter, as well as payments from PayPal Europe S.a.r.l et Cie S.C.A, the Court could not apply Article 381(1) of Chapter 12 of the Laws of Malta.

With regard to the second article, the Court noted that the garnishees originally listed were not societies and/or departments that the second respondent is employed with, but simply bank accounts. With this said, the funds affected by the garnishee order were not deemed to be the respondent's salary but simply funds in her relative bank accounts.

Therefore, the respondent's funds and her salary could not be distinguished and thus, Article 382(1) of Chapter 12 of the Laws of Malta could not be applied.

The requests of the respondents (*sekwestrati*) were thus rejected.

AZZOPARDI BORG & ASSOCIATES
ADVOCATES

137

EU Law

I SPY: KEEPING ELECTRONIC DATA IN THE NAME OF FIGHTING CRIME

Clive Gerada

Since joining the European Union, Malta is now subject to the rules passed by the European Institutions in Brussels and Maltese courts should also follow the decisions (preliminary rulings) handed down by the Court of Justice of the European Union (CJEU) in Luxembourg.

National Courts of Member States have the power to refer a case to the CJEU when the case relates to the interpretation or validity of an EU legislation. The Court of the Member State will then adopt that interpretation when deciding the local case before it. So, by way of example, if a Court in Malta is faced with an issue threading on EU law, it may refer the point to the CJEU. The CJEU will then assist by interpreting the matter.

In 2021, there were 587 preliminary references submitted by National Courts to the CJEU. Following a referral, the CJEU hands down its preliminary ruling. The CJEU does not itself apply EU law to a dispute brought by a referring court (National Court), as its role is only to help resolve it. Ultimately it is the role of the national court to draw conclusions from the CJEU's preliminary ruling. It is important to highlight that preliminary rulings are binding both on the referring court (National court referring the case to the CJEU) and on all courts in Member States.

An interesting decision by the CJEU (delivered on 20 September 2022) related to the interpretation of the Privacy and Electronic Communications Directive 2002 with respect to the retention of electronic data of customers. Having national laws that obliges service providers to retain electronic data for the purposes of fighting crime is not something that should be taken lightly. This was the matter in the referral to the CJEU in **Federal Republic of Germany vs SpaceNet AG and Telekom Deutschland GmbH**.

It happens that German law obliges telecommunications providers in Germany to store traffic data of its customers to whom it provides internet access. SpacNet AG and Telekom Deutschland GmbH sought a declaration from the CJEU confirming that they are not obliged to store data traffic of its customers (end-users). SpaceNet and Telekom Deutschland provides publicly available internet access services in Germany. In addition, Telekom Deutschland also provides publicly

available telephone services in Germany. Both companies sought to challenge German law before the German Courts and in fact the Cologne Administrative Court (Verwaltungsgericht Köln) declared that SpaceNet AG and Telekom Deutschland were not obliged to store the aforementioned data relating to its users given that that retention obligation was contrary to EU law.

Consequently, the Federal Republic of Germany appealed and the Federal Administative Court in Germany referred the matter to the CJEU to establish whether that retention obligation was contrary to EU law.

In its considerations, the CJEU, held that first and foremost, measures taken by Member States must comply with the general principles of EU law, which include the principle of proportionality, and ensure respect for the fundamental rights guaranteed by the Charter.

The Court observed that in previous judgments, such as in the case of Commissioner of An Garda Síochána and Others, the CJEU had ruled that the obligation to retain traffic data to be readily available to the competent national authorities, raises compatability issues with the rights and freedoms of individuals as protected by the Charter of Fundamental Rights of the European Union. In particular, such obligation could be incompatible with the respect for private and family life, protection of personal data and freedom of expression and information. The latter constitutes one of the essential foundations of a pluralist, democratic society.

The Court explained that traffic and location data may reveal information on a significant number of aspects of the private life of persons, including sensitive information such as sexual orientation, political opinions, religious, philosophical, societal or other beliefs and state of health. Such data enjoys special protection under EU law.

Taken as a whole, such data may allow very precise conclusions to be drawn concerning the private lives of the persons concerned. As a result of such data, one would be able to ascertain the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by the persons whose data have been retained.

The retention obligation laid down by the German legislation applies to a very broad set of traffic and location data which in essence corresponds to practically the entire population without those persons being, even indirectly, in a situation liable to give rise to criminal prosecutions. The Court argued that the German legislation at issue requires the general retention, without a reason, and without any distinction in terms of personal, temporal or geographical factors, of most traffic and location data. Thus such data retention obligation could never be regarded as a targeted retention of data.

Secondly, the Court noted that a data retention obligation has to be limited in time. In the case of the German legislation, the periods of data retention were limited to four weeks for location data and to ten weeks for other data, notwithstanding these short periods, taken as a whole, the data retained may enable very precise conclusions to be drawn on the private life of the persons whose data have been retained and enables the possibility of establishing a profile of those persons.

The CJEU also noted that not all crime, even of a particularly serious nature, can be treated in the same way as a threat to national security. Such crime must have the capability of seriously destabilising the fundamental constitutional, political, economic or social structures of a country and, in particular, of directly threatening society, the population or the State itself, such as terrorist activities.

Therefore, on the basis of the aforestated reasons, the CJEU ruled that the Privacy and Electronic Communications Directive 2002 precludes national legislative measures which provide for the general and indiscriminate retention of data traffic and location data of its end-users. However, it does not preclude legislative measures that require providers of electronic communication services to retain general and indiscriminate traffic, location data or IP addresses or civil identity of users of electronic communications systems, in situations where the Member State concerned is faced with a serious threat to national security.

The Court went on to say that the national security threat has to be genuine and present or foreseeable and that the obligation to retain data has to be limited in time to what is strictly necessary.

Finally, the Court held that such measures should be subject to an effective review either by a court or by an independent administrative body whose decision is final and binding. Such an effective review process is important to verify that the aforementioned conditions and safeguards are abided by and there is no risk for abuse.

This preliminary ruling serves as a warning to all EU Member States, that electronic data gathering obligations with the excuse of fighting crime may be contrary to EU Law.

STRIKING A BALANCE: PUBLIC ACCESS VS. THE RIGHTS OF ULITMATE BENEFICIAL OWNERS (UBO)

Clive Gerada

In the past couple of weeks there has been considerable media attention following the European Court of Justice (CJEU) decision that sought to find a balance between the rights of the ultimate beneficial owners of companies and the interests of Society.

The 5th Anti-Money Laundering Amending Directive (2018/843) included a provision namely, Article 1(15)(c) of Directive 2018/843 which meant that Member States shall ensure that the information on beneficial ownership is accessible in all cases to any member of the general public. The general public shall be permitted to access at least the name, the month and year of birth and the country of residence and nationality of the beneficial owner as well as the nature and extent of the beneficial interest held. Member States may, under conditions to be determined by national law, provide access to additional information enabling the identification of the beneficial owner. That additional information shall include at least the date of birth or contact details in accordance with data protection rules.

The CJEU decision in the joined cases **WM (C-37/20)**, and **Sovim SA (C-601/20)** dealt precisely with this aforementioned article in the 5th AMLD.

WM was the executive officer and beneficial owner of YO (a real estate company). WM brought an action before the Luxembourg District Court claiming that as a consequence of Luxembourgish law the beneficial owner of YO was at risk of kidnapping, susceptible to violence, and death. WM also argued that this law limited his travels to countries with unstable political regimes and that the Court should restrict access to his personal information. The Luxembourg District Court stayed proceedings and referred the matter to the Court of Justice for a preliminary ruling.

Sovim (C-601/2020), another Luxembourg-based company, requested that the information regarding its beneficial owners contained in the Register of Beneficial Owners (RBOs) be restricted only to certain authorities. Sovim argued that a general carte blanche public access to information on UBO's encroaches upon the right to respect for private and family life, as well as the right to the protection of personal data as stated in articles 7 and 8 of the Charter of Fundamental Rights of the

European Union. Faced with these similar arguments, the Luxembourg Court also referred this case to the CJEU.

In a nutshell, the Court of Justice of the European Union was asked to determine if public access to the data held in the Register of Beneficial Owners is compatible with the provisions of the European Union Charter of Fundamental Human Rights and the provisions of the GDPR legislation. Was unrestricted public access to the data in the Register of Beneficial Owners necessary to achieve the aims of the 5th Anti-Money Laundering Directive 2015/849 (concerning the prevention of the use of the financial system for the purposes of money laundering or terrorist financing)?

According to established court rulings, any measures that interfere with the rights laid out in articles 7 (respect for private and family life) and 8 (protection of personal data) of the Charter of Fundamental Rights of the European Union must satisfy the requirements of appropriateness, necessity, and proportionality in relation to the objectives they are trying to achieve.

To ensure that the interference is minimized, clear and precise rules must be laid out on the scope and application of the measure, as well as minimum safeguards to protect the personal data against abuse. Furthermore, to satisfy the proportionality requirement, it must be ascertained whether the measures are appropriate, necessary, and not disproportionate to the objectives they are trying to achieve.

During the negotiations of the 5th AMLD the European Parliament, Council and Commission held that allowing public access to information on beneficial ownership is necessary in order to prevent money laundering and terrorist financing.

The European Commission, Parliament, and Council argued that access to information on beneficial ownership should be limited only to data necessary to identify the beneficial owner and their interests. Access to this information can be derogated in certain circumstances in order to protect the beneficial owner from potential harm. It was also argued that Member States may require online registration to access this information and may make information about the requester available to the beneficial owner in order to prevent abuse.

The law in question stipulated the minimum threshold of data disclosure regarding beneficial owners to members of the public. However, the use of the expression 'at least' suggests that those provisions allowing for data to be made available to the public are not sufficiently defined and identifiable. Thus, the rules interfering with the rights guaranteed in articles 7 and 8 of the Charter do not meet the requirement of clarity and precision. It states that, although combating money laundering and terrorist financing is an important objective, it is primarily a task for public authorities and entities subject to specific obligations in that regard, such as credit or financial institutions.

The Court held that the EU legislature should not provide for the general public to access information on beneficial ownership as there is difficulty in providing a detailed definition of the circumstances and conditions under which the public may access information. It is assumed that the press, civil society organizations, and those who may enter into transactions with the beneficial owners of a company have a legitimate interest in accessing beneficial ownership information, however, the general public's access to such information is not strictly necessary to prevent money laundering.

The CJEU held that the information made available in the RBO may allow a profile to be assembled which could reveal the state of a person's wealth and their investments. It was argued that such information should only be released with the consent of the person concerned or according to a legitimate basis provided by the law.

Indeed, the European Court of Justice (CJEU) found that public access to information on beneficial ownership, as provided in article 30(5) of EU Directive 2015/849, interferes with the rights guaranteed in articles 7 and 8 of the Charter of Fundamental Rights of the European Union, which protect the right to respect for private life and the processing of personal data respectively.

The rights of these individuals (Ultimate Beneficial Owners) should be respected and protected. Any interference with the rights of individuals must be limited to what is strictly necessary and the proper balance between the general interest and the fundamental rights must be considered when allowing access to beneficial ownership information. Consequently, the Court held that provisions allowing

for online registration and exemptions in exceptional circumstances are not enough to ensure a balance between the public interest and personal data protection. On this basis the Court of Justice of the European Union (CJEU) invalidated a provision of the 5th EU Anti-Money Laundering Directive, namely, article 1(15)(c) of Directive 2018/843 in so far as it amended point (c) of the first sub-paragraph of article 30(5) of Directive 2015/849, that guaranteed public access to information on companies' real owners.

AZZOPARDI
BORG &
ASSOCIATES
ADVOCATES

Family Law

THE CESSATION OF THE COMMUNITY OF ACQUESTS

Keith A. Borg

Marriage celebrated in Malta, in the absence of an agreement to the contrary by public deed, produces by operation of law, between the spouses, the community of acquests. Similarly, marriage celebrated outside Malta by persons who subsequently establish themselves in Malta, also produces between such persons the community of acquests with regard to any property acquired after their arrival in Malta.

It is however competent to the spouses, even after the celebration of the marriage, and with the authority of the Court, to cause the cessation of the community of acquests established by law.

In simple terms, the community of acquests comprises all that is acquired by each of the spouses by the exercise of his or her work or industry; the fruits of the property of each of the spouses; any property acquired with moneys or other things derived from the acquests, even though such property is so acquired in the name of only one of the spouses; any property acquired with moneys or other things which either of the spouses possesses since before the marriage, or which, after the celebration of the marriage, may have come to him or her under any donation, or succession, and even though such property may have been so acquired in the name of such spouse; and any fortuitous winnings made by either or both spouses.

The law also states that all the property which the spouses or one of them possess or possesses shall, in the absence of proof to the contrary, be deemed to be part of the community of acquests.

Article 55 of the Civil Code however gives the Civil Court (Family Section) the power to, at any time during a cause for separation, and upon the demand of any of the spouses, order the cessation of the community of acquests existing between the spouses. Prior to ordering such cessation of the community, the Court is to consider whether any of the parties shall suffer a disproportionate prejudice by reason of the cessation of the community before the final judgment of separation. The law fails to define the term 'disroportionate prejudice'; it's interpretation remains within the discretion of the Court.

Our Courts have however often declared without any hesitation that none of the parties shall suffer a disproportionate prejudice by reason alone of the cessation of the community of acquests. On the contrary, Courts have often opined that such an order is beneficial to both parties on their way to a complete personal separation.

In its judgment in the names **RB vs JB** of 26 May 2022, the Civil Court (Family Section), presided by Madam Justice Jacqueline Padovani Grima, dealt with such a request. Applicant petitioned the court to order the cessation of the community of acquests pending separation proceedings between the spouses. Respondent however objected citing as a reason for such objection the principal concern that should the Court order such cessation, applicant would no longer have an incentive to reach amicable settlement, which the parties had begun discussing.

Citing local jurisprudence, the Court observed that as a rule the Court is to order the cessation of the community of acquests existing between the spouses, except for such exceptional cases where it is satisfactorily proven that such cessation will bring with it a disproportionate prejudice to one party or the other. The Court further observed that the cessation of the community of acquests cannot be prejudicial to the a party's share of the assets pertaining to the community, which such party may discover after the cessation, as the cessation of the community of acquests, the Court noted refers to the future and not to such assets that already exist within the same community.

Acknowleding respondent's reasons for objection, the Court agreed with same in that it was not the opportune moment for it to consider applicant's demand – this procedure, the Court noted, was not to be used as leverage for one party to force the other into accepting its conditions for settlement.

The main concern of the Court, which it considered as disproportionate prejudice to the respondent, was the allegation that applicant had started a business venture with his partner and therefore there was a real risk that the funds of the community of acquests could be mingled with the funds utilised in this business venture. This, to the Court ammounted to the disproportionate prejudice envisaged by the law.

The Court proceeded to reject applicant's request in terms of article 55 of the Civil Code.

TILL DIVORCE DO US PART

Nicole Vassallo

Divorce, or in other words, the dissolution of marriage, was introduced into Maltese Legislation by Act XIV of 2011. Despite having been around for over ten years, the ins and outs of the process may still be new or unfamiliar to many, all the more so following the amendments introduced by Act XXV of 2021, which were designed to create a more expedient and fair process in which the best interests of the spouses are not overlooked, and their intentions not disregarded.

A request for divorce begins with an application filed before the Family Section of the Civil Court, either by the spouses jointly, or by one spouse against the other. Where the application is made jointly by both spouses in agreement, the divorce is granted by the Court by means of a decree. Meanwhile, where the application is made unilaterally, i.e. on the demand of one spouse against the other spouse, the divorce is granted by means of a judgment. The relative judgment or decree, as the case may be, must be read out in open court.

A spouse who has been notified with a request for divorce from the other spouse (the "receiving" party), may declare his non-objection to the said request, in which case, the Court may grant a favourable judgment after ensuring that the necessary requirements for divorce are met. A case in point in which a demand was made unilaterally by one spouse against the other spouse and met with approval is the judgment **MC vs NE** decided on 12 September 2022. The names of the parties have been concealed due to privacy.

For a marriage to be successfully dissolved, the Court must be satisfied that a number of requirements have been adhered to. These requirements will vary depending on whether the spouses are already legally separated by means of a contract or a judgment. It follows that in order to obtain a judgment or decree granting divorce, the spouses need not be legally separated from each other.

When the spouses are already legally separated by a contract or a judgment:

The Court must be assured that there is no reasonable prospect of reconciliation between the spouses. This is usually confirmed by the spouses themselves in a sworn statement either in writing (via an *affidavit*) or in the Court Hall (*viva voce*). In addition, the spouses and their children, if any, must be receiving adequate maintenance, if and where this is due, which right to maintenance may be renounced by the receiving spouse at any point in time. Maintenance is deemed to be "adequate" where this is ordered by the Court in a judgment or agreed upon by the parties in a contract of separation.

When the spouses are not legally separated by a contract or a judgment:

Where a demand for divorce is made by one spouse against the other, on the date of filing one's application for divorce, the spouses must have lived apart for at least one year (or periods amounting to one year) out of the previous two years. However, when the demand is made jointly by both spouses, the spouses must have lived apart for at least six months (or periods amounting to six months) out of the previous year.

In such circumstances, the Court must also order the parties to appear before a mediator with the aim of attempting reconciliation, and where this is not achieved, an attempt shall be made at agreeing on the fundamental aspects of the divorce proceedings, such as care and custody of the children (if any), the access of the two parties to the children, maintenance, residence in the matrimonial home and the division of the community of acquests (if applicable).

As a general rule, the concept of divorce centres around a "no fault" principle. In other words, unlike separation, the spouse filing an application for divorce against the other spouse need not impute any fault to the "receiving" spouse, which may have been the reason behind his/her request.

Essentially, there are a panoply of effects of dissolution of marriage or divorce, including but not limited to, the termination of the obligation to co-habit for all intents and purposes at Law, the termination of the right of each spouse to inherit from the other spouse and more importantly, the right to remarry.

AZZOPARDI BORG & ASSOCIATES
ADVOCATES

Criminal Law

THE USE AND MISUSE OF THE DRUG COURT PROCESS

Jacob Magri

The traditional zero tolerance approach towards illicit substance abuse was curtailed back in 2015, where drug legislation in Malta was boldly revamped with the primary objective to provide a rehabilitation centred approach to the problem of drug use. This shift in mentality, reflected in the amendments introduced by Act I of 2015, led to the creation of a new judicial structure comprised of a Commissioner for Justice, Drug Offenders' Rehabilitation Board as well as a Drug Court to help deal with drug-dependent persons, who were traditionally frowned upon in a similar manner to drug traffickers.

The famous article 8 of Act I of 2015, namely the Drug Dependence (Treatment not Imprisonment) Act, Chapter 537 of the Laws of Malta, introduced the highly sought-after legal mechanism whereby courts of criminal jurisdiction may assume the functions of a Drug Court and proceed to refer the accused before the Drug Offender Rehabilitation Board after being satisfied that the conditions stipulated under article 8 of Chapter 537 are fulfilled.

If the case is directly related to the trafficking or possession of illicit drugs per se, the functions of a Drug Court may be assumed by a court of criminal jurisdiction in cases where the quantity of the drug does not exceed three hundred grams of cannabis or one hundred grams of heroin or cocaine. Where on the other hand, the offence in question is not specifically a drug-related offence, the Court may assume the functions of a Drug Court only if the individual concerned is "charged with the commission of any crime not liable to a punishment of more than seven years imprisonment".

In any case, the conversion to a Drug Court is subject to two central conditions, contemplated in article 8(2) of Chapter 537 of the Laws of Malta, namely that the offence committed was substantially attributable to the proved drug dependence of the accused and that there exist objective reasons which indicate that the accused is likely to be rehabilitated from drug dependence or that he has made substantial progress or effort to free himself from drug dependence.

While the importance of the legal tool introduced via article 8 of Chapter 537 is undisputed, it is evident that there are a number of questions which remain unanswered either due to uncertainty with respect to the application of a particular provision or due to lacunae which were not addressed during the enactment of the Chapter 537.

The judgment delivered on 28 June 2022 by the First Hall of the Civil Court in its Constitutional Jurisdiction in the names Reuben Micallef vs The State Advocate precisely centred on this element of uncertainty where a provision under article 8 of Chapter 537 was found to be in breach of the applicant's fundamental rights, who was sentenced by the Court of Magistrates as Court of Criminal Judicature to a five-year effective imprisonment term for fraud he committed to sustain his acute drug addiction.

The accused appealed his conviction and since the punishment meted by the Court of First Instance for the non-drug related crime committed did not exceed seven years imprisonment, the appellant proceeded to request the Court of Criminal Appeal to assume the functions of a Drug Court in terms of article 8 of Chapter 537.

The Attorney General objected, and in its decree the Court of Criminal Appeal held that while the appellant was indeed only sentenced to a jail term of five years, the crime he is accused of committing is liable to the punishment exceeding seven years imprisonment. Since article 8(1) of Chapter 537 is concerned only with the maximum possible punishment attributable to the offence and not with the actual punishment meted out following a conviction, the Court of Appeal turned down appellant's request for it to convert itself into a Drug Court.

Faced with this decision, Micallef instituted constitutional proceedings before the First Hall of the Civil Court in its Constitutional Jurisdiction, claiming that this provision under article 8 of Chapter 537 discriminated between those accused of committing a crime which carries a maximum punishment of less than seven-year imprisonment and others accused of committing a crime liable to a maximum punishment which exceeds seven years imprisonment but who ultimately got less than seven years following sentencing.

Before the First Hall of the Civil Court, the applicant also argued that although the punishment could indeed exceed seven years, the term meted out was that of five years and since the Attorney General did not lodge an appeal, there was no chance that his punishment would be increased, arguing therefore that it was the actual sentence which has to be taken into account when deciding on a Drug Court conversion request and not the potential maximum.

In its considerations, the Civil Court First Hall in its Constitutional Jurisdiction held that that this specific provision under article 8 of Chapter 537 contradicts the fundamental principle of presumption of innocence in that it imposes on the Court, in its deliberation as to whether to convert itself to a Drug Court, the obligation to treat the accused as if he was guilty of all the charges against him and also assume that the maximum punishment would be inflicted.

The Civil Court First Hall moreover highlighted the fact that the law, as it stands, also clearly distinguishes between persons charged with offences punishable by imprisonment for up to seven years and persons who, although charged with offences which exceed the seven-year threshold, are eventually handed a lesser punishment, nonetheless being denied access to a Drug Court.

The court ruled that it was clear that the only reason for this distinction was that for the purposes of Chapter 537, the accused was being treated as guilty, despite the fact that no sentence had yet been imposed. Even worse, was the fact that this could even happen after the accused was cleared of some of the charges.

The Civil Court First Hall in its Constitutional Jurisdiction thus declared that this specific provision under article 8 of Chapter 537 is in violation of the fundamental right to a fair hearing, specifically the principle of presumption of innocence.

In awarding an effective remedy, the Court ordered the Court of Criminal Appeal, after ensuring that the conditions mentioned under article 8 of Chapter 537 are fulfilled, to assume the functions of a Drug Court. Should said court deem that the current wording of the law precluded it from doing so, the criminal proceedings were to be postponed sine die (indefinitely) until the law was fine-tuned to grant the applicant access to the Drug Court.

Moreover, the Civil Court First Hall in its Constitutional Jurisdiction ordered that once the judgment becomes final, a copy was to be served upon the Speaker and the Justice Minister.

This judgment was appealed by the State Advocate and proceedings are currently pending before the Constitutional Court.

WHEN THE VAT RECEIPT COSTS MORE THAN THE SALE ITSELF

Arthur Azzopardi

The application daily of criminal law, sees the parties to a lawsuit, that is the prosecution, the defence and ultimately the Courts of Criminal Jurisdiction applying not only the strict *dictat* of the Criminal Code but also legal principles which are considered as being part and parcel of any criminal law justice system based on the principles of rule of law.

Some of these legal principles are enshrined in the Criminal Code itself, others can be deduced from the Code itself, yet others without being written in law are still considered as being foundation pillars of any criminal law justice system worth its salt. Chief amongst such principles is found in the Latin maxim: *actus non facit reum nisi mens sit rea*. This maxim states that a person is guilty of a criminal act only if such acts are accompanied by a criminal intention. This is the general rule.

Yet, exceptions to the rule exist. In the evolution of criminal law, a new branch of this law, known as administrative criminal law, sees the creation of crimes whereby for there to be a finding of guilt, the prosecution need not prove the accused's criminal intention. The prosecution need only prove the act done.

Administrative criminal law sees the application of what is known as strict liability, whereby the wrongful act being attributed to the person charged would have fallen foul of a specific law intended to curtail specific wrongdoing.

Undoubtedly, one might opine that the clearest example of such a specific law in our case is the VAT Act, Chapter 406 of the Laws of Malta. This law clearly sets forth very specific obligations on who needs to be registered for VAT purposes. Once a person, both natural and legal, so complies, several obligations are imposed upon it by operation of this law and any violation thereof, renders the registered person guilty of a criminal violation of the same law. For there to be a finding of guilt in terms of the VAT Act, the Courts do not need to consider whether the person charged would have acted with criminal intent or otherwise. These crimes are of strict liability. The Court needs to consider whether the wrongful act being attributed to the accused by the prosecution has occurred or not.

Cases of strict liability though do not nullify other obligations that the prosecution has such as its duty to prove beyond reasonable doubt that the accused is guilty.

On 29 April 2022, the Court of Criminal Appeal, presided by the Hon. Justice Dr E. Grima, in appeal 450/2021 in the names **Il-Pulizija vs. Clint Debono** dealt exactly with such a situation.

The facts of this case resulted from a physical on-site unannounced inspection carried out by VAT Department enforcement inspectors on 10 February 2019 at La Bottega Art Bistro in Merchants street, Valletta.

The VAT enforcement officer testified that on the day in question she had personally witnessed an employee working within this establishment selling food and drink to a customer for a combined value of €10. The same enforcement officer further confirmed under oath that the employee did not issue a VAT receipt to the customer and such a VAT receipt was only issued to the customer by the employee when the latter was so ordered by the VAT enforcement officer. The employee complied and same receipt, which is a legal obligation imposed upon all registered persons in terms of Chapter 406, was then retained by the enforcement officer and presented as evidence in Court.

Debono was accused of having failed to abide by the legal duties imposed upon him by the VAT Act since his employee failed to issue a receipt as afore explained. Debono was not physically present in the establishment throughout the service given to the customer nor when the VAT enforcement officer entered the premises.

The Court of Magistrates had declared Debono not guilty of the charges proffered against him. The Attorney General appealed. The Court of Criminal Appeal upheld the appeal filed, proceeded to quash the judgment of the Court of Magistrates, then declared Debono guilty and punished him to pay a fine of €700 – the minimum possible at law.

The Court of Criminal Appeal declared that article 82 of the VAT Act places upon the registered person very limited circumstances when he or she may not be found guilty for acts of commission or omission done by their employees.

Article 82(2) of Chapter 406 of the Laws of Malta states that :

> *"Where anything is done or omitted to be done by an employee in the course of his employment, or by any person acting on behalf of the registered person, whether such other person is an employee or not, the provisions of this Part [of the law] shall apply as if such thing were done or omitted to be done both by the said employee or other person and by the employer or registered person: Provided that such an employer or registered person shall not be guilty of an offence in virtue of this sub-article* ***if*** *he proves that he was unaware* ***and*** *could not with reasonable diligence be aware of such an act or omission* ***and*** *that he did everything within his power to prevent that act or omission"*

Undoubtedly, this is a tough level of evidence to reach and present.

The Court of Criminal Appeal agreed with the reasoning put forward by the Attorney General in that if the "employee" was not an employee of Debono, Debono himself had to prove this point according to law. The lack of a Jobsplus representative testifying as a prosecution witness to confirm the employment of the cashier at the time of inspection, does not of its own accord and could not lead to Debono's acquittal.

The Court of Criminal Appeal declared that once the employee handled the transaction on behalf of the establishment and the customer, received the money on behalf of the customer and actually proceeded to issue the relative VAT receipt when so ordered by the VAT inspector, all this led to a *iuris tantum* presumption that she was the responsible person for the establishment and thus an employee of the registered person Debono. A *praesumptio iuris tantum* is an assumption made by a court that is taken to be true unless someone comes forward to contest it and prove otherwise.

Debono failed in this regard not only in disproving that the employee was an employee of his but also that if she was an employee of his, he had prior to the inspection been duly diligent to ensure that his employee does not commit such a wrongful act of omission. A wrongful act of omission that cost Mr. Debono €700 over a sale having a gross value of €10.

THE VICTIM'S FAULT?

Arthur Azzopardi

Often a time, accidents happen because of an act of omission or commission by the wrongdoer. Yet, Courts the world over, especially when dealing with motor vehicle accidents are called upon to ascertain and determine whether the victim contributed to the causation of the accident, in part on in whole. In the eventuality that the Court does attribute partial fault to the victim, this would be reflected in the type and quantum of punishment to be meted out on the person declared guilty. Although seldom, there does also arise a scenario when the Court attributes full liability for the occurrence of the accident to the victim, whereby the person charged would be acquitted of the charges proffered against him.

The Court of Criminal Appeal was tasked to decide two appeals, filed separately by the Attorney General and by the person charged post a judgment delivered by the Court of Magistrates as a Court of Criminal Judicature sitting in Gozo.

In observance of the principle of privacy to the victim, names of the parties involved shall not be published.

The facts leading to this case could be classified as being a motor vehicle accident that occurred in 2019 in Gozo at around 19:30. As a result of said accident a third party not being the person charged lost his life. The deceased was driving a motorcycle belonging to a third party whilst the person charged was driving a motor car. The person charged was accused of having, through negligence, caused the involuntary death of the motorcycle driver, a crime contemplated in article 225(1) of the Criminal Code, of having caused involuntary damages to the detriment of the owner of the motorcycle, a crime contemplated by article 328 of the Criminal Code and also with having driven a vehicle in a reckless, negligent or dangerous manner, a crime contemplated for in article 15(1)(a) of the Traffic Regulation Ordinance.

The Court of Magistrates declared the person charged not guilty of the offences of involuntary homicide and involuntary damages, yet declared her guilty of negligent driving and condemned the driver to a fine of two hundred Euro.

The Attorney General appealed asking the Court of Criminal Appeal to confirm the finding of guilt and to overturn the judgment whereby the driver was exonerated from criminal responsibility with regards to the charges of involuntary homicide and involuntary damages, to declare the driver guilty of both said accusations and to mete the correct punishment at law.

The person charged on the other hand appealed and asked the Court of Criminal Appeal to confirm the judgment in so far as the declaration of not guilty with regards to the charges of involuntary homicide and involuntary damages and to overturn that part of the judgment that saw the driver being declared guilty of negligent driving and condemning the driver to a fine of €200.

The Court of Criminal Appeal faced with such a scenario had to evaluate the evidence brought before the Court of Magistrates with a view to ascertain whether that Court could legally and reasonably arrive at the conclusion that the first court arrived at when delivering the judgment appealed.

Forensics played a crucial part. Only two persons witnessed the event. The person charged and the deceased. Only one version of events could be heard in person, that of the accused. From the debris found on the scene of the impact, from the physical location of the vehicles, from the damages sustained by both vehicles, from the angle both vehicles ended at, from the marking found on the tarmac, it was concluded that the motorcycle was being driven at a speed varying between 80-90 km/hr. This was a considerable speed, especially when considering that the road where this accident occurred at was not an arterial road, way above the authorised speed limit.

Furthermore, on the basis of the road alignment, the particular curve of the road and the light conditions at time of impact, each driver, at best, could only see the other at about a 90meter distance. A relatively short distance when driving a motorcycle at such speed. Considering that authoritative studies have ascertained that a driver generally has a perception and reaction time of three or four seconds, when possible, and thus four seconds when driving at a speed of 100km/hr requires a distance of 110 meters before the brakes are even applied!

The Court of Criminal Appeal re-affirmed the principle that a driver, even when having the right of way is still obliged at law to keep a proper look out for any accident that could be immediately perceptible to avoid same accident from happening.

The accused claimed to have followed the Highway Code when turning into the street where the accident happened, and that the car was being driven at a slow speed not only due to the manoeuvre being undertaken but also since the driver was about to park.

Forensics led to the conclusion that the accident did not occur on the carriage way that the motorcycle should have been driving on but rather that the accident occurred on the car's carriageway.

The car's driver always maintained that the motorcycle was only visible the minute the impact occurred.

A careful analysis of the same forensics led the Court of Criminal Appeal to conclude that had the motorcycle been driven at a speed according to the Highway Code, the accident would not have occurred, since sufficient time would have passed, allowing the car to conclude the manoeuvre being undertaken and for the motorcycle to continue on its way without there ever being any impact.

The Court of Criminal Appeal concluded that in this case the accident was caused totally and solely due to the negligence with which the motorcycle was being driven with, by the deceased himself, since same speed led to the inevitable conclusion that the motorcycle's driver did not keep a proper look out.

The Court reiterated that keeping a proper lookout means more than looking straight ahead. It includes awareness of what is happening in one's immediate vicinity. A motorist shall have a view of the whole road, from side to side, and in the case of a road passing through a built-up area, of the pavements on the side of the road as well.

Consequently, the appeal by the Attorney General was denied and the appeal by the person charged was upheld with the car's driver being also declared not guilty of negligent driving. In keeping a proper lookout, the car's driver could have never seen nor foreseen the actions of the deceased.

CONSTRUCTION PROJECT SUPERVISORS: A CASE OF BEING CAUGHT BETWEEN THE HAMMER AND THE ANVIL

Jacob Magri
Mary Gauci

In the past months, Malta has witnessed several unfortunate, oftentimes tragic, construction site accidents involving structural collapses, fatal falls or other underlying occupational health and safety mishaps. Needless to say, due to its inherent and steadily increasing complexity, construction remains a high-risk sector with a very high incidence rate of both fatal and non-fatal accidents.

Among the stakeholders on a construction site is the Project Supervisor, whose duties and responsibilities are outlined under Legal Notice 88 of 2018, entitled 'The Work-Place (Minimum Health and Safety Requirements for Work at Construction Sites). Under this Legal Notice, the appointment of a Project Supervisor is mandatory. This appointment does not apply when work is being carried out for private property owners carrying out works in their own residences provided that all specified legal conditions are met, such as but not limited to the requirement that there shall be only one contractor appointed for the works and that workers are not put at risk of falls from heights.

In the domestic setting scenario, the property owner may choose to assume this role himself, provided he is competent, yet if the property owner does not appoint a Project Supervisor, then by operation of law, the property owner shall be deemed to have taken over the role, irrespective of whether he is competent or not. This is a legal quandary in its own right, undoubtedly.

Legal Notice 88 of 2018, which replaced Legal Notice 281 of 2004 in August of 2018, imposed upon the Project Supervisor added responsibilities and duties. The most notable provision in this set of legislation is that Project Supervisors are obliged to take all measures necessary to safeguard health and safety. The law does not specify what these measure are nor does it create an indicative list of such measures. Subjectivity at its best, leaving vagueness and potentially flawed personal opinions to reign in favour or against a worker's safety!

The substantial 'burdens' imposed on project supervisors were overviewed in the judgment delivered on 29 April 2022 in the names **The Police vs Simon J. Camilleri et**, where the Court of Criminal Appeal (Inferior Jurisdiction) confirmed the conviction of one of the appellants – having assumed the role of project supervisor – albeit substantially reducing the pecuniary punishment inflicted.

The first grievance raised, which was fully upheld by the Court of Criminal Appeal, concerned only one of the two appellants. Said appellant was the director of the health and safety company engaged to oversee this construction, yet he was declared guilty by the Court of First Instance in his capacity of a director of a company extraneous to this particular project. The Court of Appeal therefore proceeded to fully acquit this specific appellant.

In the second grievance filed, appellants contended that the law specifically requested that criminal action could only be instituted against the project supervisor if he acted in a negligent manner. The appellant held that he did not act negligently since he used to go on site regularly and subsequently drew up reports of all his findings which he then sent to his clients for them to implement all his instructions.

In its judgment, the Court of Criminal Appeal deemed that simply informing the client about the negative health and safety issues encountered on site and drawing the attention of the workers on site of these shortcomings, was not sufficient to fulfill the role of the Project Supervisor as defined at law. The current legal regime introduced in 2018 imposed on the Project Supervisor added duties and responsibilities, this with the aim to ensure that any risks identified are actually adequately addressed in a timely manner.

The question that arises post this judgment is: What additional duties are attributed to the Project Supervisor?

The law is silent and creates room for personal opinions, subjectivity and total elimination of standards in this regard.

Principles of law require that laws must have, create and provide legal certainty purely to do away with subjectivity and also to ensure a level playing field for one and all. This principle nowadays is also considered as being an integral human right. Yet Legal Notice 88 of 2018 does the exact opposite for Project Supervisors.

Although not specifically mentioned in the judgment, the Court of Criminal Appeal seems to imply that in order for Project Supervisors to fulfil their role in terms of law they must report any health and safety concerns encountered by them, not only to their clients but also to the Occupational Health and Safety Authority.

This judgment has opened a pandora's box. By so acting, Project Supervisors shall be reporting the hand that feeds them whilst also self-reporting themselves risking eventual criminal prosecution based on the information that they themselves would have supplied to the Authority in lieu of the teachings of this judgment when applying this law. The decision of the Court of Criminal Appeal made a clear expose` of the law as is. One must remember that Courts of Justice can only apply the law, they do not create law.

However, the Court of Criminal Appeal thought it fit that since company director was being acquitted due to an error by the prosecution, and that same company director was the second appellant's employer, which employee could not benefit from that line of defence, to reduce the original fine imposed from €5,000 to €1,000.

USURY

Clive Gerada

Usury, often described as 'dishonest profit', has a long historical life, and refers to the practice of charging financial interest in excess of the legally acceptable rate, which sits at eight percent per annum in Malta.

The crime of usury emanates from a loan agreement. This financial contract between consenting parties demands by its very nature that one returns to another the amount received together with an agreed rate of interest. Such a loan agreement is tainted as usurious if the agreed interest rate exceeds the ceiling of the legally acceptable rate at law.

It is a matter of public policy to suppress the charging of interest on loans exceeding eight (8) percent per annum. Indeed, public order seeks to avoid the entrapment of the weak and the vulnerable from vicious circles of exorbitant interest on grounds of threats and fear of demanding usurers who squeeze their debtors for pretended payments of fictitious considerations.

Il-Pulizija vs Emanuel Ellul, decided by the Court of Appeal on 20 January 2022, is an introspective decision on the elements of the offence of usury. Mr Ellul filed an appeal from the decision of the Court of Magistrates whereby he was found guilty of loaning out money to the Worley spouses against excessive interest not permissible by law.

Notwithstanding the complexity of the transaction, in succinct, the case centered round the transfer of the Worley's property in favour of Mr Ellul. The date of the contract was 6 June 2011 and the value of the property transferred according to the notarial contract was €93,000. However, the real value of the property was €186,200, and this resulted from the amount of government taxes that the parties had paid in relation to this transaction.

The Worley spouses argued in Court that this contract of sale was camouflaging a loan in the amount of circa €90,000 that was given to them by Mr Ellul. They also argued that in addition to 6 June 2011 contract, the parties had reached a verbal agreement whereby the spouses would continue to reside in the property and if they manage to find a purchaser for the property, Mr Ellul would sell the property to that

purchaser and from the revenue made on the sale of the property he would retain the amount owed to him i.e. the €90,000 and the difference would be transferred over to the Worley's.

In fact, the Worley's had managed to find a purchaser for the property, and Mr Ellul sold the property to this purchaser for the price of €230,000. Twelve days after the sale of the property, on 28 February 2012, Mr Ellul and the Worley spouses, signed an agreement whereby, Mr Ellul transferred the sum of €27,500. Therefore, according to the Worleys they were still to receive the global sum of €113,000. However, Mr Ellul kept this amount to himself.

Based on the latter allegations made by the spouse Worley, the Police proceeded with charging Mr Ellul with the offence of usury in terms of Article 298Ċ(5) of the Criminal Code and the Court of Magistrates had found him guilty of the offence and was sentenced to a fine of €8,000 and a suspended 12-month term imprisonment, provided he does not commit another offence that is punishable by imprisonment within a term of 18 months.

Mr Ellul, appealed from the sentence on the basis that the Court of Magistrates had made the wrong appreciation of the evidence brought before it and that this transaction was not that of a loan but of a sale. Therefore, this transaction could not be deemed as falling within the constitutive elements of the offence of usury.

In its considerations, the Court of Criminal Appeal, as presided by Hon. Judge Aaron Bugeja, referred to the fact that the Worley's had instituted a civil action against Mr. Ellul in relation to this contract. However, in their civil action the Worley spouses did not ask the court to declare that the contract they had entered with Mr. Ellul, on 6 June 2011, was a simulated contract and that the property should be returned to the Worley spouses.

The Court of Criminal Appeal held that at that point, the Worley spouses had accepted that the contract of sale of the property with Mr Ellul should remain in force. In fact, the Civil Courts had decided that the agreement of 6 June 2011 was nothing other than a contract of sale and not that of a loan, contrary to what the Worley's had submitted and contrary to what the Court of Magistrates (Criminal Judicature) had decided.

On this basis, the Court of Criminal Appeal agreed with the Civil Courts interpretation that this was a contract of sale therefore, the offence of usury could not subsist, given that for the offence of usury to occur there must be a loan agreement.

The Court of Criminal Appeal did not stop at that and mentioned that it could not exclude the possibility that the accused might have committed another offence given that he did not adhere to the verbal agreement he had with the Worley spouses to transfer the difference in profit.

However, since the accused was not charged with other offences, the Court of Criminal Appeal upheld the appeal of Mr Ellul, revoked the sentence of the Court of Magistrates (Criminal Judicature) and released the accused from all imputations, guilt and punishments.

WHAT IS AN INTERIM MEASURE AND IN WHAT CIRCUMSTANCES IT IS ORDERED?

Frank Tabone

An interim measure is an urgent measure requested before the First Hall of the Civil Court in its Constitutional Jurisdiction to temporarily suspend an action by which a person would otherwise face a real risk of serious and irreversible harm.

This measure was analysed in detail in a judgment delivered on 10 November 2022 by the First hall of the Civil Court in its Constitutional Jurisdiction in the names **Phoenix Payments Limited vs Financial Intelligence Analysis Unit (FIAU)**.

In this case the applicant, namely Phoenix Payments Limited, requested the Court to order an interim measure on the FIAU, to remove a notice published on the Unit's website indicating an administrative penalty issued on mentioned company.

The administrative penalty by the FIAU on Phoenix Payments Limited was issued in terms of the Prevention of Money Laundering Act, Chapter 373 of the Laws of Malta and the Prevention of Money Laundering and Funding of Terrorism Regulations, Subsidiary Legislation 373.01 of the Laws of Malta.

Article 13 of the Prevention of Money Laundering Act, Chapter 373 of the Laws of Malta gives the power to the FIAU to issue administrative penalties whenever a subject person both natural and legal, breaches or fails to comply with any rules, regulations or directives made under the mentioned act.

With regard to the administrative penalties imposed by the FIAU, the law provides that such penalties, shall not exceed the amount of five million euro; or twice the amount of the benefit derived from the contravention, breach, or failure to comply, where this can be determined; or to ten percent of the total annual turnover according to the latest approved available financial statements.

Article 13A of Chapter 373 further dictates that when a subject person feels aggrieved by an administrative penalty imposed on him by the FIAU, he may appeal such administrative penalty both on points of law and fact before the Court of Appeal in its Inferior Jurisdiction.

Article 13C of Chapter 373 further provides that any administrative penalty imposed by the FIAU, shall within five days be published on the official website of the mentioned Unit, together with any other administrative measure imposed by the Unit in conjunction with that administrative penalty.

Chapter 373 of the Laws of Malta dictates that in the case the administrative penalty has been appealed in terms of article 13A, the FIAU shall without undue delay publish information that the penalty imposed on the subject person is pending appeal before the Courts. Once the case is decided by the Court of Appeal, the FIAU shall also update the notice published on their website with the latest decision.

In this case, applicant Phoenix Payments Limited claimed that the administrative penalty issued by the FIAU was being challenged before the Court of Appeal, which case was still sub-judice and before the Civil Court in its Constitutional Jurisdiction.

The applicant further claimed that since the case was still sub-judice before the mentioned courts, the notice published by the FIAU on their website indicating that an administrative penalty was imposed on the company in question, apart from being in breach of the fundamental rights as established under the Constitution and the European Convention, such measure was also causing irreversible damage to their business. The applicant stated that following the publication of the administrative penalty imposed by the FIAU several clients decided to terminate their business relationship, causing considerable financial loss to the company.

The Court in its judgment made reference to a decision by the Constitutional Court dated 22 August 2005, in the names **Joseph Emanuel Ruggier et vs Joseph Oliver Ruggier pro et noe et** and to another judgment by the Constitutional Court dated 29 March 2019 in the names **Sherif Mohamed Shennawyh vs l-Avukat Generali**, wherein it was established that article 46(2) of the Constitution and sub-article 4(2) of the European Convention Act of Chapter 319 of the Laws of Malta, even though they do not make specific reference to the term 'interim measure', they clearly state that the court may make such orders as it may consider appropriate for the purpose of enforcing or securing the enforcement of the protection of the fundamental rights

established by the Constitution or the European Convention on Human Rights.

The Court also referred to another judgment delivered by the First Hall of the Civil Court in its Constitutional Jurisdiction decided on 16 June 2020, in the names **HSBC Bank (Malta) vs L-Avukat tal-Istat et** where in the latter judgment, the court made reference to jurisprudence by the European Court of Human Rights and listed those instances where a request for an interim measure should be acceded to:

1) There should be no other remedies available to the applicant;

2) The applicant must show that prima facie his fundamental rights are being breached;

3) That the measure will cause irreversible damage to the claimant;

4) That if the measure is not provisionally suspended with immediate effect, an imminent risk of serious harm would exist.

The court in this case after having heard the submissions made by the parties concluded that the FIAU acted in terms of the provisions of the law as established under Chapter 373 of the Laws of Malta, and that the mentioned Unit also issued a statement stating that the administrative penalty issued on Phoenix Payments Limited is subject to appeal before the court and to proceedings before the Constitutional Court.

The Court also observed that in this case any loss of business or any damage experienced by the applicant were not considered to be of irremediable harm, considering that article 13C of Chapter 373 of the Laws of Malta provides that once a decision by the Court of Appeal and by the Constitutional Court is delivered, the FIAU shall without undue delay publish any decision which alters or revokes in whole or in part the administrative penalty in question.

Finally, the court rejected the request filed by Phoenix Payments Limited to order an interim measure for the FIAU to provisionally remove the notice published on their website containing information about the administrative penalty issued by the mentioned Unit against the applicant.

EX PARTE EXPERTS IN CRIMINAL PROCEEDINGS

Jacob Magri

Ordinary witnesses cannot express opinions in a court of law. This rule emanates from article 650(1) of the Criminal Code. Opinion evidence not tendered by court appointed experts in criminal proceedings is rendered inadmissible simply because in criminal proceedings (as opposed to civil proceedings) ex-parte expert witnesses find no place.

In fact, a court appointed expert delivers opinions only because he/she is appointed and specifically authorised to so do by a court decree. The expert's opinion is accepted on the grounds that it is an informed opinion as it is based on the study and evaluation of the facts by a person who is specialised in the technical matter at stake.

Logically therefore, if the Court has chosen and appointed a specific individual as court expert to carry-out a specialised task, one would expect that specific individual appointed to carry-out the assigned task himself and not delegate or otherwise entrust the task to someone else. That 'someone else' – even if equally specialised and trained – is not backed by a court appointment and the resultant findings are reduced to ex-parte expert findings and consequently inadmissible as evidence in criminal proceedings.

This issue surfaced in the judgment[1] delivered on 28 January 2022 where the Court of Criminal Appeal fully acquitted a man who was at First Instance found guilty of defiling an eight-year-old minor and sentenced to three years effective imprisonment.

The minor victim in this case never took the witness stand; neither during the criminal proceedings before Court of First Instance nor throughout the preliminary investigative phase, i.e., throughout the Magisterial Inquiry. Given that the minor was afflicted with severe autism, the Prosecution refrained from producing the minor as a witness in view of the fact that she was not fit to testify.

At an earlier stage, during the Magisterial Inquiry, the Inquiring Magistrate appointed a forensic psychiatrist as a court expert (hereinafter referred to as Dr NC) to examine the victim in question for the purposes of determining and establishing whether she had

1 Given the sensitive nature of the case, the names of all individuals involved have been purposefully omitted.

actually been sexually abused or not and this by describing her mental state and in particular, to determine whether in his expert opinion it could have been the case that allegations made to the police by the minor were fabricated and untruthful.

At this juncture, one ought to point out that court appointed experts typically present a report (in practice referred to in Maltese as"relazzoni") in support of their opinions and findings. Dr NC, in his capacity as court expert testified in the course of the Magisterial Inquiry and exhibited his report. Remarkably however, the preamble of this report read as follows:

> *"I am Dr. AS, a basic specialist trainee who carid out this assessment as part of my training in psychiatry under the supervision of Dr. NC [i.e. the actual appointed court expert], currently employed by the Mental Health Services, Malta as a Full Time Substantive Child and Adolescent Psychiatrist with a special interest in Adolescent Forensic Psychiatry. I have the training qualifications and expertise to diagnose and treat mental illness in young people."*

The Court of Appeal, quoting this same preamble of report exhibited by Dr NC, held that the Court of First Instance was wrong in taking cognizance of the findings contained in this report since it appeared to be prepared, wholly or in part, by an individual who was at no point nominated as a court expert and therefore qualified as an ex-parte report – rendering it completely inadmissible.

The Court of Appeal in fact remarked that court expert Dr NC was not endowed with the power at law to delegate his assigned task to a third-party, namely to Dr AS in this case and if he intended to do, the least he could do was to acquire due authorization from the Inquiring Magistrate preventively.

To make matters worse, Dr AS was at no point in the proceedings summoned as a witness to confirm on oath the contents of the report exhibited by court appointed expert Dr NC. Given therefore that the report itself indicated that Dr AS had in fact examined the victim and not Dr NC, whatever Dr NC declared on oath, the Court of Criminal Appeal held, was tantamount to hearsay evidence.

The Court of Criminal Appeal also proceeded to point-out that, as a rule, in criminal proceedings (emerging from article 646(1) of the Criminal Code), witnesses – especially the direct victim – is to be examined in court and viva-voce. The remaining sub-articles of article 646 mention select scenarios that serve as an exception to this general rule. One of which is that a person may be exempt from testifying viva-voce if it is apparent to the Court that appearing for viva-voce examination may cause the witness to suffer psychological harm.

The Court of Criminal Appeal criticised the fact that Prosecution had arbitrarily decided that the 'star witness' in this case is not fit to testify without first requesting the Court of First Instance to exempt the minor from testifying viva-voce as per article 646 of the Criminal Code. It in fact argued that the applicability or otherwise of the exemptions mentioned under article 646 are within the Court's remit not the Prosecution's.

The Court of Criminal Appeal moreover pointed-out that the victim's account is only reflected in the testimony of the several social workers that took the witness stand. Although such testimony is in itself admissible, its probative value is lacking since such testimony could only have been used to effectively corroborate the victim's version of events – something which in this case is totally missing.

All these reasons left the Court of Criminal Appeal with a 'lurking doubt' as to whether an injustice may have been done and quashed the appellant's conviction. This case is now res judicata.

THE RIGHT PUNISHMENT: A SCIENCE, A BALANCING ACT, OR AN ART?

Arthur Azzopardi

The right to having an opinion, the right to freedom of speech and living in a democracy leads people, and rightly so, to express their opinion freely, unashamedly, and vociferously at times too. Social media has helped the evolution of these rights even more. In democracies the world over, people "love" to lambast the Courts of Justice when according to them a finding of guilty did not lead to the infliction "of the right and just" punishment on the guilty person.

Various jurisdictions have different methods on how Courts are to calibrate punishment to ensure a fair and equitable imposition of punishment on all persons found guilty. Social media commentators in broad terms do not reflect the ideals of society but rather only give an inkling as to the various diverging opinions ranging in society on any judgment.

In Malta, a Sentencing Policy Advisory Board that falls under the Ministry for Justice exists. Yet albeit whatever advice in principle this Board may from time to time give, our local jurisprudence sets certain considerations on punishment, and the exceptions thereto, one might say, in stone.

Principally, first time offenders are generally speaking given leaner sentences and real and effective imprisonment is mostly avoided. Yet exceptions do exist. This was evident, and rightly so in the case of **The Police vs Xiaoduo Ye**, decided by the Court of Criminal Appeal per Justice Edwina Grima on 28 October 2022.

Mr. Ye was charged with having on 15 December 2021 in St. Julians, reviled, threatened, assaulted, resisted by violence and of having caused bodily harm to PC 547, PC 479, PC 1005, PS 922, PC 297, PC 1468, PC 1200, PC 1023 and PC 332. Mr Ye was also charged with having wilfully disturbed the public peace, failed to wear a face mask and for having failed to comply with legitimate orders imparted to him.

At the time of the incident, Mr Ye was a guest residing at the Radisson Blue Resort in St. Julians. It seems that although being asked by hotel staff to wear a mask whilst roaming in the public areas of the hotel due to Covid health restrictions, appellant was not compliant with these repeated requests thus leading the hotel management to unilaterally terminate any contractual relationship with appellant and demanding that he evacuate from his room and the hotel premises. Mr Ye however once again refused to comply with these demands, necessitating hotel management to call for assistance from the police.

From the evidence tendered by the police officers involved in the altercation with Mr Ye, it transpires that he refused even to obey police orders and upon the police confiscating a sword they found in his possession in his hotel room, appellant became aggressive towards the said police officers thus leading to his arrest. During the process of his arrest, the police officers alleged that three of them (PC547, PC479 and PC1005) sustained slight injuries at the hand of Mr Ye.

From the testimony of an independent witness, it transpired that Mr Ye lunged forward towards the police officers in an aggressive way thus necessitating that he be forcefully restrained. From the testimony of this witness, it transpires that Mr Ye was exhibiting this strange behaviour even throughout his stay at the hotel, remaining immobile in the hotel gym for several hours, refusing to wear a face mask, arguing with hotel staff, and even with the lift itself, and being a nuisance even towards other guests. “The Court unfortunately witnessed this strange behaviour from the part of appellant even throughout the hearing of the appeal proceedings.”

In his appeal, amongst other grievances, Mr Ye lamented that the punishment inflicted by the Court of Magistrates was excessive, since according to him that Court did not take into consideration that he was a first-time offender with a clean criminal record and therefore the three-month prison sentence imposed upon him was too onerous in the circumstances.

The Court of Appeal rightly concluded that the punishment inflicted by the Court of Magistrates was within the parameters laid out by law and it therefore found no reason to vary the same, considering above all that Mr Ye's "intransigent behaviour reflects a person who does not bow down to authority in any way and thinks that he can defy all and sundry adamant to have his way at all costs."

Consequently, although it is true that Mr Ye was to be deemed a first-time offender, however the serious nature of the violations of law of which he was found guilty combined with his non-compliant and obstinate attitude leading to bouts of aggression can only be met with a severe punishment as rightly inflicted by the Court of Magistrates.

On this basis, the Court of Criminal Appeal rejected the appeal filed by Mr Ye and confirmed the appellate judgment in its entirety whereby Mr Ye was condemned and punished to an effective three months imprisonment and to a fine of €1,000.

INDEX

AZZOPARDI
BORG &
ASSOCIATES
ADVOCATES