ADVOCATES

FROM THE BENCH

SERIES
2024

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FROM THE BENCH

SERIES 2024

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

2024
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FOREWORD

Ivan Mifsud
Dean, Faculty of Laws
University of Malta

While David Chetcuti Dimech refers to Schrödinger's poor cat which may, or may not, have been subjected to immense suffering for the greater good of humankind, my own thoughts tend to veer towards (fictional character) Benjamin Button who had the misfortune of ageing backwards, making life rather challenging because he grew younger and younger as those around him got older. I have sometimes wondered whether, together with the physical challenges, he could have been endowed from birth with the knowledge and insight of an older, highly experienced person, thus avoiding the learning curve we all have to experience as we grow up and inevitably grow old, only to look back occasionally and wish that we knew certain things when we were younger!

Be this as it may, we are surrounded by information; one might even dare say that we are practically bombarded with it. It tends to be two-way information, because very often as we read and search digitally, we reveal details about ourselves to those who put out the information in the first place. We reveal details about our age, our preferences, etc., which information is farmed and regarded as the new gold. One has to also be careful when it comes to sources, because not all information is correct, accurate, or even true. Nor is 'information', even the most accurate, akin to 'knowledge'. The information we are bombarded with might be useful, or interesting, but we must all strive to become 'knowledgeable' because it is the latter, and not the former, which enriches us and makes us more and more insightful and hence richer as human beings.

This quest for knowledge is the aim of the educational process we embark on at a young age and follow throughout our lives, to tertiary education and beyond. The information imparted to us, whether through what we read, or classes and lectures we attend, or via various digital mediums, must be understood, absorbed and processed, to become 'knowledge' and not remain merely 'information'. This is how we become wiser.

Anybody can contribute to this process, there is indeed no monopoly on knowledge creation. Indeed, everyone should be predisposed to contribute to knowledge creation, for the general good.

AB&A Advocates, very wisely, have recognised the importance of creating and sharing knowledge, and are contributing to this knowledge-creation process, via their excellent From The Bench series, a collection of writings by different members of their firm, which writings are geared towards going beyond mere 'information'. This publication presumes that the Reader is intelligent and already fairly knowledgeable, and is treated as such. Armed with this knowledge, the readers of From The Bench will be prepared for certain situations they could easily encounter; for example if the Police arrest me I will know that I have to ask for my lawyer before anything else; if I am involved in court proceedings I know how to behave in order to not be found guilty of contempt; importantly, this year's edition of From The Bench helps to assure us that the Rule of Law works in Malta because not even the Commissioner of Police was spared being fined for contempt of court!

I personally remember many of these wise advocates at AB&A, as students at the UM Faculty of Laws, and I am very happy to see how far they have already progressed since then, with much more to come. I also remark positively on the manner in which they have managed to compile a collection of varied legal scenarios and produce succinct, clear write-ups, very suitable for today's fast-paced lifestyle. The topics vary, from annulment of marriage which tends to be rather sidelined given the ease with which one can get divorced and move on in life, to challenging FIFA's grip over The Beautiful Game, to attempting a robbery and trying to convince the court that you were only begging for some money, among others.

This publication reflects the intelligence of AB&A's members because it takes skill to identify topics of interest and produce clear write ups which anybody can read and learn from. It also takes wisdom to recognise that legal knowledge is not the monopoly of the Advocate, that we do not live in a world where the Professional leads and their clients unquestionably follow. The general public are intelligent, they ask questions, they want to understand the process, and the more they understand the smoother the lawyer-client relationship will tend to be.

I congratulate all those involved in the From The Bench series for not needing to be born old or to become old before they realise this, and recommend From The Bench to all people from all walks of life.

Ivan Mifsud
Dean, Faculty of Laws
University of Malta
26th June 2025

INTRODUCTION

David Chetcuti Dimech
Editor
From the Bench 2024

Dear Readers,

It is a pleasure to introduce you to the sixth edition of the 'From The Bench' series. As some readers may be aware, this series is a compendium of short articles published on The Times of Malta over the preceding year. This year's edition covers the year 2024, and offers a small sample out of the variety of judgments delivered by the Maltese Courts throughout the year that can help citizens understand important legal notions.

Some of these notions are important because they can apply to anybody in the blink of an eye, such as responsibility for road traffic accidents or marriage breakdowns. Others may not be as vital, but still very relevant to people's lives: the contribution on how football transfers work from the legal point of view is a case in point given the population-wide love affair with the game. Other contributions introduce the reader to concepts they may be familiar with but not know much about, such as contempt of court and European Arrest Warrants.

In a paradoxical world where knowledge is power but power (decentralised, and including keyboard warriors) does not always provide knowledge, a theme central to this year's foreword by the Dean of the Faculty of Laws, we think it is crucial to attempt to cut through the general hubbub and clarify what exactly the Courts are saying and what legal notions and principles mean in concrete cases.

Our aim has remained unchanged. We have continued to strive to bring the law closer to the public by offering succinct breakdowns of judgments and explaining, in simple terms, the relevance of key legal concepts they discuss. It is hoped that in this way, we contribute in at least a small degree to the general dissemination of legal knowledge without boring our readers to death with grand arguments, long sentences, and never-ending words. We also hope to not have misrepresented things in our attempt to keep things simple. This is a juggling act that is constantly in motion.

I would like to thank all the firm members, including those who have moved on to new pastures, 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!

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CIVIL LAW

ARE YOU THE PROPERTY OWNER? UNLOCKING PROPERTY RIGHTS THROUGH THE BEST EVIDENCE RULE

Clive Gerada

The best evidence rule, entrenched in Maltese Civil Law, serves as a guiding principle in legal proceedings, emphasizing the necessity of presenting the most compelling documentary evidence to substantiate claims or pleas. A recent judgment delivered on 15 January 2024, by the Constitutional Court in the case of *Paul Galea et vs State Advocate et*, offers a significant legal analysis on rental legislation and the application of the best evidence rule, shedding light on the responsibilities of litigants and the implications of failing to meet the evidentiary standard.

In this case, the State Advocate, acting as the defendant, contended that the plaintiffs were obliged to substantiate their title to the property in question. The initial ruling by the First Court favoured the defendant, as it found the plaintiffs had failed to establish their legal title, leading to the dismissal of the case. Particularly in cases concerning compensation for old rent laws, the presentation of documentary evidence elucidating the provenance of the property is deemed imperative, including details such as original proprietorship and lineage of succession.

The Constitutional Court at appeal stage delved into the merits of the defendant's plea, which relied on a title of lease from the plaintiffs to assert their right to occupy the property. The Constitutional Court noted the plaintiffs' failure to provide crucial evidence, such as copies of wills and testamentary research, essential for establishing their title. Notably, the Court highlighted the ease with which such evidence could have been obtained and submitted by the plaintiffs, emphasizing their lack of diligence in presenting the best evidence.

Furthermore, the Court remarked on the perceived lightness with which the plaintiffs conducted the case, indicating a failure to submit the best evidence available. However, the Court acknowledged the assertions made by the respondents, who were longstanding tenants of the property and had continuously paid rent, evidencing ongoing possession even after the passing of the plaintiffs' parents. This possession was also supported by Article 525(1) of the Civil Code, which presumes possession in favour of the plaintiffs unless proven otherwise:

> *525. (1) A person is in all cases presumed to possess in his own behalf, and by virtue of a right of ownership, unless it is proved that he has commenced his possession in the name of another person.*

Ultimately, the Constitutional Court reached a definitive decision, finding ample evidence supporting the plaintiffs' rightful inheritance of the title. Consequently, the initial ruling by the First Hall was overturned. The Court dismissed assertions of insufficient evidence while affirming the validity of the presented documentation.

Furthermore, it remanded the case to the First Court to reconsider any potential infringements upon the plaintiffs' rights and provide necessary remedies.

This judgment underscores the Constitutional Court's commitment to upholding justice and addressing potential violations with diligence and fairness, notwithstanding the fundamental importance of the best evidence rule in Maltese civil procedural law. It serves as a reminder to litigants of their obligation to present the best possible evidence in support of their claims and highlights the consequences of failing to meet this standard in legal proceedings.

HIT THE ROAD (ATTENTIVELY)!

Analise Magri

In an era of an ever increasing number of vehicles on our roads, motor vehicle accidents have unfortuntely become a normal reality being witnessed by commuters practically on a daily basis. Thereafter, the involved parties may find themselves in litigious proceedings before our Courts with the injured party claiming compensation in lieu of damages caused by the tortfeasor.

Article 1032(1) of the Civil Code, Chapter 16 of the Laws of Malta, provides that 'a person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a bonus paterfamilias'. Such a fundamental provision, well entrenched in our legal system, has formed the grounds of countless actions wherein the applicant would be requesting the Court to pronounce in his favour a monetary claim by way of damages. Motor vehicle accidents are no alien to such a scenario.

A recent judgment which delved into a compensatory claim following a motor vehicle accident was that pronounced by the First Hall of the Civil Court on the 25th of March 2024. The names of parties are being concealed in order to protect their identity.

Tha Parties presented the Court with two version of events of how the accident occurred.

On the one hand, plaintiff gave his version of events and testified that he was riding his motorcycle towards Żejtun. He testified that when he reached Dawret Ħal Għaxaq, traffic was coming from both sides, and he was driving at a distance of about one and a half vehicles from the vehicle in front of him, in a position that he describes as being 'in the middle of the vehicle but closer to the right and closer to the central strip so that the vehicles in my lane could see me and so I could see clearly what was happening on the road'. Plaintiff added that when he reached the defendant, she suddenly picked up speed, drove off of the side road straight to the right on the main road and crossing to the opposite lane that takes the traffic towards Gudja. According to plaintiff, even though he tried to stop his motorbike to avoid the collision, he didn't succeed and kept going into the side of the defendant's vehicle which dragged him with her and he consequentially fell off from his motorcycle and sustained both actual and future damages.

On the other hand, defendant testified that on the day of the accident, there was traffic in Dawret Ħal Għaxaq. She testified that the traffic that was moving in the direction of Żejtun was gathering at the Bir id-Deheb roundabout, so much so that that traffic had even reached the service road. The traffic on the opposite lane (direction Gudja) was flowing. Defendant explained how she wanted to head towards Gudja, so she turned on her indicator accordingly. She also explained that there was no traffic signal that prohibited her from crossing the main road to go on the opposite lane. The defendant testified that, since the traffic towards Żejtun was at a standstill, one of the vehicles in the standstill traffice gave way for her to cross and hence, after looking both ways, she started her maneuver to go out to the opposite lane. Defendant explained that when she had almost crossed the entire lane, she heard a noise at the back of the vehicle driven by her, on the right side when she saw plaintiff's motorcycle. She emphasised that the motorcycle driven by the plaintiff was coming from the outer part of the traffic, and the plaintiff was overtaking the vehicles in his lane, and that was why she did not see him.

The First Hall of the Civil Court started off by considering the aforecited article 1032 of Chapter 16 of the Laws of Malta and emphasising that the prudence, diligence, and attention of a bonus paterfamilias all dictate, in their application to specific facts regarding the driving of motor vehicles, that every driver must be cautious not only to observe traffic regulations, but also to be attentive towards the surrounding traffic. The Court also made explicit reference to a previous Court of Appeal judgment in the names of *Mag. A. Stagno Navarra vs N. Saliba* in order to emphasise that the main road user also has the obligation to be attentive but the degree of diligence required by him is considered to be much less than that of the side road user because the latter is not disturbing the course of traffic ('*Il-main road user għandu wkoll l-obbligu li joqgħod attent imma l-grad ta' diliġenza li jinkombi lilu hu ferm anqas minn dak tas-side road user għax hu ma jkunx qiegħed jiddisturba l-kors tat-traffiku, imma jkun miexi għad-dritt*').

Accounting for the strong pronouncement made in this Court of Appeal judgment, one would determine that the Civil Court, First Hall, decided in favour of the plaintiff and found the defendant responsible for damages. However, such a conviction is incorrect.

After carefully considering the opposing recounts made by the parties, the Court came to uphold the defendant's version of events over plaintiff's. According to plaintiff, the defendant came out of the side road only when he was less than two meters away from where she was at a standstill. The Court considered that this version was not deserving of any plausibility because it was considered incomprehensible that defendant practically ran over plaintiff when he was so close to her. Furthermore, plaintiff's testimony was also considered inconsistent with the sketch produced by the Police which was exhibited during the proceedings. It was considered quite evident from the same sketch that the defendant's vehicle had almost completely crossed the plaintiff's lane. The Court thought that if the defendant really left the side road when the plaintiff was less than two meters away from her, the impact of the motorcycle with the vehicle driven by the defendant would not have been on its side, but on the front part of the defendant's vehicle, due to the alleged proximity of the two vehicles.

The Court considered that it is more likely that, for the defendant to have left the side road, a vehicle had stopped for her and gave her a chance to exit onto the main road. Once the vehicle in front of the plaintiff stopped for the defendant to pass, the plaintiff either overtook the vehicle which was at a halt or otherwise was driving parallel to the traffic in his lane.

Taking into account the facts at hand, the Court considered that the duty incumbent on a main road is accentuated where the driver approaches a crossroads. This even more so in the case of the plaintiff, who declared that he was a frequent user of this road. The Court pronounced that when plaintiff was approaching the intersection with a secondary road, he was under the duty to use greater prudence and diligence in his driving. The maneuver used at that moment by plaintiff was considered dangerous since his visual of the road was constrained due to the vehicles standing next to him or in front of him.

In consideration of the plaintiff's version as given to the Police wherein he declared that he had thought that the defendant was going to stop and let him pass along the main road, the Court proceeded to reject the plaintiff's requests, concluding that plaintiff himself was responsible for the accident and that plaintiff failed to adopt that measure of prudence and diligence that was expected of him in the circumstances of the case.

The judgment was not appealed and is therefore final.

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CIVIL PROCEDURE

THE COURT SAYS: NO TO 'FORUM SHOPPING' WHEN REQUESTING AN EXECUTIVE GARNISHEE ORDER OR ANY OTHER ACTION

Clive Gerada

A brief background to precautionary and executive warrants

Filing proceedings against a debtor is not enough and it is the practice that a precautionary warrant is filed simultaneously with proceedings against the debtor for the amount claimed. The precautionary warrant is done by an application to the Courts of Law requesting that the amount claimed by the creditor is secured from the bank accounts of the debtor. Therefore, the precautionary warrant is used to avoid a situation wherein the creditor would be unable to execute a successful judgment against the debtor and the court's judgment would be merely a declaration. On the other hand, given that the precautionary warrant is a robust tool with severe consequences, as it attacks the bank accounts of the debtor, the creditor must have solid ground upon which his or her claim rests. If the creditor files a frivolous or vexatious precautionary warrant, this may result in the claimant being liable to pay a penalty up to €6,988.12.

There also exists the term executive warrants which refers to when the creditor is awarded a successful judgment (and the judgment is not appealed), in which case the creditor would be able to convert the precautionary warrant into an executive warrant and it is only at that stage that the creditor would be able to recover his dues from the assets of the debtor. Faced with this situation the debtor must act, and the solution to counter such an executive warrant lies in Article 281 of Chapter 12 of the Laws of Malta.

Article 281 stipulates that the person against whom an executive act has been issued or any other person who has an interest may make 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 Court shall have to decide on the 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. Therefore, the law allows the debtor to attack an executive warrant for 'any reason valid at law'.

This was the matter of several applications filed by the same company (debtor) against different individual creditors before the First Hall of the Civil Court presided by the same Judge. Given that the facts of these cases and court considerations are the same, the author of this article shall focus on the merits of the court decree of the First Hall of the Civil

Court (presided by Judge T. Abela) on 11th December 2023 in the names of *Nils Heinrich noe vs TSG Interactive Gaming Europe Ltd*. Furthermore, the author shall not delve into the supermacy of law matters that were raised in the latter proceedings and shall solely focus on the procedural elements.

Summary of facts

Mr Heinrich, on the strenght of an Austrian judgment, had requested from the Courts of law in Malta the granting of an executive garnishee order against the Maltese registered gaming company TSG Interactive Gaming Europe Ltd. The gaming company provides online gaming services duly licensed by the Maltese Gaming Authority and on the basis of this license the Maltese company provided online gaming services to its customers in Austria. It happened that Mr Heinrich had a claim against the Maltese company and filed proceedings against the company in Austria. Mr Heinrich was successful in Austria and on this basis proceeded to enforce the judgment in Malta and requested the Maltese Court to grant an executive garnishee order against the Maltese company. The application of Mr Heinrich was rejected by the First Hall of the Civil Court in Malta in July 2023.

Following this negative result, Mr Heinrich proceeded to file a second identical application. This time round the First Hall of the Civil Court, presided by a different judge, acceeded to the application and through a decree granted the executive garnishee order against the Maltese gaming company.

Consequently, the Maltese gaming company had no other option but to file an application to revoke the said executive garnishee order on the basis of Article 281 of Chapter 12 of the laws of Malta. The gaming company filed its request to revoke such decree in the acts of the first application that was filed by Mr Heinrich; i.e., before the same judge that had presided over the first application and rejected the same.

In its application to revoke such decree, TSG Interactive Gaming Europe Ltd. argued that Mr Heinrich, after his application was rejected, tried to carry out forum shopping by filing a second identical application before a different judge in order to get a favourable result. The company

argued that once the first application filed by Mr Heinrich was rejected he could not ex novo file a second identical application with the same merits before the same court presided by a different judge.

Court Considerations

Firstly, the Court noted that Article 281 of Chapter 12 of the Laws of Malta should not be applied restrictively to situations: (i) where the executive act is issued by the wrong court; or (ii) to situations where there is some defect in form. This is because the legislator specifically makes use of the words 'for valid reasons according to law' which certainly foresees broader situations. In this regard the Court referred to the pronouncements of the Court of Appeal in the case of Vincent Gauci vs Dr. Albert Fenech delivered on 27 March 2020, where it was made clear that it was departing from the restrictive and narrow position taken by the First Hall of the Civil Court in the case of Edward Pace et vs Michael Sultana on 5 May 2005.

The Court argued that the facts of the case were relatively straightforward and in describing the difference between the provisions concerning precautionary warrants and executive warrants, the Court noted that the applicant had to show that there is a valid reason at law to request the revocation of the executive garnishee order. The Court argued that once the elements of Articles 375 and 376 of Chapter 12 of the Laws of Malta are satisfied, the Court must decide upon the issuance or otherwise of the garnishee order. However, Judge Abela held that these provisions should not be applied automatically out of context. Judge Abela held that the second application by Mr Heinrich was being sought on the same grounds as the first rejected application.

When the first application was rejected and the second application was successfully filed by Mr Heinrich, this was deemed as 'forum shopping' in its purest of forms and was declared by the Court as totally inappropriate for the proper administration of justice. In this regard, the Court also referred to the reply of Mr Heinrich whereby he had acknowledged that the second application for a garnishee order against the Maltese gaming company was 'almost identical' to the first application. From the records of the acts of the proceedings, it was clear that what was being requested in the second application did not present any new

substantial facts or circumstances from those used to obtain the initial warrant. The Court argued that had the Court been informed that another application had already been filed and rejected, that Court would have undoubtedly refrained from acceding to the second application. There cannot be inconsistencies and contradictory court orders as this would run counter to upholding the principles of justice and certainty of rights.

On this basis the Court revoked the executive garnishee order that was granted on the strength of the second application and ordered the issuance of a counter-warrant. Interestingly, in its decision the Court made several recommendations to amend the legislation and referred its decree to the Commissioner of Laws. Amongst its recommendations, the Court held that the timeframe of one month to decide such matters (where the one month starts running from the date when the application is filed) did not make sense. The Court recommended that as in other situations (such as in the case of a warrant of prohibitory injunction) the one month should run from the date when the other party is notified. Another legislative recommendation that was made by the Court was that whilst the debtor has an expedient remedy to request the revocation of the garnishee order, the law does not seem to provide for a speedy procedure granting relief to the creditor in cases where an application for the execution of a garnishee order is rejected. This is notwithstanding the fact that according to the Court the creditor has a general remedy under Article 32(2) of Chapter 12 of the Laws of Malta, whereby the Civil Court, as a Superior power, has the ultimate residual power of guaranteeing that wherever there is a prejudice of rights, a remedy should be provided.

The decree was appealed by Mr Heinrich and subsequently ceded on the 1 February 2024.

RECKLESS LITIGATION OR JUSTIFIED PURSUIT OF JUSTICE?

Celine Cuschieri Debono

The right to access the Courts is a right which is sacrosanct in any democratic jurisdiction, including Malta. While a party may lose a lawsuit, the Law still protects the legitimate claim to seek and institute that lawsuit. In other words, by filing or responding to a lawsuit and then failing to have a successful outcome, one is not necessarily breaking any laws or abusing of any rights. In such circumstance, one is simply exercising his or her right to seek the legal remedy he or she requires. However, the question that ensues is: where does one draw the line? What is justified on the one hand and what is frivolous and vexatious on the other?

The Court of Appeal was faced precisely with this question and on the 18th of January 2024 in the names of *Edward Pavia vs Dr Joseph Ellis pro et noe* (to represent the heirs of Edmea Pace)[1] it delivered its judgment.

The background of the case dates back to 19th September 1987, the date when Pace (now deceased) had signed a promise of sale and obliged herself to transfer onto the Pavia (appellant) by title of exchange a property in Gżira. Pavia was bound, on the other hand, to transfer onto the appealed a property in St Paul's Bay and pay her Lm 2,000. The promise of sale was going to expire in three months. The parties did not see eye to eye and matters culminated in judicial proceedings filed by Pavia for Pace to appear on the final deed. Simultaneously, Pace filed proceedings to declare the promise of sale null and void. These two proceedings were both decided in Pavia's favour meaning that Pace was bound to sign the final deed and the case she filed herself was decided against her favour.

Pace appealed both judgments. Both of her appeals were declared to be deserted by the Court of Appeal. This drove Pace to file fresh proceedings for the declaration of nullity of the promise of sale and nullity of the judgment via which she was ordered to appear on the final deed. The Civil Court, First Hall, decided that the matter had already been decided and upheld the plea of res judicata. Pace appealed from this judgment and via a decision dated 3rd November 2006, the acts were sent back to the Civil Court, First Hall, for such Court to evaluate evidence on the plea of res judicata. In the meantime, Pace passed away

[1] Appeal reference 51/2012/1 AF.

and no one accepted her inheritance. Once again, the proceedings were declared to be deserted, this time by the Civil Court, First Hall.

Because so much time had passed from the original favourable judgments, Pavia had to institute proceedings to be able to execute his executive title, i.e. finally publish the final deed. The final deed was published on the 20th of May 2011.

Now, the premise of the present appeal and of the proceedings preceding it is as follows. Pavia deemed Pace's behaviour, particularly through the institution of several proceedings and all the different acts filed therein, to be abusive, illegal, capricious, and reckless (temerarju). Resultantly, he claimed to have suffered substantial damages. He therefore asked the Court (at first instance) to declare this and for Pace's heirs to compensate him for such damages. Curators representing Pace's unknown heirs replied by saying that they were not well aware of the facts at hand and reserved the right to present further pleas later on. The Civil Court, First Hall, did not agree with Pavia that Pace's behaviour was abusive, illegal, capricious, and reckless and deemed it to be a mere exercise of her rights at law.

Pavia appealed. He claimed that the First Court had interpreted the facts incorrectly and that, consequently, damages in the amount of €33,649.60 as well as €72,000 (to compensate for lack of use of the premises) had to be liquidated in his favour. He argued that he was deprived of the use of the premises (the property Pace had to transfer to him) for 24 years (from 1987 to 2011). The curators on behalf of Pace's unknown heirs replied by pleading prescription in terms of Article 2153 of the Civil Code.

There was however an issue with the plea of prescription. The Court of Appeal pointed out that the curators had requested the Court at the end of their appeal reply to confirm the first judgment in its entirety. But how could the first judgment be confirmed in its entirety if the plea of prescription changes things? The Court of Appeal deemed this to be contraditory and thus regarded the plea of prescription to be forfeited. What the curators had to do, the Court explained, was to ask for an amendment of the judgment which in turn had to be done via cross-appeal (*appell inċidentali*).

There then remained the issue of whether Pace's actions were indeed

reckless and abusive of the judicial system or not. The Court of Appeal explained that the right to recur to the Court's protection is amongst the most important rights, in the exercise of which the citizen should not be disturbed. It is up to the same citizen, however, that he or she does not abuse of such rights. If such rights are abused then he or she would be liable in damages. Having said this, just because a person loses a lawsuit, it does not mean that he or she abused the system. It is only in exceptional circumstances that this is the case.

The Court of Appeal referred to previous judgments of the Courts on the matter and explained that to prove reckless litigation (and thus have a successful claim for damages based on this), one has to show that such person either was fully aware of the frivolous nature of his or her claim or that such awareness was acquirable with use of mere diligence and they failed to do so.

Applying these principles to the case at hand, the Court of Appeal concluded that Pavia was clutching at straws. The Court agreed that Pace was persistent in her claim that the promise of sale is declared null and void, and one cannot deny that Pavia won the case that he filed against her to execute the same promise of sale. Furthermore, one cannot deny that Pace's appeal was declared to be deserted. It is true that she kept presenting application after application to try and make her submissions in spite of the appeal being deserted. It is also true that she proceeded with filing yet another case.

However, the Court of Appeal explained, this does not mean that she abused of the judicial system. The Court held that Pavia failed to prove any bad faith on Pace's part. The Court of Appeal also emphasised that Pavia could have enforced the judgment he obtained back in 1993 much before. It is to be noted that Pace's first appeal was declared deserted on the 26th of December 1994 and her second appeal on the 14th of February 1994. The Court held that there was nothing legally stopping Pavia from enforcing the favourable judgment at that point. The Court acknowledged that this could be because he was trying to reach amicable settlement with her, but still, it was his decision not to enforce at the time.

For these reasons, Pavia's appeal was rejected and thus the first judgment was confirmed. This means that Pace's actions were not found to constitute reckless litigation.

SCHRÖDINGER'S JUDGMENT

David Chetcuti Dimech

Judgments are pronouncements by the courts that bind the parties to do as the judgment orders. So, what happens if someone who should be bound by judgment is left out of the lawsuit?

This was the question that faced the Court of Appeal in the case of *Environmental Landscapes Consortium Limited vs Information and Data Protection Commissioner et*, decided on the 30 July 2024.

The case began through a freedom of information request (FOI request) filed by a certain individual, Mr X, for a copy of the agreement between Environmental Landscapes Consortium Limited and the Ministry for Transport and Infrastructure way back in 2015. This request was refused, so Mr X lodged a complaint with the Information and Data Protection Commissioner (IDPC). The IDPC ruled in his favour and ordered the publishing of the contract. This led Environmental Landscapes Consortium Limited to file court proceedings against the IDPC and the Ministry in order to have that decision annulled.

Things were going very well for Environmental Landscapes Consortium Limited and in fact judgment was delivered in its favour at first instance. Until, that is, the IDPC appealed and the Court of Appeal realised that Mr X, the original complainant who clearly had a vested interest in the annulment of the decision, was not involved in the lawsuit. He was only asked to testify and made a grand total of two appearances. The Court of Appeal had to ask itself: Should he have been involved? And if so, what happens next?

After much deliberation, the Court of Appeal decided these two questions as follows:

In the first place, Mr X should have been involved in the lawsuit before the Courts because the original decision by the IDPC was delivered in a case instituted by Mr X against the Ministry. Therefore, that decision could never be annulled without Mr X being a party to the judgment that annuls it. The Court of Appeal then went on to conclude that, since Mr X had been absent from the Court proceedings, the judgment delivered had to be annulled.

Why? Because the annulling judgment would only be effective between the parties to the lawsuit – and not Mr X. As far as he is concerned, the decision upholding his FOI request remains valid and he cannot be legally constrained to not reap its benefits. It cannot be enforced against him. A judgment cannot, unlike Schrödinger's cat, be both alive and dead – alive vis-à-vis certain persons and dead vis-à-vis others who are equally interested in and affected by its outcome.

The Court of Appeal, which very well cannot allow unenforceable zombie judgments to remain in existence, was left with no option but to point this fact out when the appeal came before it and send the case back before the Court of First Instance for Mr X to be roped into the suit and a decision given anew.

This judgment is final and cannot be appealed further.

REVISITING CONTEMPT OF COURT

David Chetcuti Dimech

For those who at some point had to attend a court sitting, contempt of court is not a new term. How it is regulated by law tends to be less clear. Furthermore, judgments specifically dealing with contempt are few and far between. The Court of Appeal recently gave one such rare decision concerning contempt of court which in very eloquent Maltese summarises this legal institute[2].

The case concerned two fines for contempt of court issued by a Court of Magistrates against the Commissioner of Police for failing to summon specific people wanted by the Court as witnesses in criminal proceedings.

Contempt of court is a strange legal animal in itself. While it is punished through criminal law means (a fine or detention under the Criminal Code), it is regulated by the Code of Organisation and Civil Procedure. This law, of a civil law nature, lays down the procedures to be followed in cases of contempt.

In the present case, the Court of Appeal noted that the law differentiated between two types of contempt. The first is the so-called contempt in facie curiae, which consists of acts that offend the respect due to the court during a court sitting. Examples include disrupting proceedings, smoking, answering a phone call, or trying to sneak a picture of the court hall.

Since the Court must be able to speedily bring its house back in order, the law authorises it to punish the violator there and then for contempt and impose a fine or even detention according to the provisions of the Criminal Code.

Other forms of contempt that do not involve bad behaviour during court proceedings cannot be punished on the spot. Instead, the Court must order the Registrar of the Civil Courts to initiate separate proceedings for contempt. This is because at that point, the act in question ceases to concern the Court in particular but becomes a question of the administration of justice more generally.

[2] 145/2006/2 *Giuseppe Mizzi vs Martin Debrincat*, Court of Appeal 12 December 2024.

The Court of Appeal here gave some examples from previous cases, such as the parties to court proceedings dragging their feet, obstructing a court executing officer while he is executing a court order, or failing to observe a court order.

In finding the Commissioner of Police guilty of contempt promptly during the sittings and fining him for it, the Court of Magistrates was finding him guilty of contempt in facie curiae.

This distinction between the types of contempt was crucial in the case at hand for two reasons. First, strictly speaking there is no right of appeal from a finding of contempt in facie curiae. The appropriate remedy is to request the Court to reconsider its decision. Second, if one wants to challenge the decision by saying that this was not a question of contempt in facie curiae and so the wrong procedure was followed, one must appeal within two days from the date of the decision.

In the present case, the Commissioner of Police wanted to contest the ability of the Court of Magistrates to find him guilty of contempt in facie curiae. He argued that what had happened did not qualify as that type of contempt.

The Commissioner of Police was first found guilty and fined €1,000 on the 7 May 2024 and a further €500 on the 18 June 2024. He requested a reconsideration of both decisions, and following a negative result appealed before the Court of Appeal on the 1 August 2024. This was two days after being notified that his second request for reconsideration had been turned down.

Faced with this situation, the Court of Appeal had to declare that the appeal was filed late. What the Commissioner had to do was file two separate appeals, one for each decision, within the two-day period stipulated by law.

This judgment is final and cannot be appealed further.

ADVOCATES

CRIMINAL LAW

THE IMPORTANCE OF ADEQUATELY INFORMING A PERSON SUSPECTED OF HAVING COMMITTED A CRIME WITH THE RIGHT TO A LAWYER

Frank Anthony Tabone

A person's right to a lawyer prior being questioned is about protecting them from incriminating themselves and to prepare their defence. Hence, it is of extreme importance that every suspect prior being questioned by the police is duly cautioned in terms of sections 355AU and 355AUA of the Criminal Code, Chapter 9 of the Laws of Malta. If the police fail to administer the caution adequately, any statement given by the suspect to the police would be considered as inadmissible before the Courts.

In a particular case decided by the Court of Criminal Appeal on 30th October 2023 in the names *The Police vs Hilary Clare Pinfold*, the mentioned court overturned the judgement delivered by the Court of Magistrates (Gozo) as a Court of Criminal Judicature and acquitted the accused from the charge of drink-driving. The appellant was found guilty by the mentioned First Court who sentenced her to a fine of two thousand and five hundred euro and disqualified her driving licence for a period of six months.

The mentioned Court, upon examining thoroughly the acts of the proceedings, concluded that the police, upon stopping the accused following a suspicion that she was driving under the influence of alcohol, first established the identity of the accused and then informed her that she was going to be administered the breathalyser test and also informed her that about her rights to speak to a lawyer prior doing so.

From the acts of the case, it resulted to the Court of Criminal Appeal that the police failed to administer to the appellant the rights emanating from the Criminal Code, namely those listed in section 355AU which provides the following:

> (1) The suspect or the accused person shall have the right of access to a lawyer in such time and in such a manner so as to allow him to exercise his rights of defence practically and effectively.
>
> (2) The suspect or the accused person shall have access to a lawyer without undue delay. In any event, the suspect or the accused person shall have access to a lawyer from whichever of the following points in time is the earliest:
>
> (a) before they are questioned by the Executive Police or by

> another law enforcement or judicial authority in respect of the commission of a criminal offence;
>
> (b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with sub-article(8)(e);
>
> (c) without undue delay after deprivation of liberty...
>
> (3) A request for legal assistance shall be recorded in the custody record together with the time when it was made unless the request is made at a time when the person who makes it is at court after being charged with an offence in which case the request need not be so recorded.

The Court of Criminal Appeal in this case concluded that it was evident that the police never explained the accused her right to be duly assisted prior her questioning and also throughout the investigation. She was only told about her right to speak to a lawyer. The mentioned court further emphasised that the law explains that the right of legal assistance should be in a way as explained in section 355AUA, subsection (8)(a) of the Criminal Code, Chapter 9 of the Laws of Malta namely:

> (8) The right of access to a lawyer shall entail inter alia the following: (a) the suspect or the accused person (therefore this right has to be given to suspects in pretrial proceedings too), if he has elected to exercise his right to legal assistance, and his lawyer, shall be informed of the alleged offence about which the suspect or the accused person is to be questioned. Such information shall be provided to the suspect or the accused person prior to the commencement of questioning, which time shall not be less than one hour before questioning starts;

From the acts of the case in question it appeared to the Court of Criminal Appeal that the police at no moment in time explained to the accused about which offence she was being questioned for. The fact that the appellant was asked to take a breathalyser test does not mean that it was obvious that she was being questioned solely for the offence related to drink driving.

The Court of Criminal Appeal further stated that Section 355AUA, subsection (8)(b) and (c) of the Criminal Code, Chapter 9 of the Laws of Malta also provides that:

> (b) the suspect or the accused person shall have the right to meet in private and communicate with the lawyer representing him, including prior to questioning by the police or by another law enforcement or judicial authority;
>
> (c) the suspect or the accused person shall have the right or his lawyer to be present and participate effectively when questioned. Such participation may be regulated in accordance with procedures which the Minister responsible for Justice may by regulations establish, provided that such procedures shall not prejudice the effective exercise and essence of the right concerned.

From the evidence produced neither did it result that the police had informed the accused that she had the right to speak to a lawyer in private, nor was the accused informed that she also had the right to be assisted by a lawyer throughout the investigation including when the breathalyser test was administered.

The Court of Criminal Appeal further added that the police, when the accused allegedly refused to be assisted by a lawyer, should have abided with the provisions of subsection 6 of Section 355AUA and should have recorded the refusal in writing in the presence of two witnesses to be considered as legally valid.

Therefore, the mentioned Court, after having carefully examined the manner on how the legal rights were administered to the accused, concluded without any doubts that such rights were wrongly exercised and hence any statements or tests carried out could not be considered as admissible, leaving it with no other options but to acquit the accused.

A FAILED ATTEMPT AT COMMITTING A CRIME

Jacob Magri

The law criminalises and punishes not only an individual who successfully commits a criminal offence but also one who tries but fails to commit the completed offence. Such is called an 'attempted crime'. In other words, the principal feature of an attempted offence is that it is committed even though the substantive offence is not consummated. The criminal attempt consists of actions (or omissions) falling short of the completed crime. Actions where the offender must have wanted the crime to be committed, got relatively close to actually committing it, yet ultimately failed to do so 'owing to some accidental cause independent of his will' – as the law itself holds under Article 41 of the Criminal Code.

If a man, intending to kill another man, shoots at his target but misses the latter because he did not aim properly, there is obviously no murder; yet criminal liability is contracted since the miss was not intentional but was rather an outcome the offender did not desire. If, on the other hand, the miss is voluntary – a notion referred to as 'voluntary desistance' – the offender is not guilty of 'attempted murder'. In such instances, the offender is limitedly responsible for the acts he might have committed prior to voluntarily desisting from completing the crime, provided such acts amount to a criminal offence in the first place.

In the judgment *Il-Pulizija vs Owen John Carabott*, delivered on 11 January 2024, the Court of Criminal Appeal delved into the constituent elements of attempted crime.

At first instance, the appellant was found guilty of attempted aggravated theft and condemned to a six-month effective imprisonment term. The victim, an elderly, reported to the police that a stranger, who later turned out to be the appellant, repeatedly knocked at her residence on one occassion and asked her for money. The victim, who on the day was expecting a visit from her nephew, opened the front door only to be met by a complete stranger who claimed that he was collecting money for charity. Frightened, the victim tried her best to shut the door but the offender quickly managed to stick his foot in the door preventing the victim from shutting it. Somehow, the victim managed to close the door.

Following police investigations, the offender was identified to be the appellant. He was charged with attempted aggravated theft and eventually found guilty of this sole charge by the Court of Magistrates as a Court of Criminal Judicature.

He appealed, arguing that the elements required for attempted theft to subsist were missing. He claimed to be a homeless man and all he did was ask for money. For one to be found guilty of an attempted crime, the offender must have not only committed preparatory overt acts but must have also commenced the execution of the crime. Such acts must also necessarily be coupled with the intent to commit the crime; in this case, theft.

While the appellant denied that he had placed his foot at the door to block the victim from shutting it closed, he contended that such an act would have been, at best, a mere preparatory act not an act commencing the execution of the crime of theft. The appellant moreover held that the prosecution fell short of proving that he acted with the criminal intent to actually commit theft. According to the appellant, the mere act, in and of itself, of preventing the door from being shut is not sufficient to conclusively infere that the appellant formed a criminal intent to commit theft. He argued that the prosecution could have only assumptively reached such a conclusion and therefore it fell short of proving its case beyond a reasonable doubt.

The Court of Criminal Appeal disagreed with these contentions. Proceeding to cite doctrine and jurisprudence to explain the notion of 'criminal attempt' and its consitituent elements, the Court noted that the offender did not only stick his foot at the door to prevent its closure, but had also falsely purported to be the victim's nephew while knocking at her door and even called her 'nann' (i.e. grandmother). This factor, coupled with the appellant's deliberate act of placing his foot at the door, clearly showed that his intention was indeed to enter into the household and commit theft. The Court of Criminal Appeal moreover pointed out that the appellant at no point voluntarily desisted. There was nothing to show that he voluntarily removed his foot from the door and the only plausible reason why he eventually did so was because the victim used force in her efforts to shut it closed.

In light of these combined factors, the Court of Criminal Appeal considered the Court of First Instance was correct in reaching a decison of a finding of guilt. It held that with his actions, the appellant committed preparatory acts which were clearly aimed at consummating the crime of theft. In other words, the Court of Criminal Appeal was convinced that the appellant's actions amounted to the commencement of the execution of the crime of theft and the actual theft failed to take place owing to an accidental cause independent of his will – i.e., the victim's efforts of shutting her door closed.

On the basis of such considerations, the Court of Criminal Appeal proceeded to confirm the judgment delivered at first instance in its entirety, consequently confirming the appellant's conviction and punishment.

ADVOCATES

EU LAW

MUTUAL TRUST AND EXTRADITION: THE POWER OF THE EUROPEAN ARREST WARRANT

Jacob Magri

The European Arrest Warrant (EAW) Framework Decision, adopted by the Council of the European Union in 2002, is a key instrument in judicial cooperation across the EU. Its primary purpose is to facilitate the extradition of individuals between Member States, simplifying procedures by replacing bilateral extradition treaties with a standardized process. The Framework Decision promotes the principles of mutual trust and recognition between Member States, aiming for swift and efficient surrender of individuals either for prosecution or the execution of a custodial sentence.

Malta transposed the EAW Framework Decision into its national law through the Extradition Act (Chapter 276 of the Laws of Malta) and the related Subsidiary Legislation 276.05. The principle of mutual trust and cooperation underpins the EAW, assuming that all Member States uphold comparable standards of justice and human rights. However, this principle is not absolute, and Member States retain some discretion to refuse the execution of an EAW under specific circumstances, such as concerns over fair trial rights or human rights violations.

In the judgment *The Police vs Thomas Zaugg*, delivered by the Court of Criminal Appeal presided over by Mr Justice Neville Camilleri on 14th August 2024, the appellate Court was faced with an appeal concerning the execution of two European Arrest Warrants (EAWs) issued by Belgian authorities against the appellant, Thomas Zaugg. This case revolves around complex issues related to the application of the EAW Framework Decision, particularly in the context of judgments delivered in absentia and the principle of mutual trust and cooperation.

Thomas Zaugg, a Swiss national, was the subject of two EAWs issued by Belgian authorities. The first EAW, dated 27th January 2023, covered several judgments, including judgments from the Turnhout Criminal Court and the Antwerp Court of Appeal, among others. The second EAW, dated 2nd April 2024, related to a sentence of 50 months' imprisonment imposed by the Antwerp Criminal Court. These warrants sought Zaugg's surrender to serve various prison sentences in Belgium.

The Court of Magistrates as a Court of Criminal Inquiry (the Court of Committal) ordered Zaugg's return to Belgium, concluding that the execution of the EAWs was not barred by any legal impediments. Zaugg appealed this decision, raising several grievances, including the application of article 4a(1) of the EAW Framework Decision, which deals with judgments delivered in absentia.

Zaugg's primary grievance was in fact that the Court of First Instance erred in concluding that article 4a(1) of the Framework Decision was inapplicable to the judgment delivered by the Belgian court. Article 4a(1) allows for the refusal of an EAW if the individual was not present at the trial that led to their conviction, unless certain conditions are met, such as being informed of the trial and having legal representation.

Zaugg argued that the Belgian judgment was delivered in absentia, without him being present or represented by a lawyer, and that the court exercised discretion rather than merely revoking a suspended sentence. He referenced the Ardic and Zdziaszek judgments of the Court of Justice of the European Union (CJEU), arguing that his case should be afforded the protections under article 4a(1).

However, the Court of Criminal Appeal rejected this grievance. It found that the Belgian court's decision was based on a mathematical formula rather than discretion, aligning with the Ardic case, where the CJEU ruled that decisions revoking suspended sentences based on objective criteria do not trigger the protections of article 4a(1). The court held that the Belgian authorities had provided sufficient guarantees, and the execution of the EAW was therefore obligatory.

Zaugg also contested the finality of the Belgian judgment, arguing that the Maltese court should have requested further information from the Belgian authorities to confirm whether the judgment was subject to appeal. He claimed that assuming the judgment was final without evidence violated his right to a fair trial.

The Court of Criminal Appeal also dismissed this grievance, citing that there is no requirement under Maltese law or the Framework Decision for a custodial sentence to be final for extradition to proceed. The court also noted that the Belgian authorities had provided a guarantee that Zaugg

could seek a retrial upon surrender, thus fulfilling the requirements of article 4a(1)(d) of the Framework Decision.

Zaugg further argued that the EAW did not provide sufficient evidence that he was validly summoned for the Belgian proceedings. He requested that the Maltese court either annul the decision or seek additional information from the Belgian authorities under Regulation 13A of Subsidiary Legislation 276.05. The Court of Criminal Appeal rejected this argument, emphasizing the principle of mutual trust between EU Member States. It held that the Maltese court was not required to question the veracity of the Belgian court's findings, particularly in light of the guarantees provided by the Belgian authorities.

In his final grievance, Zaugg argued that the execution of the EAW was disproportionate and violated his human rights under the EU Charter of Fundamental Rights and Directive 2016/343, particularly regarding the right to be informed of the trial and the consequences of non-attendance. The Court of Criminal Appeal rejected this grievance as well, citing the CJEU's ruling in TR v Generalstaatsanwaltschaft Hamburg (C-416/20 PPU), which clarified that non-conformity with Directive 2016/343 cannot serve as a ground to refuse the execution of an EAW. The court emphasized that the Belgian authorities had provided the necessary assurances regarding Zaugg's right to a retrial, thereby safeguarding his rights under the Directive.

In conclusion, this judgment illustrates the strength of the EAW system and its foundation on mutual trust and cooperation between EU Member States. The Court of Criminal Appeal upheld the validity of the EAWs issued by Belgium, emphasizing the limited scope of discretion in refusing such warrants. This case reaffirms the importance of mutual recognition of judicial decisions across the EU, even in complex cases involving judgments delivered in absentia, and underscores the balance between individual rights and the obligations of Member States under the EAW Framework Decision.

This judgment is final and cannot be appealed further.

CHANGES TO FIFA TRANSFER RULES: WHAT DOES THE DIARRA DECISION MEAN FOR FOOTBALL?

Clive Gerada

On October 4, 2024, the Court of Justice of the European Union (CJEU) issued a significant ruling in the case of C-650/22 *FIFA v BZ* (hereinafter referred to as the "*Diarra* case"). The decision challenges some of FIFA's regulations on the status and transfer of players, specifically their alignment with EU laws on free movement of workers and competition rules. The CJEU's ruling could open the door for players, clubs, and agents to claim damages if they were affected by these FIFA rules in the past. For example, if a club had to pay compensation under the old rules, or if a player lost out on a new contract because of them, they might be able to sue FIFA for financial losses.

The dispute began in 2014, when French midfielder Lassana Diarra (former Real Madrid and Chelsea FC player) got into a legal dispute with Russian club Lokomotiv Moscow. The club accused Diarra of ending his contract without a valid reason and the Russian club demanded €20 million in compensation. On the other hand Diarra argued that Lokomotiv hadn't fully paid him his salary, which led to his decision to leave. Eventually, FIFA's Dispute Resolution Chamber agreed with Lokomotiv Moscow and ordered Diarra to pay the Russian football club the figure of €10.5 million for breach of contract.

As a result of his dispute with the club, Diarra's career stalled because potential new clubs were hesitant to sign him due to strict FIFA rules. In fact, the Belgian club Royal Charleroi S.C., for instance, wanted to sign him but was worried about facing penalties under FIFA's transfer regulations. Consequently, Diarra filed a case before the Belgian courts against FIFA and its regulations. The Belgian Court referred the case to the CJEU via the preliminary reference procedure.

The FIFA Rules in Question

Three specific rules from the FIFA Regulations on the Status and Transfer of Players (FIFA RSTP) were challenged in this case: (i) Article 17(2): This rule states that if a player breaks their contract without a valid reason, the player and their new club are both responsible for paying compensation to the former club; (ii) Article 17(4): it presumes that a new club has encouraged the player to break their contract if they sign the player within a certain "protected period." If this happens, the

new club can face penalties like a ban on registering new players; and (iii) Article 9(1) and Annex 3: These rules prevent a player from being registered with a new club while a contract dispute with their former club is still unresolved.

The CJEU's Decision

Diarra argued that the FIFA rules violated his right to work within the EU and restricted fair competition among clubs. The CJEU agreed, finding that these rules unfairly limit both a player's freedom to move to a new club and a club's ability to sign the best available talent. The court acknowledged that while FIFA's aim to maintain stability in clubs' squads is legitimate, the current rules are too restrictive.

The CJEU highlighted that existing contract law principles, like the right to compensation for contract breaches, should be enough to maintain stability without resorting to such harsh penalties.

What does the CJEU Decision mean in practice?

This decision could lead to big changes in the international football transfer market.

The CJEU said that Players still need to honour their contracts, and compensation will still be due to the Club if they breach them. However, the CJEU said that compensation should be based on national laws, and factors like the player's new contract value and the expenses incurred by the Club in signing the player should not be considered. One major change is that new clubs will no longer automatically share financial responsibility with players who break their contracts. Previously, Players could count on their new Club to help cover these costs.

This means clubs might be more willing to sign players in dispute with their former teams, giving players more freedom to move. However, this also means that players will now be on their own if they have to pay compensation. Therefore, the financial risks for Players have increased.

Clubs must still respect existing contracts with other clubs, but the way they deal with compensation claims will change. Without the rule that automatically made new clubs share financial liability, signing a player in dispute might be less risky for clubs. Sporting sanctions for inducing a contract breach are still possible, but the CJEU has made it harder to assume that a new club is always at fault. Clubs will need to be more cautious and get legal advice when signing players who are in disputes, as the rules around what counts as "inducing a breach" are now less clear.

Impact on Ongoing and Past Disputes

The CJEU's ruling could open the door for players, clubs, and agents to claim damages if they were affected by these restrictive FIFA rules in the past. For example, if a club had to pay compensation under the old rules, or if a player lost out on a new contract because of them, they might be able to sue FIFA for financial losses. For ongoing disputes, this decision could lead to a change in how cases are resolved. Even if FIFA's judicial bodies or the Court of Arbitration for Sport (CAS) are already handling a case, the parties involved might now argue that it should be reviewed under these new legal standards.

In conclusion, while this ruling is a big deal, it doesn't completely change the game like the famous *Bosman* ruling did in 1995. Players must still respect their contracts, and clubs will still have to navigate a complex set of rules. However, the decision does give more freedom to both players and clubs in handling contract disputes, which could lead to a more flexible and competitive transfer market. A milestone CJEU decision for football and the sport industry, but in the opinion of the author not at the same level of the *Bosman* rule.

The CJEU's decision marks a shift towards balancing the rights of players with the need for fairness in the football transfer system. While it reduces some of the harsh penalties that FIFA's rules previously imposed, it also places more responsibility on players and clubs to act wisely and seek legal guidance in handling contracts and disputes. Although it is up to the Belgian Courts to give the final judgment, it is almost certain that the Belgian Court will have to adopt the CJEU findings.

This judgment is final and cannot be appealed further.

RECENT CLARIFICATIONS ON EUROPEAN INVESTIGATION ORDERS

Arthur Azzopardi
Michaela Sciberras

The European Investigation Order ('EIO'), established under Directive 2014/41/EU, is a crucial mechanism for combating cross-border crime in the EU. It allows authorities in one Member State to request evidence or investigative assistance from another, such as accessing bank records or taking witness statements.

Recently, concerns over its application and potential impact on fundamental rights prompted the Regional Court of Berlin to seek clarification from the Court of Justice of the European Union ('CJEU'). This ruling highlighted the need to balance effective investigations with safeguards for privacy and fair trial rights.

The EIO streamlines evidence-gathering across borders, replacing fragmented systems with a standardised process. Despite its utility, questions persist about who can issue an EIO, the conditions for its issuance, and the handling of sensitive data, such as intercepted communications. The CJEU's interpretation emphasizes the importance of ensuring these operations respect individual rights while maintaining trust among Member States.

Key Clarifications from the CJEU

The CJEU addressed several important issues regarding the EIO:

1. Who can issue an EIO?

One issue raised was who has the authority to issue an EIO. According to Articles 1(1) and 2(c) of Directive 2014/41, an EIO can be issued by a judicial authority, such as a judge, court, or investigating judge. A public prosecutor may also issue an EIO if their national law permits them to gather evidence in domestic cases without requiring validation by a judge. The CJEU confirmed that prosecutors are valid issuing authorities in such cases, provided they meet independence criteria to ensure decisions are free from external influence.

2. When can an EIO be issued?

The court examined the conditions for issuing an EIO, as outlined in Article 6 of Directive 2014/41.

First, the CJEU addressed the requirement that an EIO must be both necessary and proportionate to the investigation's objectives. Authorities must ensure that the request is genuinely needed and take into account the rights of the suspect or accused. The court clarified that it is not always necessary to have evidence of a specific serious crime at the time an EIO is issued unless the issuing country's laws mandate it.

Second, the CJEU considered what happens when the evidence sought is already in the possession of authorities in the country receiving the request. In such cases, the evidence can only be shared if the receiving country's laws would allow similar access in a domestic case. This ensures that the EIO respects the legal safeguards of the receiving country.

3. Intercepting Telecommunications and Data

The CJEU also examined the rules for intercepting telecommunications and gathering sensitive data, such as internet activity or phone records. It ruled that such actions fall under the directive's provisions concerning "interception of telecommunications," which require specific safeguards. For example, the authorities in the Member State where the person under investigation is located must be notified of the interception. If it is unclear which authority to notify, the issuing State must still inform an appropriate body within the receiving country. These measures aim to ensure transparency and protect individuals' privacy rights.

4. Excluding Evidence Obtained Unlawfully

Finally, the CJEU clarified what happens if an EIO is improperly issued. According to Article 14(7) of the directive, evidence obtained through an unlawful EIO must be excluded from court proceedings, particularly if it could unfairly affect the trial's outcome. This safeguard reinforces the right to a fair trial and ensures that evidence collected improperly cannot be used against a defendant.

Balancing Justice and Rights

The CJEU's decision strikes a balance between the need for effective cross-border crime-fighting tools and the protection of fundamental rights. By clarifying the rules governing the European Investigation Order, the court has provided crucial guidance for ensuring that this instrument is used fairly and lawfully. As cross-border crime continues to pose challenges for the EU, the EIO remains a cornerstone of judicial cooperation—but one that must be applied with vigilance to uphold the principles of justice and fairness.

This judgment is final and cannot be appealed further.

ADVOCATES

FAMILY LAW

THIS MARRIAGE NEVER HAPPENED!

Analise Magri

Ever since the introduction of the law of divorce in our legislative framework way back in 2011, the Maltese Courts have witnessed a steady surge in the number of cases being filed by spouses for personal separation and divorce. As the figures provided in Parliament in January 2024 evidenced, the year 2023 saw the Maltese Family Court pronounce a total of 483 divorce judgments along with 110 judgments of personal separation.

Whilst the above figures are quite considerable, not much is said about marriage civil annulment cases, judgments on which are still pronounced. Prior to delving into a recent one pronounced by our Courts, it is apt to consider the distinctions between marriage annulment, personal separation, and divorce, as whilst all three in essence contemplate a termination in the spouses' marital relationship, no one is the same as the other.

By means of a judgment pronouncing personal separation between two spouses, the married spouses would be freed from their reciprocal obligations to one another; namely, the termination of the spouses' duty to live together. A judgment of personal separation would also mean that the community of acquests between the spouses would be terminated and that both parties would, from the date of the judgment, reacquire their own individual status for entering into acts of a civil nature without the necessity of the appearance and consent of the other spouse. Each party would be considered from thereon a free individual. Saying that a personal separation brings about the termination of one's marriage is a complete misnomer. Following a judgment of personal separation neither of the spouses may civilly remarry, unless a divorce judgment is attained. Divorce is what brings about the dissolution of the marriage, meaning that the marriage would have been terminated in the most absolute manner as from the date when the divorce judgment is pronounced in open court.

The effects of an annulment are perhaps more wide-ranging than those of a personal separation or divorce. Whilst a judgment pronouncing the latter would have effect as from the date of the judgment as pronounced by the Family Court or Court of Appeal, in the case of an annulment the marriage would be deemed to have never existed in the first place. When a case for civil annulment is filed before

the Family Court, the Court's tasks are different to those undertaken in a personal separation or divorce. The crux of the whole case would be to determine as to whether either one or more requisites essential to establish and enter into a marriage were missing when the marriage was contracted. If the Court finds that either one or more requisites are absent, the marriage would be declared to have never existed right from the start.

A recent civil annulment was pronounced by the Civil Court, Family Section, on the 22nd of January 2024 as presided by Hon. Madame Justice Jacqueline Padovani Grima in the names of *DB vs Martha Mifsud et noe*. As can be noted from the case name ('okkju'), the defendant spouse was absent in these proceedings and hence had to be represented by curators.

The facts of the case were as follows. During the year 2014, the plaintiff met the defendant whilst the latter was studying English in Malta. When the defendant finished her studies, she returned to her home country, whilst both parties stayed in touch. The plaintiff travelled to visit the defendant, yet they had agreed that the defendant was to return to Malta so that both could start living together. After a few months, the defendant found out that she was expecting. Half way through her pregnancy, the defendant abruptly decided that she wanted to return to her home country so that she could give birth surrounded by her family and according to her family's traditions. Following such the plaintiff then started to insist that the parties get married so that their child would not be born out of wedlock. On the 18th of April 2016, whilst in her home country, the defendant filed an application for marriage without the plaintiff's consent, prescence, or signature. During the month of August 2016, whilst the plaintiff was physically present in the country ahead of the birth of their son, the defendant took plaintiff to a town hall centre where he had to sign three documents in a foreign language. The defendant's persistence for marriage was met with threats that should he fail to sign the documentation, the defendant would deny him a relationship and access to his child. The plaintiff complied. As the parties left the town hall centre, the defendant had informed him that they were now married and that they had gotten married in April. Following the child's birth, whilst plaintiff was back in Malta, the defendant informed the plaintiff that she was not going to return to Malta as they had originally intended and that if the defendant wanted a

relationship with his son, he was to return to the plaintiff's home country. Plaintiff complied. From thereon, the parties' relationship deteriorated even more. The defendant started to allege that the plaintiff was going to flee the country with the minor and that she was a victim of domestic violence. Their relationship ended once and for all when defendant left the home and could not be found nor contacted ever since.

The plaintiff proceeded before the Family Section of the Civil Court wherein he requested the annulment of his marriage with defendant due to the fact that his consent was obtained through physical and moral violence, or fear (according to Article 19(1)(a) of the Marriage Act, Chapter 255 of the Laws of Malta). Furthermore, the plaintiff also alleged that the parties' consent was vitiated by the positive exclusion of marriage itself, or of any one or more of the essential elements of matrimonial life, or of the right to the conjugal act (according to Article 19(1)(f) of the Marriage Act, Chapter 255 of the Laws of Malta).

In her considerations, the Court remarked how the institute of marriage is regulated by a presumption of validity, and that is only upon the production of concrete and convincing proof that a marriage can be declared to be invalid. The Court furthermore considered how marriage is one of the most essential contracts in society, and that nullity is to be the exception and definitely not the rule. Thus, the person alleging that his/her marriage is invalid and should be declared null bears the onus probandi.

Delving into the first ground which plaintiff proposed, namely that his consent was obtained through physical and moral violence, or fear, the Court noted how for such ground to be fulfilled, the violence or pressure being exerted must be such that they reflect and influence the person's mental condition to the extent that the person would not be in a free position to choose or give his/her say; and in an attempt to avoid damage being caused, that person chooses to do what the other says. When considering this ground, the Court remarked how plaintiff himself testified and admitted that he never wanted to get married, and that defendant was well aware of this from the way she disguised and kept in secret the marriage application when she took plaintiff to the town hall centre. The Court observed how it was the plaintiff's fear of not seeing his son again that forced him into marrying the defendant.

Accounting for the facts of the case, and the fearful circumstances which plaintiff found himself in, the Court acceded to the plaintiff's request for annulment and made a very strong pronouncement to this effect:

> *Il-Qorti tqis li l-intimat ma kienx liberu fl-għażla tiegħu li jersaq għaż-żwieġ, iżda din l-għażla kienet biss reżultat ta' pressjoni estrema eżerċitata fuqu mill-intimata li minħabba l-fatt li l-valuri kulturali tagħha allegatament ma kienux jikkontemplaw tarbija barra ż-żwieġ, imponiet dan iż-żwieġ fuq l-attur, għaliex kienet konvinta illi l-attur sabiex ikun missier preżenti fil-ħajja ta' ibnu, kien dispost jasal jagħmel kollox għal ibnu. It-tarbija kienet l-uniku mottiv li wassal lill-attur sabiex minkejja l-konvinzzjonijiet tiegħu, jagħmel dan il-pass, pass li ma ħax volontarjament iżda sforz tal-pressjoni qawwija u l-biża' li l-intimata teskludih kompletament mill-ħajja ta' ibnu, theddid li tenut kont taċ-ċirkostanzi tal-każ kien theddid determinati li ssoġġetta l-volontà tal-attur għar-rieda tal-intimata.*

The judgment was not appealed and is therefore final.

ADVOCATES

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