FROM THE BENCH SERIES : 2020

FROM THE BENCH – 2020

Produced and Published in 2020 by Azzopardi, Borg & Associates. All chapters first appeared as weekly articles on the Times of Malta.

Corrspondence in relation to the publication should be forwarded to:

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

Printed in Malta by Progress Press Limited.
Editor: Jurgen Micallef
Cover Design by TBWA\ANG

FROM THE BENCH – 2020

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

2020
Published by Azzopardi, Borg, & Associates

CONTENTS

Counting parties	8
Sale by licitation	11
Reopening a case?	14
Covert recordings	17
Releasing fish into the sea	20
Illiquid claims and interest	23
Jurisdictional battles	26
Breaking the seal	29
Suspended with half pay	32
May I appeal?	35
Selling at sixty	38
Selling short	41
The ramifications of emphyteusis	44
Constitutional compensation	47
Provisional execution	50
Annuling a debtor's fraudulent act	53
The third decree	55
Security for costs	58
Thou shalt not steal	61
Change of circumstances	64
What's in a name?	67
The commodatum	70
Fact or opinion?: How Maltese courts handle libel cases	73
Setting up a counter claim	76
Data protection is the new legal buzzword	79
Advocate of the child	82
Put it in writing	85
Ran out of time	88
Hidden defects	91
In the name of others	94
166A: A potent tool	97
Some bark, most bite	100
Bills of exchange	103
In the band club	106
Oath of the defendant	109
Better safe than sorry	112
To play, to boat ... or to litigate	115
A marriage annulled	118

CONTENTS CONT.

Creating trouble	121
That blessed airspace	124
The morality of money	127
Blessed be the right of inventory	130
Breaking the chain	133
Misleading investment advice	136
Clash of the condomini ... or co-owners?	139
Pay up ... or risk getting jailed	142
The law of the dead	145
... You are not the father!	148
Tenant lockout	151
Present!	154

INTRODUCTION
BY JURGEN MICALLEF

However scathing and chaotic the year of 2020 may have been, it was indeed a year to remember. Quite dramatically, a disease outbreak proliferated uncontrollably and social injustices evidently became more common than going out for a stroll without wearing a surgical mask. Chaos, at one point, virtually took over.
Law, however, is known to bring order to chaos.

In some way or another, everyone can relate to moments of chaos; be it whether your dog attacked your gardener or whether you lost thousands of Euro because of bad investment advice. The series "From the Bench" is exactly that: a platform where segments of chaos causing legal trouble are published weekly and eloquently dissected, enabling the ordinary reader to relate to moments of chaos, whilst yet providing the outcome of what legally happens when, for instance, your dog does indeed bite your gardener.

William Shakespeare once famously wrote "The first thing we do, let's kill all the lawyers". This line may be interpreted in numerous ways, though the most common interpretation of this line stems from the traditional unwelcoming and privileged reputation which lawyers are often portrayed to have. This particular irksome characterisation of lawyers is merely a subconcious prejudice which is often triggered when a lawyer is not yet required. When, however, a lawyer is required, this subconcious prejudice suddenly transforms into the highest exaltion – as if a lawyer is one's only hope.

So, instead, let's not kill all the lawyers. Instead, let's admit the vital role which lawyers have in society. Let us also appreciate that contributions such as these set of articles are the product of a lawyer's obligation towards the development and growth of society. The very idea behind these weekly articles was in fact, birthed out of our obligation to inform the public, to give back to the public.

The first edition of "From the Bench" detailed numerous landmark judgments delivered by our courts; judgments which have contributed towards the development of our law. Following such positive feedback, we have decided to retain the same approach whilst yet taking a step further and also focus on dissecting the procedural labyrinths which parties to a court case often have to face.

Though legal procedure may be considered somewhat of an untamed legal monster, the authors have attempted to domesticate this monster. One may therefore find

chapters in this publication explaining, for instance, whether and why proceedings should be instituted in Malta or Gozo, when a judgment may be appealed, and even whether a surname can be changed. The list continues.

The road to considering that we have fulfilled our role in contributing to society is a never-ending one. Nevertheless, everyone at Azzopardi, Borg & Abela Advocates strives to ensure that no shortcuts are taken, in that each and every article within this series aims to inform – at least – one member of the public at a time, each week. On this note, I must thank the Times of Malta for allowing us the space to do all of this. I must also profoundly thank all the authors for giving their input and going through the information which they convey to the public with a fine-tooth comb.

COUNTING PARTIES
BY DR CARLOS BUGEJA

Inġ. Joseph Bajada vs. Il-Kummissjoni għas-Servizz Pubbliku et
9 January 2020, 1253/18TA
Civil Court, First Hall

Laws are known to be replete with gaps, more commonly known in the legal world as 'lacunae'. The reason is generally thought to lie in the divergence between the text and the purpose of a law, for the wording of the law can hardly always cater for every possible situation under the sun.

Had law been complete and unfailing, there would little room for argument, for law would simply reduce itself to a process where some type of event on one end would automatically trigger an action and consequence in another, in what would be none more than a mundane automated 'if this then that' script the conclusion of which is foregone.

But the law is nothing like that; and that is why lawyers argue the law and the purposes behind it.

The case of 'Inġinier Joseph Bajada vs Il-Kummissjoni għas-Servizz Pubbliku et', decided by Judge T. Abela on 9 January 2020, was a prime example of an atypical bizarre procedural labyrinth which had to be debated and decided with learned innovation, for the law provided little precise guidance.

Our court system operates under a system of island jurisdictions; we have courts in Malta, and courts in Gozo. Article 768 (1) of the Code of Organisation and Civil Procedure states that where the number of the defendants in a lawsuit residing in Malta exceeds that of the defendants residing in the Islands of Gozo and Comino, each of the defendants residing in Malta may deny the jurisdiction of the court of Gozo. Likewise, where the number of defendants residing in the Islands of Gozo and Comino exceeds that of the defendants residing in Malta, each of the defendants residing in Gozo or Comino may deny the jurisdiction of the court of Malta. This privilege is known as privilegium fori.

This procedure has been part of our law of procedure for a very long time, remaining unchanged since the initial codification of the Code of Organisation and Civil Procedure back in year 1855.

It is a rule so old that one would be led to believe that everything that had to said about it was.

But the truth cannot be farther than that.

This is a rule that favours the majority of respondents in a lawsuit; if such a defence is pleaded, then the lawsuit is to be heard by the court where most respondents hold their residence.

One just has to count the defendants.

In this case, plaintiff was seeking an action against the Public Service Commission and the Permanent Secretary within the Ministry for Gozo to impugn a decision appointing another individual as Assistant Director within the Public Cleansing Directorate at the Ministry for Gozo.

The Public Service Commission is seated in Malta, and the Ministry of Gozo is situated in Gozo. There was no majority of residents in either island, and hence, plaintiff filed the lawsuit in Malta.

Simple, if not for a riveting plot twist that took after months after.

By virtue of a decree of the Court delivered six months into the lawsuit, the other applicants for the post were called to participate as joinders in the pending suit, for they were seen to hold an interest in the outcome of the case.

Now, article 962 of the Code of Organisation and Civil Procedure states that the third party joined in the suit shall for all purposes be considered as a defendant in the case. The new defendants resided in Gozo, and just like that, six months through, there suddenly emerged a shift in the numbers, because thereafter, the majority of defenders lived in the island of Gozo.

Predictably, the new respondents pled against the continuation of the suit in Malta. In its preliminary judgment, the Court rightly observed that originally, it certainly had the necessary jurisdiction to hear the case, since there was no majority of defendants seated in the island of Gozo. The situation only changed when the applicants joined into suit.

Generally speaking, these new defendants did have the right to deny jurisdiction of the Maltese court in terms of article 768 (1) of the Code of Organisation and Civil Procedure, not only because they did reside in Gozo, but also because they raised the plea at the first instance (in limine litis).

The question was: was thereafter the Civil Court, First Hall seated in Malta no longer competent to hear the case?

The law does not say anything about such rare circumstances, and neither does our rich history of judicial pronouncements, making this judgment a landmark one. The Court concluded that the privilegium fori only applied to the original parties to the case, notwithstanding any changes to the number of defendants if others join the case at a later stage. This particularly, since the court's competence would have been accepted through the progress of the case, including for instance when the original parties would have acquiesced to the court determining certain questions, such as whether or not to call into suit third parties. This reasoning moves in line with the established principle that if the court's competences is originally 'accepted' by the parties to the case, then they can no longer later plead against its jurisdiction. This is a tricky concept, for once they join the suit, the joinders also become fully-fledged defenders, and they are still to be treated as 'original defenders' for the purpose of the law. So legally speaking, one cannot really talk about original versus added defendants.

However, the court's reasoning also has sound practical justifications: had it concluded differently, it would mean that the case could bounce from one court to another, according to the number of respondents added from time to time. If court jurisdiction could shift so effortlessly, it could easily lead to procedural exploitation by those parties who are uninterested in a speedy resolution of the case. It could lead to a myriad of questions, such as: What if more joinders are needed in the future, that once again tip the balance? Why should legal interpretation lean towards the opening of opportunistic forum shopping?

For these reasons, the court rejected the plea of privilegium fori, and declared that it had the jurisdiction to continue hearing the case.

The parties requested and obtained permission to appeal.

SALE BY LICITATION BY DR CARLOS BUGEJA

Malcolm Jones et vs. Francis Debattista et
16 January 2020, 319/2018JVC
Civil Court, First Hall

Co-ownership of property is never simple.

Two or more people may sometimes draw themselves into community of ownership voluntarily. It can be a case of two investors willing to share the burdens and takings of an ambitious project. Or it can simply be a lovestruck couple buying its first property.

But many a time, individuals fall into undivided co-ownership unwillingly, often through inheritance. In some cases, originally willing co-owners fall apart, and seek to walk away with their share.

In such cases, our legislators had a choice: either to let co-owned property rot into an endless longing for an improbable agreement, or else, to provide for an opt out mechanism.

Our legislator decided in favour of choice; and truth be told, rightly so. There are hardly any economic or social benefits favouring perpetual mandatory co-ownership, so under our law co-ownership is only very limitedly imposed. Indeed, our law provides for various remedies which the co-owners may resort to, to terminate the community of ownership. This reflects the attitude of the earlier Code Napoléon, which is said to have viewed undivided co-ownership with disfavour, if not positive dislike, for its economic inconvenience.

The judgment delivered by the Civil Court First Hall on 16 January 2020 by Judge Madam J. Vella Cuschieri in the names of Malcolm Jones et vs Francis Debattista et dealt with the exit rights of the unwilling co-owner.

The most common way to cease from being in a state of community is partition. In fact, article 496 of the Civil Code is clear that no person may be compelled to remain in the community with others, and each of the co-owners may at any time, notwithstanding any agreement to the contrary demand a partition, provided such partition has not been prohibited or suspended by a will.

When speaking about a piece of land, this would often involve a simple task of

drawing a line somewhere, so each co-owner takes a piece of land equivalent to his share. Where there are two properties of equal value owned by two people indivisibly, the exercise is reduced to a mere drawing by lot.

However, not all property can be easily partitioned. As an example, one cannot really erect a wall to divide a one hundred square metre apartment.

Equally, some properties cannot be comfortably partitioned without heavy devaluation and prejudice.

The law hence provides for a remedy: sale by licitation.

A sale by licitation may takes place with the consent of all the co-owners, or by an order of the court.

Licitation is a way out of co-ownership with which the distribution is not made through property parts, but through monetary proceeds. The procedure at law stays true to the etymology of the word 'licitare', which means 'to bid a price', for the resolution involves putting the property under auction for it to be acquired by the highest bidder.

Article 515 of the Civil Code states that where common property cannot be divided conveniently and without being injuriously affected, and compensation cannot be made with other common property of a different nature but of equal value, or if no one of the co-partitioners is able or willing to take the property, it shall be sold by licitation for the purpose of distributing the proceeds thereof.

Whether or not a property is comfortably partitionable is something to be considered by an architect appointed by the court.

Court ordered sale by licitation and 'sub hasta' (sale by court auction, or subbasta) are not one and the same thing. Admittedly, this is a case of lawyers splitting legal hairs, but truthfully, the distinction is there.

The sale by licitation is the substantive right provided for in the Civil Code (Chapter 16 of the Laws of Malta), and is limited to situations where parties hold property in common. Sale by court auction is the procedure found in the Code of Organisation and Civil Procedure (Chapter 12), dictating how all sales done under court authority are to be executed. This is not limited to the sale of property held in common, but also includes for example a sale of a property owned by a debtor at the request of his creditor.

The phrase 'subbasta' has interesting origins; it said to come from the Roman tradition to mark auctions by putting up a spear– called a 'hasta', a symbol derived from the ancient practice of selling under a spear treasure acquired in war. Hence the phrase "sub hasta vendere", which in typical Maltese fashion, became 'subbasta'. Our law makes the distinction between 'licitation' and 'subbasta'; article 521 (1) of the Civil Code states that generally (with some exceptions) when the sale by licitation takes place under the authority of the court, it shall be carried out according to the rules laid down for judicial sales by auction.

In its judgment, the court reiterated that this procedure is exceptional nature, for the law always prefers physical partition over sale by licitation. Sale by licitation is procedurally cumbersome, not to mention the inevitable devaluation of the property which is brought about by the procedure itself. The law of 'sub hasta', which is equally applicable to a sale by licitation, provides that the bidding shall start from a value equivalent to sixty percent (60%) of the value of the property (disclaimer: this principle at law is subject to a constitutional case which is due to be decided in a month), and experience teaches us that it is quite rare for a property to be sold at its full value.

Sale by licitation is thus an extraordinary remedy.

The court also considered that the law imposes the participation of third parties in the bidding process (known in the legal world as 'oblaturi estraneji'), and therefore, a request for third party bidders to be excluded could not be entertained.

As a result, the court ordered the sale of the property subject to the case through licitation, and ordered that the proceeds are to be divided according to the shares held by each of the parties.

REOPENING A CASE?
BY DR GRAZIELLA CRICCHIOLA

Joseph Zammit and Mary Grace Zammit vs. Reverendu Dun Karm Busuttil
8 January 2020, 825/2018
Civil Court, First Hall

Justice is ruled by two equal proponents: facts and law.

Parties in a court case argue one, the other, or both, depending on the merit of the case. And a judgment is delivered, with the aim of laying to rest the dispute at hand. The idea is that a disputed fact or legal right becomes – through the judgment of the court – a legal truth, against which (save any right of appeal or legal impugnment) there is no further recourse. Our court system operates a binary approach – a claim is either upheld, or it is not; there is little incentive to leave a dispute open after judgment has been delivered.

Now, imagine instituting judicial proceedings against a person and the court produces an unfavourable judgment. Could that same party propose identical judicial proceedings in court on the same merits years late? Can the first judgment be overturned by a second new judgment? Can a claimant file case after case, until he gets it right?

Simply put, no he cannot.

A civil case is decided when the court delivers its final judgement.

There are two ways how judgments are deemed to be final. Firstly, it is when the first court delivers its judgment, and no appeal is filed within the period stipulated by law. Secondly, it is when an appeal is indeed filed, and the Court of Appeal delivers its judgment. We do not have a court of third instance (such as for instance, the Italian Corte Suprema di Cassazione). With the judgment of the Court of Appeal, a case is laid to rest.

This system ensures an efficient system with reliable final judgements.
Maltese law explains this mechanism through a principle known as res judicata, literally translated to mean, 'a matter (already) judged.' The principle of res judicata aims to cease proceedings which otherwise deserve to be heard and decided by the court. The law discourages repetitive and unnecessary litigation, whilst preserving. already limited judicial resources. In a way, this principle also protects the finality

of judgements.

Basically, once one is handed a 'final judgment', one is pretty much certain that the dispute is over.

Of course, even the law of res judicata has nuances and exceptions. Our courts have always interpreted this principle in a very rigid manner. In case of doubt, the court would decide against the existence of res judicata, and this to safeguard the person's right to access court as enshrined in article 6 of the European Convention of Human Rights (ECHR).

Although there are general principles that govern the applicability of res judicata, courts also consider the unique facts of a given case in deciding whether a party should be precluded from relitigating a particular claim or issue.

The institute of res judicata was the crux of the matter in the case delivered by the Civil Court, First Hall on January 8 by Judge Mark Chetcuti in the names of 'Joseph Zammit and Mary Grace Zammit vs. Reverendu Dun Karm Busuttil'.

The facts of the case were as follows: Back on the 7th July, 2010, the Civil Court, First Hall had decided in favour of defendant, and had ordered plaintiff to pay the former the sum of €90,927.07, representing equalisation of profit due. Moreover, the court had also ordered that the property relating to the case was to be divided in equal shares between the parties. These judicial proceedings also made reference to another case decided on the 7th October, 2016, in which the Court ordered spouses Zammit to pay the tax expenses owed for the division, the expenses for the curators and other judicial expenses.

After some time, spouses Zammit filed another lawsuit, complaining that the contract of division was published without their presence and that the shares of the parties were not equal. They requested for the Court to revoke and annul the existent division contract and to nominate a legal expert to value the property, for a new and fairer contract to be drafted.

Predictably, the defendant argued that the matter subject of this new case had already been decided back in 2010, effectively thus raising the plea of res judicata. The court observed that plaintiffs did not appeal from the earlier decisions given by the court, so those decisions were indeed final and not further contestable. The court then went into great detail to explain the principle of res judicata. It reiterated that for this plea to be successful, three exhaustive elements must be proven. It

explained that the new judicial proceedings instituted must have (i) the same merits, that is, the new pleas must be based on the same juridical facts which formed part of the previous pleas which were determined in the previous judgement; (ii) the judicial proceedings must be instituted between the same parties; and (iii) the object of the case must be identical to each other.

If all of these concur, then indeed a res judicata plea is to be upheld.

In this case, the Court analysed the application filed by spouses Zammit to establish whether all these conditions for res judicata where present.

The court noted that in fact the parties in all the three cases were the same one. The object of the court case was also the same, and the merits were identical for effectively, what was being requested was the division of the property held in common, something which had already been requested and decided in the previous cases.

After considering the facts of the case, the court decided that spouses Zammit were precluded from filing judicial proceedings since the matter at hand was already decided. For these reasons, the Court accepted the plea of res judicata and ordered all costs to be paid by the applicants.

COVERT RECORDINGS BY DR CARLOS BUGEJA

Daniel Zammit vs. Rocco Bartoluccio
3 February 2020, 80/2019
Small Claims Tribunal

The legality of covert recordings was seldom in the mind of our legislators back in 1855, when our procedural laws were consolidated into the Code of Organisation and Civil Procedure. Thomas Edison's would not patent the Cylinder Phonograph – the first ever mechanical recording device – for another twenty-two years, and even then, this machine would be too large to conceal at least for another hundred years. Clandestine recordings of conversations between people was not a reality that the law had to deal with. At least, not at that moment in time.

Then came the mobile phone.

Audio recording became easier, and people started recording.

Today, a few opt to use their recording apps on their phones for a private rendition of their favourite guilty pleasure song, worthy of an internet-viral X-Factor audition. Others hold recordings for more astute purposes; perhaps to prove or disprove an allegation in court. Some of these recordings are made covertly, without the other person knowing.

This leads to a pertinent question: are covert recordings admissible as evidence in a court of law?

The answer can be found in the decision delivered by the Small Claims Tribunal in the names of Daniel Zammit vs Rocco Bartoluccio, on 3 February 2020 (80/19 – Adjudicator Dr Kevin Camilleri Xuereb). This decree followed a request made by plaintiff to be allowed to exhibit recordings of conversations had with the respondent.

The respondent objected to the request.

The Tribunal's decision was nothing but an impeccable compendium of each and every facet of the principle of admissibility within the Law of Evidence.

The Tribunal stated that our law requires all evidence to be relevant to the matter at hand. Moreover, parties are required to produce the best evidence that the

party may be able to bring forward. Any declaration made by a party against his interest, or any other writing containing any admission, agreement, or obligation is admissible as evidence. Any writing, whether printed or not, and any inscription, seal, banner, instrument or tool of any art or trade, tally or score, map, sign or mark, which may furnish information, explanation or ground of inference in respect of the facts of the suit, are admissible as evidence.

It can thus be safely stated that the law's primary concern is its relevance, and not its fons et origo (its origin). The search for truth is paramount, and one must not lose sight of this objective – in a way, the end does justify the means.

In the United States, the approach is encapsulated under the legal metaphor of the 'Fruit of the Forbidden Tree', depicting a logic that if the source (the "tree") of the evidence is tainted, then so is anything gained (the "fruit") therefrom.

There is no such thing at Maltese Law.

The principle under our law is that any piece of evidence that makes more or less probable a fact in issue, is admissible, unless there exists an exclusionary rule of evidence that renders the piece of evidence inadmissible.

The Tribunal, drawing inspiration from English Law (where our law of evidence is born), stated that the admissibility of evidence is not affected by the means used to obtain it. The use of illegal or unfair techniques to obtain evidence does not generally make otherwise relevant and admissible evidence inadmissible. A forbidden tree will nevertheless produce untainted (that is, permissible) fruit. As early English judges used to state: "It matters not how you get it; if you steal it even, it would be admissible in evidence." It is largely immaterial how evidence is obtained, so long as it leads to the truth.

This legal understanding is clear, and also borrowed by our courts.

Evidence unlawfully, improperly or unfairly obtained is nonetheless admissible as a matter of law, as long as it is relevant to the matters in issue. If it is, the court is not concerned with how the evidence was obtained.

While this proposition may at first look preposterous, it is necessary for the path towards truth.

The Tribunal quoted a past judgment which had point-blankly stated that a person has the right to record a conversation with someone else, even without the other

person's consent. The recording is admissible as evidence, for it may serve as a means how that proponent corroborates his or her version of events.

Certainly, recordings must be approached with some caution, as there is always a risk that a recording is manipulated in order to draw the party who is unaware of the recording to state something which could easily be taken out of context. Nevertheless, one cannot deny the value of what is proven through recordings.

The Tribunal examined the General Data Protection Regulation (EU Regulation 2016/679) and found that these rules had not created any exclusionary rules of evidence. Furthermore, these regulations do not apply to the processing of personal data by a natural person in the course of a purely personal or household activity. Be it as it may, even if the recording had indeed been in breach of data protection regulations, it would have still been admissible as evidence, for the long-standing principle is that illegally obtained evidence can still be proposed in a court of law.

Furthermore, Article 6 of the European Convention on Human Rights (basically, the right to fair hearing) does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law.

The Tribunal hence stated that the preservation of a telephone conversation may serve as a memorisation of a historical fact producible as evidence, if it satisfies the requirement of relevance. While graciously reprimanding respondent for quote-mining what was stated in past judgments, it elected to allow the production of the recordings as evidence.

The case continues.

RELEASING FISH INTO THE SEA
BY DR MARY ROSE MICALLEF

Fish and Fish Limited vs. Direttur Ġenerali Sajd u Akwakultura et
7 February 2020, 50/2020/1
Civil Court, First Hall

In order to the ensure effectiveness of a future judgment, the Maltese procedural system adopts what are known as precautionary warrants. A precautionary warrant enables the holder of a right to preserve what he claims is due to him until such right becomes executable after obtaining a court judgment.

Pending such judgment, the holder of such right may seek to institute a precautionary warrant against his debtor, in order to secure his rights which would be then confirmed through the final judgment.

Until such rights are acknowledged by the courts, there would be a likelihood risk that the person's right would be 'disposed' of by the defendant in kawża.

The main legal norm in connection to the issuance of such warrants, is that they must be accompanied by a contentious litigation suit. Failing this, the issuer would be exposing himself to legal penalties.

Amongst the list of precautionary warrants, we find the prohibitory injunction. This warrant is deemed to be the mightiest amongst its kind. Unlike other precautionary acts, which acts mainly seek to preserve assets, arrest air or sea vessels, seize assets or property, impede persons from departing the Islands, the injunction prevents a person from doing a specific act.

The injunction is typically used in cases involving a development which is causing structural damage to an adjacent tenement, whereby owners of such would seek this injunction to prevent developers from carrying on with their works.
The successful issuance of such warrant, in such circumstances would effectively mean that the developer in question must stall its works until the court pronounces a final decision on the matter.

Past cases have shown that this injunction was sought, even for the most unusual cases – judgments are evidence of this. By way of illustration, this warrant was once requested as a mode to prevent a married man's lover, from entering the couple's matrimonial home. Needless to say, the court had dumped such request.

This warrant was recently used in an identical abnormal situation – applicants (a fishing company) sought to impede the local fishing authorities from releasing into the sea a school of bluefin tuna – the case in the names of Fish and Fish Limited vs Direttur Ġenerali Sajd u Akwakultura et decided by the Civil Court First Hall on the 7th February 2020.

This case was the outcome of a prior email that was sent by the Director General of Fisheries, whereby, plaintiff company was informed that the tuna in question was to be released in the sea.

Plaintiff company instituted procedures of prohibitory injunction as to impede the concerned Authorities from releasing the fish. They claimed that they had bought the fish in question which priorly had been caught legally – hence they claimed that they were the legal owners of the tuna. Consequently, claimant company claimed that the Director General's decision was null and contrary to law. Claimant company demanded authorisation to place the tuna in their own fish farm.

The court discussed in detail the cumulative elements that need be established for it to accord the warrant.

Firstly, for such warrant to be granted the court must be satisfied that the person who is suing out the injunction, prima facie (mad-daqqa t'għajn) possesses such right. For the court to establish this, it need not to delve significantly into the merits of the case - it merely needs to examine, whether on the face of it, claimant who is seeking the warrant, is a possessor of such right. In fact rarely are the cases where evidence about the merits of the case are heard before the court when hearing precautionary warrant suits.

Secondly it must be shown to the satisfaction of the court, that if the respondent, is not precluded from committing the act in question (in this case releasing the fish), then claimant would be suffering irremediable damage. Irremediable damage essentially means that the damage that would be caused cannot in any way be remedied, except by the issuance of such warrant.

Strictly speaking this second element ties with the principle that the injunction is only to be resorted to as a last resort remedy, including the fact that it cannot be resorted to as an alternative to other precautionary warrants that the law makes available.

Furthermore, an injunction may only be resorted to if the issuer requests the preclusion of an act, not as a means to get someone ordered to do something – its an obligation di non fare not di fare. The court deemed that strictly speaking

claimant company was merely demanding authorisation to place the fish in its own fish farm, since this authorisation was not granted by the fishing authorities. Evidently, the claimant company were seeking this authorisation rather than preclusion of the release of the fish.

An injunction cannot be resorted to if the act that seeks preclusion has already occurred – the courts may not reverse what has been already been done. The court observed that the Director General, had already issued such decision, and in this light the warrant in question could not be used to revert that decision.

When it comes to claims against the government, claimants need to satisfy an extra requisite –the court shall not issue any such warrant against the Governmental authorities unless the authority against whom the warrant is demanded confirms in open court that the thing sought to be restrained is in fact intended to be done. It must also be satisfied that unless the warrant is issued, claimant would be suffering prejudice that when calculated it would result to be disproportionate in consideration to the actual doing of the thing sought to be restrained.

In conclusion the court observed that the fish in question were in an illegal situation, since it emerged that claimant company had exceeded the prescribed tuna quota. Moreover, none of the abovementioned elements were satisfied by claimant company, therefore the court rejected the request for the issuance of the prohibitory injunction.

ILLIQUID CLAIMS & INTEREST
BY DR CARLOS BUGEJA

Mariella Vidal vs. Micaela Cassar
18 February 2020, 774/2014GM
Civil Court, First Hall

Interest is the cost of using somebody else's money.

Under Maltese law, the deprivation of use of one own's money is made good by the payment of interest at the rate of eight per cent a year.

This is really and truly a simple concept, justifiable on the basis of the fact that the creditor has not had his money at the due date, whether regarded as the profit he might have made through investment if he had had the use of the money, or, conversely the loss he suffered because he had not had that use. In personal injury compensation cases, the idea is to fully compensate the aggrieved party by putting him into a position he would have been in had the wrongful act not been committed, and not allow the perpetrator of the act to enrich himself unfairly on money he should have paid to the victim.

Certainly, one may have misgivings with this principle, for truth be told, a sum of money deprived of cannot in reality always be invested successfully. Some investments may go wrong.

However, our law presumes that money may be invested without any difficulty and at any time, and operates under this assumption. Hence, where a sum is due, interest is also due without the creditor being bound to prove any loss.

Decisions on interest due is rendered a tad more complicated when a plaintiff in a lawsuit does not ask the court to decide upon a specific sum, but instead leaves it up to the court to determine (the legal term being 'to liquidate') what is due.
This can be done.

Some claims may be of such a nature that it would be impossible for the plaintiff to know from the onset what he is owed. An example of this is claims for compensation for personal injuries, which may depend on conclusions reached by a medical expert appointed by the court after the case would have been filed.
Often, the question arises as to from when shall interests be calculated if there is a favourable judgment for compensation where the request is initially unspecific. Is it

from the date when the damage occurred? Is it from the date when the case is filed? Or is it from when the judgment is delivered?

This might initially seem like a trivial question; but in reality, it is not. A five-year-old claim worth one hundred thousand euro can bring therewith a staggering forty-thousand-euro worth of legal interest.

The timing of interest is thus critical.

The answer to this question lies in the Latin principle correctly termed: 'illiquidis mora non contrahitur, mora non committitur in illiquidis et incertis', and that 'non potest improbus videri, qui ignorant quantum solvere debeat.'

This is legalese for: there can be no default on a debtor for the lack of payment of illiquid debts.

The idea is that it is impossible to adopt interest for late payment on a credit of compensation for damages which is still unquantified.

The judgment of the Civil Court, First Hall, in the names of Mariella Vidal vs Micaela Cassar (774/14GM), delivered on 18 February 2020 studiously discussed this principle at law.

This was a typical action for the liquidation and payment of damages suffered by a victim of a traffic accident. Back in 2014, plaintiff had filed a judicial letter against respondent, and had proposed, on a without prejudice basis, that respondent pays as compensation the sum of €77,112. Respondent did not pay, and a few months later, plaintiff filed the lawsuit.

The court found that respondent was responsible for the accident, and quantified the damages suffered by plaintiff at €92,107.81.
However, there was the quandary of interest to sort out.

The court quoted article 1139 of the Civil Code, which states that '...where the subject-matter of the obligation is limited to the payment of a determinate sum, the damages arising from the delay in the performance thereof shall only consist in the interests on the sum due at the rate of eight per cent per annum.' Conversely, it can be stated that interest does not trigger if the sum request is not quantified.

This makes sense, for if the debtor does not know how much the claim of the other party is, he is not to be faulted for not paying. This principle does however

carry an exception, exemplified in the Latin brocard 'malitiis non est indulgendum' (mischievous behaviour should not be endorsed); that is, if respondent would have frivolously and vexatiously delayed the liquidation of what is due, or when he is fully aware of the amount being claimed, then interest may still be triggered prior to the determination of the amount due.

It has also been stated by our courts that interest starts running from the date in which the amount due becomes decidedly manifest. It is not sufficient to reveal the amount claimed, for interest starts running only when the amount is objectively determined by a court of law. For instance, if the court determines a lesser amount than that claimed, no interest is due prior to the conclusion of the judicial investigation in a court case. Simply put, interest starts running from when the sum claimed is easily determinable, or when it is determined by a court of law.

Here, it could not be stated that respondent's defence was in any way capricious. In this case, the determination of the amount was not easily ascertainable, no less because it depended on a number of factors, including medical conclusions (those leading to the rate of disability suffered by plaintiff) which are often subject to much debate. Respondent was not in any way to be fault for the fact that the case had taken six years to conclude.

For these reasons, there was no justification against the adoption of the general principle 'in illiquidis non fit mora'.

The court then ordered respondent to pay plaintiff the sum of €92,107.81 by way of damages, with interest to run only from the date of the judgment of the court.

JURISDICTIONAL BATTLES
BY DR CARLOS BUGEJA

eHealth Limited vs. Sergio Giglio et
24 February 2020, 85/2020MCH
Civil Court, First Hall

At the core of the European Union objectives is the cooperation between Member States in legal and judicial matters. Differences in laws of different member state hamper the sound functioning of the internal market, for the very fact that people would think twice before engaging in business with someone in another member state if a future dispute would be administratively impossible (or impractical) to resolve.

Hence, a number of EU regulations provide for easy and efficient rules that seeks to regulate cross-border transactions and intra-community disputes. The idea is to adopt measures relating to judicial cooperation in civil matters having cross-border implications, aiming at helping people resolve administrative or legal issues in other EU countries as easily as at home. Undoubtedly, a system of rapid and simple recognition and enforcement of judgments given in a member state yields an efficient European Union, which in turn incentivises more trade and cross-border cooperation.

Often, lawsuits are accompanied by precautionary warrants, a tool afforded to a claimant who seeks to provisionally protect his claim until the matter is finally determined by a court of law – the most renowned being the garnishee order, which is an interim measure whereby the funds belonging to the debtor are sequestered from the possession of a third money and deposited in court for the taking of whoever wins the case at the end.

An efficient judicial system of provisional protective measures is vital in a society; without it, many would be the cases decided which would then could not be enforced.

Cross-border disputes may complicate matters; a plaintiff in a lawsuit may need to protect his claim beyond the local territory, more so if his adversary has no assets in the country where the claim is first lodged, or when it is probable that a successful claim would eventually have to be enforced in another member state.

Intra-community precautionary warrants are regulated under EU Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, known as 'Brussels Recast'.

These rules were explored by the Civil Court, First Hall in application number 85/2020MCH, in the names of eHealth Limited vs Sergio Giglio et, decided on 24 February 2020. The company eHealth Limited had requested and obtained the issuance of a precautionary warrant of seizure of company shares against companies officially registered in Italy and the UK. Legally speaking, these company shares were thus situated in Italy and the UK, and not in Malta.

The request had been made under article 35 of these Regulations.

Article 35 states that 'Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter.' These foreign companies hit by the precautionary warrant argued in court that the warrant was null and avoid, and asked for it to be revoked, for the reason that the Maltese court issuing it did not have the necessary competence to issue it in the absence of territorial jurisdiction on the subject-matter of the warrant (that is, the company shares).

The company that had originally requested the issuance of the warrant disagreed. It referred to the Regulations' recitals which state that where provisional, including protective, measures are ordered by a court having jurisdiction as to the substance of the matter, their free circulation should be ensured under the Regulation, unless they are measures which were ordered without the defendant being summoned to appear. The recitals further state that where provisional, including protective, measures are ordered by a court of a member state not having jurisdiction as to the substance of the matter, the effect of such measures should be confined to the territory of that member state issuing the precautionary warrant.

In giving out its decision, the court stated that it appears from the Regulations that provisional measure could indeed be issued in a member state even if that member state did not have jurisdiction on the substance of the action filed before it. This however did not mean that the Maltese courts had jurisdiction on property situated in another jurisdiction, for it had next to no control over it. Indeed, the courts of the place where the assets subject to the measures sought are located are those best equipped to assess the circumstances which may lead to the granting or refusal of the measures sought, and furthermore to lay down those rules and conditions that must be observed for proper observance of the measures authorised.

While it may be true that similar protective measures may be found in all of the relevant member states (for instance, the 'warrant of seizure' is not endemic to Malta, and may be found in many other countries), the granting of certain protective

measures necessitate detailed knowledge of the actual circumstances under which the precautionary measure is to take place. It is thus inevitable that there must be a real connecting link between the subject-matter of the measures sought, and the territorial jurisdiction of the court before which these provisional measures are requested.

It was further stated that precautionary measures issued under article 35 of Brussels Recast Regulations may not be imposed on the judge in the foreign state who has wider jurisdictional power, for that would be unnecessary and illogical interference.

As a result – the court concluded – the companies requesting the revocation of the warrant of seizure filed in Malta were right to claim that the Maltese court did not have territorial jurisdictions on the subject-matter of the precautionary warrant.

As a result, it removed the warrant, and ordered the company eHealth Limited to pay the costs of the proceedings.

BREAKING THE SEAL
BY DR KEITH A. BORG

A vs. B
28 February 2020, 99/2017/1
Constitutional Court

That relational breakdown may affect minor children adversley is quite a given. Too often the main players in any such breakdown fail to appreciate the manner in which their dealings and ultimate decisions affect minor children in their care. There is similarly little room to deny that children do make up their own opinions. Fortunately, our law affords a voice to minor children in the figure of the Children's Advocate.

The Children's Advocate is principally tasked to provide legal advice and assistance to children, to establish and present the views of the child before any court of law or any administrative authority, and to provide explanations to the child concerning the possible consequences in the case of compliance with his or her views. This figure allows a minor to ascertain his/her wishes and feelings, thereby giving a Court the opportunity to take into account a child's voice without, perhaps, placing the child too close to the conflict.

Article 12 of the United Nations Conventions on the Rights of the Child states that States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. It is also stated that for this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The manner in which the Civil Court (Family Section) dealt with one such report by a Children's Advocate was the highlight of the judgment delivered by the Constitutional Court on the 28 February 2020. Due to the sensitivity of the matter and in respect of the litigants' privacy, the parties' names are not being reported.

The facts of the case were as follows: the spouses had signed a contract of consensual personal separation which saw their minor daughter residing with her mother, while visitation rights were afforded to the father. Some time after,

the mother initiated mediation proceedings based on the premise that what had previously een agreed on contract with respect to their minor daughter was in effect harming same. By means of a specific application to the Civil Court (Family Section), the mother, alleging that her daughter was complaining that the father was exerting physical violence on the minor, requested the latter court to appoint a Children's Advocate to the minor and to, pending the Advocate's report, reduce the father's visitation hours, which visitiation had to take place, the mother pleaded, under supervision.

Acceeding to this request, the Civil Court (Family Section) appointed a Children's Advocate; after accessing the report prepared by the latter, the Court immediately ordered that the report be sealed thereby rendering it inaccessible to the parents. It then proceeded to decree that the father's visitation rights were to be reduced to once a week, for one and a half hours, under the supervision of Aġenzija Appoġġ.

Unhappy with the situation, the father requested the Civil Court (Family Section) to refer the matter of the First Hall of the Civil Court in it's Constitutional Jurisdiction claiming that the fact he could not gain access to the Children's Advocate report constituted a breach of his right to a fair hearing / trial as protected under the Constitution as well as under the The European Convention on Human Rights.

With the First Hall of the Civil Court in it's Constitutional Jurisdiction finding aginst the father, the matter was referred, on appeal, to the Constitutional Court. In it's judgment of the 28 February 2020, the Constitutional Court found that it was not the Civil Court's (Family Section) order to have the report sealed that amounted to the complained breach, but rather the fact that the Civil Court (Family Section) pronounced its decree without due motivation and based said decree on the Children's Advocate report without giving the parties due explanation for it's decision not to disclose the content of said report.

In it's judgment, the Constituional Court emphasised the general principle that litigants were to be made aware of any information being considered by a Court when said information is pertinent to the exercise of their rights; where the interests of minors are at play, the Court was also to consider whether such disclosure may give rise to any undue harm to a minor. The Court was then to weigh up the interests of a minor against the interests of said minor's parents, seeking always the best balance. Where such balance is unattainable, the interests of the minor were to be kept supreme and consequently previal. The Constituional Court also placed significant emphasis on the need for decrees to

be well motivated citing the litigants' right to be informed of the basis of any such interim decisions.

The Constitional Court concluded that the litigants' deprivation of access to the Children's Advocate report together with the lack of motivation of the decree delivered by the Civil Court (Family Section) indeed constituted a breach, thereby upholding the father's appeal and declaring breach of the father's rights as protected by Article 6 of The European Convention on Human Rights – the right to a fair trial.

The Civil Court (Family Section) was ordered to place the litigants in the same situation as that obtaining immediately after the order to have the Children's Advocate report sealed.

SUSPENDED WITH HALF PAY
BY DR REBECCA MERCIECA

Mark Formosa vs. L-Avukat Ġenerali
28 February 2020, 85/2017/2
Constitutional Court

The presumption of innocence is the legal principle that one is considered 'innocent until proven guilty'. It is a simple phrase that generates considerable interest among legal circles, for the wide implications that it brings therewith. One very important question which is often asked is whether the presumption of interest is reserved at trial stage, or whether it starts even before that.

Persons being investigated for a potential criminal offence often find themselves being dismissed or suspended from work with half pay - whether such investigations are carried out by the police, whether a Magisterial Inquiry is ongoing, or whether these employees are investigated by their employer. The system is most prevalent in the public sector.

This tradition of suspension with half pay was the matter in the judgment of Mark Formosa vs. l-Avukat Ġenerali, decided by the Constitutional Court on the 28th February 2020.

In this case, the plaintiff, a Director within the Public Service in the grade of a Senior Principal, had been informed that the operations of the plaintiff's office were being investigated, and as such, he was being suspended from the exercise of his duties as an employee with the public service, and was only to receive half his salary while the investigation went on.

It so happened that five months after the precautionary suspension had been initiated, a recommendation was made for the removal of the precautionary suspension, and thus, the plaintiff was sent to work in a different department. He was however informed that he had no right to receive the allowances for the period during which he had been suspended, and that the salary which had been withheld from the him during the suspension period would only be refunded to him had he managed to be acquitted from the charges to be brought against him before the criminal courts.

The plaintiff was not happy with this, and thus filed a lawsuit, claiming that the suspension and the reduction in his salary had been in breach of his fundamental

rights protected by article 3 (prohibition of torture), article 6 (right to a fair trial) and article 7 (no punishment without law) of the European Convention on Human Rights. He also based his action on article 36 (protections from inhuman treatment) and article 39 (protection of law) of the Constitution.

The Civil Court First Hall (Constitutional Jurisdiction), while acknowledging that the suspension with half-pay created a financial and psychological burden on the employee, determined that such a burden was not enough to qualify as inhuman and degrading treatment. This reasoning was later confirmed by the Constitutional Court on appeal, which dismissed plaintiff's argument that him being 'labelled' resulted in inhuman and degrading treatment. The Constitutional Court rejected this claim and stated that for treatment to be inhuman, it is to deliberately cause one mental and physical suffering or harm to the body.
The plaintiff further claimed that it would have been just for him to be heard prior to the issuance of the precautionary suspension. He further asserted that had he been given an audience, the outcome would have been different, and he would not have been suspended with half pay. Simply put, he was lamenting against a breach of his right to fair hearing.

The court considered that the Public Service Commission Disciplinary Regulations do not expressly state that the plaintiff was to be heard prior to him being suspended, although it was likewise to be granted that there is was no rule against giving the plaintiff time to be heard. The first court had originally rejected the plaintiff's claim concerning the breach of his fundamental right to be heard, but the Constitutional Court did not agree. It stated that independent of what the rules stated, it would have been 'good practice' for the employee to be given the opportunity to speak up before a recommendation was given. This was not done, and as a result, the Public Service Commission prejudiced the employee's right to a fair hearing.

However, when it came to article 7 of the Convention (no punishment without law), the Constitutional Court agreed with the first court that there was no breach. The court considered that while it was true that the precautionary suspension had led to the employee to suffer a reduction in his salary by half, this was not a measure ordered following a conviction, so it could not be stated that there was a breach of article 7.

Despite finding breaches in some places, the Constitutional Court faced another difficulty: plaintiff had brought no evidence as to what his salary was prior to the suspension and neither did he bring any evidence towards any consequences suffered while on half salary. The court noted that the plaintiff had just stated

mentioned that he had 'loans' to pay, however did not indicate what these consisted of. Neither did he present any evidence of the hardship him and his family suffered because of the decision of the PSC to withhold half his salary. This notwithstanding, that two years had passed from when the suspension was lifted, and no criminal proceedings had been taken against him. There was simply a pending Magisterial Inquiry, which had yet to be concluded. Moreover, the arbitrary reduction of half the employee's salary is nothing but a form of punishment given before the employee is even found guilty of an offence or misconduct which merits dismissal. There was no doubt that the five months during which the employee had been suspended brought about uncertainty for the plaintiff.

Above all, the simple fact that the plaintiff had been employed meant that he was entitled to a salary. No procedure had been taken to determine whether the decision to reduce plaintiff's salary by half during the precautionary suspension was a reasonable one or otherwise, and no evidence was brought that linked the employee to an offence or to misconduct. The fact that a Magisterial Inquiry was underway and that a computer was taken from the plaintiff's residence to be inspected was not enough evidence that the plaintiff had actually done something wrong.

Thus, the Constitutional Court ordered that the plaintiff was to be paid the remaining salary which had been withheld, together with 5% interest from when each part of the salary had been withheld.

MAY I APPEAL?
BY DR CARLOS BUGEJA

Brian Galea et vs. Adam Cilia
11 March 2020, 165/2018LM
Court of Appeal

The right of appeal is not automatic.

In some cases, someone who feels aggrieved by a decision of a court first has to request permission to appeal from that court who would have made that very same decision. If the court says 'no', then one cannot immediately appeal.
As strange as it sounds, this is the law, and there are valid reasons for its existence.

Courts give three types of decisions: decrees, judgments, and those which in rare cases, our courts described as being neither decrees nor judgments. For one to decide how to challenge a decision, one must first find out the nature of the decision one is dealing with.

This is not always a simple task.

Decrees are usually defined as orders on particular issues that may arise during a lawsuit, while a judgement is a pronouncement on the whole claim. This is a generic distinction, and by no means an unfailing one, as most lawyers will tell. This may look awfully complicated, and quite truly, it is.

Article 229 (1) of the Code of Organisation and Civil Procedure (COCP) starts out by listing the decrees that can only be appealed from together with the final definitive judgment. For instance, a decree allowing or disallowing the expunging of a document from the records of the case cannot be appealed from mid-case and halt the case until the appeal on that point is decided. Ther Any grievance on the list decrees must wait, and then addressed at the end, together with an appeal from the final judgment. That way, cases are not unnecessarily delayed as lawyers argue the nitty-gritty of every single procedural aspect that arises as the case proceeds.

However, there are a number of decrees which may indeed be appealed from before final judgment is delivered. These are once that are considered vital, and that necessitate a 'final' decision prior to the delivery of the final judgment. The law, in article 229 (2) of the COCP provides a limited list of these kind of appealable

decrees, such as a decree refusing the joinder of a third party in a lawsuit. Other decrees not included in the lists under article 229 (1) and article 229 (3) may be appealed from before the definitive judgment only if and after the court gives the aggrieved party permission to appeal, upon a request to be filed within ten days from the date on which the decree is read out in open court. The court may only grant such leave of appeal if it deems it expedient and fair that the matter be brought before the Court of Appeal before the definitive judgment. These are – simply put – the rules of appeals from decrees.

When it comes to judgments, there is a similar procedure, provided for in article 231 of the COCP.

A case may be decided by more than one judgment. There may be preliminary issues which need to be decided prior to hearing the rest of the case, such as when there is a plea against the jurisdiction of the court hearing the case. The court will first deliver a judgment on that plea, and if it finds that it does have jurisdiction, it will move to decide the merits of the case by means of a second judgment.

It is generally stated that where several issues in an action have to be determined by separate judgments, appeals may be made only together with the final judgment, unless the aggrieved party manages to obtain leave from the court to file an appeal on a first judgment, mid-case, and prior to the delivery of the final judgment.

The idea is that parties are not to be allowed to exploit the nuances of court procedure and seek an appeal from every single decision in order to delay the conclusion of the case. If an appeal could be filed from every single decision of the court, cases would just never end.

These principles were the matter in the judgment delivered by the Court of Appeal on 11 March 2020, in the names of Brian Galea et vs Adam Cilia (165/2018/1LM).

Applicants had filed a lawsuit against Respondents before the Rent Regulation Board. Respondents failed to reply in time, but eventually asked the Board to give them some more time and allow them to nonetheless file their reply. The Board acceded to the request and by means of a decision dated 8 May 2019, granted respondents an additional twenty days to file their reply to the lawsuit against them.

Applicants appealed from this decision.

Respondents, now the Appealed, asked the Court of Appeal to reject the appeal for various reasons, including because in their view, prior to appealing, Appellants had to request leave of the court.

The first question that needed to be asked was: was the decision of the Board of 8 May 2019 a decree or a judgment?

The court quoted past judgments which stated that decrees do not generally 'close' the matter before the courts. If the decision merely provides for a particular episode of a procedural aspect within the context of the matter at hand, that it should be considered as being a decree. If it decides the matter at hand or releases a respondent from the case (quando terminat negotium de quo agitur), it is to be considered as a judgment.

The court stated that the decision in question did not settle the whole of the lawsuit, nor did it release Respondents from the case. It was merely a procedural decision which sought to regulate the way forward. It was not a judgment, and therefore, article 231 of the COCP, which refers to judgments, was not applicable. Having established that the decision was indeed a decree, and not a judgment, it moved to analyse whether it was one of those listed under article 229 (1) (those that can only be appealed from together with the final judgment) or under article 229 (2) (those that can be appealed from immediately, without needing leave of the court).

Indeed, it was not.

As a result, one had to fall on the provisions of article 229 (3) of the COCP, that is those decrees which by exclusion, may only be filed upon obtaining permission from the court. It was hence clear that Appellants had to seek leave of the Rent Regulation Board prior to appealing.

Appellants had not done this, and therefore the appeal was deemed null.
As a result, the case was returned to the Rent Regulation Board for it continue.

SELLING AT SIXTY
BY DR MARY ROSE MICALLEF

Guccione et vs. Avukat Ġenerali et
27 March 2020, 46/2016/1
Constitutional Court

Judicial sale by auction ('subbasta' in Maltese, sub hasta in Latin), is the forced sale of an asset belonging to a debtor, in favour of a creditor's claims.

Provisions regulating the judicial sale by auction can be found in our Code of Organisation and Civil Procedure, Chapter 12, which are among the most complex to be found in our laws of procedure.

The judicial sale by auction is essentially an executive act, most feared by debtors who typically, or one daresay expectantly, do their utmost to smother its legal flames.

The law of 'subbasta' imposes a merciless rule which is often subject to angst and controversy. This is the sixty percent rule, set out in article 319(5) of the COCP. This article at law states that offers in an auction are to start from a value equivalent to sixty percent of the value of the asset to be sold. Better offers are equivalent, then upwards of that sum; but really and truly this leaves the possibility that an asset is sold 'cheaply' for the price of sixty percent of its actual value.

By way of example, a debtor's villa, valued at one million euro, can be purchased for the mere price of six hundred thousand euro, if only one person elects to bid. The proceeds of sale would go in favour of the creditor as to satisfy his claims, while any balance shall continue to remain due. Any residue would be returned to the debtor. It is thus possible that a debtor loses a property worth one million, but ends up only paying six hundred thousand from what is due by him. The four hundred thousand euro in value will be enjoyed by that person who would have bought the property at a discount.

It comes as no surprise that this provision is on obvious target for a constitutional challenge; it purports dire considerations for its 'prima facie' question as to whether this is in breach of the fundamental right to property. The judgment in the names "Guccione et vs Avukat Ġenerali et" delivered by the Constitutional Court on 27 March 2020 tried to settle this quandary.

This judgment was given following an appeal from a prior judgment delivered by the First Hall, Civil Court, in its Constitutional Jurisdiction on 2 November 2018. Debtors had obtained a banking facility for the sum of around €900,000. Eventually, they fell in default of their obligations and were unable to pay the debt. Meanwhile, by virtue of a subsequent judgment the same persons were confirmed as debtors to a mutual creditor.

The latter creditor asked the court to authorise the sale of debtors' residential property through 'subbasta'. At that time, the property was worth around €590,000.

It so happened that the bank who owed money ended up buying the property by offsetting part of the debt to thereto (known as 'animo compensandi') in the amount of €410,000. This means that the bank acquired a property worth €590,000 for a value €180,000 less! This also at a time where real estate prices were booming. Not only the bank acquired a property the value of which surpassed the value of the debt legally considered to have been extinguished, but the bank also had a balance to collect, so much that it proceeded again to recover the remaining debt.

The debtors sought constitutional redress. They claimed; (a) that the sixty percent rule breached their property rights; and (b) that that the legislator had failed to legislate for scenarios (such as theirs) where a creditor purchases an asset, which he later sold for a profit, reeking profit from their misfortune. The Civil Court First Hall, in its decision, determined that the sixty percent rule breach the fundamental right to property. It endorsed the long-standing principle of proportionality in situations like this – the state must seek to strike an equilibrium between the demands of the public's general interest and the private fundamental rights. It stated that states may always legislate for the common good of its peoples – yet with caution. The sacred fundamental rights must always remain protected. Therefore, proportionality in public expropriation situations would be ascertained when the proprietor of a property is fairly compensated in consideration of the asset deprivation that he has suffered. The first court has considered that the sixty percent rule was creating a disproportionate burden on the debtors. Although it was true that debtors cannot be allowed to escape their obligations, it was equally true that the debtors' fundamental rights should equally remain protected.

After citing several ECtHR judgments, the court had concluded that the threshold of sixty percent of the actual value of the asset was too low and hence not proportionate. In this respect, it liquidated a compensatory sum in favour of debtors.

Respondents appealed.

The Constitutional Court did not agree with the decision of the first court. It deemed that the debtors were given ample time to remedy their default. Citing previous judgments, the court held that judicial sales may always be avoided if the debtors opt to regulate their position in terms of their obligations.

The court also commented that the judicial intervention of the judicial sales was truly legitimate, for it ascertained that the creditor had a solution, in case debtors opt to remain in default. While acknowledging that fair compensation could not always be adhered to as a result of the sixty percent rule, it argued that such rule was there to ascertain that interested bidders do participate and that effectively the asset is sold, even considering the risks that are inherently carried by bidders in a judicial sale. Without the sixty-percent rule, many properties would remain unsold, and many debts unsatisfied. In this case, the fact that debtors in question had continue to occupy the property sold made the sale more difficult.

As a result, the Constitutional Court held that the debtor's fundamental rights were not violated, therefore – and to date – the sixty-percent rule remains unscathed.

SELLING SHORT
BY DR CARLOS BUGEJA

Cyril Worley et vs. Emanuel Ellul et
27 March 2020, 952/2012AE
Court of Appeal

Very few people would use the word 'interesting' to describe Law. Enthralling? Even less.

But to the keen observer, Law can be quite fascinating. It sets out rules of conduct ostensibly floating in a vacuum, which are then used in a myriad of scenarios which the legislator himself would not have predicted in the first place. Take for example the case of Cyril Worley et vs Emanuel et, decided on 27 March 2020 (952/12AE). Different legal points were at play, at first glance unrelated, but which when cooked together, created an enthralling legal decision worthy of notice.

Respondents had loaned some money to plaintiffs.

A few months later, plaintiffs (the debtors) transferred onto respondents (the creditors) a property they owned for the price of €93,000. In the contract of sale, it was stated that plaintiffs could continue to reside in the property sold. Then, less than a year later, respondents sold the property freshly theirs for the price of €230,000, making a staggering profit. Plaintiffs further renounced to their right to live in the property, while respondents declared that all that due to them had been paid and released plaintiffs from all obligations towards them. Clearly, this contract had a lot to do with the debt due, although the parties did not agree how.

Then, a few days later, the parties entered into a separate private writing. Here, plaintiffs (the debtors) received the sum of €27,500 from respondents (the creditors) and both agreed that 'following the execution of this Private Agreement and the relative payment contemplated therein, the Parties hereto have no further pending matters in relation to each other'.

Plaintiffs filed a lawsuit, claiming that the understanding between the parties had not been respected. Plaintiffs stated that the idea at the time was that respondents would try and sell the property acquired. Then, both would sit down, calculate the debt still due plus interest, and any extra derived from the sale of the property would be returned to plaintiffs. This notwithstanding,

plaintiffs lamented they had only received the sum of €27,500. According to their calculations, they had to get more.

Simply put, their plea was that a large chunk of the 'extra' (save those €27,500) had been kept by respondents. To plaintiffs, this was nothing but an appropriation of a sum as interest higher than that permitted by law. To plaintiffs the fact that the property was sold short its market price was sufficient evidence that there was an underlying agreement between the parties, and one which was not respected.

As a result, plaintiffs asked the court to order respondents to pay that sum which it is quantified to have been illegally retained, after considering the maximum rate of interest payable at law.

The relevant laws are articles 1852 and 1853 of the Civil Code, Chapter 16 of the Laws of Malta.

It is stated by our law that the rate of interest cannot exceed 8% per year; any higher interest agreed upon shall be invalid and is thus to be reduced to the said rate. So too, if a higher interest than that fixed by law has been paid, the excess shall be deducted from the capital. Any contract which is made to evade this rule may be rescinded.

In this case, respondents had merely asked for reimbursement of the 'extra', and not for the rescission of the contract.

In a judgment dated 30 January 2015, the Civil Court First Hall had stated that since the contract of sale was not being challenged, then it could not do anything other than to consider that contract as a mere contract of sale, despite any reservations it may have. The court is bound by law to determine the issues brought before it and none more; it cannot second guess a contract which it was not specifically asked to rescind. Furthermore, plaintiffs had even declared in the last private writing (when they received the sum of €27,000) that they had no further claims against respondents, and they could not now attempt to turn back time to receive more money than they had initially accepted to receive.

As a result, the first court threw out the lawsuit.

Plaintiffs appealed.

The Court of Appeal decisively endorsed the considerations of the first court. It stated that a contractual agreement binds the parties under the principal known

as 'pacta sunt servanda'; it is the law between them, and as a result it cannot be retracted, unless by agreement, or for reasons provided by law. It is a long-standing principle that no oral testimony is to be permitted as evidence against what is written in the contract, particularly when the parties' intention is clear – 'contra scriptum testimonium non fertur'.

It was no use for plaintiffs to argue that the contract of sale was to be understood as a loan contract, for the contract stated otherwise. There was no attempt by plaintiffs to challenge the contract on the basis of 'simulation' (an action for rescission of contract in which parties would have pretended to perform a transaction different from that in which they really were engaged in); thus, the first court was correct to state that the contract could only be regarded as a contract of sale, and only that.

Had there really been an agreement for plaintiffs to receive any residue from the further sale of the property, it was their responsibility to include that see that the condition is put in writing. Lacking this, there is no room for any other interpretation.

Furthermore, they had then freely signed yet another agreement (the last one) in which they released respondents from any further claim. If contracts can be retracted just like that, then contracts would be of no use. It reiterated that a contract is law between the parties; they cannot be erased just because either party has a change of heart.

As a result, it confirmed the decision of the Civil Court First Hall and ordered plaintiffs to pay the costs of the case.

THE RAMIFICATIONS OF EMPHYTEUSIS BY DR CARLOS BUGEJA

Jurgen Lee Bord vs. Ramon Cassar et
27 March 2020, 984/2013
Court of Appeal

Emphyteusis – an obscure word (one that interestingly, the typical spellcheck software does not even recognise), and the proper legal term used to describe the more familiar concept of 'ground-rent' (ċens in Maltese).

There is a lot to say about the institute of emphyteusis; it is rich in history, yet relatively poor in modern debate. Indeed, ground-rent is today mistakenly considered by many to be a mere redundant nuisance, as if it is something that one can easily do away with, with next to no legal consequences.

Certainly, this is not the case.

Emphyteusis is a legal contract proper, one that carries myriad rights and duties.

Emphyteusis was originally (and to a certain extent, is still today) a contract whereby a landowner would lease a tract of land to another, in perpetuity or for a long time, in return to a low rent. The occupier (the emphyteuta) is duty-bound to take care of the land, and to actually improve it. The idea was that owners who possessed many lands (and could not possibly care for them all) would make sure that under the hand of the emphyteuta, the lands are cultivated and not laid to waste. Like that, the occupier would obtain the enjoyment of a land he did not own without having to fork out a capital outlaw, and the owner would still exercise a form of dominion over the property through the receipt of groundrent. At the same time, the property would not be merely taken care of, but it would actually be improved. Should the emphyteuta not pay rent, or cause to deteriorate the land, then the contract could be terminated.

Noticeably, this is quite a special contractual relationship, unlike any other. These elements carried over throughout the centuries and are largely still part of the institute of emphyteusis today. Interestingly though, redemption (fidi) was not an original ingredient to this legal institute; it was introduced in Malta only by a law enacted in 1981. Prior to that, emphyteusis could not be redeemed. Maltese law recognises two types of emphyteutical concessions: perpetual ground-rent and temporary ground-rent.

Perpetual emphyteusis is that which lasts forever, and is at face value almost indistinguishable from ownership, save for the payment of groundrent – which can be redeemed – and for the burden of any conditions in the original concession, such as for instance, the altus non tollendi (a prohibition from developing the property for more than a determined height) – which, as per the most prevalent judgments, cannot be unilaterally redeemed.

Temporary emphyteusis is somewhat of a significant lesser right – it is a concession that is granted for a period of time (usually a long one). Upon the expiration of this period, this property is to be returned to the dominus (the owner), supposedly in an improved state.

Expectedly, the value of a property subject to a perpetual emphyteusis is substantially higher than that subject to a temporary emphyteusis, more so if at the time of purchase, the temporary concession is soon to expire.

This difference in value is what encouraged the plaintiff to pursue a remedy in court in the case of 'Jurgen Lee Bord vs Ramon Cassar et', decided by the Court of Appeal on 27 March 2020 (984/13).

In 2008, Plaintiff had purchased a property from respondents. They had told him that the property was subject to perpetual ground-rent, and indeed, this burden was also indicated as such in the contract of purchase. To plaintiff's shock and horror, he later discovered that the emphyteusis was not – as he was told – a permanent one, but a temporary one, which was set to expire in year 2027. Whereas he had purchased a property that he had thought he (and his heirs) would enjoy perpetually, he had now found in 2013 (when he filed the lawsuit) that after just fourteen years, he would have to return it to the owner.

As a result, he filed a lawsuit against respondents, requesting that the contract is rescinded on the basis of an error of fact, and that they money paid is returned. At this juncture, that court was called to decide whether or not plaintiff's consent had been given through deceit or error of fact and whether there existed the suitable requisites for such a cause to succeed.

The law permits an error of fact to void a contract only if that error affects the substance itself of the thing which is the subject-matter of the agreement. Therefore, an error as to a matter ancillary to the subject-matter of the contract will not invalidate that contract.

Not every error of fact is justified; the error must be excusable, and not one

which is made through carelessness or lack of attention.
The Civil Court First Hall had concluded that there was indeed a substantial determined error of fact.

Respondents appealed.

In its judgment, the Court of Appeal stated that when purchasing the property, plaintiff had reasonably believed that the emphyteusis was perpetual, so much that he paid the relative appropriate price. Respondents (now the appellants) were arguing that the error of fact was not excusable, for he could have found the truth had he conducted the correct notarial searches, which would have uncovered contracts done in years 1911, 1936 and 1937, all mentioning the existence of a temporary ground-rent.

The court noticed first that respondents themselves had declared in the contract of purchase that the property was subject to perpetual, and not temporary ground-rent. It was not correct to state that plaintiff could have conducted further notarial searches, for there is no obligation at law on the purchaser to conduct searches that far back. Indeed, there was no indication in the more recent contracts (done in years 1988 and 1995) that the ground=rent could have been a temporary one. These all mentioned a perpetual ground-rent of Lm0.25, in accord with that declared by respondents on the contract of sale.

It mattered not that respondents had not tried to fool plaintiff. The cause of error of fact in law did not require respondents to know about the error or for them to have an intention to deceive. It is an element neutral to the state of mind of the other party in contract.

As a result, it confirmed the decision of the first court, and returned the case for it to continue being heard on the remaining matters.

CONSTITUTIONAL COMPENSATION BY DR EDRIC MICALLEF FIGALLO

Alexander Falzon et pro et noe vs. It-Tabib Prinċipali tal-Gvern (Saħħa Pubblika) et
27 March 2020, 1/2018/1
Constitutional Court

During the initial onslaught of the COVID-19 pandemic in Malta and after the ordering of the general closure of the Courts, the Constitutional Court waded on as possible and amongst others delivered judgement on two appeals from a judgement given on the 11th December 2019 by the Civil Court, First Hall acting according to its constitutional jurisdiction, and in relation to fundamental rights as provided for in the Constitution and the European Convention on Human Rights (the "Convention").

The Constitutional Court delivered its judgement on both appeals on the 27th March 2020, in the names of Alexander et pro et noe v. It-Tabib Prinċipali tal-Gvern (Saħħa Pubblika) et.

The facts of the case related to a dockyards' employee being regularly exposed to asbestos throughout his working hours during his twenty-eight year employment there. On the basis of the evidence submitted and considered by the courts, and established law, this was held by both courts as causing the development of cancer and eventually leading to his untimely demise on the 20th April 2018, as claimed by the plaintiffs. Essentially, the plaintiffs sought a declaration as to the violations of the rights referred hereunder and a quantification of damages together with an order of payment in their favour.

The legal reasoning adopted and, or accepted by the Constitutional Court mostly coincided with that of the Civil Court, First Hall, however it varied and revoked the awards on the basis of factual evidence and procedural facts. It importantly acceded to claims rejected by the first court on the basis of evidence. The final result is quite substantial.

In its first instance judgement the Civil Court, First Hall had found a violation of the fundamental right to life protected under article 33 of the Constitution and article 2 of the Convention, for which the first court had awarded a total of €40,000 in compensation, €35,000 of which as moral damages and €5,000 by way of pecuniary damages. This first court did not consider other claims by the plaintiffs related to the violation of the right to the private and family right of

the individual safeguarded under the Constitution and article 8 of the Convention, and no appeal was submitted and thus such claims were settled in accordance with the first court's judgement.

The actual proceedings involved numerous witnesses, and particularly expert witnesses, which led to both courts in this case to agree and declare in favour of the plaintiffs that there was a violation of the right to life, which in the end would lead to monetary compensation for damages.

To summarise the final awards, of the €40,000 initially awarded as aforesaid, the Constitutional Court revoked the €5,000 awarded by way of pecuniary damages and reduced the €35,000 awarded by way of of moral damages to €28,000, resulting in a reduction of €12,000 for a total of €28,000. Atrociously scandalous, some would hastily and wrongly inveigh!

However, on a review of the evidence submitted and the arguments thereon on appeal, unlike the first court, the Constitutional Court accepted the fifth and sixth claims by the plaintiffs, essentially relating to lucrum cessans (loss of earnings) and liquidated the same to the amount of €119,400, which added to the €28,000 as reformed, gives a total of €147,400 by way of damages, thus leading to a difference on appeal of €107,400 in favour of plaintiffs. This loss of earnings essentially related to the taking up of the trade of carpenter on a self-employed basis on which the Constitutional Court was convinced that it would have been the source of livelihood for the deceased and his family. Therefore, upon applying established practices as to the quantification of damages, the Constitutional Court gave the above result.

Interestingly and originally, while the Constitutional Court had revoked the first court's €5,000 awarded by way of pecuniary damages relating to the family's household needs, which in probability would have been taken care of by the deceased, the Constitutional Court considered this contribution by the deceased to his family by adjusting his prospective monthly income upwards for the purposes of quantifying damages related to loss of earnings.

In the end, it is of considerable legal interest to point out an obiter dictum observation (one having no effect on the actual judgement of the court) made by the Constitutional Court and relating to the appropriate actions to be raised for similar cases in the future. This is quite technical, but in the end it could drastically affect the rights of damaged parties. The Constitutional Court, apparently agreeing with the State Advocate that the action before it should have been raised in front of the ordinary courts according to ordinary civil law,

remarked that in the past the constitutional courts were called upon because moral damages could not be granted to a plaintiff in an ordinary action under article 1045 of the Civil Code. Article 1045 relates to damages arising in tort, ergo not from contractual breaches. Ordinary courts refers to the civil courts not acting under their constitutional jurisdiction (the Civil Court, First Hall, and the Constitutional Court on appeal), while ordinary law generally refers to law besides the Constitution and the Convention.

The Constitutional Court observed that in the case at hand one had a contractual breach at law and thus article 1045 was inapplicable to this case. On the basis of more recent judgements by our courts, which departed from previous understandings, nothing barred our ordinary courts from granting moral damages for contractual breaches. This means that resorting to a court having constitutional jurisdiction to gain such damages is not necessary, and the Constitutional Court seems clear and unequivocal on this. The question to be raised is whether this might lead to the dismissal of future constitutional actions like the one at hand.

PROVISIONAL EXECUTION BY DR CARLOS BUGEJA

Soċjeta tad-Duttrina Nisranija vulgo MUSEUM, Sezzjoni Maskili vs. Philip James Żammit et
27 March 2020, 283/19
Court of Appeal

Generally speaking, a case typically ends when the time allowed by law to file an appeal expires without an appeal having been filed, or when the appeal is finally decided.

With this, the case reaches the coveted zenith known as res judicata. Generally speaking, only then can a judgment be executed, for it would have reached the desirable stage known as res judicata pro veritate habetur: where it is legally regarded to contain the truth of what it pronounces, and where it can no longer be contested. The philosophical justification is that society requires a definite ultimate stage where one can say that a dispute is over, and that a definite solution capable of execution has been reached.

So typically, a judgment cannot be automatically executed until this stage is reached. One obtaining the eviction of an illegal tenant cannot generally and automatically expect the court's support for the return of his property unless the appeal stage is fully extinguished.

Simply put, there is no executable judgment unless there is a final judgment.

And the general rule is that a judgment which would not have yet constituted res judicata is not enforceable.

But like many things law, there are exceptions.

Judgments ordering the supply of maintenance, any judgment providing redress against infringement of the individual's right to life or providing remedies against illegal arrest or forced labour, and any interlocutory decree, are all immediately enforceable, notwithstanding that there be a pending appeal.

For all other judgments, there is the faculty to seek an order of the court, declaring that a judgment is provisionally enforceable, despite the fact that an appeal from it is yet to be decided. This is found in article 266 of the Code of

Organisation and Civil Procedure, Chapter 12 of the Laws of Malta.

Such a request was the matter in Is-Socjetà Tad-Duttrina Nisranija vulgo MUSEUM, Sezzjoni Maskili vs Philip James Żammit et, decided on 27 March 2020 by the Court of Appeal (283/19).

The faculty to request a provisional enforcement of a judgment pending appeal is particularly useful, especially to our generation. Our Civil Superior Court of Appeal arduously hears and decides around four hundred cases a year, which is a phenomenal number, given the complexity of the appeals it is often called to decide. But new appeals each year are almost double that amount, and inevitably, a backlog is created, and appeals will unavoidably take long to be decided.

This faculty provides a possibility of relief to that party for whom the wait for the appeal decision is most prejudicial. It is also serves to discourage less than virtuous parties in a case to use the right to appeal as a bargaining tool, or to appeal just for the sake of prolonging yet another inevitable loss to the detriment of the holder of a right against them. This is particularly true in eviction cases, where the filing of a frivolous appeal could literally mean four more years of waiting for the owner of the property. This law symbolically (and perhaps, inadvertently) pulls the rug out from under the feet of these iniquitous litigants.

It is thus also a measure for good order, fairness and good faith.
Indeed, some courts have in the past still given a certain weight to judgments still subject to an appeal, stating that these are not mere arguments, but decisions of the court worthy of notice, in turn dismissing any presumption that the law holds a dearly-held desire that only final judgments be executed. The situation is just that a non-final judgment is not self-executable, and for it to be made enforceable, one requires a special declaration by the court.

The plaintiffs in this case had acquired a property by means of a judicial sale by auction. They had instituted proceedings against two people occupying the property (the respondents), requesting that they be evicted on the basis that they had no valid legal title on the property so acquired. MUSEUM also requested damages. The First Court had acceded to MUSEUM's request and ordered respondents to evict from the property and to pay damages. Respondents appealed.

The court started by examining article 266 (7) of the Code of Organisation and Civil Procedure, which states that the court shall declare the 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 it than such execution would cause to the opposite party. The measure of prejudice is largely left to the discretion of the court. If said request is acceded to, the party against whom execution of a judgment declared provisionally enforceable shall, in case of reversal or variation of such judgment in appeal, be entitled to damages and interest.

The court noted that the fact that the appeal withheld the execution of the judgment delivered by the First Court did not preclude it from declaring that it could be provisionally executed, should it be requested. It transpired that in this case, appellants were not even contesting that part of the decision of the First Court, by virtue of which they had been ordered out of the property; they were merely contesting that part of the judgment awarding damages. Having said that, it was evident to the court that plaintiffs had much more to lose than respondents if the judgment would not be rendered provisionally enforceable.

As a result, it ordered that pending the decision of the appeal, the eviction is to be made enforceable, effectively granting MUSEUM the right to get hold of the property.

The court ordered each party to pay its own respective courts.

ANNULING A DEBTOR'S FRAUDULENT ACT BY DR MARY ROSE MICALLEF

Bank of Valletta plc vs. Joecar Limited et
27 March 2020, 66/2012/1
Court of Appeal

A creditor's primary concern is primarily the financial state of his debtors. For how the creditor satisfy his claims if his debtor is insolvent or if his solvency is not enough to entertain his claims. After all, the control and management of the financial affairs of the debtor will always remain in the hands of such debtor. Time and again creditors have faced circumstances wherein their debtors intentionally and fraudulently, shrunk their patrimony to tatters – this by opting to alienate their assets. Once a debtor's asset is transferred unto third parties, then the creditor can no longer lay his hands on it - this, unless the creditor succeeds in instituting the actio pauliana against his debtor.

This institute is provided for in article 1144(1) of the Civil Code which merely provides that any creditor may in his own name impeach any act made by his debtor in fraud of his claims. It is an action against the fraudulent activity of the debtor, and if successful it would extinguish the debtor's fraudulent act.
In turn, the debtor may plead the benefit of discussion that is set up in articles 795 to 801 of the Code of Organization and Civil Procedure. This plea antidotes the actio pauliana, for it perceives the ability of the debtor to set off his debts against the creditor's claims.

The actio paulina was recently resorted to by a creditor bank who sought to rescind an act – a lease agreement - that was contracted by his debtors and unrelated third parties. The judgment bears the names of Bank of Valletta plc vs Joecar Limited et, that was delivered by the Court of Appeal on March, 27.

Facts concerned defendants – two limited liability companies who had been declared debtors of the creditor bank. Initially the said companies had obtained a loan facility from the bank and as security they hypothecated their immovable property. The companies fell in default of their obligations and the bank sought to recover its credit. Hence it proceeded to institute the sale by judicial auction against the immovable property that had been initially hypothecated. The property in question was bought animo compensandi (the amount was offset against the existing debt owed) by the creditor bank. Meanwhile, it transpired that

such property was not freehold – in fact, it was being occupied by the lessees under a lease agreement.

This lease was granted by the debtor companies in favour of the lessees who happened to the directors of such companies. This agreement occurred right after the creditor bank obtained a judgement against the said these companies. Naturally, the bank perceived such actions as fraudulent made with the sole intention of prejudicing its claims. Afterall, the bank had ended up acquiring a property that was being occupied by third parties under the title of lease.

Consequently, the bank sought to institute the actio pauliana against his debtors and the lessees, in order to impeach the lease agreement. The court discussed in detail the cumulative elements of the actio paulina, which are mainly four.

Plaintiff must necessarily be 'a creditor' – this essentially means that the creditor had to be someone who has a claim. A creditor does not need to be someone who is owed money – a creditor of a debt that is certain, liquid and due - it may be anyone who pretends a right. Indeed, the court deemed that the bank fulfilled such criteria.

The second element is known as the 'eventus damni'. Simply put this element requires proof that the debtor's action (in this case the lease agreement) had rendered its patrimony insolvent or barely solvent – that is that the claims in question cannot be satisfactorily entertained. The creditor may never recover its claims if the debtor is in state of insolvency. Interestingly, when it comes to this element the burden of proof shifts unto defendant (the debtor) – as it is, he who must proof that he is solvent. The court deemed that the element of eventus damni was satisfied as debtors failed to proof that they owned other assets that could satisfy the bank's claims.

Third comes the element of the 'consilium fraudis' – the knowledge of the debtor that his act was diminishing his assets to the prejudice of his creditors. The court considered that the shareholder of the debtor companies, who was someone very well versed into the commercial transactions, knew very well that the lease agreement would shrink further the companies' assets to the prejudice of the bank, who had just won a judgment against the said companies. The court also noted that the property leased was of significant value, and that it had been leased for a long term in consideration of a low rent. Moreover, the lessees happened to be the directors of the debtor companies – hence this element was deemed as satisfied.

THE THIRD DECREE
BY DR CARLOS BUGEJA

Josephine Azzopardi vs. Angelo Farrugia et
27 March 2020, 1203/18/1
Court of Appeal

Carmel Grima vs. Carmelo Gauci et
27 March 2020, 369/19
Court of Appeal

Napoleon's infamous attempt at social engineering Frenchified Jews back in 1808 was coined by some as 'The Third Decree'.

This is not what this is about.

What this is about is that decree in our law which is neither definitive nor interlocutory, that decision by a court of law which is neither considered to close a matter once and for all, nor that which is considered to regulate the procedural affairs of an ongoing case. It is that which our courts describe as being the 'third type of decree', one which holds a special standing in our law for the unique way it can be contested.

This type of decree was the matter decided upon by the Court of Appeal in two separate cases both delivered on 27 March 2020, that of Josephine Azzopardi vs Angelo Farrugia et (1203/18/1) and that of Carmel Grima vs Carmelo Gauci et (369/19). The facts were different, but the legal argument in both was similar, and so, it would do the Court of Appeal a great injustice to quote one and not the other.

In both cases, applicants had requested the first court to revoke a garnishee order (mandat ta' sekwestru) which the other party had served against them. The law allows for this possibility via article 836 (1) of the Code of Organisation and Civil Procedure, Chapter 12 of the Laws of Malta, a procedure known as the 'counter-warrant'.

In both cases, the first court rejected the request, and in both cases, applicants filed an appeal from the decision. Both asked the Court of Appeal to overturn the decision of the first court and to order the removal of the garnishee order filed against them.

The respondents in each case plead to the nullity of the appeal, stating that applicants had no right to file an appeal against the first court's decision.

In its decisions, the Court of Appeal quoted past judgments, which state there are three types of decrees recognised by our laws: definitive decrees, interlocutory decrees and the third kind of decree. Only the first two may be appealed.

Anyone who feels aggrieved by a decree which is of the third kind can only hope to overturn it by filing a separate lawsuit, and not by filing a mere appeal.

The difference is sizeable. An appeal is a continuation of the case decided, while a new lawsuit is what it says it is – a new proper lawsuit, which at the end would be subject to an appeal itself. Typically, procedural decisions are fast-tracked into the Court of Appeal's busy agenda, and this inevitably a new lawsuit takes longer to be decided and is generally more costly.

The Court of Appeal stated that there is no doubt that the decree in question was neither definitive (one that closes the controversy between the parties and binds the Judge) nor interlocutory (one that regulates a point of procedure during a case).

Indeed, when one sets to analyse article 223 of Chapter 12 of the Laws of Malta (which lists how and when certain types of decrees are to be appealed from), one does not find anything in respect of decrees rejecting an application for the removal of precautionary warrant.

Article 836 (5) states specifically that no appeal or challenge shall lie from a decree acceeding to the removal of a precautionary warrant. In Josephine Azzopardi vs Angelo Farrugia et, the Court of Appeal argued that this could suggest that a contrariu sensu, a decree rejecting such an application can somehow be challenged. The legislator decided not to state how such a contest is to be made, and therefore, there was no reason to depart from the long-held principle that a decree rejecting an application for the removal of a precautionary warrant is to be kept in the same category as an original decree for the issuance of a precautionary warrant, that is a third kind of decree which cannot be appealed from, and which can only be challenged through a completely separate lawsuit.

In the case of Carmel Grima et vs Carmelo Gauci, the Court of Appeal added that rather than a question of contrary logic (a contrariu sensu), the correct conclusion is that the general rule is that there is no appeal from a decree unless that right is expressly granted by article 229 of Chapter 12 of the Laws of Malta. The decree in question is not mentioned by this article at law.

In both cases, the Court of Appeal concluded that appellants were not allowed to file a direct appeal from the first court's decision to dismiss their application for the removal of the garnishee order. They had to file a separate lawsuit by means of a sworn application, and if necessary, then appeal the judgment of that court. In both cases, the logic of the court was incontrovertible, and supported by years of jurisprudential teachings. It is the law as written that perhaps places an unnecessary burden on that party that desires to contest the decision dismissing his or her request. Inevitably, a proper lawsuit will probably take longer than an appeal (and certainly longer than a request for reconsideration) to be decided, and in the meantime, that person hit by the precautionary warrant may suffer harm through a warrant, which later, a court could ultimately consider to be unfair or illegal.

Certainly, the law does provide for relief; one can request the court to order the party requesting the issuance of a warrant to pay a hefty penalty and/or damages, particularly where the request is found to have been made maliciously and/or vexatiously.

But many a time, the harm created by an improper warrant cannot be easily vindicated through actual damages. Thus perhaps, it is fine time for one to ease this burden, and provide effective and efficient access to justice to those unfairly burdened.

SECURITY FOR COSTS
BY DR CARLOS BUGEJA

Alfred Baldacchino et vs. L-Avukat Ġenerali et
27 March 2020, 40/2016/1
Constitutional Court

Appeals are not mere golf balls to be thrown around without much aim or logic, as often done by the first-time golfer.

The Court of Appeal is already tremendously busy as it is. The last thing it needs is a barrage of appeals with no real scope and logic. For this reason, the law attaches penalties to frivolous appeals, and provides for procedural measures against those who eventually intend to aimlessly toss a proverbial golf ball and then try to avoid paying the green fee.

This is done through article 249 of the Code of Civil Procedure, Chapter 12 of the Laws of Malta.

This article at law states that (subject to a few exceptions) in the case of an appeal from judgments or decrees given in a cause initiated by sworn application, security for costs is to be produced and deposited in court within twelve months from the date of the notification of the amount to be deposited, or if the appeal is to be heard earlier than twelve months from such notification, by two days before the date set for the hearing of such appeal.

The security for costs is calculated by the Registrar of Courts and is usually based on the official tariffs provided in the law. If the amount so calculated is not paid in time, then the Court of Appeal shall declare the appeal to have been abandoned, and the appeal is to be immediately disposed of and struck off the court's list. And just like that, the original judgment would stand.

The golf club has to be picked up in time, or the game is over.

The law does provide a way out for those genuine appellants who are unable to pay the security for costs, for in some cases, this may amount to thousands of euros. An appellant may request that he delivers a guarantee for the costs on his own recognizance (probabilis causa litigandi), if he shows a prima facie probable cause of action in his appeal , and if he swears on oath (and convinces the court) that he was unable to raise such security as is required by law. This is not a simple plea to make, for one must keep in mind that often, notification

for the payment of the security for costs is sent years after the appeal is filed. An appellant would usually have plenty of time to plan ahead and put aside the necessary funds.

In the case of Alfred Baldacchino et vs L-Avukat Ġenerali et, decided finally by the Constitutional Court on 27 March 2020, plaintiffs lamented that the method of computation of the security for costs by the Registrar of Courts breached their right of fair hearing guaranteed by article 6 of the European Convention of Human Rights and article 39 of the Constitution of Malta.

The issue was this: in another case that preceded this one, plaintiffs had been sued by the Director of Lands for damages, and lost. The court had ordered them to pay the sum of €438,090, a loss they vehemently contested, so much that they had appealed that judgment. The security for costs was calculated as a percentage on this amount, adding up to a staggering €17,367.

Plaintiffs pleaded to the court that they did not have funds to make the payment and requested that they pledge their admittance into the appeal through their oath. The court had considered the matter, but found that plaintiffs did have the means to pay this sum. As a result, it rejected the request, and declared that the appeal had been legally abandoned.

But plaintiffs would not have it.

They filed a constitutional case, claiming that they had been denied effective access to justice when the Registrar of Courts decided that the amount to be deposited as security for costs due was to be calculated on the basis of the amount liquidated by the court in the judgment against them (that is, €438,090). They were not arguing against the mathematics used in the computation, but rather against the fact that the Registrar took the sum quantified by the court in the appealed judgment as the starting point. The logic was unmistakeable: if I am contesting a judgment, I cannot be denied appeal for not paying a security calculated on the basis of that very same judgment I am appealing from. To plaintiffs, the Registrar of Courts was wrong in deeming the amount liquidated by the first court as being a final and reliable starting point for his computation. As a result, the deposit requested was way too high, putting them into a position whereby they were unable to pay the security for costs, and thus unable to advance their appeal.

The Civil Court, First Hall (Constitutional Jurisdiction) found no human rights breach. Plaintiffs appealed.
In its judgment, the Constitutional Court stated that at the moment when the

'taxxa tal-Qorti' was published, there existed a determined amount established by a court of law (the €438,090), upon which one could calculate the security deposit according to the official tariffs in the law. It was true that the amount was being contested, but it was also true that plaintiffs had no guarantee that they were right in their arguments. Furthermore, once plaintiffs were appealing from the court's decision to order them to pay the sum of €438,090, it was logical for the Registrar of Courts to calculate the security deposit on that amount. The court added that the security for costs is a justifiable measure to ensure that all costs are covered should an appeal be rejected. Indeed, the amount requested as deposit was less than 4% of what the case was about. The notice for payment of the security for costs was delivered to plaintiffs four years after they had filed the appeal, and so they had ample time to prepare themselves.

For these reasons, there was no breach of the Constitution or the European Convention of Human Rights, and as a result, the Constitutional Court rejected the appeal.

THOU SHALT NOT STEAL
BY DR RENE DARMANIN

The Police vs. Eldhose Joy
15 May 2020, 12/2020
Court of Magistrates (Gozo)

In 2019, crime statistics revealed that theft was the predominant criminal offence, making up just under half of the crimes committed in Malta. This has been the case since the nineteenth century when what men comprehended by the term 'crime' was largely theft and assault. As a matter of fact, records at the Legal Documentation Centre of the National Archives show that 42.38% of the total cases heard by the Criminal Court between 1838 and 1888 were crimes against the property.

At the time, crimes against the property carried the heaviest imprisonment sentences and a first-time offence of simple theft was punishable with hard labour for one to six months.

Despite that under our Criminal Code, theft is categorised as an offence against property and property and public safety, the Maltese legislator does not define the crime of theft and sets off immediately by indicating the aggravations of theft. Nonetheless, authoritative sources within the legal profession define theft as, 'the unlawful taking of someone else's property without his consent in order to make a gain'. Most law students will blindly (and proudly) recite this definition in the Italian language ('la contrattazione dolosa di cosa altrui, fatto invito domino con animo di farne lucro'), made famous in the legal sphere by Italian jurist Francesco Carrara.

Really and truly, this definition encompasses all essential elements which the prosecution needs to prove beyond reasonable doubt in a case where the accused is charged with the offence of theft.

Under our law, theft is committed as soon as the offender touches an object with the intention of stealing it, so in actual fact it is irrelevant whether an object was removed from the sphere of control of its owner. This approach postulates a fixed and invariable gauge. However, it is worth emphasizing that the actions need to be accompanied with the corresponding malicious intent to steal – in the absence of said intention, a person cannot be convicted of theft. His actions may amount to a mistake of fact but surely not to the criminal offence of theft.

This was the matter at hand in the case of The Police vs Eldhose Joy decided by the Court of Magistrates (Gozo) on May 15, 2020.

To put things into context, Mr Eldhose Joy was principally accused that on some day during the month of January he committed the theft of a laptop to the detriment of the Kempinski Hotel as well as for having during the same period, as an employee working within the Kempinski Hotel, committed the theft of a bicycle, which theft was aggravated 'by amount'. Theft is aggravated by amount when the value of the thing stolen exceeds €232.94, a strange number which is reflective of the old lira, that is 'Lm100'. Since, at the time, the accused was employed within the Kempinski Hotel, the prosecution claimed that such theft was also aggravated 'by person'.

After returning the said laptop back to its rightful owner, upon arraignment, the accused declared that he was guilty of stealing the laptop but that he was not guilty of stealing the said bike.

The Court heard that the Kempinski Hotel used to rent out bikes to clients on demand, however said bikes were owned by a sub-contractor. One of the bikes was noted missing when the sub-contractor went to the hotel to collect his bikes after the hotel closed due to Covid-19. At the time, no police report was filed with the police. The financial controller of the hotel confirmed under oath that a police report was filed when another employee of the hotel, noticed that the accused was uploading on his social media pictures with the company laptop and bicycle. He further confirmed that the hotel management was not aware of the exact period in which the bike went missing.

When asked about the screenshots which were produced to the Court by the said financial controller, the witness confirmed that such screenshots were obtained through a third party who in turn passed them on to him. Nonetheless, throughout the entire criminal proceedings, this third party was never brought to testify and confirm the origin and authenticity of the said pictures.

In its accurate considerations, the Court of Magistrates pointed out that it is fundamental for the prosecution to produce the best evidence to the Court's review. In the present case, the prosecution did not summon the most important witness – that third party who noticed the pictures which were allegedly uploaded on the accused's social media profile and subsequently alerted his employer.

Considering that the front office desk failed to notice that one of the bikes was missing and only became aware of such after the sub-contractor and owner of

the said bikes drew their attention, the Court concluded that the time or date when the alleged theft took place was not proven successfully.

After delving into the elements making up the offence of theft, the Court determined that since the person who noticed such images on social media was not summoned to testify as well as considering that the prosecution has failed to put forward evidence linking the account from which the pictures were taken with the accused it was not proved beyond reasonable doubt that the accused had stolen the bicycle.

The Court, after noting that the accused, being a first-time offender, had registered a guilty plea at an early stage of the proceedings with regards to the theft of the laptop and in view of the fact that the laptop and the uniform were returned to the Police, condemned him to nine months imprisonment and ordered that such sentence shall not take effect unless the accused commits another offence punishable with imprisonment during the subsequent three years from the date of judgement.

Both the Attorney General and the accused may appeal from this judgement.

CHANGE OF CIRCUMSTANCES BY DR CARLOS BUGEJA

John Camilleri et vs. Luke Camenzuli
14 April 2020, 250/2020
Civil Court, First Hall

At a time while many were baking away their lockdown boredom (and informing the whole of Facebook about it), on April 14th, the Civil Court First Hall quietly delivered a succinct decision that strayed away from years of long-established legal interpretations of the law of precautionary warrants.

This was done in the decision given by Mr Justice Robert G Mangion in his decree in the names of John Camilleri et vs Luke Camenzuli (250/2020).

Whoever is hit with a precautionary warrant filed and decreed against him may make an application to the court requesting that such precautionary act be revoked, either totally or partially. The law does not allow one to ask for the revocation of a warrant just for any reason. In article 836 (1) of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta), it lists the ground on the basis of which one can make such a request.

One of the grounds is that found in sub-article (f), which states that a precautionary warrant may be removed if 'it is shown that in the circumstances it would be unreasonable to maintain in force the precautionary act in whole or in part, or that the precautionary act in whole or in part is no longer necessary or justifiable.'

The operative terms here are 'maintain' (in the Maltese version of the law, 'jinżamm') and 'no longer necessary' ('mhuwiex aktar meħtieġ') – two phrases that have inspired a long line of judgments stating that for one to successfully challenge a precautionary warrant, one must prove that there had been a change of circumstances that no longer justify the keeping of the precautionary warrant. This idea based itself on the proper wording of the law, that is that the law implies the court's job is not to state whether or not the warrant was initially justified, but whether a warrant presumably justified could continue to be considered as justified in view of a change in circumstances. The starting point of any accepted warrant is that is was justified, and it is not enough for one to claim that it had been wrong from the very start. Through this interpretation of article 836 (1) (f), one's

hope is to prove that a warrant presumably justified is no longer so.

It is hard to trace when it was that our courts first took this approach, and who really was the originator of this interpretation. What is certain is that this argument has been copied and repeated for long years, until this interpretation became the one 'legal truth'.

Certainly, the wording of the law is poorly thought out, and admittedly, it creates unnecessary pain for genuine people who are hit by utterly unjust precautionary warrants, but who cannot do anything about it because 'the circumstance would not have changed'.

Here, it is important to highlight the fact that usually, when many requests for the issuance of warrants are acceded to (save for instance, the prohibitory injunction), the parties aren't heard, and issuing a warrant is many a time a case of a court rubber-stamping a request without much investigation and/or a right of reply being given to the other party.

The law only provides that a request for the issuance of precautionary warrant is to be confirmed on oath by the claimant, but investigation further than that is rare. We have seen some cases where the court would request that the claimant provides more information to support his request. But this system has not really caught on (perhaps because every year, thousands of precautionary warrants are filed), and most of the times, requests like these are almost accepted automatically.

Inevitably, through this system, among a number of fully justified warrants, there will be a few which are unfair, frivolous, and totally unjustified. And that person hit by this second kind of warrant would many times not be able to do anything about it, because as frivolous as the warrant would be, after it would have been filed and accepted, there would have been 'no change of circumstances' that could allow him to ask for the removal of the warrant, even if that warrant would have been unjustified at the first place!

This is one of those awkward instances in the law where the rights of a person are severed through poor drafting and perhaps too much of a stringent interpretation (and reliance on previous judgments). As it is, and as it was being interpreted, one may successfully remove a precautionary warrant that was initially correct, but no longer justified, but one cannot obtain the removal of a warrant that was wrong and frivolous from the very beginning and continues to be so!

This interpretation may even carry constitutional implications, for one is not

given a reasonable opportunity to successfully access justice to defend against an unjustified precautionary warrant. One cannot defend against an unjustified request for the issuance of a precautionary warrant when it is originally filed, and also cannot ask for its removal, unless circumstances would have changed, even if that warrant would have been flagrantly unjustified in the first place.

In the decision of John Camilleri et vs Luke Camenzuli (250/2020RGM), the court took note of all the oddities in this law and its interpretation.

It stated that article 836 (1) (f) should not be interpreted as being applicable only when circumstances change. There may be circumstances where a precautionary warrant should not be 'maintained', because it was wrong from day one.

When issuing a precautionary warrant, a court usually does not investigate the merits, and rests on the oath of claimant in order to accept the request. Therefore, it follows that for a precautionary warrant to be removed, there need not be any change of circumstances, but it is enough that a warrant was unjustified from the very beginning. The Court further stated that the word 'maintained' in the law does not necessarily mean that there has to be a change in the circumstances. Had it been the case, the wording of the law would have been different, and perhaps clearer.

As a result, and after looking at the facts of the case, the court ordered that the precautionary warrant filed against applicant is to be removed.

It remains to be seen whether or not this new (and perhaps more flexible) interpretation of article 836 (1) (f) will catch on. Beyond any legal debate, it is certainly a fairer approach, and one which discourage the abusive exploitation of precautionary warrants.

WHAT'S IN A NAME?
BY DR GRAZIELLA CRICCHIOLA

Miriam Christine Borg pro et noe vs. Direttur tar-Reġistru Pubbliku
5 June 2020, 389/2019
Civil Court, First Hall

The sources from which names and surnames are derived are almost endless: nicknames, physical attributes, trades, heraldic charges, and almost every object known to mankind. Tracing a family tree in practice involves looking at lists of these names - this is how we recognise our ancestors. When communities were small each person was identifiable by a single name, but as the population increased, it gradually became necessary to identify people further.

Traditionally, the surname and the family nickname were an instant way of recognition. A person would be able to deduce several things associated with a person's surname. In the past, any particular surname would imply that the bearer came from a particular location (eg. Catania from Sicily and Genovese from Genoa). There are also some peculiar trends in Malta relating to location-specific surnames which are associated with certain towns or villages such as the strong presence of Abela in Zejtun, Bugeja in Marsaxlokk and Busuttil in Safi. Each surname has its own tale and given that there are about 20,000 of them in Malta there are lots of stories to go about. Certainly, our surnames are very indicative of our country's multicultural history. Of course, this method of recognition is not quite as accurate as it once was, given the drastic increase in international family names which accumulated through recent ethnic intermarriages. Interestingly, the 2011 census found that 76% of the population share the same 100 surnames.

Records show that the Public Registry started to record births in Malta from 1863. All the details about each individual is listed down in the birth certificate. This registry is kept up-to-date and well organised. Any correction of errors in the transcription of any entry must be done by means of a note in the margin of such entry and any cancellation made must leave the cancelled words clearly legible. The million-dollar question would be, can a surname be changed?
This was discussed in a decision given by Mrs Justice Joanne Vella Cuschieri in the case of 'Miriam Christine Borg pro et nomine vs Direttur tar-Registru Pubbliku' decided on the 5th June, 2020.

The facts of the case were as follows: Plaintiff (a woman) was in a relationship

with a man, from which a child was born. The parents chose that the child was to be registered under the father's surname. Plaintiff stated that at that time, she had genuinely thought she would eventually marry her child's father and take up his surname. Like that, all the family would bear the same one surname. Unfortunately, the relationship did not work out, and each of the parents went their own way. Eventually, plaintiff entered into a new relationship, got married, and gave birth to another child, this time fathered by her husband. This (second) child was registered with a double-barrelled, taking both plaintiff's surname as well as her husband's.

This created a bit of a situation. Plaintiff's two children (half-siblings) ended up with a different surname (because they had a different father). There is nothing strange about this; indeed, today it is quite a common occurrence. Plaintiff however was not happy about this situation, and purportedly driven by her children's best interests, filed a lawsuit against the Director of Public Registry, requesting the Court to order a change in her first child's surname, so that her first child would bear her surname too together with the father's surname. Like that, both children would have at least one common surname, together with their respective father's surname. Like that, there would have been something to connect both siblings.

In his reply, the Director of Public Registry argued that since there was no error from any of the public servants employed within the Public Registry, it was in the Court's discretion to decide whether or not to accede to plaintiff's request.

During the proceedings, plaintiff (the mother) explained that she had originally believed that she was going to marry the father of her first child, and hence, she had elected not to include her name in the child's name. Of course, this changed once the relationship ended.

In its accurate considerations, the Court pointed out that the correction of a surname is – from a legal point of view - more problematic, in that it can only be done if it turns out that there was a genuine mistake. The Civil Court First Hall reiterated that our courts' decisions in this regard are consistent; and this due the fact that if a change in the surname is easily permissible, this may affect and could prejudice third parties since said third parties would find it much harder to conduct an effective investigation on the person with whom they were contracting. As a result, surnames are not to be changed, just like that.

In its judgement, the Court went in great detail into the merits of the case. It

pointed out that given the fact that the child was only three years of age, third parties would certainly not be affected. The Court stated that it truly believed that plaintiff committed a genuine mistake when she registered her child and this since she believed that she was going to marry the child's father.

The Court even went a step further in its considerations. It pointed out that our laws have always established that the best interest of the minor should always prevail and prioritized in any given circumstance. The Court believed that if plaintiff's requested had to be acceded to and if the minor would subsequently have at least one common surname with her sibling, that child will be provided with a sense of certainty about her identity in the Maltese community as well as instil in her a sense of belonging in the family who is raising her.

Both parties to the suit may appeal from this judgement.

THE COMMODATUM BY DR CARLOS BUGEJA

Bartolomeo Gauci et vs. Ronald Abela
5 June 2020, 929/2017JVC
Civil Court, First Hall

People enter into contract all the time. Often, the nature of contracts is easily discernible; it does not take years of legal experience or any profound knowledge of the learned opinion of legal heavyweights such as Laurent, Denning, and Mattirolo to recognise a contract of sale from a rent agreement.

But people can get rather creative. And so, the law recognizes some forms of contract which are less obvious and common, but which are still enforceable at law.

Once such contract is the Commodatum.

Commodatum is defined by law (article 1824 of the Civil Code, Chapter 16 of the Laws of Malta) as 'a contract whereby one of the parties delivers a thing to the other, to be used by him, gratuitously, for a specified time or purpose, subject to the obligation of the borrower to restore the thing itself'.

The word 'gratuitously' is key.

Commodatum has an interesting historical profile. In early Roman times, there existed one way how one could contract – through the static form of 'stipulatio', a contract built on very strict rules, which interestingly, took the form a simple question and answer.

At this point in history, the prevalent system had yet to start acknowledging the possibility of individual diverse contracts. Early research shows us that Roman culture considered it socially rude for two friends, neighbours, or members of the same family to request that an agreement is stipulated through a formal contract. Romans placed a great weight upon friendship, and a friend who lent something to another friend could not acceptably demand a formal promise in return. It is said that demanding a contract from a friend was practically a taboo. And so, while relationships developed, they remained largely unregulated and unprotected at law.

And then, Rome grew, and neighbourly relationships started showing cracks. Dear friendships became less so, and cultural traditions dwindled. And new forms of contract other than the 'stipulatio' became an absolute necessity. During the first century BC, one can trace the emergence of 'commodatum', a 'gratuitous loan for use', as a separate contract, and the law eventually started to recognise it and giving it legal strength.

Today, Commodatum is part of our law, and it has been so for more than a hundred years.

As a contract, it is not as abstract as it may first sound. A mother that allows her son to go live into a property of hers for free until he dies would unknowingly be conceding him a classic 'commodatum'. Someone who lends a photo camera to a friend to take with him on holiday, without any expectation of payment, would also be entering into a commodatum agreement. The most important thing is that there is a 'thing' which may be returned, and which is lent for free. So, a loan of money is not a commodatum, because the borrower is not expected to return the exact notes and coins received, but only an equivalent amount. That is a different contract altogether, known as 'mutuum'.

With commodatum, the law does not require a written agreement, and indeed, almost every commodatum agreement is made verbally, many times without the parties even realising that what they are entering into is legally called that. The judgment of Bartolomeo Gauci et vs Ronald Abela delivered by the Civil Court, First Hall (still subject to appeal) on 5 June 2020 (929/2017JVC) analysed the contract of commodatum.

Plaintiffs filed a lawsuit, seeking respondent's eviction from a property they owned, claiming that they held no valid title at law. Respondent disagreed; he plead a number of matters, and also claimed that he held a title of commodatum on the property.

Here, there was no valid written contract of lease, so the court had to look elsewhere.

The Court made a thorough analysis of the law of commodatum. It quoted Italian author Ricci, who is known to have stated that the basis of the contract of commodatum is the desire by the party lending a thing not to make profit, but to simply render a favour. Certainly, parties are always free to agree on a consideration pursuant to a loan. That is perfectly lawful. But then, the contract would no longer be a commodatum, and it would be something else completely. The bottom line is this: if there is a payment consideration, there is no

commodatum. It may very well be a lease, or it may be the less known contract of precarium. But it is not commodatum.
It has been stated both in Malta and abroad that a nominal insignificant consideration does not exclude the existence of commodatum (si quis conduxerit una nummo, conductio nulla est, quia et hoc donationis instar inducer). But anything further than nominal consideration transforms the contract into something other than commodatum.

Here, the Court noted that respondent used to pay plaintiffs the sum of sixteen euro each day as consideration for the occupation of the property. There was no gratuity; certainly, the amount could not be qualified as a nominal compensation, and thus certainly, there was no commodatum. As a result, respondent could not rely on the existence of a commodatum to continue occupying the property.
The Court further held that this was not even an atypical or innominate contract. At the end, it found that plaintiffs were correct in stating that respondent did not have a valid title at law.

As a result, and in furtherance of other unrelated reasons which the Court considered, the Court ordered respondent to leave from the property, together with an obligation to pay all costs.

FACT OR OPINION?: HOW MALTESE COURTS HANDLE LIBEL CASES
BY DR REBECCA MERCIECA

Malta Gay Rights Movement vs. Ivan Grech Mintoff
17 June 2020, 387/2015/1
Court of Appeal

The internet and especially social media have made it especially easy for us to share our opinion publicly. The famous Italian author Umberto Eco is known not to be a big fan of this development, stating bluntly that: "I social media danno diritto di parola a legioni di imbecilli che prima parlavano solo al bar dopo un bicchiere di vino, senza danneggiare la collettività. Venivano subito messi a tacere, mentre ora hanno lo stesso diritto di parola di un Premio Nobel." (translated to: "Social media gives legions of idiots the right to speak when they once only spoke at a bar after a glass of wine, without harming the community - but now they have the same right to speak as a Nobel Prize winner.").

Many will disagree with this forthright statement; we often find articles or stories which party-line up with our views and opinions online, so what's wrong with sharing only those sections which enhance and glorify our opinions? After all, aren't freedom of opinion and expression engrained in our fundamental human rights?

One's right to an opinion and expression is protected by Article 19 of the Universal Declaration of Human Rights.

However, such rights carry responsibilities which are often forgotten behind one's perception of his right of freedoms.

It has been stated that nobody has the right to twist facts causing damage to those who oppose him to influence those who place their trust in him and to project facts that are not true. Such is especially true for comments published by a person in politics who has obligations towards citizens, who in turn expect loyalty towards the truth and honesty. In the present case, the Court found that loyalty was not respected by the defendant when he twisted the facts to obscure the plaintiff.

Such was confirmed by a judgement dated 17 June 2020, whereby Chief Justice Mark Chetcuti presiding over the Court of Appeal in its inferior jurisdiction

confirmed the judgement previously delivered by the Court of Magistrates on the 28th of February 2019 in the names "Malta Gay Rights Movement vs Ivan Grech Mintoff".

The defendant had made declarations which were found to be libellous and defamatory to the plaintiff movement using three channels, namely: TV, print and social media.

Allegations had been made by the defendant on a TV program which was televised on the 9th October 2015 whereby he had alleged that the plaintiff movement "jieħdu flus mingħand nies li joqtlu tfal" (take money from people who kill children).

The defendant had also published a letter on one of Malta's Sunday newspapers dated 18th October 2015 which was entitled "Lies and assumptions about MGRM and Planned Parenthood", and had also published a Facebook post on his Facebook Page on the 19th October 2015, suggesting that the MGRM were in bed with the world's foremost abortion promotions by allegations such as : (The movement) "admits to taking money…", justifies it by…" and that it fills "their (being children) heads with harmful gender indoctrination".

Defamation under Maltese is used as an umbrella term which includes libel and slander. Libel is in turn considered to be defamation by publication, including printed matter or media content or whereby words or visual images are broadcast on a website, and slander is defamation by spoken words uttered with malice. However, it is stated that words are not considered to be defamatory unless they cause serious harm or are likely to seriously harm the reputation of the specific persons or persons making the claim.

The first decision to be taken by the court during the preliminary hearing of a defamation suit is whether the case at hand may be referred to mediation, or whether the parties are likely to reach an amicable agreement. In such case, even if the parties do not manage to find a mutual agreement, the case will continue to be heard before the court.

If the court considers that comment in question to constitute libel or slander, the court will then move to quantify the damages that may be awarded. In doing this, the court usually considers several elements, such as the nature and seriousness of the allegation made in the defamatory declaration, the means of publication, how far the said defamatory declaration would have been shared, whether an

apology had been made or offered, proof regarding the plaintiff's reputation and when truth of facts is invoked by the defendant, whether parts of the facts which would have been broadcast where true or otherwise. Upon finding for the plaintiff instituting a defamation suit, the Court may also order the operator or editor of a website to remove the published defamatory declaration and to order any other person responsible for such defamatory declaration from distributing, selling or showing material containing such a declaration.

Monetary compensation awarded in defamation suits is two-fold; the plaintiff may be awarded pecuniary damages if he proves actual damages suffered, and he may also be awarded moral damages. Moral damages are capped at €11,640 for libel, and €5,000 for the finding of slander.

In this present case, the court considered that the plaintiff did not quantify any actual (as opposed to 'moral') financial damages suffered by the movement as a result of what the defendant has broadcast. The court also confirmed that the defendant, as apolitical figure had the obligation to publicly comment about issues concerning public interest and that citizens expect direction regarding various issues, including abortion from such political figures. The court considered that the allegations which had been made by the defendant were of a serious (and criminal) nature and moreover, it further noted that the defendant had also failed to share all the details which he was informed about while he made allegations based on facts which were substantially incorrect.

The Courts finally found that the defendant's allegations, which suggested that the MGRM obtained funds generated from abortion services, were made to impinge on the movement's credibility and thus the Court of Appeal confirmed that the defendant's declarations where libellous and defamatory to the plaintiff movement, and ordered defendant to pay the Malta Gay Rights Movement the sum of €3,000.

SETTING UP A COUNTERCLAIM BY DR CARLOS BUGEJA

Anthony Sciberras vs. Angelo D'Amato et
30 June 2020, 176/2012RGM
Civil Court, First Hall

In military and football, counterattacking has always been a favoured tactic; it allows the defendant to turn an offence into its own attack, thereby surprising the opponent and gaining tactical advantage.

At first glance, the counterclaim looks as somewhat of a similar move, although its purposes are less tactical, and have more to do with the principle of the 'economy of justice'. In a court of law, a party's demand is a counterclaim if it asserts a claim in response to the claims of the other. Simply put, a defendant of a lawsuit may reply and then turn onto the offensive and put forward a claim of his own against the original plaintiff. This would be a counterclaim, known in the law as 'reconvention' (rikonvenzjoni or kontro-talba in Maltese).

Article 396 of the Code of Organisation and Civil Procedure (COCP, Chapter 12 of the Laws of Malta) states that in any action, it shall be lawful for the defendant to set up a counter-claim against the plaintiff, provided the claim of the defendant is connected with the claim of the plaintiff, in the sense that it either arises from the same fact or from the same contract or title giving rise to the claim of the plaintiff; or if the object of the claim of the defendant is to set-off the debt claimed by the plaintiff, or to bar in any other manner the action of the plaintiff, or to preclude its effects.

The idea is that two issues that can be dealt together are better dealt like that, than separately. A properly utilised counterclaim can lead to a more efficient and consistent delivery of justice. It is not just that it is always faster to deal with two cases as one, there is also the issue that two cases which have to do with the same thing but which are dealt separately by a different judges can easily lead to two conflicting judgment. Take this as an example: plaintiff files a lawsuit, claiming that defendant owes him money in virtue of a contract of works signed with defendant. Defendant files a separate lawsuit to annul the same contract, claiming that he signed it under duress. Both win, and the plaintiff would have obtained a court order for the payment of a sum of money in virtue of a contract which another court would have declared as being null and void.

Surprisingly, this does occasionally happen, and the institute of counterclaim (as well as other institutes, such as the 'plea of connection of actions') seeks to avoid these tricky situations.

Unfortunately, however, the counterclaim is often used with tactical intentions, a move which our courts rightfully frown upon.

The way to set up a counterclaim is to file it together with the reply to the original lawsuit. That is the only time one can file a counterclaim. When a counterclaim is filed, both claims are then dealt with together and decided in one judgment.

The judgment of Anthony Sciberras et vs Angelo D'Amato et (176/2012RGM) dealt with many interesting legal issues, one of which was a plea made by plaintiffs stating that the counterclaim filed by defendants against them was null and void since it was not 'connected' to plaintiff's claim. Plaintiff said that defendant could not have used the counterclaim procedure, and instead had to file a separate lawsuit.

The law is clear: for a counterclaim to be valid, it has to be 'connected with the claim of the plaintiff' in the way provided by article 396 COCP (cited above). The counterclaim has to be such as to offset plaintiff's claim, or in any other way bar it. Alternatively, the counterclaim has to originate from the same fact, the same contract, or the same title.

The Court quoted Italian jurists who spoke about 'communanza di origine'. For a counter claim to be set up, there must necessarily be a definite nexus between the claim and the counterclaim. It also quoted past judgments, who had held that the counterclaim is an extraordinary and special remedy, and thus it has to be used carefully and in strict adherence with the law. So, unlike the counterattack in military and football, the counterclaim has a very specific purpose, and indeed, using counterclaims as a 'mere tactic' is discouraged, if not considered as being outright unlawful.

The Court explained that the phrase 'arising out of the same fact' in article 396 has been interpreted widely, to mean not only the particular circumstance brought about by the plaintiff, but also the wider understanding of the circumstances preceding it, or those that have to do with it.

In their sworn application, plaintiffs had complained that defendant's property had created a number of illegal servitudes onto their property. Defendants retorted by

filing a similar claim, holding that it was plaintiff's property that had created illegal servitudes on their property. The first lawsuit's subject was plaintiff's property, while the subject of the counterclaim was defendant's property.

The Court noted that the second claim could not in any way offset or annul the first, nor was it based on an identical title or contract. It further held that the fact that the two properties in question were situated next to each other did not mean that the counterclaim arose out of the same fact. Indeed, the evidence needed for the counterclaim was different than that needed for the original lawsuit, and therefore, it could not be stated that the cases were connected as understood by article 396 of the COCP.

As a result, the Court agreed with plaintiffs that since the counterclaim did not respect the letter of the law, it was null and void, and could not be considered further.

'DATA PROTECTION' IS THE NEW LEGAL BUZZWORD
BY DR EDRIC MICALLEF FIGALLO

LeoVegas Gaming plc vs. Il-Kummissarju għall-Informazzjoni u l-Protezzjoni tad-Data
12 June 2020, 161/2018LM
Court of Appeal

It is a law which is often hastily and randomly cited - many times under a misguided impression of what it is really all about.

On 12th June 2020, the Court of Appeal (Inferior Jurisdiction) gave its judgement on appeal for case 161/2018LM in the names LeoVegas Gaming p.l.c. (C59314) ġia LeoVegas Gaming Limited vs Il-Kummissarju għall-Informazzjoni u l-Protezzjoni tad-Data.

The judgement dealt with the distinction between the role of a data controller and a data processor and their respective obligations towards data subjects. While extremely technical, this judgment could have significant practical effects on the rights of the people involved as regards their personal data and privacy. Here, the UK's Information Commissioner Office's received a staggering 9729 reports against the appellant company, licenced in Malta. The reports related to unsolicited communications sent and received through mobile phones, to promote the business of the company. The ICO had sent a request to Malta's Information and Data Protection Commissioner (hereinafter "IDPC") to have such complaints investigated.

The IDPC gave his decision on 17th September 2017, finding that "Leo Vegas failed to provide the required evidence which is necessary to legitimise the sending of the marketing communications by its engaged or appointed affiliates." He thus found a breach of regulation 9 of the Processing of Personal Data (Electronic Communications Sector) Regulations, which regulated unsolicited communications. As a result, it proceeded to impose an administrative fine of €5,000, due as a civil debt to the IDPC. The aforementioned company appealed this decision in front of the Information and Data Processing Tribunal.

The central point before the Tribunal was whether the appellant gaming company was a data controller or not. The Tribunal considered what determines whether one is a data controller or a data processor and referred to the now famous EU General Data Protection Regulation (commonly known as 'GDPR'). According to

this law, the 'data controller' is that (natural or legal) person that determines the purposes and means for the processing of personal data, while a 'data processor' is someone who processes personal data on behalf of the controller.

In the gaming sector, affiliates are an important market player for many companies. Simply put, in the online gambling industry, affiliates have the role to promote the operators' web portals; in return, they receive a percentage or commission. The appellant company's main point of attack against the IDPC's decision was that the latter had decided on the basis of it being the data controller. The Tribunal analysed the gaming company-affiliate relationship and concluded that this was one in which the affiliate acted for and in the interest of the appellant company. The Tribunal also made reference to the guidelines issued by the Malta Gaming Authority by which it is stated that an affiliate solely acts on behalf of the Operator by driving traffic towards that Operator and when such an affiliate would not have otherwise been processing that data had it not been for his relationship with the Operator then that affiliate is acting as a processor, basically meaning that the Operator (that is the gaming company) is indeed the data controller.

The Tribunal also referred to the contract between the appellant company and its affiliate, by which the latter two had agreed that the appellant company "exonerated itself from any liability regarding any breaches of data protection", and other contractual clauses by which the affiliate had to refrain from spamming the appellant's company customers and how the affiliate was "responsible for the loss or destruction of or damage to personal data".

This is indeed of high general legal interest because many laymen and professionals seem to draft contractual terms and conditions so liberally as to forget that there is law which prevails over any contractual agreement contrary to it. The Tribunal, without spelling this out explicitly, clearly implied this fundamental principle and rightly so applied it to data protection law and its obligations on data controllers and processors, and by implication also to the rights of the data subjects themselves, especially since those rights ultimately find their source in the fundamental right to privacy and the protection of personal data. This is quite poignant especially with regards to a contractual clause which made it explicit between the parties that in no manner is the appellant company to be considered the data controller or even a data processor. These contractual provisions between private parties were rightly discarded as untenable at law by the Tribunal.

In the end, the Tribunal confirmed the decision of the IDPC.

Appellant company appealed to the Court of Appeal.

In its decision, the Court went further in its considerations, pointing out to contractual amendments made between the appellant company and its affiliate, which came about in reaction to the Tribunal's decision. The Court eventually referred to these same amendments to solidify the case against the appellant company. The Court also made reference to material by the UK's ICO on the nature of the transactions and the data processing involved in the gaming sector and how these interrelate with data protection law. The Court made such reference approving the same material.

At the end of its considerations, the Court referred to the provisions under Maltese law as regards unsolicited electronic communications, being the provisions which the IDPC rested upon to give its decision. The Court rightly pointed out that these were applicable in case someone leads someone else to breach them, implying the role of the data controller in this given case. In truth, the actual wording affects persons without specific reference to their nature as data controllers or data processors. One could also argue that the actual nature of controller or processor is possibly irrelevant, and that the contractual obligations involved between the appellant company and its affiliate, and their fulfilment, would on their own also have made them fall foul of the referred provisions.

In the end, the IDPC's decision was confirmed by the Court of Appeal, and the fine imposed was upheld.

ADVOCATE TO THE CHILD
BY DR GRAZIELLA CIRCCHIOLA

AB vs. CD
30 June 2020, 82/2019
Civil Court, First Hall

While many parents undergoing separation proceedings are able to rise above the emotion, anger and resentment that could have developed over the course of the relationship and put the best interests and needs of the children ahead of their own needs, there are an equal number of parents who, unfortunately, cannot see past their own needs. More often than not, these parents end up using their children as pawns in separation proceedings to hurt the other parent or gain an advantage in the litigation.

The role of the child advocate guarantees representation of the child in court. This way, the child's best interests are safeguarded by an independent person, whose mandate is concerned with the child, and not the parents.

The process undertaken by the child advocate is quite straightforward. The child advocate will normally hold one meeting with the child, and he or she would then prepare a report, which is accessible to the Judge, but not to the parents or their lawyers.

This oddity is many times questioned on the basis of the allegation that there is a fundamental human right breach. The argument is that the Civil Court (Family Section) would take important family decisions, such as those on custody and visitation issues, on the basis of the child advocate's report – a report which the parties to the suit cannot read. This means that the parties would be face with the decision of the court which refers to a report and conclusion which one cannot see.

In a way, in practice, it could be said that the child advocate has a dual role - on one hand, advocating and protecting the child, giving them a voice in the proceedings and promote their best interest, and on the other hand, as a court expert of substantial influence on the case at hand. This conflicting dual role is often than not, causing more complications rather than solutions especially when dealing with cases of parental alienation. If the child's preference has been unduly influenced by others, especially a parent, the child is unable to reflect on his own judgment.

The role and functions of the child advocate were dealt with and considered in great detail in a decision delivered by Mr Justice Robert G. Mangion in the constitutional reference 'AB vs CD' decided on the 30th June 2020.

The facts of the case are as follows: In 2018, the mother of the children filed an application in the Civil Court (Family Section) requesting the suspension of the father's visitation rights to the children. Without ordering that such application is to be served to the father, so that he can reply, the Court appointed a child advocate to prepare a report. Based on the report prepared by the child advocate, the Court ordered the termination of the father visitation rights to his children. In this regard it was emphasized in the case that the father was never aware that the mother made such a request to the Civil Court (Family Section). Additionally, it was stated that the report of the child advocate was sealed, and the parties did not have the opportunity to read it.

Soon after, the father filed an application to contest this decree which terminated his visitation rights and requested to be given the report prepared by the child advocate.

The Civil Court (Family Section) denied his request.

The father proceeded to request the Civil Court (Family Section) to refer the matter to the First Hall, Civil Court in its constitutional jurisdiction, complaining that due to the procedure adopted by the Civil Court (Family Section) by which his visitation rights were suspended, his rights to a fair trial and right to family life had been breached.

In its decision, the Civil Court, First Hall in its Constitutional Jurisdiction went in great detail in explaining the function and role of the child advocate. It was explained that the legislator's intention on the creation of the role of the child advocate in judicial proceedings was to safeguard the interest of the children. The legislator thought that such interests of the children would be better safeguarded if a lawyer represented said children – a lawyer not representing the father or the mother – but as the name itself suggest, a lawyer safeguarding solely the interest and the rights of the children.

The court however criticised the dual role which the child advocate is being expected to serve in separation proceedings where on the one hand he is expected to act as a court expert and on the other hand he is to represent the minor's interest in an objective and independent manner before the Civil Court (Family Section).

The court concluded that the father's rights to a fair hearing were indeed breached when the Civil Court (Family Section) terminated his access to this children without giving him an opportunity to participate in the proceedings and without even giving him the opportunity to analyse the report prepared by the child advocate. The court held that as long as the child advocate is treated as a court expert and as long as he prepares reports and files them in court, then all parties to the case should have an opportunity to see and evaluate the report exhibited in court by the child advocate and to contest the findings.

Both parties to the suit may appeal from this decision.

The names of the parties have been removed in order to protect their identity and the identity of the minor's involved.

PUT IT IN WRITING
BY DR CARLOS BUGEJA

Emanuel Caruana et vs. Ta' Dernis Limited
30 June 2020, 1097/13GM
Civil Court, First Hall

Some contracts are done verbally, and many of these survive and are enforceable without ever being put into written form.

Other contracts have to legally be put in writing, often through formalities working as indicia of seriousness of the contract, from which the parties can understand that a higher attention is required. This way, the conclusion of that contract is more evidently deliberate, and as a result more rational. In some places, the law requires a written instrument or even a public deed, so to ascertain and publicise the terms of the agreement, to everyone's benefit.

The value of a written agreement is crystal clear. It provides certainty, conviction, and clarity. It leaves no doubt as to what the parties agreed to and how their relationship is to be regulated. In a written agreement, it is presumed that all that the parties wanted to agree upon is there to be read.

From this emerges the principle known in the legal world as contra scriptum testimonium, non scriptum testimonium non fertur.

Almost everything law can be explained through an eminent Latin maxim. Although ostensibly pretentious, Latin expressions actually often manage to elucidate complex legal rules in a few words which are simple to comprehend. That is why these maxims have outlived many other attempts to explain legal principles and still continue to echo in courtrooms right to this very day.
The judgment delivered by the Civil Court, First Hall on 30 June 2020 in the names of Emanuel Caruana et vs Ta' Dernis Limited (1097/13GM) expounded on this Latin brocard. It gave a rich and broad historical account of this rule, and how it is to be applied under Maltese law.

Plaintiffs were owners of a large land, which they had sold to respondent company. In the contract of sale, the parties declared that part of the selling price – the sum of €410,000 – had already been paid to the sellers (the plaintiffs) prior to the day of the contract.

Later, plaintiffs filed a lawsuit, claiming among other things that what was

declared in the contract of sale was not true, and that in fact, contrary to what was stated, they had not received the sum of €410,000. As a result, they requested that the court quantifies the sum yet to be received as price for the purchase of the land, and to order respondent company to pay said sum, with interests.

Referring to the Latin brocard, contra scriptum testimonium, non scriptum testimonium non fertur, the Court stated that it is a sacrosanct principle at law that oral evidence cannot overrule what appears to have been agreed to in writing. Despite this not being part of Maltese codified law, it is a principle rooted way back in history, so much that it can be found in old Roman laws. It quoted the writings of celebrated Maltese judge Paolo Debono, who had written – way back in year 1897 – that since written acts are done with the scope of conserving the memory of juridical facts agreed to between the parties, they ought to retain stronger confidence than the mere uncertain recollection of witnesses.

The Court further quoted English author William Mawdesleuy Best, who had stated that 'parol evidence' is inadmissible where it has the scope to 'cut down, control, or contradict the ascertained purport of any document under seal, or other valid written instrument of a solemn and conclusive nature, in any suit founded upoen such instrument and between parties or pricies thereto...'

The idea is this: the law has to assume that in choosing the solemn form employed to embody their agreement, the parties would have intended that the instrument expresses all that they agreed upon, thereby removing any debate caused by 'bad faith' or the 'uncertain testimony of slippery memory'. As the Maltese proverb eloquently states: "Il-miktub mhux maħrub". To admit oral testimony against what is clearly expressed in writing would utterly defeat the scope of a written agreement. The written instrument is thus necessarily conclusive of its own content, and so it must be considered.

Certainly, oral testimony may be admissible when it seeks to clarify doubtful clauses, or when it seeks to put light on the intentions of the parties behind an ambiguous clause. It is also admissible where the agreement is vitiated by error or fraud, or where there are extraordinary reasons that justify the consideration of further evidence.

The Court observed that in this case, plaintiffs did not justify their allegations, nor had they successfully cited any extraordinary exception to this general rule. They did not claim that the declaration had been simulated, or that it was vitiated by error or fraud. They had simply stated that contrary to what was declared and

signed in the contract of sale, they had not received the sum of €410,000. This was not sufficient.

The Court further noted that in any case, it was rather implausible for plaintiffs to have declared to have received such a large sum without having actually received it. Indeed, they had never mentioned the sum of €410,000 prior to instituting the lawsuit, and had neither intimated the Notary alleged to have kept the money, nor indicated such a pretention in the judicial letter filed. There were also several inconsistences in plaintiffs' positions and testimonies, and respondent company had plausibly proven that it had made a number of payments to plaintiffs, in cash and by means of a transfer of a number of properties.

In conclusion, the court, while acceding to some of plaintiffs' demands, it completely rejected the allegation that the sum of €410,000 had not been paid. Plaintiffs were ordered to pay 90% of the costs of the case.

Twenty days have elapsed since this judgment was delivered, and no appeal has been filed.

RAN OUT OF TIME
BY DR RENE DARMANIN

The Police vs. Tanya Carmen Chetcuti
14 July 2020, 115/2016
Criminal Court of Appeal

Prescription, or as is more commonly referred to in other jurisdictions, the Statute of Limitations, is a notion originating from Roman law, denoting a fixed period of time within which a court case has to be instituted against a defendant. This is a fundamental element applicable to both criminal and civil cases.

The Maltese legislator enacted a body of laws determining these periods in relation to different offences. The executive police are precluded from instituting criminal proceedings after the lapse of the prescriptive period relative to the particular offence in question.

From a criminal law perspective, the concept of prescription is of great significance due to the fact that through prescription, the legislator attempts to safeguard the accused from having a case instituted against him a long time after the completion of the crime. Its objective is to restrain the executive police from charging suspects with crimes arising from the loss of evidence, death, loss of memory of witnesses and obscurity of facts. The institute of prescription is of paramount importance in a democratic society, in attempting to strike a balance between the rights of society at large and those of the alleged perpetrator. Of course, from a 'popularity' point of view, prescription may be deemed like an infamous way how people may escape justice, but in reality, it is not. It is indeed an important part of justice itself. Apart from the legal aspect of prescription, from a logistical point of view, it is argued that it is not logistically efficient for the courts to be determining cases where the facts are no longer detectable, evidence no longer traceable, witnesses no longer accessible, and when statements are affected by the fallibility of the human memory. The bottom line is that cases instituted after a long time are as a general rule too weak to argue and prove.

Some schools of thought argue against the imposition of a prescription period while others contend that the application of prescription in criminal cases is part and parcel with the fundamental right of each and every suspect to have his guilt and innocence determined by a fair and an effective legal process. However, the main conflict revolves around what length of time is truly regarded as fair.
It is worth mentioning that back in 2013, Parliament approved a bill for the

removal of prescription on acts of political corruption. This law practically prevents politicians charged with corruption in relation to the office which they hold from raising the plea of prescription. More recently in 2018, Judge Giovanni Grixti, whilst acquitting a man accused of defiling a young relative due to the fact that the criminal action was time-barred and consequentially, through this judgment, called for amendments in laws related to sexual abuse crimes and this in light of the fact that victims of sexual abuse only comprehend the seriousness of the offence years later.

In Malta, the prescriptive period which determines whether or not a charge is time-barred is regulated by the punishment for which that particular offence would be ordinarily liable without taking into account any aggravating factors. Once a criminal case is instituted within the prescription period stipulated by law, said prescriptive period is said to be suspended. Contrastingly, if a criminal case is filed once the prescriptive period laid down by law has lapsed, the plea of prescription may be raised by both the defence as well as ex officio by the Court. This would then lead to the extinction of the criminal action.

This was the matter at hand in the case of 'The Police vs Tanya Carmen Chetcuti' decided by the Court of Criminal Appeal in its Inferior Jurisdiction on July 14, 2020.

The accused was first charged before the Court of Magistrates on the accusation that on the 15th of March 2015, she had driven a motor vehicle on a road whilst unfit to drive through drink or drugs and that of driving a motor vehicle after consuming so much alcohol that exceeded the prescribed limit.

By means of a judgement delivered by the Court of Magistrates on the 1st of March, 2016, the Court of Magistrates decided that the accused had not been notified with the charges in the English language within the prescribed period of time and declared the proceedings as time-barred.

The Attorney General felt aggrieved by the said judgment and filed an appeal from this decision arguing that the prescriptive period for the crimes with which the accused was charged was that of two years. Considering that the court judgement declaring the action as being time barred was delivered during a period of one year from the date of the alleged offence, the Attorney General contended that the action could have never been time-barred. The Attorney General requested the Court of Criminal Appeal to declare the judgement as defective and to annul the judgement of the Court of Magistrates.

Subsequently, the Court of Criminal Appeal, through a partial judgment delivered

on the 14th of June, 2019, held that the judgment of the first court was null since the charges were not notified to the accused appellant in the English language - taking into consideration that the accused was a foreign national and the appellant could not comprehend the Maltese language.

Eventually, the Executive Police notified Ms Chetcuti with the charges in the English language on the 23rd of June, 2020.

The court observed that the punishment applicable for the offences that the accused was charged with could not exceed six months of imprisonment and that in terms of the Criminal Code, the prescriptive period for such actions was two years. Considering that five years had lapsed before the appellant was notified with the charges in the English language, the Court of Appeal stated that the proceedings were time barred and acquitted accused appellant from all charges pressed against her.

HIDDEN DEFECTS
BY DR CARLOS BUGEJA

Victor Mifsud et vs. Victor Spiteri et
20 July 2020, 623/2005/1
Court of Appeal

Sale is a contract built on trust and confidence. The genuine seller desires to deliver a good product to his customer and – why not – in turn make a profit, and the purchaser hopes to receive what he paid for, with no ugly surprises.

To guarantee this peaceful rapport, the law provides for the guarantee against latent defect. It is an absolute guarantee, one which is inherent and automatic, unless otherwise stipulated. It is a valuable instrument for those who would like to go beyond the usual fervid rants on specifically-dedicated groups on social media.

The law states that the warranty which the seller owes to the buyer is in respect of the quiet possession of the thing sold and of any latent defect therein (article 1408, Civil Code). This is a renounceable obligation; however, generally speaking, the seller is bound to warrant the thing sold against any latent defects which render it unfit for the use for which it is intended, or which diminish its value to such an extent that the buyer would not have bought it or would have tendered a smaller price, if he had been aware of them.

In the case of Victor Mifsud et vs Victor Spiteri et (finally decided by the Court of Appeal on 20 July 2020), plaintiff lamented that a bus that they had bought had serious hidden defects, which diminished its value drastically, so much that had they known about such defects, they would not have bought it. For this reason, plaintiffs asked that respondents are ordered to pay all damages suffered thereby. By means of a judgment of the Civil Court, First Hall, respondents were ordered to pay plaintiffs the sum of €10,062.89.

Respondents appealed, and this is where we pick this case up.

In their appeal, respondents stated that the first court should not have found that the defect existed at the moment that the sale was concluded.

The Court of Appeal clarified that not every defect can lead to a successful action at law. The defect has to be hidden at the moment of sale, and it has to be such as to render the thing purchased unfit for the use for which it was

acquired. It has to be an abnormality, a failure, or a defect in the good sold that eliminates its integrity or usefulness. Moreover, the seller is not answerable for any apparent defects which the buyer might have been able – through careful analysis – to discover for himself. The seller has to responsibility to inspect the thing bought, at least superficially. This is not to say that the law's dogma is towards a pure caveat emptor (buyers beware!) – far from that. The law simply requires an ordinary assessment of the suitability of the thing bought. Of course, one is not expected to conduct complex and minute analysis of the thing bought, and be penalised if one does not, for that would place an excessive burden on the buyer. The court would consider the circumstances of the case, by taking into account various factors pertaining to the situation at hand and it will then decide whether the defect was hidden or apparent.

In this case, it was stated that after being used for a number of months, the bus's windscreen suddenly cracked. On close inspection by the first court appointed expert, it was concluded that the frame that held the windscreen was defective, and that was why the windscreen had cracked. The Court stated that there was no doubt that the defect was latent, and not apparent, and held that plaintiffs should not be faulted for not noticing the defect.

However, this was not all.

Before the first court, after the first original expert, another three court experts had been appointed as 'additional referees'.

There is nothing strange with this; in fact, our law provides that when a party disagrees with the conclusions of the original court expert, it may ask the court to proceed to the appointment of additional referees who shall make their report on reaching a majority decision on the subject of the reference.

Simply put, this is one way how one can contest the conclusions reached by the first court expert.

It is a costly procedure (its proponent would have to pay the costs of three experts), and it can only be requested by means of a note to be filed within ten days from the date of the publication of the report or when the referee has been dispensed from attending before the court, such time shall commence to run from the date of the receipt by the party or his legal procurator of a notice signed by the Registrar of the Court, stating that the report has been published. The peculiarity here was that these additional three court experts disagreed with the first one, stating that the defect encountered had nothing to do with the

design or manufacture of vehicle, so respondents were not to be faulted. Respondents lamented to the fact that the first court had accepted the first report, and totally disregarded the second.

The Court of Appeal stated that the law is clear in that the court is not bound to adopt the report of the referees against its own conviction. If it is not convinced, it can decide against what its expert says. Likewise, the court can 'choose' between a number of reports filed before it, for there is no doctrine that says that 'additional referees' are necessarily better or more reliable than the first one. Here for example, the original court appointed referee had the benefit of seeing something which the subsequent experts did not: the cracked windscreen itself. This was because by the time the additional referees were appointed, the windscreen had been fixed. Therefore, the first court had been correct to rely on the first report, and not the second.

For these reasons, the court rejected the appealed, and confirmed the first judgment. It also ordered respondents to pay the costs of the case.

IN THE NAME OF OTHERS
BY DR MARY ROSE MICALLEF

Kevin Zammit et vs. Carmel Galea
20 July 2020, 908/2006/1
Court of Appeal

Possession is a very important term in property litigation, for it is a legal medium that scrutinises the title of ownership.

It is a general principle of law that he who possesses is presumed to be the owner of the thing held by him – be it an immovable or movable property. Presumptions at law are very peculiar - a presumption is an establishment of a fact which is automatic, and which may be made without the aid of proof. In many cases, presumptions are rebuttable, meaning that they be contested by means of evidence to the contrary. But presumptions hold an important role at law, for they set a fixed starting point from which one can depart.

Article 525(1) of the Civil Code presumes that a person possessing a thing is deemed to possess it on his own behalf, and by virtue of a right of ownership. This legal institute and presumption exist independently of the formal legal titles. That is, the starting point of the law is that someone who possesses something does not possess it on behalf of someone else. Likewise, the law presumes that where there is possession there is ownership.

But these are both rebuttable presumptions, because there may be circumstances where possession – the physical detention of a thing – exists independently of any title, including ownership title. So, one can put forward evidence that seeks to contradict these presumptions.

For instance, there may be cases where a person holds a land without having any title deed in his name. Such possessor, by law (and in terms of article 525(1)), is initially presumed to hold the right of ownership – just as if he has acquired the land by virtue of a notarial deed. Once again, this is a rebuttable presumption. Indeed, it is recognised at law that a possessor who has held a land (without having a contract in his name) for a period of thirty years (and if the appropriate legal requisites are satisfied), may acquire such land by virtue of the acquisitive prescription (in Common Law terms known as 'Adverse Possession'). In common parlance this legal institute is commonly (and perhaps imprecisely) referred to as "it-trobbija tal-ġust".

This is essentially the reason why possession is regarded to be a stronghold in favour of the possessor, especially in cases where possession and title deeds compete, for possession may not only demonstrate presumed ownership, but it can actually eventually lead to proper ownership through acquisitive prescription. In Malta, ownership through prescription is not as rarely found as one would first think.

When title and possession exist simultaneously over the same thing, in connection to the same person (the owner), there is really no problem, for these two legal statuses complement one another. In short, having both (possession and ownership title) means holding absolute ownership – the most desired form of ownership – the most qualified form of title.

The issues arise when this legal presumption in favour of possession is sought to be challenged by evidence that one is holding a property not in his own name, but on behalf of another. The quandary is most interesting when the two elements (possession and ownership) are fragmented in a way that the court has to dig deep and decide who the actual owner is.

This was the matter finally decided by the Court of Appeal on 20 July 2020, in the case in the names of Kevin Zammit et vs Carmel Galea.

Appellant, a farmer, held in his possession a portion of agricultural land. The farmer was being sued by third parties who claimed to be the owners of such land. Claimants were demanding that the court orders his eviction from the property. Appellant argued that he had held the land for a long time, and thus had acquired it through acquisitive prescription.

On the other hand, claimants claimed that appellant was occupying their land by virtue of mere sufferance (b'mera tolleranza) that was originally granted to him by their father, and as a result, no matter how long he had held the land, it did not become his.

In examining the merits of the case, the court discussed the legal issues surrounding possession in light of 'acquisitive prescription'. Possession is after all what triggers the conception of acquisitive prescription – being the elementary ingredient of this legal institute.

The court found that the farmer in question actually 'knew' that the property belonged to third parties, although he claimed the he should be considered as having acquired the property under the title of acquisitive prescription. This was problematic, because for one to acquire a property through acquisitive

prescription, he has to have held the thing as though it belongs to him - animus et corpus; corpus possessionis et animus possidendi vel animus domini. The frame of mind of the possessor is key.

The court however concluded that despite the fact that the farmer knew that the property was owned by others, since he had held the property with the intention of becoming its owner though acquisitive prescription, this element of prescription was satisfied.

The legal problem for the farmer was something else; if a tenant is found to have held the property through mere sufferance, he will never be able to acquire it, no matter for how long he would have held it. Such possessors cannot shift to acquisitive prescription, because they hold a bond with the original owners. Mere sufferance is a title that enables its holders to hold the property with the blessings of the original owners. Thus, the owner would still be very much in the picture.

In this case, the court found that the farmer was holding the property under a title of mere sufferance; indeed, the farmer and the owner had originally agreed that the former was to farm the land, but return it when the owner requested it back.

For this reason, the court stated that the farmer knew very well that he was holding the land with the consent of the owner (that is, on behalf of the owner) under a title of mere sufferance, and thus acquisitive prescription had never been triggered.

The court thus ordered the famer to evict from the land in question.

166A: A POTENT TOOL BY DR CARLOS BUGEJA

Frank Azzopardi vs. Carmen Pace
9 July 2020, 692/2012
Civil Court, First Hall

Legal tradition has conceived many elaborate terms to describe legal institutes or procedural instruments. These ostensibly complex words often have historical connotations – take subbasta for example, which derives out of the term 'sub hasta', meaning the spot at the bottom of a spear fixed to the ground, where in Roman times, auctioning of enemy loot took place.

Occasionally however, legal instruments are simply known by the article at law where they are found. Ask any lawyer worth his salt, and he will know exactly what you are referring to if you cite article 469A (judicial review against an administrative act), article 495 (forcing a sale among co-owners), or article 1357 (executing a promise of sale).

In terms of popularity, article 166A of the Code of Organisation and Civil Procedure (COCP) reigns atop all of these, for indeed, it gives rise to a prominent procedural tool which is literally known by the moniker 'letter 166A', and by no other name.

Where someone is a creditor of a debt that does not exceed twenty-five thousand euro, he can file a judicial letter against the debtor under this article at law, informing him clearly that if he does not reply within thirty days from service upon him of the said judicial letter by presenting a note in the record of the said judicial letter rebutting the claim, such judicial shall constitute an executive title. This means that the money will be due the same way as if the creditor would have obtained a final judgment against the respondent.
This is a potent tool, for it may allow a creditor to get a judicial title capable of being enforced, literally within thirty days.

Of course, the law takes precautions against abuses; for instance, the letter has to rigorously follow a certain form, it has to be confirmed on oath, and it shall clearly inform respondent of his right to oppose it. Moreover, subarticle (5) provides that any executive title obtained according to the provisions of this article may be rescinded and declared null and void if upon a request by application in the Court of Magistrates (Malta) or in the Court of Magistrates

(Gozo), as the case may be, to be filed within twenty days from the first service upon him of any executive warrant or other judicial act based on the said title, the court is satisfied that he was not properly notified or that the judicial letter did not contain one of the requisites in the law.

The exclusivity of the applicability of subarticle (5) was the matter in the case decided by the Civil Court, First Hall on 9 July 2020, in the names of Frank Azzopardi vs Carmen Pace.

The attentive reader would have immediately started to ask a pertinent question: why was the case decided by the Civil Court, First Hall, when subarticle (5) directs the complainant to the Court of Magistrates?

Indeed, that before the court was not an application under article 166A(5), but a proper lawsuit filed before the superior courts.

Respondent had in the past filed a judicial letter under article 166A, claiming that plaintiff owed him €15,471.20 in connection with the purchase of a calf. Plaintiff failed to reply within thirty days, and as a result, respondent had obtained an executive title.

Eventually, plaintiff filed a lawsuit. He claimed: (i) that the oath taken by the creditor on the judicial letter was erroneous and untruthful; (ii) that the amount claimed had already been paid; (ii) and that as a result, the court ought to invalidate the executive title, and order debtor to refund what was paid in excess.

Admittedly, the debtor was in a bit of a pickle. Let us assume for a moment that it was true that the sum mentioned in the judicial letter was not due; article 166A(5) allows the debtor to act only within a certain timeframe only (within twenty days from the first service upon him of any executive warrant or other judicial act based on the said title) and only to obtain a declaration that the executive title obtained through article 166A is null and void and not to demand a refund of any sum (plus interest) that the creditor would have managed to receive irregularly. That would have to be requested in a separate lawsuit.

However, this does not seem to be the reason why plaintiff filed this case this way. Originally, the debtor had already proceeded before the Civil Court, First Hall, only to later withdraw the lawsuit. Then, he filed an application in terms of article 166A(5) before the Court of Magistrate, but his application was rejected. He had appealed, but the appeal was declared as being procedurally inadmissible.

This was his fourth attempt at contesting the judicial letter, in what was clearly a strenuous pursuit against the myriad procedural barriers he had to face. The idea was that the court's margin of powers is wide and ample, and as a result, it could decide this case, no matter what.

However, the court stated that the action could not be acceded to. An executive title obtained under article 166A may only be contested as provided by law, and the court's general powers are not sufficient to oust the limits the law placed on it.

Moreover, plaintiff had already done the procedure in terms of subarticle (5), and he now could not replicate the same causes before another court, not to mention that the decision of the Court of Magistrates previously undertook had reached finality, and could no longer be contested. The court stated that the procedure allowing one to contest an executive title obtained through article 166A had been exhausted, and there was nothing else to be done.

It further quoted article 166A(6), which states that no opposition other than that specifically provided for in subarticle (5) shall stay the issue or execution of any executive act obtained thereunder or the paying out of the proceeds of any warrant or sale by auction carried out in pursuance thereof.' Any complaint about the executive title had to be raised at the proper stage, that is within the thirty days from the service of the judicial letter.

As a result, it rejected the case, and ordered plaintiff to pay the costs of the case. Plaintiff filed an appeal.

SOME BARK, MOST BITE
BY DR REBECCA MERCIECA

Nicholas Mizzi vs. Joseph Delia
12 June 2020, 265/2016LM
Civil Court, First Hall

"No person who has any dog under his control shall allow such dog to stray and where the dog is taken out in any street, the dog shall be kept of leash" (Article 3(1) of the Control of Dogs Regulations, (Subsidiary Legislation 312.01). This article at law, albeit not generally known word by word, is no secret to the public at large. Indeed, when this regulation is breached, the licensee or the keeper of the dog shall be deemed to have committed a contravention. This legislation specifically indicates that ''street'' includes any road, alley, square, bridge, shore front, quay, or other place of public passage or access, and so excludes the time when a dog is held at home. The responsibility is wide and ample.

The Dogs Act (Chapter 312 of the Laws of Malta) itself clearly, and perhaps harshly, states that where any owner or keeper is found guilty of having failed to keep a dangerous dog (being a dog who has bitten or assaulted a person) under control, the penalty (apart from a small fine payable by the owner) is an order to the police to 'destroy the dog' (remarkably, that is the phrase used by the law). Fortunately, this option is rarely resorted to (although technically speaking the law states that the court 'shall' – and not 'may' - give such order). Furthermore, for the court to order for 'the destruction of a dog', it shall not be necessary for the prosecution to prove that the owner or keeper knew that the dog was dangerous.

On the civil law side of things, the Civil Code, specifically article 1040, leaves no doubt that the owner of an animal or a person using an animal shall be liable for any damage caused by it, even if such animal had strayed or escaped.

As the saying goes, a dog is a man's best friend; and he is to be properly raised, trained, and controlled. Any neglect by the owner in this sense is not only possibly detrimental to third parties, but also to the dog itself and its owner. This brings us to the case of Nicholas Mizzi vs Joseph Delia (265/2016LM), decided by Civil Court, First Hall decided on 12th June 2020.

Respondent had engaged plaintiff, a gardener, to do some works at his home. Plaintiff's dog, a German Shephard had suddenly attacked the gardener, and bit the back of his foot, causing personal damages valued at just over €16,000.

Plaintiff lamented that he underwent surgery to fix the damage, and even had to attend physiotherapy sessions to aid his recovery. Eventually plaintiff's wound had healed, however he still complained of pain and still had restrictions to his movement for a while.

The plaintiff based his case on Article 1040 of the Civil Code.

Respondent completely rejected any allegation that the dog had bit plaintiff. His position was that the bite never happened.

At the time when the dog allegedly bit the plaintiff, the plaintiff was alone, and thus nobody could confirm if the plaintiff had in some way interacted with the dog. It was established as fact that the dog had never attacked anyone before, and the defendant's family had never considered it to be a 'dangerous dog'. To the contrary, this dog was considered to be a family dog who loved to play both with humans and smaller dogs. It was also confirmed that the plaintiff had encountered the dog before and he had never requested the defendant to put the dog on a leash or in any way indicated that he felt unsafe with the dog around.

Respondent defended his position, implying that the gardener was somewhat of an erratic person, stating that on two other occasions, respondent had suffered separate incidents, both of which had nothing to do with the dog, and both of which occurred solely because of his own negligence.

The gardener however still blamed the dog, and in turn the dog owners.

The court faced conflicting testimonies; however, it heavily relied on the fact that the doctors and medical specialists had considered the injuries to be compatible to a dog's bite. It is vital to clarify that medical professionals can often easily make such a distinction; indeed, to a doctor, a dog's bite is clearly distinguishable from let's say a knife attack.

In this case, the court was not told to consider the question of whether or not the plaintiff could have provoked or contributed to the incident, for instance by teasing the dog. The question was simply: did the dog bite the gardener?

Considering the nature of the injuries, the court could conclude that the incident did occur as recounted by plaintiff, and that respondent, as the owner of the dog, was to be held responsible. The court reiterated that the owner of animal is liable to any damages caused by it, even if such owner could not foresee or

contribute to the damage caused. It is a wide and ample responsibility, with heavy consequences at law.

In this case, the medical expert testifying stated that he was not in a position to determine if plaintiff's injury had left permanent damages, however the plaintiff had claimed that he had to stop working for a period of time, and since he was self-employed, for that same period he had to increase the number of workers to replace his duties. Furthermore, the court appointed psychiatrist testified how this incident had caused plaintiff substantial anxiety and post-traumatic stress disorder, so much that it caused him a disability quantified at 12%.

In adding up the damages due, the court took into consideration the doctors' bills, the days away from work, and the fact that plaintiff had managed to obtain some sort of compensation by the Social Security Department. The court further considered that the plaintiff also suffered a 12% disability as a result of the trauma he had endured. In computing the future loss of earnings to be suffered by the plaintiff on account of the percentage of disability, plus inflation, minus a reduction due to the fact that the payment was going to be made in one lump sum, and not in income through a number of years, the court concluded that the damages payable by respondent to plaintiff were to be in the sum of €16,063.91.

This judgment has not been appealed.

BILLS OF EXCHANGE
BY DR CARLOS BUGEJA

Western Company Limited vs. Spiridione Muscat
1 September 2020, 584/2020RGM
Civil Court, First Hall

People sign bills of exchange (kambjali) without much thought, often when purchasing a second-hand car under an instalment plan (known as 'hire-purchase'). In practice, usually, bills of exchange accompany a contract; the contract details the rights and obligations of both parties, and the bills of exchange serve as guarantee for the payments agreed to. This instrument is simple to use, practical and valuable in many instances, only if the parties are well aware of the legal consequences of such a document.

A bill of exchange is similar to a cheque or a promissory note – it is a written order for payment, that binds one party to pay a fixed sum of money to another, on mere demand or at a predetermined date. The wording is usually something like this: "Pay in Malta, on (day-month-year) this bill of exchange to the order of (creditor's name and surname and identity card number), the sum of (amount), signed (creditor's name and surname and identity card)."

This is a useful tool, for it gives access to credit and goods to those who do not possess the capital to make certain purchases. On the other hand, it reduces the risks undertaken by the creditor, and makes it easier for him to enforce that due to him, without the need of lengthy lawsuits. It facilitates trades and offers sufficient clarity and guarantees.

But as with all things law, one needs to proceed with caution.

Bills of exchange are given the stature of an executive title, meaning that they are almost at the same level as final judgments. Simply put, having a signed bill of exchange gives the payee immense legal strength. All one needs to do is to file a judicial letter, to render that bill of exchange executable. After that, one can file the necessary warrants, including for instance an executable garnishee order. The debtor does have somewhat of a solution; he can try file an application asking for the suspension of the execution of the bill of exchange, if he manages to demonstrate that the signature on the document is not his, or if he brings forward grave and valid reasons to oppose the said execution. This has to be done within twenty days from when he is served with the judicial letter. This remedy is found in article 253 (e) of the Code of Organisation and Civil Procedure,

Chapter 12 of the Laws of Malta. If he is a successful, the 'creditor' would have to file a lawsuit to enforce the bills of exchange, known in the legal world as 'actio cambiaria'.

In Western Company Limited vs Spiridione Muscat (for procedural purposes, the name of the case in this kind of proceedings are inverted, thus Muscat was the plaintiff, although he appears second in the title), decided by the Civil Court First Hall on 1 September 2020 (584/2020RGM), plaintiff was seeking the suspension of the execution against him of a number of bills of exchange. He stated that bills of exchange number 1 to 59 were time-barred, and that in any case, in another lawsuit, he was attacking the contract to which the bills of exchange were attached.

The court went into great detail in describing the legal effects of bills of exchange. It stated that the bill of exchange cannot be separated from the principal obligation for which they were drawn, it is endorsed (ġirati) onto a third party. Only then (that is when a third party gets involved) does the bill of exchange acquire absolute autonomy separate from the contract for which it was drafted.

Referring to the element of 'grave and valid reasons' for the opposition of a bill of exchange, the court stated that the reasons must be serious, and not so wide as to render futile the executive strength that the law wanted bills of exchange to contain. Furthermore, this procedure is not intended at rescinding the bill of exchange, but merely to suspend its execution. For the former, there is a separate procedure found in the Commercial Code, and the two must not be confused. So, for instance, if someone is violently constrained to sign a bill of exchange, he may request the suspension of its execution (our courts have deemed this reason to be sufficiently grave) and then separately, by means of a proper lawsuit, demand the rescission of said bill of exchange. In considering whether or not there is a valid reason, the court must examine the merits at face value, so that the plaintiff is given time to then challenge the bill of exchange properly.

In this case, the court noted that since it prima facie appeared that more than five years had passed since bills of exchange 1 to 59 could have been executed, plaintiff could have a valid plea of prescription. As a result, there was sufficient cause for the court to suspend the execution of the bills of exchange, until the plea of prescription could be formally raised in any actio cambiaria filed by respondent.

However, the rest of the bills of exchange could not be halted. The fact that a separate court case had been instituted in order to attack the contract connected to the bills of exchange, meant that the issue was not one that could be easily decided. Therefore, such a complaint fell outside of the court's remit under article 253 (e) COCP. A pending lawsuit was not a grave and valid reason as understood in the law, and therefore, the court could not disregard the scope of the law (that bills of exchange constitute an executive title) and accede to plaintiff's request.

In conclusion, the court suspended the execution of bills of exchange numbered 1 to 59 and rejected the request in connection with the rest of the bills of exchange. Plaintiff was ordered to pay one-fifth (1/5) of the costs, while the rest were to be paid by respondent.

IN THE (BAND) CLUB
BY DR EDRIC MICALLEF FIGALLO

Lilian Martinelli et vs. Avukat Ġenerali
25 June 2020, 75/2019GM
Civil Court, First Hall (Constitutional Jurisdiction)

On the 25th June 2020 the Civil Court, First Hall (Constitutional Jurisdiction) gave its judgement on case 75/2019 GM. This was a fundamental rights case instituted by the landlords against the State and the occupants of their property for the violation of their fundamental property rights as safeguarded by our Constitution and the European Convention on Human Rights.

What is of particular interest in this case is that it involved a każin. In Malta, this should be a social club for some form of society, in this case a football club, being Naxxar Lions Football Club. Każini are often held to be of social and cultural importance, in fact they should centre around the activities of the sport club, the philarmonic society et cetera. This does have legal and practical significance which will be referred to further on.

In the cases of każini it often happens that the property had been occupied for decades. As often happened, these were often leased out and at a subsequent stage made subject to special protection by specific rent legislation. In this particular case the lease was subject to Chapter 69 of the Laws of Malta, the Reletting of Urban Property (Regulation) Ordinance, originally promulgated on the 19th June 1931. As a matter of fact, the lessees Naxxar Lions Football Club occupied the property since 1945.

The plaintiffs sought declarations to the effect that their fundamental rights under the Constitution and the Convention had been violated, that as a consequence thereof the provisions of Cap. 69 and Act X of 2009 (which inter alia amended and affected the application of Cap. 69) are inapplicable in their regard, and that the Court issues such orders and directives to give effect to their fundamental rights including by declaring that plaintiffs are not obliged to re-let their property as per Cap. 69 and that the plaintiffs are entitled to regain the full possession of their property. Plaintiffs called upon the Civil Court, First Hall to order the eviction of the occupants and to liquidate the damages suffered and order the defendants to pay for the violation of the fundamental rights of the plaintiff.

In essence, the Civil Court, First Hall acceded to all of the plaintiffs' request, bar the request for eviction. This was dealt with in line with recent practice adopted by our Courts, albeit disputable, i.e. a declaration that the occupants can no longer rely on the protection of the special rent laws to occupy the property concerned. Damages were also liquidated and payment thereof was burdened on the Office of the State Advocate.

What is of practical interest in this case is that submissions were made to, and considered by, the Court in view of the social or cultural purposes which such każini have in Maltese society. The European Convention on Human Rights allows discretion to contracting States when controlling the use of property for such purposes. This is particularly relevant when determining the quantum of damages to be afforded to plaintiffs, as settled Maltese and European jurisprudence allows for damages to be reduced when compared with market values. The Court considered two aspects affecting the damages awarded, the first being that the aim of the State was a legitimate one, while the second being that said aim did not have as much social significance as when dealing with social housing. Plaintiffs had claimed damages well in excess of a million euro, and this on the basis a technical report by an independent Court appointed expert. In line with the referred jurisprudence, the Civil Court, First Hall awarded an amount of €256,000.

Respondents pleaded a number of exceptions to the plaintiffs' case, which were all rejected by the Civil Court, First Hall as long as incompatible with its judgement. The first plea was related to the availability of so-called ordinary remedies under Cap. 69, (a constitutional one like this, being extraordinary). The Court rejected this plea on the ground that in its constitutional jurisdiction it has wide discretion in applying the same, and particularly so in cases such as this one in which the ordinary remedies under Cap. 69 have been found to be extremely wanting in giving an effective remedy to the plaintiffs. The Court seemed to veil its criticism towards the State Advocate for raising this plea, by referring to the notorious inefficacy of the remedies under Cap. 69 as known to legal practitioners. This plea is often raised with the same results, being a waste of time and resources to the detriment of swifter justice.

The State Advocate also pleaded the inapplicability of article 37 of the Constitution, by virtue of a transitory constitutional provision making it inapplicable with regards to laws enacted prior to 1962. The Court rejected this by reference to jurisprudence which extended its applicability to those laws when their effects protracted in time after 1962. The Court also stressed that the provisions of the European Convention Act do not have such a transitory provision or derogation, and also referred to jurisprudence by the European Court

of Human Rights which make it clear that the Convention applies with respect to all of the State's alleged acts and omissions even when they are merely extensions of an already existing situation.

Likewise, the Court rejected the State Advocate's plea that in such protected leases there is no deprivation of property as contemplated under article 37 of the Constitution. The Court referred to a thread of constitutional jurisprudence whereby article 37 was deemed applicable in cases affecting any interest in or right on any kind of property.

Cases are meant to be fought out when negotiations fail, but the pleas above keep on being raised by the Office of the State Advocate, notwithstanding now copious jurisprudence to the contrary. This can be held to be an overly prudent, or worse a vacuously combative, litigating praxis.

This case has been appealed by the Office of the State Advocate and said appeal shall be heard and determined by the Constitutional Court.

OATH OF THE DEFENDANT BY DR CARLOS BUGEJA

Bank of Valletta plc vs. Dr Joseph Ellis noe
2 September 2020, 522/2018/1
Court of Appeal

Judicial relationships, not unlike natural phenomena, are subject to the effects of time. Time operates either in conjunction with a positive or negative act of man or independently of any such act, and time produces juridical effects. Such is the institute of prescription.

There is a lot to say about 'prescription'; here today, we will limit ourselves to extinctive prescription (prescriptio). This is the plea that purports to seek the extinction of an action through the operation of time, which is described by our law (article 2107 (2) of the Civil Code) as a 'mode of releasing oneself from an action, when the creditor has failed to exercise his right for a time specified by law.'

Prescription was originally tied to payment. The debtor cannot be expected to retain proof of payment of debt forever, just in case down the line, perhaps in twenty years, the creditor re-seeks payment. Cases filed late are hard to prove for both parties, and had it not been for prescription, much of the time of the court would be consumed with cases involving years-pending debts most of which cannot be proven. Therefore, the law provides for the extinguishment of a right of action after a certain time, as a way to obtain closure. Each action has its own prescription period, so one will find actions which expire after a mere one year, and others which expire after ten years.

Prescription is an institute present in most jurisdictions, and not just in Malta. There is a lot to say about prescription, and today's case is none but a drop in the ocean of legal arguments that may arise. The case of Bank of Valletta p.l.c. (C 2833) vs Dr Joseph Ellis noe concerned article 2160, which provides for one way how a plaintiff can shield himself against a plea of prescription. Civil law (and here, we are purposefully excluding Criminal Law) provides for a number of manners how one can defeat such a plea; for instance, the running of time is interrupted if the alleged debtor makes a payment on account (article 2134, Civil Code), or if the debtor acknowledges the right of the party against whom such prescription had commenced (article 2133, Civil Code)

Originally, through article 2160, the plea of (short) prescription could be defeated

if the plaintiff put the defendant on oath, and asked him to declare that he is not a debtor, or that he does not remember whether the thing has been paid. If the defendant failed to that, then prescription fall, and would no longer be a valid defence. At that time, the plaintiff (and not defendant, who would have raised the plea of prescription) had to do this.

The idea is that prescription is a matter of conscience, and it would be immoral if the debtor, aware of the debt, were to deny its existence on oath.

In 2017, the law changed, and the responsibility shifted completely onto the defendant who would have pleaded prescription, and article 2160 no longer remained a direct tool to the plaintiff.

Today, 'the prescriptions established in articles 2147, 2148,2149, 2156 and 2157 (of the Civil Code) shall not be effectual if the parties pleading them, do not of their own accord declare on oath, during the cause, that they are not debtors, or that they do not remember whether the thing has been paid.'

Therefore, ever since the 2017 amendments, the defendant is required to take the oath and make this declaration, or else he would no longer be able to plead prescription. This is vital if a defendant hopes to successfully plead prescription. Often times, defendants fail to do this. Indeed, since the passing of this new law, many prescription pleas have fallen due to this simple omission.

In this case – a debt–collection case – the defendant was appearing as curator ad litem for the proper defendants, so appointed by the court because the actual defendants were absent from Malta. Curators often have no contact with the absent parties – but are appointed to safeguard their interest.

The Small Claims Tribunal had rejected the plea of prescription raised by the curator on behalf of the absent defendants and found the debt to be due. As a result, it ordered the defendants to pay the plaintiff the sum of €4,259.49, together with interest and legal costs.

The curator appealed, lamenting that the case should have been decided according to the law that was in force when the case was filed. Interestingly, he further lamented that the position of the Tribunal was unfair insofar as he could not – as a mere curator appointed by the court (who is unaware of the exact facts of the case and the situations of the parties) – be expected to testify on oath that the debt is not due as required by article 2160 (1) of the Civil Code.

With respect to the first grievance, the Court of Appeal stated that the case had been filed in year 2018, and the new law (the one shifting responsibility onto the defendant) had come into force in 2017. Therefore, the Tribunal was correct in applying the new law, and to expect the defendant to take onto him the responsibility of the procedure provided by article 2160 (1).

With respect to the second greviance, the Court of Appeal stated that article 2160 (1) makes no distinction between the proper debtor and the debtor represented by a court-appointed curator. The court could not just abandon the wording of the law and decide on its own accord. The curator had observed that it was improbable for a curator to manage to make contact with the defendants he was representing. Thus – he stated – if the decision of the Tribunal was to be upheld, it would result in the breach of the Fundamental Human Rights of the absent respondents. The court stated that as a Court of Appeal in its ordinary jurisdiction, it was not competent to decide questions of a constitutional nature, and as a result, it could not take further cognizance of such a greviance.

As a result, the Court of Appeal rejected the appeal, confirmed the appealed judgment, and ordered respondents to pay the costs of the case.

BETTER SAFE THAN SORRY
BY DR RENE DARMANIN

Il-Pulizija vs. Matthew Grech
14 September 2020, 11/2018
Court of Magistrates (Gozo)

Malta's unrivalled climatic conditions makes it an optimal year-round destination for swimming. While some may enjoy a refreshing dip in the relatively clean Maltese coastal waters, anytime an opportunity may arise, even during the winter season, others prefer to do so during the summer season. In fact, for most people in Malta, when they think of summer, the first thing that comes to mind is swimming. Jumping in the water is the ideal way to cool off on blazing days. If you live or work in Malta, when you are not swimming in the summer, you will probably be thinking of the next time you will be.

In recent years, the Maltese Transport Authority launched several campaigns promoting responsible behaviour and safety at sea. Such campaigns do not only target those making use of sea vessels but also swimmers. In fact, the Maltese Transport Authority, in order to ascertain that everyone at sea enjoys himself responsibly without putting himself or others in danger, between May and October of each year, installs designated swimming zones marked by red and yellow buoys in order to restrain seacrafts from entering inside said zones and bathers could enjoy themselves without any worries.

Whereas bathers are encouraged but not legally obliged to swim within these swimming zones, Maltese legislation prohibits any bather to swim in any area which is beyond 20 metres of any part of the water's edge in the Grand Harbour and Marsamxett Harbour. This summer, a total of 56 swimming zones have been set up by Transport Malta.

Diversely, ship masters are legally compelled to use reasonable skill and care when operating a craft. If a person suffers from involuntary homicide or bodily harm at sea, and from the evidence collected it appears that such accident occurred due to lack of skill or care, the Police may decide to institute proceedings against the master of the vessel.

This was the matter decided by the Court of Magistrates (Gozo) as a Court of Criminal Judicature on September 14 in the case in the names 'Il-Pulizija vs Matthew Grech'. Grech was principally accused that on the 19th of June, 2016 at

around 11:30am whilst navigating his boat near Hondoq ir-Rummien Bay, through imprudence, carelessness or unskilfulness in his art or profession, or through the non-observance of regulations, caused the death of Allan Michael Stanley.

Medical practitioners confirmed that the victim died after being struck by the accused's boat propeller while swimming outside of the swimming zone at Hondoq ir-Rummien. The Court of Magistrates presided over by Magistrate Dr Joseph Mifsud heard the victim's wife testifying that it was customary for her husband to swim outside of the swimming zone although she repeatedly advised him not to do so since he suffered from heart conditions and it was not safe to swim outside of the swimming zone due the constant marine traffic in the area. Another eye witness of the incident, who was also present with the couple on the day of the tragic event, confirmed what the victim's wife had testified earlier and claimed that the victim used to swim far away from the water's edge without any signalling buoys.

Another witness who was kayaking in the same area on the same day affirmed that on the day, the sea was rough and he could barely notice the victim swimming without any signalling buoys. The witness also confirmed that no other bathers were accompanying the swimmer at that time.

Criminal liability can only be attributed by appraising the actions of the accused within a framework of circumstances which he personally anticipated at the time in question. The Court explained that the crux of criminal negligence consists in the possibility of foreseeing the event which has not been foreseen. The accused could only be convicted if it is proven beyond reasonable doubt that the event complained of could have been foreseen by the reasonable prudent person. Consequently if the accused had to be found guilty for the involuntary homicide of Mr. Stanley, there must exist a chain of causation between a negligent act on his part having failed to foresee that which was foreseeable to the ordinary prudent man.

From the wording of the law, it is quite clear that the offence must be a result of imprudence, carelessness, professional unskilfulness or non observance of regulations, being therefore involuntary in nature. However, the prosecution does not need to prove that the accused was careless and imprudent and unskilful and in breach of regulations, in that any one of such circumstances would be enough to satisfy the required elements of this offence.

In its factual analysis, the Court noted that the accused was navigating his boat around 50 to 70 metres away from land and 100 metres away from the

swimmers' zone. The Court also pointed out that the victim, despite swimming outside of the swimmers' zone, failed to take any precautions to ensure safety at sea including the use of marker buoys.

Whilst making extensive reference to a safety investigation report issued by Transport Malta, the Court specified that "swimming or snorkelling outside a swimmers' zone is neither illegal nor prohibited. However, the close proximity to boats transiting the area increases the risk to snorkelers and swimmers who venture outside the established (safe) zone"

The court observed that there was not a shred of evidence that the accused was wrong in his assessment of the situation and concluded that the victim was totally responsible for the tragic accident and consequently acquitted the accused from all charges brought against him.

The Attorney General may appeal from this judgement.

TO PLAY, TO BOAT... OR TO LITIGATE
BY DR KEITH A. BORG

Malta Playing Fields Association vs. Royal Malta Yacht Club
15 September 2020, 241/2016
Civil Court, First Hall

Emphyteusis is a contract whereby one of the contracting parties grants to the other, in perpetuity or for a time, a tenement for a stated yearly rent or ground-rent which the latter binds himself to pay to the former, either in money or in kind, as an acknowledgment of the tenure.

Originating in Roman Law, the contract of emphyteusis is contract by which a grant of a right is made either in perpetuity or for a time to the possession and enjoyment of land, originally agricultural, subject to the keeping of the land in cultivation, and the payment of a fixed annual rent, and/or other conditions. Really, one would think there is no immediate connection to either playing fields or yachts alike.

And yet the contract of emphyteusis, actually two contracts of emphyteusis were the subject of the judgment of First Hall of the Civil Court of the 15 September 2020 in the names Malta Playing Fields Association vs Royal Malta Yacht Club and by means of a decree of the 2nd June 2016 they were called into the suit as joinder parties the Lands Authority (already Commissioner for Lands) and Sport Malta (already Malta Council for Sport.)

The Court, here acceded to the claim proposed by the plaintiff Association, thereby declaring that the Royal Malta Yacht Club held no valid title at law to occupy the premises in Ta' Xbiex consisting of the lido in Triq ix-Xatt. It consequently ordered its eviction therefrom within a two month period from when the judgment becomes res judicata, that is finally adjudicated without the possibility of being pursued further by the parties.

The facts of the case where the following.

By contract dated 29 August 2002 the Government of Malta granted unto the plaintiff Association the portion of land in question, that is the lido, by title of temporary empytheusis for a period of forty nine years.

However, subsequently in 2008, and by Presidential Declaration, the same portion of land was expropriated with the expropriation order citing public

purpose. Under local law, specifically under the Land Acquisition (Public Purposes) Ordinance the President of Malta may by declaration declare any land to be required for a public purpose. Public purpose is widely defined as any purpose connected with exclusive government use or general public use, or connected with the public interest or utility (whether the land is for useby the Government or otherwise).

The validity of said expropriation was soon, and successfully, contested by the plaintiff in proceedings separate to those being here reported. There the aforesaid expropriation order was struck down by the Constitutional Court with same being declared in violation of article 37 of the Constition of Malta (protection from deprivation of property without compensation) and of article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms (protection of property) and therefore null and void.

Let us for the moment remeber that 'null and void' here basically means unenforceable from the moment it was created.

As the proceedings before the Courts of Consitutional Jurisdiction progressed, by contract dated 23 September 2009 the then Commissioner of Lands (today the Lands Authority) and the then Kunsill Malti ghall-Isport (today Sport Malta), granted unto the defendant Club a larger parcel of land comprising the the lido, equally by title of temporary empytheusis and equally for a period of forty nine years!

Complicated ... not quite yet.

The main argument proferred by the Royal Malta Yacht Club was that, despite the decision of the Constitutional Court, 'its' contract of the 23 September 2009 had never been rescinded or declared void. Contrarily the plaintiff Association argued that once the expropriation order was nullified, and therefore unenforcable from the moment it was created, then, any act subsequent thereto was similarly null and void.

Tasked with all this complexity, the Court noted that, in view of the decision of the Constitutional Court, the contract dated 29 August 2002 between the Government and the plaintiff Association was still, to date, a valid contract, in virtue of which the Government could not be considered as being absolute owner of the lido. The Government's rights were now limited to the receipt of payment of the yearly rent or ground-rent and to the exercise of any residual rights thereon. The Government had, after all granted the lido to the plaintiff Association. Hence, and again in view of the judgment of the Constitutional

Court and its retroactive effect, the Government could not (subsequently on the contract 23 September 2009) legally grant the defendant Club a temporary empytheusis on the lido as, simplistically placed, it was not the absolute owner of the land.

Given that the remedy which a court of law grants must necessarily be limited to the interest which forms the basis of the suit, the Court brushed aside a number of matters raised by the defendants, such as, whether the plaintiff Association had effectively abided by the contractual terms originally imposed upon it in 2002, whether or not the plaitiff was still managing local playing fields as well as any matters relating the the plaintiff's statute. The pleas raised by the Lands Authority (arguing that none of the claims were directly directed at it) and Sport Malta (arguing that it has no pwer to determine the defendant Club's rights over the lido) as to them being non-suited were described by the Court as frivolous, particularly given the fact that they were parties to the 2009 contract.

The judgment is subject to appeal.

Parting question: what happens now to all the rent or ground-rent paid by the Royal Malta Yacht Club in virtue of the contract dated 23 September 2009. One guesses that rather than playing or boating, it's going to be more long drawn litigation.

A MARRIAGE ANNULLED BY DR GRAZIELLA CRICCHIOLA

MC vs. Dr Joseph Brincat noe et
2 October 2020, 114/2019JPG
Civil Court (Family Section)

Many say that marriage is one of the most important pillars of our society. Traditionally, it was viewed as the basis of the family unit and vital to the preservation of morals and civilization, and any attempts at tarnishing its solidity and form were traditionally fervently resisted.

Throughout the years, the institute of marriage has evolved and the concept of what constitutes marriage and who has the right to marry has changed. There is no universal definition of marriage so much so that each and every state defines the institute of marriage according to their law and custom.

Legally speaking, marriage is however generally defined as a solemn act through which two persons establish a union between themselves. Regardless of the reasons why couples enter into marriage, it is an institute which is usually taken very seriously. There are two basic traditional forms of marriage; religious and the civil ceremony, and both types will give the spouses certain rights.

Over the years, marriage annulments have been the subject of great discussion and various studies. Both under the Canonical system as well as under the Civil system, it is now comprehended that marriage is brought about through the consent of the spouses, legitimately manifested by those qualified according to the law. Just like any other contract, capable consent is key.

Annulment is often associated with the Church and the Ecclesiastical Tribunal; but that is merely half of the reality, since the term 'annulment' also encompasses civil annulments. As a matter of fact, the institute of civil marriage annulment has been discussed in a decision given by Mrs. Justice J. Padovani Grima in the case of 'MC vs Dr. Joseph Brincat nomine et' (for clarity's sake, the lawyer here was not a party to the case, but was merely appointed to appear on behalf of an absent respondent, and that is why the case carries his name) decided on 2 October 2020.

Although each case dealing with annulments is to be considered in light of its own circumstances, our courts tend to annul a marriage when any of the

spouses manages to prove some form of impediment or defect that would render the contract of marriage invalid.

Maltese civil law considers marriage as a contract. Just like any other contract, the principle of consent lies as one of the fundamental elements for the foundation and validity of the marriage. Upon exchanging consent, the parties must be endowed with certain degree of maturity and psychological capacity rendering them fully conscious of the obligation, duties and responsibilities that come with marriage. Through various case law, it may be said that our courts recognize the requirements of monogamy, indissolubility, and procreation as the essential requisites of marriage.

The facts of the case were as follows: parties got married on the 23 October 1998. The wife alleged that the defendant's sole intention in marrying her was to obtain Maltese citizenship. Plaintiff complained that defendant had a serious defect of discretion of judgement on their matrimonial life as well as on essential rights and duties accompanying marriage. In a few words, both agreed that the marriage should be annulled, but disagreed on whose fault it should be. Unsurprisingly, they blamed each other.

During the proceedings, plaintiff managed to prove that after a few weeks together, as a married couple, respondent abandoned her completely. Her relatives were not aware that she got married, it was only after respondent's abandonment that the wife informed her relatives about said marriage. On the other hand, the Curators who were appointed to represent the defendant's interest due to his absence from the Maltese Islands, failed to provide any evidence on his behalf since they were unable to communicate with the husband.

In its judgement the Court pointed out that the marriage is an institute of public order and must enjoy the safeguards which it deserves to guarantee the importance and solemnity of this institute. The Court continued to explain that there exists a presumption of validity in favour of marriage which requires that a marriage should not be declared invalid unless sufficient, clear and concrete evidence is produced. The Court emphasised that the nullity of marriage is the exception to the rule and consequently, any request for a marriage to be declared null, should be considered on its own, taking into account all the circumstances of the case.

One of the arguments raised by the plaintiff was that defendant's consent was vitiated in terms of article 19 (10) (f)" of Chapter 225 of the Laws of Malta. This article states that if spouses' consent to the marriage is vitiated by the positive

exclusions of marriage itself, or any one or more of the essential elements of matrimonial life, or of the right to the conjugal act, the marriage would be deemed as void. Simply put, this ground of annulment refers to situations where a person is capable of understanding the essential rights and obligations of marriage but simultaneously, this person simulates his/her intention in accepting but in actual fact, s/he is positively and categorically excluding them. As bewildering as this may sound, simply put, a marriage may be annulled if a person enters into marriage knowingly excluding the consequences of the marriage itself.

As a result, and after looking at the facts of the case, the Court outlined that the matrimonial cohabitation lasted only two weeks after the marriage. The Court deemed that defendant's demeanour in this short period of time leads the Court to reasonably conclude that this was not simply a matter of incompatibility of character or any matter which arose after the marriage which would result into just a personal separation. For these reasons, the Court upheld plaintiff's requests and declared that the marriage could be declared null and void on terms of article 19(1)(f) of Chapter 255 of the Laws of Malta. The Court ordered that the judicial expenses are paid by the defendant.

Both parties to the suit may appeal from this judgement.

CREATING TROUBLE
BY DR CARLOS BUGEJA

Angela Debattista vs. Joanne Debattista et
6 October 2020, 901/10/1
Court of Appeal

A will ('testment') is the ultimate expression of mortality salience; it is the manner in which a person acknowledges one's finiteness, by regulating how one's estate is to be divided when death's unavoidable arms close in. This inherent desire in most to prepare for their death and leave no problems behind has given birth to the old idiomatic euphemism: 'get your affairs in order'.

And indeed, many do.

Unfortunately, often times, wills create problems. Notable stories by authors such as Jane Austen ('Pride and Prejudice') and Charles Dickens ('Bleak House') are testament to the fact that wills are often not just legal documents, but a common source of ugly disputes. Even the good old Harry Potter had to engage in an inheritance struggle, when the Minister of Magic would not hand him over Godric Gryffindor's sword (which he had inherited from Albus Dumbledore), telling him: 'that sword was not Dumbledore's to give away' (apparently, the concept of 'legato di cosa altrui' is alien to the magical world).

Court cases about wills fought between family members are often lengthy, intense, and downright ugly. Regrettably, brothers and sisters who would have grown up together often end up at the opposite side of the courtroom, gazing at each other with contempt, and arguing until the bitter end.

This is why a number of testators opt to make provisions in their will against those who attempt to disrupt their succession plans. More often than not, the idea is to discourage rebellious behaviour from those who are not too happy with what they end up getting. The idea is to keep familial peace.

One will find many wills stating that those who cause trouble ('min jaqla' l-inkwiet') will lose their right to claim their share from the inheritance. This condition is commonplace, and may be perfectly valid.

The case of Angela Debattista vs Joanne Debattista et (ultimately decided by the Court of Appeal on 6 October 2020 – 908/10/1) was about a similar clause. In

their last will and testament, the testators (the mother and father) had stated in article 10 that those heirs who contest the will or cause trouble will forfeit all their rights granted by the will, and will only have the right to claim the reserved portion ('jekk xi ħadd mill-imsemmi eredi jipprova b'xi mod jatakka kwalunkwe parti ta' dan it-testment u/jew jaqla' l-inkwiet, huwa jiddekadi mill-benefiċċji kollha lilu mħollija f'dan it-testment u jieħu biss il-leġittima').

The father passed away, and his estate devolved onto his heirs.

Plaintiffs (the mother and four of the heirs) claimed that respondent (the other heir) had a gambling problem and owed some money to a third party. She had guaranteed her debt against her one-tenth (1/10) undivided share of a property in Qawra, which she had inherited from the father together with her siblings. They claimed that her actions affected everyone else, since plaintiffs owned the other nine-tenths (9/10) of the property. Eventually the creditor had instituted proceedings against the respondent to recover this debt and had even requested that said property be sold by judicial auction ('subbasta'). Plaintiffs had been trying to suspend the execution of the subbasta and had even filed a lawsuit in order to try cancel the hypothec which respondent had registered on the property in Qawra. Eventually, yet another hypothec was constituted against said property, this time by a new creditor. Furthermore, on several occasions, other creditors of respondent had visited the plaintiffs, demanding to be paid.

Plaintiffs complained that they had inadvertently been dragged onto respondent's woes. They had even been risking that their property is sold by court auction, and this through no fault of theirs. To plaintiffs, respondent's unruly behaviour was such as to cause serious trouble ('inkwiet') to plaintiffs, thus triggering the forfeiture of all benefits acquired by respondent through the father's will. To them, respondent's behaviour qualified as 'inkwiet' as defined in article 10 of the will, and therefore, respondent could no longer benefit from the will.

The first court (per Judge J. Zammit McKeon) rejected the claim. Plaintiffs appealed, pleading to the Court of Appeal to conclude that the 'trouble' ('inkwiet') caused by respondent due to her indebtedness qualified as the 'trouble' referred to in the father's last will and testament. They reiterated that the term 'inkwiet' in the will was not restricted, and indeed, respondent's woes had adversely affected the inheritance for which the will refers.

In its judgment, the Court of Appeal agreed with the first court that when referring to the possibility of an heir causing trouble, the testator was referring

to trouble having to do with the division of the will itself, and not trouble in a general sense. While it was true that respondent's actions could have indirectly affected the will, she had done nothing to contest the will, and all guarantees were limitedly granted on her own share. Furthermore, respondent's gambling habits had been long time coming, and had already been there before the will was drafted; had the testators wanted to provide measures against respondent's gambling habits, they would have been more precise and referred to it specifically, and would have excluded her completely from the will. The fact that they did not confirm the literal and restrictive interpretation of what they said, similar to what others have done before.

The Court of Appeal concluded that as troublesome as respondent may have been, it could not be said that she had caused trouble ('inkwiet') in breach of article 10 of the will.

As a result, the Court of Appeal confirmed the decision of the first court, rejected the appeal, rejected plaintiff's case, and ordered them to pay the costs of the case.

THAT BLESSED AIRSPACE
BY DR MARY ROSE MICALLEF

Rudi Carbonaro et vs Samuel Spiteri ei
15 October 2020, 36/2019
Civil Court, First Hall

Airspaces situated in common units are a potential nightmare to the respective unit users. Airspace in these circumstances is comparable to common property – property that is shared or used between a multiple of individuals. Such common feature is likely to seed conflict between its users. Indeed, and resultantly, the law (which is also an expression of human behaviour) favours division or alienation of the property being owned in common. Here one can perhaps make reference to the notable 495A of the Civil Code, which action may be sought to sell off the common property, even in cases where the sale is being opposed to by one or several co-owners who do not hold the majority of shares.

Question with regards to the ownership of airspace and rights arising therefrom have been brought before our courts time and time again. By example, let us presume that a ground floor tenement has an internal yard or shaft, the major question that arises is: who owns the airspace above that yard or shaft. Are owners of overlying apartments entitled to any rights in connection to the adjoining airspace? This not to mention the question of servitudes (the legal jargon is "easements") between the overlying and the underling tenements.

Servitudes are another never ending variance that predominantly feature in litigious suits when the airspace is being battled on. Servitudes are rights attached to immovables; essentially where tenements are literally being served by another – they are rights established to the advantage of a tenement over another tenement. Really and truly, the owner of the tenement which acquires such right may use the other tenement, for the purposes of exercising the same acquired rights. By example, such as the opening of apertures abutting into the internal airspace.

Indeed, servitudes are the result of commodities, which have further troubled the legal thought on airspace rights. The question about where to place an air-conditioning unit, flushing apparatus, geysers and other relative household appliances or their servicing cables or drains – i.e. whether these can be transmitted through or placed in the common airspace, has featured regularly before our courts. These latter scenarios, where the crux of the matter in the

case Rudi Carbonaro et vs Samuel Spiteri et, decided by the Civil Court, First Hall, on October 15.

In a nutshell, plaintiffs were owners of ground floor tenement, which included an internal yard. According, to them, they also owned the yard's overlying airspace.

Defendants – owners of the overlying tenements - installed a number of AC units, together with geysers and flushing apparatus, in the yard's overlying airspace. Claimants demanded the removal of the installed appliances, by instituting the legal action known as the actio negatoria servitutis. By virtue of this legal action, claimants demand a judicial declaration, which confirms that their property ought not serve another property. To note that this action, may only be instituted by owners against other owners – tenants or other possessors may not feature in such judicial actions.

On the other hand, defendants argued that they had every right to install such appliances, because the yard was intended to service the overlying apartments. The basis of these disputes are always the respective contracts of purchases – these should determine the respective rights that were acquired by the different owners, even when it comes to the position of servitudes.

Defendants submitted that claimants', contract of purchase, had in fact subjected their property to all existing active or passive servitudes that emanated by result of the building's physical position. By effect, they claimed that they had every right to install such devices. In essence they pleaded, that in terms of the contracts of purchases, their property enjoyed the perpetual right of use of all the common parts of the block of apartments which were intended for the common use including also the right to use the internal opened space of the complex.

Back to the concept of the airspace – by law, and in terms of article 323 of the Civil Code, whosoever, owns the land, owns also the space above it, and whatever exists in that airspace, or under such land. Claimants merely rested their claim on this principle. On the other hand, respondents, armoured themselves with their right to use the internal opened space, in terms of the contract of purchase.

The court upheld, claimant's claims, arguing that such right of use, did not extend to the right to place aircon units, or the other installed appliances. It noted, that defendants' property only enjoyed those rights which existed at construction stage, such as the passing of cables or drainage system, through plaintiff's airspace, or the existing windows which abutted in the same said airspace.

Conversely, defendants' were not entitled to add on further servitudes (such as by installing aircon units) on the airspace, without the explicit consent of the ground floor owners.

The court referred to several previous judgments on same matter and highlighted the following important principles, always in connection to the issues of internal airspaces in building complexes.

Whoever owns the land is the owner of the air overlapping such land – the ownership extends vertically up to the sky, in terms of the Roman Law principle 'usquae ad coelum'. What is already being served may continue to be served, but new services, require the consent of the land-owner. The development of the airspace, must take place in such a way that there is no invasion or introspection of air and the property of ground floor neighbour; in this sense the owner of the overlying tenement, (in the absence of the ground floor owner's consent) is even prohibited from hanging out his clothes in the said airspace.

In this light, the court declared that the servitude to install aircon units or other appliances had to be specifically provided for in the contract of purchases – failing this specific reference defendants had no right to install such devices. Consequently, the court, ordered the removal of the installed appliances at defendant's expense.

THE MORALITY OF MONEY
BY DR KEITH A. BORG

Skylarov Oleg Anatolyevich et vs. Anthony Mallia et
26 October 2020, 792/2016
Civil Court, First Hall

Usury, in legal terms is a rate of interest on a debt which is in excess of the percentage allowed by law. As it stands, our law allows a maximum interst of eight per cent (8%) per annum.

The reasons for the criticisim of usury tend to tread on common ground, ranging most notably from the concept of income which is not earned, double charging, economic instability, and perhaps the most common, the exploitation of the needy. Historically, societies and religous denominations alike have all had something quite different to say about the matter.

Our law lays down the basic rules in article 1852 and 986 (2) of the Civil Code. In their direct simplicity, these stipulations of the law state that the rate of interest cannot exceed eight per cent (8%) per annum and that any higher interest agreed upon shall be reduced to the said rate. If a higher interest than that fixed by law has been paid, the excess is to be deducted from the capital. Any obligation to pay a rate of interest exceeding eight per cent (8%) per annum is void in regard to the excess.

In its judgment of the 26 October 2020 in the names Oleg Anatolyevich Sklyarov u Maria Dolores sive Doris Sklyarov u fil-verbal tas-seduta tat-12 ta' Marzu 2019, il-Qorti ordnat il-korrezzjoni fl-okkju fis-sens illi kunjom ir-rikorrenti irid jaqra Azzopardi v. Anthony Mallia u Kristina Aleksandrovna Mallia, the First Hall of the Civil Court was tasked with a related issue.

In virtue of a public deed dated 3 May 2016 plaintiffs constituted themselves as debtors in favour of defendants for the sum of seventy thousand Euro (EUR70,000). Said constitution was affected following a loan, in the said sum, which plaintiffs required for business purposes and which plaintiffs had demanded and obtained from defendants. The sum was to be repaid within two months, interest free. Notably, the monies were not paid in the presence of the publishing Notary but in the defendants' car following the conclusion of the deed.

According to plaintiffs, the sum loaned was in actual fact that of fifty thousand Euro (EUR50,000) with the remaning balance being illicit interest.

On the 13 July 2016, the two-month period was extended by a further two months and on a subsequent occassion, defendants attempted to settle with plaintiffs by means of post-dated cheques which plaintiffs refused.

Plaintiffs argued that they settled the sum of forty thousand Euro (EUR40,000) after having borrowed the monies from a third party for the sole purpose of settling this debt. Following judicial action by the defendnats, plaintiffs proceeded to suit requesting the Court to declare the public deed of the 3 May 2016 and any subsequent extensions thereto null on the basis of unlawful consideration.

Defendants rebutted by denying any unlawful doing, claiming that they had not been paid, and that the deal was for them to be paid twenty per cent (20%) on profits generated by plaintiffs, and not by way of interest.

After an attentive recital of relevant jurisprudence on the matter, the Court immediately proceeded to declare it was absolutely not beleiving the version of events given by defendants.

In the filed of civil litigation, when assessing the evidence brought before it, the criterion embraced by our courts is not whether the judge absolutely believes the explanations provided to him or her, but whether these same explanations are, in the various circumstances of life, plausible. This is on the balance of probabilities. This is in contrast to what applies in the field of criminal law where guilt must result without any reasonable doubt. It is in fact accepted that not any kind of conflict should leave the Court in such a state of perplexity rendering the presiding judge unable to decide with a clear conscience.

Pivotal in assisting the Court in arriving at it's final decision was the testimony rendered by a Notary which the litigants had consulted before actually choosing to consult the notary who published the deed in question. She did indeed testify that the litigants wanted to conclude an agreement with the sum of fifty thousand Euro (EUR50,000) being the capital and the sum of twenty thousand Euro (EUR20,000) being interest thereon. Said Notary in fact refused to publish such a deed.

The Court further noted that had defendants' version of events been credible, why would the contract in question not have sipulated the margin of twenty per cent (20%) on profits (?). The fact that one of the defendants was unemployed

and would often visit plaintiffs' residence to demand and exact payment didn't help. Neither did the fact that the alleged sum of seventy thousand Euro (EUR70,000) was not paid before the publishing Notary; why would it not be paid before the Notary if there was nothing fishy with the deal, the Court asked. And yet, the Court noted, plaintiffs had failed to provide sufficient proof of payment of the alleged sum of forty thousand Euro (EUR40,000)! Under cross-examination one of the plaintiffs had departed from the original sworn statement provided to the Court. In the latter he claimed that he had borrowed money from a third party to settle the debt with the defendants, which he claimed he did, while under cross he testified that this was also a loan for business purposes.

The weight of evidence imposes a burden on the party alleging the fact. Such a burden is equally shared between the litigants, whether plaintiff or defendant, in respect of the version of events being claimed.

Fot the above reasons, the Court acceded to plaintiffs' requests limitedly declaring the public deed of the 3 May 2016 and any subsequent extensions thereto null on the basis of unlawful consideration only in so far as interest in excess of the rate of eight per cent (8%) per annum on the capital sum of fifty thousand Euro (EUR50,000).

BLESSED BE THE RIGHT OF INVENTORY
BY DR REBECCA MERCIECA

Cosaitis et vs. Loporto et
29 October 2020, 122/2018JZM
Civil Court, First Hall

One cannot demand the execution of his rights to an inheritance whenever he pleases. Such an action expires after ten years from the day of the opening of the succession, that is the from the death of the testator. This applies to any person demanding an inheritance, legacy or the reserved portion.

It is often wrongly assumed that a person has two choices: he can either accept an inheritance, or renounce to it. There is indeed a third option, the acceptance of an inheritance under the benefit of inventory.

An heir's right to avail himself of the benefit of inventory when assuming the status of heir is considered sacramental by Maltese law and any testamentary disposition denying this right is considered invalid.

Simply put, through this legal tool, one will accept to inherit, only after 'seeing' what is in the estate of the deceased. It is a cautionary move for those not entirely certain that the estate of the deceased is worth inheriting.

The acceptance of an inheritance with the benefit of inventory shall be made in the registry of the Civil Court (Court of Voluntary Jurisdiction) by the person wishing to avail himself of such a benefit. Upon filing a note to this effect, the person desiring to make up the inventory shall declare on oath that he or she shall faithfully describe the estate.

Such a description must specify in detail all debts or liabilities of the estate as well as all wearing apparel, household goods, silver and gold articles, jewellery, money, other movable property, as well as the value of such property, debts due to the deceased, all rights of action and all immovable property. Together such would constitute the contents of inventory.

Among others, the effect of inventory as inscribed in the Civil Code is that the heir's own property is not intermixed with the property of the inheritance. Moreover, one of the greatest advantages of accepting inheritance with the benefit of inventory remains that the heir shall not be liable for the debts of the

inheritance beyond the value of the property. With the benefit of inventory, the heir cannot be compelled to satisfy claims out of his own property except to the extent of the balance which results to be due by him or her.

This was reflected in judgement delivered by Judge Zammit Mckeon presiding over the First Hall Civil Court in the case 'Cosaitis et v Loporto et' (122/2018 JZM) on 29th October 2020, whereby the court dealt with a stalled final deed of sale. The hopeful purchasers of a property in Isla instituted proceedings against defendants who were the vendors/co-owners of the property in question. Prior to the expiry of the promise of sale, the plaintiffs had filed a judicial letter summoning defendants to appear for the publication of the final deed of sale, however the defendants failed to appear for the said final deed.

Unfortunately, during the period of promise of sale, one of the vendors fell seriously ill and upon seeing such, his brother (also a co-owner) graciously offered the purchasers to move the appointment set for the final deed to a closer date. At the time, the purchasers had refused and had claimed that the Notary who was to publish the deed was abroad.

The ill vendor passed away prior to the date set for the final deed of sale. His untimely passing complicated matters both for the purchasers as well as for the other co-owners who were still interested in selling the property. One of the co-owners even offered to sell his undivided share. However the problem lied with the deceased's heir.

The deceased vendor had nominated his wife as his universal heir, who in turn accepted her late husband's inheritance with the benefit of inventory knowing that her late husband had a number of creditors to settle dues with. She claimed that appearing on the final deed prior to deciding whether she would be accepting the inheritance without restrictions would prejudice her position prior to her knowing all the facts.

This left the purchasers with little alternative but to institute legal proceedings against the vendors and the late vendor's universal heir seeking an order from the court to force the co-owners to appear for the final deed according to the terms of the promise of sale signed in 2017, with the nomination of curators to represent any 'no-shows' if necessary.

The court considered that during the continuance of the time allowed for making up the inventory and for deliberating, the person entitled to succeed is not bound

to assume the status of heir. However, such person shall be considered curator at law of the inheritance and may be sued as representing the inheritance to answer claims brought against it.

Judge Zammit McKeon was very clear and concise in his decision. The court affirmed that the acceptance of inheritance with the benefit of inventory has the effect of keeping the heir's property separate and distinct from the inheritance itself. The court confirmed that the acceptance of inheritance with the benefit of inventory still meant that the heir accepted the inheritance, and that no legitimate or legal cause was stopping the heir from appearing for the publication of the deed of sale. Based on such reasoning, the co-owner who had inherited the deceased original vendor was ordered to appear on the final deed of sale on the 29th January 2021 and a curator was also appointed to substitute her in case she fails to appear on the specific date for the final deed.

BREAKING THE CHAIN
BY DR CARLOS BUGEJA

81 & 82 Limited vs Mario Borg
4 November 2020, 1134/2013JD
Rent Regulation Board

In difficult times, a tenant may find itself with an excess of rented space it does not need or can afford. The easiest thing would be for one to terminate the lease, and return the property to the landlord, if only the landlord would be that much accommodating. Sometimes, as the rent market grows, it would make sense for the tenant to pass the lease unto a third party, charge a higher rent, and rack up profit.

This is permissible, as long as the original landlord – the owner – would have allowed it. Article 1614 (1) of the Civil Code states that the lessee is not entitled to sub-let a thing or to assign its lease, unless such right was agreed upon in the contract. Nowadays, the right of subletting is rarely allowed, but in the past – in a different era – it was common to allow one's tenant to pass the property leased unto a new tenant, whether through assignment or sublease.

Throughout the years, our courts have seen hundreds of crafty (and admittedly, creative) arrangements (be it management agreements, the creation of ghost companies or the transfer of shares of a tenant company) executed in order to mask illegal subleases into something else seemingly genuine.

But our courts and law caught up with these schemes, and today, any form of agreement by means of which a lessee transfers to third parties the possession of a premises or of a business operated from the commercial tenement, however it is denominated, is still considered to be a sublease. And if it is not permitted, it makes grounds for eviction.

Many people have made some serious money through sublease which had been originally allowed at a time when the rent market was not what it is today. It is not rare to find a tenant paying some €200 a year in rent, while making thousands through subletting it to a third party. There is nothing illegal about that.

And in these cases, the original landlord cannot do much, for he is a part of a legal chain (Owner > Lessee > Sub-lessee) which he is duty-bound to respect. It is not unheard of for this chain to be even longer, for the lease to be passed on

several times, and ending up with a number of sub-lessees (or so to speak, a sub-lessee, then a sub-sub-lessee, then a sub-sub-sub-lessee, and so on).

In the case of 81 & 82 Limited vs Mario Borg (decided by the Rent Regulation Board on 4 November 2020 (1134/2013JD)), plaintiffs sued respondent, claiming that he had no legal title under which he could occupy a property they owned in The Strand, Sliema. They asked that he be evicted.

Among other things, respondent claimed that he held the property under a title of sublease, granted to him by the original lessee.

So far so good – if not for an intriguing plot twist, that occurred five years into the lawsuit.

While the case was being heard in court, plaintiffs had met with the heir of the original tenant, who signed an agreement, renouncing to the original lease for a fee, thus terminating the original lease agreement. This was done without respondents' (the sublessee) consent or knowledge. And just like that, the first link of the chain was broken, because the first lease had ended.

What did this mean for the sublease, which in a way was the offspring of an original lease that existed no more? Could the sub-tenant claim any rights over the property once the original tenancy had ended?

In its judgment, the Rent Regulation Board quoted several past judgments that delved into this quandary. It stated that it appeared that the owners of the property had never acknowledged respondent as their direct lessee, and thus respondent maintained his character as sublessee, and nothing more than that. It held that when the sublessee is not directly acknowledged by the original lessor, when the original lease is terminated, so are any derivative leases in favour of any sublessees. The rights of the sublessee depend on the rights of the original lessee, for without the original lease, there cannot be a sublease. The sub-letting of a lease is different from an assignment of a lease. The latter is merely a transfer of rights had by the lessee, while the former brings about the creation of a new contract to which the original lessor is not party. To the owner and original lessor, the sublessee is merely a third party. Therefore, the survival of the sublease is completely dependent on the survival of the original lease. Indeed, when granting a sublease, the lessee is only entitled to grant that which he has, and not more; if the sublease survived the termination of the lease, it would mean that the sublessee would be conferred more rights than his originator.
It is also irrelevant how the original lease is terminated – the most importanti

thing to note is that when the 'master' lease is terminated, so are any agreements that are derivative to same.

Therefore, once in this case the heir of the original lessee renounced to the lease, the sublease held by respondent had to be considered as having also been terminated. In this legal chain, once the first link is broken, the subsequent links simply do not hold any longer. This process is automatic and inevitable.

Having made these considerations, the Rent Regulation Board decided the case by ordering the eviction of respondent but ordered each party to pay its own costs.

Respondent can appeal within twenty days from the delivery of the judgment.

MISLEADING INVESTMENT ADVICE BY DR EDRIC MICALLEF FIGALLO

Rosina Agius vs Global Capital Financial Management
28 October 2020, 59/2018
Court of Appeal

On the 28th October 2020 the Court of Appeal (Civil, Inferior) pronounced its judgement in case 59/2018 Agius Rosina vs Global Capital Financial Management. The judgement was given upon appeal application by the defendant Global Capital Financial Management, which disagreed with the first instance judgement by the Arbiter for Financial Services, as given on the 14th May 2018. The latter had found in favour of plaintiff Rosina Agius. On appeal therefrom, the Court of Appeal confirmed the first instance judgement in full.

The substance of the case centres around the investment of a sum exceeding €30,000, which the elderly lady had inherited from her deceased brother by way of various investments and bank deposits held by him. The case successfully complained of by the plaintiff is one related to failure in providing adequate and diligent professional assistance in the field of financial investment, particularly with regards to the type of investor concerned. Indeed, the latter resulted as being an elderly person, illiterate and having no knowledge of the English language, which was the main language used for the written contractual agreements entered into between the parties. The plaintiff had fully trusted the defendant, with the latter negligently betraying the trust afforded.

Before tackling the substance of the case, revolving on the obligations of the defendant company and its default, we do have to open up a parenthesis on the plaintiff's own fault. The plaintiff was chastised by both Arbiter and Court for signing documents she did not read, and could not read. While generally strong, this alone is not a surefire argument to raise against the signatory, particularly in certain transactions involving a negotiating imbalance between the parties, as was this case. The Arbiter apportioned 25% of the judicial expenses to be borne by the plaintiff, but without affecting in any way the claim of the plaintiff, which was acceded to in full. This seems anomalous, and was indeed raised as a grievance on appeal by the defendant company. The Court of Appeal rejected it and stated that given the contractual relationship between the parties and the imbalance between them as resulting therefrom, and particularly the vulnerability of the plaintiff, then greater responsibility had to be cast upon the defendant company with none to be attributed to the plaintiff. While she argued

against it in the appeal proceedings, the Court of Appeal also pointed out that the plaintiff did not file an appeal on the apportionment of judicial expenses by the Arbiter, and hence it could not but deny the grievance of the defendant company and confirm the Arbiter's decision on this aspect.

Another legal aspect central to parties' case was prescription, and its determining factors. Did the alleged fault of the defendant result from contractual obligations or from tort? The former allows a period of five years, while the latter allows two years to file the relevant action. Citing apparently conflicting jurisprudence, both Arbiter and Court determined that the relationship was indeed contractual, and they did so after considering numerous documents between the parties and their provisions. This led to the action not being time-barred (preskritta) as pleaded by the defendant company, thus foiling its attempt to avoid its liabilities.

Scrutiny should now turn upon the defendant company's major fault. The plaintiff had approached the defendant so as to get advice on how to invest her capital (the money initially invested) in a manner which procures her income, is easy to liquidate and without putting the capital invested at risk. Upon receiving advice by the defendant, the plaintiff proceeded to invest on a financial product named The Protected Asset TEP Fund 2. This was a result of a prior process on which the Arbiter and the Court clearly found the defendant at fault for its handling of the defendant, meaning the client and her investment capabilities.

Categorizing investors is central to access investment funds, and some investors should not be allowed to invest in categories of funds deemed to be beyond their capabilities, subject to consequences at law, as in this case. The burden lies with companies such as the defendant, being appropriately licenced, regulated and well-resourced with supposedly diligent professionals so as to adequately assess the prospective investor and make such calls.

The final judgement confirmed that the defendant company should never have advised and accepted the investment by the plaintiff due to the fact that she could not, under any reasonable consideration, be considered as an experienced investor. The contractual relationship between the parties was based on various documents making up the agreement and confirming that the investment funds were fit for experienced investors. The Arbiter and the Court, as did the Malta Financial Services Authority in a separate opinion, all concurred that from the documentation provided to the plaintiff by the defendant company it resulted that the funds invested in were fit for experienced investors, a far cry from the plaintiff. This investment misselling, and related lack of diligence by the defendant, compounded by the procedural fact that it raised numerous pleas

without substantiating them with any evidence in the proceedings, was damning. All this led to acceptance of the plaintiff's claim that the defendant engaged in investment misselling, which results in compensation.

The causation between this misselling and the damages suffered by the plaintiff was contested but confirmed on appeal. The remedy granted and confirmed on appeal was that sought by the claimant, being that the defendant company repurchase the investment at the original price, with interest running as determined by the Arbiter. This was to reinstate the plaintiff at her position prior to her investment, without less of income. Of interest, on interest, excuse the pun, is that on appeal the defendant contested the interest determined by the Arbiter but the Court of Appeal confirmed the same pointing out to the wide discretion afforded to the Arbiter under the Arbiter for Financial Services Act, and the special legal provision by which interest could even run from the date of the conduct complained of.

CLASH OF THE CONDOMINI...OR CO-OWNERS?
BY DR KEITH A. BORG

Malcolm Debono Pace et vs. Mark Borda et
23 November 2020, 266/19TA
Civil Court, First Hall

The purpose of titles at law exist because of the implication that emanate therefrom. For instance, when an individual enters into a promise of sale agreement for the purchase of a property, he or she is assigned the title of a purchaser. Apart from merely obtaining such title, that individual would thus start to (legally) benefit from the rights granted to a purchaser and, naturally, must also adhere to the obligations which any other purchaser must adhere to. Upon the successful purchase of such property, the purchaser becomes an owner, and all the same, certain rights and obligations start to apply. Significantly, when an individual becomes an owner of an apartment, he or she also becomes the co-owner of that which is common to the apartment block. Should that apartment block also have an association and a registered condominium, that co-owner also becomes a condominus.

Therefore, an owner of an apartment may exercise specific rights available to owners, co-owners or condomini; depending on the circumstances. This ultimately means that apart from the Maltese tradition of causing a scene in the common areas of the building, a co-owner may institute legal proceedings against another co-owner, or the Association may institute such proceedings against an individual condominus.

In fact, the issue decided by the court in the recent partial judgment of 'Malcolm Debono Pace et. vs. Mark Borda et'. (delivered by the Civil Court, First Hall on November 23) (266/19TA) concerned whether the plaintiffs had locus standi (that is, the right to bring an action in court) to institute proceedings at all because of the title availed of by the plaintiffs in instituting the proceedings.

The primary issue of the case concerned a 'ladies cleaning room' situated right above the defendant's penthouse. Prior to these proceedings, the defendant had occupied this room as his own property – blocking all access to the other co-owners/condomini of the apartment block. Because of this, the plaintiffs had instituted proceedings, asking the court to declare that this room was part of the common property (as indicated by their respective contracts of acquisition) and hence, both plaintiffs and defendants should have access to this room.

The defendants naturally contested the claims brought forward by the plaintiffs. Whilst not opposing certain rights which are due to the plaintiffs (such as their right of access to the roof in order to install water tanks and television aerials as well as the plaintiffs' right in respect to the lift shaft), a particular plea gained prominence. It was stated that the action exercised by the plaintiffs in instituting these proceedings should not have any effect. This is because this particular action, the so-called actio petitoria, may only be exercised by co-owners; and since this particular matter concerned the common parts of a condominium, then the plaintiffs ought to exercise their rights as condomini, hence unable to exercise the actio petitoria.

The actio petitoria is in fact an umbrella term for a list of potent actions exercised by owners against possessors (yet another title with a plethora of implications at law). Predominantly, the action utilised by the plaintiffs is based on the premise postulated by article 322(1) of the Maltese Civil Code, which states that "save as otherwise provided by law, the owner of a thing has the right to recover it from any possessor". This nonetheless seemed to be a convenient option for the plaintiffs in this case; whereby the defendant was merely the possessor of the room and hence, as co-owners of the common area, they brought forth this action.

The defendant, however, pointed out that article 17 of the Condominium Act indicates that: "In matters relating to the common parts of the condominium, the administrator has the representation of all the condomini and has also the judicial and legal capacity to sue the condomini or third parties and to be sued" – ergo, the plaintiffs do not have standing to institute proceedings as co-owners.

Based on these two conflicting remarks, the court admitted that this is indeed a particular issue which has never been dealt with by the courts. It is important to note that it is a general principle of law that laws which are specific (special) in nature are prioritised over laws which are general; lex specialis derogat generalis. By analogy, this would imply that the Condominium Act is prioritised over the Civil Code. However, the court opined that despite such principle, it is the general law which would apply in this case in virtue of safeguarding one's right to ownership.

In furtherance to that, it stated that the rights of the condomini under the Condominium Act are indeed compatible with the rights of co-owners to exercise the action which the plaintiffs in this case had brought forth under the Civil Code. Therefore, it may now be argued that in the very limited instances (such as in this case) where the Condominium Act may limit the right to ownership, the

condomini may avail theirselves of the general provisions in the Civil Code which secures the right to (co-)ownership.

Logically, the court made an exception in applying the general law over the special law in order not to limit one's right to ownership as protected by the European Convention on Human Rights as well as the Constitution of Malta. Since the right of ownership is evidently highly protected, rejecting the plaintiff's claim in this regard would have given rise to a Constitutional application regarding a breach to one's enjoyment of his or her property. On the basis thereof, the court rejected this plea made by the defendant and hence ordered the continuance of the case.

PAY UP... OR RISK GETTING JAILED
BY DR RENE DARMANIN

The Police vs. Rade Djinovic
10 October 2020, 139/2020 & 140/2020
Criminal Court of Appeal

Statistics reveal that lone parenthood in Malta is on the increase. Data published by the National Statistics Office demonstrates that lone-parent households with dependent children are at the greatest risk of poverty and social exclusion. This goes to show the paramount importance of child support payment. It turns out that receipt of child support tends to enhance child development on many fronts including children's health, education achievements as well as from an emotional and social viewpoint.

In terms of the Maltese Civil Code, child support or more commonly referred to as maintenance, includes food, clothing, health, habitation and education. On various occasions, Maltese courts have reiterated that with respect to maintenance obligations, domestic law does not differentiate between children of a married couple and those of unmarried partners. The Civil Code provides that whosoever may be the person to whom the children are entrusted, shall maintain their right to watch over the child's maintenance and education, and shall still be bound to contribute thereto.

Domestic legislation provides that both parents shall continue to provide sufficient maintenance to their children until said children attain the age of 18 years unless said children continue to study on a full-time basis or suffer from a physical or mental disability, in such cases parents are bound to maintain their children till the age of 23.

Till this stage everything is rosy in the garden until the Family Court goes on to determine the amount of maintenance which the non-custodial parent should pay. Famous American actor, writer and director Ethan Hawke once said "Everyone has to pay their child support, and no matter if you're a Hollywood actor or anyone else, it's always a little bit more than you want to pay."

When determining the amount of maintenance, judges tend to consider the financial needs of the child, the income or earning capacity of the child as well as those of the parents, any physical or mental infirmity of the child or of either of the parents as well as the standard of living enjoyed by the family before a

breakdown. The key when determining the amount of child support, especially after a breakdown, is to ensure that the child continues to be brought up with the same standard of living as before.

Where the parent supplying maintenance becomes incapable to continue to provide such maintenance, in whole or in part, said parent may request the Family Court to be released from this obligation or that the amount of maintenance be reduced. Such requests are usually acceded to when the applicant manages to prove up to the satisfaction of the court that the maintenance due cannot be paid due to a change in financial circumstances such as when the parent becomes unemployed or when one's salary decreases surprisingly.

If on the other hand a parent and/or spouse arbitrarily fails to pay maintenance contributions when due, this may amount to a criminal offence as provided under Article 338(z) of the Criminal Code. In fact article 338(z) provides that such offence is consumed as soon as a person fails to give to a person the sum fixed by that court or laid down in the contract as maintenance for that person, within fifteen days from the day on which, according to such order or contract, such sum should be paid.

However, married parents are not only legally bound to maintain their children, but they are also legally obliged to maintain each other and to contribute towards the needs of the family in proportion to their means and ability to work.

This was the matter decided by the Court of Criminal Appeal on October 10 in the case in the names 'The Police vs Rade Djinovic.' Djinovic was first charged before the Court of Magistrates accused of failing to give to his wife the sum fixed by the Court as maintenance for his wife and children from the 28th of June, 2018 till the 28th of November, 2018.

By means of a judgement delivered by the Court of Magistrates on the 20th of July, 2020, Djinovic, upon his own admission, was found guilty of the charge brought against him and condemned to three months imprisonment, which were being suspended for three years.

Mr Djinovic felt aggrieved by the said judgement and filed an appeal requesting the Court of Appeal to confirm that part of the judgment whereby he was declared guilty and varies that part where he was condemned to three months of imprisonment suspended for three years. Appellant argued that the punishment awarded was unjust and excessive. Appellant contended that he was a first-time

offender and that he never failed to abide by that same order in the part that interests the minor children.

The court observed that when a Court is faced with determining punishment, various factors have to be reviewed including those circumstances which affect the victim, the interest of society of large as well as those of the accused.

With respect to Mr Djinovic's appeal, the Court pointed out that although a year had passed from its due date, appellant has failed to pay maintenance to his wife. The Court of Appeal, in its accurate considerations, noted that appellant "is either not realising that he is committing an offence against the administration of justice and insists in remaining in such default or otherwise is simply being in defiant and oblivious to the laws of the country."

The Court of Appeal affirmed that the law is very hard on these type of contraventions so much so that it provides a prison sentence for those who fail to comply with the law in this regard. It is worth mentioning that even if one is sentenced to an effective prison term, the duty to pay maintenance would still be due unless he or she gets a revocation of such an order from the Family Court.

Consequently, the Court of Criminal Appeal, after concluding that the punishment awarded by the Court of Magistrates was within the parameters established by law, found no reason to depart from the said punishment and decided to confirm the judgment given by the first court.

THE LAW OF THE DEAD BY DR CARLOS BUGEJA

Franmar Limited vs. Rev. Father Joseph Bartolo pro et noe
1 December 2020, 395/19GM
Civil Court, First Hall

At first glance, the law of procedure may seem unnecessary restrictive, something to be conveniently used and carefully exploited by those who otherwise cannot get a favourable judgment. The idea among many is the the law of procedure is a tool that alienates from real justice.

The truth cannot be farther than that; the law of procedure has the purpose of establishing uniform rules that shall be respected and strictly implemented in order to determine by law the substantive issues before the courts of justice. It regulates how a court case is to be conducted against any unfair advantage of one party over the other, so as to ascertain that both sides of the case can properly present their arguments. The law of procedure is important; that what is often considered by the public at large as unnecessary fuss on trifling matters is actually a vital part of the proper administration of justice.

Originally, procedural issues were more rigidly considered, and many a time, lawsuits were rejected on account of a procedural defect. But in time, Maltese law moved away from the rigidity of the past and entered into a new era of "substance over form", and today, most procedural shortcomings can be salvaged in a court of law, as long as the other party is not gravely prejudiced thereby.

A judgment delivered of the Civil Court, First Hall, decided on 1 December 2020 (Franmar Limited vs Rev. Father Joseph Bartolo pro et noe, 395/19GM) sought to answer a curious procedural question: is a lawsuit filed against a dead person null and void?

Plaintiff had filed a lawsuit against four individuals, in an attempt to enforce a promise of sale for the purchase of a property. Two of the respondents replied, citing the nullity of the lawsuit on account of the fact that the other two defendants were dead, and had been so prior to the filing of the sworn application. The argument was rather straightforward: one cannot file a lawsuit against a deceased individual. Seeing this, plaintiff asked the court to appoint curators so that they represent the two deceased individuals.

The judgment of the court will be one to spark some debate, for it pushed the boundaries of formalities in an unprecedented fashion. Those less concerned with strict procedural formalities will see this judgment as a happy development, while perhaps those traditionalists will see it as a step too many.

In its judgment, the court quoted article 789 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) which lists the instances where the plea of nullity is admissible: if the nullity is expressly declared by law, if the act emanates from an incompetent court, if the act contains a violation of the form prescribed by law, even though not on pain of nullity provided such violation has caused to the party pleading the nullity a prejudice which cannot be remedied otherwise than by annulling the act, or if the act is defective in any of the essential particulars expressly prescribed by law.

In all of these cases, the act will not be null if such defect or violation is capable of remedy under any other provision of law.

It stated that where any person involved in lawsuit dies while the case is being heard, the heir or executor of such party, or any other person interested may make an application for an order enabling him to continue the suit in substitution for the party deceased, or where there is no heir, curators may be appointed to represent the vacant inheritance. This procedure is known in the legal world as the 'leġittimazzjoni tal-atti'. When this procedure is not availed of, the suit is continued in the name of the deceased party and any judgment delivered shall be valid.

The problem was that the legislator had elected not to provide for rules of procedure to be adopted when a lawsuit is filed against someone who at the time of filing had been already dead. While therefore an act filed this way is certainly defective, is the defect of such a nature that it cannot be corrected?

According to article 175 of the Code of Organisation and Civil Procedure, at any stage of the proceedings until judgment is delivered, the court may allow any of the parties to substitute any act or permit any written pleading to be amended or corrected, provided that such substitution or amendment does not affect the substance either of the action or of the defence on the merits of the case.

The introduction of this article at law pioneered the departure from the earlier excessive formalism that characterised the law of procedure. In a bit of a brief history lesson, the court recounted how a Scottish lawyer, Sir Andrew Jameson, had protested against the excessive formalism of Maltese law, and had suggested that our law changes to follow New York procedural law which to him

contained provisions that are so evidently in conformity with reason and justice. Following this analysis, the law was amended several times, each time with a view to lessen the rigour by which the laws of procedure (many times, to the detriment of substantive justice) were considered.

The court's power to correct mistakes in judicial act is wide and far-reaching. In this case, there was no doubt that plaintiff's mistake was merely a procedural one; the case was filed against two deceased individuals, instead against the heirs or against curators, who assume the interests and obligations of the deceased. The court stated that death does not bring about the termination of one's obligations, but these are merely transferred onto the deceased person's heirs, who are still obliged at law to execute any promise that the deceased had undertaken, so much that "an inheritance" itself may be a party to a suit. It would be a great illogicality for the law to provide for the substitution of a person who dies mid-case, but not for one who dies before the case even starts. While technically speaking this is not a proper 'leġittimazzjoni tal-atti', it is a correction which article 175 of the Code of Organisation and Civil Procedure allows.

In addition to this, the court noted that when plaintiff had requested the appointment of curators, respondents had not objected, which means that any defect was accepted through legal acquiescence.

For these reasons, the court rejected the plea of nullity put forward by respondents and ordered the case to continue. However, since the pleas were valid at the moment they were made (that is prior to the court allowing the correction), the court ordered plaintiff to pay the costs relative to this judgment.

...YOU ARE NOT THE FATHER!
BY DR GRAZIELLA CRICCHIOLA

ABC noe vs EFC et
10 November 2020, 231/19AGV
Civil Court (Family Section)

Learning about family history and family ties is important. In this manner, one would be able to understand himself; allowing a person to know his or her roots, who they are and where they come from. It is in our nature to connect with our ancestors, having a sense of belonging.

Understanding and discovering our history and parentage fills an innate need in each one of us (and makes good trash television: ask Maury Povich or Jerry Springer). Activist Marcus Garvey is known to have said that, 'a people without knowledge of their history, origin and culture is like a tree without roots.'

It is a well-known fact that filiation towards the mother is based on the fact of birth, this should not raise any difficulties - mater in iure semper certa est. Many would find the question "Who's Your Mother?" absurd, even as new reproductive technologies (such as surrogacy and IVF) and family formation may break the old idea of maternal certainty.

On the other hand, paternity has been always thought of as naturally unclear, as opposed to the apparent and uncomplicated fact of maternity.

Our basic provisions relating to paternity and filiation still rely on presumptions – the most important of which date back to Roman Law. Article 67 of the Civil Code (Chapter 16 of the Laws of Malta) provides for a iuris tantum (rebuttable) presumption that the husband is presumed to be the father of the child born in marriage. This paternity presumption can be overturned only through judicial action, which action may only be initiated by a certain group of persons expressly stipulated by law, in a few instances described at law. Without any doubt, this process is life-changing and dramatic for all the parties involved.

Our Civil Code contemplates for three actions having to do with natural filiation: (1) the disavowal of a child born during wedlock; (2) the contestation of the filiation of a person born three hundred days after the dissolution or annulment of marriage or the time stipulated by law where the husband would have been physical impossible of cohabitation with his wife or in cases where the wife had

an adulterous relationship; and (3) an action of the child seeking to establish his proper filiation.

In the judgement 'ABC nomine vs EFC et' delivered by Mr. Justice Anthony Vella on the 10th November 2020 (231/19AGV) (the names have been omitted due to the personal nature of the facts), the mother requested the court to declare that her husband is not the natural father of her daughter and that defendant GH be declared as the actual father of the child.

The parties had gotten married on the 28th June, 2000; fifteen years into this marriage, plaintiff gave birth to her daughter. The issue was that even though the parties were legally married, they had been living separately since 2013, thus before the child was even conceived. Therefore, despite the fact that the child was born 'in marriage' the husband was not the father. The other defendant, GH, was the biological father.

Now, we have said earlier that in article 67 of the Civil Code, the law presumes that children born in wedlock are the offspring of the spouses. Simply put, by means of this case, the plaintiff tried to attack this legal presumption.

In its decision, the court explained that our law does not consider lightly the request for a change in the birth certificate of a child born during marriage. This action is not only intended to deprive the child from its natural status of being born during marriage but also depriving the child from the family in which s/he was raised.

Without any doubt, the DNA test plays a pivotal role in these type of cases in ascertaining the paternity of an individual this is mainly due to the fact that DNA results are indisputable. Interestingly, this genetic testing mechanism is one of the few instances in law where the court can be almost absolutely certain of which versions of events are true. In many other cases (say, a land dispute), the court will be able to investigate the evidence, deduce who is saying the truth and who is not, but there will always be some level of doubt. Not the same can be said in paternity cases; DNA evidence can show 99.99% accuracy, and can deliver to the court a scientific peace of mind that its decision is correct.

Having said that, in these cases, in the absence of genetic and scientific evidence, the Civil Court (Family Section) may still consider any other evidence presented before it which it deems to be relevant, including the drawing of inferences from the fact that a person did not provide a genetic sample, despite being ordered to do so. As a matter of fact, in this particular case, the parties' DNA tests were not

presented in court. Nevertheless, defendant EFC admitted that he was not the actual biological father whereas defendant GH agreed with plaintiff's claims that he was the biological father.

After analysing the evidence brought forward (including the fact that all parties agreed about the actual paternity of the child) the court decided that defendant EFC was the natural father of the minor and acceded to plaintiff's requests.

These cases have little to do with law, and much more to deal with sociology and psychology.

One must understand that these cases may sometimes result into the child switching fathers. Other times, it would just result in the child losing his/her "father", the latter causing more heartache, anxiety and stress to the child. Sad to say - there may be instances where the husband, afters years raising the child, discovers that he is not the natural and biological father. No doubt, the husband will feel hurt and angered by his wife's betrayal, but should the aggrieved husband repudiate a child, who for years viewed this person as her/his only father? Is this change in paternity always in the best interest of the child? These are very difficult questions.

Some may take the position that family relationships should be based on much more than genetics. While it is true that DNA testing has led to greater emphasis on genetic connections, the law's appreciation of parent-child relationships is more complex than that. Indeed, some courts have even recognised the principle of social fatherhood, and refused to change a child's parentage, to preserve the child's parental stability, despite having scientific proof that the person the child knew as his father, was not.

Whether or not one agrees is a debate that will continue for years.

TENANT LOCKOUT
BY DR CARLOS BUGEJA

David Lauri vs. Claudette Buttigieg u Joseph Buttigieg
15 December 2020, 516/2017JVC
Civil Court, First Hall

Our law is built on good order - and the arm of justice is the sole and ultimate adjudicator of disputes between parties. One cannot just presume to have a right, and pretend to enforce it arbitrarily without resorting to the courts; the law legislates against those who take matters in their own hands. The law does not take kindly to vigilantes, which is why it makes the exercise of a pretended right a criminal offence. Rights are given or denied by the courts of justice (or the equivalent boards or tribunals), and not by one's unilateral idea of what is right or wrong. All of us have met people who always think they are right, even when they are not. Now imagine for a second if those people could just go seize what they think is theirs, arbitrarily, without verification or limitation. The pretend creditor can just come and take your car, the resentful family member can just run off with part of your rightful inheritance, and the squatter can just start occupying the field he has a hunch is his.

If everyone could do that, we would live in chaos.

In the law of lease, one cannot chuck out a tenant without a court's order, even if one has a thousand reasons for doing so. This prohibition is strict; an owner cannot change the keys to the front door of a property rented without the tenant's consent, even if the tenant has never paid rent, even if he has broken most of the terms of the lease agreement, and even if he has abandoned the property occupied, and become absolutely untraceable. Once again, this is a measure that gives dignity to the administration of justice, and avoids dystopian chaos.

Indeed, even when the period of the lease would have expired, one just cannot chuck out the lessee without first obtaining the relative order of the Rent Regulation Board. That would highly likely be a criminal offence under article 85 (1) of the Criminal Code, which states that:

'Whosoever, without intent to steal or to cause any wrongful damage, but only in the exercise of a pretended right, shall, of his own authority, compel another person to pay a debt, or to fulfil any obligation whatsoever, or shall disturb the possession of anything enjoyed by another person, or demolish buildings, or

divert or take possession of any water-course, or in any other manner unlawfully interfere with the property of another person, shall, on conviction, be liable to imprisonment for a term from, one to three months'.

Indeed, an exercise of a pretended right may also give the 'victim' the right to file an action in court for the restoration of the thing taken from him by spoliation. This action is known as the 'azzjoni ta' spoll', or simply, 'spoll'.

This is what the plaintiff did in the case of David Lauri vs Claudette Buttigieg u Joseph Buttigieg, decided by the Civil Court, First Hall on 15 December 2020 (516/2017JVC).

The parties had entered into a contract of lease for a period of eighteen months. At one point, respondents (the landlords) started alleging that plaintiff (the tenant) had illegally sublet the property, breaching the terms of the contract between them. For this reason, respondents visited the property, and changed the locks of the front door, impeding plaintiff from entering. Respondents did not deny changing the locks but stated that they had the right to do that, since the breach of the terms of the contract of lease brought about the termination of the agreement ipso jure. In stating so, they quoted article 1569 (1) of the Civil Code, which states that: 'A contract of letting and hiring shall also be dissolved ipso jure upon the fulfilment of a condition under which the dissolution of the contract was expressly covenanted...'

Ipso jure is an abstruse term; literally, it means 'by mere operation of law', but its application is less literate than that.

In its decision, the court explained the importance of the action of spoliation; it is a tool of social utility that impedes a citizen from taking the law in his own hands, on what he unilaterally believes are his rights. It is a measure of public order that maintains public peace.

It seldom mattered that the tenant could perhaps have been in breach of the lease agreement. It seldom mattered that maybe, plaintiff could have been right. That is a matter that always has to be decided by the competent court and not alone by the person making that claim. It seldom matters that the lease agreement would provide for a resolutive condition, that is for the termination ipso jure of the lease on the occurrence of one or more events. It must be added that this is true, notwithstanding if in the agreement, there is a clause stating that the landlord be authorised by the tenant to change the locks of the premises without needing to seek authorisation from the Rent Regulation Board on the

occurrence of a certain event. A private agreement may not give one power to break the law. This is the kind of behaviour the law wants to discourage, thus providing the remedy of the 'azzjoni ta' spoll'.

Therefore, in this case, respondents were wrong to take the law in their own hands, and plaintiff was right to complain about their behaviour. The court however noted that the case had taken long to be decided, more than three years, when the lease subject to the case was of a mere one year and a half. This created a problematic situation, as plaintiff had originally demanded an order for the return of the property from which he was dispossessed. The original period of the lease had expired while the case was being heard, and as a result, the court could not return the property to a tenant (the plaintiff) who was no longer such. But the court did declare respondents guilty of wrongful spoliation and ordered them to pay the costs of the case.

PRESENT!
BY DR CARLOS BUGEJA

Ludovico Ausano Filotto vs. Hi Sky Limited
10 December 2020, 1078/2020
Civil Court, First Hall
Originally published 4 January 2021

Under Maltese law, we have the procedure commonly known among lawyers as the 'giljottina' (formally called 'trial by special summary proceedings'). No – there is no legal mechanism for the setting up of the tall, upright frame with a weighted and angled blade suspended at the top to be used as tool to exercise capital punishment. Our law of procedure provides for a different kind of 'giljottina'.

This is the procedure reserved for those cases which the law considers to be straightforward. It allows the plaintiff to seek a judgment at first instance, meaning that if plead successfully, respondent would not be allowed to raise a formal defence, the trial will be dispensed of, and the plaintiff may obtain a decision promptly during the first sitting.

Of course, not all cases can be decided by means of the trial by special summary proceedings. In human rights law, there is something called 'the right to fair hearing' – a most important principle dictating that except in very special circumstances, no person should be judged unless he is given the opportunity to respond to the evidence against him. This right is in fact quite a big deal and cannot be dispensed of haphazardly.

The law allows for the use of special summary proceedings in two instances: for the recovery of a debt, certain, liquidated, and due, not consisting in the performance of an act; or for the eviction of any person from any urban or rural tenement. In order for the plaintiff to demand that the case is dealt with summarily, in his sworn application he must declare on oath that in his belief that is no defence to the action. The sworn application is then served to the respondent, who is ordered by the court to appear before it on a stated day and time.

And here comes that part of the law that was crux to the matter before the court in the case of Ludovico Ausano Filotto vs Hi Sky Limited, decided by the Civil Court First Hall on 10 December 2020. Article 170 (1) of the Code of Organisation and Civil Procedure states that if the defendant fails to appear before it, or if he appears and does not manage impugn the proceedings taken by the plaintiff,

on the ground of irregularity or inapplicability, or otherwise by satisfying the court that he has a prima facie defence, the court shall forthwith give judgment, allowing the plaintiff's claim. It is thus crucial for respondent to take careful note of the stated date and time and appear in court. Failure to appear may (or rather, will) have devastating effects.

Therefore, respondent has to do two things: first, he has to appear in court on the appointed date, and second, he has to successfully convince the court at first sight that he has valid pleas to make. This does not mean that that respondent needs to show the court that he is right, but only that he may be right, if he is given the opportunity to formally present his defence. What usually happens is that the lawyer assisting respondent would explain to the court the pleas he is prepared to bring forward, if given the chance. If the court is satisfied at prima facie level that there is indeed a defence to be made, then it will allow respondent to formally file his sworn reply, and the case will then take its normal course as a proper lawsuit. One must state that our courts are usually very cautious when dealing with these kinds of procedures, and more often than not, they do give respondents the benefit of the doubt. Very few are the cases decided summarily.

Now the question is: what does the law mean when it says that the court shall give the judgment forthwith 'if the defendant fails to appear to the sworn application' (in the Maltese version: 'jekk il-konvenut jibqa' kontumaċi')?

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

In its judgment, the court stated that while it is true that a procedure of this kind has to be considered restrictively, the procedural requisites must nonetheless be followed. Now, one of the rules of procedure necessitates the physical presence of respondent (in this case, since it was a company – one of its directors). There was no explanation why the Maltese director did not attend the sitting, and the law was clear: article 167(2) of the Code of Organisation and Civil Procedure states that the sworn application is to contain 'an order to the defendant to appear before the court', while according to article 170, defendant must appear.

It was not enough for only the lawyer to be there – in drafting the law, the legislator specifically required that respondent himself to appear. The procedure 'bil-giljottina', is different from a 'normal lawsuit' in the sense that it places the respondent into two disadvantages: he has to personally appear, and he has to convince the court that he has a prima facie defence for him to be allowed to further contest the case. The law requires the court to decide the case in favour of the plaintiff if respondent fails to appear, and in this case, respondent was not there. As a result, the court acceded to plaintiff's demand, and ordered respondent to pay the sum of €1,320,000 plus interests.

This judgment has since been appealed from.

INDEX

INDEX

Actio Cambiaria, 103.
Actio Negatoria Servitutis, 124.
Actio Pauliana, 53.
Actio Petitoria, 139.
Annulment, 118.
Appeal, 35, 58.
    Frivolous Appeal, 58.
Article 166A, 97.
Bills of Exchange, 103.
Burden of Proof, 127.
Children's Advocate, 29, 82.
Compensation, 47.
Condominia, 139.
Contract, 85, 70.
    Commodatum, 70.
    Oral Agreement, 85.
    Pacta Sunt Servanda, 41.
    Written Agreement, 85.
Co-Ownership, 11, 124.
    Sale by Licitation, 11.
    Partition, 11.
Counter Claims, 76.
Court Experts, 92.
Criminal Negligence, 112.
Data Protection, 17, 77.
    Data Controller, 79.
    Recordings, 17.
Decrees, 35, 55.
    Third Kind of Decrees, 55.
Domestic Animals, 100.
Emphyteusis, 44, 15.
Employment, 32.

European Law, 26.
    Judicial Co-operation, 26.
Evidence, 17.
Filiation, 148.
Fraud, 53.
Interest, 23, 41, 127.
    Usuary, 127.
Investment, 136.
Involuntary Homicide, 112.
Joinder Parties, 8.
Judgements, 35, 50.
    Provisional Enforceability, 50.
Jurisdiction, 8, 26.
    Competence, 8.
    Privilegium Fori, 8.
    Intra-Community Disputes, 26.
Late Payment, 23.
Lease, 53, 106, 133, 151.
    Lease Agreement, 53.
    Band Clubs, 106.
    Sub-Letting, 133.
    Assignment, 133.
    Lock-out, 151.
Legal Lacunae, 8.
Libel, 73.
Marriage, 118.
Maintenance, 142.
Negligence, 112.
Pacta Sunt Servanda, 41.
Plea of Nullity, 145.
Prescription, 88, 94, 109, 136.
    Acquisitive Prescription, 94.
    Criminal Prescription, 88.
    Extinctive Prescription, 109, 136.

Property, 94, 106, 115, 124.
Airspace, 124.
Expropriation, 115.
Possession, 94.
Right to Property, 106.
Title, 115.
Res Judicata, 14, 50.
Right to Life, 47.
Sale, 38, 41, 91, 130.
Latent Defects, 91.
Promise of Sale Agreement, 130.
Sale by Judicial Auction, 38.
Separation 29, 82.
Servitudes, 124.
Special Summary Proceedings, 154.
Spoliation, 151.
Succession, 121, 130.
Benefit of Inventory, 130.
Wills, 121.
Surnames, 67.
Tort, 23, 47, 100.
Asbestos Cases, 47.
Damages, 23, 47, 100.
Liquidation, 23, 47.
Moral Damages, 47.
Percentage of Disability, 100.
Theft, 61.
Warrants, 20, 26, 64.
Intra-Community Precautionary Warrants, 26.
Precautionary Warrants, 20, 64.
Prohibitory Injunction, 20.

www.abalegal.eu