
AZZOPARDI
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FROM
THE
BENCH
SERIES
2023

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FROM THE BENCH

SERIES 2023

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

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CRIMINAL LAW cont'd...

FOREWORD

Judge Carmel Agius

I was so pleased when I was invited to write the Foreword to this year's "From the Bench". Having lived and worked in The Hague for the past 22 years I have witnessed from a distance the enormous and complex development of law in our country, but I was not aware of this fantastic publication.

One of the very first things I learnt as a law student is that law is not static but very much dynamic. The nature of law is that it evolves in response to societal changes. But keeping abreast with the law as it changes is challenging: it's challenging for lawyers and I dare say magistrates and judges too. One can therefore imagine how arduous, difficult, and exacting it is for the layman who has no legal education basis and is more prone to misunderstand what s/he learns. I remember as a magistrate and later a judge reading reports in the papers about my judgment/s the day before. At times I couldn't recognize my judgment in the report and I used to worry about the wrong information being imparted to and processed by the general public.

This online publication "From the Bench" is a wonderful innovative initiative by Azzopardi, Borg & Associates Advocates. For the past five years, this law firm has kept the public abreast of this evolution in the legal sector by sharing the decisions of our Courts of Justice, explaining the law through its application and interpretation. So, my congratulations and I hope this law firm will continue with this initiative in the years to come. I myself used to be law reporter of the Times of Malta before I became a lawyer and for a couple of years after and this helps me appreciate this initiative even more and strongly recommend it.

This year's topics are as varied and interesting as those in the past years and I expect them to engage your attention. I myself couldn't stop moving from one article to the next and must confess I read the whole lot in one day! The article on Mr Justice Bugeja's judgment on tampering with a person's postal mail is intriguing. So too is the judgment of Mr Justice Spiteri Bailey on the appointment of a provisional administration. The article "Courting or Sexual Harassment" is very interesting and informative as is the one on domestic violence. A very topical article is that dealing with the judgment of the Court of Appeal

in the Phoenix case regarding the constitutionality of fines imposed by FIAU which is still being discussed in some legal fora today. Very pertinent is the article "Hate Speech or Freedom of Expression?". I could go on and mention all the articles one by one but I think it's better to let you find out yourselves.

In certain very developed countries, public or community legal education and information are given great importance, many times starting from primary and secondary schools. Legal awareness is considered necessary and steps are taken to keep the public informed and educated. In Malta, we are not yet that advanced but we have made gigantic steps forward, for example in the areas of domestic abuse, all types of harassment, gender discrimination, LGBTIQA+, human rights and freedoms, and employment rights amongst others. But in my humble opinion, much of this is imparted in a disorganized manner and many a time by inexperienced laymen with limited knowledge.

This year's "From the Bench" is extremely important in this context as it helps the public understand better certain judgments of our courts.

Judge Carmel Agius

INTRODUCTION

David Chetcuti Dimech
Editor, From the Bench 2023

Dear Readers,

It is a pleasure to introduce you to the fifth edition of the 'From The Bench' series. This is a notable milestone in more ways than one, because it marks the fifth anniversary of both this publication series and the law firm that produces it.

Writing the foreword to the first edition in 2019, Founding Partner Dr Arthur Azzopardi expressed the desire that the publication, and the corresponding contributions published in The Times of Malta over the preceding year, would help 'educate the general public in the ways of the law' and make the law accessible to them. In another foreword to the same edition, Judge Giovanni Bonello noted that 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'.

With five years under its belt, perhaps it's time to take stock and see whether the journal has stood up to both its intended purpose and the expectations placed on it. It should be remembered that the contents of this journal remain the contributions that the various authors make to The Times of Malta over the year preceding its publication. The trend has remained, the discipline amongst the firm's ranks mostly unwavering. The articles are well-received, and judging by this edition's foreword writer still spark joy in the hearts of even seasoned legal veterans! Conclusion: the journal is on track.

Law is change, and judgments are a big part of that change. The basic principles often remain immutable unless altered by radical legislative change. Judgments, however, can add nuances and interpretative caveats to the written word of the law that may not be apparent by simply reading the law. Plus, the law today has reached gargantuan proportions. Gone are the days when the Laws of Malta could neatly fit and adorn a single shelf. Today they probably would not fit a lawyer's chambers! This makes the lawyer's job a nightmare, but we rarely stop to think about what it must be like for persons who are not trained in the law to know what the law in their regard is without having to turn to help-against-payment.

That is where this journal has carved out an important niche. Academic journals, such as the one championed by the Għaqda Studenti tal-Liġi, deal with the law from the academic perspective – interesting, but only if you already have a solid grasp on the basic legal principles (and in some cases, even that is not enough). For the general public, an academic contribution rarely says much about what the law means in day-to-day life, what it means to them personally. This journal allows the public to see the law in play through a live dissection of recent court judgments that turns often inaccessible legalese into a story with a moral: the legal principle the author would decide to bring to the reader's attention. All of a sudden the judgment comes to life and may, at times, become relatable or provide answers the reader did not know where to find. At the end of the day though, the aim of the articles appearing on The Times of Malta and this journal is to offer a good read to readers on the weekend.

With that thought, I would like to thank all the firm members for taking time out of their busy schedule to pen the narratives that compile this volume. I would also like to extend our gratitude to The Times of Malta for hosting our series for another year and in turn helping us reach our aim of bringing the law closer to those expected to obey it.

I hope the reader will once again enjoy the pieces in this volume and perhaps also learn something new.

Happy reading!

David Chetucti Dimech
Paralegal
Azzopardi, Borg & Associates Advocates

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Commercial Law

WHEN IT'S TIME TO UNWIND: DISSOLUTION OF COMPANIES BY COURT JUDGMENT

Nicole Vassallo

On 29 April 2022, a limited liability company registered in accordance with the Laws of Malta with the name Petrozavodsk Gruppa Limited (C-65063), lodged a request before the Civil Court (Commercial Section) for its dissolution and consequential winding up by the same Court following an extraordinary resolution to that effect, in terms of Article 214(1)(a) of the Companies Act (Chapter 386 of the Laws of Malta).

The Companies Act prescribes three principal ways whereby a company may be dissolved and consequently wound up: by the Court, by the creditors of the company to be so dissolved and wound up, or voluntarily by its members.

Petrozavodsk Gruppa Limited, a holding company established on 9 May 2014 for the purpose of holding shares belonging to the company Besedka Software & Services Limited, made its request on the basis that the latter company was no longer in operation and had been inactive for years before the application in question was filed. Indeed, a simultaneous application requesting the dissolution and consequential winding up of the subsidiary company Besedka Software & Services Limited had also been filed following an extraordinary resolution of its members and directors.

The Civil Court (Commercial Section) referred to the extraordinary resolution containing the decision taken by its members to dissolve and wind up the company. In this regard, the Court considered that:

> *Illi r-riżoluzzjoni straordinarja meħuda fit-3 ta' Marzu 2022, DOK P2, tagħmel referenza ampja u ċara għad-diffikultjiet li l-kumpannija de quo għandha biex tkompli topera, u tispjega b'mod ċar u inekwivoku il-motivazzjoni li wasslet lil kumpannija għal dik irrizoluzzjoni, u ċioe li l-oġġettiv tagħha spiċċa kompletament.*

The suspension of a company's business operations for an uninterrupted period of twenty-four months may in fact constitute a ground for one to request for a Court dissolution and winding up, as explained in the Companies Act, in the same way that a company's inability to pay its debts may also lead to the said dissolution and winding up by a Court judgment.

In delivering judgment, the Court referred to the work of Professor Andrew Muscat, namely *Principles of Maltese Company Law*, and cited the following extract regarding the 'disappearance of the substratum':

> A company`s substratum is the purpose or group of purposes which it is formed to achieve – in other words, its main objects. If the company has abandoned all its main objects (and not merely some of them) or if in practice it cannot achieve any of them, then its substratum has disappeared…

Meanwhile, the Act also prescribes circumstances which shall lead to a Court dissolution and winding up, in Article 214(2)(b), in cases including but not limited to: where the number of members of the company is reduced to below two and remains so reduced for more than six months (except in the case of single-member companies); where the number of directors is reduced to below the minimum prescribed by law and remains so reduced for more than six months; or, if the Court believes that there are grounds of sufficient gravity to warrant the dissolution and consequential winding up of the company.

In the present judgment, the Civil Court concluded that the company Petrozavodsk Gruppa Limited was justified in requesting its dissolution and consequential winding up, which it had done by means of an extraordinary resolution, as it stated in its concluding remarks before proceeding to accede to the company's request, cited below:

> *Meta kumpannija ma tagħmilx negozju tkun entita` bla ruħ għaliex ma tkunx qiegħda taqdi l-għanijiet tagħha. Milli aċċertat, il-kumpannija waslet at a point of no return. Wara li fliet id-dokumenti esebiti u r-rekwiżiti legali kollha, din il-Qorti hija tal-fehma illi r-riżoluzzjoni straordinarja saret u saret għal/ ragunijiet leġittimi fiċ-ċirkostanzi partikolari li tinsab fihom il-kumpannija.*

Moreover, the Court proceeded to nominate a liquidator (*stralċjarju*) for the performance of duties assumed by a liquidator of companies as envisaged in the Companies Act. This includes verifying the assets and liabilities pertaining to the company, taking control of any assets it may have, making and/or defending any action or legal proceedings on behalf of and in the interest of the company, disclosing the need

for any measures whatsoever in the interest of the company's assets, and drawing up a report within the timeframe established by the Court awarding judgment.

The judgment was delivered by the Civil Court (Commercial Section) on 6 March 2023 in the names *Petrozavodsk Gruppa Limited (C-65063) vs X* and bears reference number 49/2022 ISB.

The judgment is final and may not be appealed further.

ENFORCING INTELLECTUAL PROPERTY RIGHTS IN MALTA

Rebeeca Mercieca

Holders of intellectual property rights, those authorised to use intellectual property rights, particularly those with a licence of such rights, are among the list of persons entitled to avail themselves of the measures, procedures, and remedies provided by the Enforcement of Intellectual Property Rights (Regulation) Act. The second court decree of this current year was delivered by Judge Ian Spitery Bailey on the 3rd January 2023, and it was based on Article 8 of Chapter 488 of the Laws of Malta. It was based on an application filed by a company who claimed that it held intellectual property rights of a computer software.

Persons who claim to enjoy intellectual property rights and who seek judicial remedies against others infringing their rights shall hold reasonable evidence demonstrating that they are the right holders and that their rights are either being infringed by a third party or in imminent danger of being so.

Such persons may request the Court to issue, against the alleged infringer of an intellectual property right, a decree intended to prevent any imminent infringement of such intellectual property right, or to forbid, on a provisional basis, even prior to hearing the defendant, and subject, where appropriate, to a recurring penalty payment where provided for by law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder.

An interlocutory injunction may also be issued, under the same conditions, against an intermediary whose services are being used by a third party to infringe an intellectual property right. Additionally, such persons may also request the Court to order the seizure of goods suspected of infringing an intellectual property right.

On a commercial scale, in cases where the applicant demonstrates the existence of circumstances likely to endanger the recovery of damages, the court may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of the same infringer's bank accounts and other assets.

An application (880/2022ISB) filed by Egames Bond Limited (a Maltese registered company) versus the American registered company, Computools LLC, and Swedish One Set Plan AB before the First Hall

of the Civil Court sought to prohibit the defendants from breaching its intellectual property rights by their current use in commercial activity of the defendant companies including by the distribution and sale of the applicant's literary works.

Applicant company had engaged Computools LLC to develop a software named 'GoPlany' for it and the parties also agreed that consultation services were to be provided by the developer to the Maltese company, as reflected in the terms of their agreement. The parties further agreed that the applicant was the sole and exclusive intellectual property owner of the literature, being a computer software which had been developed for it by the defendant, Computools LLC for the applicant's sole and exclusive benefit. The Applicant company had indeed paid the total sum of one hundred, thirty two thousand, seven hundred, fifty-six euro and forty-nine cents (Eur 132, 756.49) as part-payment for the software.

In August 2022, the applicant company was informed by Computools LLC's representative that the agreement had been terminated and that there had been fresh negotiations with a third-party, One Set Plan AB, and such without the applicant's warning or authorisation. It was further informed that despite the previous payments by the applicant amounting to one hundred, thirty two thousand, seven hundred, fifty-six euro and forty-nine cents (Eur 132, 756.49), One Set Plan AB was to continue making payments to the American company for the continuation of developments of the computer software.

The Maltese company argued before the court that the termination of the agreement was executed in an abusive way and in breach of the same agreement, which to it was still a valid agreement.

The applicant company also discovered a website for the said computer software, by virtue of which the Swedish entity was portraying itself as the owner of the software 'GoPlany' and that it was further offering the sale of the computer software to third parties. One Set Plan AB also created a YouTube channel with tutorials explaining how the software works to those persons who purchased the software and made use and profited off the same software in an abusive way to the detriment of Egames Bond Ltd.

The court declared that it was satisfied that the requisites required by law for it to accede to the applicant's request had been met and it was further convinced that the applicant is the owner of the intellectual property rights it so claimed.

The court further acknowledged that delays in such a quick and delicate market only cause huge losses to the detriment of the applicant, which losses may not be remedied and so it acceded to the application, even though the Maltese curators appointed to represent the respondents stated that they were not informed of the facts of the case. The court however clarified that it was not in any way expressing itself on the merits or pretentious yet to be brought forth by the applicant, and it was only temporarily prohibiting the respondent companies from using the literary work forming the disputed software for distribution or sale.

This order was delivered on pain of 'reasonable penalties' by those breaching the court's order.

This decree was delivered by the court in chambers on the 3rd of January 2023, and the court also authorised the applicant company to notify the respondents by courier.

The decision is final and cannot be appealed further.

THE PROVISIONAL ADMINISTRATOR

Keith Borg

Article 228 of the Companies Act (Chapter 386 of the Laws of Malta) lays down that the court may appoint a provisional administrator at any time after the filing of a winding up application and before the making of a winding up order. The provisional administrator is tasked to carry out such functions and powers in relation to the administration of the estate or business of the company as the court may specify in its order appointing him/her and is to furthermore hold office until such time as the winding up order is made or the winding up application is dismissed.

The Commercial Court, presided by Mr Justice Ian Spiteri Bailey, in its decree of the 14 April 2023 in the cause in the names of *Liberty International Aktiengesellschaft vs John's Group Limited*, refuted the request for the appointment of a provisional administrator.

The facts of the case were as follows: Liberty International Aktiengesellschaft requested the Court to appoint a provisional administrator to take control of John's Group Limited and all its assets, and to give the said administrator all such powers that the Court deems appropriate. At the basis of its request was an executive title obtained against John's Group Limited to the tune of €100,000. Liberty International Aktiengesellschaft argued that it had an interest in ensuring that the assets of John's Group Limited are conserved and that the appointment of a provisional administrator, in the circumstances, was essential in order for the said administrator to identify, trace, and take full control of John's Group Limited's assets; this in order to ensure that there is no disposal of the company's property in violation of Article 221 of Chapter 386 of the Laws of Malta. This Article lays down that in a winding up by the court, any disposition of the property of a company, including any rights of action, and any transfer of shares, or alteration of the status of the members of the company, made after the date of its deemed dissolution, shall be void, unless the court otherwise orders.

John's Group Limited countered this request by objecting to same. It argued that Liberty International Aktiengesellschaft had failed to substantiate its request that it had any serious and real fear of the disposal of the company's property. Holding that Article 221 of Chapter 386 of the Laws of Malta was not applicable to the case at hand. It further argued that, in order to safeguard its position, applicant company had at its disposal other judicial tools and that therefore there should be no divestment of the directors' powers.

The Court noted that the business of John's Group Limited was in the tranport sector. The company owns the shares in John's Garage Limited and both companies are managed by the same directors and have the same shareholders. The Court further noted that John's Group Limited owns a number of immovable properties and that it was burdened by debts of approximately €1,800,000: it was in the process of signing a contract with third parties in order to develop and transfer some sites that belong to the company with a portion of the proceeds to be dedicated to the settlement of debts.

Citing local jurisprudence, the Court observed that the decision it had been called upon to make was to be dictated by the facts and circumstances of the case. The Court opined that it must always have the the peace of mind that the administration and financial management of the affairs of the respondent company will be conducted well, in a transparent manner, and free from ambiguity so that the position of the company is never such to be prejudicial to the value of its assets and consequently to its creditors. The main function of a provisional administrator, the Court observed, was to preserve the assets against the risk of dissipation or reduction in value by the directors. The need for good, effective and transparent conduct by the directors becomes even more imperative when the company has only one asset. It was clear in the mind of the Court that these proceedings were instigated as a result of Liberty International Aktiengesellschaft's preoccupation that John's Group Limited would dispose of its assets pending a potential winding-up order. The Court however further observed that John's Group Limited was not contesting the sum due to Liberty International Aktiengesellschaft, and was doing its best to settle its dues.

Once the list of immovable property owned by John's Group Limited, had, pending these proceedings, become known, and having established that the latter does indeed have a plan in place to pay all its creditors, the Court felt it should not intervene and even disrupt the said plan, particularly when it appeared that the directors of the respondent company were acting in the best interests of all those concerned.

The Court proceed therefore to refute the request for the appointment of a provisional administrator. It however ordered John's Group Limited, or rather, it's directors, to give periodic accounts under oath, substantiated by documentation where possible, regarding the developments in the process of settlement of its dues.

The decision is final and not subject to further appeal.

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Constitutional Law and Human Rights

WHY ARE FIAU FINES UNCONSTITUTIONAL? DISSECTING THE RECENT JUDGMENT OF THE FIRST HALL CIVIL COURT (CONSTITUTIONAL JURISDICTION)

Clive Gerada

On 30th March 2023, the Civil Court, First Hall, (Constitutional Jurisdiction) (hereinafter "the Court"), in *Phoenix Payments Ltd vs Il-Korp Għall-Analiżi ta' Informazzjoni Finanzjarja u L-Avukat Tal-Istat*, declared that the fines imposed by the Financial Intelligence Analysis Unit (hereinafter "FIAU") were unconstitutional. Although this judgment is pending appeal, it is important to understand the reasoning of Hon. Judge Audrey Demicoli in reaching such a decision.

Briefly, the case related to an investigation and a subsequent decision by the FIAU in relation to a number of anti-money laundering failings the FIAU had noticed in the operations of Phoenix Payments Ltd. (hereinafter "Phoenix"). The FIAU communicated its decision to Phoenix and ordered it to pay an 'administrative fine in the amount of Euro 435,576 as a result of regulatory failings.

What followed was an appeal by Phoenix before the Court of Appeal (Inferior Jurisdiction) on the basis of ordinary law - i.e. the Anti-Money Laundering Act, Chapter 373 of the Laws of Malta, and S.L. 373.01 of the Laws of Malta. In the same appeal, Phoenix also alleged that the actions of the FIAU during the investigation breached Malta's Constitutional Law.

Whilst the appeal was still ongoing (*subjudice*) the lawyers of Phoenix filed another case, this time round before the First Hall of the Civil Court in its Constitutional Jurisdiction against the State and the FIAU. Phoenix alleged that a number of provisions of the Anti-Money Laundering Act (Chap. 373 Laws of Malta) were in breach of the right to a fair trial. Additionally, Phoenix also alleged that the manner in which the FIAU had conducted the investigation violated the right to a fair hearing as enshrined by Article 39 of the Constitution of Malta and Article 6 of the European Convention of Human Rights (which Malta had ratified in 1987).

In reply to this Constitutional case, the FIAU and the State Advocate argued that Phoenix did not exhaust all ordinary remedies since the Court of Appeal (Inferior Jurisdiction) had not yet decided on the appeal filed by Phoenix challenging the same administrative fine of the FIAU. In referring to the judgment *Insignia Cards Limited vs Il-Korp għall-Analiżi ta' Informazzjoni Finanzjarja et*, the Court held that Phoenix was not using the constitutional process to stall or abuse the process. The company had a right to file the constitutional case before the Court of Appeal decides on the whether the administrative fine should stand or not.

Another preliminary argument raised by the FIAU and the State Advocate related to the fact that the complaint raised by Phoenix did not relate to criminal accusations or proceedings. Therefore, this complaint could not fall in the parameters of the rights protected by fair hearing (Article 39 of the Constitution of Malta and Article 6 of the ECHR). FIAU argued that there is a distinction between the crime of money laundering itself and administrative fines as a result of lack of conformity with a legal obligation, order, or a legitimate directive issued by FIAU.

In fact, the FIAU argued that, distinctively, the proceedings of the crime of money laundering are conducted before the Criminal Courts whereas administrative fines as a result of regulatory non-compliance are imposed by the FIAU. The merits of this case did not relate to the crime of money laundering but to lack of conformity with a legal obligation. Therefore, administrative fines should be imposed. Furthermore, the FIAU argued that European Union Law - Directive 2015/849/EU - had classified these penalties as administrative in nature.

In dissecting the arguments of the FIAU the Court referred to the Engel criteria (*Engel and Others v The Netherlands*) in order to determine what should be regarded as a criminal accusation/ charge. There are three criteria: (i) classification of domestic law; (ii) nature of the offence; (iii) nature and the gravity of the penalty. The Court held that in this case, it is true that the alleged failings of Phoenix are not classified as crimes. However, the nature of the offence, on the basis of which the FIAU imposed the administrative fine, could not be considered as 'compensatory' but a fine with the purpose of acting as a deterrent.

The Court also delved into the criteria that 'The offence should also extend to the population at large, although it may be limited to such general categories of persons as taxpayers and road users'. The FIAU argued that the rules which Phoenix was in breach of related to regulatory obligations that are exclusive to subject persons and does not relate to the public in general, thus, this criteria was not satisfied. However, the Court was not of the same opinion as it argued that subject persons classify as general category of persons and not as a given group with a particular status. In shedding light on this distinction, the court made reference to the Strasbourg judgment of *Ozturk v Germany* and the domestic judgment in the names of *Rosette Thake noe et vs Kummissjoni Elettorali et*.

Furthermore, the Court held that only in the context of internal disciplinary proceedings of a group that has a special status (such as disciplinary offences by civil servants and the police are not criminal in nature, same applies to disciplinary offences by members of the liberal professions even if a severe punishment such as a fine, suspension, or striking-off may be imposed), the European Convention of Human Rights does not apply.

Thus, in light of the above considerations, the Court decided that the administrative fine imposed by the FIAU was of a criminal nature (natura penali) and could be scrutinised in terms of the right to a fair hearing (Article 39 of the Constitution of Malta and Article 6 of the ECHR).

Violation of the Right to a fair hearing (Article 39 of the Constitution of Malta and Article 6 of the ECHR)

Therefore, having established that the fines imposed by the FIAU against Phoenix were of a criminal nature, the Court had to decide on the second test; that is, if the FIAU was regarded as a 'court' in terms of the provisions of the right to a fair trial.

Article 39(1) of our Constitution stipulates that, whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

In referring to the judgment *Federation of Estate Agents vs Direttur Generali (Kompetizzjoni) et*, the Court held that term 'court' should be meant in the classic sense of the word. Therefore, the proceedings against a person accused of a criminal offence should be conducted by an independent and impartial court from the get go and not by any other organ. The Court also made reference to the judgment *Digisec Media Ltd vs Direttur Generali (Affarijiet tal-Konsumatur) et,* whereby the First Hall of the Civil Court (Constitutional Jurisdiction) had referred to a list of superior and inferior courts as established by the Code of Oragnisation and Civil Procedure in Malta. The Court held that it is not contested that the decision in question was taken by the FIAU and not a superior or inferior court as established by domestic law.

Furthermore, the Court held that notwithstanding that the Anti-Money Laundering legislation provided for the possibility to appeal a decision taken by the FIAU before the Court of Appeal (Inferior Jurisdiction), this was not enough to remedy the unconstitutionality of the FIAU's decision. The right to a fair hearing should be respected and followed from the very beginning of the proceedings. On this basis the Court was of the opinion that Article 13(2) of Chapter 373 of the Laws of Malta and Regulation 21 of Subsidiary Legislation 373.01 violated the fundamental rights of Phoenix to a right to a fair hearing as protected under Article 39(1) of the Constitution of Malta and are therefore null and void. Consequently, the Court declared that the compliance investigation by the FIAU against Phoenix and the subsequent decision of FIAU to impose the so-called administrative fine were also null and void.

Judgment is currently pending appeal before the Constitutional Court.

WHEN ARE DELAYS BY COURTS IN DELIVERING JUDGMENTS CONSIDERED TO BE UNREASONABLE?

Frank Anthony Tabone

Efficiency of court proceedings is without doubt one of the major challenges of national justice systems. Efficiency of justice is a major component of fair trial and of effective remedies.

Undue delays by any court or any other adjudicating authority in delivering judgment give rise to a breach of Article 39 of the Constitution and Article 6 of the European Convention on Human Rights.

Article 39 of the Constitution and Article 6 of the Convention dictate that a court or any other adjudicating authority must be independent and impartial and must also ensure that any person is given a fair hearing within a 'reasonable time'.

In a Constitutional judgment delivered on 11 January 2023 by the First Hall of the Civil Court in the names *Mark Micallef vs L-Avukat tal-Istat*, the Court presided by Madam Justice Anna Felice dealt with a request by the plaintiff demanding for an appropriate and effective remedy for the breach of his fundamental rights as protected under Article 39 of the Constitution and Article 6 of the Convention.

The Court, after having analysed in detail the evidence and the note of submissions of both parties, whilst referring to a particular textbook namely Protecting the right to a fair trial under the European Convention on Human Rights and also to a number of foreign and local jurisprudence, concluded that the term 'reasonable time' is to be assessed by a cumulative test involving three main criteria: 1) the nature and complexity of the case; 2) the conduct of the applicant; and, 3) the conduct of the authorities.

The following are some of the more relevant extracts from the judgment, translated into English:

Nature and Complexity of the Case

By contrast, the complexity of a case allows more leeway to the authorities in justifying a longer delay. For example, a criminal case involving a vast number of charges or a large number of defendants. Complex cases concerning tax evasion, company fraud or money laundering. Another example would be of a particular case resulting in legal complexities which could also justify a longer delay in delivering judgment.

Conduct of the Parties vs Delays by Authorities

The Government cannot excuse the overall length of proceedings by citing the applicant's appeals, motions, requests etc. The defendant cannot be blamed for taking full advantage of the resources and tools afforded by national law in the defence of his interests (*Kolomiyets v Russia*).

Reasonable diligence will be required from the authorities in each procedural step, such as filing evidence and submitting observations, in all criminal cases and when they are one of the parties in a civil case (*Baraona*, §§46- 57).

Where another private party has caused a delay in a civil case, the court has to take steps to expedite the proceedings and not to extend time-limits at the party's convenience without good reason (*Guincho*). Even in pursuing the interest of the protection of defence rights, such as the need to summon witnesses on behalf of the defence at trial, the authorities may be in breach of the 'reasonable time' requirement if not carrying out the task with reasonable diligence (*Kuvikas v Lithuania*, §50).

General delays caused occasionally by the courts' case-load may be acceptable as long as they are not prolonged in time, and where reasonable steps are being taken by the authorities to prioritise cases based on their urgency and importance (*Zimmerman and Steiner*, §§27-32).

> At the same time, the Contracting States are required by Article 1 of the Convention to organise their legal systems so as to ensure compliance with Article 6, and no reference to financial or practical difficulties can be permitted to justify a structural problem with excessive length of proceedings (*Salesi*, §§20-25).
>
> Where a case is repeatedly re-opened or remitted from one court to another (the so-called yo-yo practice), the Court tends to regard it as a serious aggravating circumstance, which may result in a violation being found even if the overall duration of the proceedings does not seem excessive (*Svetlana Orlova v Russia*, §§42-52).

The Court also remarked that, in order to determine if a particular person had his rights established under Article 39 of the Constitution and Article 6 of the Convention breached, it is imperative that each case is assessed on a case-by-case basis and that there should be no fixed time-limit for any particular type of proceedings.

The Court stated that any person has the right for a proper hearing and that the proceedings must be expedient without undue delays, thus resulting in a more efficient and effective justice system. It also falls within the responsibility of the State to ensure an adequate and expedient judicial process.

The Court also observed that it did not seem that the case in question was a complex or a complicated one. Nevertheless, the definitive judgment was only delivered after seventeen years, five months, and eight days. It took a period of eight years for the first court to deliver its judgment, from 20 April 2006 till 18 September 2014. Subsequently the judgment was appealed, and it took another five years for the Court of Appeal to appoint the case for hearing and to deliver its judgment.

Finally, the Court declared that the applicant suffered a violation of his fundamental rights for not having had a proper hearing as stipulated under Article 39 of the Constitution and Article 6 of the Convention. As a result, the State Advocate was ordered to pay the amount of thirty-five thousand five hundred and forty-two euro (€35,542) in interests accumulated because of the undue delay, as well to a non-pecuniary compensation amounting to a total of two thousand euro (€2,000), with costs to be borne by the State Advocate.

The decision bears reference number 165/2021 and was confirmed on appeal before the Constitutional Court on the 11 March 2024. However, the Constitutional Court reformed the amount of compensation due to the applicant to four thousand euro (€4,000) in pecuniary damages, and two thousand euro (€2,000) in non-pecuniary damages, and split the costs of the proceedings between the parties.

NO COMPENSATION MAY EVER BE ENOUGH TO PROTECT CITIZENS FROM EPISODES OF DOMESTIC VIOLENCE

Rebecca Mercieca

Malta ratified and implemented the Istanbul Convention which specifically requires positive State action to prevent and protect women from domestic violence. This includes serious threats, beating, and stalking. However, local authorities still struggle with lack of resources, and consequently are at times considered to be incapable of acting in a timely manner. This in turn continues to encourage and foster a sense of impunity among perpetrators of domestic violence to an alarming degree. This has led a woman to take constitutional action against the authorities in Malta.

A woman and her children were receiving threats from her previous partner, and even though continuous reports were filed with the police, the latter failed to take immediate action, nor did they provide adequate information and security. This played a part in causing more damage to the woman, so much so that she had to resort to psychological help as she and her children continued to live in fear.

This victim of domestic violence filed proceedings against the State Advocate and the Commissioner for Police before the First Hall of the Civil in 2020 detailing the lack of State action she experienced. She sought a declaration from the Court that the lack of immediate and effective action on the part of the respondents, or any of them, amounts to a violation of fundamental rights. Her case was decided on the 12th of October 2023 (83/2020 AF).

Despite the restraining order issued on 29 July 2019, the aggressor persisted with his behaviour and continued to scare and threaten the applicant and her children so much so that there was a time when she had no choice but to find refuge at a shelter.

The applicant claimed that she felt diminished and broken, that not enough attention was given to her by the police and that her complaints were not taken seriously.

Essentially, the applicant's complaint against the Police was based on the accusation that despite the reports she made, they failed to arrest and bring her aggressor before the court in a timely way and thus she continued to suffer from more episodes of domestic violence.

The main argument the defendants put forward was that the applicant was to blame for what she was going through. This because, despite having seen and experienced the violent/aggressive behaviour of the aggressor, she chose to stay with him so much so that she even got pregnant once, twice, three times from this same person. The Court partly agreed with the respondent's view in so far as they argue that the claimant should have learnt from her mistakes and moved on after the first signs of abuse and aggression; however the Court also understood that such relationships are exploitive and dangerous, in the sense that they often leave the victim depending on the aggressor.

The Court stated that it is of the firm opinion that such abuses may never be tolerated and/or excused and it is precisely for this reason that the State must assume a proactive role in order to avoid such incidents. It further recognised that the cardinal point of these procedures was that the mechanism in force in the field of domestic violence is lacking and without a solid, effective, preventive, and punitive framework.

It further confirmed that the State's responsibility is threefold in terms of law:

i. The obligation to design and implement a legislative framework, adequate and effective, which not only offers protection but also serves as a deterrent against domestic violence;

ii. The implementation of immediate and effective protective measures in order to protect the safety and integrity of the victim and her family members;

iii. The obligation to conduct an effective investigation as well as the implementation of an effective judicial system in order to combat and prevent domestic violence.

Currently, the police lack a centralised system, and so when a report is made at a police station, the police taking the report will only be aware of that report being made at that moment. They have no system to help them detect which other reports have been made in connection with the report being filed before them or with regard to a specific aggressor. Due to this serious lacuna in the system, the police taking the report at a particular police station would not have any information about any restraining or protection orders issues against the aggressor

and in favour of the victim filing the report before them. Access to such information would no doubt help them assess the level of risk of the case better and potentially minimise the excess documentation which the victim would have to carry to the police station each time, in an effort to persuade them that she is saying the truth.

The court indeed recognised that situations like these are what cause the public to lose faith in the institutions, and which result in victims giving up on the system and failing to report incidents.

Notwithstanding the fact that the aggressor has been breaching the restraining order continuously, it took the police seven (7) days from when the victim made a report to arrest the aggressor. The Court further noted that this was not acceptable and that the State was in serious default of executing its obligations to implement measures to ensure the timely, immediate, and effective measures to ensure immediate protection to victims.

The Court established that the claimant's fundamental human rights in terms of Articles 36 and 44 of the Constitution had been breached as were her rights in terms of Articles 3 and 8 of the European Convention on Human Rights. It further considered that the facts of the case could have led the claimant to suffer an even graver tragedy and that the psychological harm which the claimant had experienced was extremely serious. She was awarded compensation in the sum of thirty thousand Euro (€30,000), which are due to be paid to her from the State Advocate due to the fact that the Police's inefficiencies were issues which the State is due to take action on.

Within its concluding remarks, the court made a strong statement: no liquidation of compensation may ever be enough to protect citizens from episodes of domestic violence. It is only with a strong and effective legislative foundation and system, that the state can fight this battle, providing the protection and peace of mind which should be the foundation stone within all homes and intimate relationships.

The decision is currently pending appeal before the Constitutional Court.

AZZOPARDI BORG & ASSOCIATES
ADVOCATES

Civil Law

CONNECTION INTERRUPTED: WHO IS AT FAULT?

Celine Cuschieri Debono

In law and in life, whoever is responsible for damage has to pay. This is a basic principle of civil law, enshrined in Articles 1031, 1032, and 1033 of the Civil Code, Chapter 16 of the Laws of Malta. These articles hold that a person is bound to act with the diligence of a bonus pater familias (of a reasonable ordinary man). If, in the absence of such diligence and prudence, harm ensues upon another as a direct result of such person's action or omission, that person is liable for damages.

On the 5th of October 2023, the Court of Appeal in a judgment in the names of *GO p.l.c. vs Schembri Infrastructures Ltd et*, dealt precisely with this principle. However, before delving into this judgment, a few moments shall be dedicated to the judgment given by the Civil Court, First Hall, on the 3rd of April 2019.

The facts were as follows. On the 28th of April 2011, the plaintiff company alleged that while the respondent company was undergoing infrastructural works at Għar Dalam Street, Birżebbuġa on the 20th of March 2007 or a few days before, it caused it structural damages amounting to €72,960.40. This is because allegedly, it had caused damages to GO p.l.c.'s (then Maltacom p.l.c.) cables. The respondent's company's insurers, Mapfre Middlesea p.l.c. and Elmo Insurance Ltd, were later called into the proceedings, of course, as respondents.

The respondent company replied to the lawsuit and stated that it was not the party responsible for the damage suffered by the plaintiff company and that it was due to the plaintiff company, through its own negligence and lack of attention, that the damage was caused. The insurers, in their respective replies (along with pleas regarding the merits), pled that that they have no juridical relationship with the plaintiff company and that thus they should be released from the consequences of the judgment (*liberati mill-osservanza tal-ġudizzju*).

At the outset, the first Court held that the insurers had no juridical relationship with the plaintiff company and proceeded to release them from the consequences of the judgment. It is important to note that no appeal was lodged on this point and thus the Court of Appeal did not have any authority to delve into it in any way whatsover.

On the merits, the Court had to ascertain whether the respondent company Schembri Infrastructures Ltd was at fault for the damage or not. It examined the evidence at hand as well as the relevant provisions of the law. Essentially, before the works undergone by the respondent company had started, the plaintiff company's representative had marked with the colour green the locations where its cables were passing through so that the respondent company could avoid those areas.

The respondent company held that the plaintiff company had not completed this exercise correctly and that is why the damage ensued. The Court considered Condition 14 of the General Conditons of the respondent company's permit (which allowed it to undergo the works). This stipulated that while the employees of the entities (in this case the plaintiff company) had to be precise in marking the locations of the cables, these are only indicative in nature and should in no way be interpreted as exonarating the contractor (the respondent company) if these markings are done incorrectly.

However, the Court interpreted this as meaning that the plaintiff company had the obligation to indicate precisely where its cables are, despite this obligation featuring nowhere in the permit. It considered that the plaintiff company had failed to prove that the markings were made anywhere close to the actual location of the wires and observed that these were only done in a general way. The Civil Court, First Hall, in light of conflicting versions, was not convinced that the respondent company was at fault for the damage. The Court concluded that the plaintiff company did not prove its case according to law. It therefore proceeded to reject the plaintiff's claims in their entirety.

The Court of Appeal disagreed. This followed an appeal lodged by the plaintiff company. The Court made reference to Articles 1031, 1032, and 1033 of the Civil Code, previous jurisprudence, as well as the facts at hand. The argument was that the first Court failed to properly examine the facts and particularly all obligations imposed on the respondent company and its breach of the same.

Consequently, the plaintiff company (hereafter referred to as 'the appellant company') argued that the first Court failed to correcty apply the legal principles at play including those regulating the level of proof required. It argued that the first Court had essentially twisted the meaning of Condition 14 of the permit because nowhere did it impose on it the obligation to indicate precisely where its cables are. Indeed, it is expressly written that even if the markings were incorrect, the respondent company (hereon after referred to as 'the appealed company') was not exonerated from responsibility.

So what were the other conditions which the appealed company had breached? From the outset, the works were conducted with large and invasive machinery (makkinarju goff) and not with hand tools as recommended by the permit. The appealed company's architect himself confirmed that they were working with such machinery.

Moreover, the appealed company had to inform the appellant company's Technical Executive before trenching works are done so that he can go on site and detect the cables. The appealed company never informed the appellant company that it was commencing trenching works. It also resulted that the road in question had been widened and that prior consultation before the works commenced was even more important than before. The two witnesses who explained this had not been cross-examined by the appealed company.

Moreover, the appealed company, when it had conducted pilot holes (which are there to detect better the location of the wires), had not found the appellant company's cables and did not dig further in order to find them.

This led the Court of Appeal to conclude that the appealed company was negligent and thus responsible for the damage that ensued. It emphasised that the contractor was obliged to inform the appealed company three working days before starting works. This was not done. The appealed company brought no proof indicating that it had made this contact with the appellant company.

The Court also remarked that from the testimony of the appealed company's architect itself, it resulted that when digging, the appealed company had found two 'dead' cables belonging to Enemalta, then another cable was observed. The appealed company assumed that it was also a dead cable but then realised that it belonged to Maltacom, not Enemalta. The Court thus acceded to the appellant company's appeal.

The Court of Appeal then proceeded to liquidate damages in the amount of €69,785 payable from the appealed company (Schembri) to the appellant company (GO). Interest was deemed to run from the date of the judicial letter and thus from the 8th of January 2008.

This judgment is final and not subject to further appeal.

CONTRACTS MUST BE DONE IN GOOD FAITH!

Clive Gerada

All contracts must be carried out in good faith, and shall be binding not only in regard to the matter therein expressed, but also in regard to any consequence which, by equity, custom, or law, is incidental to the obligation, according to its nature. And, where any person, fails to discharge an obligation which he has contracted with another to carry out, he shall be liable in damages. The damages due can be twofold: (i) in respect of the loss which a person has sustained, and (ii) the profit of which a person has been deprived of.

Even if the debtor, did not act in bad faith, he can still be held liable for damages, where competent, both for the non-performance of the obligation as well as for the delay in the performance thereof. Unless that person proves that the non-performance or delay was due to an extraneous cause that is not imputable to him. Presupposing that the object central to the agreement is legitimate, a contract between two or more parties becomes the law – pacta sunt servanda - and is commonly followed by a handshake between the parties. In bygone years the handshake was used to indicate that there was an agreement between the parties without the cumbersome paperwork, contract negotiations, and expensive legal fees. This method was relied upon because during the periods in which it became formalized, a man's word meant something.

Although nowadays, the handshake is no longer the norm for creating a contract and it is not legally binding, however, in today's business dealings the value and significance of the handshake remains. A handshake following a signing of a deal merely shows a sign of good faith (*bona fidi*) where both parties intend to honour the contract terms of the agreement. Good faith and honouring contract terms were the matters of the decision of the Maltese Court of Appeal (Civil, Superior) dated 25 May 2023, in the names of *David Bruce Wildy et vs Sunshine Biscuits Company Limited*.

The case referred to a public deed between the parties concerning the purchase of an immovable property from the appellant company. The immovable property related to a shop with a subterranean level i.e. the 'basement', access to the roof of the superimposed block for the same shop for the use specified in the said a contract. In the deed the appellant company guaranteed the peaceful possession and

enjoyment of the premises as well as guaranteed that the property that was being sold was built according to the plans approved by the Planning Authorities. In addition to this, the appellant company declared that 'a trading permit already exists to cover the activity carried out in the premises'. The appellant company continued that this property was previously run as a food and beverage shop on two levels with the basement level used as a kitchen to prepare and cook food.

Following the signing of the public deed, the appellees found out that, contrary to what was declared and guaranteed to them by the appellant company in the contract of sale, the premises could not be used as presented to them. It turned out that the property in question did not have the trading permits as guaranteed on the said contract and the declaration in the said contract that the trading permits already existed turned out to be incorrect and misleading.

The appellees filed a lawsuit claiming that because of the contractual default on the part of the appellant company and in breach of the guarantees it gave, they had suffered severe reduction in the full enjoyment of the premises purchased by them, as well as significant damages due to the illegal behavior of the appellant company.

Additionally, the appellees argued that on advice of their architect, to be compliant with building laws and applicable policies, they had to carry out a radical change in the structure of the same shop and this because the kitchen, which was previously located and operated at basement level, had to be installed at the ground level of the shop instead, and consequently the basement level had no further use except for storage. This caused the basement level to have a much lower commercial value than expected, and the use of the ground level particularly the seating space for customers was limited due to a substantial part of the floor area was taken up by the kitchen. The appellees reiterated that because of this, they incurred other costs to carry out the necessary changes. Added to this, the plaintiffs meant that the kitchen - which was in the underground level purchased by them from the appellant company, together with the appliances - could not be used.

Given that the premises were being used for an activity without authorization from the authorities, the appellant company was in default when on the contract it guaranteed that the premises was covered by a license covering that trading activity, and that the place was built

according to the permits approved by the Planning Authority.

The First Hall of the Civil Court argued that these guarantees made on the contract were incorrect and misleading and certainly were not done in good faith on the part of the appellant company or its representatives. Contrary to what they had claimed on the witness stand, it was evident that the representatives of the appellant company acted in bad faith because they knowingly deceived the appellees and thus the appellant company was liable for damages in the global sum of €154,521.02. This line of reasoning was confirmed by the Court of Appeal (Civil, Superior).

Reinforcing the Civil Court, First Hall, decision, the Court of Appeal held that it could not fault the appellees given that during their several inspections they had carried out before purchasing the premises they saw that there was a kitchen in the basement level and there was an oven and a dumb waiter. For this reason, the appellees were led to believe that food could be prepared from the basement level kitchen. In confirming the sentence of the Civil Court, First Hall, the Court of Appeal reiterated the legal principle emerging from Article 993 of the Maltese Civil Code, which provides that contracts must be executed in good faith.

The Court of Appeal only varied the judgment limitedly by reducing the amount of damages awarded from €154,521.02 (as awarded by the Civil Court, First Hall) to €141,342.38. This for reason that the appellees also had the obligation to reduce damages. The appellees knew that the appellant company was ready to sign the relevant corrective documents and thus the Court of Appeal considered it fair that instead of a loss of profit commensurate to twenty-nine months, one had to consider a loss of earnings for twenty-five months instead.

The decision is final and not subject to further appeal.

THE RIGHT OF A CREDITOR TO IMPUGN FRAUDULENT ACTS OF THE DEBTOR

Clive Gerada

Any creditor has the right to challenge any act performed by a debtor where such acts are meant to defraud his claims. Our Civil Code allows the possibility to attack these fraudulent acts; in fact, if the fraudulent acts were carried out under an onerous title (for instance, against payment) the creditor must bring proof of fraud on the part of both contracting parties. However, if the acts were performed under a gratuitous title, it is sufficient for the creditor to prove fraud on the part of the debtor alone.

This matter centred round the case in the names of *Merkanti Bank Limited et vs Raiffeisen Bank International AG et*, decided by the Court of Appeal (Superior Jurisdiction) on 29 March 2023.

The defendant bank (Raiffeisen) had extended a substantial loan to a group of companies, Scully Royalty Ltd formerly known as MFC Group. The loan was secured by the parent company of the group, which later changed its name to LTC Pharma (Int) Ltd (a foreign company incorporated under the laws of the Marshall Islands). In fact, LTC had entered into an agreement with Raiffeisen Bank securing the said loan as a guarantor.

It happened that there was a need to restructure the companies within the group, and Scully Royalty Ltd (formerly known as MFC group) informed Raiffeisn about its intentions. Additionally, LTC was sold and no longer formed part of MFC group. It occured that Scully Royalty Ltd (another foreign company incorporated in the Cayman Islands) acquired forty-nine million, nine hundred and ninety-nine thousand, nine hundred and ninety (49,999,999) shares in Merkanti Holding p.l.c. (a company incorporated under Maltese Laws) from LTC Pharma (Int) Ltd. According to Raiffeisen Bank, this restructuring, change in ownership, and transfers had violated the loan conditions, leading it to request repayment of the loan in full. The defendant bank Raiffeisen claimed that the money was not repaid, prompting it to initiate legal proceedings.

In fact, the defendant bank (Raiffeisen) filed a case against Scully Royalty Ltd and others in 2019 in the Cayman Islands, where Raiffeisen claimed to be a creditor of a debt guaranteed by LTC and through this case, Raiffeisen had sought to impugn the transfer (through the actio pauliana) of shares in Merkanti Holding p.l.c. from LTC to Scully. As a result of these proceedings, Scully Royalty together with Merkanti filed

proceedings in Malta seeking a declaration from the Maltese Courts that the transfer of shares, which Raiffeisen has contested in Cayman Islands, is lawful. Additionally, Scully Royalty and Merkanti requested a declaration from the Maltese Courts that none of the claimants have engaged in illegal, bad faith, or fraudulent actions. This action is known as the negative actio pauliana, the inverse of the actio pauliana.

However, before entering the merits of the case, the Maltese Courts had to decide if Malta had jurisidiction to hear the merits of the case. It is clear that the basis for the current action stems from LTC (Int.) Pharma's failure to fulfill its obligations under the guarantee, which resulted from the Merkanti transfer and other transfers.

The defendant Bank Raiffeisen argued that if the guarantee did not exist, there would be no grounds for the proceedings in the Cayman Islands and even less so for the proceedings in Malta. Moreover, Raiffeisen suggested that the legal actions of Scully and Merkanti resemble a negative actio pauliana, which is in contrast to an actio pauliana, which allows the creditor to challenge acts carried out fraudulently by the debtor that harm the creditor. In this case, Scully Royalty are seeking a declaration that the Merkanti transfer was not intended to defraud creditors and therefore cannot be contested (the opposite of an actio pauliana). Scully Royalty Ltd defended the legitimacy of the share transfer, arguing that the agreement with LTC Pharma (Int) Ltd was exclusively related to the shares in a limited liability company incorporated under the laws of Malta. They contended that the transaction had no substantive or real connection with the Cayman Islands.

Initially, the First Hall of the Civil Court in Malta had accepted the plea of lack of jurisdiction. However, the Maltese Court of Appeal had a different view. It held that the main contract in question was not the guarantee given by LTC to Raiffeisen but rather the transfer of shares in Merchants Holding p.l.c. between LTC and Scully. The Court of Appeal held that given that the transfer involved shares in a company registered in Malta, the court determined that the place of fulfillment of the obligation was in Malta, thus falling under the jurisdiction of the Maltese courts. Consequently, the Court of Appeal, upheld the appeal, annuling the judgment of the Civil Court, First Hall, and rejected the plea of lack of jurisdiction.

As a result, the case was sent back to the Civil Court, First Hall, so that it hears and decides on the merits of the proceedings. The outcome of this legal battle will undoubtedly have far-reaching implications for both Scully and LTC Pharma should the Civil Court, First Hall, decide that the transfer of shares in Merkanti was made in bad faith to defraud the creditor company Raiffeisen Bank.

It remains to be seen how the court will rule on this contentious matter.

The case is currently pending the second round of proceedings at first instance.

LATENT DEFECTS: WHEN SHIP HITS THE FAN

Nicole Vassallo

Article 1408 of the Civil Code binds the seller to warrant the thing sold against latent defects. In principle, defects are considered 'latent', according to Article 1424 of the Civil Code, when such defects render the thing sold unfit for its intended use, or which diminish its value in such a way that the buyer would not have bought it in the first place, or would have paid a smaller price, had he been aware of them. As the name suggests, the seller may not be held responsible for defects which were apparent at the time of sale, which the buyer could have discovered for himself.

As a remedy, the buyer may demand to either restore the thing acquired and have the full price paid back to him (which action is known as the *actio redhibitoria*), or to retain the thing and have only part of the price paid back (which action is known as the *actio aestimatoria*). Either demand (i.e., restitution or part repayment) may not be instituted later than six months from the date of delivery of the thing sold where this is a moveable, or one year from the date of the contract where the thing sold is an immovable. Where, however, it was not possible for the buyer to discover the latent defect, prescription shall only start to run from the day on which it was possible for him to discover such defect.

In its decision of 11 January 2023, the First Hall of the Civil Court in the cause of *Roderick Debattista et vs Charles Mifsud et*, where the action instituted by the plaintiff buyers was that of restitution and payment in full (*actio redhibitoria*), held that the defect burdening the thing sold, other than being 'hidden', must be objectively severe and must have existed at the time of the sale. Moreover, for the 'latent' element to succeed, the Court confirmed that the prospective buyer must have not been able to discover the defect, despite having inspected the item thoroughly prior to the sale. Where the expertise required to inspect the item is lacking, the prospective buyer is expected to request the assistance of an expert, so much so that the Court stated that '*xerrej ma jistax jilgħabha tal-injorant fit-teknika jew fil-kumplessità tal-ħaġa mixtrija biex jeħles mill-obbligu li jifli b'għaqal il-ħaġa minnu miksuba*'.

The Court clarified that while jurisprudence and the law do not recognise inspections conducted by professionals/experts as a legal requirement, a prospective buyer is expected to use the prudence and diligence of a *bonus pater familias* in inspecting the thing to be acquired.

In the judgment cited above, the plaintiffs acquired a yacht registered in Malta on 19 April 2013, for the total price of €76,000. After making use of the yacht throughout the summer of 2013, it was placed in the boatyard in November of that year, upon which plaintiffs began maintenance works including what is known as the 'antifouling removal process'. It was due to this process that plaintiffs immediately discovered 'blisters of osmosis' on the hull of the yacht. The plaintiffs alleged that the yacht was burdened with a latent defect which diminished its value to such an extent that they would not have bought it had they been aware of it. This notwithstanding, plaintiff Mr Debattista did not feel the need to hire a surveyor to inspect the yacht at the time of sale, as the Court pointed out in its judgment.

In delivering judgment, the Court turned to the expertise of court-appointed Engineer Philip Grima, who claimed that: '[…] the buyer was grossly negligent in not having had a competent marine surveyor attend the yacht to determine moisture content of the underwater hull prior to purchase, despite having every opportunity to do so. He witnessed and accepted the underwater hull as presented to him prior to launching the 2013 season and on signing the bill of sale shortly afterwards'.

In light of the above considerations, the First Hall of the Civil Court proceeded to dismiss the plaintiffs' application which sought the rescission of the contract of sale, with costs.

The decision is final and not subject to further appeal.

MODERN CHARIOT ON FIRE

Rebecca Mercieca

On buying a new vehicle, one finds himself at the crossroads when deciding on the type of insurance cover one is willing to pay for to cover one's shiny new car. Whether third-party cover is enough or whether the proud new owner of that shiny BMW X5 should opt for a fully comprehensive cover is one of the most important decisions the vehicle owner must take at that juncture.

On the 1 March 2023, the Court of Appeal in its inferior jurisdiction delivered a judgment which stemmed from an insurance claim opened back in 2015 (case reference: 96/2022 LM). Back in 2015, claimant had a fully comprehensive insurance cover with his insurance of choice for his vehicle. On the 30 April 2015 his vehicle burst into flames while in a garage complex in San Pawl il-Baħar. The claimant turned to the insurance company he held the vehicle's insurance policy with and made a claim based on his fully comprehensive insurance cover, whereby he claimed the value his vehicle had prior to the fire, being that of €35,000.

To his disappointment, the insurance turned down his claim, refused responsibility, and claimed that the insurance policy he held was null from the start since, according to the same insurance company, the information the claimant had provided the insurance company with in the initial proposal form presented by him was incorrect.

The claimant proceeded to arbitration that same year and claimed that the insurance company was obliged to pay him damages and expenses suffered as a result of the accident, also considering the value of the vehicle at the time of the accident, in all amounting to €35,000. The value claimed was indeed the value he had purchased the car at in 2014. Prior to insuring it, no survey had been undertaken, yet the insurance company had at the time accepted the premium based on that value, even though no proof of value had been brought to it by its client. The value of the 2012 vehicle was also supported by the inquiry, as it was given an estimated value of €34,500 prior to the fire.

The insurance company not only rebutted the claimant's claim, but also presented a counter-claim whereby it sought a declaration that the insurance policy was null and without any effect at law due to the false declaration made by the claimant in the proposal form.

Good faith indeed forbids a party to draw the other into a bargain

from his ignorance of what the other party privately knows, due to a fact unknown to him and his believing to the contrary. Whereas the insurance company argued that the policy was null because of the fact that the claimant had failed to disclose the fact that there had been a criminal judgment delivered against him, the claimant refused that there was any type of insurance fraud and so the two fought it out during arbitration for the following seven years.

Full disclosure of all material facts is of great importance to an insurance company, as it is what leads it to decide whether to accept the risk or not. Maltese law, however, does not specifically indicate what amounts to a 'material fact' or otherwise, thus such is decided on a case-by-case basis. In this case, the arbitrator had to place himself in the insurance company's position in order to determine whether it would have accepted the risk had it known of this 'mysterious' fact, and such without considering the actual fact that the accident being claimed did eventually occur.

The arbitrator indeed also gave weight to the fact that the insured did not have any prior claims with the insurance company, notwithstanding that he has several other vehicles, boats, a jet-ski, and his home insured with the insurance company, and also the fact that he had been insured with the insurance company for several years. Moreover, he also considered that the criminal case the insured had been involved in was in no way related to fraud or motor vehicle accidents, and neither was it linked to theft or fire.

It transpired that the claimant had been involved in a fight and had been found guilty of causing grievous injuries to the other party. The insurance company claimed during proceedings that such was a risk factor which it would have not taken had it known, as it considered that the claimant was prone to 'revenge attacks'. The arbitrator was not convinced of the reasons brought by the insurance to justify the reason given for the fact in question to be considered as a material fact. The arbitrator considered that the insurance company would have probably still accepted to continue to insure the claimant at the time had he disclosed his record and explained what had happened. This reasoning led to the arbitrator to decide in favour of the claimant, and it was decided that the insurance company was not justified in deciding not to honour the claim made by the claimant.

The arbitrator awarded the claimant €34,500, and the insurance company appealed the decision in July 2022 claiming that the proposal form was the law between the parties and that any false information given should have led to the invalidity of the insurance policy.

The claimant rebutted the appeal filed by the insurance company and argued that the appeal itself was invalid since it was based on a principle of fact and not of law, which in itself precluded the Court of Appeal from considering this appeal. Thus, the decision delivered in arbitration was confirmed on appeal on the 1 March 2023. This means that the claimant is now to finally receive the funds he claimed back in 2015 from his insurance company, together with expenses.

This decision is final and may not be appealed further.

SERVITUDES

Nicole Vassallo

Undoubtedly, everyone has heard the word 'easement' or more likely, '*servitù*', but what does it mean?

The Civil Code defines an easement as a right established in favour of a property over another property belonging to another person, for the purpose of making use of that property, for example, an easement of right of passage, or of restraining the owner from the free use of the property, for example, where this involves a prohibition to build on a certain land. More specifically, the Law categorizes easements as continuous or discontinuous, and apparent or non-apparent.

This legal principle was studied by the First Hall of the Civil Court, in a judgment delivered on 15 June 2023 in the names *Licari vs Gusman*, where the alleged owner of what we call the dominant tenement, i.e., the person making use of another person's tenement, requested the Court to declare and decide that she had the right of perpetual use and passage of the roof belonging to the defendant in the block of apartments in which plaintiff also resides, which use was limited to the installation and maintenance of plaintiff's water tank, television aerial, and dish antenna. In this case, the defendant was the owner of the servient tenement, i.e., the property subject to the easement ('*servitù*'). The plaintiff had also requested the Court to declare that the mentioned right of passage was to be exercised from the doorway and not the window leading to the roof, seeing as the defendant had not allowed the plaintiff to exercise her right of passage from the said doorway in the months prior to the lawsuit.

As a rule, easements are created in either of two ways: by Law or by act of man. In fact, in so far as easements are created by act of man, the Civil Code states that it shall be lawful for owners to establish any easement which is in no way contrary to public policy.

In the case at hand, the plaintiff had acquired an apartment by virtue of a deed of sale dated 30 January 1995. This deed, the conditions of which had been agreed upon by the parties, conceded in favour of plaintiff 'id-dritt biss ta' użu perpetwu tal-bejt fuq l-istess blokk, liema użu jkun limitat għal servizzi, ċioe` għal tankijiet tal-ilma, aerials tat-television, u dish antenna'. In this judgment, the Court categorized this easement as one which is discontinuous and non-apparent. For this and other easements of its kind, Article 469(1) of the Civil Code states they

must be created by means of a valid title, and so cannot be obtained by prescription, i.e., by the passage of time.

On a separate note, the Law requires that the title creating an easement results from a public deed, in the absence of which the title is null. Where the easement is created by a deed in one's lifetime, the easement shall not be operative as regards third parties before the deed is registered in the Public Registry.

The First Hall of the Civil Court considered that:

> [...] *sabiex din l-azzjoni tal-attriċi tirnexxi, jeħtiġilha tipprova li hija għandha l-jedd vantat minnha u ċioè jedd t'użu u konsegwentement t'aċċess għal fuq il-bejt proprjeta` tal-konvenuti. Jekk l-attriċi jseħħilha turi tali jedd, sid il-bejt u ċioe` l-konvenuti Gusman ma jistgħu jagħmlu xejn li jnaqqas jew ixekkel tali servitù.*

The Court's reasoning stems from the principle established in Article 474(1) of the Civil Code that the owner of the servient tenement cannot do anything which tends to diminish the exercise of the easement or to make such exercise more inconvenient. He may not alter the condition of the tenement, nor may he assign for the exercise of the easement any part of the tenement other than that over which it was originally established. In the case at hand, the defendant had made plaintiff's easement more burdensome, if not impossible, by changing the locks of the door leading to the roof of which the plaintiff had the right of use and passage.

Drifting away from the case at hand, the Court referred to the judgment in the cause of *Zarb et vs Carabott* et decided on 12 May 2006, in a generic attempt to define the use of one's roof, i.e., 'użu ta' bejt'. It also referred to the judgment in the names *Grima vs Atkins* delivered on 6 July 2007, wherein the Court considered that the abovementioned definition must have a wide interpretation. In fact, it considered that '*it-twaħħil tal-kanen u ħbula tal-inxir żgur jitqies bħala użu normali tal-bejt*'. The Court went a step further to state that '*dment li l-użu jkun normali u raġjonevoli, u ma jtellifx lis-sidien l-oħra mit-tgawdija li huma jistgħu jagħmlu fuq il-bejt, dak l-użu għandu jitħalla*'.

Having said that, the generic interpretation given to this phrase could not have applied to the case at hand, given that the deed of sale signed between the parties specifically limited the plaintiff's right of use over the defendant's roof to '[...] servizzi, ċioè għal tankijiet tal-ilma, aerials tat-television, u dish antenna'.

The Court delivered final judgment by accepting plaintiff's requests and rejecting defendant's pleas, with costs against the latter. The decision is final and not subject to further appeal.

YOUR TIME HAS RUN OUT: THE ISSUE OF PRESCRIPTION

Celine Cuschieri Debono

Everything that begins must end. Nothing lives forever and neither does the possibility to exercise a legal action. Someone's right to sue is not indefinite but is prescribed by a timeframe. This is the institute of prescription, and more specifically, extinctive prescription. The notion is that if a particular amount of time elapses from when one can exercise a legal action, then the action dies and cannot be exercised. Prescription is dealt with in Title XXV of the Civil Code (Chapter 16 of the Laws of Malta). In Article 2107(2), it is described as a means through which one can absolve oneself of an action when the creditor of same action would not have exercised the action within the timeframe prescribed at law.

While prescription runs automatically, it can be interrupted. Article 2128 provides that prescription is interrupted by the filing and notification of any judicial act. In simple terms, if the alleged creditor files a judicial letter against the alleged debtor, then prescription is interrupted. This means that the prescribed time of prescription starts running afresh (*vide* Article 2136).

In the case of an action for payment which does not fall under any other category of prescription under any other law – and which does not result from a public deed – the term of prescription is that of five years. This means that if more than five years elapse from when the action could have been exercised, the respondent in the lawsuit can successfully make the plea of prescription and thus the claims of the plaintiff cannot be acceded to. This is provided in Article 2156(f) of the Civil Code.

An important notion that is at times overlooked is that provided in Article 2160(1) of the Civil Code, which provides that the prescription as per inter alia Article 2156 will not have effect if the debtor does not of his/her own volition take an oath during the lawsuit that he/she is not the debtor. This carries with it important implications because something which can be seen as a technicality has the potential to make or break one's plea of prescription.

This is precisely what the Civil Court, First Hall, dealt with in the judgment in the names of *Emanuel Spagnol et vs Mario Caruana et noe*, delivered on the 14th of July 2023. The merits concerned *serviġi* allegedly given by the plaintiffs to John sive Giovanni Simiana. John Simiana passed away on the 20th of February 2015. The lawsuit was

filed on the 11th of January 2022. These dates are crucial for the question of prescription. While the plaintiffs claimed compensation for services rendered to Simiana, the respondents pleaded prescription under Article 2156(f) of the Civil Code. Now, the case was filed against curators acting on behalf of the unknown heirs of John Simiana. This means that there was no one in his or her personal capacity appearing in the case as a respondent.

So who was obliged to take the oath as per Article 2160(1)? The Court pondered at length on this question. It inquired whether the absence of such oath in this case rendered the plea of prescription inapplicable. The Court first analysed the judgments cited by the plaintiffs on the matter, which all pointed towards the direction that the requirement of Article 2160(1) also binds the curators acting on behalf of the respondents. The Court disagreed. It held that despite recognising the importance of the oath taken under Article 2160 of the Civil Code in ensuring that a plea of prescription will be successful, it did not agree that curators acting on behalf of respondents are also bound by this. There is a principle at law that if the law wants to state something it will do so, and when this is not done, it is not up to anyone to add it. This is the principle of 'ubi lex voluit dixit'. Applying this principle, the Court explained if the law wanted the requirement of the oath of the respondents to also apply to the representatives of same, it would have done so. But it did not. Furthermore, in this particular case, the curators had no way whatsoever to obtain knowledge that would render them able to take such oath – no heirs or persons interested in the inheritance of the deceased could be identified.

The Court went on to explain the forma mentis of prescription. It explained that it is based on the principle that anyone who alleges a right is responsible to exercise it within reasonable time. The different prescription timelines applicable exist to ensure legal certainty and so that the debtor is not subject indefinitely to proceedings from any person who deems himself/herself a creditor.

Zooming back into the case in question, the Court held that if Article 2160 were to be interpreted as imposing the same obligation on curators representing defendants, it would essentially be penalising the curators for simply doing their job. This is because in this situation, again, they had no way to be furnished with information that would render them able to take such oath. Expecting the curators to take such oath would be wholly unreasonable, the Court explained.

Considering all of this, the Court proceeded to acceed to the plea of prescription raised by respondents and reject all claims put forth by the plaintiffs.

The decision is final and not subject to further appeal.

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Civil Procedure

A CONTUMACIOUS DEFENDANT: NO WALK-OVER FOR THE PLAINTIFF

Analise Magri

The importance of taking immediate action when receiving a legal or court document can never be over-emphasised. It has been many a time reiterated in countless articles and writeups that when an individual or a company is served with a court document, a ticking clock may very well start to run. A timeframe within which one might have to submit a reply starts to decour. This is surely not to be taken lightly as should one fail to file a reply in a timely manner, the negative implications of such an inobservance may very well be irreperable.

The buzzword used in legal jargon to refer to the failure of a party summoned to respond in the manner and form required by law is a Latin derivative term known as contumacia, or as better known in Maltese '*kontumaċi*'. Taking proceedings before the Superior Courts as an example, should a defendant fail to file a reply within a period of 20 running days from due service of a sworn application, and also fail to appear for the sittings held by the Court, that defendant would have ticked all the boxes to be identified as a contumacious defendant, for he has been duly served with the initial proceedings but failed to take timely action as required by law (i.e. filing a sworn reply). At this stage, the contumacious defendant shall be precluded from filing a sworn reply to the case and bringing evidence in his defence at all hearings. This unless he manages to show to the Court that he had valid and sufficient reasons to justify his lack of a timely filing of a statement of defence, and his own lack of prescence during the hearing appointed by the Court.

When a defendant has been declared to be contumacious, what does this mean and imply for all the parties to the suit? With respect to the defendant, his contumacious position is not to be taken as equal to an admission of the claim being brought against him. The defendant is still deemed to be contesting the claim put forth by the plaintiff at all times and is still considered to be in a procedural state of contestation. Though not necessarily present at the sittings and with the legal inability to bring forth and produce any evidence, the contumacious defendant is still considered to be putting up a fight against the plaintiff's claims.

From his part, the plaintiff is not to take the fact that the defendant is contumacious as a green light that his claim will be automatically acceded to. Surely not. The plaintiff is still legally bound to prove his own

claim and bring forth the best evidence that he has in his possession in order to justify what he is requesting out of the Court. The paramount rules of evidence are not to be bypassed as a legal obligation of proving one's own case still rests on the plaintiff.

Should the plaintiff fail to substantiate and prove his own claim by sufficient and relevant proof, that same plaintiff might very well find his own case being lost in favour of the contumacious defendant.

This exact situation occured in a judgment pronounced recently by the Civil Court, First Hall, on the 20th of October 2023 in the names of *Paul Demicoli et vs Joseph Farrugia et.* The facts of the case were as follows. The plaintiffs, Paul and Jason Demicoli, had been engaged by the defendants to build and construct a semi-detached villa and swimming pool in Mellieħa. Some of the material which had to be utilised for the said building and construction was provided by the defendants themselves. The plaintiffs filed proceedings before the First Hall of the Civil Court claiming the total sum of €157,145 from the defendants, which sum allegedly represented payments due to them for their work. All the defendants, duly served with the proceedings, failed to file a reply, failed to appear during the sittings held by the Court and did not attempt to prove that they had a valid reason for their failures.

In this circumstance, the Court fairly remarked on the fact that even though the defendants were considered to be in a state of contumacia, this does not mean that automatically the plaintiffs' claims are to be acceded to. The Civil Court, First Hall, accounted for and remarked on its very own duty to examine whether the plaintiffs' demands are indeed justified and this irrespective of the fact that the defendants were considered contumacious.

After having considered the evidence tendered by the plaintiffs, namely their own viva-voce testimony, and the documentation exhibited, the Court was still not convinced that the plaintiffs' demands deserved acquiescance and this due to plaintiffs' failure to show that they had indeed carried out the works for which they were demanding payment, for their unsuccess in adequately proving the amount the being claimed, and also for having failed to confirm the authenticity and veracity of the documents presented. Consequentially, the plaintiffs found their request being rejected by the Court.

Most notably, the Court also proceeded to remark on the fact that defendants' state of contumacia should have not led the plaintiffs to slack in producing their own evidence, and the best evidence in their possession to support their claim. A contumacious defendant does not equate to a curtailment of the onus of proof which rests on the plaintiff.

The judgment is currently pending appeal before the Court of Appeal.

THE JOINDER

Nicole Vassallo

In every civil action, the plaintiff must have valid juridical interest in the action being instituted, and must bring evidence to substantiate the same. This juridical interest, besides being personal, direct, and legitimate, must subsist from the moment the lawsuit is filed until judgment is delivered.

In civil proceedings that naturally involve a plaintiff and a defendant (or a number of them), the Law allows a third-party to join a lawsuit pending between the original parties, either upon a demand of one of the original parties to the suit or at the Court's discretion (*ex officio*). The third-party's entrance can take place at any stage of the proceedings, provided that this precedes the judgment, and any request to that effect may only be lodged before a Court of first instance (i.e, not at a stage when the proceedings are being heard before an appellate Court). The third-party that joins the suit is referred to as a "Joinder" (more often known as the "*Kjamat in Kawża*"), reference to which is made in Article 961 of the Code of Organisation and Civil Procedure.

The Joinder, whether introduced to the suit following another party's request or *ex officio*, may participate in the action as a defendant, and is therefore entitled to file written pleadings, raise pleas, and ultimately avail himself of the same rights and benefits granted to every defendant, despite not being an original party to the suit.

A judgment delivered by the Court of Appeal on 12 July 2023 weighed in heavily on the principles surrounding the legal notion of "*Kjamat in Kawża*", in the names *Dr Mark Attard Montalto et vs Dr Michelle Tabone noe*. Following the Court's decision at first instance which upheld defendant's request to introduce a Joinder in the action, the Court of Appeal was tasked with deciding whether the Court of first instance was legally correct in its stance.

The Court of Appeal contended that the principle of juridical interest applies here in much the same way as it would at law if one were to institute any new claim. The Court of Appeal also reiterated the importance of the already vastly developed concept of "*Kjamat in Kawża*", which may come into play for a variety of reasons, including to prevent conflicting judgments, to protect the original defendant's interests in regard to third-parties and the plaintiff's own interest and peace of mind that the principles of justice are observed. When the

circumstances of a case merit the need for a Joinder to participate in the proceedings, and the presiding Court acknowledges it, it is incumbent on the Court to make an order to this effect, *ex officio*, without the need of a request by one of the parties ("*meta in-neċessità tal-kjamata in kawża tiġi rikonoxxuta mill-Qorti, jsir dover tal-istess Qorti li tordnaha mhux biss fuq talba tal-partijiet iżda anke ex officio*").

Meanwhile, a person who successfully shows that he is interested in any action currently ongoing between other parties may be admitted to the lawsuit as what is known as an "Intervenor", at any stage in the proceedings. This means that if an individual, not being a party to an existing suit, has a legitimate and direct interest in that suit, he may file an application demanding he be heard by the Court since that particular judgment might also affect his position at law. Unlike a Joinder, an Intervenor may request admission to the suit from both a Court of first instance and an appellate Court.

What does local jurisprudence have to say about this? In a judgment delivered on 5 July 2023, the First Hall of the Civil Court submitted that to qualify as an Intervenor, one must have juridical interest in the lawsuit that is direct and substantial, and that goes beyond having a simple interest in the outcome because of its repercussions on related future lawsuits. In other words, a prospective Intervenor must be ready to show that he is vested with direct interest in the case at hand, and not its outcome because of how this may affect future cases. The most significant difference between a Joinder and an Intervenor is that while an Intervenor can never be bound by the judgment in which he has been admitted as an Intervenor, a Joinder is subject to the outcome of the claim which may be allowed or disallowed in his regard, as if he were an original defendant.

Where this does not concern the issue of Joinders and Intervenors, the Court is generally kind to errors made in written pleadings or applications, by virtue of Article 175 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta), which allows the substitution of any act or the amendment of any pleading as long as this substitution or amendment does not affect the substance of the action or the defence. In fact, the Court has for years been trying to abolish certain procedural formalities surrounding the correction of acts and pleadings that had previously resulted in dragging out cases for far

too long unnecessarily. Unless the substance of the merits of the case are likely to be prejudiced, the preferred route taken by the Court is to salvage the acts and pleadings, not to reject an apposite request for correction or substitution, which rejection would have likely resulted in the acts or pleadings being declared null by the Court.

The Court of Appeal in the judgment quoted above, dated 13 July 2023, upheld the judgment delivered at first instance, thereby allowing the Joinder to participate in the proceedings.

The decision is final and cannot be appealed further.

POWER OF COURT TO ORDER OR PERMIT AMENDMENT OF WRITTEN PLEADINGS

Frank Anthony Tabone

The Court has the power to order or permit amendment of written pleadings. Article 175 of the Code of Organization and Civil Procedure, Chapter 12 of the Laws of Malta provides that:

> the court may, at any stage of the proceedings, at the request of any of the parties, until judgments is delivered after hearing where necessary the parties, order the substitution of any act or permit any written pleading to be amended, either by adding or striking out the name of any party and substituting another name therefor or by correcting any mistake in the name of the character of the parties, or by correcting any other mistake or by causing other submission of fact or of law to be added even by separate note, provided that no such substitution or amendment shall affect the substance either of the action or of the defence on the merits of the case.

In a judgment delivered by the Civil Court, First Hall, on 8 March 2023 in the names *Carmel sive Charles Caruana vs Prim Ministru*, the Court dealt with a request made by the plaintiff to correct the sworn application as per Article 175 of Chapter 12 of the Laws of Malta.

The plaintiff requested the court to correct the sworn application by adding an identity card number and to make changes to the first paragraph of same application by specifying the article of the law on which the action was being based.

The defendant in his reply objected to the request made by the plaintiff, arguing that Article 175(1) of Chapter 12 of the Laws of Malta was not intendent to correct errors which affect the substance of the action. Therefore, the defendant requested the court to reject the application filed by the plaintiff because it will affect the substance of the action.

The court, while referring to two judgments delivered by the Court of Appeal, one delivered on 28 February 1997 in the names *Fino vs Fabri* noe and another judgment delivered on 24 January 1994 in the names *Ellul vs Coleiro*, emphasized that when dealing with an application in terms of Article 175 of Chapter 12 of the Laws of Malta, the practice to be followed by the courts is that to be more inclined to accept such requests and unless same request does not drastically change the substance of the action or of the defence on the merits of the case.

In this case, the Court, upon examining the sworn application and the changes requested by the plaintiff in terms of Article 175 of Chapter 12 of the Laws of Malta, concluded that the requested corrections will clearly not change the substance of the action and that the demands subject to the sworn application will not be affected.

The court further added that while accepting the changes to the sworn application, such changes will not prejudice any of the parties, in this case the defendant, since same will be given the opportunity to file a reply, rebutting the demands by the plaintiff as corrected.

The Court, after having examined Article 175 of Chapter 12 of the Laws of Malta and also the request for corrections filed by the plaintiff, remarked on why same plaintiff wanted to change the sworn application by saying that the action is being done under Article 32(2) of Chapter 12 of the Laws of Malta which article of the law states 'the Civil Court hears all cases of a civil or commercial nature, and all those other causes that the law expressly says it should take their cognition'. The Court further commented that Article 32(2) of Chapter 12 of the Laws of Malta does not provide for any specific action but simply provides for the jurisdiction of the Civil Court, First Hall.

This decision was appealed, and a final decision was given by the Court of Appeal on the 14 March 2024, whereby the authorised corrections were confirmed. The case was sent back before the Civil Court, First Hall, for it to continue hearing the case.

THE INTERESTING CASE OF A WARRANT OF PROHIBITORY INJUNCTION SEEKING TO DERAIL MFSA FROM ITS TRACKS IN PROCESSING PRIVILEGED DATA

Clive Gerada

A warrant of prohibitory injunction is a strong and effective tool in hindering anyone under the sun from taking action which could have prejudicial effects against you. Our law requires that two elements be satisfied in order for a prohibitory injunction to be acceeded. Firstly, that the applicant requesting a prohibitory injunction must show that *prima facie* (at face value) he has rights. The Court of Appeal in *Grech pro et noe vs Manfre* (decided on 14 July 1988) had said that this element is objective and does not depend on the discretionary element of the judge. The rights pretended either exists prima facie at face value (mal-ewwel daqqa t'għajn) or else they don't exist. The second element that the applicant must prove is that, if the court does not accede to his request and grants the prohibitory injunction, then the rights of that applicant would be irremediably prejudiced.

If a person seeks an application for a warrant of prohibitory injunction against the government or an authority established by the Constitution of Malta or against a person in the exercise of his functions as a public official, then the situation is somewhat different.

As a general rule, the law prohibits the court from ordering a warrant of prohibitory injunction against the government or an authority established by the Constitution of Malta or against a person in the exercise of his functions as a public official, unless the government or the aforementioned authority or public official, does not confirm in open court that the thing which the court is being requested to stop from happening is in fact going to take place.

In this case, the court has to be satisfied that, if the warrant of prohibitory injunction is not acceded too, then the prejudice that results to the applicant would be disproportionate when compared to the same action that the court is being requested to inhibit. These elements are found in Article 873(1), (2), and (3) of Chapter 12 of the Laws of Malta.

Furthermore, the abovementioned elements are cumulative and if one of these elements are not satisified then the court is obliged to reject the application for the issuance of a warrant of prohibitory injuction. It has to be kept in mind that the court procedure relating to warrant of prohibitory injunction is a summary procedure (that has to be decided in one sitting).

This was the matter of *LifeStar Holding plc et vs Awtorità għas-Servizzi Finanzjarji ta' Malta et*, decided on 1 February 2023 by Hon. Judge Spiteri Bailey.

The presideing judge was asked to decide on an application of warrant of prohibitory injunction filed by the LifeStar Holding plc, LifeStar Insurance plc, and GlobalCapital Financial Management Limited (hereinafter referred to as 'applicants' or 'claimants') against the Malta Finacial Services Authority (hereinafter referred to as 'MFSA') and Mazars Consulting Limited (C 29387) (hereinafter referred to as 'Mazars').

The facts of the case surround an investigation carried out by the MFSA on the applicant companies' property. MFSA had elevated data and information from the servers, laptops, and email accounts of the applicant companies. Subsequently, the MFSA asked Mazars (one of the defendants in this case) to commence analysing and processing the data elevated. Mazars were engaged for this particular task since the authority did not have the appropriate software or resources to carry out such a task.

The applicant companies in turn instituted these proceedings requesting the Court to prevent the respondents from analyzing, reading, accessing, using in any other way, processing, or disclosing any privileged information and/or documentation (electronic and physical) in terms of Article 588 of the Code of Organization and Civil Procedure (Chap. 12 of the Laws of Malta) that was exchanged between the claimants (applicant companies), or any of them, and their lawyers and accountants.

From the evidence submitted, the Court was not satisfied that the MFSA was not going to pursue the action that the claimants sought to stop through the injunction. Therefore, as a result, the Court moved on to consider the request.

During the hearing of evidence, it resulted that the MFSA had given an order to elevate data and take control of information and documentation pertaining to the applicant companies. It resulted that such data might have also included privileged documentation. As a result, the applicant companies instituted civil proceedings against the MFSA, separate from these proceedings.

The MFSA engaged Mazars to analyse the data of the applicant companies. This data had to be first separated from what is relevant and what is not relevant. Following that, another filtering process had to be carried out in order to eliminate all the data that is privileged, so that such data is not processed and analyzed. Moreover, Mazars argued that this process of elimination was to be carried out by an individual who was extraneous to the investigation.

The defendant company Mazars (the company tasked with assisting the MFSA in the investigation) used a software system that automatically filters certain domains (such as email addresses of the lawyers of the applicant companies) and excludes data such as emails and content coming from these domains. Therefore, the data is not physically read by a natural person.

The Court argued that the right to protect privileged documentation is true and real (*veru u reali*) and must be protected at all times. In this regard, the Court had to analyse at face value (*prima facie*) if this right was impinged upon by the MFSA and Mazars. The Court had to keep in mind the element of proportionality, meaning that the applicants need not prove to the court that as a result of the authority's action it would suffer irremediable prejudice. It would suffice to prove that the action of the authority is disproportionate.

Consequently, the Court held that it was satisfied on a prima facie level that the protocols that MFSA had adopted and the process that Mazars had adopted in the course of the processing of data from the claimant companies, were designed to protect the rights of the applicant companies with respect to privileged documentation. Whilst conceding that systems and softwares can never provide an infalible guarantee, the Court held that the defendants (the MFSA and those assisting in the investigation) were doing all that was possible in their power, ability and all that was reasonable to protect the rights of the applicant companies.

Moreover, the Court noted that an authority should not have a '*mano libera*' (free hand) to ignore and violate the rights of those being investigated. However, in the same breadth the Court argued that it will not allow individuals being investigated to hinder disproportionately the investigative function of an authority.

Referring to the facts of this particular case, the Court held that the MFSA was carrying out its duty within the parameters of the law and taking all the necessary precautions to protect the rights of the investigated companies. In fact, the Court noted that it was solely the fault of the applicant companies lack of cooperation that the MFSA had to elevate all data, including, in all probability, privileged documents.

The Court considered that if the application for a warrant of prohibitory injunction had to be rejected, taking the abovementioned reasons into consideration, the prejudice suffered by the applicant companies would not be dispropotionate. The Court went on to say that even if, in the remote circumstance that one of the privileged documents is not filtered by the software system, the prejudice would only result in the event that the authority uses the information contained therein for their advantage or to the disadvantage of the applicant companies. The Court held that the authority had already declared that it was not going to make use of such privileged documentation and in the worst case scenario that the authority decides to take advantage, the applicant companies would have other ordinary remedies and administrative actions that it can resort to. Consequently, the Court made reference to the separate civil proceedings (pending) that the applicant companies had instituted against the MFSA on this particular matter.

The Court decided that the applicant companies had satisfied the first element of the warrant of prohibitory injunction, that is the prima facie right to protect privileged documentation not to be processed. However, they had failed to prove the second element that is the prejudicial element. The Court held that there were enough safeguards to ensure that the companies right's were protected.

The decision is final and not subject to further appeal.

YOUR RIGHTS... ON THE FACE OF IT

Celine Cuschieri Debono

The legal tools at the disposal of any person are not to be used frivolously. Indeed, whenever any legal act is filed, be it a lawsuit or a warrant (mandat), there needs to be a legitimate claim raised by the legitimate person against the legitimate respondent/s.

In relation to warrants, Article 836(8) of the Code of Organisation and Civil Procedure, contemplates penalties against the party submitting the warrant in situations such as when 1) the warrant is not followed by a lawsuit in the prescribed timeframe, 2) when there are no doubts as to the liquity of the alleged debtor, and 3) when the warrant is issued with malice or is frivolous or vexatious. One can also claim, under Article 836(9), any such damages suffered because of the issuance of the warrant, provided that one of the circumstances contemplated in Article 836(8) exists. Indeed, penalties and damages are typically claimed in the context of an application for revocation under Article 836(1); namely, because the circumstances in which such damages can be awarded are limited.

Ironically, there may be instances where a fresh precautionary warrant is used as a counterattack to the other party's prior filing of an alleged frivolous warrant. In such cases the original 'respondent' would be the 'claimant' with respect to the new warrant.

This is what happened in a decree delivered by the Civil Court, First Hall, on the 9th of February 2023 in the names *Paul Falzon et vs Paula Debono*. The proceedings concerned the issuance of a warrant of prohibitory injunction wherein the claimants (previously respondents in other warrants) asked the Court to prohibit the defendants from selling or donating a voluminous list of immovable properties owned by the respondent. The amount cautioned by the claimants was that of €1,200,000.00.

The reason invoked for requesting the warrant of prohibitory injunction was that the respondent (then claimant) had obtained in her favour the issuance of a number of garnishee orders (*mandati ta' sekwestru*) against the claimants (then respondents). Such garnishee orders, when added up, amounted to €289,000. However, for some reason, the amount cautioned by the fresh warrant was that of €1,200,000.00. The claimants in the present warrant alleged that due to the issuance of the original garnishee orders, they had suffered damages. They argued that the

warrants had been filed frivolously, abusively, vexatiously, and targeted towards causing them damages.

Therefore, the Civil Court, First Hall, had to examine the fresh warrant in light of the requisites at law. It explained that for a claim for the issuance of a precautionary warrant to be successful, the claimant must show that he or she has a *prima facie* right that must be protected and that if the warrant is not issued, he or she will suffer irremediable prejudice. Furthermore, it held that the absence of one of these elements is fatal for whoever is making the claim. The Court agreed with the respondent that the claimants had not explained how they arrived at the amount claimed in such a way to convince the Court that on a *prima facie* level there is a claim for such amount. The Court further remarked that the amount had not been liquidated yet. Furthermore, the claimants resorted to a fresh warrant without exhausting their remedies at law with respect to applications that can be filed in the acts of the previous warrants.

The Court thus concluded that the claimants had not satisfactorily shown that they have a *prima facie* right. The Court explained that because of this it did not need to delve into the issue of the irremediable prejudice. Thus, it rejected the claim of the claimants for the issuance of the warrant of prohibitory injunction.

Such decree is not appealable.

SUE NOW, OR FOREVER HOLD YOUR PEACE

Celine Cuschieri Debono

Some opine that conflict, in nature, is inevitable. In organised society, Courts of Law exist so that disputes may be settled in a civil manner. Having said that, no one is ever thrilled to be served with a judicial act. In truth, which reasonable person would enjoy the threat of being sued? One may also dare to assert that the threat of being sued can be more anxiety-inducing than the lawsuit itself. Indeed, once a lawsuit is filed, one may start to come up with an adequate strategy to tackle the type of lawsuit, the facts as explained by the counter-party, and the claims contained therein. So what happens if someone warns another person via, say, a judicial letter or protest that they will proceed judicially against them but then nothing happens? Is one expected to simply sit and wait until the dreaded day arrives? Not exactly.

The law provides for this scenario in Article 403 of the Code of Organisation and Civil Procedure in what is known as a jactitation suit (*jattanza*). It stipulates that where a person makes a claim against you via judicial act or otherwise in writing, and you wish to be liberated from it, you may within one year file a sworn application asking the Court to fix a timeframe within which the person making the claim has to sue you. The timeframe cannot exceed three months. This means that the person who originally sent you the claim in writing would have three months from the judgment to file a lawsuit against you. Article 403 holds that if such person, then, does not proceed with the lawsuit within that specified timeframe, he can never proceed against you on that claim. The idea behind this law is for the person making the claim not to drag his or her feet in filing the lawsuit. The legislator is basically allowing one to nudge the other party to get a move on, so to speak.

The judgment in the names of *Joseph Beppe Bugeja noe et vs St. Angelo Mansions Block 5 Association* decided by the Civil Court, First Hall, on 14 April 2023 dealt precisely with this matter. In their sworn application, plaintiff association explained that St. Angelo Mansions is a residential complex in Birgu composed of 13 blocks of apartments, car spaces, and garages underneath the blocks as well as external parking at street level. ASAMO administers the common parts of the complex. At the same time, each individual block is administered by a particular association. The defendant association is such an example, meaning it administers Block 5. According to ASAMO's statute, whoever owns an apartment in the complex is a member of ASAMO.

On the 16th of December 2020, the defendant association (i.e. St. Angelo Mansions Block 5 Association) filed a judicial protest against the plaintiff association (ASAMO), alleging that it had usurped the powers of same defendant association and calling upon it to cease and desist from collecting dues from the respective owners. Essentially, defendant association claimed through the judicial protest that not all members of same defendant association were part of the plaintiff association (ASAMO) and that the plaintiff association was exercising powers that actually belonged to the defendant association (i.e. St. Angelo Mansions Block 5 Association).

On 28 January 2021, the plaintiff association filed a counter-protest denying all claims and allegations. Despite this, the defendant association was still purporting that its members had a right not to pay ASAMO its annual dues and ASAMO was facing resistance in the process of collecting said dues from some of the owners of apartments in Block 5. Having said that, no lawsuit was filed by St. Angelo Mansions Block 5 Association against ASAMO on this basis. The situation thus remained very unclear.

This is what led ASAMO (plaintiff association) to file a jactitation suit against St. Angelo Mansions Block 5 Association (defendant association) on 21st June 2021.

The defendant association responded to the jactitation suit by stating that one of the essential elements for such suit to succeed was absent. It argued that in the judicial protest it was not vaunting any right or pretension. It argued that it was simply reacting to the plaintiff association's 'abusive and illegal behaviour' and that the judicial protest was not spontaneous but the result of provocation by same plaintiff association.

Therefore, the Civil Court, First Hall, had to examine these circumstances in light of the essential elements for a jactitation suit to succeed. The Court examined all documentary evidence provided as well as witnesses produced. It also referred to previous judgments on the matter. It explained that six elements need to subsist:

1) The plaintiff must possess the thing or matter cautioned;

2) The defendant must have presented a claim on the same thing or matter;

3) The claim must be spontaneous and not provoked by the plaintiff's behaviour;

4) The claim must be capable of being exercised judicially;

5) The claim must have a defined specified scope; and

6) The claim must not be conditional.

The Court illustrated that the true bone of contention in this case was the third element – the element of spontaniety. It remarked that ironically, despite the defendant association insisting that the judicial protest was a the result of provocation and was not spontaneous, there were witnesses produced by same who confirmed that this was not the case.

Therefore, after delving into each element and applying them to the circumstances at hand one by one, the Court proceeded to acceed to the claims of the plaintiff association. It gave the defendant association three months within which it must file a lawsuit against the plaintiff association on the pretensions mentioned in the judicial protest.

If the defendant association fails to sue the plaintiff association within the timeframe established, it loses the right to do so forever. It must sue now or forever hold its peace.

This judgment is currently pending appeal before the Court of Appeal.

THE STORY OF ONE ARRESTED SEA VESSEL

Keith Borg

The law lays down that executive titles, including judgments and decrees of the courts of justice of Malta, may, according to circumstances, be enforced by an executive act. One such act is the warrant of arrest of a sea vessel.

Article 281 of the Code of Organization and Civil Procedure then provides for the manner in which executive acts may be impugned. To this end, the person against whom an executive act has been issued, or any other person who has an interest, may file an application, containing all desired submissions together with all documents sustaining such application, to the court issuing the executive act praying that the executive act be revoked, either totally or partially, for any reason valid at law.

The application is to be served on the opponent who shall, within a period of ten days (the court may, in urgent cases, reduce this period), file a reply containing all submissions which such opposite party may wish to make together with all documents sustaining the reply. In default of such opposition the court shall accede to the demand.

The court is to decide on the aforementioned application after hearing the parties and receiving such evidence as it may deem fit, if it so considers, within a period not later than one month from the filing of the said application.

An appeal from the court decree acceeding to, or refuting, the application may be entered by application within six days from the date on which such decree is read out in open court. The Court of Appeal is then to appoint such appeal for hearing within one month from the date when the decree is read out in open court, and the appeal shall be decided within three months from the date when it has been appointed for hearing. No security for costs of the appeal is required.

In its decree of the 8 August 2023, the First Hall of the Civil Court, presided by Madam Justice Anna Felice, in the cause in the names *Nassau Maritime Holding DAC vs Il-Bastiment M/V 'Dominia'* dealt with one such application filed in terms of article 281 of the Code of Organization and Civil Procedure.

The facts of the case may be summarised as follows.

By means of his urgent application to the court, Captain Antonio Cilidonio, appearing on behalf of the vessel M/V Dominia as well as on behalf of its owners Morfini SpA, requested the revocation of a warrant of arrest issued against the mentioned sea vessel.

The applicant based his claim on the fact that the company that owns the vessel affected by the abovementioned warrant had, in July 2021, filed in the court of Bari judicial procedures in the context of which that court had ordered a moratorium (temporary prohibition) on the filing of judicial acts against the same Morfini SpA. A restructuring plan had been presented to the court in Bari in February 2022; yet the company's creditors did not approve said plan and in fact bankruptcy procedures were initiated. Following a request from Morfini SpA, the court of Bari again imposed a ban on the filing of judicial proceedings by the creditors.

Citing local jurisprudence, the court observed that the procedure in terms of Article 281 is essentially limited to what may result from the judicial act itself. The procedure does not reopen the merits of the dispute between the parties.

The court made reference to Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), specifically to Article 8 of same, which states that the opening of insolvency proceedings is not to affect the rights *in rem* of creditors or third-parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

These rights in rem of creditors, in particular, refer to: (a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage; (b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee; (c) the right to demand assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled; (d) a right *in rem* to the beneficial use of assets.

Furthermore, the right, recorded in a public register and enforceable against third parties, based on which a right in rem within meaning of the above may be obtained, is to be considered to be a right *in rem*.

The court considered that, in the case at hand, the credit of Nassau Maritime Holding was secured by a 'First Priority Mortgage' and therefore consituted a right *in rem* attracting the protection of the Article 8 of the Regulation. The court also made reference to the local Pre-Insolvency Act, specifically to Article 25(5) of the said Act, which provides for exclusions from stay of individual enforcement actions in relation to, amongst others: (a) any action *in rem* against a ship or sea vessel; (b) any proceedings that may be instituted by the holder of a registered mortgage or a privileged creditor over a ship or sea vessel, or any other actions or proceedings to which a ship or sea vessel may be subject in terms of the Merchant Shipping Act; and (c) any warrant of arrest, whether in personam or in rem, of a sea-going vessel.

The court strongly disagreed with the applicant's argument that the order of the court of Bari, following the request by Morfini SpA, was applicable or subject to recognition in Malta. In addition to the dubious jurisdiction of the court in Bari in the case of a vessel arrested in Maltese waters, the Court noted that the request filed therein by Morfini SpA was never notified to Nassau Maritime Holding. Neither could applicant seek refuge in the provisions of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

The court also rubbished as superfluous applicant's claims of fraud and forum shopping as allegedly perpetrated by Nassau Maritime Holding; it also found baseless the applicant's allegation of untimeliness of the executive act, particularly considering that the debt in question had been due for years.

The court therefore proceeded to dismiss applicant's request, with costs.

The decision was fully confirmed on appeal by the Court of Appeal on 5 September 2023.

YOU'VE BEEN CANCELLED

Nicole Vassallo

A procedural notion the importance of which often goes unnoticed is the cancellation of a case following the parties' default of appearance at trial. In any litigious cause, the two sides with a vested interest in that cause, i.e., plaintiff(s) who instituted the cause and defendant(s) against whom the cause was instituted, are expected to participate actively in the proceedings, which participation involves, at the very least, one's own presence during the trial. Article 199 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) caters for those instances in which either both plaintiff or defendant, or the plaintiff, fail to make an appearance during a trial before the Superior or Inferior Courts.

A judgment in which this procedural instrument was invoked due to the default of appearance of both plaintiff and defendant was that in the names of *Duncan Mizzi vs Keven Agbigbi*, delivered on 30 August 2023 by the Rent Regulation Board. The parties' non-appearance despite the case being called three times led the Board to order the cancellation of the cause from the list, at the plaintiff's sole expense.

In the event that the cause is called on three times, and the defendant or his advocate appear but not the plaintiff or the plaintiff's advocate, the defendant has the right to demand that the plaintiff be declared non-suited with costs (i.e., *liberat mill-osservanza tal-ġudizzju*), effectively discontinuing the proceedings against the said defendant. This is not to say that the plaintiff does not have a remedy in the event of cancellation of the cause following default to appear. For the cause to be 'restored' to the list so that it is heard and determined by the presiding adjudicating body, the plaintiff must file an application to this effect within three months from the date of cancellation of the cause. Such a demand will only be met once, so the plaintiff and/or his legal counsel must ensure their presence at subsequent hearings of the trial. Having said that, the principle of cancellation of causes may not be invoked when a cause is awaiting the outcome of another cause.

Despite the wording of Article 199 suggesting that the power to cancel a cause from the list is one which vests solely in the Superior and Inferior Courts, and not in Boards such as the one at hand, the Board ascertained in its judgment of *Mizzi vs Agbigbi* that the Reletting of Urban Property (Regulation) Ordinance grants the Rent Regulation

Board the authority to exercise the powers vested in the Civil Court by Chapter 12 of the Laws of Malta (of which the cancellation of causes due to default in appearance forms part via Article 199).

In the judgment of *Mizzi vs Agbigbi*, after the cancellation of the cause from the list due to the parties' failure to make an appearance, the plaintiff chose not to avail of his remedy granted by Article 199(3) of Chapter 12 to restore the cause to the list, for this to heard and determined upon the same acts. As a result, the Rent Regulation Board reaffirmed its decree whereby it had cancelled the cause at plaintiff's expense, and lastly claimed that it will not be taking further cognizance of the proceedings. This means that in view of plaintiff's inaction to request the restoration of the cause within the three-month window allowed by Article 199(3), plaintiff may not institute proceedings against the same defendant and on the same merits on which the cancelled cause was based.

The judgment is currently pending appeal before the Court of Appeal (Inferior Jurisdiction).

AZZOPARDI BORG & ASSOCIATES
ADVOCATES

Criminal Law

COURTING OR SEXUAL HARASSMENT?

Arthur Azzopardi

American author and advocate for persons with disabilities Helen Keller once stated that 'life is a daring adventure or nothing at law'. All and sundry agree that the adventures of life include meeting new people and the creation of personal intimate relationships.

These relationships are natural to all beings. Nature so dictates. In the animal kingdom each species has its courting process. Human beings albeit considered more intelligent than other animals regularly fall foul of what is acceptable during their courting. This problem, one may opine, arises since humans tend to forget, for one reason or another, that courting, like all other aspects of life, must conform to the norms of decency, respect, and morality.

So great is this flaw found in humans that various laws have been enacted, both locally and at an international level, to ensure that humans know the legal boundaries of what is permissible and what is not.

On the 6th of January 2023, the Court of Criminal Appeal presided by Justice Grima delivered a judgment on this issue (Appeal 215/2022). The question that the Court was tasked with examining related as to whether the crime of sexual harassment as contained in Article 251A(1)(e) of the Criminal Code required a course of conduct by the perpetrator to the detriment of the victim, or whether one instance was sufficient.

The case related to an incident that took place on the 14th of October 2021 in a bar found in Floriana. The victim was in this place together with her partner, yet the perpetrator still sought to "court" her. Realising that all his attempts at chatting up this woman were proving futile, the perpetrator, not wanting to give up this conquest, upon seeing the victim go to the restrooms, and being aware that there were no other persons in there, followed her and prevented her from exiting the restrooms, while at the same time pulling her hand to draw her towards him and attempting to kiss her hand. The victim objected strongly and filed a police report.

The case was first decided by the Court of Magistrates, which Court – albeit confirming the truthfulness of the victim's version of events and declaring the accused's actions as being offensive, humiliating, degrading, and threatening, and naturally concluding that this is not courting – declared the accused not guilty on a point of law.

The Court of Magistrates concluded that since sexual harassment was a subbranch of the generic crime of harassment, the legal principles applicable to the crime of harassment had to be applied also in instances of sexual harassment. Therefore, the Court of Magistrates, (one might add, much to its displeasure), concluded that since this incident occurred only on one day and therefore was lacking a course of conduct, (this being a *sine qua non* condition for a finding of guilty for the crime of harassment), the accused could not be declared guilty and also punished.

The Attorney General thought it fit to exercise her right of appeal from this judgment.

Justice Grima, in her unique style of clarity, sharpness, and legal knowledge, did not mince words. Whilst confirming that a course of conduct was essential for there to be a finding of guilty of the crime of harassment in relation to a number of subbranches of this crime, all of which had been promulgated into law by means of Act XX of the year 2005, the Judge declared that, yet, this did not apply to the subbranch in issue. Her reasons were primarily that this subbranch (e), making sexual harassment a crime of its own accord, was promulgated by means of Act XIII of the year 2018 by means of which law Malta implemented its assumed international obligations in terms of the Council of Europe's Istanbul Convention on action against violence against women and domestic violence.

Justice Grima, after repeating the principle aim of the Convention, delved into the text of Article 251A(1)(e) to explain why the Attorney General was correct. The text of the law, clearer in its English version, states that the perpetrator of such a crime shall be guilty not only when (he) pursues a course of conduct but also when (he) subjects another person to any act and or conduct with sexual connotations. The wording of the law refers to an "act" or "conduct." The law does not imply the plurality of wrongdoing only, it also allows for a singular wrongful act of commission.

The Court of Criminal Appeal, whilst confirming (and making her own too) in full the appellatives used by the Court of Magistrates in describing what the perpetrator did, upheld the Attorney General's appeal, revoked the decision of not guilty, proceeded to declare the appealed party guilty, and punished him to six months' imprisonment, which term was suspended for a period of two years and also imposed upon the accused in favour of the victim a Restraining Order.

The judgment is final and cannot be appealed further.

IS IT HATE SPEECH OR FREEDOM OF EXPRESSION?

Frank Anthony Tabone

Is it hate speech or freedom of expression? Even though in many jurisdictions hate speech is considered as an offence towards an individual or group of people, there are instances where a particular expression could be protected under the right to freedom of speech, which is a recognised human right.

Article 82A of the Criminal Code, Chapter 9 of the Laws of Malta, regulates the offence of incitement to hatred, also known as hate speech. This offence occurs when a person or a group of persons use threats with the intention to stir up hatred against a specific person or group because of their gender, gender identity, sexual orientation, race, colour, language, national or ethnic origin, age, disability, citizenship, religion or belief, or political or other opinion.

Article 82A of Chapter 9 provides that:

> Whosoever uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up violence or hatred against another person or group of persons on the grounds of gender, gender identity, sexual orientation, race, colour, language, ethnic origin, age, disability, religion or belief or political or other opinion or whereby such violence or hatred is likely, having regard to all the circumstances, to be stirred up [...]
>
> "violence or hatred" means violence or hatred against a person or against a group of persons in Malta defined by reference to gender, gender identity, sexual orientation, race, colour, language, national or ethnic origin, age, disability, citizenship, religion or belief or political or other opinion, or whereby such violence or hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term from six (6) to eighteen (18) months.

Sanctioning hate speech was also the subject matter of several debates between legal experts, which matter was also referred to the European Court of Human Rights (ECtHR) several times. The ECtHR used two approaches. The first approach was that of exclusion from the protection of the European Convention on Human Rights (ECHR), as

provided for in Article 17 of the ECHR, whereby a comment can result in hate speech and incitement to hatred; the second approach by the ECtHR was that as regulated by Article 10, paragraph 2, of the ECHR which provides that freedom of speech:

> is applicable not only to "information" or "idea" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.

Additionally, the ECtHR, in a judgment delivered on 7 December 1976, in the names *Handyside v the United Kingdom*, whilst referring to Article 10, paragraph 2 of the Convention further added that:

> such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.

This judgment by the ECtHR was referred to by the Court of Criminal Appeal presided by Madam Justice Edwina Grima on the 28th July 2023, in the case *Police vs Michael Leonard Paul Hammond*. Mr Hammond was charged in court for having breached Article 82A of the Criminal Code, following a comment made on Facebook on a post shared by a group of people known as 'LGBTI+GOZO'. The appellant was found guilty by the first court and sentenced to six months imprisonment suspended for three years.

Mr Hammond appealed the judgment mainly on the fact that the prosecution failed to prove its case beyond reasonable doubt and that he could never been found guilty by the first court. The Court of Criminal Appeal upon delivering judgment considered that the comment made by appellant was abusive and insulting towards the LGBTI community and that upon writing the post in question it had to be evident for the appellant that such comment would have led to such sentiments as regulated in terms of Article 82A of the Criminal Code.

The Court of Criminal Appeal in its judgment referred to another judgment by the ECtHR in the names *Erbakan v Turkey* whereby the latter Court stated that:

> [...] [T]olerance and respect for the equal dignity of all human beings constitute foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance [...], provided that any [...] "restrictions" [...] imposed are proportionate to the legitimate aim pursued'.

The appellate court cited another judgment by the ECtHR in the names *Vejdeland and Others vs Sweden* and stated that:

> inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner. In this regard, the Court stresses that discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour".

In conclusion the Court of Criminal Appeal, after having examined all the circumstances of the case, decided that the comment posted by appellant was in fact in breach of Article 82A of Chapter 9 of the Laws of Malta and confirmed the judgment pronounced by the First Court.

The decision is final and not subject to further appeal.

MY WAY OR THE HIGHWAY

Arthur Azzopardi

Y&T, the American rock band, in 1982 launched their album 'Black Tiger'. 'My Way or the Highway' was a success. The name of this song derives from a very commonly used phrase in the English language, which means that the speaker is asserting the view that either the recipient accepts the speaker's policies or alternatively, the recipient is to leave. No divergence of opinion to that of the speaker is allowed.

Had this been the case in common parlance only and be absent from daily life, the Criminal Code would not have, since the 10 June 1854, declared that the arbitrary exercise of pretended rights is a crime.

On the 4 September 2023, the Court of Criminal Appeal, presided by Justice Scerri Herrera, delivered judgment in the case bearing appeal number 522/2019.

Tracing the origins of this crime to Article 168 of the laws existing under the Kingdom of the Two Sicilies (1819), the Court of Criminal Appeal once again re-affirmed the correct teachings of Professor Sir Anthony Mamo whereby this crime was grouped under the Title 'of crimes against the administration of justice and other public administration'. Justice Scerri Herrera, quoting Professor Mamo, re-confirmed that:

> These crimes attack the State but indirectly, inasmuch as, without being actuated by motives hostile to the Government, they proceed from other causes, often of a private character and affect those social institutions on and by which the machinery of the Government rests and moves: those institutions, that is to say, which provide the means of guaranteeing to every member of the community the integrity of his rights and those benefits which derive from the state of civil society.

Referring to previous jurisprudence developed by our Courts in relation to this crime, it is undoubtedly stated that this crime is targeted against the public administration since a private individual would have, whilst in breach of the law, used the powers afforded by law to the authorities against another private individual. The aim of Article 85 of the Criminal Code is intended to protect property, be it movable or immovable, from a unilateral act of usurpation by a third-party that would lead to the deprivation of the legitimate owner's use, enjoyment,

and ownership of said property without having made recourse to legal proceedings. Thus the reason why this crime has been placed under the title of crimes against public administration. It is for this reason that courts of criminal justice act with speed to repristinate law and order in instances when a private individual has taken it upon himself to do what should and can only be done as a result of a judicial process and decision.

In the case at hand, it had clearly transpired that the appellant had conducted excavation works in an alley used not only by him but also by others. The Court of Criminal Appeal did not (correctly so) delve into who actually owns this alley of sorts, since that function is clearly and undoubtedly within the Civil Court's jurisdiction. Nevertheless, from the evidence at hand it resulted beyond any reasonable doubt that the injured party made regular use of said alley to access his property. It also transpired that at a certain point in time, the appellant had installed a gate at the beginning of the contested alleyway, without the permission of the injured party. Yet the same injured party still accessed the alley in question, since the said gate was never locked. Appellant, though, did not limit himself to just such an action. As a result of the works undertaken, the injured party was now exposed to serious risks when even attempting to use said alleyway. The alleyway now ended up having different street levels precluding the injured party from accessing this alleyway with his motorbike as he previously did.

To compound matters, the appellant, while testifying before the First Court, unashamedly stated under oath that he could not be bothered (*ma jimpurtahx*) with the accusations levelled against him since the works undertaken by him were done by him in his own property, albeit knowing full well that the injured party had the right of access over said alleyway. The acts done by the appellant changed the *status quo* (not the 1962 British rock band) that existed between the parties. Irrespective of whether the appellant is right according to civil law, he could not do what he did. Had appellant wanted to challenge *status quo*, he had to make recourse to the civil courts.

The Court of Criminal Appeal, on the basis of the above, having considered all evidence presented before the Court of Magistrates (Gozo) as a Court of Criminal Judicature, proceeded to dismiss the appeal filed and confirmed in full the punishment handed down by

the First Court whereby the appellant was punished to a fine of five hundred euro (€500) and by application of Article 377 of the Criminal Code further proceeded to oblige the appellant to remedy the situation and repristinate the alleyway as it was prior to the excavation works within seven days and also ordered the imposition of a daily fine of ten euro (€10) until all works are done and the alleyway is back in the same condition it was prior to the report having been fined.

Daily fines mean daily fines – Saturdays, Sundays, and public holidays included. Failure of payment of fines leads to effective imprisonment. Hopefully by time of writing the works so ordered have been done, as otherwise the Court of Criminal Appeal would really be in a position to say, it's my way or the highway.

The judgment is final and cannot be appealed further.

WHAT IS CONSIDERED AS SELF-DEFENCE?

Frank Anthony Tabone

In simple terms, self-defence is when an individual protects himself by using force against someone who is attacking him. Self-defence is a plea which can be raised by a person charged before the Criminal Courts for homicide or bodily harm, and is regulated in our Criminal Code, Chapter 9 of the Laws of Malta.

The key provisions of self-defence in the Criminal Code are found under Title VIII, Of Crimes against the Person, Sub-title III, Of Justifiable Homicide or Bodily Harm. Article 223 provides that no offence is committed when a homicide or a bodily harm is ordered or permitted by law or by a lawful authority or is necessary for an individual to defend himself or another person. Article 224 of the Maltese Criminal Code further provides that actual necessity of lawful defence include when the aggressor is killed or injured:

(a) In the act of repelling at nighttime between the hours of sunset and sunrise.

(b) Upon entering an inhabited house, apartment or a connected building either by scaling walls or breaking in.

(c) Upon committing or attempted to commit theft aggravated with violence.

(d) As a defence from one's own chastity or that of another person.

The plea of self-defence was the subject matter of an appeal filed before the Criminal Court of Appeal presided by Madam Justice Dr. Edwina Grima on the 31 May 2023 in the names *Police vs Desislava Vasileva Maksimova*. In her appeal, the appellant Ms Maksimova requested the Court to vary the judgment delivered by the Court of Magistrates as a Court of Criminal Judicature wherein she was found guilty of having caused grievous injuries to the detriment of her partner and was sentenced to a term of two years' imprisonment. In her appeal, the appellant claimed that she was wrongly convicted since she acted in self-defence.

The Court of Criminal Appeal, prior delivering its judgment, observed that there are three elements at law that are doctrinally required for the crime of homicide and bodily harm to be legally justifiable:

1) The offender must commit a serious threat or aggression,

2) Unprovoked and inevitable which offence threatens imminent injury or death, and

3) That the reaction must be proportionate to the threat or aggression as so qualified.

Hence, what the defence had to prove is that the danger faced by the appellant during the incident was unjust, grave, and inevitable and that the response to the danger faced by the appellant was objectively proportionate to the extent of the aggression.

The Court referring to Professor Mamo further added that:

> The accused must prove that the act was done by him to avoid an evil which could not otherwise be avoided. In other words, the danger must be sudden, actual, and absolute. For if the danger was anticipated with certainty, a man will not be justified who has rashly braved such danger and placed himself in the necessity of having either to suffer death or grievous injury or to inflict it. In the second place the danger must be actual: if it had already passed, it may, at best, amount to provocation or, at worst, to cold-blooded revenge, and not to legitimate defence; if it was merely apprehended, then other steps might have been taken to avoid it. Thirdly, the danger threatened must be absolute, that is, such that, at the moment it could not be averted by other means.

The court commented further that the *ratio legis* behind the plea of legitimate defence in such a way that the killing or body harm is justified, is when the person finds himself in a serious situation and being unable to resort to other means of escape or to avoid the danger, thus being forced to resort to the means to protect himself or any other person from that danger which must be actual, serious and unavoidable.

Thus, if it results that the person had other choices at the moment of the incident which he could have adopted then the justification of self-defence will be missing. However, in those situations where it results to the court that the force exercised by the person in question was not

proportionate to that received by the aggressor, the crime could be excusable on the grounds of the exercise of excessive self-defence as regulated in article 230(d) and 227(d) of the Criminal Code.

Article 227(d) of Chapter 9 of the laws of Malta provides that wilful homicide is to be considered as excusable 'where it is committed by any person who, acting under the circumstances mentioned in article 223, shall have exceeded the limits imposed by law, by the authority or by necessity'. Article 230(d) of the Criminal Code provides that 'the crime of wilful bodily harm shall be excusable in the cases mentioned as excuses for wilful homicide in article 227(d)'.

The Court in this case, after having examined all the evidence and the arguments brought forward by both parties, was in a position to conclude that the appellant actions could not be justified under Articles 223 and 224 of the Criminal Code, nevertheless her action could be considered as excusable in terms of Article 230(d) and 227(d).

Hence, in view of the forgoing the Court opted to change the punishment given by the Court of Magistrates as a Court of Criminal Judicature and instead of two years' imprisonment, the appellant was sentenced to eight months' imprisonment suspended for one year.

The decision is final and cannot be appealed further.

SHOULD DRUG LABS BE ACCREDITED?

Jacob Magri

On popular television shows, forensic scientists and investigators solve major crimes within the show's hour-long format, presenting forensic testing as quick producers of irrefutable court evidence. But real-life forensic testing is not such a plain sailing process. When it comes to criminal cases in Malta, forensic testing, being a specialised task, is carried out by court-appointed experts. To competently carry out their tasks – be it DNA, fingerprint, or abuse of drugs analysis – the court-appointed expert would need a forensic testing laboratory equipped to produce accurate and reliable findings.

Many forensic testing laboratories worldwide are being granted the ISO/EIC 17025 accreditation, with many countries in fact requiring that forensic testing only be conducted in such accredited laboratories. In Malta, the National Accreditation Board (NAB) is the sole national accreditation body. It assesses organisations that provide forensic testing, inspection, and calibration services to ensure they meet international standards. Essentially, ISO/IEC 17025 accreditation is the industry standard which certifies that a lab uses valid sampling and testing methods to produce reliable and accurate test results.

The judgment delivered by the Criminal Court on the 10th of November 2022 in the names *The Republic of Malta vs Etienne Farrugia* precisely centred on whether forensic testing labs used by court experts to examine illicit substances require accreditation.

In one of his preliminary pleas, the accused, through his legal counsel, argued that the report exhibited by the court expert appointed to conduct drug analysis ought to be declared inadmissible since the laboratory used to conduct the relative scientific forensic examinations was not an accredited drug testing lab according to ISO/IEC 17025 and consequently failed to comply with EU law and standards.

The EU Council Framework Decision 2009/905/JHA on the accreditation of forensic service providers carrying out laboratory activities, which was fully transposed into Maltese law by means of Subsidiary Legislation 460.31 on the 29th of March 2016, requires Member States to have accredited forensic service providers for laboratory activity.

The accused contended that the lab used by the court-appointed expert to conduct drug analysis in this case – one found at University of Malta premises – was not accredited by the NAB as being in conformity with the EN ISO/IEC 17025 standard. He held that there is only one accredited laboratory for the testing of drugs samples in Malta, and it was not the one used in this case.

According to the accused, the analysis in an unaccredited laboratory meant there was no certainty about how the drug examination should be done, how the instruments are calibrated, and the environment in which the analysis was carried out and this led to very serious doubts about the drug test and the report presented in Court.

But there's a catch. In its judgment, the Criminal Court referred to previously decided judgments and pointed out that as it stands, the Council Framework Decision 2009/905/JHA, as transposed into Maltese law, does not apply to drugs analysis. It is limited in scope and necessitates accreditation only for laboratory activities resulting in DNA-profile and dactyloscopic data – both of which have nothing to do with drugs analysis.

While it is true that the definition of certain terms under the mentioned EU Framework Decision, such as the definition of 'forensic service provider' and 'laboratory activity', are overarching and afforded a wide and generic interpretation, the requirement of laboratory accreditation – for some odd reason – is exclusive to laboratory activities resulting in DNA-profile and dactyloscopic data, and not also drug sampling.

For this reason alone, the Criminal Court could have rejected the preliminary plea brought forward by the accused, as other Courts had done in previous occasions. However, it delved a bit deeper. It held that in any case, even if the applicable EU law necessitated accreditation for labs used for drugs analysis too, the work conducted by the court-expert ought not to be automatically declared null and inadmissible.

While the Court conceded that time is ripe for the law to require higher standards, including by making accreditation a requisite for labs used for drug analysis too, it also maintained that the absence of accreditation alone did not automatically imply that the expert's examination was not up to standard. The Court referred to the expert's testimony as registered in the acts of proceedings, who had remarked

that lack of accreditation does not exempt him from adhering to a number of international standards, including calibration of the apparatus used, among other verification methods.

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

The Court, drawing inspiration from past judgments, stated that the admissibility of evidence is not affected by the means used to obtain it. The use of illegal or unfair techniques (which in this case did not result) to obtain evidence does not generally make otherwise relevant and admissible evidence inadmissible.

The Court moreover elicited the fact that the defence at no point raised doubts as to the qualifications and competency of the expert appointed and at no point contested the resultant findings of his report throughout the compilation of evidence stage – and this in spite of the fact that Subsidiary Legislation 460.31 was already in force at the time that the expert exhibited his report.

For this reason, the Criminal Court proceeded to turn down this preliminary plea raised by the accused.

The judgment is final and not subject to further appeal.

YOU HAVE MAIL (NOT!)

Arthur Azzopardi

The earliest recorded letter originating from Malta was sent by Grand Master Philip de L'Isle Adam in 1532.[1] After all these years one might have thought that as basic a right as liberty, or the right to good quality air, members of Maltese society would know better than to steal or disturb another person's postal mail. In this age of electronic communication, where millions are invested on an annual basis in protecting one's electronic mail, one might opine that it is easily forgotten that tampering with another person's mail is a crime!

On 22 June 2022, Justice Aaron Bugeja, sitting in the Court of Criminal Appeal (appeal 346/2022), was tasked to consider whether the actions of an estranged husband amounted to the crime of tampering with another person's postal mail. Due to the subject matter of the case, names of the parties shall not be referred to.

The appellant, the husband had been found guilty by the Court of Magistrates with having violated Article 62(h) of Chapter 254 of the Laws of Malta, the Postal Services Act, and Article 85 of Chapter 9 of the Laws of Malta, the Criminal Code, and punished him to a fine of three thousand Euro (€3,000) and two thousand Euro (€2,000), respectively. The husband felt aggrieved by that decision.

Amongst the grounds for appeal filed by the husband, the second grievances dealt with concerned, according to him, the lack of evidence in relation to the necessary criminal intent accompanying the crime in terms of the Postal Services Act, and on this basis the husband asked the Court of Criminal Appeal to revoke his finding of guilty.

Justice Bugeja, yet again, painstakingly delved into the powers of the Court of Criminal Appeal as to when and under what circumstances it may overturn judgments of the Court of Magistrates. One might opine that this exercise was too long for the untrained legal mind, yet true to form, principle, and duty, Justice Bugeja, in his style for detail and hoping that lawyers constantly keep in mind the principles based on which our courts function, did not shy away from such a duty. He also once again reiterated the general principles on the laws of evidence that have governed our legal system since time immemorial.

[1] David Dandria, 'Postal History at the Notarial Archives' *Times of Malta* (Malta, 12 March 2017).

On the 6th August 2021, the wife filed a report at her local police station that she had not received HER 'government vouchers', sent to qualifying citizens by MIMCOL in lieu of the Covid-19 pandemic. The wife informed the Police that MIMCOL had sent her said financial assistance vouchers and MIMCOL had provided her the relative tracking number issued by Maltapost plc (Malta's licensed postal services provider in terms of the Postal Services Act) pertinent to her vouchers. It transpired that said vouchers had indeed been received by the occupant of the address that MIMCOL had in relation to the wife on the 21st June 2021 at 15:02. The wife further reported that she used to live in said address while she was still married to her husband, the appellant. The police spoke to the husband who confirmed that he no longer lived there either, but that a Polish citizen lived there. The police spoke to the new tenant citizen who in no uncertain terms confirmed that he really lived there and after collecting all mail, always, promptly and dutifully, passed on same to the husband. The Police had to talk to the husband again who confirmed the new tenant's version and went on to confirm that amongst the post received by him from the new tenant, there also were three envelopes not addressed to him, yet he did not open same. The husband claimed that he had written on said envelopes that the addressee no longer lived in that address and remailed same. According to the husband this was what he always did upon receipt of post addressed to his estranged wife.

At this juncture, the words of Eleanor Roosevelt spring to mind: 'There are always two choices. Two paths to take. One is easy. And its only reward is that it's easy'.

And what a choice the husband had – either to ensure that the post addressed to his estranged wife reaches her timely and in an uninterrupted fashion once in his possession or risk a fine that ranges between one thousand Euro (€1,000) and twenty-five thousand Euro (€25,000) or a term of imprisonment between one month to twelve months or to both punishments together!

Article 62(h) of the Postal Services Act states that any person who maliciously opens or causes to be opened any postal article which ought to have been delivered, or maliciously does any act whereby the due delivery of a postal article is prevented or delayed, or communicates or makes use of any information obtained from a postal article so opened, shall be guilty of this crime.

The prosecution called as its witnesses, the wife to confirm her report and her lack of receiving her financial assistance vouchers issued by MIMCOL during the Covid-19 pandemic, a representative of Maltapost plc to confirm that the postal object bearing tracking number RR429989454MT had indeed been received by the occupant of the address where said postal object was addressed, a MIMCOL representative to prove that the wife was entitled to said vouchers, and also that vouchers had been sent to her via postal mail at a specific address and also the new tenant. Pertinent to point out at this juncture that the new tenant and his family were living in said address based on a valid lease agreement entered into with the owner of the property – none other than the estranged husband himself.

During the proceedings the husband stated that he followed a practice as dictated by good judgment and known to one and all that once he no longer had any contact with his wife, he would state on each envelope that his wife no longer lived there and proceed to post back said postal articles in the letter boxes owned and controlled by Maltapost plc itself. The husband claimed that this was done by him without any malice, operating under the belief that the Postal Operator would return the item to the sender.

On this basis, the Court of Criminal Appeal concluded that the husband was accepting the version of events as proven by the prosecution. The husband had failed in providing Maltapost and/or MIMCOL with an alternative address where his wife resided.

Justice Bugeja proceeded to interpret the law whereby due delivery of a postal object was not meant to be read and construed as meaning only that the postal item had to be delivered at the addressed identified, but rather that it had to be received by the addressee. On this reasoning, the Court of Criminal Appeal concluded that for a person to just state 'no longer lives here' is not sufficient, since this would render the Postal Operator in an impossible situation to carry out his duty.

The Court held that in those real instances where the recipient of a third-party's postal mail does not know or have any contact with the previous occupant, that person should proceed to Maltpost to explain that no forwarding address could be provided. Yet this was not the case for the appellant.

Justice Bugeja concluded that an act of omission, by the husband failing to provide Maltapost with his estranged wife's current address was an act of malice thus rendering him guilty of this crime.

The husband could not plead that he did not know where she resided: they both knew each other well; they had a plethora of ongoing legal issues and court cases that had been ongoing for around 4 years. On this basis the Court concluded that indirectly they still were in contact, and the husband could easily have asked his lawyer to communicate with his counter party as to where his estranged wife was to receive her postal mail.

The fact that the wife was 'confusing' property rights with residency rights did not exculpate the husband. Once in receipt of the wife's mail, the husband became part of the chain of logistics that the law protects and wants protected to ensure safe, timely, and adequate receipt of postal objects by their intended addressee. Whether one finds himself in this chain of logistics by volition or not is irrelevant: once a part of it, you are obliged to ensure your best.

The Court of Criminal Appeal concluded that the acts of the husband could therefore be only interpreted as having been done or not done, with the necessary intention to disrupt due receipt by the wife of his government issued financial assistance during the Covid-19 pandemic. The fine of three thousand Euro (€3,000) was confirmed.

The decision is final and not subject to further appeal.

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EU Law

GIVE CAESAR WHAT BELONGS TO CAESAR

Keith Borg

It is often said that in life, only two things are constant: death and taxes. While one day man may perhaps conquer death, it seems unlikely he will ever conquer taxes. The law doesn't quite seem to help us deal with this 'taxing' situation.

The Council of the European Union Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties, and other measures caters for the mutual assistance between the Member States of the European Union for the recovery of each other's claims and those of the European Union with respect to certain taxes and other measures. It ensures fiscal neutrality and has allowed Member States to remove discriminatory protective measures in cross-border transactions designed to prevent fraud and budgetary losses.

This Directive lays down the rules under which the Member States are to provide assistance for the recovery in a Member State of, amongst others, any claims relating to all taxes and duties of any kind levied by or on behalf of a Member State or its territorial or administrative subdivisions, including the local authorities, or on behalf of the European Union.

By virtue of this Directive, the Commissioner for Revenue, on behalf of the Ministry of Finance, as the competent authority in Malta, is therefore empowered, in case of a valid request from a Member State of the European Union, to collect the tax due to that Member State from any person located in Malta. Furthermore, according to law such a request from a Member State is treated as a request regarding a civil debt owed to the Government of Malta which the competent authority in Malta is duly authorised to collect.

The proceedings in the names *Il-Kummissarju tat-Taxxi vs Neon Media Limited* decided by the First Hall of the Civil Court on the 17 February 2023 dealt with the applicability of this Directive. In his application to the Court, the Commissioner for Revenue explained that respondent company has been indicated by the competent authority in France, a member of the European Union, as an entity which owed the French Government a debt of €73,637.98 in Value Added Tax. Being satisfied that, in relation to this request, all the relevant requirements of the Directive mentioned above had been complied with, and submitting

that since the respondent company is a company registered in Malta, the right to collect therefrom the amounts claimed was bestowed upon him in virtue of the aforementioned Directive, the Commissioner for Revenue petitioned the Court to order the registration of the claim for same to constitute an exectuvie title according to local legislation. Apart from the capital, the Commissioner for Revenue also sought interest according to the laws of Malta from the date of service of the application initiating the proceedings in question until the date of settlement of the monies due.

Having been duly served with the acts of the proceedings, respondent company failed to contest the claim. The Court therefore summarily proceeded to acceeded to the request of the Commissioner for Revenue. This happened because as soon as one is duly served with the acts of the proceedings, the deadline at law to reply to same (which is typically 20 days) is triggered. If one does not file a reply within the legal deadline, such person is deemed to be in default (*kontumaċi*).

Truly a case of wherever you are, taxes are always due.

For related content, read: https://timesofmalta.com/articles/view/from-the-bench-have-you-been-served.939294

The judgment is final and not subject to further appeal.

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Family Law

OF DIVORCE

Rebecca Mercieca

The courts of civil jurisdiction in Malta have jurisdiction to hear and determine demands for divorce if at least one of the spouses was domiciled in Malta on the date of the filing of the demand for divorce or if at least one of the spouses was an ordinarily resident in Malta for a period of one year immediately preceding the filing of the demand for divorce.

Either of the spouses may demand divorce or dissolution of the marriage, and although most commonly the parties would already have separated according to law, it is not required that prior to the demand of divorce the spouses shall be legally separated from each other by means of a contract or by a judgment. When divorce is pronounced between spouses who were previously separated by a contract or by a judgment, the pronouncement of the dissolution of marriage shall not bring about any change in what was ordered or agreed to between them, except for the effects of divorce resulting from the law, such as those related to succession and to the obligation of cohabitation. The wife may also request to revert to her maiden surname.

Subsidiary Legislation 12.20 requires that, in cases where the parties are not already separated, proceedings are initiated by means of an application requesting the appointment of mediation proceedings. Such a request may also be made when the other spouse is absent from Malta, whereby the applicant shall request the court to authorise the applicant to initiate divorce proceedings without the need of mediation, since the other spouse resides in a foreign territory.

The demand for divorce may be made by both spouses jointly if the spouses have lived apart for at least six months out of the preceding year. It may also be requested by one party against the other if on the date of commencement of the divorce proceedings the parties would have lived apart for a period amounting to at least one year out of the preceding two years, or on the date of commencement of the divorce proceedings, the spouses are separated by means of a contract or court judgment.

The Court pronouncing divorce shall also be satisfied that there is no reasonable prospect of reconciliation between the spouses and that the spouses and all of their children are receiving adequate maintenance, where this is due, according to their particular circumstances.

Both parties shall have the right to remarry after the pronouncement of divorce.

Such were the circumstances in a judgment delivered by the Civil Court (Family Section) on the 27 April 2023. In 2021, the applicant, who had been living in Malta for over five years, filed an application requesting the court to declare the dissolution of her marriage from respondent husband, who had never come to Malta.

The applicant also filed an application for the appointment of curator to represent her absent husband. The deputy curators appointed did not succeed in establishing contact with respondent, however the Court observed that the applicant had exhibited two sets of correspondence sent by respondent indicating that he has no objection to applicant's request for divorce.

The applicant also requested the Court's authorisation to revert to her maiden surname, which request had been acceded to.

There existed no community of acquests between the parties and neither did they ever acquire any assets or contracted any liabilities together. The Court was also satisfied that there was no prospect or hope for reconciliation between them since besides the fact that they have been separated de facto for over ten years, they were also living totally separate and independent lives.

The parties had children, who were no longer minors, and there was no dispute between the parties in connection with any maintenance payments, thus all the legal requisites had been satisfied for the dissolution of marriage to declared on the 27 of April 2023.

The decision is final and not subject to further appeal.

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Industrial Law

THE LSE RECOGNITION TRADE DISPUTE 2022

Rebecca Mercieca

The definition at law of a "Trade Dispute" is a dispute between employers and workers, or between workers and workers, which is connected with any one or more of the:

(a) terms and conditions of employment, including the physical conditions in which any workers are required to work;

(b) engagement or non-engagement, termination or suspension of employment or the duties of employment, of one or more workers;

(c) allocation of work or the duties of employment as between workers or groups of workers;

(d) matters of discipline;

(e) facilities for officials of trade unions;

(f) machinery for negotiation or consultation, and other procedures relating to any of the foregoing matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in any such negotiation or consultation or in the carrying out of such procedures; and

(g) the membership or non-membership of a worker in a particular trade union.

Trade disputes are referred to the Industrial Tribunal by a letter signed by the parliamentary secretary for social dialogue within the office of the prime minister, after a request is made by one of the parties.

In July 2022, a request of the sort was made by the Union for Professional Educators (UPE) versus the Directorate for Educational Services.

The dispute was as follows.

The UPE stated that it had the absolute majority of members who were Learning Support Educators (LSEs), and that such employees no longer wanted to form part of a Collective/Sectoral Agreement with other employees falling under different categories and grades of work, since their work was different in nature. UPE claimed that such was detrimental to the LSE's work conditions and that the categories or grades which formed the grade of LSEs constitute an appropriate or separate bargaining unit and thus the UPE sought an order by the Industrial Tribunal for the process of verification to begin (or to be continued) and this with the intention of it obtaining recognition as the union for LSEs.

To the Directorate, the UPE's request was one which sought to create a subdivision between educators, who already form part of a trade union, being a trade union which has been recognised for several years (the Malta Union of Teachers).

The Tribunal found that LSEs fall within the teaching grades emanating from the teaching profession, and the same salary scale/ grading structure which also include the teaching grades of kindergarten educator, teacher, head of department, assistant head of school, learning centre coordinator, education officer, and head of school. It further noted that LSEs may be promoted to a scale 9, which scale is also applicable to the first grade of teachers, however they continue to be called LSEs.

The Tribunal further noted that LSEs, kindergarten educators, teachers, heads of school, and assistant heads have a number of identical working conditions – such as leave entitlement, place of work, periodical training, parents day, school activities, scholastic years, working hours, and use of computerised systems for student details – even though their job descriptions and functions differentiate from one another. Needless to say, co-ordination between the different grades of educators is essential for the smooth running of the educational system.

The term 'appropriate/separate bargaining unit' is not defined in the law; however, the Tribunal concluded that, in practice, grades of work which carry out a similar type of work are classified and grouped together as one class of workers and are represented by one trade union which enjoys the majority of the collective of the workers including all the

different grades, and not the majority of one specific class of workers. Such workers are classified as one to negotiate collective conditions of work and are covered by one collective agreement.

The Tribunal concluded that several different criteria exist for a group of workers to qualify as an appropriate/separate bargaining unit. Among them are:

(a) whether basic work conditions, such as working hours, are common or apply only to the workers making the request;

(b) whether the locations from where they carry out their duties are common for the different grades of workers, or specifically for them;

(c) whether co-ordination of work between the different grades is necessary for the work to be carried out;

(d) whether the grade of workers are already covered by a Collective Agreement; and

(e) whether that agreement includes grades of sectoral workers or general grades of workers.

The group of workers' bargaining history is also considered, as well as whether the request for recognition is made for the first time because the grade of workers do not form part of a trade union and are not covered by a collective agreement.

In its concluding remarks, the Tribunal classified the plaintiff's request into three categories:

1) the lack of procedures, protocols guidelines and nationwide policy for LSEs;

2) risks, health, and security at the place of work; and

3) LSE's possess a role, qualifications, duties, and functions which are distinct and not tied with progressions or promotion.

The Tribunal found that there is a nationwide policy providing each school with a budget which may be used according to the different student needs that may arise. Regarding guidelines, it understood that all cases are different and that solutions are not found in books, but through the help of other professionals which may assists the LSE's according to their specific needs.

With regard to risks, health and security measures had been taken over the years for the introduction of lifters, which assist students in getting up. This apart from the assistance which LSEs have access to from other professionals in cases of issues regarding lifting, feeding, and toilets. Finally, the Tribunal considered that any worker, even if not a member of a trade union, may refer to the OHSA to investigate and take any action necessary regarding risks of health and security at the place of work.

In its judgment dated 20 June 2023 (case reference number 4083/HW) the Tribunal examined the LSEs bargaining history and also noted that no contestation was made that the grade of LSEs is a grade that forms part of a class of education workers. The Tribunal was further satisfied that there exists a similarity between the work LSEs do and other grades of educators, and because of this it concluded that LSEs should remain a grade classified as forming part of the same class as the other grades of educators and should not be considered as a distinct grade with an appropriate/separate bargaining unit and its own collective agreement, separate from the class of educators. For such reasons it was decided that the LSEs should remain covered by the collective agreement existing between the Directorate for Educational Services and the Malta Union of Teachers, which union has recognition for the grades of the educational workers class, and thus the UPEs request was rejected.

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