FROM THE BENCH SERIES : 2019

FROM THE BENCH – 2019

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

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Printed in Malta by Progress Press Limited.
Editor: Dr Carlos Bugeja
Cover Design by TBWA\ANG

FROM THE BENCH – 2019

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

2020
Published by Azzopardi, Borg, & Abela Advocates

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FOREWORD
BY THE TIMES OF MALTA, PRINT EDITOR

Journalism has a natural and special affinity for law.

That is hardly surprising, both being among the "four pillars of democracy". Indeed, law can lay claim to two of those pillars through the legislature and the judiciary, the one laying the foundations on which the other operates.

The other two, the media and the executive, are not that complementary. Rather the opposite in fact, as the one strives to hold the other to account on behalf of the electors. It is this very function, in fact, that has earned journalism its place as the "fourth pillar".

In this sense, journalism and the judiciary are both mechanisms by which the principle of accountability is put into practice.

The pair share several other values crucial to the proper functioning of democratic nations. Journalism upholds justice, for one. And in good journalism, as in the impartial exercise of justice, truth is uppermost in the pantheon of principles.

Both are champions of human rights, both strive to elevate standards of behaviour, both help shape the evolution of society, both seek order from chaos. Both, to one extent or another, reflect the voice of the people, one through its content and the other by implementing the laws enacted by the people's representatives.

Having so much in common, it is no wonder, then, that weekly law reports have been a long-standing tradition in Times of Malta.

Those reports serve an important function. They help bridge the gap between readers and the law.

Journalism is all about communication. Journalists like to explain, in plain language, the events and trends they report on, conveying them as clearly as possible to what we like to refer to as the "ordinary reader".

Law, on the other hand, is practised within closed circles of like-minded individuals who understand each other perfectly but whose use, by necessity, of specialised concepts and technical language is notoriously inaccessible to the lay person. Legalese does not feel it must explain itself any more clearly than in being understood by legal persons.

Enter 'From the Bench'. In seeking to elucidate important court judgments for our readers, it spans the chasm between the arcane world of the justice system and the rest of the world untutored in the rich principles and fine intricacies of legal proceedings and decisions.

Journalism, by covering myriad areas, helps readers make decisions about their governments, their societies, their communities and their own lives. Court reporting is one of the mainstays of our day-to-day work.

'From the Bench' injects into that mix a deeper dimension, explaining the reasoning, the context, the legal background and the importance of the courts' often landmark decisions.

'From the Bench' boosts the Times' journalistic credentials by opening an intellectual doorway into the legal system and its influence on societal norms and progress.

It not only provides educational stimulus to discerning readers but also enhances their ability to make decisions about what may be happening in important areas of their communities and their lives.

Mark Wood
Print Editor
Times of Malta

FOREWORD
BY MR JUSTICE EMERITUS GIOVANNI BONELLO, FORMER JUDGE OF THE EUROPEAN COURT OF HUMAN RIGHTS

To a jurist notorious for lamenting the scarcity of good law literature, drawing up the Foreword to this book came as a relief. Up to relatively recently, the absence of legal writings, both those aimed at professionals and those targeting the public, was almost total, and totally accepted. I remember the days when it was deemed perfectly normal to be appointed professor of law at our university, without ever having published one single article on a legal subject. Matters have improved, but we are still nowhere close to the outputs, in quantity if not in quality, of other civilized countries. So far only one law journal, issued once a year by university students, attempts to fill this black cultural hole. Otherwise, at least as far as periodicals go, very few seem anxious to break the academic conspiracy of absence.

I find all this rather disheartening. In other advanced democracies, the pronouncements of their constitutional or supreme court are awaited with trepidation, received with controversy, debated with skill and dissected with passion. Here they attract as much public attention and as much juridical critique as the routine pronouncement of a minor tribunal. Something must be very weak in the chain of 'receiving and imparting' information to account for the drought in the divulging and obtaining of data relevant to law issues. If the constitutional and human rights judgements are poorly served on the communication front, no happier fate awaits the pronouncements of other courts.

It is in this context that the present collection of recent reports becomes so welcome. It has started to build bridges between the sources of law and justice on one hand, and on the other the ignorance or indifference of the public. The compilers have hit on the magic formula to connect the two seemingly mismatched extremes. Ordinary men in the street "can enjoy law if we make it interesting enough for them".

That is where this book represents a breakthrough. So far, law reporting in Malta has been often competent, but universally humdrum. Even the 'competent' could at times be questionable. I remember a local law report stating with not a whiff of sarcasm "The court said that a married woman can make a case and can therefore be an actress" - and Hollywood celebrated. The authors hit on a different strategy: leave justice serious but make its reporting fun. Every report is still an account of a judgement, but trussed up in some literature, some human interest, historical anecdote, shreds of irony and a cultural cast. It seems the editor made it imperative, on pain of dismissal, to ensure that anyone who started, would also finish reading the report. I learn from the authors and avoid clichés like unputdownable.

This has been, so far, rare in local law reporting. Congratulations go to Dr Carlos Bugeja, the editor and apparently the guiding spirit of his breath-of-fresh-air team of lawyers responsible for the weekly reports in The Times: Laura Calleja, Graziella Cricchiola, Rene Darmanin, Rebecca Mercieca, Mary Rose Micallef and Edric Micallef Figallo, all with their own personal style, all worthy contributors to this project.

One thing I missed in these reports: a succinct critique of the reasoning behind the judgement. Surely the authors, all qualified and practising lawyers, must have had their own subjective evaluation as to whether they agreed or not with that rationale and with those conclusions. And I very deliberately used the word critique, not criticism. I am nor interested in fish-wife revilement, though that would, at times, be just retribution. What I would have liked to see was rational, documented, even dispassionate agreement or disagreement - and why.

Rarely does this approval or disapproval trickle through – surely not because the reporters believed every judgement was censure-proof. Is this due to the reverential fear of higher authority endemic in a nation that for centuries, and until very recently, has always been servant in its own home? Honestly, I am not very impressed by praise where it is due, and silence where it is not.

This critique would layer more added value to these reports. It would keep the judiciary on its toes, knowing its toils and failings were being scrutinized, rather than merely spread. Debate, dialectics, confutations promote not only diversity, but responsibility. There are arguments in favour and against having separate opinions in judgements. Against, that lack of unanimity cripples the authority of the judgement. In favour, that separate opinions provoke further research and inquisitiveness. We know that what was yesterday's minority opinion can become tomorrow's legal dogma. The same applies to intelligent and bona fide external critique of judgements by qualified commentators.

I believe it is everybody's duty to contribute his or her informed opinion to the debate. The great dearth of serious judicial criticism may be one of the factors that has precipitated the reputation of Maltese legal professionals in Europe. Malta has, pro capita, in cases examined on the merits, the absolute European record of judgements overturned by the Strasbourg Court of Human Rights – ninety percent. Why not react to this opprobrium in the proper fora and with the proper language? Or are we proud of a ten percent success rate?

Let's face it. Deservedly or undeservedly, the legal professions in Malta do not enjoy the most luminous of reputations: certain scandalous conflicts of interest which are no-nos throughout the civilized world and would lead to instant disbarment elsewhere, are here tolerated, if not actually encouraged, without anyone batting an eyelid.

In which other European country is a lawyer allowed to carry on acts of trade? Right, nowhere. In which other democracy are serving police officers permitted to earn an extra buck and act as private lawyers? Right, nowhere. Where in civilized Europe can a person work as a lawyer and, say, a medical GP concurrently? Where in civilized Europe are undergraduates, found guilty in court of crimes of dishonesty, welcomed to the legal profession? Answer: only in Malta. With these truly abysmal ethical standards, unworthy of a third-world country but prevalent in Malta, is anyone amazed at the less than virginal perception of lawyers out there?

It is encouraging to discover dynamic and ethical activity on the other side of the fence, like that from the team of lawyers who created From the Bench. They engaged in a project principled, valuable and praiseworthy, indirectly also a project To the Bench. Kudos to them.

FOREWORD
BY DR ARTHUR AZZOPARDI

2019 saw the birth of Azzopardi, Borg and Abela Advocates – a law firm that practices law in direct contact with individuals, covering day to day issues to mundane tasks – ranging between issues such as third-party wall rights to complex factoring legislation. The difficulty remains a constant one, clients having misconceptions of what the law states. This saw the birth of the "From the Bench" series. The idea stemmed from a want to educate the general public in the ways of the law, we at ABA Legal wanted to simplify the law and bring it closer to people who have no access to the inside workings of how decisions about them are made on their behalf. The start of this series stemmed from a want any lawyer that takes the time to pen articles, has. We want you to know that we have our finger on the pulse of what is relevant and important legal information.

This collection of articles already showcases ABA Legal's in-depth knowledge and understanding of the law and therefore this Forward allows us the luxury of shifting gear and giving space to a more approachable tone. Ambition and drive may have prompted the first few articles, but truth be told, that sentiment changed rapidly, and this grew into a routine exercise of taking stock, staying on form, keeping current.

Practicing law and writing about it carry polar energies. The law we practice is aggressive and rich in adrenalin, easily comparable to a boxing match with many rounds. To the naked eye, the sport could look like nothing more than an uncouth scuffle, but those trained in the art will attest to the elegant choreography, chess-like forethought, and the necessity to be quick on your feet.

Writing about the law, on the other hand, is a sit still, relational, introspective exercise where at best you spar with your inner-intellectual to outdo your last piece. Our "From the Bench" articles and now this book, are a compilation of hours dedicated to promoting the law, a testament to our dedication and investment in all matters legal. We believe that writing about the law mattered less to us than practicing it, but mattered, nonetheless. We could say that the tremendous positive feedback we received from clients and colleagues had no impact on our choice to publish, we could spin this any which way, but I will leave you with what has metamorphosized into our current truth. We write about the law because it is necessary.

INTRODUCTION
BY DR CARLOS BUGEJA, EDITOR

Law is a complex subject. It is the product of hundreds of years of experience of what should and should not be correct behaviour. It regulates conduct in the abstract, by providing general rules that then need to cater for a myriad of situations which the law itself cannot initially predict. It is continuously developing, yet still contains rules unchanged since the times of Ancient Rome. There is no doubt – law is complicated.

But I believe (or better, hope) that if you tell a story well enough, you can explain law simply enough. Law does not operate in a vacuum; indeed, law exists to attach itself to facts and to utilise learned rules to deliver justice. Without facts, there is no law.

And court cases can indeed make a good story. Were it not the case, John Grisham would still be practicing law in the state of Mississippi in the US, and Judge Judy would still be a family judge in a New York court. Legal thrillers on television are as popular as ever. People do enjoy law, if we make it interesting enough for them.

On the other hand, if public opinion (most prevalent in online comments to court reports on online newspapers) reveals anything, it is that we in the legal world do quite a poor job in explaining law out there. Many people do not get law, and it is largely our fault.

These two axioms formed the blueprint for the series 'From the Bench', that appeared weekly on the Times of Malta. The idea was to humbly try to inform the public about the intricate details of law, and use recently delivered court judgments as illustrations of how these principles are employed in practice. There are hundreds of studies about the power of storytelling, and I believed that if we recount the story behind a court case well enough, perhaps people would start reading and understanding. There was nothing heroic about our endeavour; we live law, and we wanted to share it, the best that we could.

And the Times of Malta delivered, giving us the space to publish article after article, every Monday for a whole year. And for this, we thank them wholeheartedly.

The main challenge was how to depict complex facts and principles in a way that they can be understood, without leaving out vital ingredients. First, we tried using simple language and a gripping narrative. We hope to have succeeded. Second, we attempted to put cases under the microscope and each time speak about a single fine detail, and not attempt to fit everything under the sun in one single chapter.

And so, we had a number of tort cases, each delving into a different point altogether. The same happened with other broad principles, which were dissected and split into a number of articles. This allowed us to discuss complex matters in simplistic detail in a way that the non-legal person could understand. We hope to have accomplished our goal.

And then, to our sincere yet pleasant surprise, lawyers and law students started reading too, and started using the cases analysed as their way to keep themselves updated with what our courts were saying.

The encouraging reactions to our weekly articles is what prompted us to publish this book. Like this, we can gather all of our articles, and immortalise them into one complete edition.

2019 was a year of many important judgments. In this first edition, we have developments in the law of tort, and we have the first judgment given under the newly enacted article 12B of the Housing Decontrol (Ordinance), Chapter 158 of the Laws of Malta. We have landmark constitutional cases, and we have the introduction of principles of Civil Law previously unutilised by our courts. Without a doubt, it was a good year for our courts, and for the development of law in the Maltese jurisdiction. We hope that with this edition, we manage to synthesize this progress.

Of course, the essence of a judgment is best captured if it is read in its entirety; to this end, with each chapter, we provided proper citations. There were also many judgments delivered this year which are equally excellent and captivating, but which we had no space to cover. We shall always encourage one to read our courts' judgment, for they provide unrivalled updated literature.

We in no way purport to have done anything grandiose. But if we have somehow managed to even slightly contribute to the development of law in Malta and its appreciation, we will consider our aims to have been reached.

THE COURT'S CALCULATOR
BY DR CARLOS BUGEJA

Alfred Cuschieri vs Mary Louise Refalo
10 January 2019, 566/10GM
Originally published 11 February 2019
Civil Court, First Hall

The judgment delivered on 10 January 2019 in the names of Cuschieri Alfred vs Refalo Mary Louise (566/10GM) Civil Court, First Hall, per Mr Justice Grazio Mercieca is a significant one in the sense it may have very well reconceived the judicial approach to quantification of damages in personal injury ("tort") cases.

The Maltese system of tort is based on full restitution (known with the Latin maxim, restitutio in integrum), that is that an injured party is – through the awarding of damages - restored to the state which would have prevailed had no injury been sustained. This means that the victim of a tortious event may not derive any profit from his own misfortune; the court merely tries to restore to the plaintiff all actual (and since the amendments of ACT No. XXXII of 2018, in some cases, moral and/or psychological) damages suffered.

According to Maltese law, the damage which is to be made good by the person responsible for a tortious event shall consist in the actual loss which the act shall have directly caused to the injured party, the expenses which the latter may have been compelled to incur in consequence of the damage, in the loss of actual wages or other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused.

Much of the quantification exercise is often simple arithmetic. The tricky part for our courts has always been to quantify the damages deemed as being those losses of future earnings arising from any permanent incapacity, whether total or partial (known in the legal sphere as, lucrum cessans), particularly since the law itself does not provide for a hard and fast mechanism for quantification.

Ever since the celebrated judgment of Michael Butler vs Peter Christopher Heard (1967) – known to every law student and lawyer alike - our courts have been trying to devise a standard and harmonised formula to effectively determine the quantity of these damages, in homage of the restitution principle. In time, this formula was retouched and remodelled into what today is a mechanism which – by and large – has done its job well.

Generally speaking, the formula goes something like this:

[% of disability] [established by a medical expert]	x	[salary] [usually, the average of the,three years preceding the tortious event, considering also cost of life increases]	x	[multiplier] [generally being the remaining working life expectancy in terms of number of years, after taking account of victim's age on the day of the tortious event, considering also the chances and changes of life]

Another factor needs to be taken into account: the rule usually known as "the lump sum reduction".

Traditionally, the Maltese courts have adopted a regiment whereby a reduction of around twenty percent (20%) is affected from the damages awarded as lucrum cessans to compensate for the fact that the plaintiff would have been awarded one whole sum (and investable as such) as restitution for a loss (future earnings arising from any permanent incapacity) which otherwise would have accumulated over a number of years. Indeed, this principle is yet another tribute to the principle of restitutio, since without this rule, the benefit derived from interest received on that lump sum payment would actually result in a payment that goes beyond mere restitutive compensation.

Eventually, this system was reorganised, and the courts started providing for a reduced deduction where cases would have taken a certain amount of years to be decided. Usually, for every year following the third year from the institution of the lawsuit, a two percent (2%) reduction is made from the original twenty percent (20%). Therefore, by way of example, a court cases decided after five years could see a reduction of sixteen percent (16%) instead of twenty percent (20%).

On 10 January 2019, in Cuschieri Alfred vs Refalo Mary Louise (577/10GM), the Civil Court, First Hall gave a novel and interesting twist to this traditional instrument. It observed in today's world, the principle of the lump sum reduction does no longer make sense, given that the original purpose behind such a system is no longer relevant.

The Court declared it will not affect any lump sum reduction. It stated that it is true that such a reduction did make sense until a few years ago, in a time when commercial banks paid interest at five percent on fixed deposits. This meant that in some cases, it happened that the injured party would have been paid the compensation as one capital, and on top of that, would have earned a sum which sometimes is even equivalent to the salary he or she would have earned if the incident did not happen. The Court argued that this is not the case today, since interest paid is practically negligible, and all the capital is consumed.

The reasoning adopted by the Court is thought-provoking, to say the least. While through the years, there had been some judgments that had expressed some reservations about the rule of the "lump sum reduction" and whether it is still fully applicable, rarely before had a Court refuted it so emphatically.

The reasoning adopted by Mr Justice Grazio Mercieca in this judgment is not that to date has caught and became the trend; indeed, at this juncture, our courts are still clinging on the strict traditional application of the lump sum reduction rule. This is an important question to follow, not only on the legal front, but also from a financial point of view, since a total refutal of the lump-sum reduction rule could potentially bring therewith a 20% increase in sums awarded in a lot of tort cases.

It is also interesting to discuss whether the lump-sum reduction rule should solely rest on banking interest tendencies, or whether other investments which would justify the survival of the rule (for example, today, investment in property is still considered to be lucrative) should be considered as well.

What is certain is that fifty years on from the judgment of Butler vs Heard, the rules of quantification of damages continue to evolve steadfastly, as new judges bring with them new experiences, new approaches, and new interpretations of a law that cannot but grow with the passing of time.

LEND ME YOUR NAME
BY DR CARLOS BUGEJA

Maxine Camilleri vs Alessio Speranza
31 January 2019, 593/2015LSO
Originally published 18 February 2019
Civil Court, First Hall

The concept of 'Prestanome Mandate' is often misconstrued, perhaps due to the wrong impression had by many that it is necessarily a product of illicit intentions. Prestanome Mandate is a legal mechanism by virtue of which an 'apparent owner' is appointed to act as mere administrator or holder of a property to the benefit of another person, who is the real owner. In such cases, the mandatory would be 'lending his name' to the real owner, and acts on his behalf without ever needing to reveal the identity of the actual owner.

Since 2004, this concept has been formally recognised by Maltese Law (article 1124A and 1124B of the Civil Code, Chapter 16 of the Laws of Malta).

Unsurprisingly, this contract - indeed, like any other - can be used for both regular and illicit purposes. After all, its very existence is characterised by its 'secretive' nature and the wishes of the mandator not to appear or be seen to be appearing on a contract. Our courts have many times refused to accept the existence of a nominee mandate the existence of which was merely to circumvent a provision of the law which prohibited the mandatory to appear in his own name (for example, in situations where the mandator was prohibited by law from acquiring property). These mandates were considered by our courts to have been formed on the basis of an illicit cause (causa illecita), and therefore deemed null and void at law.

However, it has been said time and time again that despite the 'private' nature of prestanome mandates, they are perfectly regular and enforceable if their purpose is not illegal. Indeed, like any other mandate, it could be agreed to orally, without any need to actually put down the terms in writing.

The judgment delivered by Madam Justice L. Schembri Orland on 31 January 2019, in the case of Maxine Camilleri vs Alessio Speranza (593/2015LSO – Civil Court, First Hall) illustrates the successful and legal use of this rarely used mandate.

The facts were as follows: The parties were in a relationship which started when plaintiff was still a minor. Subsequently, defendant acquired a property alone, and he alone appeared on the public deed of sale. However, by means of another private writing, the

parties further agreed that even though plaintiff did not appear as owner in the contract, she nonetheless owns a share of the property as well as a share of the loan.

On this basis, plaintiff requested the Court to order defendant to transfer onto her a share equivalent to one-half of the property.

Now, as a general rule, a private writing is not considered sufficient to grant title to an immovable property, since only a public deed (a contract before a Notary, and duly registered as such) is capable of transferring ownership of an immovable property, alone or with others. Therefore, in this case, the declaration of ownership by means of a private writing could not be considered as granting ownership of the property.

This is where the Prestanome Mandate came into plaintiff's refuge. In delivering the judgment, the Court went into the detail of various civil law concepts, amongst which the principle of pacta sunt servanda (a Latin principle meaning that what is agreed to by the parties is law between them), the principle that contra scriptum testimonium, non scriptum testimonium non fertur (meaning that, oral testimony that seeks to counter what appears in writing is inadmissible), and at the end, the concept of prestanome mandate.

It referred to the private writing in which the parties had declared that plaintiff owned part of the property bought by defendant, and stated that this was evident of the fact that defendant was given a mandate by plaintiff to buy the property in his name, but partly on her behalf, given that she was still a minor and incapable of acquiring it herself.

The Court considered that such a mandate was perfectly legal, and reflective of the parties' wishes at the time of the purchase of the property, given that the public deed and the private writing were both signed on the same date. It threw out defendant's argument that plaintiff could only request the reimbursement of the money she had forked out as her share of the payment of the bank loan, since it considered the private writing to be a clear manifestation of the parties' intention that each should hold half of the property. It also stated that it made no difference that at the time, plaintiff was a minor, since that fact did not make the cause of the agreement an illicit one.

Having considered all the facts and legal issues, the Court considered that there was a prestanome mandate for that part of the property bought by defendant on plaintiff's behalf. It concluded that plaintiff's requests merited to be upheld, and therefore, it ordered defendant to transfer onto plaintiff half undivided share of the property.

The facts of this case will most certainly be too familiar to many. There are many circumstances which necessitate resolution by means of a judicial recognition of a

prestanome mandate. Indeed, it may be the only solution for parties in weaker positions who for a reason or another, are unable to appear on contracts in their own name, be it in business or in family matters. Indeed, lawyers often encounter situations whereby someone would have entrusted another with funds to purchase a property, only to realise later that his trustee would then have bought it for himself. Often, lawyers encounter situations very similar to those of the case at hand. Without the formal and legal recognition of the prestanome mandate, there would have been little one could do.

The judgment of Maxine Camilleri vs Alessio Speranza is a stellar recent example of the courts' recognition of prestanome mandates and its effects, and the efforts to protect it as a legally enforceable contract at law.

This judgment has since been appealed from.

WHEN MIGHT IS NOT RIGHT
BY DR LAURA CALLEJA

Paul Portelli et vs Emanuel Said
5 February 2019, 91/17JVC
Originally published 25 February 2019
Court of Magistrates (Gozo) (Superior Jurisdiction)

Imagine waking up one morning to find that someone has taken over an item you so dearly possess without you having ever given him permission to do so. What legal civil action lies at your disposal and what can you do to regain possession of said item? Among the various possessory actions available, you may wish to resort to that known by lawyers as the actio spolii.

This is exactly what the plaintiffs did in the case of Paul Portelli et vs Emanuel Said (decided by the Court of Magistrates (Gozo) (Superior Jurisdiction) on 5 February 2019).

Prior to delving into the merits of the case, it is worth noting that the actio spolii can be resorted to by anyone who has been dispossessed of an item or by anyone who has had an item, previously in his possession, detained by another. Through this action possession is reinstated to the possessor, that is the plaintiff. As it became clear to the plaintiffs in this case however, for the actio spolii to subsist three important elements have to be present,

In their court application, plaintiffs alleged that sometime after 16 October 2017, while in possession of a plot of land in Nadur, Gozo, the defendant accessed their land without their permission and proceeded to plough it. Plaintiffs were not pleased with the defendant's action and thus decided to institute judicial proceedings against him. Relying on article 535 of the Civil Code, Chapter 16 of the Laws of Malta, plaintiffs requested the Court to declare that the defendant had carried out an act of spoliation against them and to subsequently order him to reinstate to them the plot of land.

Plaintiffs also argued that they had been in possession of the land in question since 2015, first under a title of sub-lease from the defendant, and after 2017, under a title of lease from its original owner.

The defendant rejected these claims. He plead that the elements required for the actio spolii to subsist did not exist. Moreover, he argued that the land in question had been in his family's possession for a number of years, except for one particular year (2015) where he had allowed the plaintiffs to make use of the land. That said, he contended that in October 2017 the land was already in his possession.

In its legal considerations, the Court, whilst making ample reference to consistent jurisprudence on the matter, highlighted the three crucial elements that need to be present for the actio spolii to be successful.

Through the actio spolii a person who has been molested in his possession of an item may be reinstated in that possession. It follows therefore, that for this action to be successful one must prove that he was truly in possession of the item before the act of spoliation or detention took place. This regardless of whether the act of spoliation or detention is carried out by the actual owner of the item or not. Therefore, one may argue that the availability of the actio spolii discourages one from taking the law into one's own hands.

The law also limits the pleas one can bring forward to such an action. One cannot thus resort to arguing that he had some form of right to carry out the act of spoliation or detention by virtue of the title he has over disputed item.

In this case both parties had possessed the land in question during different periods of time. After being made privy to a legal letter sent by plaintiffs to the defendant informing him of their intention to vacate the plot of land by August 2017, the court concluded that the allegation made by the plaintiffs that in October 2017 they were in possession of the plot of land was dubious at best.

There was another matter to determine: No actio spolii can be successful unless and until the plaintiffs manage to prove that the act of spoliation or detention carried out by the defendant was so carried with violence, that is, against the will of the possessor, or clandestinely, that is in a manner which is hidden from the possessor. The presence of violence or clandestineness is imperative as it shows the defendant's intention to deprive the possessor from actually possessing the item.

In this case, and after examining all the evidence produced in front of it, particularly the legal letter sent by the plaintiffs to the defendant (above-mentioned), the Court concluded that in no way could it be said that the defendant's actions amounted to an act of spoliation or detention by violence or clandestinity.

Having established that, one had to determine whether or not the action was instituted in time. The law provides that the actio spolii must be instituted within two months from the date of spoliation or detention of the item in question. This time-period cannot be renewed or extended in any manner and thus is peremptory in nature.

It is also interesting that in such an action, it is the plaintiff's responsibility to prove that the case was initiated within the two-month time period and this regardless of whether

the defendant pleads it as a defence or not. Given that this time-period is provided by the law itself, the adjudicator faced with deciding such a spoliation claim must ascertain that this element has been satisfied by the plaintiff. Should it result that this important element is missing, the court cannot but reject the plaintiff's claim.

In the case being examined, the Court, after once again referring to the legal letter sent by the plaintiffs to the defendant and to the remainder of the evidence submitted, concluded that the defendant had acceded to the land well before October 2017 thus any alleged act of spoliation must have occurred before this date. Given that the case was instituted in November 2017, the Court decided that the plaintiffs' action was thus time-barred.
The Court, bearing in mind that none of the three required elements above-mentioned subsisted, accepted the defendant's pleas and rejected the plaintiffs' claim in its totality.

THE RIGHT TO, WHAT?
BY DR CARLOS BUGEJA

Robert Galea vs Maġġur John sive Vanni Ganado et
25 February 2019, 41/2017/1
Originally published 4 March 2019
Court of Appeal (Inferior Jurisdiction)

The judgment of the Court of Appeal (Inferior Jurisdiction) in the case of Robert Galea vs Maġġur John sive Vanni Ganado et (41/2017/1) will surely send shockwaves throughout the legal community for the way it highlights the constitutional absurdity of a court's legal impotence to decide against a law whose constitutionality is – by way of mammoth euphemism – deemed suspect, because of a legislative intervention of its brother in the trias politica – Parliament. It is a manifestation of a court eloquently protesting against its inability in its ordinary capacity to shoot down a law which was specifically promulgated to nullify judgments delivered by constitutional courts, and instead, be forced to apply it.

This case revolved around the now infamous article 12 of Chapter 158 of Malta (Housing (Decontrol) Ordinance), enacted back in 1979. This was a law which pretty much sought to transform hundreds of private individuals into social housing providers, compelling them to keep renting their properties at a low rent, even against their own will. It did so by choosing a class of contracts of temporary emphyteusis, and dictating that on the expiration of the period agreed to, the owner could not take back his property. Instead, the emphyteusis automatically converted into lease in perpetuity, under a regime of very limited increases in the rent the owner could receive. Time and time again, our courts and the European Court of Human Rights have scorned this article at law, and declared it to be in flagrant breach of the fundamental right to property, found both in the Constitution of Malta and the European Convention of Human Rights.

Last year, Malta tried to alleviate is constant and numerous shootdowns of this law, by adding a new mechanism by means of Act XXVII of 2018: article 12B. On the owner's request, the occupant is subjected to a means test, and those who pass this test shall have the right to continue occupying the property, for a rent of not more than the equivalent of two percent of the market value of the property, part of which will be paid by the State. This law applies to new cases, as well as those who have already been subject to a decision of court of constitutional jurisdiction.

The facts of the case were as follows: Plaintiff owned a property which was subject to the protected lease under article 12 of Chapter 158 of the Laws of Malta. He had

sought to challenge this article at law before the Civil Court, First Hall (Constitutional Jurisdiction). This was at a time when Act XXVII of 2018 had not yet been introduced. In its judgment, the court in its constitutional capacity once again declared article 12 of Chapter 158 of the Laws of Malta to be in breach of plaintiff's right to property, and considered that defendants could no longer rely on this article at law to protect their occupation of the property.

Plaintiff then proceeded to request the Rent Regulation Board to declare that without the protection of article 12, defendants no longer had the right to retain the property, and that therefore, they shall vacate the property. The Rent Regulation Board acceded to the request, but defendants appealed, stating that in the meantime, Act XXVII of 2018 had come into force and that the Rent Regulation Board ought to have applied it.

In its judgment, the Court of Appeal made a thorough analysis of the situation and the newly enacted law. It noticed how in effect, the newly introduced Article 12B (11) states that even a landlord who had a favourable judgment of the court of constitutional jurisdiction (basically, paving the way for his tenant's eviction), could not proceed to request the eviction of the occupier without first availing himself of the procedure under the new law.

In its judgment, the Court of Appeal cautiously noted that one may have reservations on this new law (Act XXVII of 2018), more so when one would have obtained a judgment by a court of constitutional jurisdiction, and now having to face yet another hurdle against taking back one's property. It added that this new law adds yet another element of frustration for owners.

It sadly noted that as a court of appeal in its ordinary jurisdiction, it lacked competence to actually decide about the constitutionality of this new law, and further noted that it could not order a constitutional reference on the matter at its own accord. It reluctantly varied the judgment of first instance, but opted to send back the acts of the case to the Rent Regulation Board to give chance to plaintiff to decide on his next step.

The Court was correct to cautiously note the oddness of this new law. In a peculiar role reversal, Parliament seems to have muscled the court of constitutional jurisdiction out of the function given by the Constitution of Malta (think: the highest law of the State), and enacted a law that sought to effectively nullify a decision by that same court. Ironically, a judgment declaring a law unconstitutional is nullified by another subsequent law which is arguably unconstitutional in its own right!

Yes, the intention of this law must have been noble – to protect vulnerable tenants facing imminent eviction. But as Samuel Johnson famously said: "The road to hell is

paved with good intentions," and hell is what these owners of properties might describe their never-ending ordeals in order to take back their property. It is perhaps a situation where a pain-killer is being mistaken for the cure.

The judgment of Robert Galea vs Maġġur John sive Vanni Ganado et (41/2017/1) is perhaps one of the first to highlight the frustration to be created by Act XXVII of 2018. But it will not be the last. This new law is certain to be the subject of many talked-about judgments for years to come, indeed, as this law will inevitably – sooner or later – go back before the scrutiny of the Constitutional Court.

WHOSE FAULT IS IT?
BY DR GRAZIELLA CRICCHIOLA

Lawrence Mercieca et vs General Director of the Department of Health et
28 February 2019, 1294/2003
Originally published 11 March 2019
Civil Court, First Hall

Unlike abroad, medical practice cases in Malta have somewhat of an infrequent relationship with our courts. There are a few cases instituted, and fewer that actually find the support of our courts and a medical professional is found responsible for medical malpractice. This is by no means an assessment of the local courts' decision-making exercise, but perhaps merely a reflection of a general good standard of medical practice in Malta, or else an indication of a non-litigious culture, particularly in these kinds of situations.

Liability in the medical profession occurs when the patient is not treated according to acceptable medical standard of care. The idea that every person who enters into the medical profession undertakes to exercise a reasonable level of care and skill is not a new concept. It is indeed one that dates back to Roman times, and even earlier than that. The Code of Hammurabi (2030 BC) reads that "If the doctor has treated a gentleman with a lancet of bronze and has caused the gentleman to die, or has opened an abscess of the eye for a gentleman with a bronze lancet, and has caused the loss of the gentleman's eye, one shall cut off his hands."

In the case of Lawrence and Grace spouses Mercieca vs General Director of the Department of Health et decided by the Civil Court, First Hall on 28 February, 2019, plaintiffs claimed that defendants were responsible for the disability suffered by Lawrence Mercieca, since – they said – they had failed to give plaintiff proper warnings of the surgery's risk, and as well as due to medical shortcomings during and after plaintiff's surgery. Defendants rejected these claims and insisted that any permanent disability was not cause through their omission or negligence.

The facts of this case are as follows: Plaintiff's doctor had informed him that he had a compression of the cervical spinal cord. Following the necessary tests, plaintiff was reluctant to undergo surgery, but his pain and suffering was such that, he felt it would be wiser to accept to submit himself to surgery.

In its judgment, the Court outlined that doctors are not obliged to advise and provide all the information to patients in order for them to make an informed decision about

any treatment or surgery which they need to undergo. Their duty was to deliver that information required by their professional practice standards. It cited different judgments to this effect. The Court added that in order for one to examine whether the doctor provided sufficient information, the test would be dependent on the 'generally accepted medical practice'.

In its conclusions, the Court went against the recommendation of the court expert appointed (something that the law permits the Court to do) and found that indeed, the doctor had provided sufficient information on the conditions, the surgery and all consequential risks.

The Court however found that the neurosurgeon exercised a number of technical deficiencies, by committing mistakes in the analyses, interpretation, and diagnoses. The Court also found that the neurosurgeon had taken wrong decisions on the choice of the medical intervention to be undertaken, and had subsequently expressed lack of interest after it was confirmed that Mr. Mercieca suffered a paralysis.

The Court found that the neurosurgeon failed to exercise the required medical standard of care, and further remarked that doctors are obliged to update themselves in medicine and exercise diligence and this to the ultimate benefit of their patients.

It was further pointed out that as with most sciences, differences in opinions are common, and differences in doctors' opinion on patients' diagnosis and treatment would not automatically result in the finding of negligence. In the realm of diagnosis and treatment there is ample scope for a genuine difference in opinion. However, this before the Court was not a simple divergence in medical opinions, but one in which there was various shortcomings.

The Court therefore concluded that the neurosurgeon was responsible for the damages suffered by Mr. Mercieca together with the General Director of the Department of Health, as his employer. The court awarded plaintiff the sum of €128,444.91.

Assessing the exercise of the medical profession from a legal point of view is tricky, to say the least. Separating what is mere professional opinion, and what is absolute negligence is even more complicated. The judgment of Lawrence and Grace spouses Mercieca vs General Director of the Department of Health et is a rare fine example of a Court that managed to clearly explain this difference.

DEALING WITH NO-SHOWS BY DR CARLOS BUGEJA

Reactilab Limited vs Caroline Debattista
12 March 2019, 1038/2018GM
Originally published 18 March 2019
Civil Court, First Hall

There was nothing particularly remarkable about the facts in the case of Reactilab Limited vs Caroline Debattista (1038/2018GM – decided on 12 March 2019); it was the typical debt-collection dispute, plenty of which are heard by our courts every day. What was interesting, however, was how the Civil Court, First Hall, delivered in its judgment, with meticulous detail, a historical lesson of the institute of contumacia at law.

Contumacia is the state in which the defendant finds himself if, after he has been summoned by the Court, he fails to file a sworn reply within the period provided at law – usually of twenty days.

The Maltese Code of Civil Procedure provides rather thinly in regulation of this institute at law, and most of the rights appertaining to a defendant who is in contumacia were established by our courts. When reading judgments, one realises that historically, our courts did not take kindly towards defendants in contumacia. Indeed, the basis of this doctrine is held to be that of lack of respect towards the courts, and one's deliberate or negligent failure to appear further to a court's order.

In the judgment of Reactilab Limited vs Caroline Debattista, the Court traced the etymology of the word 'contumacia' in the Italian understanding of one who did not incline to the authority of the Church - usually through excessive vainglory – and this despite possibly facing excommunication.

It explained how during earlier times (in Roman Law), plaintiff was authorised to force defendant to appear before the Judge, 'abtorto collo' (literally, by dragging a reluctant defendant to court), and later through the sequestration of his property. In time, the law evolved in such a way that the presence of the defendant no longer remained indispensable, despite there still being remains of an attitude towards punishing defendant for failing to appear and defend himself.

Today, this attitude is manifested in the fact that the contumacious defendant is not allowed to contradict the facts proposed by plaintiff and is not permitted to bring forward any evidence. In fact, it must be said that a contumacious defendant is legally

reduced to a somewhat silent passive observer of the case brought against him; and while this situation does not guarantee a win for the plaintiff (it was said time and time again that in the superior courts, silence through contumacia is nevertheless deemed as a contestation of the case), there is little that the defendant can do.

In this judgment, the Court further observed that, at a time, Maltese law provided that if the defendant defaults in filing the sworn reply, the court was then obliged to mete out its judgment as if the defendant failed to appear to the summons. This, unless defendant demonstrated to the satisfaction of the court a reasonable excuse for his default in filing the sworn reply within the prescribed time.

Back in 1993, there were some attempts to ease this rule, after the Permanent Law Reform Commission noted that this provision was excessively formalistic and ritualistic and possibly in contradiction with the fundamental human right of fair hearing. It proposed an amendment stating that a contumacious defendant could nevertheless be entitled to defend the action if he satisfied the court that he had a 'prima facie defence', in law or in fact, or else, disclosed such issues of law or of fact as may be deemed sufficient for him to defend the case against him.

This proposal never made it into law; but the legislator added a proviso stating that the court shall, however, before giving judgment, allow the defendant a short time which may not be extended within which he could make submissions in writing to defend himself against the claims of the plaintiff. Such submissions would have then to be served on the plaintiff who shall be given a short time within which to reply.

This is the law as it stands today.

In its judgment, the Court referred to another judgment, that of Costantino Abela vs George Azzopardi (22 May 1990, Collection Volume LXXIV.II.337), which had expounded on the significance of the institute of contumacia, and had stated that it meant that the defendant had failed to be present for judgment, for reasons unjustified, which would in turn indicate a deliberate disobedience of the court's order, and a level of arrogance towards the rules of judicial procedures. Contumacia in its juridical sense meant the total absence of the defendant, both in the acts of the case and during the hearing.

The Court concluded that since the defendant in this case neither filed a reply, nor did she appear for the court sittings, she was to be considered contumacious for the purpose of the law. The Court then moved on to accede to plaintiff's requests and ordered defendant to pay plaintiff the sum of €26,002.83.

'TIL DEATH DO US PART
BY DR CARLOS BUGEJA

Mafimex Limited vs Saviour Muscat et,
20 March 2019, 1213/15AF
Originally published 25 March 2019
Civil Court, First Hall

"I promise to be true to you in good times and in bad, in sickness and in health. I will love you and honour you all the days of my life." We have all been there, listening carefully to a young couple nervously reciting those words that set to bind them for the rest of their married life.
Rarely has the meaning of those words echoed louder than in the case of Mafimex Limited vs Saviour Muscat et, decided by the Civil Court, First Hall on 20 March 2019.

One of the defendants in this case owned a greengrocer, and he had fallen behind in payments due to one of his suppliers. A case was instituted both against him and his wife.

The Court immediately found against the husband, but opted to give the wife the opportunity to put forward her defence.

His wife, co-defendant in the case, testified that at the time that the business was grounded, she was already separated de facto from her husband, and hence had absolutely nothing to do with the business. She insisted that the debt belonged to her husband, since it was him who managed the shop, and it was him who made the order from the plaintiff. Remarkably, her husband agreed.

She further referred to article 1324 of the Civil Code, and argued that normal acts of management of a trade, business or profession being exercised by one of the spouses, shall vest only in the spouse actually exercising such trade, business or profession even where those acts, had they not been made in relation to that trade, business or profession, would have constituted extraordinary administration.

In its judgment, the Court noticed that while the parties did lead separate lives prior to their subsequent formal separation, at the time the debt was incurred they had still been married, and therefore, the regime of community of acquests still applied to them.

Simply put, the community of acquests is the common pot between the spouses; anything which is acquired by them during the marriage enters into a common fund – both the good and the bad; the abundance, and the meagre.

It further noted that as a result, their common fund as spouses was responsible towards third parties, even when the act leading to the debt was done by only one of the spouses, as long as it was a normal act of management of a trade, business or profession.

The wife was therefore responsible to that extent of her share in the community of acquests for all debts incurred by her husband. Indeed, the law provides for such a mechanism in order to facilitate trade, as otherwise third parties would have to obtain both spouses' consent, in every transaction, as small as it may be. This would not be practical.

Indeed, the law seeks to devise a system that balances the rights of all the parties involved; on the one end, there is no need for a spouse to drag the other spouse into each and every act undertaken, and on the other end, the third party can enter into transactions with peace of mind, knowing that behind the spouse, there is the community of acquests.

Of course, this principle at law generates a number of difficulties, mostly for what can be considered as the weaker spouse in marriage, who often unknowingly becomes a co-debtor through the other spouse's doing. This law places a lot of responsibility on the spouse not involved in the business, to oversee the use of the funds forming party of the community of acquests, and act if necessary. Indeed, a spouse can then move to request that the court orders the other spouse to be excluded from administering the community, either because he/she is not competent to administer it, or because he/she is guilty of mismanagement.

Having seen the facts of the case, and after quoting various judgments, the Court concluded that the fact that the wife was in no way involved in the business was no use to her defence. Ultimately, she did know about the business, and knew that it was being operated whilst the community of acquests between her and her husband was still functioning. It was of little relevance that when they subsequently separated the husband had declared that he would shoulder the debt himself, since that contract was res inter alios acta, meaning that it could not legally adversely affect the rights of those not party to it.

However, it was not all gloom and doom for the wife; the Court did cautiously acknowledge that what the spouses agreed to in the contract of separation (that he would assume the debt), could give the wife the right of action against her husband, to recover what she would have to pay - a right commonly known as a 'dritt tar-rivalsa'.

The Court then moved to order the wife to pay the debt due but limited to her portion of the community of acquests between her and her husband. It reserved the right of the wife to seek redress against her husband.

EVICTION BY RETIREMENT?
BY DR CARLOS BUGEJA

Anna Maria Falzon vs Paul Sant
26 March 2019, 121/2016JD
Originally published 1 April 2019
Rent Regulation Board

Throughout the years, it has been a staple in our Law of Lease that a property rented must be utilised according to the use for which it is rented. By way of example, a property rented as a garage cannot be transformed into a snack bar without the owner's consent (the consent may be tacit or expressed). This principle holds true to many scenarios, and it has been said that change of use gives the right to lessor to terminate the lease.

Eventually, this principle inspired the birth of another, one possibly inspired by the teachings of the celebrated author Laurent, who had said that 'non si usa della cosa secondo la sua destinazione non usandone'; meaning that one cannot utilise a property consistently with its use, if it's not used at all.

This means that a property abandoned by the lessee is treated in the same way as a property the use of which had been transformed, and a tenant may be evicted on the basis that he is not making use of the property subject to lease. This principle is more or less settled, and has been even made part of our written law of lease, if with a slight twist.

In fact, article 1555 of the Civil Code, Chapter 16 of the Laws of Malta, states that if the lessee uses the thing leased for any purpose other than that agreed upon by the parties, or as presumed, or in a manner which may prejudice the lessor, the lessor may, according to circumstances, demand the dissolution of the contract. Article 1555A adds that in the case of a residential property, failure to use it for a period exceeding twelve months shall be deemed to be use in breach of the law.

What is perhaps less settled is the question of how this principle is to be practiced when the tenant abandons the property not through his free will, but due to health or medical reasons, which force him to spend time away from his home, be it in hospital, with a family member, or otherwise.

The judgment of the Rent Regulation Board of 26 March 2019, in the names of Anna Maria Falzon vs Paul Sant, was partly an attempt of the Board to answer this question.

It has been said time and time again that in these cases, it cannot be automatically said that the tenant would have abandoned the lease or renounced to his right of tenancy. It has been said that one cannot exclude that the tenant could for one reason or another, return to his rented home, and continue in his tenancy. What is important is for the Rent Regulation Board to carefully examine the facts of the case and decide upon the specific merits before it. Indeed, the law directs the Rent Regulation Board to decide 'according to circumstances', today in accordance with article 1555 of the Civil Code.

It must be said that our law does not limit this only to health reasons; the proviso to article 1555A of the Civil Code states that when a person has failed to use the leased tenement due to being temporarily absent from the tenement due to work, study or health care, then such failure shall not be deemed to be use capable of bringing about the termination of the lease.

The question that follows is: what is to be considered as temporary absence?

The law does indeed provide a specific mechanism, largely introduced by Act X of 2009. In this case, the landlords sought to obtain the eviction of their tenants, among others, on the basis that they had abandoned the property and had instead been living in a retirement home, and that their daughter had no valid title to replace them in their occupancy. They also demanded the eviction of the tenant's daughter, who was claiming that she had obtained the right to continue in the tenancy enjoyed by her parents.

The Rent Regulation Board quoted articles 1555 and 1555A of the Civil Code, and went on to quote the law, stating that when the lessee of a lease which started before the 1 June 1995 is recovering in hospital or in an old people's home, and where such person is certified to be permanently dependent on the institution, the lessor shall have the right to terminate the lease, unless the circumstances show the existence of a person who has the right to 'inherit' the right of tenancy in terms of the law.

Considering the facts of the case, the Rent Regulation Board found that one of the original tenants in this case had passed away, whereas his wife had been living at a retirement home for the previous four years. The Board found that the surviving tenant had a degree of dependency on the institution where she was residing, and that it was highly unlikely for her to return the property leased, despites efforts made to the contrary by the daughter to prove otherwise.

The Board therefore acceded to plaintiff's request to terminate the lease in respect of the tenants and ordered their eviction. The Board further stated that their daughter had failed to show that she qualified to continue the tenancy according to the criteria laid down in the law, and hence moved to apply the lifeline afforded by article 1531G (b) of

the Civil Code, by giving her the right to continue occupying the property by lease for a period of five years, with a rent equivalent to double of what was being paid by her parents. The Rent Regulation Board ordered that upon the expiration of the five-year period, plaintiff could take back their property, as one free of any tenants.

FLOGGING A DEAD HORSE? BY DR CARLOS BUGEJA

Alessandro Farrugia et vs John Mercieca et
28 March 2019, 8/2019JZM
Originally published 8 April 2019
Civil Court (Commercial Section)

The judgment of the Civil Court (Commercial Section) of 28 March 2019 in the names of Alessandro Farrugia et vs John Mercieca et (8/2018JZM) ventured into areas of company law previously untouched by our courts, in turn achieving what can be described as nothing short of a landmark judgment.

Disagreements in a company are increasingly common and can often escalate into hostile disputes which could lead to the collapse of an otherwise successful business concern. Disputes may arise in a number of ways, with common reasons being disagreements about the management or direction of the company, or concerns over possible suspicious activities by any of the directors, among others.

The law does provide for some effective and efficient remedies, mostly through the principle of 'protection of shareholders against unfair prejudice', found in article 402 of the Companies Act, Chapter 386 of the Laws of Malta. Simply put, any member of a company who complains that the affairs of the company have been or are being or are likely to be conducted in a manner that is likely to be, oppressive, unfairly discriminatory or unfairly prejudicial towards members of the company in a manner that is contrary to the interests of the members as a whole, can seek remedy. The Registrar of Companies is granted a similar remedy.

The Court then has the power to provide for a myriad of orders, ranging from simply regulating the conduct of the company's affairs in the future, to actually going to the extreme of dissolving the company and providing for its consequential winding up.

In this case, plaintiffs proceeded against defendant, who had occupied the position of Director and General Manager of a company plaintiffs were members of. They alleged that defendant had been guilty of a number of abusive acts against the interest of the company and its members, including by concealing information about the financial state of the company, authorising dealings without the other director's knowledge, withholding the payment of creditors, and withdrawing money from the company's bank accounts.

All of this – plaintiffs reiterated – led to the ruin of the company, so much that the company had been dissolved and was in the process of being wound up.

They sought an action for damages as a remedy under article 402 of the Companies Act.

There were many questions to be discussed during the case, but one of them was particularly remarkable: can a remedy against unfair prejudice be proposed when the company involved was all but dead? Can an action in terms of article 402 be instituted when the company involved is dissolved but yet to be wounded up? What can be done once the affairs of the company had been put on life-support, and all that remained was for one to pull the plug so that the company ceased to exist?

In trying to settle this quandary, the Court went into great detail, quoting several sources, including celebrated authors, local and foreign judgments. In its seat, it likened itself to a medical practitioner presented with a patient who is alleged to be suffering from one or more ailments which can be treated by an appropriate remedy applied during the course of the continuing life of the company. Indeed, it was said that if the objectionable conduct did not recur, there is no scope for giving relief under this law.

Ultimately – the Court observed - the remedies provided at law had one common denominator: the necessity of the court's intervention at a time when a company was still fully functioning, and not on the brink of its demise. Indeed, in its nature, the remedy against unfair prejudice presupposed the existence of a company; or else, there would not be any purpose for the existence of the action itself.

The logic behind this rationale is hardly arguable.

But the Court decided to go a step further, setting to lay any doubts to rest.

It compared the action under article 402 to what used to be known as the 'derivative action', an action which prior to the coming into force of the Companies Act (the law regulating company affairs in Malta), our law had borrowed from English common law. A shareholder could, even before the introduction of article 402, act on behalf of a company against the company's own directors, to seek remedy against the director's wrongdoing where the company does not institute the action itself. With the birth of the Companies Act in 1995, the derivative action was put aside and replaced with the remedy against unfair prejudice in article 402. Indeed, this new law was somewhat of a statutory form of the now succumbed derivative action.

The Court observed that it had been said time and time again that the derivative action became inaccessible once the company went into liquidation. As the court suitably

noted, there was nothing to suggest that the same reasoning cannot be applied to the remedy under article 402 of the Company's Act. Indeed, if anything, such tradition re-affirmed the sound thinking of the court in respect of article 402.

The Commercial Court therefore concluded that once the company was in liquidation, the remedy against unfair prejudice could not be availed of, and moved on to dismissed plaintiffs' case.

YOUR HOUSE, YOUR FAULT
BY DR CARLOS BUGEJA

Nigel Mallett vs Dolmen Complex Limited
28 March 2019, 1270/2010GM
Originally published 22 April 2019
Civil Court, First Hall

The judgment of the Civil Court, First Hall of 28 March 2019 in the names of Nigel Mallett vs Dolmen Complex Limited (1270/2010GM) is a significant one for the way it touches the different facets of what can be described as 'premises liability'. It is a judgment that sounds a warning to all those (be it shops, offices, or as in this case, hotels) receiving guests in their premises, and sheds light on their responsibility towards their patrons and invitees.

Every person has a duty to ensure a reasonable degree of security of a property for which he is responsible, particularly if third parties are to be invited or permitted into same. Premises liability is a legal concept that typically comes into play when an injury is caused by some type of hazard or unsafe condition in someone else's property.

The premise is that an individual has a right to be safe in places wherein he is invited or wherein he is permitted. As with most personal injury cases, the litmus test is whether there was any negligence on the part of the person alleged to be responsible, that is, whether there had been a failure of one to take reasonable care in situations where one would typically expect one's property to be visited by other persons.

The case at hand was what can be described as a typical 'slip and fall' incident. Plaintiff, an IT Manager at the University of Malta, was helping in the organisation of a conference at the premises - a hotel run by defendant company. While going down the stairs, he slipped in a puddle of water leaking from a number of planters, and fell, injuring himself. He suffered a permanent disability, quantified at 6%.

The Court studied the version recounted by the number of witnesses who were present on the day, as well as those who were familiar with the hotel's daily practices. After analysing the facts at hand, it transpired that indeed, on the day of the incident, there was water along the staircase leading to the restaurant, and no notice warning passers-by to exercise caution was placed anywhere in the vicinity.

Having established the fact, the Court then moved to study the legal aspects of the case, quoting authors and judgments which in the past had already delved into matters

similar to the case at hand. It stated that the hotelkeeper's duty to provide a safe environment is akin to a consideration for the payment received. Indeed, this obligation is one of a contractual nature, and therefore, the hotelkeeper's responsibility is not a mere product of the accident itself but is born out of a pre-existent contractual relationship dictated by the very nature of the hotelkeeper-guest juridical rapport.

The difference may not mean much to most, but in reality, it has significant legal implications, particularly in respect of the question of what proof must be submitted for a case for damages to be successful. In cases where damages arise out of a contractual relationship (ex contractu), it would be sufficient for the claimant to prove the existence of an obligation towards him, while in a claim arising purely from the incident causing harm and no other pre-existent contractual relationship (ex delicto vel quasi), one would need to demonstrate the causal link between the harm and the person responsible for it.

The Court stated that plaintiff had managed to prove that there was a pre-existent contractual relationship and consequent infringement. Surely enough, the fact that plaintiff slipped and fell on the water and got injured while in the hotel premises was sufficient for the purpose of the case, more so when considering that defendant company had not managed to prove otherwise, or to convince the Court that it was not responsible for the occurrence. To the Court, it mattered not that the plants in the staircase were watered by another company; for the contractual relationship between the hotelkeeper and the guest remained unaltered.

The Court also referred to one of respondent company's pleas, in which it had pleaded to be exonerated from responsibility since it had always engaged competent people and exercised the necessary diligence in respect of the people so employed. In doing this, respondent company had effectively raised the qualifications of the doctrine of culpa in eligendo as a defence, a principle of tort law that imposes strict liability on employers for any tort committed by their employees. This defence presupposes that the employer's liability is only to those cases where it is proven that the employed had engaged incompetent persons or persons which he ought to have known that they were not competent. Defendant company's logic was that it did not engage incompetent persons, and that therefore, it could not be held liable.

The Court disagreed. It cautiously noted that this defence could not be availed of in cases where damages ensued out of breach of contract. As this was the case, such defence could not be successful.

Having extinguished all that was needed to be said in respect of the responsibility of the incident, the Court then moved to quantify the damages suffered, and condemned respondent company to pay plaintiff the sum of €11,160.48.

RETRIAL: ERRORS IN JUDGEMENTS
BY DR MARY ROSE MICALLEF

Alfred Mallia et vs Alex Vella et
29 March 2019, 1196/1989/2
Originally published 15 April 2019
Court of Appeal

Our system of legal redress adopts a two-tier structure; cases are first heard before and decided upon by the courts of first instance (such as the Court of Magistrates and the Civil Court, First Hall, in case of civil matters). Thereafter, any grievances can be addressed to the Court of Appeal, being the court of second instance. The procedures before the appellate courts are predominantly a revision of the merits that were previously heard and determined before the first instance courts.

The Court of Appeal then delivers its own judgement, which judgment cannot be appealed from. The latter judgments become what is legally termed as res iudicata, loosely translated into 'a cause (already) judged'. In Malta, there is no court of third instance, akin to the foreign concept of the Court of Cassation. What is determined by the Court of Appeal is so determined conclusively.

Essentially, it was said that this stance is indispensable for justice's sake as it attempts to exclude possibilities of never-ending procedures or conflicting judgments, warranting legal certainty and uniformity.

There are merely two exceptions to this dearly held principle: one is the possibility to overturn a judgment effected in breach of a constitutional provision or a fundamental human right or freedom.

The other, is the institute of Retrial.

This institute is perhaps one of the most restrictive legal procedure under Maltese Law, mostly because it is intended to reopen what otherwise would have been considered as a final judgment. It is only natural therefore that in deciding such cases, our courts thread carefully.

This institute of Retrial was the crux of the matter in the case of Alfred Mallia et vs Alex Vella et, decided by the Court of Appeal on 29 March 2019.

The restrictive nature of the institute of Retrial is evident in the fact that relief may only be obtained if one of the twelve grounds listed in Article 811 of the Code of Organisation

and Civil Procedure (Chapter 12 of the Laws of Malta) subsists. There is little room for interpretation; this list is neither merely indicative nor capable of any broadening. It is indeed an exhaustive list of causes that give rise to retrial.

Two of these grounds feature the concept of 'error': error with respect to the wrong application of the law and an error resulting from the proceedings or documents of the case.

These grounds formed the basis of plaintiffs' claim in this case in their attempt to obtain retrial from a final judgment of the Court of Appeal.

This case initially concerned the grant of a building permit for a fireworks complex that was owned by the Santa Maria Club of Mosta. Previously, the Court in both instances had decided that such permit was null, because the complex breached the distance requirements, set out by the Explosives Ordinance, Chapter 33 of the Laws of Malta.

The relative law had provided that fireworks factories had to be at a distance of not less than 183 meters from any inhabited place, from any street that was regularly used by motor vehicles 'or' from any other street within 183 metres of which it would not be advisable, in the opinion of the competent authorities, to establish such factory. The authorities had issued the grant on the basis of the third criterion.

Therefore, the determining point in this case was whether there was any road that was regularly used by motor vehicles in the vicinity of such factory.

Plaintiffs argued that that the Court of Appeal had wrongly applied the law when it had disregarded the fact that the above-mentioned criteria were in fact alternative and not cumulative. Hence argued that the competent authorities were at liberty to choose between the "motor vehicle" criterion or the "any other street" criterion.

The problem was constituted by the fact that situated close to the factory in question was an agricultural road used by farmers driving their field machinery. Because of this road, the Court of Appeal had annulled the factory's building permit since it found that the building was in breach of the 'motor vehicle' requisite.

Plaintiffs were now contending that the term 'motor vehicle' did not comprise agricultural machinery but referred to conventional vehicles, such as cars. They claimed that the Court had erroneously disregarded evidence that showed that this agricultural road was not suitable for cars to use. Therefore, stated that the competent authorities had correctly issued the permit on the basis of the "any other street" criterion, as this was the applicable requisite.

Plaintiffs argued this gave them the right to seek retrial on the basis of 'error'.

In its judgment, the Court reiterated that principles of retrial must be restrictively interpreted, especially to avoid chances of creating a third instance precedent.

With reference to factual errors, the Court emphasised that this must essentially be a fact the veracity of which was incontestably excluded, or a supposition of a non-existing fact. The documents related must therefore have totally excluded a truthful fact. Furthermore, in both instances the said error must have determined the judgment's outcomes.

Additionally, the Court decided that the error that was being claimed by plaintiffs was based on a true fact- that such road was being used regularly by farmers. Hence no error was proven, therefore this claim was outright dismissed.

Lastly, when considering the error of the law, the Court established that such error must intrinsically mean that, objectively, the wrong law was applied to the given facts- thus, it is not a question of the court's own interpretation. Therefore, if the right law had been applied to the merits, there could be no error resulting merely from the interpretation adopted by the previous court. Given that the judgment in question had established that such road was being regularly used, then it was correct to state that the "motor vehicle" criterion was applicable when the permit was issued, as such criterion would have excluded the corresponding alternative.

In conclusion, the Court found that plaintiffs had failed to satisfy the grounds for retrial, and therefore, dismissed the case.

PARENTAL CATCH-22
BY DR RENÈ DARMANIN

X pro et noe vs Avukat Ġenerali
16 April 2019, 27/2019/1/LSO
Originally published 29 April 2019
Civil Court, First Hall

Traditional perceptions of the respective roles of parents in their child upbringing belong in the past. Recent years have seen notable changes in the way parental responsibilities are shared between the parents.

The respective 'traditional' roles of either parent have faded into a more equal collection of rights and duties; and today, it can no longer be said that one parent has duties which the other does not. In fact, in various recommendations, the Council of Europe has recognised this development, and emphasised that 'the family sphere must secure women and men the same parental rights and responsibilities, irrespective of marital status, including provisions on economic maintenance for children, parental responsibilities, and contact with children in cases of separation'.

The essential utility of contact with children as an integral part of the exercise of a sound family life is widely recognised by academics, professionals, and above all, by the European Court of Human Rights. In fact, the European Court of Human Rights has, in various judgements, acknowledged the indispensability of this concept. As a matter of fact, it was said time and time again that parent-child separation should be the exception and not the norm.

This principle holds true both when the family is still intact as well as when the family has gone through some sort of marital disaccord. This, more so when today's reality shows that in Europe, there are more than ten million children whose parents are divorced or separated. Studies show that it is valuable for both the parent and the child to preserve the relationship between each other and to foster consistent direct interaction.

The decisions of our family courts have always, by and large, sought to operate under one basic principle: that the end of the relationship between the spouses does not mean and should not lead to the termination of the parental relationship that adults have with their children. Separation proceedings often lead to a situation where children are put to reside with one of the parents, and away from the other. This notwithstanding, most children are encouraged by professionals, and in turn, by our courts, to build a

relationship with the non-resident parent, as it is understood that contact with both parents is critical, especially for young children.

It can be said that the principle of continuation of a family relationship with the non-resident parent is in tune with the guarantees offered by article 8 of the European Convention of Human Rights – which establishes the principle that each and every individual is to be afforded the right to respect for his private and family life.

The evolution of the role of the non-resident parent was the matter at hand in the case of 'X' in his own name as well as in representation of his four minor children vs Avukat Ġenerali and decided by the Civil Court, First Hall in its Constitutional Jurisdiction on the 16th of April, 2019 (27/2019/1/LSO).

In this case, plaintiff, the father of four minor children, was undergoing separation proceedings. Initially, the father had been given the right to meet his children under the guidance of a supervisor from Agenzija Appoġġ. Other than his youngest child, all other three minors were reluctant to maintain their relationship with their father.

This situation led the court to seek the expert opinion of professionals. After noting how the relationship of the children with their father had deteriorated, the court saw that it was in the best interest of those very same children that father's visitation rights be suspended.

Plaintiff sought to challenge this decision, basing his grievance on article 8 of the European Convention of Human Rights – the right to respect for private and family life. He instituted constitutional proceedings (the case at hand) requesting the court to issue an interim measure and allow him to have visiting rights vis-à-vis his children.

The manner in which the Civil Court, First Hall in its Constitutional Jurisdiction dealt with this complaint was noteworthy, to say the least.

Referring to the facts at hand, it noted that if contact between the parent and his child is suspended abruptly, this will inevitably lead to irreparable damage between the father and his children, which would make it more unlikely for the relationship to ever recover. If the father were to be prohibited from spending time with his children, there was no way that a relationship could be fostered, and in turn, there was no way that the children would then want to spend time with their father.

The reasoning is interesting, and very well thought. Inadvertently the decree had created a textbook Catch-22 situation, worthy of Joseph Heller's finest examples. The father could not visit his children because the relationship was considered not to warrant such

visitation rights, unless things improved. Yet, things could not improve since the only way how things could improve was through visitation, which the father was prevented from having.

The Civil Court First Hall remarked that even though the presiding judge before the Family Court had the opportunity to discuss the matter with the three older children, the youngest child was never heard. In fact, it was observed from the psychological reports exhibited before the Family Court, that the youngest child did not have any difficulties to maintain his relationship with the claimant. And yet, he was prevented from seeing all four children, including that child the relationship with whom was perfectly healthy.

In its decree, the Court furthered the idea that the interaction with the non-resident parent, in this case, the father, is crucial for the child's interest and should only be restricted if there are convincing reasons for doing so. It concluded that in this particular case, whereas there existed compelling reasons which justified the decision of the Family Court with regards to the older three children, the same could not be said with regards to the youngest child.

The Court did not stop there. It appointed a clinical psychologist to put forward any recommendations in order to enhance the parental relationship between the father and his children, and moved to issue an interim measure to allow the father to visit his youngest child once a week, under supervision.

NOT QUITE A PIECE OF CAKE
BY DR CARLOS BUGEJA

Vassallo Group Realty Limited et vs Baketech Supplies & Services Limited
30 April 2019, 790/2016GM
Originally published 6 May 2019
Civil Court, First Hall

The intricate legal considerations made in the judgment of the Civil Court, First Hall of 30 April 2019 in the names of Cater Group Limited et vs Baketech Supplies & Services Limited will certainly capture the attention of traders, lawyers, and – since the case involved cake – those with somewhat of an insatiable sweet tooth.

Plaintiff company produced food to be served in catering establishments, including restaurants and cafeterias. In December 2010, it had ordered several machineries from respondent company, among which, a cake-cutting machine. Plaintiff company complained that this machine was not working as it should have; it was not cutting the cakes properly, and instead, it was pushing them out with excessive force and throwing them on the floor. As a result – plaintiff company complained it had to employ extra man-hours to do what the cake-cutting machine was supposed to.

In any other case, these facts would have normally led to a common action under article 1390 of the Civil Code, an action available to a buyer where there is a consignment of aliud pro alio, – one thing instead of another. What propels an action is when there is a difference to be assessed both on the basis of the buyer's expectations of the thing bought as well as on the basis of the agreement with the seller himself. In fact, the law states that if the thing which the seller offers to deliver is not of the quality promised, or is not according to the sample on which the sale was made, the buyer may elect either to reject the thing and demand damages, or to accept the thing with a diminution of the price upon a valuation by experts.

These would have been the two sole options available to plaintiff company (being a buyer), had this case not had one peculiarity – an email sent on 9 January 2013 by a representative of respondent company, promising to provide plaintiff company with a replacement of the cake-cutting machine originally consigned.

Rather than pursuing an action under article 1390, plaintiff company opted to set-aside its rights as purchaser, and to enforce instead the subsequent promise and request damages.

The question that the court sought to answer was this: in this case, could one speak any longer of a buyer-seller relationship, or was now the relationship between the parties to be solely assessed on the basis of the subsequent promise in the email of 9 January 2013?

Plaintiff company argued – and the Court agreed – that evidence demonstrated that the original seller-buyer relationship between the parties was later substituted with a new obligation born out of the promise made in the email of 9 January 2013. The court stated that this substitution constituted what is legally known as 'novation'.

Simply put, 'novation' is the legal principle by which an existing contract is extinguished, and a new contract is brought into being in its place. It is one of those legal concepts that saw its beginnings in Roman Law, and managed to fight through centuries of legal development to subsist until today.

Quoting various judgments, the court found that the promise made by respondent company to deliver a new cake-cutting machine constituted an entirely new obligation that extinguished that prior one; the nature of which had been strictly circumscribed in the parties' respective roles as seller and buyer.

The Court disagreed with respondent company that the email in question could not constitute an agreement as defined by law in article 1233 of the Civil Code (which lists which transactions must be expressed in public deed or private writing), for it satisfied the elements of the law. Indeed, promises such as those made in respondent company's email were valid and fully legally enforceable, even if made verbally.

The Court went further; it quoted article 9 (1) of the Electronic Commerce Act, Chapter 426 of the Laws of Malta, which states that: "An electronic contract shall not be denied legal effect, validity or enforceability solely on the grounds that it is wholly or partly in electronic form or has been entered into wholly or partly by way of electronic communications or otherwise."

Having determined the existence of a valid obligation, the Court moved to analyse plaintiff company's requested remedy. It stated that the words of the email of 9 January 2013 could not be read in a vacuum and out of the context in which they were said; therefore, while it was acknowledging that the obligation to replace the cake-cutting machine did indeed exist, it stated that it would not be ordering respondent company to provide the replacement promised.

Instead – it stated – it would be ordering the payment of damages.

The Court considered that when the machine originally purchased was not functioning well and respondent company failed to substitute it, plaintiff company had to carry on its activity manually, this leading to added time and expenses. Calculations produced by plaintiff company demonstrated that these extra expenses equalled €69,045.03. However, it was also proven that in late 2012 plaintiff company had borrowed another machine which could cut most of the cakes produced by plaintiff company. As a result, the court decided to only grant damages for expenses incurred during years 2011 and 2012

Documents exhibited in court showed that during that span, plaintiff company had a total of 36,957 cakes which needed to be cut. An employee was paid an hourly rate of €5.66 to do such a job, with each cake taking an average of 3.5 minutes to be cut. Therefore, the Court concluded that the actual expenses incurred were in the sum of €12,202, which were to be paid by respondent company to plaintiff company, with interest.

Respondent company appealed.

OF ISLANDS AND PRIVILEGE
BY DR LAURA CALLEJA

L-Avukat Patrick Valentino noe vs Salvu Mintoff & Sons Limited
30 April 2019, 973/2018LSO
Originally published 13 May 2019
Civil Court, First Hall

Gozo is known for a number of things - amongst others - the lush green fields, the crystal-clear beaches and mouth-watering ravioli with ġbejniet. For litigation lawyers however, Gozo is synonymous with the giving of the master of all pleas, that of the privilegium fori.

Simply put, when a defendant pleads privilegium fori, he or she is essentially arguing that another court, not being the one where the lawsuit was instituted by the plaintiff, has the privilege of hearing and deciding that case. Under our law, this privilege is granted to a Gozitan or Maltese defendant who requests that a case being heard against him or her is heard in the court of the island of his or her habitual residence.

Naturally, various exceptions to this plea exist.

Historically, this plea was not just reserved for those who fell within the remits of articles 741(c), 767 and 770 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) but rather, was resorted to many a times by ecclesiastics and clergymen alike who preferred to have their case tried in front of the Ecclesiastical Tribunal or equivalent.

Today, at least in civil matters, this is no longer possible.

Indeed Maltese procedural law provides two instances when the above can be pleaded: (i) when the majority of defendants reside in a particular island but the lawsuit is instituted in the courts of another (article 741(c) and 767); and (ii) where the obligation forming the subject matter of the lawsuit was to be carried out in a particular Island, but the lawsuit itself is instituted in the courts of another (article 770).

Despite the scarcity of information surrounding the origins of this plea in our law, it is interesting to note that it is closely related to article 50 of the Code of Organisation and Civil Procedure. This article stipulates that in matters involving habitual residents of Gozo and Comino, it is the Court of Magistrates (Gozo), whether in its inferior of superior jurisdiction, that has competence.

One may argue therefore, that the privilegium fori plea, as understood and applied today, owes its existence to the fact that Malta and Gozo are two islands separated by water. Against this background, it is interesting to wonder, especially given the ongoing tunnel saga, whether this plea will survive should these two islands be one day connected by land.

On 30 April 2019, the First Hall, Civil Court delved into the intricates of the privilegium fori plea in the case of L-Avukat Patrick Valentino bħala r-Rettur tal-Beneficcju lajkali imsejjah Abbazia di Sant'Antonio delli Navarra kkonfermat b'digriet tal-Eccellenza Tieghu Monsinjur Arcisqof tal-ghoxrin (20) ta' Frar tas-sena elfejn u sbatax (20/02/2017) u f'isem u ghan-nom u in rapprezentanza tal-istess Beneficcju vs Salvu Mintoff & Sons Limited (C5093).

In brief, the merits of the case where as follows: The plaintiff, as represented, was the owner of a number of plots in an area referred to by multiple names, mainly 'tal-Qasam', 'Tal-Wardati', 'Tal-Hawli' and 'Ta' Ghar id-Dar' in limits of Qala, Gozo. Adjacent plots of land were granted to the defendant company to be used as a quarry. The latter, the plaintiff alleged, not only made use of the land granted to it but extended its operation to the plots of land mentioned earlier – therefore, making use of land belonging to the plaintiffs and which was never granted to it. Despite this being brought to the defendant company's attention, the latter not only continued to occupy said land without the required authorisation but allegedly took over an even bigger area. To this, and amongst various other pleas, the defendant company claimed privilegium fori.

Given the nature of the please, and the fact that it has to be pleaded from the very start of the case (otherwise it will be considered as having been forfeited), privilegium fori was the first matters to be decided by the Court – hence why this judgment is described as only being a judgment in parte.

The Court first established that this plea is tied to residency as per the Roman legal maxim, actor sequitur forum rei – the plaintiff must follow the forum of the property in dispute or the forum of the defendant's residence. Then it went on to consider the parties' submissions.

The defendants argued that various judgments had concluded that if a person's dealings and base are found to be in Gozo, then the Gozo court is competent. This regardless of the registered address of that person.

The plaintiff argued that the matter was not as simplistic. Basing itself on the Court of Appeal judgment in the names of John Mary Grima vs Francis Cutajar et (decided on 28 January 2013), plaintiff contended that the basis from where the defendant

company habitually operated did not in itself trump the fact that its registered address, at least when the case was instituted, was based in Malta. Moreover, the case in question was not based on obligations contracted between the parties and thus article 770 of the Code of Organisation and Civil Procedure did not apply. Finally, it also argued that given the defendant's registered address, no consideration was to be given to the location of the property in dispute or to the place where this judgment is to be eventually executed. Hence the competent court was that of Malta.

The First Hall, Civil Court sided with this argument. It concluded that the defendant company's Maltese registered address was undisputed - once this is established and the Court's competence consequently determined, the defendant company's place of operation bears no further significance to the privilegium fori plea.

Therefore, the privilegium fori plea was not upheld.

The Court thus resolved that it had the required competence to hear and decide this case and consequently ordered the continuation of the lawsuit.

This judgment was later confirmed by the Court of Appeal in a judgment delivered on 28 February 2020.

SPEAK NOW OR FOREVER HOLD YOUR PEACE
BY DR CARLOS BUGEJA

Philip Dimech pro et noe et vs Joseph Galea
14 May 2019, 999/2018GM
Originally published 20 May 2019
Civil Court, First Hall

In the age of Facebook, Instagram and Tinder, it might be hard to believe that there was a time when people would actually assert and boast that they are married, even if they were not. This was – surprisingly – a fairly common occurrence.

This oddity had led to the creation of an action under Canon Law, commonly known as the action against the 'jactitation of marriage' (derived from the Latin word 'jactare', which means 'to throw about or boast of in public, to the detriment of someone else') – mostly prevalent in common law jurisdictions. A person could ask the ecclesiastical courts (and later, the common courts) to declare that a marriage being attributed to him or her never existed, and that the boaster be enjoined to refrain from making that claim any further in the future. This was (ironically, one could say) an action tantamount to defamation against slanderous accusations.

A famous action against the jactitation of marriage was brought in an English court in spring of 1819, by the Right Hon. Edward Lord Hawke against a Lady named Elizabeth Augusta Corri. He lamented that she had been falsely styling herself as his wife, and therefore unfairly assuming the title of Lady Hawke. The complaint prepared by Lord Hawke's solicitors inadvertently reveals the precise purpose of this action:

'That Lord Hawke is, in no way, married or united with this lady, (meaning, as the Court presumes, neither in fact nor in law); that she has falsely and maliciously boasted and reported, that she is married to him, whereas, in fact, no marriage has taken place; and that, on her being desired to desist from such conduct, she paid no attention, but continued, falsely and maliciously, to boast and report such fact, to the no small prejudice and injury of the complainant'.

Lord Hawke was correct: the parties were indeed not married. But to his shock and horror, he still lost the case. It turned out that Lord Hawke was in an adulterous relationship with Corri and had even allowed her to introduce herself as his wife, but only while they were cohabiting. That – to the court – was sufficient to dismiss Lord Hawke's suit.

This is an example of many cases of the sort.

In time, the number of suits against the jactitation of marriage slowly dwindled, and in most jurisdictions, such an action did not survive the dawn of the twentieth century; but it did inspire one similar action which forms part of Maltese laws today: the jactitation suit.

True to its brother, the jactitation suit (in Maltese: 'jattanza' or 'kawża ta' millantazzjoni') is an action available to a person who is facing a claim made against him by another, which for some reason or another, is not followed by a lawsuit. It may be brought by the holder of a right attacked by a claim. The most important element in the action is that a claim is vaunted (the jactitation), in some judicial act or in writing, which runs counter to the rights of some other person. Furthermore, the claim challenged must not be in respect of an uncertain right, contingent upon any event or condition, or of a right with regard to which no action can, for the time being, be taken; it must refer to a determinate right.

If the person against whom the claim is made wishes to be forever liberated from such a claim, he may – within a year of such jactitation – demand that the court establishes a term (not exceeding three months) by which the claimant must institute proceedings in furtherance of his claim, or else be enjoined in perpetual silence.
In other words, one is told to speak now or forever hold his peace.

The case of Philip Dimech pro et noe et vs Joseph Galea, decided by the Civil Court, First Hall on May 14, 2019, was an attempt by plaintiffs to exercise this action at law.

They complained that respondent had alleged some sort of right on a property which was theirs – this by means of a legal letter dated 4 February 2017. The action was instituted on 12 October 2018 – that is, more than a year later.

In its judgment, the Court went into great detail in analysing the legal principles surrounding the 'jactitation suit'. It explained that this institute at law satisfies both legal and social necessities; disputes are not left hanging without being resolved, and a person is not allowed to perturb another with claims and pretensions that are never brought to court for final determination.

This does not mean that this is an action that can be brought impetuously. Equally (if not more) important is the rule that one cannot be forced to file a court case (invitus agree nemo cogitur), and as eloquently stated by Professor Caruana in his renowned Notes on Civil Procedure, the 'jactitation suit' is no less than a violation of the principle

that no one may be compelled, against his will, to institute proceedings and reduce to an insignificant term the normal period for the institution of a lawsuit.

It is perhaps a necessary evil, that however obliges the court to apply the law strictly. Article 403 of the Code of Civil Procedure (Chapter 12 of the Laws of Malta) obliges the recipient of claim to act within a year of any jactitation, that is a claim which he seeks to silence. The Court correctly argued that this meant that the legislator in Malta wanted to drastically limit the timeframe in which such an action may be exercised (unlike some of its foreign counterparts, which grant no timeframe).

The Court noted that respondent had forwarded his claim in writing on 4 February 2017, and plaintiffs had only moved to institute the action twenty months later, and therefore outside the one-year period provided by law.

Hence – the Court concluded – since one of the core elements of the action was missing, there was no need to further examine the other elements. It rejected plaintiffs' action, and ordered them to pay the expenses.

STATAL PRIVILEGES?
BY DR GRAZIELLA CRICCHIOLA

Godfrey Ciangura vs Ministry of Home Affairs and National Security et
16 May 2019, 155/2012JRM
Originally published 27 May 2019
Civil Court, First Hall

So much has been said about the principle of 'equality of arms in justice', that one would be led to believe that from a procedural aspect, today it makes no difference whether on the other side, there is an individual, a commercial entity, or even the Government; the law applies to all, without difference or favour. In theory, this principle refutes any concept of a privileged litigant.

A look at our laws of procedure reveals a remarkable contradiction to this idealistic principle. Indeed, our Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) is jam-packed with privileges made principally to serve the government in court.

Some of these are rather inconsequential – such as the fact that cases involving the government shall be heard before those involving 'just' private parties. Others are more significant than just a simple matter of queuing; most notably, the privilege afforded to the government in article 460 of Chapter 12 of the Laws of Malta.

Under our law, one is not generally required to warn the other of its intentions to institute a lawsuit. Of course, there are ethical considerations to take account of (ideally, one does grant an advance notice), as well as sparse consequences which the proponent may suffer for not having at least written to respondent prior to filing an act (for example, a person issuing a warrant, such as a garnishee order, may be condemned to pay a penalty if it results that he had not called upon the defendant to pay the debt, as least fifteen days prior to filing the warrant). But generally, one can proceed without having to file a proper notice beforehand.

However, cases against the government are treated differently. In fact, article 460 of Chapter 12 of the Laws of Malta states that no judicial act commencing any proceedings may be filed, and no proceedings may be taken or instituted, and no warrant may be demanded, against the Government, or against any authority established by the Constitution, other than the Electoral Commission, or against any person holding a public office in his official capacity, except after the expiration of ten days from the service against the Government or such authority or person as aforesaid, of a judicial letter or of a protest in which the right claimed or the demand sought is clearly stated.

Naturally, there are some exceptions to this rule.

One can comprehend the purposes behind this law in what was described as its original purpose – to allow the possibility of out of court settlements prior to a case being instituted. One may also argue that this privilege is necessary for the efficient governance of a state. It is nevertheless a privilege that attracts a lot of criticism, and maybe justifiably so. As aptly stated by the Commission for the Holistic Reform of the Justice System in its White Paper and in its final report (issued on 30th November 2013): "this procedure puts the government in an advantageous position on the citizen, when the citizen does not have the same equality of arms against the government."

Be it as it may - simply put, a formal notice must be given to the government prior to suing it, and one cannot file a lawsuit until ten days pass from when that notice is received. Also, the law is clear that the warning must be in the proper form – through a judicial letter or a protest - and therefore, verbal warnings, emails, legal letters, etc, are not sufficient.

This is not a question of ethics or mere courtesy. This is a requirement which must be observed, on pain of nullity.

As a matter of fact, various litigants have fallen into this trap, and throughout history, a myriad of cases have been thrown out simply because the government had not been properly warned in terms of this law.

The judgement of the Civil Court, First Hall decided on the 16 March 2019 in the names of Godfrey Ciangura vs Ministry of Home Affairs and National Security et was yet another one of those cases.

In this particular case, plaintiff requested the Civil Court, First Hall to establish that the Aviation Security Committee (a governmental body) was abusive and unreasonable in its decision to reject his request for the renewal of his 'OMAS Pass'. The OMAS Pass is a special pass which enables an individual to enter into certain restricted places in the airport. It was argued that the Aviation Security Committee had granted or renewed the 'OMAS Pass' of other individuals which were in plaintiff's same situation.

Plaintiff admitted that he had not sent a judicial letter as he was required to do by law. He argued however that the Aviation Security Committee knew about the complaint, and its members were well informed of the situation, since throughout the years, a number of legal letters had been sent. To plaintiff, this was sufficient.

The Court disagreed.

Quoting authors and judgments which had dealt with the matter in the past, it stated that the law is very clear about how the government is to be informed of a citizen's complaint. The Court outlined that not every judicial intimation would be adequate and sufficient for this procedural privilege to subsist. In fact, the warning must be made through a judicial letter or a protest - and must be put forward in a clear and concise manner for the authority to be able to address this complaint.

The Court was completely correct; it abided perfectly by its duty to apply the law as it is, without delving into considerations of opinion on whether the law is fair or not. This might be hard to comprehend for some, but courts in their ordinary jurisdiction are duty bound to strictly utilise the legal tools given to them, and apply the law, whether they agree with it or not.

However, cases such as these serve to spark again the very same question that has been asked time and time again, but that has yet to be tested in a court of law: How does these statal privileges at law fit with the principle of equality of arms? How does these procedural burdens affect the right of access to justice? Why should the government be granted privileges that an ordinary man is not?

It is curious to understand how a constitutional court would deal with questions such as these; and perhaps, it is only a matter of not if, but of when.

The judgment has since been appealed.

"PEEPING TOMS" AND THE LAW
BY DR CARLOS BUGEJA

Alan Abdilla et vs Wayne McKay
23 May 2019, 556/2019LM
Originally published 3 June 2019
Civil Court, First Hall

The 17th century legend of the notorious Peeping Tom is known to many, especially in the locality of Coventry, UK. It speaks of an English noblewoman, Lady Godiva, who rode naked on the streets of Coventry, covered only by her hair, while commanding all persons to keep within doors and from their windows, on pain of death. One man – Tom – could not resist peeping, earning himself not only the ultimate punishment of death (some historians say that he was merely struck blind), but also an eternal moniker that would become part of popular culture and survive well into the twenty-first century.

Privacy and property have for long enjoyed a somewhat symbiotic relationship. Protection of property rights is even constitutionally recognised – both locally and abroad – as a significant safeguard against intrusions of the privacy interests of owners from acts by the government.

Maltese property law also provides for a myriad of rules against the intrusion of proprietary privacy by private actors, even where is no intention in any way comparable to that of infamous Tom. Most notably, the mere interference with someone's property or possession in the exercise of a pretended right is a crime, punishable with imprisonment for a term from one to three months.

Our law does not deal with modern priers with blinding – and certainly not death. But it does provide objective measures in favours of one's privacy, and this through a concept known to lawyers as 'Praedial Easements' or 'Servitudes'.

In reality, most legal easements take the character of building regulations. They regulate and limit the rights of a tenement over another. Where the owners of both tenements agree, there is not much to be said. But when they do not, one has to look into the provisions of the Civil Code to find the solution.

The case of Alan Abdilla et vs Wayne McKay (decided on 23 May 2019, 556/2019LM) specifically dealt with this issue. Respondent owned a property overlying that belonging to the applicants. He wanted to develop his property further and sought the Planning

Authority's approval to construct further floors and to open up new windows, balconies and other apertures, among them ones opening directly onto plaintiff's parapet, internal yard, and backyard.

Applicants requested that the Court orders an injunction by virtue of which respondent would be prohibited from proceeding with the construction work, at least until the matter was fully decided in a lawsuit to follow.

They lamented that respondent wanted to create further illegal servitudes on their property. They quoted two judgments of our courts, both stating that the owner of a land is considered to be the owner of the airspace above it (cuius est solum, eius est usque ad coelum et ad inferos, Latin for 'whoever's is the soil, it is theirs all the way to Heaven and all the way to Hell'). Their argument was that the opening of additional apertures overlooking and in turn invading their airspace would be prejudicial to their proprietary rights, as well as to their privacy.

Simply put, applicants' complaint was that the apertures planned would be such as to create an illegal 'right of prospect'. They referred to the general principal at law which prohibits the making of windows that may interfere with the neighbours' privacy. In other words, in a sense, applicants' argument was that the windows proposed would serve the owner of the overlying property to 'pry' directly onto the underlying property, and therefore, into applicants' airspace.

In essence, applicants' complaint referred to an alleged invasion of airspace in three parts of their property: the parapet, the backyard, and the internal yard.

There is no doubt that respondent had no interest in plaintiff's private lives, nor did he intend to pry into their backyard. If anything, he simply wanted to use his property to its full potential. But this hardly mattered, at least not for the purpose of the law.

The Parapet

In dealing with the parapet, the Court observed that article 426 of the Civil Code provided for a remarkable exception to the general rule; it allows for the opening a balcony, window, door or other opening in the external wall, provided that the stability of such wall is not affected thereby. The law is very clear that this right is only reserved for the external wall leading to the street, and not for any other wall. It considered therefore that applicants could not prohibit respondent from opening new apertures on the facade, if works were done in line with the planning permit and with utmost respect to the structural stability of the building.

The Backyard

Respondent's argument was that his property already had a right of prospect onto applicants' property and therefore, the development would not exacerbate the situation. The Court disagreed; it stated that even if respondent did enjoy an original praedial right over applicants' property, it did not mean that he can open additional windows onto applicants' airspace. If respondent insisted on opening apertures in the overlying development, he could simply change his plans, and withdraw his building in a way that his new apertures would be overlooking his own airspace, and not the applicants'.

The Internal Yard

Likewise, the Court stated that the opening of new apertures could not be allowed, as they would be creating additional and aggravated servitudes which could cause harm to applicants, including through an invasion of their privacy – which was protected at law. In conclusion, the court ordered the issuance of a prohibitory injunction against respondent, limitedly however to any part of the development proposed that was to affect the backyard and the internal yard, but not in respect of the parapet.

MAKE SURE THE PRICE IS RIGHT
BY DR EDRIC MICALLEF FIGALLO

C H Formosa Company Limited vs Direttur Generali (Taxxi Interni)
27 May 2019, 160/11VG
Originally published 10 June 2019
Administrative Review Tribunal

Buyers should beware when declaring the transfer price of immovable property, for their fiscal obligations are to be complied with for their own serenity.

On the 27 May 2019, the Administrative Review Tribunal, as presided by Magistrate Gabriella Vella, delivered its final judgement on application number 160/11VG in the names of C H Formosa Company Limited vs Direttur Ġenerali (Taxxi Interni).

This judgement related to issues involving the declared transfer value on a deed of sale dated 20th March 2008 for an immovable property. The crux of the case related to the real value or payment for the immovable property at issue, compared to the value declared by the parties in the deed of sale. The declared value amounted to €628,930.81.

Duty is due, by virtue of article 32 of the Duty on Documents and Transfers Act (Chapter 364 of the Laws of Malta), inter alia on every document whereby any immovable property or real right thereon is transferred to any person, and said duty is of €5 for every €100 'or part thereof of the amount or value of the consideration for the transfer of such thing or of the value of such thing, whichever is the higher'.

Legislation allows the Commissioner for Revenue to assess the real value or payment for the transfer concerned if he deems that the declared value is less than 85% thereof. This is what the Commissioner did in the given case; he proceeded towards an evaluation of the real value of the immovable property at €980,000.00 (as rounded up). The plaintiff in the case at hand, being the company buying the title on the immovable property, objected to the evaluation and the eventual demands by the Commissioner through the relevant procedures under the Duty on Documents and Transfers Act, Chapter 364 of the Laws of Malta. However, under the same procedure, the Commissioner refused to amend his assessment and reasserted his demands according to the aforesaid evaluation. This assessment gave an additional taxable amount of €351,000 and resulted in a demand for a duty of €17,550 plus an additional duty of the same amount (according to applicable law at the relevant moment in time for the case, which was subsequently amended in liberal fashion), for a total of €35,100.

The plaintiff then appealed to the Tribunal and raised pleas on the merits of the case which, in light of the judgement, are of substantial interest. The plaintiff had contended that the transfer price declared was the actual value of the immovable property, alleging that the evaluation by the Commissioner was a result of the expert appointed for such evaluation evaluating the property as substantially renovated following the transfer. However, the expert denied this under oath and was believed by the Tribunal.

Further inconsistency in the evidence tendered was in relation to the plaintiff's allegation that the sale was subject to approval by the bank, who was a creditor of the sellers, so that the latter may waiver guarantees, hypothecs and privileges in its favour. This essentially backfired and contrasted with the testimony tendered by the plaintiff. Bank officers testified that the bank had to receive an amount in excess of a million euro to accept and issue said waiver. This was above the declared value of the transfer. Basing itself on the plaintiff's own allegation and the evidence tendered, the Tribunal was convinced that the transfer price in the deed of sale of the immovable property was not declared in full with the clear and evident aim of not paying dues in full

Reinforcing its conviction, the Tribunal referred to the testimony of the director of the company appearing as plaintiff and that of its legal counsel. In the deed of sale as filed in the acts of the proceedings by the Commissioner, besides the declared value for the transfer of the title on the immovable property, the parties had also agreed to the sale of the movable property (furniture et cetera) found therein for the price of €528,343.34.

The Tribunal asserted that this was an absolutely senseless difference of €64,057.77 between the declared price of the immovable and movable properties, particularly considering that the immovable property was in a state of absolute abandonment and extensive refurbishment was required as testified by witnesses for the plaintiff.

The Tribunal further concluded that it is impossible for the Tribunal to believe, and therefore be convinced, that the plaintiff had acquired the movable property for a value in excess of €500,000. It declared that is more probable and plausible that the plaintiff had paid the sum of €1,193,803.85 for the immovable property, being the total declared amounts for the immovable and movable properties on the deed of sale.

The Tribunal held this to be the actual value paid by the plaintiff.

The law provides that duty is due on the higher between the price paid and the market price of the immovable property, thus the Tribunal declared €1,193,803.85 as being the value on which duty was to be calculated. Being empowered by law to increase the dues towards the Commissioner as contested by the plaintiff (art. 58(4), Chapter 364 of the Laws of Malta), it declared in its judgement that it rejected all pleas by the plaintiff, and

rather than confirming the dues assessed by the Commissioner, increased said dues by €21,390, leading such dues to amount to €56,490 rather than the €35,100 which had been claimed by the Commissioner.

This judgment is evident of one irrefutable fact: buyers should beware when dealing with fiscal authorities, especially if buying immovable property and not declaring the real value thereof in the deed of sale. Attempting one's chances at law may be successful or even lead to a worse situation than one in which the fiscal authorities would have had you in.
As far as the State is concerned, buyers beware and pay up.

This judgment has been appealed from.

THE LION'S SHARE OF THE BLAME
BY DR CARLOS BUGEJA

Francine Cini vs Robert Galea
3 June 2019, 302/17LM
Originally published 17 June 2019
Civil Court, First Hall

The facts of the case of Francine Cini vs Robert Galea (decided on 3 June 2019 – 302/2017LM) were rather straightforward, if horrifically graphic.

Plaintiff, a nurse by profession, was at respondent's property, which held a variety of exotic animals, among which – a lion. She reached her hand into a lion's cage, in an attempt to stroke it. True to its primal instincts, the big cat grabbed the lady's hand in its powerful jaws, and mauled onto arm, causing her substantial injuries.

She sued the lion's owner, claiming that it was him who encouraged her to stroke the lion and therefore, it was him who was to be blamed for the accident. Presumably, she was acting in terms of article 1040 of the Civil Code, which states that the owner of an animal, or any person using an animal during such time as such person is using it, shall be liable for any damage caused by it, whether the animal was under his charge or had strayed or escaped.

Unsurprisingly, the defence brought forward by respondent was that the injury suffered by plaintiff was self-inflicted; in other words, he pleaded to the rule known by the Latin maxim 'volenti non fit iniuria'.

Under our law, fault is a tricky concept. It is generally stated (in article 1031 of the Civil Code) that every person shall be liable for the damage which occurs through his fault. It is further stated in article 1032 (1) of the Civil Code, that a person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a bonus paterfamilias (a standard of care analogous to that of 'the reasonable man').

In tort (personal injury) cases, fault is often the principal contention; parties often entertain contradicting versions as to who is to be blamed for the event causing the injuries. But sometimes, one finds himself asking deeper questions, such as: What if the event is not respondent's fault? What if it was the injured person's fault himself? What if the injured person appearing as plaintiff willingly and knowingly assumed predictable risks inherent to the activity in which he was participating at the time of his injury?

Simply put, the doctrine of volenti non fit iniuria states that if someone voluntarily places himself in a position where he knows that some degree of harm might result, he may not subsequently bring an action in tort against a third party. It exonerates that person who would otherwise be deemed to be responsible, for the fact that the victim would have knowingly assumed a certain level of risk for that act that caused the injury.

This is not a new concept; indeed, it can be traced back to ancient times, in the maxim famously formulated by the great Roman jurist, Ulpian: 'nulla iniuria est, quæ in volentem fiat' (meaning: 'no injustice is done to someone who wants that thing done').

This defence is somewhat similar to another defence often brought forward in tort cases, that of 'contributory negligence'. This is provided for in article 1051 of the Civil Code, which states that if the party injured has by his imprudence, negligence or want of attention contributed or given occasion to the damage, the court, in assessing the amount of damages payable to him, shall determine, in its discretion, the proportion in which he has so contributed or given occasion to the damage which he has suffered, and the amount of damages payable to him by such other persons as may have maliciously or involuntarily contributed to such damage, shall be reduced accordingly.

The resemblance is apparent, but nevertheless, the legal difference is noteworthy. When one pleads 'contributory negligence', it means that one is stating that the claimant contributed to the damage suffered thereby and that the damages awarded are to be reduced in proportion to that fault, usually manifested in a percentage number which is cut from the compensation awarded (in proportion to the apportioned blame).

The defence of 'volenti non fit iniuria' is different; it is a 'complete' defence, in the sense that it seeks to totally exculpate defendant from any liability whatsoever.

The Court considered in this case that there was no doubt that plaintiff was aware of the possible consequences of putting one's hand into a lion's cage. She knew what could (or rather, would) happen, yet she decided to reach into the cage nevertheless, voluntarily assuming certain risks inherent to that same act. It found that it seldom mattered whether respondent had encouraged her to do so, as the lion's reaction was to be expected. The lion was confined into a cage for a reason, and it was rather obvious that the lion would not react graciously to an unfamiliar intruder. As the saying goes – true, the lion is a mighty, noble animal, but it is an animal nevertheless!

The Court found that plaintiff had no managed to prove that respondent had in any way acted in an illicit manner. The lion was properly registered and well maintained. There was nothing to indicate that respondent had in any way forced plaintiff to reach into the cage, and ultimately, plaintiff's behaviour – albeit foolish – was hers and hers only. She had acted with a profuse lack of prudence, so much that she had voluntarily placed herself into unnecessary risk and danger.

Therefore, if there was anyone to blame, it was the plaintiff.

In conclusion, the Court moved to reject plaintiff's request for damages, and also ordered her to pay the costs of the case.

CAPACITY TO ACT
BY DR MARY ROSE MICALLEF

Mario Bugeja vs Bernardette Brincat et
5 June 2019, 301/2012AF
Originally published 24 June 2019
Civil Court, First Hall

A contract creates binding chords between its contracting masters. The general presumption is that whatever is agreed to, is law to its subject parties, and breach of contract triggers liability to the party in default. Nevertheless, beyond the agreed substance, contract has its own founding principles that would always prevail over above the said agreed substance.

There exist four main elements that configure the very core of an agreement. The substance of the contract relies on these elements for their existence, for neither can live while the other survives. Resultantly, the binding chords would be permanently breached of one of the following essential condition is found to be absent or lacking.

Article 966 of the Civil Code (Chapter 16 of the Laws of Malta) provides the essential conditions to the validity of the contract, that are: (a) the capacity of the parties to contract; (b) the consent of the party who binds himself; (c) a certain thing which constitutes the subject-matter of the contract; and (d) a lawful consideration.

This discussion shall delve into the first essential condition – capacity, for without it, there will be no need to find the other elements. If someone is incapable to stand in contract, the contract fails right away. And indeed, 'capacity in contract' was the essence of the judgment Mario Bugeja vs Bernardette Brincat et, decided by the Civil Hall, First Hall on 5 June 2019.

Simply put, capacity entails the ability to independently (mentally) take care of one's own affairs.

This case related to a dispute between siblings in connection with a donation of an immovable property that had been transferred to the defendant by her parents way back in 2009. As it happens, plaintiff contended that a half undivided share of the said property, which share represented the portion transferred by his mother to defendant, was null and void. He alleged that his mother had lacked mental capacity at the time the said transfer occurred, and therefore she was incapable of contracting the said donation.

The defendant pleaded that her mother had been sane and capable, owing to the fact that subsequent to the said transfer she had performed other civil acts – acts that plaintiff opted not to impinge.

Defendant also pleaded nullity of proceedings, since plaintiff opted to call their mother into suit personally, whilst at the same time claiming that she lacked mental capacity. This follows the principle that persons who can be sued or sue must always have the ability to take care of their own affairs. Litigants must have contractual capacity, otherwise, they cannot sue or be sued personally.

To defendant, this was a rather contradictory move, since while plaintiff was stating that his mother was not mentally firm, he was suing her personally as one who can stand in judgment, and therefore as a person who did not suffer from mental infirmity. This plea was eventually resolved because the parties' mother was interdicted by the Court on same date of filing, and a curator was appointed in her stead.

In determining the parent's contractual capacity, the Court referred to the applicable provisions of the Civil Code. These essentially provide that any contract that is entered into by a person who lacks the use of reason is null and shall be subject to rescission. Persons who are not capable of understanding owing to some mental defect or who are unable to manifestly express their will are incapable of making donations – such persons need not necessarily be formally interdicted.

The Court referred to a previously established judgment, which had listed the fundamental principles that had to be considered in cases that concern the impinging of contracts on the basis of mental incapacities.

These principles state that capacity is always presumed, and incapacity is an exception hence the legal presumptions favours capacity over incapacity. Nullifying a contract on grounds of incapacity is challenging as the law presumes that everyone has the capacity to contract unless incapacity is unequivocally proven.

The burden of proof shall be borne by the party who alleges the exception of incapacity and that incapacity must essentially exist at the time of the contract.

Capacity law does not entail that one has to be perfectly and rigorously sane and knowing – if that were the case, many a person would fail the test. What mattered was that at the time of contract, one possesses the ability to understand the consequences of one's own actions.

Furthermore, for insanity to be substantially proven, unequivocal and precise facts must exist, in the sense that any doubts would favour sanity in accordance with the above-mentioned presumption. One may daresay at our jurisprudence requires conclusive proof of insanity, something that goes beyond the balance of probability principle in civil matters.

The Court also considered that the objective manifestation such as signature and marks, do not guarantee the sanity and capacity of their signatory party.
One cannot simply regard the external features of consent, that is the markings of the signatory party since capacity is essentially connected with the inner psychological willingness of the party. Capacity, that is, the awareness of one's wishes, and their corresponding consequences are what drives the willingness of a contracting party.

Therefore, if a party cannot independently take care of his or her own affairs, his or her will can never be validly crystallised. Persons suffering from such incapacities would not be able to contract since they lack the critical understanding of their own actions.

The Court found that the mother had been diagnosed with 'severe deficits in cognitive function' – years before the contract of donation. Through the trespass of time, this condition worsened to the extent that medical practitioners had suggested the relocation of the patient to a closed ward.

The Court disagreed with the defendant's submissions, who stated that there was no way that her mother was mentally incapable - she was simply suffering from mere forgetfulness. It held that from the gathered evidence one could clearly see that such a person was suffering from a ruthless mental condition that had robbed her the capacity to contract. The condition had rendered such patient incapable to the extent that she no longer possessed the necessary use of reason required by law, to be able to contract the donation in question.

Consequently, the Court annulled the transfer of the donated half undivided share and rescinded the donation in part.

MEETING OF THE MINDS
BY DR CARLOS BUGEJA

Maria Speranza Buttigieg et vs Cutajar JS (Holdings Limited)
25 June 2019, 269/2006/1
Originally published 1 July 2019
Court of Appeal

Contract has existed for a long time; certainly, since the times of Ancient Rome, although at that time, it was completely differently formulated. It was long after that contract theory descended into an analysis of the component parts of contract, that of an offer and an acceptance – what is often known as the meeting of the minds (consensus ad idem).

Contract can take many forms; of course, there is the obvious idea of formal contracts like 'sale', 'lease', or 'donation'. Then, there are less obvious contracts, like the subscription to a music streaming service, or the entering into a private car park for a fee.

Indeed, contract is everywhere.

Whichever the case, contract has always been driven by one central and fundamental idea: to confer power to the will of two or more parties into a contractual relationship and consolidate it into a legally binding framework of rights and obligations enforceable in a court of law.

Indeed, the term itself is derived from the Latin term, 'contra here', which means 'to draw together, combine, make an agreement'.

The sovereignty of will in contract has been described as an integral part of personal liberty. This is why voluntariness in contract is key – a concept omnipresent in all systems of contract, starting from ancient Roman Law, to British philosophy, the Code Napoléon, and the Maltese Civil Code of today.

It will come as no surprise therefore that contracts signed under duress, violence and fraud can be successfully challenged in court.

The case in the names of Maria Speranza Buttigieg et vs Cutajar JS (Holdings Limited) (decided on 25 June 2019 by the Court of Appeal) was an attempt by plaintiff to seek the invalidation of a contract of sale entered into by an individual she had subsequently

inherited, under the allegation that the seller had signed the contract under error, fraud, and/or moral violence perpetrated by respondent company.

In a thirty-three-page judgment dated 11 July 2013, the Civil Court, First Hall stated that it was not convinced that the seller's consent was vitiated by error or fraud, but it did find that the contract was afflicted by moral violence. Consequently, it ordered its rescission.

Respondent company was not too happy with this pronouncement, and appealed to the Court of Appeal, seeking the revocation and the annulment of the judgment of the first court.

In its judgment of 25 June 2019, the Court of Appeal started by examining in detail the principle of 'moral violence' as a vice of consent.

It stated that moral violence can indeed lead to the rescission of a contract, so long as it is grave and unjust, and naturally – determining in the giving of consent.

Not every threat is sufficient; it has to be such that it triggers in what would be described as 'a reasonable person' the fear that harm will be caused to his person or his property or to a close relative (the spouse, or of a descendant or an ascendant). The law also specifies that mere reverential fear towards any one of the parents or other ascendants or towards one's spouse shall not be sufficient to invalidate a contract, if no violence has been used.

Moreover, not every state of doubt or mere anxiety in the person giving consent will lead to an invalid contract. In fact, the party alleging violence must show that committing to the obligation in contract was the only way for him to get away from the threat of violence to be perpetrated onto him.

The Court of Appeal considered that the purchaser had certainly devised a meticulous plan in order to acquire the seller's property. Indeed, it could be said that the seller had not received a fair deal, or rather, a full equivalent of what he was granting (known in the legal world as 'laesio'), but that did not mean that there was in any way violent behaviour.

The contract was signed and published in the seller's home, and in an environment that did not indicate any fear or violence. Therefore – the Court of Appeal considered – it could not agree with the first court that the contract was afflicted by violence.

That might have been the end for the plaintiff's efforts to seek the rescission of the contract, had there not been another plot twist, worthy of a Stephen King thriller.

Whereas the Court of Appeal could not establish violence, it stated that it could conclude that the seller's consent was indeed vitiated – not by violence – but by fraud.

Simply put, fraud is the intention to deceive. Fraud is not presumed and must be proven.

Our law states in article 981 of the Civil Code that fraud shall be a cause of nullity of the agreement when the artifices practised by one of the parties were such that without them the other party would not have contracted. Puffery is not fraud, unless it is accompanied by deceitful conduct; therefore, one generally cannot claim fraud just because the 'pastizzi' bought are not the 'best on the island' as they would have been superlatively advertised by their vendor.

There must be an element of seriousness, gravity and deceit, without which one would not have contracted.

In this case, the Court of Appeal was satisfied that the events that led to the publication of the contract of sale were carefully manoeuvred by respondent company so that the seller would be tricked to transfer his property. It noted a series of acts that demonstrated a precise plot to deceive the seller. The plan devised was careful, aggressive, and tenacious. According to the Court of Appeal, this did not constitute violence, but it did equal to fraud.

Hence, the seller's consent was indeed vitiated, not through violence, as decided by the Civil Court, First Hall, but through fraud. Therefore, the judgment of the first court could be confirmed, albeit for different reasons.

As a result, it confirmed the judgment of the Civil Court, First Hall, and ordered that the contract be rescinded.

JUSTICE DELAYED – JUSTICE DENIED?
BY DR RENÈ DARMANIN

Antonio Gatt vs Avukat Generali
27 June 2019, 91/2018RGM
Originally published 8 July 2019
Civil Court, First Hall (Constitutional Jurisdiction)

Back in the 19th century, former British Statesman and Prime Minister William Gladstone famously proclaimed that 'justice delayed is justice denied.' This was later on reiterated by Martin Luther King Jr when in his letter from the HM Prison Birmingham wrote that: 'We must come to see with the distinguished jurist of yesterday that "justice too long delayed is justice denied". We have waited for more than three hundred and forty years for our God-given and constitutional rights'.

Notable recognitions of delays in the justice system often recognise the standpoint of the accused or the victim, and advise that for a person looking for justice, the time taken for the determination of their issue is critical to the justice experience. In essence, these acknowledgements are uniform with more studies which show that the length of proceedings is a crucial factor in determining whether or not parties to a suit consider that the justice system is just and fair.

Historically, criminal trials from the seventeenth to the early twentieth centuries were very distinct from those of today. The accused was granted minimal rights – legal representatives rarely attended proceedings whilst prosecutors and judges used extensive discretion in their exposition of the law. Simply put, the rights of the accused were not a priority - but courts were efficient.

Change was significantly stimulated in the nineteenth century with several legislative implementations seeking to improve the rights of the accused. The rights of the accused during a criminal trial were subsequently crystallized with the enactment of the European Convention of Human Rights.

Article 6 of said Convention pronounces guarantees, which are diverse but emanate from one fundamental right – The right for each and every individual to be afforded a fair hearing.

One such guarantee is the administration of justice without delays.

Nevertheless, even though various conventions, regulations and international legislative instruments oblige our courts to deal with cases in a reasonable and timely manner,

there are no hard and fast rules indicating what is to be reckoned as reasonable time. The European Court of Human Rights constantly reiterates that in order to decide whether the length of proceedings is reasonable or not, the Courts should look into the facts of the case, the conduct of the applicant as well as into the complexity of each and every case.

This was the matter at hand in the case of Antonio Gatt vs Avukat Ġenerali decided by the Civil Court, First Hall in its Constitutional Jurisdiction on 27 June 2019 (91/2018 RGM).

To put things into context, in this particular case, claimant was arraigned before the Court of Magistrates in 2001. After twelve sittings, the Prosecution declared that all evidence in favour and against the accused was compiled and that there was no further evidence to produce. Subsequently, the Attorney General issued a bill of indictment ordering Mr Gatt to be tried before the Criminal Court.

Later on, the Attorney General insisted that a certain Simon Xuereb, who was also undergoing separate criminal proceedings related to the commission of the crimes with which the claimant was being accused of and who had already testified in the criminal proceedings instituted against claimant, had to testify again once his proceedings were decided once and for all.

Considering that, according to the prosecution Mr Gatt's criminal proceedings heavily depended on Xuereb's testimony, the Criminal Court acceded to said request. At this point, claimant had no other option other than to patiently wait for the criminal proceedings against Xuereb to take their course whilst his proceedings were stalled. It must be pointed out that during this period all of claimant's assets were frozen and he had to adhere to strict bail conditions.

In its accurate observations, the Court noted that the proceedings against Simon Xuereb were concluded back in 2009, and the Prosecution was obliged to inform the Criminal Court with same. Yet, the Prosecution never did, and as a result, in 2014 the proceedings instituted against claimant were still stalled.

On 11 July 2018, claimant was not found guilty of any of the charges.

In its judgment, whilst referring to several other judgments of the European Convention of Human Rights, the Court concluded that the length of said criminal proceedings was not reasonable and this due to unnecessary delays caused by the Prosecution .The Court then decided that there was a breach of claimants' right of fair hearing within reasonable time and ordered the Attorney General to pay claimant the sum of €10,000 as a form of non-pecuniary compensation. It also ordered the Prosecution to pay the costs of the case.

THE QUANDARY OF DEPOSIT BY DR CARLOS BUGEJA

Joseph Zammit noe vs Tarcisio Galea Properties Limited
8 July 2019/669/2017LM
Originally published 15 July 2019
Civil Court, First Hall

Law is not a stranger to popular misconceptions, or myths that in the eyes of many become facts.

This is to be expected; law is a complex artefact, the logic of which may not be apparent to the untrained mind. Indeed, as one US Chief Justice once put it: 'The beauty of law is that it is the product of the ages—wrapped in the opinion of the moment. The law takes from Aristotle, Coke, and Aquinas and is applied to the disorder and unruliness of mankind - just as an artist borrows from Michelangelo, Botticelli, and Van Gogh'.

One can hardly speak of misconceptions at Maltese Law without bringing up the concept of 'deposit' in promise of sale agreements (konvenji). It is an institute riddled with mistaken ideas as to what the law actually states.

Parties negotiating a sale of a property may agree on the payment of a deposit to be attributed on the final deed as part of the purchase price. It has become norm for the deposit to be in a sum equivalent to ten percent of the purchase price.

Contrary to popular belief, the law does not impose the payment of deposit; so there may be a deposit of ninety-five percent, or no deposit at all. The law grants the parties a relatively free hand in this respect, and it is up to the parties to decide. The law will then respect the will expressed by the parties, in homage to the principle of pacta sunt servanda (a Latin brocard roughly meaning: 'what is agreed to by the parties is the law between them').

Most promise of sale agreements speak about 'deposit', but a few others have a different term shrouded in mystery, and once again, in a myriad of misconceptions – that known as 'earnest' (in Maltese: 'kapparra').

'Deposit' and 'kapparra' are not the same thing; when one pays (or receives) a 'deposit', he is still obliged to appear for the final deed of sale. When a sum is paid in earnest, neither of the parties is legally bound to appear at the final contract of sale, but the defaulting party will be liable to pay a 'penalty'.

A question which often arises is: what happens to the deposit if the promise of sale expires and for some reason or another, the final deed of sale is not published?

This was the question in the judgment of the Civil Court, First Hall in the names of Zammit Joseph noe vs Tarcisio Galea Properties Limited (Mr Justice L. Mintoff, 8 July 2019).

The popular understanding (and a myth, one should say) is that the party who is not at fault is entitled to retain the deposit, by right. This is an incorrect presumption, shared by many, even, sadly, in the legal profession. Perhaps one is not to be faulted for thinking this way; it is indeed logical that the party in breach of the promise of sale is penalised, one way or another.

Fact however is that it is not that simple.

The law (article 1357 (2) of the Civil Code, Chapter 16 of the Laws of Malta) states that on the expiration of the term agreed to in the promise of sale, its effects expire, unless the promise calls upon the promisor, by means of a judicial intimation filed before the expiration of the period applicable as aforesaid, to carry out the same, and unless, in the event that the promisor fails to do so, the demand by sworn application for the carrying out of the promise is filed within thirty days from the expiration of the period aforesaid.

This is the only solution available for a party in a promise of sale against the defaulting party - for presently, there is no action at law providing for the retention of deposit. Therefore, the party at the wrong end of the situation cannot opt to retain the deposit (or even request the court to authorise him to retain the deposit), but he is forced to request the fulfilment of the promise of sale, and only that.

Strange as it may sound – this is the law.

The law provides for a one two-part solution; and unless that path is taken, the promise of sale will cease to have effect, with no ifs and buts. With no valid promise of sale, one cannot request to retain the deposit, because there would be no valid promise of sale mentioning any deposit.

Really and truly therefore, there is really no law that allows a party to just retain the deposit, no matter how creative one is in drafting the deposit clause in the promise of sale agreement. If one fails to follow to the letter the procedure indicated in article 1357 (2) within the relative timeframes, the promise of sale will simply cease to exist, and everything within will no longer be enforceable, including the deposit clause.

This question is not short of legal controversy. But time and time again, our Court of Appeal has confirmed this legal oddity, most notably, in the judgment of Gloria Pont vs JCL Construction Limited (delivered on 1 February 2008), and other judgments that followed.

The question of course is: if there is next to no legal solution for a party to retain the deposit – what is really the point of the payment of deposit? That is indeed the big quandary.

In the judgment of Zammit Joseph noe vs Tarcisio Galea Properties Limited, the Court considered that neither party to the promise of sale had proceeded in terms of article 1357 (2), which meant one thing: the promise of sale had expired. As a result, its effects would have completely evaporated into nothing, including any conditions relating to the payment of the deposit. Hence, the parties had to revert to the status quo ante, that is to their original position prior to the existence of the promise of sale.

As a result, the respondent company was ordered to return to plaintiff the sum of €29,117.17 originally paid as deposit.

An appeal has been filed.

CONSTITUTIONAL REMEDIES - ARE THEY SO?
BY DR EDRIC MICALLEF FIGALLO

Louis Apap Bologna vs Calcedonio Ciantar et
12 July 2019, 47/2017/1
Originally published 22 July 2019
Constitutional Court

On the 12th of July 2019, the Constitutional Court delivered a judgement on appeal in the case of Louis Apap Bologna vs Calcedonio Ciantar, l-Awtorità tad-Djar u l-Avukat Ġenerali (47/2017/1), a case which engaged the appellate function of the Constitutional Court in relation to fundamental rights as protected by the Constitution, in accordance with article 46(4) of the same.

This case tackles the fundamental rights of immovable property owners in relation to what is imposed upon them by the legislator and the executive, an imposition which ends up limiting their enjoyment and use of their property, ostensibly justified by the general interest of the community. The relevant private property had been requisitioned by the State, and was subsequently leased out to a third party (in the instant case, one of the defendants) on social welfare grounds, with such third party paying rent to the Housing Authority.

This case is a result of a string of fundamental rights cases between the same parties, starting off from case 57/2009 heard by the First Hall of the Civil Court, itself appealed to the Constitutional Court and which at all levels had in effect found a violation of the plaintiff's fundamental rights due to the requisitioning and occupation of the immovable property concerned. The property owner had eventually taken the case to the European Court of Human Rights which set the damages due for said violations at a higher level than the Maltese courts, however the requisition and the occupation continued beyond such judgements.

The property owner eventually filed this constitutional case (47/2017) asking the Court: (1) to declare that the continued occupation as requisitioned and occupied by the occupant, without a due compensation reflecting market values, violated his fundamental rights as protected by the European Convention of Human Rights; (2) to condemn the defendants to return to him the property as free and vacant after having annulled all relevant requisition orders; (3) to liquidate any compensation due for said violations; and (4) to provide any further adequate remedy to make good for said violations.

While our courts found that said continued occupation was a violation of the property rights of the plaintiff, what is of greater interest in this case is that it dealt more specifically with the remedies afforded for said violation. This is where the First Hall of the Civil Court and the Constitutional Court eventually diverged.

The appeal to the Constitutional Court was filed by the two public defendants as the Housing Authority and the Attorney General contested the violation of the plaintiff's fundamental rights as confirmed by the First Hall of the Civil Court on first instance and the remedies afforded to him. The Constitutional Court confirmed such a violation on appeal, but reformed the remedies afforded by the first court.

The first court had annulled all requisition orders and given the Housing Authority a maximum of four years in which to provide adequate alternative accommodation to the occupant, upon which or failing which all defendants (including the occupant) had to return the property to the owner with vacant possession. The first court had also fixed the payment of €350 per month (to increase by 5% per year, if applicable) by the Housing Authority to the property owner as compensation for the continued occupation, while the occupant had to keep paying rent to the Housing Authority at the rate which had been allowed to him by the latter. The first court also liquidated damages for the violation of the fundamental rights of the plaintiff.

Four years seem like quite a generous period, especially considering that the amount of compensation appears to be relatively low considering the levels of rent prices. However, the Constitutional Court reformed the judgement of the First Hall of the Civil Court by cancelling the order towards the occupant to release the property with vacant possession according to the aforesaid terms and cancelling the order towards the Housing Authority to find adequate alternative accommodation for the occupant within a maximum period of four years. It also cancelled the order to pay compensation as fixed by the first court for each month of continued occupation. The Constitutional Court confirmed the rest of the judgement by the first court, but what are the results of this?

The end result for this application alone (47/2017) is that the property owner was declared as having his fundamental rights violated and for which compensation was to amount to a total of €7,875. He was to bear one third of the costs of the appeal, which he did not file. Did the Constitutional Court state or decide that the property owner could not eventually evict the occupant or otherwise obtain the free and vacant possession of his property?

It did not.

In line with the consistent pronouncements of our Constitutional Court, it stated that it is not adequate for it to order such eviction but declared that the laws involving the requisition and the lease by the occupant no longer retain legal effect, and that these can no longer be relied upon by anyone, notwithstanding any initial legitimacy, as they are inconsistent with the fundamental rights provisions applicable through the European Convention Act and the Constitution. So what does it mean?

Plaintiff has to bring forward yet another case in front of an ordinary judicial body (not one having constitutional jurisdiction) in order for the eviction to be ordered, but this seems like an unnecessary procedural formality which could take years.

Does the Constitutional Court unnecessarily prolong the delivery of a proper and effective remedy for victims of fundamental rights violations by the State, besides making it more onerous? The Constitution and the European Convention Act would clearly indicate that the powers are there for the courts to use, with words as clear as can be. Does the legal order require that one avoids using one's judicial powers to deliver justice expeditiously and instead have it done by the ordinary judicial bodies, when it is not an ordinary matter? Should the legislator intervene?

BESTOWING WHAT'S NOT MINE BY DR CARLOS BUGEJA

Helen Vella et vs Mario Vella
12 July 2019, 526/2012/1
Originally published 29 July 2019
Court of Appeal

Wills are not known to make an exciting reading. This is to be expected; they exist to rigorously portray the testator's last will and testament, and therefore, there is little room for creative input. Indeed, all around the world, almost all wills contain standard legal terminology that rarely will capture one's eye.

Well, except perhaps for the last will and testament of Charles Vance Millar (1853-1926), a cynical and rather haughty Ontario lawyer (also a bachelor) with a penchant for practical jokes, whose will has become part of Canadian legal history, for it was a will the like of which had never been seen. He famously opened his last will and testament with: 'This Will is necessarily uncommon and capricious because I have no dependents or near relations and no duty rests upon me to leave any property at my death and what I do leave is proof of my folly in gathering and retaining more than I required in my lifetime'.

His testamentary dispositions were all evident of Millar's odd sense of humour and aversion to human greed. He left his summer home in Jamaica to three lawyers Millar knew despised each other. He gave stocks in a brewery to religious leaders known for their prohibitionist views, and likewise left shares of an Ontario Jockey Club to three men who fervidly opposed horse racing, provided that they became members of the club.

But it was perhaps his last clause that elevated this famous will into something not short of legal legend. He chose to bequeath most of his assets to the woman who, in the ten years following his death, would have given birth to the largest number of children.

During his lifetime, Millar had been a wealthy man, and unsurprisingly, this peculiar testamentary disposition gave birth to a true and proper 'sporting event', what is known in Ontario as the 'Great Stork Derby'. Eleven families literally competed to produce the most babies and win the 'contest'. The will survived years of litigation, and a decade later, four mothers would have given birth to nine babies each, and would end up sharing the final prize, a dazzling $100,000 each (what would roughly be €1,600,000 of today).

Maltese Law of Succession has seldom enjoyed such a colourful history. This notwithstanding, we do have one law the nature of which is rather odd and

controversial. This is the institute of law known as the legato di cosa altrui (translated to: the legacy of a thing belonging to someone else), a concept also present under Italian Law.

This institute at law was the central theme in the judgment given by the Court of Appeal on 12 July 2019, in the names of Helen Vella et vs Mario Vella.

Logic would say that one only could bequeath what is his; it would obviously be outlandish to think that the good old Joe Borg could bequeath the Auberge de Castille to his surviving nephew. But under our law, that could actually be done – obviously subject to some conditions.

There are two manners by which a testator may dispose of his property causa mortis (upon his death): firstly, by nominating heirs, who would inherit all of the testator's assets, and secondly, through legacies by singular title; where the testator would choose to leave a particular thing to a particular person who may not be necessarily an heir.

At law, once after the testator's death, the heirs accept the inheritance, they are responsible to actuate the legacies made in favour of third parties and deliver them according to the testator's wishes. This is usually the main catch with becoming an heir; once one accepts the inheritance, he is made responsible for all 'debts' and 'liabilities' of the inheritance, including to deliver legacies in favour of third parties.

The general rule is that where the thing forming the subject of a legacy belongs to a person other than the testator, such legacy shall be null.

But the law provides for an exception: article 696 (1) of the Civil Code (Chapter 16 of the Laws of Malta) states that should the testator declare in the will that he knew that the thing was not his property, but the property of others, then the will is perfectly valid. In such a case, the heir (who at law is responsible to deliver the legacy and give it those who are entitled to receive it according to the will) may elect either to acquire the thing bequeathed in order to make delivery thereof to the legatee, or to pay to such legatee the fair value thereof.

So theoretically speaking, a testator is indeed permitted by law to bequeath the Auberge de Castille in his will, as long as he declares in the will that he knows that it is not his. Then, it would the heirs' job to either acquire it and deliver it to the legatee or pay a fair price therefor. If the heirs then deem such an undertaking to be too onerous, they could just simply renounce to the inheritance and be released from any obligation connected with it.

In Henry Vella et vs Mario Vella, it transpired that the testatrix had left respondent the use and usufruct of a property she admitted knowing that it was not entirely hers (she owned only a sixth undivided share – which was also left to respondent). Plaintiffs sought to challenge that right of use and usufruct granted to respondent on the property as a whole. By means of a judgment of 24 April 2014, the Civil Court, First Hall rejected plaintiff's demands.

Plaintiffs appealed.

The point in issue was whether the legato di cosa altrui mentioned in the will could affect that part of the property belonging to third parties – in this case, the plaintiffs, who had also benefitted from the very same will.

The Court of Appeal confirmed that for a legato di cosa altrui to be valid at law, the declaration mentioned in article 696 (1) of the Civil Code is a must. Without it, the legacy would be null. The Court continued that it is then the heir's responsibility to acquire the object in merit, or else pay its value to the legatee. Where the object is already in the heirs' possession, then they would no longer be able to opt for the option to pay its value – and must therefore deliver the object according to the testatrix's last wishes.

The Court of Appeal considered that in this particular case, the deceased's wishes were fully valid at law, and once plaintiffs decided to acknowledge her will and accept the legacies they themselves had received, then they were bound by all other obligations in the same will, including to grant respondent the use and usufruct of the property in question.

In conclusion, the Court confirmed the judgment of the Civil Court, First Hall and rejected the appeal.

THE MORAL DAMAGES DEFICIENCY BY DR CARLOS BUGEJA

Lawrence Grech et vs Tabib Principali tal-Gvern (Saħħa Pubblika) et
12 July 2019, 78/2013/2
Originally published 5 August 2019
Court of Appeal

The judgment of the Constitutional Court in the names of Lawrence Grech et vs Tabib Principali tal-Gvern (Saħħa Pubblika) et, delivered on 12 July 2019 is a significant one, both in its content and its consequences. Its implications will possibly challenge the traditional understanding of our law of compensation for damages, right at its very core.

Our law of damages is based on a decades-old premise; that the damages recovered should put the victim in the state he was prior to the act causing damages, known by the Latin maxim: restitutio in integrum. This is the foundation of our tort law; no one can recover less than he would have lost, and no one can recover more.

One can indeed trace other early (pre-1962) ideas which depart from this basic principle, but for more than fifty-five years, it was understood that it mattered not what was the conduct leading to the damages; the exercise was purely arithmetical, and any damage claimed (however it may have been caused) must be quantified purely in terms of pecuniary loss. This means that traditionally, a victim of an involuntary traffic accident and a victim of a violent punch who suffered the same amount of damages would be compensated equally. We have hundreds of court judgments which confirm this principle.

Unsurprisingly, moral and punitive (or exemplary) damages could hardly fit into such a rigid framework, and our law has traditionally (with some exceptions) largely stayed away from these concepts.

In time, this idea started to evolve, most recently, through the 2018 amendments of article 1045 of the Civil Code, which now states that in the case of damages arising from a certain class of criminal offences, the damage to be made good by the ordinary courts shall also include any moral harm and, or psychological harm caused to the claimant.

The law is very clear: the only acts for which an ordinary court can grant moral (and psychological) damages are crimes affecting the dignity of persons under Title VII of Part II of Book First of the Criminal Code (sexual offences) and wilful crimes against the person subject to a punishment of imprisonment of at least three years under Title VIII

of Part II of Book First of the Criminal Code (such as voluntary grievous bodily harm and wilful homicide).

Therefore, what now triggers the right to claim 'moral harm' is the nature of the conduct of the tortfeasor – which begs the question: are they really moral damages, or are they punitive damages instead? Are they really intended to compensate the victim, or are they intended to punish the tortfeasor? If they are punitive in nature, how do they fit the axiom of restitutio in integrum?

These are however questions for another time.

In courts of constitutional jurisdiction, the situation is rather different. It is quite common to see moral damages (often called non-pecuniary damages) being awarded in cases where the victim would have suffered from a breach of a fundamental human right.

Therefore, a claimant who is not victim to either of the criminal offences listed under article 1045 of the Civil Code may only hope to be awarded moral damages if the act he was victim to was such as to be classified as a breach of a fundamental human right (or more than one) by the State, and seeks to recover those damages before a court of constitutional jurisdiction.

Other than that, ordinary courts are not generally allowed to grant moral or non-pecuniary damages.

In the case of Lawrence Grech et vs Tabib Prinċipali tal-Gvern (Saħħa Pubblika) et, plaintiff had claimed that whilst in employment with the Malta Drydocks, he had been exposed to a toxic material commonly known as 'asbestos', which had caused him to fall seriously ill. Indeed, roughly a year after the court case was instituted, plaintiff sadly passed away from the same illness, and the case was taken up by his heirs.

The complaint was that as a result of this exposure to the toxic material, Mr Grech had had his fundamental human rights breached, namely, his right to life, his right not to be subjected to inhumane and degrading treatment, and his right of respect to his family and private life.

Plaintiffs were therefore seeking a twofold compensation – compensation due to the breaches of the Mr Grech's fundamental human rights, as well as compensation for actual losses suffered by Mr Grech for the fact that due to his illness, he had to cut his working life short and retire early. The latter would have been the salary that Mr Grech would have been entitled to receive had he been in employment up until his retirement age.

By means of a judgment of 8 November 2018, the Civil Court, First Hall (Constitutional Jurisdiction) awarded plaintiffs the sum of €30,000 in non-pecuniary damages. But it rejected the claim for the payment of actual damages – it stated that these could not be considered in the constitutional forum, since they were a matter for the ordinary courts to decide upon.

Plaintiffs appealed to the Constitutional Court.

The Constitutional Court disagreed with the reasoning of the first court. It observed that courts of constitutional jurisdiction are conferred with the power to grant any remedy in order to guarantee the restitutio in integrum. This includes the awarding of actual damages. Had Mr Grech not been forced to retire from work due to his illness, he would have benefitted from an income of €11,322.63 a year under the Voluntary Retirement Scheme offered by the Malta Drydocks, adding up to the sum of €59,434. The Constitutional Court considered that the first Court was correct in awarding the sum of €30,000 as moral damages, but it should have also added the actual damages.

Therefore, it awarded plaintiffs the sum of €89,434, including both moral and actual damages.

In the final and most significant part of the judgment, the Court acknowledged the limitation imposed on the ordinary courts by article 1045 of the Civil Code, in the sense that they are presently only allowed to award moral damages in very limited circumstances (where the damage is cause by a certain class of criminal offences). As a result, claimants who wanted to claim moral damages - such as plaintiffs - had no other choice but to resort to the courts of constitutional jurisdiction, for matters which could (with a few changes in the law) easily be tackled by ordinary courts.

The Constitutional Court therefore encouraged Parliament to consider amending the law so that there would no longer be the need for victims to seek a declaration of a breach of a fundamental human right in order to obtain moral damages.

In conclusion, the Constitutional Court remitted the judgment to the Speaker at the House of Representatives (Parliament), who by law (article 242 of the Code of Organisation and Civil Procedure – Chapter 12 of the Laws of Malta) is obliged to lay a copy of the judgment on the table of Parliament during the first sitting that follows, for further discussion, and one would hope, for due implementation of the Court's recommendations.

REJECTING A SALE
BY DR CARLOS BUGEJA

Dr Louis Buhagiar vs UCIM Co Limited noe
12 July 2019, 1309/2010/1
Originally published 12 August 2019
Court of Appeal

Law has always been preoccupied with the rights of the purchaser. We find legal principles relating to defects in things sold as far as back as in the XII Tables of Ancient Rome (451BC); indeed, the redhibitory action was initially meant to protect a 'consumer' on the purchase of slaves and draught animals. The purchase could – upon discovery that the slave had serious defects not obvious at the time of purchase – demand that the vendor takes back the slave and return the price paid.

Despite the abolishment of slavery, these consumer–protection principles survived, and eventually, they were embedded into various legal systems across Europe, including in the Maltese Civil Code.

Our Civil Code provides for a strong system of protection in favour of purchasers – be it through consumer law, through warranties, or through the general warranty of peaceful possession granted in every contract of sale of an immovable property.

The law however provides for two distinct rights, which are similar in nature, although different in consequence.

Article 1424 of the Civil Code obliges the seller to warrant the thing sold against any latent (hidden) 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 had he knew about those defects, unless it would have been stipulated that the seller shall not in any such case be bound to any warranty (article 1426). In such cases, the purchaser can either institute the actio redhibitoria, to restore the thing and have the price repaid to him, or, institute the actio aestimatoria, to retain the thing and have a part of the price repaid to him which shall be determined by the court (article 1427).

Article 1390 of the Civil Code provides that if the thing which the seller offers to deliver is not of the quality promised, or is not according to the sample on which the sale was made, the buyer may elect either to reject the thing and demand damages, or to accept the thing with a diminution of the price upon a valuation by experts.

One must distinguish between delivering something which would later result defective and offering to deliver something of a different quality or nature from that stipulated in the contract.

The distinction between the two legal principles is important; in the latter, a purchaser may still be entitled to file an action in court despite the fact that the product is in no way defective, but simply of a quality different than that promised. Indeed, despite their apparent similarity, either situation occurs at a different moment, calls for a different action, and carries therewith different legal principles and consequences.

In both instances, the purchaser may elect to reject the thing and demand the return of the price, or to retain it and request the diminution of the price. However, in the latter case (when the thing which the seller offers to deliver is not of the quality promised – article 1390) the purchaser may, when refusing to accept the thing delivered to him, also always demand the payment of damages. In an action against latent defects, this is not an option which is available all the time; one can sue for damages only if it is shown that the seller knew about the defects of the thing sold and chose not to disclose it.

The judgment of the Court of Appeal in the names of Dr Louis Buhagiar vs UCIM Co Limited noe, delivered on 12 July 2019, was about a complaint made by plaintiff in respect of the purchase of a car he had purchased from respondent company back in 2006. He stated that the car had developed defects which continuously reoccurred, so much that the engine had to be changed.

In 2010, purchaser elected to file a lawsuit – not as an action against latent defects – but in terms of article 1390 of the Civil Code, stating that the car purchased was not of the quality promised, despite the fact that the main complaint was that the car had hidden defects.

In a judgment delivered on 12 December 2013, the Civil Court, First Hall noted this apparent oddity in the action chosen by plaintiff, but decided not to consider this fact further since respondent company had not pleaded to the inefficiency of the action preferred. It then moved to accede to plaintiff's requests and ordered the rescission of the sale.

Both parties appealed.

In its judgment, the Court of Appeal noted (among other things) that the action proposed (that under article 1390) is available at the moment that the object is delivered or right afterwards; granting the option to the purchase at that time to either refuse

the object or to retain it under a price–reduction. Therefore – the court considered – this action should not be available after the object had been delivered and retained, meaning that if an object would have been delivered, the juridical form of its rejection should be through the formal deposit of the thing under the authority of the Court. Otherwise, it is deemed that the object sold had been accepted.

In this case, the car in question had been received by plaintiff back in 2006, and the lawsuit was filed in 2010. Its keys had been deposited in court well four years after the cars had been consigned, and therefore, it could never be said that the car purchased was being rejected within the time and parameters of article 1390 of the Civil Code. Therefore, an action under article 1390 could never succeed. Furthermore, in any case, the case was time-barred.

Of course, this would imply that possibly, had plaintiff instead based his lawsuit on an action for latent defect (rather than on the basis that the thing delivered was of a different quality than that promise) the outcome could have been different.

At the end, the Court of Appeal acceded to the appeal filed by respondent company and threw out plaintiff's case, and also ordered him to pay the costs of the proceedings.

YES, MINISTER?
BY DR EDRIC MICALLEF FIGALLO

Paul Demicoli vs Ministru tal-Politika Soċjali et
12 July 2019, 2/2010/2
Originally published 19 August 2019
Court of Appeal

On 12 of July 2019, the Court of Appeal (Superior Jurisdiction) delivered a judgement on appeal in the case of Paul Demicoli vs Ministru tal-Politika Soċjali, Segretarju Permanenti fil-Ministeru tal-Politika Soċjali, u l-Avukat Ġenerali (2/2010/2).

This case tackles the delegated legislative powers given by Parliament to others and the scope thereof. Such delegation is in most cases in favour of Ministers and involves the power to make subsidiary legislation, which is generally intended to organically augment a main law and provide for matters that are to be regulated by the main law and according to its purposes.

Delegated legislative powers are provided for through an Act of Parliament. The main law in this case is Chapter 424 of the Laws of Malta, the Occupational Health and Safety Authority Act. Subsidiary legislation is often used due to specific, technical or future circumstances, or the foreseen need for expedient legislation, or due to a regrettable want of time or some shortcoming in the drafting of the main law as identified following its final publication. It is an essential legislative mechanism, especially due to needs related to EU membership.

In fact, to strengthen their case as to the validity of the challenged provisions, the defendants had unsuccessfully argued on appeal that the subsidiary legislation in question was a transposition of an EU Directive. The Court of Appeal pointed out that the provisions challenged were emanated by virtue of Chapter 424. It added that if the main law and its subsidiary legislation did not provide for what the EU Directive required, then this was no justification to create criminal liability without a valid legislative act.

In this case the plaintiff attacked provisions contained in Legal Notice 281 of 2004 as it had placed new responsibilities on him as the owner of a site on which construction works were being carried out.

It did so by introducing a definition for 'client' which included him under the remit of the legislation as said definition, exactly copied from the relevant EU Directive, provided that '"client" means any natural or legal person for whom a project is carried out'. The

'client' was burdened with a number of obligations, including that of appointing project supervisors and with other health and safety requirements for works being carried on their properties. While it was repealed by Legal Notice 88 of 2018, promulgated after the delivery of the first instance judgement, the Court of Appeal judgement noted that the latter legislation retained the provisions eventually found to be null and without effect in this case. Thus, the legislator needs to amend the legislation accordingly.

The plaintiff alleged that the above went beyond the powers given to the Minister under the main law, and on that basis challenged them. He asked the court to declare that the Minister acted beyond his powers in promulgating said provisions as relating to 'client' as well as declaring said provisions, as well as any new responsibilities ascribed to him by them, null and without effect.

The First Hall of the Civil Court, by its judgement dated 1 January 2018, had accepted the plaintiff's claims in full. This judgement was appealed by the defendants and eventually decided by the Court of Appeal on the 12th July 2019. The first court pointed out that when considering subsidiary legislation, it must compare the powers allegedly used by the delegate with those actually provided for by Parliament. As long as both corresponded then the subsidiary legislation was valid, otherwise it was not. It added that in many cases subsidiary legislation must be read with the main law and construed in accordance with the latter.

In considering subsidiary legislation, it made considerations as to what hinted to the true purposes of the the main law according to which the provisions of the subsidiary legislation have to be read. It considered various provisions of the main law to determine the legislative intent behind it, which, on final analysis by the said court, burdened employers and not the owners of the site in which the works were taking place. The courts deemed this fatal for the challenged provisions.

While interesting insofar as legislative drafting and the interpretation of laws is concerned, this case was problematic as through their interpretative process the courts concluded that the new legislation provided for new criminal responsibilities. The first court held that this addition of new criminal responsibilities on other persons, through subsidiary legislation and beyond those already provided by the main law, could unacceptably fly foul of the fundamental criminal law maxim nulla poena sine prævia lege (no penalty without a prior law).

Defendants asserted unsuccessfully that the definition for 'client' was not substantially new at all, as the category concerned was covered by the broader definition found in the main law for 'employer'. This was discarded by the courts. In considering the new definition of "client" under the subsidiary legislation, both courts pointed out that the

full definition of 'employer' in the main law had specifically excluded 'owners, occupiers or possessors on behalf of whom work is being carried out', and interpreted this as excluding such categories from the operation of the main law. Thus, these could not be included though subsidiary legislation as that would be inconsistent and contrary to the legislative intent behind the main law. This intent was held to be the providing of safeguards in relation to working conditions with regards to employment and the commissioning of services.

The Court of Appeal merely reformed the first instance judgement by making a clarificatory reference to the definition of employer' under the main act, which did include owners under given circumstances.

Consideration should be given to the fact that subsidiary legislation is: (i) possible by Act of Parliament and limited by said Act of Parliament; and (ii) it must be in harmony with the provisions of the Act of Parliament as it is not standalone legislation but is subsidiary and subservient to the Act of Parliament which delegated the power for it to be created.

MAINTENANCE FRAUD
BY DR GRAZIELLA CRICCHIOLA

Stephen Vella vs Adriana Vella
12 July 2019, 574/2012/1
Originally published 26 August 2019
Court of Appeal

With commitment comes responsibility.

Marriage is one huge commitment; it carries therewith a myriad of personal responsibilities, and also an equal number of legal responsibilities and obligations that are often misunderstood or underappreciated.

Marriage imposes on the spouses the fundamental obligation to maintain each other and their children. This is a very important obligation inherently attached to the institute of marriage, so much that the failure to pay maintenance may subject one to criminal proceedings, and in some cases, even imprisonment. The quantum of this obligation is usually a major bone of contention during separation proceedings. Unsurprisingly, it is because of disagreement on this that most cases fail mediation and end up in court.

Our domestic law does not provide a formula that determines the quantum of maintenance. We do find some kind of minimum standards to start with, but there is no hard and fast rule that sets a sum to be paid.

The closest we get to a formula is in the cardinal rule that the maintenance due is in proportion to the needs of the person claiming it and to the means of the person obliged to pay. When determining the amount due, our courts tend to consider various factors, including but not limited to the salary of each spouse, whether alternative accommodation has to be purchased or rented, and the lifestyle of the children in question.

It is a dangerous yet common misconception held by many that if a parent does no longer have the financial means (due to unemployment or decrease in his salary) to maintain his child, he/she may unilaterally decide to reduce or stop maintenance.

This is not the case.

The law is very clear; in the absence of an amended court order allowing the suspension of the duty of each and every parent to maintain his children or permitting a reduction

The judgment of 15 July 2019, in the names of Central Real Estate Limited vs Michael William Orr et specifically dealt with the duties of the real estate agent (and the broker) and how he is to be compensated for the services rendered.

The facts of this case were as follows:

Plaintiffs wanted to sell their property in San Pawl tat-Tarġa, Naxxar, and engaged plaintiffs as their real estate agents. The parties signed a commission agency fee agreement.

Plaintiffs had eventually found prospective purchasers and introduced them to respondents, conducting the negotiations, and leading the parties to sign a promise of sale agreement. At a certain point in time, the parties to the promise of sale agreement encountered some difficulties, and the promise of sale expired without the sale being finalised. Thereafter, plaintiffs were taken out of the picture completely.

After some time, respondents and prospective purchasers resumed contact, and entered into a fresh new promise of sale and eventually signed the final deed of sale, without involving plaintiffs. This notwithstanding, the conditions of sale were identical to those agreed to in the first promise of sale agreement, to which plaintiffs had been party.

As one would expect, the real estate agency was claiming that it had entirely fulfilled its obligations, and that as a result, the court should condemn respondent to pay the sum of €53,000, representing all the commission agency fees due. Respondents denied the claims.

In its judgment, the court quoted various judgments and reiterated that for the real estate agent to acquire the right to claim compensation, three elements must cumulatively occur:

(i) The transaction must be concluded;
(ii) The agent's participation must have been requested or at least accepted by both parties; and
(iii) The agent's work must have led to the parties reaching the idem placitum consensus (the meeting of the minds).

Otherwise, no brokerage fee is due.

However, this does not mean that if one of these elements is missing, nothing is due to the real estate agent, for he may still be entitled to another form of compensation, phrased by our courts as compensation for locatio operis or servigi. Servigi is the legal

term used to encapsulate the right of someone to seek compensation for services rendered, if there is no prior contract to that effect (so much, that it is considered as a 'quasi-contract').

Therefore, if for instance the transaction is not concluded through no fault of the agent, and thus he is not entitled to be paid in terms of the agency agreement, he may still be entitled to a form of compensation for services rendered, albeit perhaps at a reduced sum.

The raison d'être is easy to follow: despite the fact that the deal would not have been finalised, the agent would have still rendered services for which he ought to be compensated.

It would then be the court's job to quantify the compensation due, according to the circumstances of the case. Judgments teach us that in some cases, the compensation due may even be equivalent to that due had the transaction actually taken place.

The Court noted that there is no shadow of a doubt that plaintiff company had the right to be paid for services rendered to respondents. Plaintiffs had had a decisive impact in the signing of the first promise of sale, and the second one was nothing but a reproduction of the first, despite the fact that parties chose not to directly involve the real estate agency in it. Whereas it was true that plaintiffs could not expect to be paid the full sum agreed to in the commission agency fee agreement, they had still been instrumental to the transaction, and as a result they had a right to claim and be paid compensation for services rendered.

As a result, the Court ordered respondents to pay plaintiffs the sum of €21,000.

THE CONTEST OF TITLES
BY DR MARY ROSE MICALLEF

Victor Felice et vs Anthony Muscat et
12 July 2019, 553/2003/1
Originally published 9 September 2019
Court of Appeal

Suppose that an owner of a property (say, a land) finds out that his property is being occupied by someone else, who claims to be the owner. Suppose that at face value, the occupier does hold a contract stating he has legitimately purchased the property in question from a third party, unknown to the initial owner. Both have a contract of purchase, but – of course – both cannot be the owners. What is to be done? Who is the rightful owner of that property?

Surprisingly, this is quite a common occurrence in Malta, and it was indeed the subject matter of the case in the names of Felice Victor et vs Muscat Anthony et, decided by the Court of Appeal on the 12 July 2019.

Issues with respect to property title conflicts have dominated causes brought before our courts.

These causes undertake the juridical path that is labelled as the actio rei vindicatoria. In simple terms, 'rei vindicatio' means the right to recover a thing.

The rei vindicatoria saw its conception in the ancient Roman Law; and to this day, it has been the main action that owners institute, in attempt to recover the thing (such as immovable property) held in possession of another. For the action to subsist, the owner must have been physically dispossessed of the thing that belonged to him.

Our Civil Code does not anywhere mention the 'actio rei vindicatoria'. The only form of reference to this action is in article 322(1), which establishes the right of owners to recover their things from the possession of others.

Throughout this case, the court had to determine who actually was the rightful owner of a private passage in a rural area. In the event that it found that plaintiff was indeed the owner of such land, the defendant had to evicted from such passage.

The Court elaborated on the main elements of this action, which local court judgments established to be amongst the most rigorous and stringent from all civil actions.

in the previously determined amount of maintenance in light of the changes in one's financial situation, maintenance still has to be paid, and in the full amount ordered by the court.

Neither is a suspicion that one's child is not biologically his enough to justify the suspension of the payment of maintenance. There is an absolute duty at law for a every parent to maintain his own children. Our law provides for a rebuttable presumption that a child conceived in wedlock is legally presumed to be the child of the married couple and thus imposes on the parents a duty to maintain that child and to continue maintaining such children even in the case of marital separation.

The question arises – what will happen if after separation proceedings, after years of paying maintenance towards that child, one of the spouses discovers that he is not the biological parent of the child? What if the suspicion is confirmed scientifically, and further on, by means of a court judgment? What are the solutions offered to a parent who had paid maintenance for a child who was not biologically his?

This was the scenario in the case in the names of A vs B decided by the Court of Appeal on 12 July 2019 ('A' and 'B' are being used instead of the parties' real names in order to respect the privacy of the parties to this case).

Spouses A and B had been legally separated for long years. In their separation deed, the husband had assumed the contractual obligation to pay his wife the amount of Lm40 every week as maintenance towards the couple's two children, both born in wedlock.

At one point, to plaintiff's horror, he discovered that he was not the biological father of one of his children, and this was confirmed by a decision of the Civil Court (Family Section).

In light of this pronouncement, plaintiff instituted proceedings before the Civil Court, First Hall, requesting the said Court to order his legally separated wife to reimburse him of all the money he had paid by way of maintenance towards the child in question. He also requested the Court to order respondent to pay interest from the date of when such maintenance was paid.

The Civil Court, First Hall, did agree with plaintiff that payments paid to the mother for the maintenance of the child who he had later found out not to be biologically his were to be returned by the mother. In fact, in delivering its judgment the court ordered respondent to reimburse her husband with the sum of €49,781.36, but rejected plaintiff's plea with regards to the payment of interest.

Respondent felt aggrieved by this decision and appealed to the Court of Appeal, seeking to revoke and annul the judgement of the first court.

Plaintiff also appealed, claiming that together with the maintenance returned (which the first court had granted), he also had the right to receive interests at the right of 8% per annum.

Plaintiff's main argument at appeal stage rested on the alleged bad faith of his former wife.

He argued that under our law, any person who receives, whether knowingly or by mistake, a thing which is not due to him under any civil or natural obligation, shall be bound to restore it to the person from whom he has unduly received it.

The law however further states that if the person who has unduly received payment acted in bad faith, he is bound to restore both the capital and interest thereon as from the day of the payment. His argument was that the wife had acted in bad faith when entering into the separation contract and she has subsequently knowingly kept postponing the date for the DNA test to be held.

Therefore, in plaintiff's view, he was entitled to receive both the capital and the interest. The wife denied that she had acted in bad faith.

The Court of Appeal agreed with the husband. It stated that it was proven that the wife had acted in bad faith, knowing that her husband was to pay maintenance for a child who was not his, and yet accepted to receive the money for long years after that.

Consequently, the husband was entitled to receive both the maintenance paid as well as to the interest calculated upon said maintenance.

To this effect, the Court of Appeal confirmed the judgment as delivered by the Civil Court, First Hall, and ordered once more the defendant to pay the sum of €49,781.36 as maintenance paid to her in favour of the said child, and further condemned her to pay the sum of €24,233.44 as interest.

BROKERING A DEAL
BY DR CARLOS BUGEJA

Central Real Estate Limited vs Michael William Orr
15 July 2019, 991/2017JZM
Originally published 2 September 2019
Civil Court, First Hall

However innate owning property is in our modern perception of human existence, today's cultural understanding of property ownership and its relationship to law is really and truly a relative 'recent' phenomenon.

One can definitely find early concepts of territoriality. Yet, the early attitude towards land was very different from ours; it was characterised by an intimate spiritual connection far off from the concept of ownership we recognise today. It was only late in the growth of human society that land ownership started becoming a good capable of being legally recognised; right around this time, land ownership started becoming a tool inherent to societal standing – a commodity central to the human struggle for power and wealth.

Even then, property ownership in the absolute sense was not for the many. It was reserved for the elite, the blue-blooded, and the landed gentry. Only the very rich (or rather, the powerful) owned property, and most lands occupied by the common folk belonged to the church or the ruling-class, both in Malta and abroad. The elite had more property than they could manage, so we see a lot of legal concepts that emerged in order to facilitate the administration of these properties: such as feudalism, 'emphyteusis' (ċens), and indeed, to a certain extent, the concept of 'estate agent'. Indeed, the term 'estate agent' was originally coined to refer to the person known as a 'receiver of rents' – a steward appointed by rich landowners to administer lands on their behalf.

At the dawn of the twentieth century, property ownership in Europe became less of an exclusive privilege. Around this time, people were choosing more and more to involve themselves in the purchasing and selling of homes, and there started this love affair of intermediaries with property deals. Year 1805 saw the emergence of the first organised real estate agency in the UK, and the business of selling property continued to develop in the years to follow.

Today, real estate agents are big players in our economic society; and yet their rights and duties at law are still often misunderstood.

In fact, owners instituting such action must necessarily prove their title unequivocally – in adherence to the principle of probatio diabolica (the devil's proof). This means that the level of proof must be very strong, and far beyond the usual level of balance of probabilities. The plaintiff claiming to have been dispossessed of his own property is not required to prove defendant's lack or defective title, but he is definitely required to prove his.

Anything short of that would render the vindicatory action unsuccessful.

Doubt as to the claimant's title would favour the defendant in question. At this stage, the defendant is fictitiously relegated to a passive state as he does not need to prove anything. Here the success or otherwise of the action would depend upon plaintiff's ability to prove his title on the property in dispute.

The burden is completely on that person who would have instituted the action. The defendant can conveniently stay put, unless and until plaintiff manages to establish an original title. The latter is however subject to a fundamental and interesting exception – should defendant plead that he has title on the property, the action would be automatically converted into another sister action – the actio publiciana.

Therefore, an action starting as an actio vindicatoria can convert automatically into an actio publiciana if the defendant chooses to claim title himself.

Our courts started to blend the rei vindicatoria with the publiciana, when the abovementioned plea was triggered. The latter action is a successor of the former vindicatory action, which likewise was established by Roman Law.

This action must be triggered by the court, once and if the defendant pleads and attempts to prove title upon the land that is being claimed back by plaintiff.

The change triggered through this plea is far from a simple name change. The actio publiciana alters what originally is the stringent nature of the rei vindicatoria, and once the defendant claims title on the property in dispute, it would no longer be a case of the plaintiff having to prove title under a probatio diabolica. What is originally a case solely resting on the plaintiff's ability to unequivocally prove title, becomes a mere contest of titles of: who has the better title? The party to successfully prove to have a better title is victorious.

Therefore, at this stage, the original idea of the stringent burden of proof disappears; one has to merely prove that he has a better title than the other claimant.

This difference is vital; it may very well be that a plaintiff would be unable to prove title unequivocally in a vindicatory suit, yet be able to prove a better title than his opponent once the action transforms into an actio publiciana.

In its judgment, the Civil Court, First Hall had simply decided that plaintiffs had failed to unequivocally prove that they were the owners of the passage in question, disregarding the fact, that in their sworn replies, defendants had pleaded title to the passage in dispute.

Plaintiffs appealed.

The Court of Appeal pointed out that the first court had failed to trigger the conversion of the actio rei vindicatoria into an actio publiciana; this was a must, once respondents had pleaded title of the property in disputes. Had respondents opted not to plead title, the action would have had to proceed through the vindicatory pathway, and the first court would have been correct to only request that plaintiffs prove their title.

To this effect, the Court of Appeal had to appreciate and analyse the contest that existed between the parties' titles. Initially both parties had submitted evidence in their attempt to prove and acquire title.

Eventually the Court determined that the plaintiffs (at this stage the appellants) had a better title than the defendants. Therefore, it overturned the judgment of the first court, declared that plaintiffs were indeed the righteous owners of the passage, and ordered the eviction of defendants from the said passage.

THE CO-OWNER WHO GOT AWAY
BY DR REBECCA MERCIECA

Mary Ann Bugeja et v Avukat Dr Joseph Grech noe
6 September 2019, 14/1985
Originally published 16 September 2019
Court of Magistrates (Gozo) in its Superior Jurisdiction

A walk in the streets of ours islands reveal numerous beautiful properties which look run-down, ostensibly having been abandoned by their owners. The truth is that many of these properties are owned by several owners who at some point, found themselves at a stand-still due to conflicting ideas as to what to do with their co-owned properties.

Take this initial premise as an example: Following the demise of your aunt Lucy seven years ago, you inherited an undivided share of a villa together with four of your siblings and a cousin who you have never met. Had it been solely up to you, you would definitely have been sold the property. Your cousin has been living far off in Canada all his life and had little motivation to keep in touch with his family and have had little interest in preserving his Maltese heritage.

All the other co-owners but your cousin want to sell, but there is no way for you to manage to reach out to your cousin living in the Great White North, let alone to convince him to sign off the sale.

You can just opt sell the property without your cousin's consent, then deposit his share in Court, right?

Wrong.

When co-owners are unknown, cannot be traced, or when they flat-out disagree with the sale of the property held in common, the co-owners who own the majority of the share of the property cannot just by-pass the co-owners owning any minor share of the said property. Any co-owner, however small his share may be, has to give his consent to the sale – despite the strangely common misconception had by many that if the share is small, one just needs to deposit the co-owner's share of profit in court. The signature of that 0.1% share co-owner is as important as that of that owning 75% of the property.

This does not mean that the dissenting co-owner can veto the proposed sale forever.

The solution to this was provided by the introduction of Article 495A of the Civil Code (Chapter 16 of the Laws of Malta) into our law back in 2004. This article of the law states

that co-owners owning the major portion of property so co-owned may refer their intention to sell to the Court, which in turn has the power to authorise the sale of the co-owned property.

This is the correct procedure to undertake; there is absolutely no law that allows anyone, be it a co-owner, a lawyer, or a Notary, to simply deposit the dissenting co-owner's money in court without prior authorisation given through a procedure under article 495A. There is no way one can legally proceed with the sale of the whole property without court intervention.

In the case Mary Ann Bugeja et vs Avukat Dottor Joseph Grech noe decided by the Court of Magistrates (Gozo) in its Superior Jurisdiction on 6 September 2019, three siblings together owning three quarters of a property in Nadur, Gozo, brought a suit against their estranged brother, who owned the quarter and so happened to be living in the United States of America.

The plaintiffs had entered into a promise of sale with a third party to sell the property so owned for the price of €235,000. The plaintiffs declared that they had made several attempts at contacting their brother (the defendant) to obtain his signature, all of which failed. And so, apart from solemnly confirming to the Court that the other co-owner could not be found, the plaintiffs asked the Court to authorise the sale as proposed, and to appoint curators to represent the absent co-owner in the proceedings, and also for them to subsequently appear in the contract of sale in his stead.

This is a perfectly legitimate procedure.

Our law provides for a solution if a party to a case is considered to be 'absent'. That person's void is filled by someone else, appointed to represent his interests in his absence - this person is known as the curator.

The procedure to appoint curators is very methodical.

Curators are only appointed after notice of the request (known as 'the banns') is posted up at the entrance of the building in which the court sits, and a copy of the banns together with a copy of the pleading or a summary thereof is served on one of the persons most closely related to the person to be represented or his friend. If no relative or friend is known, then the banns need to be published in the Government Gazette and in at least two daily newspapers.

If within six days, no person appears to represent the absent person, then the court will appoint an advocate and a legal procurator to appear as curators.

This way, the law ensures that the absent person's position is well taken care of. A curator nominated does not necessarily need to know the person he is representing, although he is responsible at law to try to get in touch with him.

However, at times circumstances make it impossible for a curator to reach the person he is representing; in such situations, the curator states whether he has managed to contact the person being represented in the proceedings and also furnish the Court with the facts he becomes aware of.

This was the situation in this case; the curator appointed to represent the brother living the United States of America did not manage to contact his representee, and therefore could not present any objections on his behalf. This notwithstanding, the Court still entered into the merits of the case and noted that the plaintiffs were proposing a sale to a third party for a price which an architect had deemed to be proper and justifiable given the size and location of the property, and the current trend in the property market. Therefore, the absent brother's interests were to be properly safeguarded, and his share of the profit would be later deposited in court for the brother to withdraw. The could only be done because there would be a court order, and cannot be done arbitrarily by the other co-owners.

The Court therefore acceded to the request, authorised the sale, and appointed the curator to also appear on behalf of the absent brother in the final deed of sale.

A SAFE PLACE OF WORK
BY DR ARTHUR AZZOPARDI

Edgar Gatt vs Medserv Operations Limited
18 September 2019, 645/2015LM
Originally published 23 September 2019
Civil Court, First Hall

Compensation for injury at the place of work is often associated with the infamous tacky lawyer infomercials most prevalent in the United States of America. These are often prepared by desperate ambulance-chasing lawyers, who solicit clients in virtually every way imaginable, including by promising intrepid deals such as no win, no fee'.

In Malta (fortunately, one must say), no such adverts are permitted.

However, regrettably, occupational injuries are still a common occurrence. On 1 August 2019, the NSO published data showing that just in the first six months of 2019, 1,553 persons were involved in non-fatal accidents at work, and another 3 lost their life.

At law, employers are responsible for the health and safety of their employees while they are at work. This is a dearly kept principle, so much that our Occupational Health and Safety Authority Act (Chapter 424 of the Laws of Malta) establishes an Authority (OHSA) specifically set up to ensure that the physical, psychological and social wellbeing of all workers in all workplaces are promoted and safeguarded. Indeed, any person who breaches this law may be imprisoned for a period of up to two years and be condemned to pay a fine of up to €11,646.87. This, apart from the punishment carried by the general provisions of the Criminal Code relating to involuntary homicide or bodily harm, which may result in yet another fine and another imprisonment term (where in addition to causing the death of a person the offender has also caused bodily harm to another person) of up to ten years.

Simply put, health and safety laws are a serious matter.

On the other hand, the civil legal obligations imposed on the employer are also vast and wide-ranging. These were the subject of the judgment delivered by the Civil Court, First Hall on 18 September 2019 in the names of Edgar Gatt vs Medserv Operations Limited (645/2015LM).

In this case, plaintiff lamented that while at work, he was involved in an industrial incident, causing him to lose three toes from his right foot. He testified that while trying

to lift a rock bit, it rotated and landed on his foot, causing the injury. He blamed his employer, alleging that the rock bit was not properly fixed, meaning that his employer had acted with negligence and in breach of regulations, and hence requested that the court condemns his employer to pay damages. The court-appointed medical expert confirmed that plaintiff had suffered from a 3% permanent disability.

Many witnesses testified, and their versions of events were largely inconsistent.

The Court observed that while the company did invest in health and safety measures, it could have been much more attentive to effectively protect its employees. It found that the accident had occurred due to the fact that the team working on the rock bit did not have sufficient time to properly discuss the best way to do the work to limit danger. Certainly, a company such as respondent faced challenges on a daily basis relating to time constraints and limited workforce; but this did not mean that it could encourage the taking of shortcuts. The protection of the employee cannot be traded for better productivity, and the court could never take kindly to cutting corners at the expense of safety. The court found that respondent company had not taken the necessary measures to minimise the dangers, and actually encouraged certain risky work practices.

Therefore, respondent company had failed to provide its employees with a safe place of work, and also failed to operate a safe system of work.

The Court quoted various judgments that had previously analysed the legal implications of the employer-employee relationship. The principle is that the employer is duty-bound to ascertain that the workplace is always in a reasonable state of security. This includes providing secure machinery, a clean and safe workplace, constant supervision of the workers, and regular maintenance on the tools utilised. Moreover, the employer must provide a safe system of work, and that in planning a system of work, the employer must also take into account the fact that workers may become careless about risks involved in their daily work. This is and remains the employer's responsibility.

The legal reasoning is this: in a contract of employment, there is an implicit pact (applicable even if not specifically written) that obliges the employer to provide a secure workplace. The relationship between the employer and the employee is necessarily based on contract, but a duty of care also exists under the general law of tort. This hybrid relationship between the two parties in an employment contract calls for a careful consideration of the applicable factors.

The Occupational Health and Safety Authority Act obliges the employer to take a number of measures to prevent physical and psychological occupational ill-health, injury or death,

based on principles such as the identification and avoidance of hazards associated with work, the taking of all necessary measures to reduce risks, the adaptation of work to the worker, particularly in so far as the design of work places, the choice of work equipment and the choice of working and production, and the development of a coherent overall prevention policy which covers technology, the organisation of work, working conditions, social relationships and the influence of factors related to the working environment.

The Court considered that it had been sufficiently proven that respondent company had breached several of these principles, and that hence, it should be responsible for the damages suffered by its employee, the plaintiff.

Plaintiff had suffered from a 3% permanent disability. After taking account of his salary and age at the time of the incident, it ordered respondent company to pay plaintiff the sum of €4,013.76, as well as the costs of the case.

THE EUROPEAN SMALL CLAIMS PROCEDURE BY DR MARY ROSE MICALLEF

David Moore vs Goldcar Rental Malta
23 September 2019, 6/2018CZ
Originally published 20 September 2019
Civil Court, First Hall

Today, our relationships are not limited to the 316 square kilometres that make up our archipelago. In the past thirty years, we have started interacting more and more with people and companies beyond our shores; indeed, cross-border relationships today are common and vast, ranging from complex company to company trade imports, to a simple purchase of a mobile phone from a foreign seller on E-Bay.

Every day, we are interacting with people outside our country.

As one would expect, relationships sometimes go sore, and give rise to disputes.

Cross-border litigation is often perceived to be cumbersome and costly. The mere fact of having adverse parties residing in different territories could create complex scenarios when it comes to litigious procedures.

Traditionally, it was not deemed worthwhile to sue a foreigner, especially if the claim was low in terms of money. A creditor in Malta who was owed €2,000 had little incentive to file a court case against a debtor living far off, say in north Portugal; it was simply not worth it.

A little-known fact is that to the contrary, suing someone within the EU is far from complicated, and this thanks to Regulation (EC) No. 861/2007 (as amended by Regulation (EC) 2015/2421), the European Union rules establishing the European Small Claims Procedure.

This Regulation (like many others) has been driven by the European objection to attain judicial cooperation and harmonisation between Member States. Traditionally, the procedural law of the country where the action if brought, was the law to be applied, even if proceedings were engaged by a non-resident of such country. The courts had always adhered to this adorned principle of the lex fori and regulated their own procedure in accordance to their laws.

Traditionally, this served to discourage a creditor from pursuing court again against

someone living in another country, for he could very well be tangled up in unfamiliar rules, formalities and procedures of that other country.

This European Union's objective, however, has found a way of providing for an alternative mode of procedure that have their own set of rules, which would be automatically applicable, regardless of the procedural rules of the country where the creditor or debtor come from.
Indeed, this Regulation purports to advance the EU Treaty's objective to support the elimination of obstacles to the good functioning of civil proceedings, even - if necessary – by advancing more compatibility of the diverse procedural rules that exist amongst different Member States. The spirit of this Regulation entails the simplification of civil and commercial cross border litigations, which concern small costs and claims. This is done by offering alternative simplified procedure to the already existent national ones.

This procedure applies to cross-border cases in which one of the parties is domiciled or habitually resident in a Member State of the European Union, other than the Member State of the court or tribunal which has been seized to determine the case. Simply put, it applies to cross-border litigation within the EU, and cannot be used, for example, by a Maltese person against another person living in Malta. Furthermore, it is strictly an EU based procedure, and cannot be utilised when the other person habitually resides in a non-EU country.

This is a small claims procedure, so it is only applicable with respect to civil and commercial matters where the value of the claim does not exceed the sum of €5,000, save any interest, disbursements or expenses.

In commencing these European proceedings, the claimant needs to fill in a standard claim (called, 'Form A') that is set out in the said Regulation. This form is to be lodged within the relevant court or tribunal that enjoys jurisdiction (that is, which country has the power to hear the case) to determine the matter in question. Form A will then be sent to the court seized, via any means of communication that have been made available to the European Commission by the Member State in question. The contents of the claim, other than the relevant details of the parties, include an account of the facts, description of evidence that supports the claim in question, as well as any relevant supporting documents.

The general rule is that the European Small Claims Procedure is to be conducted via written means. Oral hearing is an exception to rule, and the court or tribunal shall only

hold oral sittings if it considers that it is not possible to deliver the judgment, solely on the basis of the written evidence.

Moreover, oral sittings do not necessarily require the physical presence of the parties – the Regulation allows such to be undertaken via videoconferencing, or through other means of communication. In some exceptional cases, parties are allowed the faculty to request sittings orally, but only if the court elects that the written submissions are not sufficient for the fairness of proceedings. Furthermore, the Regulation obliges the court or tribunal to use the simplest and least burdensome method of taking evidence, and expert evidence or oral evidence are only to be used as last resort measures. The purpose is to provide a speedy and efficient delivery of justice.

Court fees are capped to the same amounts that are charged to parties who undertake national small claims procedures. Also, legal representation is not mandatory when such procedure is engaged.

The procedure is simple and effective, as evident from the judgment delivered on 23 September 2019 in the names of David Moore vs Goldcar Rental Malta, which was an excellent example of the European small claims procedure being utilised to its maximum utility.

The facts of such case concerned a typical scenario of a claim which amounted to the sum of EUR1,440. The parties resided in different territories – claimant being a foreigner whilst defendant was a local car operator.

During this case, the Tribunal determined that no oral hearing was required, since the written evidence that was furnished by both parties enabled it to determine the case on the basis of written means. After having seen all evidence, the Tribunal partially upheld claimant's request, and ordered respondent to pay claimant the sum €997.69, with legal interest.

A RIGHT OF WAY
BY DR CARLOS BUGEJA

Raymond Gauci et vs Peter Vella et
27 September 2019, 856/06/1
Originally published 7 October 2019
Court of Appeal

The origins of agriculture in Malta are as ancient as man's presence on these islands; there is indeed ample evidence demonstrating a never dwindling vocation to husbandry and agriculture all throughout our history.

Despite this indigenous dedication, traditionally, private ownership of agricultural land by farmers was somewhat rare. A large part of agricultural land was (and still is) occupied by farmers under a long (and in some cases, perpetual) emphyteutical concession, granted thereto by the Government or the Catholic Church. There are also a number of lands leased by the Government (or the Joint Office) to private parties under an agricultural lease renewable year after year, what is more commonly known as 'qbiela'.

In Medieval times, the term 'gabillott' referred to the 'receiver of rents' – a steward appointed by rich landowners to administer lands on their behalf and to collect the qbiela. Today however, the gabillott refers to that farmer who works fields owned by someone else, that is – an agricultural tenant.

Unsurprisingly, there are a number of legal principles and rules pertaining to the gabillott, which are inapplicable for farmers who own the fields they work. These were the subject in the judgment of the Court of Appeal delivered on 27 September 2019, in the names of Raymond Gauci et vs Peter Vella et (856/06/1).

In this case, two farmers occupied neighbouring portion of lands, both under a title of agricultural lease (qbiela), owned by the Government of Malta, and administered by the Joint Office. Respondents were the heirs of the original tenants, and a dispute arose when plaintiffs sought to stop respondents from passing over their land. Respondent argued among others that they had the right to pass back and forth over the land of their neighbour, like their ancestors before them.

By means of a judgment of the Civil Court, First Hall, respondents had been ordered not to pass over plaintiffs' leased land. Respondents appealed.

In deciding the appeal, the Court of Appeal immediately noted that the case before the first court was incorrectly treated as a matter of servitude law.

The concept of 'servitude' (sometimes known as 'easement') is the legal principle providing for the right to use and/or enter onto the property owned by another without possessing it. It is best typified in the right of way which one landowner may enjoy over the land of another. In praedial servitudes, we distinguish between what are a dominant tenement and a servient tenement. Essentially, the dominant tenement is the tenement enjoying such servitude,

whilst the servient tenement is the one suffering the servitude. Servitudes are hence a weight on absolute ownership, for the property owned is burdened by the right of another person, a real right which becomes part and parcel of that property and cannot be alienated freely. In Civil Law, real right refers to a right that is attached to a thing, rather than a person. It remains part of the property even when that property is sold, for it is a matter intrinsically tied to the property itself, and not to the individuals holding it. Therefore, a tenant cannot grant a servitude on a land which is not his.

However, it is fairly common for different tenants of agricultural lands to establish a modus vivendi, usually through a relationship based on friendship or good neighbourliness. This is acknowledged at law and is a far stronger right than that known as 'mere tolerance'.

The Court stated however that 'a right of way' granted by a gabillott does not have the character of a servitude, for how as long it exists, it does not generate a real right over the property. Furthermore, if the owner of the lands is the same person (and only the tenants are different), there can be no servitude, even since it is generally stated by law that an easement is extinguished where the dominant and the servient tenements become united in the ownership of one person.

Therefore, a right of way granted by an agricultural tenant is not a servitude. It merely creates a personal obligation that the owner has to respect provided that it does not hinder his right of ownership. It does not burden the property itself and is not transferable towards third parties.

This does not mean that arrangements made between agricultural tenants are obligation-free or that they can be unilaterally retracted. That would be the case with grants on the basis of 'mere tolerance', which are innately titleless grants withdrawable by the grantor at any time and without prior notice. Arrangements made between gabillotti ion the other hand are legal undertakings fully recognised by law and enforceable in a court of law; however, they are only personal to the individuals making it and do not extend further than that.

The fact that respondents' ancestors had used the path for a length of time did not create a real right, but if anything, a mere personal obligation appertaining only to that person in favour of whom it is granted. Therefore, the obligation created in favour of respondents' ancestors died with them, and was not inherited by respondents, once plaintiffs did not wish to extend this favour thereto. Therefore, respondents had no protected to right to use the land occupied by plaintiffs, despite the fact that their ancestors did use it.

For this reason, the Court of Appeal confirmed the judgment of the first court and ordered respondents not to use plaintiffs' land.

CONTROLLED RENTS
BY DR EDRIC MICALLEF FIGALLO

Ethel Baron et vs l-Avukat Generali et
27 September 2019, 56/2015/1
Originally published 14 October 2019
Constitutional Court

On the 27th of September 2019, the Constitutional Court delivered judgement on two related appeals in the case of Ethel Baron u l-Avukat Dr Andrew Sciberras bħala mandatarju speċjali ta' Susan Farrugia u żewġha Carmel Farrugia għal kull interess li jista' jkollhom vs L-Avukat Generali u Bernard u Emanuela sive Lily konjugi Lynch (56/2015/1).

This case challenges the provisions of the Housing (Decontrol) Ordinance (Chapter 158 of the Laws of Malta) on the basis of the fundamental rights of landlords. The main culprit is Article 12, Chapter 158, which is essentially that legal provision allowing tenants to convert their titles of temporary emphyteusis in ones of lease, and in the process forcing the occupation of the property against the landlords' free enjoyment of their property rights.

As has been declared in multiple cases at all judicial levels, including by the European Court of Human Rights, the aforesaid provision falls foul of fundamental rights law. Throughout its legislative history, Chapter 158 has fallen foul of the fundamental property rights of landlords, and beyond that criticism has been levied against the remedies afforded by Malta. The main novelty in the cases at hand is in fact related to the possible remedies afforded to landlords according to the Constitutional Court, which could well be a step back.

The main bone of contention of the applicants in this case was that there was a lack of proportionality between the detriment they suffered by the application of the law, and the public interest allegedly sought by the same, which test of proportionality is an essential element to determine whether a restriction to the enjoyment of fundamental rights is legitimate. In this case, this notion of proportionality takes centre stage and by invoking it the Constitutional Court ended up indicating a new mechanism which the landlords should, according to said court, activate to safeguard their rights.

As a side note, in this case there was a (failed) attempt by the defendants to claim that the landlords were fully knowledgeable, and thus in acceptance, of the legal situation they were into according to law. The first court pointed out that such knowledge and

alleged acceptance does not clear the violation of the landlords' fundamental property rights as the landlords were not truly free to wilfully and freely contract a lease which was forced upon them by the legal situation. There also could be no waiver of the rights involved, as a waiver must be wilful and free. In the case of a violation of fundamental rights, the same was said for the landlords' acceptance of the rent given by the tenant. This was confirmed by the Constitutional Court.

In this case, the first court had found a violation of the fundamental property rights of the landlords and declared article 12(2) of Chapter 158 as inconsistent with the landlords' property rights as deriving from the Constitution and the European Convention on Human Rights, and therefore in violation of the landlords' fundamental rights. It also provided for pecuniary compensation for said violation, and as was becoming quite common, had declared that the tenants could not invoke the said provision of Chapter 158 to claim a title on the immovable property and continue residing in the property concerned.

The latter declaration was important, and in reality, it was our courts' response to applications by the landlords requesting the tenants' eviction, which ended up rejected by our courts having constitutional jurisdiction. Instead, these courts redirected landlords towards initiating a separate case specifically requesting eviction, which according to the Constitutional Court was to be done in front of the competent judicial organs of the land. Unfortunately, the plaintiff has to bring forward yet another case in front of an ordinary judicial body (not one having constitutional jurisdiction) in order for the eviction to be ordered, but this seems like an unnecessary procedural formality which could take years.

The remedies afforded by the Constitutional Court were as described above, save for the Constitutional Court's twist due to the 2018 amendments to Chapter 158. The Constitutional Court referred to amendments brought by Act XXVII of 2018, particularly to the introduction of article 12B to Chapter 158, which according to the same court provides landlords with an ordinary remedy in front of the Rent Regulation Board. The amendments extended the board's functions so that the it may consider the proportionality existing between the detriment suffered by the landlords and the interests of the tenants, and upon a finding of disproportionality the same board could change the conditions of the lease in order to make them more equitable between the parties. The court stated that this new ordinary remedy leads to a situation in which the provisions of Chapter 158 cannot be generally declared to be in violation of the landlords' fundamental rights. The court thus revoked that part of the first instance judgement which had ordered the tenants not to invoke the article 12 of Chapter 158 to claim a title of lease and continue residing in the property concerned.

This could leave an anomalous situation as the Constitutional Court still found that there was a violation of the landlords' fundamental rights, but referred the landlords to the aforesaid new remedy. This is brought about by the fact that the amendments came to be when the case had already been initiated.

It would now seem that landlords are to refer their matter to the Rent Regulation Board so that the latter may either change the conditions of the lease concerned and establish proportionality between the parties or else to order the eviction of the tenant within a period of five years, as per article 12B of Chapter 158.

Frankly, constitutional and fundamental rights challenges to article 12B are to be expected and one should be free to cast serious doubts on its conformity with fundamental rights law.

WHAT ABOUT THE VICTIMS' RIGHTS? BY DR RENÈ DARMANIN

Carmel Aquilina vs Il-Kumissarju tal-Pulizija et
27 September 2019, 83/2018
Originally published 28 October 2019
Constitutional Court

By ensuring the proper administration of justice, fair trials constitute an indispensable part of a democratic society. Whilst on the one hand, fair trials ensure that the defendant's guilt or innocence is determined fairly, on the other hand from the victim's perspective, fair trials allow victims of crimes to believe that their rights are being safeguarded and that eventually justice will prevail. This is of utmost relevance particularly after taking into account that several statistics reveal that the number of people directly afflicted by crime is on the rise.

Both Article 39 of the Constitution of Malta as well as Article 6 of the European Convention of Human Rights pronounce guarantees which are diverse but emanate from one fundamental right: the right for each and every individual to be afforded a fair hearing.

While international human rights law defines the notion of fair trial as a collection of procedural guarantees the defendant is entitled to, the question for those who deal with victims of crime rests on whether there exists an equivalent right or collection of rights for victims.

Even though some may argue that such rights are secured by the Victims of Crime Act as well as by the Maltese Criminal Code, however a new issue may crop up in a scenario where the rights afforded by the said legislative instruments are not provided.

In such a case, would it be possible for the victim of crime to institute constitutional proceedings on the basis of his right of fair hearing as crystallized by the Maltese Constitution and the European Convention of Human Rights?

This question was the bone of contention in a case heard before the Constitutional Court decided on the 27 September 2019, in the names of Carmel Aquilina vs Il-Kummissarju tal-Pulizija u l-Avukat Ġenerali (83/2018).

It is worth mentioning that the provisions guaranteeing the right of fair hearing as protected by the principal legislative instruments were not specifically intended to

safeguard the rights of victims of crime; in fact there are limited judgements of the European Court of Human Rights that speak about the victim. Nevertheless, when looking at more recent judgements of the European Court of Human Rights, one could easily note a deviation from the said Court in the way such right is being interpreted in order to broaden the security granted under the European Convention to victims of crime.

The facts of the aforementioned case are relatively straightforward. Back in 2009, the plaintiff filed a report at the Police General Headquarters, complaining that his business partner and a third party had defrauded him. Subsequently, the Police instituted criminal proceedings against the alleged perpetrators. After nine more years, the Court of Magistrates declared that on the basis of the evidence brought forward by the Prosecution, the accused could not be found guilty of the charges brought against them. As a result, the accused were acquitted.

Carmel Aquilina instituted constitutional proceedings before the Civil Court, First Hall in its Constitutional Jurisdiction, basing his application on his right of fair hearing under the Maltese Constitution and the European Convention of Human Rights, arguing that the Police had failed to properly and efficiently investigate and prosecute his complaint. Aquilina contended that the Maltese Criminal Code created a procedural imbalance in light of the fact that whereas the accused in criminal proceedings had the right to appeal from the judgement of the first court; the complainant was not afforded this same right.

Both the Attorney General and the Commissioner of Police asserted that Aquilina, being an alleged victim of crime, lacked the necessary juridical interest to institute such an action and consequently could not base his constitutional application on the right of fair hearing. As a matter of fact, it was argued that Aquilina was neither the accused nor a suspected person and therefore the right of fair hearing was not applicable to him. The Civil Court, First Hall agreed with the arguments brought forward by the Attorney General and the Commissioner of the Police and declared that the plaintiff, as the alleged victim, lacked the necessary juridical interest to make such claim.

Aquilina appealed before the Constitutional Court, contending that although he was not the accused in the criminal proceedings, but rather the victim, the right of having a fair trial was still applicable to him. He sustained his argument by claiming among others that had the Court of Magistrates found the accused guilty, it could have ordered the offenders to pay such damages for injury or compensation for the loss suffered by him. Therefore the outcome of the case could have easily affected him, meaning that he did have legal interest in the case.

The Constitutional Court, in its precise observations, whilst distinguishing between the right of fair hearing as provided by the Maltese Constitution and that guaranteed under the European Convention of Human Rights, noted that the legal position of the victim in criminal proceedings may be governed by the guarantees by the Convention only when the victim's involvement in the criminal proceedings is connected to the determination of his civil rights.

Contrastingly, the right of fair trial as safeguarded by the Maltese Constitution was broader in nature.

For these reasons, the Constitutional Court concluded that in view of the fact that through the criminal proceedings, Aquilina could have been compensated for the damages suffered, the victim had the necessary juridical interest to institute proceedings on the basis of the Maltese Constitution, rather than on the European Convention of Human Rights. As a result, it revoked the first judgment, and sent the acts of the case back to the Civil Court First Hall in its Constitutional Jurisdiction for the case to continue to be heard.

HERITABLE OBLIGATIONS BY DR CARLOS BUGEJA

Mercury plc vs Persona Limited
10 October 2019, 103/14GM
Originally published 21 October 2019
Civil Court, First Hall

The judgment delivered by Mr Justice Grazio Mercieca on 10 October 2019, in the names of Mercury plc vs Persona Limited (103/14GM) is an excellent portrayal of the intricate elegance of Maltese Civil Law. It is a demonstration of a court laudably seeking to not only deliver justice, but also to teach innovative complex principles of law which rarely appear in judicial discourse.

The facts of the case were relatively simple: Plaintiff company had on 29 December 1986 sold an apartment to another company, tying it with a number of conditions in the deed of sale, such as: to retain a right of first refusal on the property, to utilise the property for residential purposes or as offices only, not to affix placards in or outside the apartment, and to impose said conditions to all subsequent purchasers. Subsequently, purchaser company sold the property to a third party, Persona Limited (respondent company). Oblivious to what was to happen, the new owner started using the property as a clinic, housing dermatologists, gynaecologists, oncologists, and surgeons, among others, and affixed signs on the outside of the building.

Plaintiff company filed a lawsuit claiming that respondent company had breached the conditions previously imposed on the company that originally bought the apartment. It asserted that the conditions made towards the original purchasers also tied the new owners of the property, for the conditions are applicable not only to the signatories to the first deed of sale, but also to their successors in title. It requested that the court order respondent company to rectify the breaches.

Respondent disagreed.

In its judgement, the Court first sought to decide whether or not plaintiff company had what is known as the 'juridical interest' to promote the action. The notion of 'juridical interest' is one of the procedural elements necessary for an action to be admissible at law (these elements are known in the legal world as presupposti processuali).

It has been said that a person is deemed to have an interest in instituting an action before the courts if he can derive a useful result therefrom. The judgement must be

capable of bringing a certain utility for the plaintiff, contrary to the prejudice that he would suffer if the courts do not intervene. The interest must be juridical, direct and personal, and actual.

The Court concluded that plaintiff company did have the necessary juridical interest to proceed with the lawsuit.

That resolved, it was then time for the Court to consider whether the conditions imposed on the first deed of sale applied to the subsequent owner. In other words, upon acquiring the property, did respondent company inherit the conditions previously imposed on its vendors? Could it use the property as a clinic, and affix placards contrary to the obligation undertaken in the original purchase? Was this undertaking to be considered as a 'heritable obligation'?

Really and truly, 'heritable obligations' is not a phrase used commonly in legal parlance throughout the continental systems of law (such as Malta). However, it still is a very suitable phrase, for it elegantly manages to effectively express the significance of the principle at law. Simply put, an obligation is heritable when its performance may be enforced by a successor of the obligee or against a successor of the obligor.

Article 998 of the Civil Code states that 'Every person shall be deemed to have promised or stipulated for himself, for his heirs and for the persons claiming through or under him, unless the contrary is expressly established by law, or agreed upon between the parties, or appears from the nature of the agreement'.

Was therefore respondent company bound with the obligations undertaken by its vendor in the deed of 29 December 1986?

Through the years, the interpretation of this question at law has been swerving from one side to the other, the most prevalent understanding being that universal successors continue in the personality of deceased, while particular successors – like purchasers – did not. Hence, via this argument, the acquirer by particular title is not bound by the original contract in which he was not party, provided that the obligations are personal in nature.

Personal obligations differ from real obligations in the sense that the former are personal to the person against whom they are made, while the latter are inherently tied to the property itself, independent of the person holding it.

To determine whether the obligation was personal or real in nature, the court had to refer to a doctrine of Roman origin, known as numeros clausus. There is no mention of

numeros clausus in our law, but it is still a principle which is considered as a matter of public order.

The numeros clausus principle is a concept of property law which limits the number of types of right on third party property that the courts will acknowledge. It refers to the idea that the only real rights acknowledged are that rights provided for by law, and none else. A private party can neither create additional or new real rights nor rewrite or impermissibly further develop the content of existing real rights, for they would interfere with party autonomy that is considered to reign in contract law. The Court traced the historical development of this principle, and stated that admitting unrestricted private rights onto property owned by third parties would risk fragmenting the liberty and absoluteness dearly associated with the concept of ownership.

Hence, the Court concluded that the obligations entered into by the original purchaser on 29 December 1986 did not bind the subsequent owners, in this case, respondent company. The court further stated that neither can it be said that these obligations created a legal easement or servitude, for they did not contain the requirements mentioned by article 458 of the Civil Code for a legal easement to be valid ('The title creating an easement is null unless it results from a public deed; and where the easement is created by a deed inter vivos, the easement shall not be operative as regards third parties before the deed is registered in the Public Registry as provided in article 330, on the demand of any of the parties interested, or of the notary receiving the deed').

For these reasons, the Court rejected plaintiff company's action, but due to the fact that it considered the case to be complex and somewhat novel, it ordered that costs were to be divided equally by both parties.

TOWARDS THE 2%
BY DR CARLOS BUGEJA

A vs B et
28 October 2019
Originally published 2 December 2019
Rent Regulation Board

We all know about the constitutional calamity that is article 12 of the Housing (Decontrol) Ordinance, Chapter 158 of the Laws of Malta. It has been besieged and successfully challenged in virtually every court of constitutional jurisdiction available to a person owning property in Malta: The Civil Court First Hall, the Constitutional Court, and the European Court of Human Rights. Today, there is hardly any convincing argument against the fact that article 12 is in breach of the property owners' fundamental right to property.

Back in 1979, Parliament had introduced a law stating that a certain class of temporary emphyteusis concessions (even those that had been made prior to the enactment of said law) would automatically be converted into perpetual lease upon the expiration of the period agreed to between the parties in the original contract. Any prospect for the owner to regain possession of his property vanished into thin air, and like that, what originally was a temporary contract with an end in sight, became a rigid never-ending lease with meagre rent increases only every fifteen years.

Time and time again, this law was bludgeoned by our courts and the European Court of Human Rights, declaring it to be in flagrant breach of the fundamental right to property.

In 2018, Parliament had a golden opportunity to untie this Gordian knot, and propose bold and definite measures to get to the bottom of this crisis once and for all. It could have adopted specific instruments in line with the recommendations of the ECHR, in turn safeguarding the rights of the property owners, and at the same time providing for the least possible distress to the guiltless tenants.

Instead, by means of Act XXVII of 2018 and the newly enacted article 12B, Parliament introduced rather timid rules that will perhaps hardly make property owners too happy.

By virtue of the newly enacted article 12B of Chapter 158 of the Laws of Malta, those owning property occupied by someone else under title of lease created by virtue of a previous title of emphyteusis or sub-emphyteusis, may ask the Rent Regulation Board (chaired by a Magistrate of the Court of Justice) to conduct a means test on the

occupant, and decide whether the tenant qualifies for the continued occupation of the property, with an increased annual rent of not more than the equivalent of two percent of the market value of the property. Rent shall then continue to be the same for the following six years.

The 2% spoken about in the law is not a fixed number, but a threshold – a maximum. Therefore, the Rent Regulation Board is free to determine a yield less than that, obviously subject to a number of considerations that the law obliges the Board to make.

It has been reported in various outlets that Malta's average annual rental yield typically floats between 3.3% to 6.64% of the value of the property. That is, a property worth €200,000 could get one as much as €1,106 in monthly rent.

Yet, through the newly enacted article 12B, the most a property owner can hope for is a meagre €333 a month, which is just a third of that obtainable in the free market.

The case of A vs B et, decided on 28 October 2019 by the Rent Regulation Board, was an attempt by an owner to seek an increase in rent payable by the tenant in terms of article 12B.

The property in question was found to be worth around €165,000. Respondent had been paying rent at just under €300 per year. Plaintiff had already resorted to the Constitutional Court; it had obtained a declaration that article 12 was ineffective and had also been awarded the sum of €10,000 as compensation due by the Attorney General.

In deciding the case, the Rent Regulation Board first quoted the law (article 12B(11)), and a previous judgment of the Court of Appeal, and stated that despite there being a judgment of the Constitutional Court declaring article 12 to be invalid, it was nevertheless not lawful for the owner to request the eviction of the occupier without first availing himself of the provisions of this article 12B.

Thereafter, the Rent Regulation Board moved to refer to article 12B(6), stating that in establishing the amount of rent payable (up to a maximum of 2%) the Board "shall" (notice, not "may") give due account to the means and age of the tenant and to any disproportionate burden particular to the landlord. The Rent Regulation Board is even conferred power through article 12B(7) to determine that any increase in rent shall be gradual – thereby softening the blow inevitably brought about by what could be a massive increase in rent. What the Rent Regulation Board cannot do is to provide for a rent which is more than that provided by law, that is 2% of the value of the property as established by architects in the official list of said Board.

The Rent Regulation Board noted that plaintiff had not demonstrated any disproportionate burden particular onto him and reiterated that the purpose of this new law was to foster a balancing act between the rights of the owners and those of the tenants. The Board also noted the value and potential of the property, as well as the fact that the rent presently payable was relatively low.

It also noted that the tenant was 52 years old, and had a low annual income, all deriving through state social benefits; indeed it found that a rent equivalent to 2% of the value of the property would have constituted half of respondent's annual income, which would have been disproportionate in terms of his personal and financial circumstances. Above all, she required social protection, adequate housing and preservation of her personal dignity.

These are all elements which the Rent Regulation Board is required by law to consider and has no choice but to follow these rules. It must stated that in this judgment, the Board demonstrated an unerring discernment of these rules, mostly considering since this was the first judgment to employ this new law.

It acknowledged the role of the Housing Authority in the equation, as the entity who could be conceding subsidies to people like respondent in order to ease the sudden increase in rent.

As a result of all these considerations, it opted to give effect to article 12B(7), and ordered that rent is to be increased gradually, at a 1% yield for the first two years (€1,650 per year),

and then a 1.25% yield (€2,062 per year) for the following 4 years.

Plaintiff appealed the judgment.

NO, YOU OWE ME
BY DR CARLOS BUGEJA

Middlesea Insurance plc vs Raymond Avallone
29 October 2019, 900/08/1
Originally published 4 November 2019
Court of Appeal

The institute of compensation (sometimes known as 'set-off', and in Maltese, 'tpaċija') lives to cater for the existence of a multiplicity of obligations and a concurrence of reciprocal dues. The idea is that two corresponding debts may serve to extinguish each other on the basis of a total or partial set-off of what is due. It is an autonomous institute that has existed since classic Roman times, all throughout the Middle Ages and up to the provisions of the various civil codes (including Malta) we have today.

This principle is best exemplified in the phrase found in the Roman Digest, the historical compendium of juristic writings on Roman law compiled by order of the Roman emperor Justinian I, way back in the 6th century: compensatio est debiti et crediti inter se contributio (meaning: compensation is the reciprocal extinguishment of a debt and a credit). Each of the creditors pays himself and keeps what he owes, in what is really and truly a dual fictitious payment.

The judgment of the Court of Appeal in the names of Middlesea Insurance plc vs Raymond Avallone (900/08) delivered on 29 October 2019 specifically dealt with the institute of compensation (set-off) under Maltese law.

There is a lot to say about legal compensation; it is an institute that has been analysed, studied, and debated by many for hundreds of years. It has been subject of academic papers, books, judgments, and dissertations all around the globe, not least in Malta.

And yet, this judgment by the Court of Appeal somehow managed to eloquently capture most of the key elements of this institute of law, providing an impeccable starting point for those who want to dig deep into this principle at law.

Plaintiff company had instituted a case requesting that the court orders respondent to pay the sum of €14,884.23, consisting in premia and stamp duty (according to plaintiff, due to it by respondent) in connection with a number of insurance policies issued by plaintiff company in favour of respondent. Respondent had defended himself stating that the sum claimed had been set-off against money owed by plaintiff company to respondent, for claims he had lodged therewith, and which plaintiff company had failed to pay.

In delivering its first judgment (later appealed) the Civil Court, First Hall had quoted article 1197(1) of the Maltese Civil Code, and stated that set-off shall only take place between two debts both of which have for their subject-matter a sum of money or a determinate quantity of fungibles of the same kind, and which are both for a liquidated amount and exigible.

Legal compensation (or set-off) occurs automatically (ipso jure) even without the knowledge of the parties. The moment two debts exist simultaneously, they are mutually extinguished to the extent of their corresponding amounts.

However, legal compensation cannot be said to operate when one of the debts is not acknowledged by the party said to owe it. In such a case, it is the duty of the respondent alleging the operation of set-off to propose the necessary counterclaim in order to obtain a concurrent judicial pronouncement of the amount said to be owed, which in turn would then enter into the compensation equation. This way, respondent would be able to extinguish his obligations towards the plaintiff up to the amount owed to him by plaintiff; this through judicial (as opposed to 'legal') set-off.

The first Court noted that respondent had only managed to present scattered and unconvincing evidence to sustain his allegations that he had made claims with plaintiff company. These were not sufficient to warrant the existence of an automatic legal set-off. Nor could the court execute a judicial set-off, since respondent had not filed the relative counterclaim.

As a result, the court acceded to plaintiff company's request.

Respondent appealed.

In its judgment, the Court of Appeal specified that as a revisory judicial organ, it has the duty to carefully dissect the appreciation of the facts made by the first court, and correct it where it considers the first court to have erred, irrespective of the extent of the mistake. The Court of Appeal considered that the first court had conducted a careful and learned exercise, and had indeed arrived at the correct conclusion. It further reiterated its disagreement with appellant's position that he was somehow prejudiced by the fact that he was burdened with the responsibility to prove the dues he was claiming to have extinguished his debt via compensation, for after all, it was him who decided to come forward with such a defence.

Moreover – the Court of Appeal stated – the defence of compensation is really and truly an admittance of the obligation against which compensation is claimed, for if the principal obligation does not exist, nor there can be a place for an allegation of legal compensation.

It was to be further noted that legal compensation occurred naturally and without human intervention when there were two corresponding debts that existed at one moment in time; in such a case, these reciprocal debts are not extinguished through the effect of a court judgment, but automatically on the very outset of their coexistence (ex tunc). It is also necessary that the reciprocal debts are homogeneous in nature, but autonomous in their existence.

Hence, one rapport that gives birth to a number of crossclaims does not give rise to the institute of compensation. Authoritative Italian authors (namely Pescatore and Ruperto) had stated that the institute of compensation assumes the existence of autonomy of the connections to which the debts of the parties refer, with the consequence that, when instead of a single relationship, the dispute translates into a complex assessment of 'to give and take', one can no longer speak of legal compensation.

The Court of Appeal found that several of the necessary elements for legal compensation to occur were missing, and therefore, the first court could not be faulted for reaching the conclusions it had reached.

As a result, the Court of Appeal confirmed the decision of the first court, and ordered appellant to pay the costs of the case.

RESTRAINTS OF TRADE
BY DR REBECCA MERCIECA

Antonio Camilleri pro et noe vs Salvatore Sicurella
30 October 2019, 100/18RM
Originally published 25 November 2019
Court of Magistrates (Malta)

'Restraint of trade' clauses in employment contracts have always attracted legal controversy.

These are clauses intended to limit the actions of an employee after the termination of his employment with his employer.

Such clauses also include non-disclosure clauses with are commonly included in employment contracts appertaining to professionals and businesses, with the aim of achieving reasonable protection to trade secrets and to increase the protection of professional secrecy among professionals. Such restrictive clauses include 'non-compete clauses', which are intended to prohibit an ex-employee from taking on clients of the employer for a specific period following the termination of the employee's engagement with the said employer.

Clauses devised with the intention of restricting an employee's actions and protect the legitimate interests of the employer are not prohibited by law for professionals and business, and similarly, no law prohibits employers in different fields of trade, including technical persons, such as barbers and hairdressers from including similar clauses in employment contracts.

Upon the termination of employment (brought about by either party) questions regarding this kind of restrictive clauses start to trigger deeper consideration about the specific details of what had been signed by the parties at the beginning of the employment. Can an ex-employee bypass such clauses even though he had signed the same employment contract? Are such clauses valid according to law? Does the employer have a right to seek redress in case of breach, or are such clauses simply included as a deterrent for the employee?

Restraint of rade clauses may undeniably be disputed, based on the principle that the restrictions imposed by the employer by virtue of an employment contract are only enforceable if they are legal and founded in the law of employment, as well as reasonable (and hence justifiable) according to the circumstances of the employment.

The principle finds its roots in our Civil Code, specifically, article 985, which clearly states: 'Things which are impossible, or prohibited by law, or contrary to morality, or to public policy, may not be the subject-matter of a contract'.

Therefore, the employer who is burdened to prove that the restrictions included in such employment contracts directly relate to a legitimate interest appertaining to the same employer, which interest must be reasonable and that it does not go against public order. These limitations applicable to the restraint of trade clauses imposed by the employer are directly in line with the aim of Employment and Industrial Relations Act (the law governing employment in Malta – Chapter 452 of the Laws of Malta), that of protecting the rights of the employee who is inevitably considered to be in a weaker position than the employer.

When asked to enforce employment contracts with restraint of trade clauses, our courts have considered the elements of the employment in dispute, such as the role the employee held, his salary, the nature of the line of business, the effective period the employee had worked for the employer as well as the specific contractual elements constituting the restriction: time, place and purpose. The more restrictive the post-contractual conditions, the more the employer is bound to justify their reasonableness.

In the case of Antonio Camilleri in his own name and representing 'Antonio's Barber Shop' vs Salvatore Sicurella, decided on 30 October 2019 by the Court of Magistrates (Malta), the plaintiff argued that the defendant, an ex-employee of Antonio's Barber Shop, had dishonoured some of the conditions in his employment contract (after his employment had been terminated) and thus, plaintiff claimed the pre-liquidated damages of €8,000 in accordance with the employment contract previously signed between the parties, upon the defendant's engagement with the plaintiff's Barber Shop in 2017.

One of the clauses in the disputed employment contract in this case stated that the employee was precluded from carrying out any "activity, within the jurisdiction of Malta which may directly or indirectly compete with that of the Employer or prejudice the latter's interest's" both during his employment with the plaintiff, and also for 6 months following the termination of his employment.

The Court considered that the pre-liquidated damages in comparison to the defendant's monthly salary was unreasonable and that this clause was too generic and thus precluded the defendant's labour capacity almost completely. It stated that these restraint of trade clauses restricted the ex-employee both from being self-employed and also precluded him from being employed with someone else, even if not in direct competition with his previous employer. The court interpreted this clause to mean that

the defendant could not work as a barber, as a hairdresser or in any occupation which dealt with hair, including grooming or the sale of products for men.

The Court further stated that it was unjust to constrain a foreigner who had established himself in Malta to go back to his country in order to abide by this clause and it further considered that this clause brushed against the defendant's right to work, which is protected by the Constitution of Malta, and didn't simply restrict the defendant from working with competitors or clients of the plaintiff. Hence the court declared that this clause was unreasonable and contradicted public order and was thus not enforceable.

Nevertheless our juridical system does acknowledge the right of employers to have limited protection against ex-employees working with existing customers in order to protect the employer's goodwill, however the court interpreted the clause relating to competition in the case at hand also to be too generic and one that hinders the principle of fair competition. This restraint, as worded in the employment contract in dispute, was interpreted to prohibit the defendant from doing business even with those persons who he did not have a direct relationship with during his employment with the plaintiff.

Similarly, the Court stated that a clause relating to poaching employees who had been employed with the plaintiff at the same time as the defendant, as being unreasonable and thus unenforceable.

The Court further declared that the clauses appertaining to pre-liquidated damages in the employment contract signed by the parties were based on unreasonable restraint of trade clauses, which could not be enforced and thus rejected plaintiff's clai.

This judgement has been appealed from by the plaintiffs.

TIME IS UP!
BY DR MARY ROSE MICALLEF

Bank of Valletta plc vs Renald Camilleri
1 November 2019, 306/18LM
Originally published 11 November 2019
Civil Court, First Hall

The right to sue another for something is haunted by a legal principle known as 'extinctive prescription'. To the untrained eye, it is a strange principle with questionable purposes. But – as it will be seen – it has ancient legal and philosophical roots that fully justify its existence in the legal sphere.

Prescription in general is all about the passage of time – it merely consists of two classes: the acquisitive prescription and the extinctive prescription.

Our Civil Code defines the first as a mode of acquiring a right by a continuous, uninterrupted, peaceable, open, and unequivocal possession for a time specified by law. On the other hand, prescription is also a mode of releasing oneself from an action, when the creditor has failed to exercise his right within due time as prescribed by the law.

This legal institute is very strong at law, perhaps stronger than more popular institutes like wills and contract, for it may indeed unilaterally conceive or execute rights, if the relevant legal requisites are achieved.

On the face of it, prescription may be criticised as being unjust and unfair since it is a legal principle that allows legitimate rights to be lost in favour of others, and extinguishes the litigious right of action that creditors have against their debtors. Legal authors have in fact criticised this institute as being a means to turn a wrong into a right – it is unjust that a debtor is let off the hook due to the trespass of time – it is also unjust that through the passage of time, legitimate rights (even property rights!) are lost in favour of a third party possessor.

Yet the legal world intrinsically depends on such ancient institute. Its legal spirit is driven by the fundamental concept of legal certainty which was originally conceived in Roman Law. A right at law cannot be left hanging forever, nor can it live in a state of uncertainty until the end of times. In fact, originally, Roman Law set out the pediments of the acquisitive prescription – this was the so-called institute of usucapio. The ancient institute of usucapio is an identical image of the acquisitive prescription that is applied today.

The matter at hand in the case decided by the Civil Court First Hall on November 1, in the names of Bank of Valletta plc vs Renald Camilleri was about a different type of prescription: that known as 'extinctive prescription'.

Symbolically, the extinctive prescription could be perceived as a measurement, a cut-off date, a boundary line or even a shelf life that is connected to a right of action. Once the period provided in the law elapses, then so does the right of action connected therewith. Indeed, some would say that prescription presupposes payment. One who has paid a due cannot be expected to hold onto the receipt forever in order to prove payment. Likewise, one who holds a proper defence against payment cannot be expected to keep proof of his defence forever. And just like that, prescription intervenes in order to protect him against an extinguished claim.

In fact, our Civil Code sets out different time spans in connection to specific classes of judicial actions. Amongst others, the Code bars actions for payment of ground-rent, maintenance, rents, interests, monetary retentions, and any other debts by the lapse of five years. The five-year prescriptive period is triggered once the credit owed falls due.

Simply put, if a credit falls due today, the creditor must institute a judicial action within five years from this present day – unless such creditor opts to interrupt prescription. Otherwise his right of action could be potentially extinguished as soon as the five-year period lapse.

The Court noted that interrupting the prescription is the antidote against time. Prescription may be interrupted by virtue of judicial acts, including through the means of filing of judicial letters. By virtue of filing such judicial act, interruption of time would be presumed, and the prescriptive period would start to run afresh. Therefore, judicial letters serve as extensions to such prescriptive period and would enable the creditor to sue the debtor post the original prescriptive tenure.

It is imperative however, that such judicial letters are duly served upon the debtor within not more than a month from when the prescriptive period lapses.

The case cited above was a typical credit recovery action, initiated by the bank against the respondent. The credit in question amounted to €53,048.16.

It happened that a loan facility was granted by the bank to the respondent by virtue of a private writing dated 7th October 2008. The bank alleged that respondent had failed to honour payment of the abovementioned sum, and interests.

Respondent pleaded prescription on the basis of article 2156(f) of the Civil Code, which specifically bars actions for the payment of any other debt arising from commercial transactions or other causes, after the expiration of five years.

In countering such plea, the bank alleged that it had attempted to contact respondent on several occasions, for the repayment of the loan, yet such attempts were fruitless.

The Court observed that a judicial letter had been filed by the bank against respondent, which judicial letter contained an intimation to settle the debt. Such letter was filed on the 18th January 2010. Therefore, in accordance to the prescriptive provisions, the prescriptive term started afresh from this date and lapsed on its fifth anniversary.

In response to the plea of prescription, the bank attempted to use an alternative antidote to interruption. In terms of law, prescription could be tacitly or expressly renounced to. Tacit renunciation entails that the debtor informally admits that he is indeed a debtor.

The bank attempted to put forward the argument that defendant had not contested the fact that a loan facility was granted to him and therefore it argued that this was an admission of a debt.

The Court however upheld respondent's plea of prescription and dismissed the bank's claim on the basis that its right of action had been time barred by the five-year prescriptive period.

This judgment has since been appealed from.

BEYOND THE VEIL
BY DR CARLOS BUGEJA

Shaun Attard vs Joseph Schembri et
4 November 2019, 198/2019LM
Originally published 18 November 2019
Civil Court, First Hall

At the very core of Company Law is the rule that a limited liability company has a distinct personality recognised by law; as such, a company shall sue and be sued in its own name, and generally speaking, its directors are not to be pulled into matters strictly belonging to the company they run. Limited liability companies also operate under 'a corporate veil' – a legal concept that separates the personality of a corporation from the personalities of its shareholders. Hence, it is generally accepted that a civil wrong (here we are not speaking about criminal liability – that is a different argument altogether) committed by a company is only answerable by said company, and no one else.

But this is far from an absolute axiom.

Indeed, we have seen plenty of cases (more abroad than in Malta) in which the court lifted a company's corporate veil and held shareholders liable for an obligation undertaken by the company. We have also seen a handful of cases in which the directors were found to be responsible in an action in tort together with the company they ran.

The judgment of Shaun Attard vs Joseph Schembri et, delivered by the Civil Court First Hall on 4 November 2019 (198/2019LM) was one of the latter.

The precise form of the problem raised in this case is not new. And yet, the question of whether directors ought to be responsible for the tortious act of their company is still a difficult one. On one hand, there is the desire to preserve the enjoyment of limited liability afforded by incorporation. The economic necessities in favour of strict application of this principle can hardly be discounted. On the other hand, there is the general interest to ensure that a victim of a tortious act is protected against possible fictitious corporate alibis.

In the world of tort, a rigid attitude in respect of the limited liability principle is dangerous, to say the least; it would be too easy to use the device of acting as a director to escape liability and pin responsibility to a company which might not even be worth powder and shot. At the end of the day, how logical would be to say that the plaintiff cannot also sue the individual who, in effect, is the company impersonated? How could

it be said that it was the company – and not the director – who would have caused the tort, particularly when the company is merely a legal fiction created as a front to the directors?

On the other side of the fence, what purpose would the corporate limitation at law hold if it could be disapplied or disregarded here and there, as one pleases? Would then too many commercials decisions be fraught by considerations of directors' liability in a context where such liability should be legally minimal?

There are all valid questions, with not-so-easy answers.

In this case, plaintiff was seeking compensation in view of an injury he suffered while at his place of work. He sued the company, as well as the director in his personal capacity, the latter having had admitted his responsibility for the incident in separate criminal proceedings brought against him (possibly – although it is not clear from the judgment – specifically for his role as director of the company). During the civil proceedings, respondent denied responsibility for the incident. He further defended against his personal involvement in the case due to the fact it was the company that employed plaintiff, and not himself personally, and even more so since on the date of the incident, he had been abroad. He therefore asked to be relieved off the case.

The Court stated that in tort cases, it is generally held that a director is liable together with the company for tortious events committed by the company, if they are an immediate and direct result of the director's behaviour. It quoted literature stating that a director who would have authorised, directed and procured the commission of a tort by his company may be personally liable to the victim of the tort even though he would not be aware that the acts authorised were tortuous or did not care whether the acts were tortuous or not.

This position is consonant with that had by the English courts, who repeatedly and eloquently (in true English jurisprudential fashion) explained this principle, with only a few sparse dissents. Really and truly, this is indeed a matter which has little to do with company law, and much to do with basic principles of tortious liability. What the court stated in effect is that respondent's status as a director could not invest him with absolute immunity.

It is not immediately clear from the judgment if the extent of the role played by the director is to be a factor in deciding whether or not he should be held responsible in tort together with his company in particular cases. It seems that the director did not bring up this defence, and therefore, the court had no reason to tread that path.

The Court further considered that respondent had personally admitted to the criminal charged brought against him, and therefore had to be held responsible for the incident, together with his company. It found that respondents had not provided their employee with a safe place of work, and that therefore, the accident had occurred through their fault. Hence, they were to pay for all damages suffered.

At the end, it quantified the damages suffered by plaintiff in the sum of €25,706.44, and order both respondents to pay the sum between them (in solidum), together with costs of the proceedings.

WRITTEN OR NOT?
BY DR GRAZIELLA CRICCHIOLA

Marco Pisani vs KPM Marine Services Limited
5 November 2019, 139/16CFF
Originally published 16 December 2019
Court of Magistrates (Malta)

Work: a concept all of us (save a privileged few) comprehend. It is a means of nurture and an essential part of our identity. This is true in most parts of the world.

In Malta, work has an even more profound value. Indeed, according to the Maltese Constitution, Malta is a democratic republic founded on work and on respect for the fundamental rights and freedoms of the individual.

Owing to the fact that employment is so important in terms of an individual's dignity and self-worth, the contract of employment is also deserving of special treatment.

Employment contracts are important for both the employee and the employer. An empoyment contract stipulates and provides the duties and responsibilities of both parties. For instance: the elemental duty of an employee is to work for the employer and in return the employer is bound to pay his employees according to work within a certain time frame. An employment contract develops a strong basis for protecting both parties' interest. Normally such contracts hold details as to the employee's obligations, his health insurance policy, sick days, annual leave days, danger money, reasons for why his or her employment may be terminated, and much more.

Whereas some take it as a given that a contract of employment needs to be in written form in order to be enforced, this is in fact a common misconception. In fact, our courts have often faced a situation where the employment relationship between the parties would have been regulated by means of a verbal agreement between the parties, and not a contract in written form.

In such a scenario, how can a person prove and enforce a verbal contract of employment?

This is not an easy question to answer (indeed, if it had been, there would be no need to delve further).

This question was the main issue in the case of Marco Pisani vs KPM Marine Services Limited, decided with a judgment delivered by the Court of Magistrates on

5 November 2019. Faced with such a situation, the Court held that in the absence of a written contract, the plaintiff may bring forward other evidence including but not limited to the testimony of other co-workers to substantiate his claim that, even though his employment was not regulated through a written contract, such relationship in actual fact existed.

Naturally, in these cases, the court would be faced with conflicting evidence. The court would be required to analyse and weight the credibility of all the witnesses brought forward, their consistency and likeliness of their testimony. Nevertheless, proof brought forward to the court must lead the judge presiding the case with moral certainty and not merely possibility of the facts.

The facts of this case were as follows: In 2015, the plaintiff - Ship Captain Marco Pisani was offered employment by the defendant company. According to their verbal agreement, the parties to this case agreed that Pisani's work included the navigation of a vessel from Egypt to the Maldives. It was established that such employment was on a definite basis, and for the following ten years, Pisani had to be paid €2000 monthly apart from other allowances and benefits.

Before embarking on his first trip, on multiple occasions, plaintiff had attempted to put pressure on the defendant company to sign a written contract of employment. However, such attempts were futile as the defendant company continuously assured him that their verbal agreement was still valid and in fact gave the plaintiff €750 as a form of guarantee.

Subsequently, plaintiff was informed that his services were no longer required as the defendant company had failed to win the government contact. As a result, plaintiff requested the defendant company to honour their contract of employment and be reimburse him of the amount €11,937.27 representing works carried out to them during employment.

Contrastingly, defendant company argued that there was no written and signed contract that crystallises the intention of the parties and thus there was no enforceable relationship between the two. It was also argued that since there was no written agreement signed between the parties, plaintiff was not eligible for reimbursement.

The Court, after taking account the facts of the case, declared that in cases where no written agreement was signed between the parties, the burden of proof lies on the plaintiff. As a matter of fact, it was the plaintiff who was legally bound to produce enough evidence in support of his claim. Allegations need not be proved to an

absolute certainty; the party alleging must merely reach the level of persuasion assigned by law. In civil cases, the level of proof required would be the balance of probabilities.

Eventually, the Court concluded that the plaintiff managed to prove that there was a clear offer and acceptance of offer between the parties, that the parties had agreed on the terms of employment and there was a valid consideration between the parties. Credibility played a critical role in the determination of whether a verbal contract existed or otherwise. As a matter of fact, the Court remarked that the version of evidence given by plaintiff was more factual and reliable.

The Court ordered defendant company to pay plaintiff the sum of €11,937.25, (from which the amount of €2400, which were already paid, had to be deducted) together with the costs of the proceedings.

The defendant company has since then appealed from the judgement.

CONSTITUTIONAL FEUDS BY DR CARLOS BUGEJA

Josephine Azzopardi pro et noe vs Onorevoli Prim Ministru et
29 November 2019, 6/2015/1
Originally published 9 December 2019
Constitutional Court

The warm 2019 summer season saw the European Court of Human Rights severely chastising our courts for the way they were dealing with rent-related constitutional cases, pouring thereon a cold shower (not the ones you'd enjoy in the scorching heat) on the methodology that had been widely adopted here in Malta.

But our Constitutional Court would not have it.

In a judgment delivered on 29 November 2019 in the names of Josephine Azzopardi pro et noe vs Onorevoli Prim Ministru et, it retorted with decisive dialectic, pointing out what it considered to be the ECHR's flawed logic.

Colourful argy-bargies between courts are not at all rare. Indeed, in jurisdictions allowing expressed dissenting opinions, one can even find heated dialogue between judges in a one and same judgment.

Putting aside any reservations that one may have for reasons of legal certainty; legal discourse is positively vital in jurisprudential growth.

But let us first rewind a little bit.

In the past few years, constitutional cases relating to controlled rents have taken our society by storm. Dozens of old controlled rents were deemed as creating an unjust and disproportionate burden on the owners, and both local legal systems of residential controlled rents (Article 12 of Chapter 158, and Chapter 69) were declared as being in breach of the provisions of the European Convention of Human Rights and the Constitution of Malta.

There is one thing which our courts of constitutional jurisdiction seemed to agree on: it was not the court's job to order the eviction of a tenant holding lease under an 'unconstitutional rent'.

Our courts have adopted the habit to merely declare the articles at law controlling

the rent to be unconstitutional and invalid, award compensation, and state that the tenant could no longer rely on those articles at law rendered invalid. The owner would then have to resort to the Rent Regulation Board and seek eviction therein on the basis of the fact that the tenant (without the protection of the law deemed invalid) did not have a valid title at law.

The constitutional proceedings had to be followed by ordinary civil proceedings.

In the case of Portanier vs Malta, delivered on August 27, the ECHR bludgeoned our courts for the choice of this approach.

This is not to say that this choice had not been previously criticised (the words of former ECHR Judge Giovanni Bonello echo most prominently). But this time, it was the ECHR who lead the wave of disapproval.

The ECHR stated in Portanier vs Malta that there is no doubt that the courts of constitutional jurisdiction could evict a tenant, which measure would prevent the continuation of the violation. It reiterated that once the constitutional decision is made, it would appear that the success of the eviction request before the ordinary jurisdictions would be evident in the absence of any other legitimate title to the property. Therefore, the ECHR argued, there is really no purpose to pursue a second action with additional expenses, the result of which is practically foregone.

It urged our courts to immediately provide for the eviction of the tenant holding the property under an unconstitutional rent, without forcing the owner to institute another lawsuit. It moved to ask: "Why does an applicant have to undertake another set of proceedings with connected expenses, and continue to suffer the violation for a number of months or years, if its result is automatic?"

It further stated that the Constitutional Court's role is to bring a violation to an end; and considered our courts' refusal to provide for immediate eviction as an abdication of the responsibility assigned to them by the Constitution of Malta.

In the judgment of Josephine Azzopardi pro et noe vs Onorevoli Prim Ministru et, the Constitutional Court took umbrage at these comments, not the least because it felt that the ECHR failed to understand the distinct particularities of individual cases, as well as the particularities of Maltese Law itself.

The Court was being called upon to decide on an appeal by the Attorney General, as well as an appeal by the owner who claimed – among other things – that the first court should have ordered the eviction of the tenant.

The Constitutional Court referred to a previous unrelated judgment of the ECHR which had also admonished Malta, only to retract the admonishment in a later judgment.

It stated that specifically in the case of Portanier, owner had requested eviction after having obtained a declaration from the Constitutional Court that tenant could no longer rely on the provisions of article 12 of Chapter 158 of the Laws of Malta to justify his occupation of the property. It observed that in the second case (the eviction case), respondent had raised new pleas which he could only raise in the ordinary courts, and not in courts of constitutional jurisdiction.

It reiterated that had the court – in Portanier vs Malta – ordered the eviction, and delivered what the ECHR defined as 'an impeccably comprehensive remedial action', it would have prevented the tenant from sounding his views on issues other than those constitutional in nature, possibly breaching the right of fair hearing guaranteed to the tenant. The Constitutional Court saw nothing impeccable about this conundrum.

The Constitutional Court emphasised that after all, any legitimate title other than that hit by the constitutional issues (as well as other ordinary pleas) would be the ordinary court's competence to decide upon. Indeed, it was rather contradictory to state that the success of the eviction request before the ordinary jurisdictions would be evident in the absence of any other legitimate title to the property, when any 'legitimate title to the property' is to be established in an ordinary court of law, that is during the second lawsuit.

The Constitutional Court stated that laws of procedure have to be respected, and that the creation of procedural anarchy could not lead to efficiency and justice. Contrary to what was said in the decision by the ECHR, the court did not have unlimited powers, since even the highest court in Malta was bound by rules of procedure.

As a result, it rejected the grievance requesting an order of eviction of the tenant.

SERVING THE TAXPAYER
BY DR EDRIC MICALLEF FIGALLO

X vs Commissioner for Revenue
5 December 2019, 29/15 VG & 30/15 VG
Originally published 23 December 2019
Administrative Review Tribunal

On 5 December 2019, the Administrative Review Tribunal delivered two partial judgements in two separate cases which are of interest for taxpayers in fulfilling their fiscal obligations and for the authorities entrusted to enforce those same fiscal obligations. Partial judgements are judgements given on particular points which must be decided, or it is procedurally expedient to have them so decided, before the delivery of the final judgement in any given case.

The relevant cases for the purposes of this article bear numbers 29/15 VG and 30/15 VG. Both appeals were filed against the Commissioner for Revenue by taxpayers, and both related to Value Added Tax obligations. In both cases the appellants are seeking a reduction in the amount of taxable or calculated revenue as claimed by the Commissioner for Revenue and the striking out of all the relevant estimates by the Commissioner.

In both these cases the Commissioner for Revenue raised a preliminary plea related to article 48(5) of the Value Added Tax Act (Chapter 406 of the Laws of Malta) and the referred partial judgements are judgements on such a preliminary plea, and exclusively so. So, what does article 48(5) of the VAT Act provide and what did the Tribunal decide in relation to the Commissioner's plea thereon?

In both cases the Commissioner for Revenue requested the application of the provisions of article 48(5) allegedly due to the indifferent attitude of the appellants, ergo a grossly negligent lack of co-operation by the appellants towards the Commissioner. Article 48 of the VAT Act basically provides for the record keeping obligations of taxable persons and sub-article (5) thereof provides for situations in which taxable persons do not comply with requests by the Commissioner in relation to said record keeping obligations. Obviously, for clarity's sake it is to be said that the provisions of the VAT Act are strictly related to VAT obligations and that taxpayers also have other record keeping obligations.
The judgements at hand deal with something which goes beyond compliance by taxpayers as far as VAT record keeping is concerned but refer to situations in which the Commissioner is still investigating on such compliance (or the suspected lack

thereof). Article 48(5) provides on the powers and obligations of the Commissioner in requesting documents from taxpayers and on making copies thereof, but importantly it also provides for the lack of compliance by taxpayers in relation to such requests. Indeed, in the given partial judgements the Tribunal reviewed the applicability of article 48(5) and decided on the procedural consequences affecting taxpayers should it be found that said article is applicable. In the given cases and in similar cases, these are fundamental considerations as the taxpayers' appeal might by significantly affected, especially since in the ongoing cases they would be disallowed the tendering of what could be relevant evidence which could make or break their case.

What are the procedural consequences should article 48(5) apply? As pointed out by the Tribunal, the first proviso of article 48(5) provides that if there is evidence that after being requested by the Commissioner by means of a notice in writing, that such person failed to produce without any reasonable excuse any records, documents, accounts and electronic data within thirty days from the date of service of such notice, such person shall not be allowed to produce such records, documents, accounts and electronic data at a later stage after the issue of the provisional assessment or assessments or before the Tribunal or in any court of law.

So basically, unless one produces the documents to the Commissioner of Tax at investigation stage, he would not be able to then produce them during any proceedings filed before our courts.

Thus, in the given cases, the Commissioner actively sought the application of said proviso in an attempt to procedurally hinder the appellant in submitting any evidence which falls under what is stated above, which evidence could be pivotal for the appellants' claims and their acceptance by the Tribunal.

Delving into the notification requirements in both cases, the Tribunal allowed the Commissioner of Revenue's plea in case 29/15 VG and disallowed it in case 30/15 VG. However, in both cases, the Commissioner had actually repeatedly failed in adequately notifying the taxpayer according to the VAT Act and also according to the relevant notification provisions of the Code of Organization and Civil Procedure (Chapter 12 of the Laws of Malta, article 187(4) thereof) in relation to corporate bodies (such as companies). In case 30/15 VG the Tribunal also made a very appropriate reference to the Postal Services (General) Regulations (Subsidiary Legislation 254.01) and regulation 33 thereof, which inter alia provides that the recipient of a registered mail item is to sign for its receipt and failing so the item is to be deemed as undelivered (and thus, not notified), as was to be deemed the case in case 30/15 VG.

Acting within the relevant time periods at law, the Commissioner defaulted in his notification obligations because his officers had merely left the relevant written notices in the letter box at the registered address of the companies concerned, save for one notice out of a total of eight for both cases which was validly handed over to one of the directors of the relevant company (which eventually led to the Tribunal's acceptance of the Commissioner's plea in 29/15 VG). The Tribunal also found that leaving the notices in a letter box is not legally equivalent to sending by post, as required by article 73(2) of the VAT Act.

Describing the legitimate modes of service of such notices under VAT legislation, the Tribunal pointed out that the Commissioner's notices are to 'be served either personally or by being sent by post', and in the given cases no service was done physically to the person of somebody competent to be notified, save for one notice as previously stated.

It is pertinent to point out that assuming that the Commissioner for Revenue is acting within the relevant time periods at law, then he does not seem constrained in issuing multiple identical notices for the purposes of article 48(5). However, the adequate service thereof is imperative.

A GET OUT OF JAIL FREE CARD? THINK AGAIN... BY DR RENÈ DARMANIN

Il-Pulizija vs Biondy Clayd Raafenberg
12 December 2019
Originally published 13 January 2020
Court of Criminal Appeal

A common notion in criminal law which a lot of people have trouble comprehending is the granting of bail. It is often heard on the news that the accused was granted bail or in Maltese 'ingħata l-ħelsien mill-arrest'. In layman's terms the granting of bail refers to those instances whereby persons awaiting trial are temporarily released from custody.

First and foremost, it is worth mentioning that the granting of bail, is envisaged under article 5 of the European Convention of Human Rights. This fundamental human right holds that everyone has the right to liberty. No one shall be deprived of his liberty unless one's continuous detention is reasonably considered necessary to prevent the commission of another offence or to prevent the accused from fleeing whilst criminal proceedings are underway.

The European Court of Human Rights has reiterated on several occasions that 'the presumption is in favour of release'. Until a conviction, the accused must be presumed innocent. This essentially requires the provisional release once the accused's continued detention ceases to be reasonable. A person charged with an offence must always be released pending trial unless the State can show that there are 'relevant and sufficient' reasons to justify the continued detention.

When determining whether to grant bail or otherwise, our courts consider the nature and seriousness of the offence with which the accused is being charged, any previous convictions, as well any community ties which the accused may have. The court must also ascertain that the accused is reliable and shall appear in court when ordered to do so and that it is not likely that the accused will commit any offence whilst on bail.

If the court accedes to the accused's request and grants bail to the person charged, our courts usually imposes several conditions which the accused must comply with. These conditions often include conditions which restrict the accused from leaving Malta. The court may also order the accused released on bail to sign at any District Police Station which the court may deem fit or orders the accused to retire at his

home by not later than a specified time. The court may also order the accused to deposit a stipulated sum of money and/or to make a financial guarantee. Nonetheless, when the court decides to order the accused to make a deposit so that the granting of bail is guaranteed, the court must take into account the nature and quality of the offence as well as to the financial health of the accused.

With respect to the amount of the bail deposit, Loretta Lynch – a former Attorney General of the United States once said, 'What is the price of justice? What is the price of justice? When bail is set unreasonably high, people are behind bars only because they are poor. Not because they're a danger or a flight risk - only because they are poor. They don't have money to get out of jail and they certainly don't have money to flee anywhere'.

If the accused, whilst benefitting from bail, fails to comply with any of the conditions imposed by the ourt, bail will be lost, a new warrant of arrest will be issued against him and the deposit as well as any guarantee shall be forfeited in favour of the Government of Malta.

This was the matter at hand in the case of Il-Pulizija vs Biondy Clayd Raafenberg decided by the Court of Criminal Appeal on December 12, 2019.

To put things into context, in this particular case, the accused was primarily arraigned under arrest and was eventually granted bail under several conditions, amongst which he had to make a financial guarantee of €10,000. Back in November 2018, Mr Raafenberg was once again arraigned before the Court of Magistrates accused of having breached the bail conditions imposed upon him. Upon admitting to the charge brought against him, the Court of Magistrates revoked the accused's bail, ordered his re-arrest, condemned him to six months imprisonment and decided not to order the confiscation of the guarantee which was safeguarding Raafenberg's bail.

The Attorney General - as the public prosecutor - appealed from this judgement, requesting that the part of the judgement where the accused was found guilty of the charge brought against him would be confirmed, but asked the Court of Criminal Appeal to order the forfeiture of the personal guarantee to the Government of Malta.

In its accurate considerations, the Court of Appeal pointed out that under article 579(2) of the Criminal Code (Chapter 9 of the Laws of Malta), it was incumbent on the Court to order the forfeiture of the personal guarantee. The Court of Magistrates had no choice but to do so.

Consequently, by means of this judgement, the Court of Criminal Appeal varied the judgement delivered by the Court of Magistrates by confirming that part where it found Mr Raafenberg guilty of the charge brought against him, once again revoking his bail, ordering his re-arrest, and sentencing him to six months imprisonment. However, it revoked that part of the judgement of the Court of Magistrates where it was decided that the personal guarantee would not be confiscated in favour of the Government of Malta, instead ordering said confiscation.

All in all, the institute of bail is a very controversial topic especially in situations where the accused is charged with heinous crimes. Having said that, there is a principle that rises above anything else, and which one must always bear in mind: the accused must always be presumed innocent until proven guilty, and by the granting of bail, our courts attempt to strike a balance between the rights of the persons charged and those of society in general.

A PROPER LOOKOUT
BY DR CARLOS BUGEJA

Stephen Galli vs Nathalie Barbara et
16 December 2019, 252/17LM
Originally published 6 January 2020
Civil Court, First Hall

Every trip in a car, as short as it may be, imposes upon the driver a number of legal obligations, perhaps stricter than one would first assume. Certainly, everyone is aware of the duty to keep one's car in a state of roadworthiness, and most have a good idea of the harsh legal consequences of driving under the influence of alcohol beyond the threshold provided by Maltese law (hint: it sometimes takes just one drink to reach the limit).

But how many do really comprehend the true facet of the obligation to 'keep a proper lookout'?

The judgment of Stephen Galli vs Nathalie Barbara et, delivered by the Civil Court, First Hall on 16 December 2019 (252/2017LM), presented a studious assessment of this principle at law.

The case was a typical action for damages filed by plaintiff following a traffic accident. Respondent had driven out of a driveway of a commercial outlet into a main road, when suddenly, there was an impact with a motorcycle, driven by plaintiff, who was driving down that very same main road. The motorcyclist suffered permanent disability, later quantified at 27%, leading him to seek damages against the driver with whom the impact occurred, and the company that insured her.

There were a number of matters tackled by the court in this judgment, but none stood out more than the question: was respondent maintaining a proper lookout when the accident occurred?

It is generally stated (in article 1031 of the Civil Code) that every person shall be liable for the damage which occurs through his fault. According to article 1032 of the Civil Code, a person shall be deemed to be in fault if, in his or her own acts, he or she does not use the prudence, diligence, and attention of a bonus paterfamilias.

The term bonus paterfamilias does not carry a precise legal definition; but it has traditionally meant something equivalent to 'a good father of the family' –

a diligent guardian of the rights and interests of his or her ward. In the world of road-accident tort law, bonus paterfamilias may in fact be understood through the concept of 'proper lookout'.

From the time we were first taught to drive, we have always known that we should keep our eyes on the road. Simply put, proper lookout is the due degree of attention expected of the driver of a vehicle in avoiding collisions with other vehicles or pedestrians. It binds every car-driver to maintain a proper lookout by all available means which are appropriate to the prevailing circumstances and conditions in the road, in order to make a full appraisal of the situation and of the risk of collision.

It is a duty to fellow drivers to expect the unexpected, and to be ready to act upon it in time.

The court stated that should a driver not see what one should have reasonably seen, it necessarily meant that he was not keeping a proper lookout, since every car driver has a duty to see what is in plain view. It quoted past judgments and smashed what is often seen as a common misconception, reiterating that keeping a proper lookout means more than looking straight ahead.

This duty at law includes maintaining complete awareness of what is happening in one's immediate vicinity. A motorist shall have a view of the whole road, from side to side, and in the case of a road passing through a built-up area, of the pavements on the side of the road as well. It is undeniable that traffic accidents are often a result of split-second distractions, often coupled by the fact that traffic contingencies may be sudden and without warning. For there to be negligent driving, there need not be specific violations of precise traffic rules, but it is sufficient for the driver not to have exercised ordinary prudence.

The law is harsh and unforgivable in this respect, and understandably so.

A driver must thus drive diligently in a wider sense, taking account of the safety of other road-users and pedestrians. This means that it is not sufficient for a driver to look straight in front of him, but he must also have an awareness of his immediate vicinity, adjusting his driving according to the state of traffic, the state of the road, light, and other factors, all of which enter into the wide significance of 'proper lookout'.

Some may argue that the vigilance required from a car-driver is somewhat onerous – and granted, it really is. However, one must understand that road vehicles are in many cases held to a high standard because of the great potential for damage

a negligently operated vehicle can cause. At the risk of sounding cliché, a car is a dangerous weapon, and one must tread carefully.

Going back to the case at hand, the Court stated that whether or not respondent had maintained a proper lookout is then something to be proven on a level of balance of probabilities. Only that way could the court be satisfied that the facts being alleged had been sufficiently proved. The standard of 'balance on probabilities' denotes that the contested facts are proved to be more probable than their non-existence. If the possibility of facts being true is equal to it being false, the burden is held not to have been discharged. Thus, the case fails actore non probante reus absolvitor (meaning that when the plaintiff does not prove his case, the defendant is absolved.)

The Court considered that respondent had to be more careful when exiting the driveway onto the main road, particularly since she had wanted to cross two carriageways.

Therefore, it concluded that indeed, she was responsible for the accident, and the motorcyclist's injuries, and in turn, the company that insured her had to pay for the damages incurred.

After calculating the damages due, it ordered the insurance company to pay plaintiff the sum of €22,244.41.

WHERE DO YOU GO?
BY DR CARLOS BUGEJA

KPJ Company Limited et vs Elsil Limited et
23 December 2019, 1158/19GM
Originally published 31 December 2019
Civil Court, First Hall

When we think of the Courts of Justice, we think of the neoclassical courthouse built in Valletta on the site of the former Auberge d'Auvergne, with its dominant portico with six columns that are sure to capture every passer-by's eye. It would thus be justifiably presumed that there is only one court, which is responsible for anything judicial.

However – the truth cannot be farther from that.

Our legal conception of 'court' is beyond the architectural structure that adorns Republic Street in Valletta. It signifies a mixture of compartmentalised chambers each having their own exclusive (or in a few cases, non-exclusive) responsibilities; these are collectively and individually known in the legal world as 'court jurisdiction'. Jurisdiction is the power which each of the judicial authorities exercises in the performance of its functions. Underlying this is the concept of 'competence', which can be defined as the measure according to which such power is distributed between the various authorities.

We have myriad courts, each with different competences. We have a Court of Magistrates (Criminal Judicature), a Court of Magistrates (Criminal Inquiry), and a Criminal Court. We have a Court of Magistrate (Civil Jurisdiction), a Court of Magistrate (Gozo – Superior Jurisdiction), a Civil Court First Hall, a Civil Court (Family Section), a Civil Court (Voluntary Jurisdiction Section) and a Civil Court (Commerce Section), to mention a few. Then, we have a number of boards and tribunals, such as the Rent Regulation Board, the Land Arbitration Tribunal, the Administrative Review Tribunal, a Small Claims Tribunal, and Industrial Tribunal, among others.

Each of these are afforded power by what are known as the ratione materiae (the matter at hand), or the ratione valoris (the value in play).

Lawyers have to be very careful to file judicial acts before the court exercising proper competence; otherwise (more in the past than today), they risk facing devastating competences, for an act filed before the incorrect court (legally defined

as 'the incompetent court') could very well be deemed null and invalid. This has traditionally posed a massive headache to members of the legal community, for it is not always very clear in law which court is responsible for which act. We recall the infamous confusion brought about in the past by the now abolished (in 1995) Commercial Court, where whether this court had competence mostly depended on whether or not the parties could be defined as being 'traders' in terms of the law.

The decision in the names of KPJ Company Limited et vs Elsil Limited et (1158/19GM), delivered on 23 December 2019, set to answer the question of which court is competent to take on a precautionary warrant filed in connection with a rent dispute.

For a long time, it had become quite a habit for many lawyers wanting to file a precautionary warrant to limit their choice between the Court of Magistrates and the Civil Court First Hall – depending solely on the value of the claim. If the precautionary warrant was of a value of less than €15,000 (whatever the nature of the case) it was filed in the Court of Magistrates, whereas everything else was filed in the Civil Court First Hall.

Therefore, whilst to the untrained eye, this was a simple question for the court to answer, in reality it was one which could have disarmed years of widely accepted routine.

In answering the question, the Court quoted article 264 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) which states that judgments are enforceable by the court by which they are delivered, even though the execution is to take place beyond the limits of the local jurisdiction of such court. This article at law however speaks limitedly about executive warrants (those seeking to execute judgments) and not also precautionary warrants (those seeking to protect the claimant pending judgment).

Despite this lacuna, it is logical to argue that since precautionary warrants act as a security before his claim is decided by the courts, they are to be filed in the same court that will take cognisance of the claim they seek to protect. Their purpose is to preserve plaintiff's claim until the case is decided – that is to prevent the periculum in mora.

The Court however expressed its view that this broad principle does not necessarily apply to all tribunals (as opposed to courts), since board and tribunals often have limited jurisdiction. Indeed, it is not rare for specific laws to provide for the execution to be conducted by a court other than the tribunal for which it refers. For instance, the execution of judgments of the Small Claims Tribunal is vested in the Court of

Magistrates, and therefore, the law does not permit the filing of warrants before the Small Claims Tribunal.

Therefore, it cannot be unfailingly stated that a precautionary warrant is to be filed in the court or tribunal where the case is to be heard. This is not true in each and every circumstance.

However, when speaking of rent issues, Chapter 69 of the Laws of Malta states clearly in article 20 that the Rent Regulation Board shall have all such powers as are, by the Code of Organization and Civil Procedure, vested in the Civil Court First Hall. Furthermore, the enforcement of the decisions of the Board shall vest in the Board itself. The law further states in article 21 that any warrant or order issued by the Board shall be signed by the Chairman and certified by the Registrar or Clerk of the Board. The court noted that the law does not expressly distinguish between precautionary and executive warrants, and on the strength of the Latin brocard ubi lex non distinguit, nec nos distinguere debemus (where the law does not distinguish, nor the interpreter must distinguish), neither should the court.

Therefore – the Court considered – the claimant was wrong to file the precautionary garnishee order before the Civil Court First Hall. It concluded therefore that the garnishee order was null and without effect.

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