CVL2008
LAW OF PROPERTY

The European Law Students' Association

MALTA

ABOUT ELSA

ELSA Malta is a distinguished member of the ELSA International network, comprising over 50,000 students from more than 350 law faculties across Europe. The organization is deeply committed to upholding the values enshrined in its motto - "A just world in which there is respect for human dignity and cultural diversity" - and strives to achieve this mission in all its activities.

Founded in 1986, ELSA Malta is recognized as a prestigious student organization by the Senate of the University of Malta. Its primary aim is to represent all law students in the University and provide them with a diverse range of opportunities.

ELSA Malta offers various events throughout the academic year that cater to the needs of law students of all ages, providing them with an excellent opportunity to expand their legal knowledge across various topics in the Law Course. Additionally, these events can prove to be of great value to students from other faculties as well.

Furthermore, ELSA Malta also strives to promote international understanding and cooperation by fostering cultural exchange and encouraging students to participate in international projects, conferences, and competitions. By engaging in such activities, ELSA Malta seeks to equip its members with valuable skills and experiences that will help them become responsible and active citizens of the global community.

DISCLAIMER

Please note that the student notes provided by ELSA Malta are intended to supplement your own notes and independent study. These notes may contain errors or omissions, and we cannot guarantee their accuracy or completeness. While these notes may act as a tool to enhance your understanding of the material covered in class, we advise against relying solely on them in preparation for examinations or assignments. It is crucial to attend all classes, review the assigned readings, and take your own notes.

ELSA Malta cannot be held responsible for any consequences that may arise from the use of these notes, including poor academic performance or misunderstandings of course content.

By accessing and using these notes, you acknowledge and agree to these terms and conditions.

ACKNOWLEDGMENTS

ELSA Malta President: Luke Bonanno

ELSA Malta Secretary General: Jake Mallia

ELSA Malta Director for External Relations: Beppe Micallef Moreno

Writer: Luca J. Camilleri IV

Luca J. Camilleri IV

THE LAW OF PROPERTY

Dr Phyllis Aquilina
Dr Patrick Galea
Dr Peter Borg Costanzi

INTRODUCTION

The areas to be covered are ownership and coming to ownership, the attributes and limitations of ownership, the remedies in defence of the right of ownership, co-ownership, deeds of emphyteusis, servitudes. As well as expropriation (the forceful seizure of private property by the State for public purposes), and other rights over property (usufruct, use, and habitation).

In Roman Law we refer to the law of property as the law of "things". Modern Maltese property law is derived to a large extent from the law of things under Roman Law. Maltese Civil Law is by and large made up of three different pillars: the law of persons (modern family law), the law of things (combines the law of property and the law of obligations, regulates the rights and the obligations which a person can have over things or in connection to things throughout his lifetime), and the law of succession (rights and obligations arising after the death of a person and the assets and liabilities which he has at the time of death). There exists a parallel between the person and the thing with the latter in general giving the person rights and consequences depending on the kind of relationship that exists between the person and the thing. It will be noted that the person, besides his being a person and its consequences, has what is known as a patrimony which is his capacity of having rights and obligations over things. It will also be noted that these rights and obligations can be of different kinds (real rights or personal rights) with each having its unique consequences. The way in which the law classifies things (either physical objects or rights) under different headings, why it does so, and what the consequences of such classifications are shall also be noted. Finally, the most important right in the law of property, the right of ownership, will be fully explored. To that end, the following shall be considered: what is ownership under law? What are the consequences of enjoying ownership over a thing? How can this right be defended and asserted? What are the judicial actions which are not expressly listed in Maltese law, but instead derive completely from Roman Law and have been affirmed to exist completely in Maltese Law by the Courts (*actio rei vindicatoria*)?

The Maltese Law of Property is mostly to be found in Book Second "*Of Things*" in the Civil Code (Cap. 16 of the Laws of Malta). It will be noted that this part of Maltese Law in the Civil Code has the massive advantage of being stipulated in very short, concise, clear, and to-the-point provisions which have been part of Maltese Law since the original enactment of the ordinances comprising the Civil Code. There are also several Acts of Parliament which also regulate specific areas in the law of property (such as, *inter alia,* the *Condominium Act*, the *Land Registration Act,* the *Public Registry Act,* the *Trust and Trustees Act,* the *Government Lands Act,* the *Land Acquisition Public Purposes Ordinance* [REPEALED], the *Consumer Affairs Act*). The Maltese Civil Code was originally written as separate ordinances by Sir Adrian Dingli who left notes on several of the provisions which he included in said ordinances (known as Sir Adrian Dingli's personal notes on the Civil Code) in which offers the original source of the provision and whether he made any modifications, or whether the provision is entirely his own. Other sources include foreign laws (only those which have been the source for Maltese

Civil Law) as well as foreign jurisprudence and commentaries. Commentaries, especially older ones, are a useful tool as therein one will find an explanation of the law in different practical scenarios whilst putting the law in context.

A HISTORICAL OVERVIEW

Maltese law of property originates in Roman Law. We tend to assume that Roman Law existed some two thousand years ago and for that reason is outdated and pointless. This is incorrect. Roman Law is the origin of today's civil law. The law is living and is constantly updated to respond to the new situations of life so to that end Roman Law does not exist in its format of two thousand years ago but is instead a constantly updated version. Between the Institutes of Justinian and today centuries have passed, and life has changed with the passage of time. Throughout these years Roman Law and the concepts found within have evolved to respond to the new realities of life and things over the centuries.

After the fall of the Roman Empire, we have the Middle Ages when Roman Law evolved under the important influence of the Roman Catholic Church. That is to say, Canon Law developed in parallel and influence with to a very large extent the Roman that continued to be applied throughout the Middle Ages. In fact, as a parallel to the Roman Law that was written under the influence of the Church, we have the development of the *corpus juris canonici.* These two bodies of (*corpus juris Justinian* and the *corpus juris canonici*) law plus the local custom of the different communities and kingdoms that existed at the time all over the European continent formed what we refer to as the *ius commune.* This was the law applicable in the private law sphere across Europe up until the era of codification (the 19th century). As one will note from the times of the Roman Empire till the 19th century this sphere of private law continued to be regulated in principle by the rules of Roman Law taking on important influences from the law of the Church and the local custom. Prior to the era of codification, the law was not written in a single book, meaning there was no dingle book regulating private law as we have now in the Civil Code. Law was not known to the public in general but known to whoever was entrusted with judging in those communities. A very important development towards the end of the Middle Ages is what we refer to as the rebirth of Roman Law during the renaissance. At that point of time, beyond the largely unknown body of rules, we have for the first time the critical analysis and study of the Roman Law concepts, principles, and doctrinal writings. For the first time in centuries whoever was studying the law did not merely rely on the old written Roman Law and the writings of the Church but started to study Roman Law in a critical way, trying to understand why it developed in the way it developed and updating it in a meaningful sense to the new realities of the 15th-17th centuries.

All this development, coupled with the French revolution, leads with the movement towards codification. At the end of the 18th century, we find the first attempts at compiling the law and making it known. The crucial development for our purposes is that in 1804 when the French Civil Code was compiled and promulgated by Napoleon himself, known as the *Code Napoleon.* For the first time in history private law is written down in simple language with the provisions being written in a concise, exhaustive manner with the use of general rules of principle. The importance of this code lies in the fact that it was copied and/or adapted for many of the private law codes across Europe and beyond. The Maltese Civil Code is one such Code. It is modelled on and follows to a large extent the Civil Code of Napoleon of 1804. Take,

for example, the definition of the right of ownership (article 320), which is an exact translation of the corresponding definition provision in the French Civil Code of Napoleon (article 544). Even the Maltese Civil Code's formatting follows that example set in the original French Civil Code. In the case of the Italian Civil Code, the Italian Civil Code that exists today does not follow the tradition of the Napoleonic Code as the Italians in 1865 adopted a Civil Code following the French Napoleonic Code model which was then repealed in its entirety during the Second World War for obvious political reasons. The Italians then adopted a new Civil Code merged together with a Commercial Code following the German tradition. The German tradition of Civil Law differs from that of France as the Germans enacted a Private Law Code very late compared to other European jurisdictions with the Germans not having a single Civil Code until 1900. That Civil Code (which is the Civil Code in place today) does not follow the French tradition. German provisions are longer and include more philosophical content as the German Civil Code is the outcome of a lot of studies and commentaries of legal authors on the concepts and principles which formed the *ius commune.* The philosophy behind the German Civil Code is completely different from that of Malta, and in practice that translates itself into completely different rules, provisions, and perspectives. The *Code Napoleon* was also adopted outside the European Continent as is evidenced by the Civil Code of Quebec, Canada. Because of the French political influence in the region, Quebec to this day has its private law contained in a Civil Code and said Code is modelled on the original Civil Code of Napoleon. Also, the state of Louisiana, United States of America, applies the same concepts which we find in the *Code Napoleon.* Other interesting jurisdictions include the Spanish and Dutch Civil Codes which both follow the French model somewhat faithfully. The private law of South Africa is also derived from Roman Law concepts.

The Maltese Civil Code was drafted by one man, Sir Adrian Dingli, a Crown Advocate in the mid-19th century, at a time when Malta was ruled by the British. The British were only interested in imposing their own public law because of the strong continental influence in private law and the use of the *ius commune* in the private law sphere at the time. There were various attempts in the mid-19th century to draft an exhaustive law in the form of a code for Maltese private law following what was taking place in other European States; however, these attempts failed and Sir Adrian Dingli, in his role as Crown Advocate, took it upon himself to draft an exhaustive written body of Maltese private law. He managed to do so over a period of seventeen years between 1856 and 1863, producing twenty-one ordinances. What is known today as the Civil Code was originally promulgated in the form of twenty-one ordinances, with each focusing on a particular sphere of private law, which were ultimately joined together. These were consolidated and promulgated by virtue of ordinance VII of 1869. Besides producing said ordinances, Sir Adrian Dingli left a series of notes on the sources of the individual provisions in the original ordinances that he drafted. There are instances where he refers to other European Codes and instances where he notes provisions to be of his own drafting. Because of the British propensity for legislating through acts of parliament, owing to their legislative influence at the time we now have multiple important aspects of private law, including the law of property, regulated outside the Civil Code. The Civil Code contains the general principle of private law and thus retains its importance as it is supplemented by the different acts of parliament regulating particular areas of private law.

PATRIMONY

The concept of patrimony is a very abstract one. It is a concept which was largely developed in the tradition of the French Civil Code by two legal authors, Aubry est Rau, who produced a treatise where they expanded this concept of patrimony which lies at the basis of the system of property law which we have in the *Code Napoleon* and all those Codes that followed the French tradition. To understand this concept, one may draw a parallel between patrimony and personality: there exists the concept of personality, divided into the physical person and the legal person with their common element between the personality that affords the person rights and obligations which arise from the different branches of the law. There exist different types of legal persons (take, for example, the LLC and the commercial partnership) with all of them existing individually from the physical persons that compose them. The second schedule of the Civil Code, entitled *Of Legal Organisations,* makes mention of, and regulates other kinds of legal persons which also benefit from the advantage of separate legal personality. As the legal personality is separate from the physical person that composes it, so is an individual's patrimony. Every person, be it a physical person or a legal one, has in law rights and obligations which are particular, individual, and distinct to that person. These rights and obligations can be of two kinds: either strictly personal/familial (referring to the private circle of that person), or patrimonial.

In common parlance, when one speaks about patrimony one is referring to cultural and historical aspects of things. In law, this concept refers to something else. The concept of patrimony refers to the rights and obligations which a person, be it a physical person or a legal one, has in connection to things throughout his/her/its lifetime. In order to understand exactly what is being discussed when referring to the concept of patrimony one must see what a person is in terms of law, and what are the rights and obligations in connection to things which make up this patrimony of a person. **Article 3(1) of Schedule II, Title II of the Civil Code** defines legal persons as *"organisations endowed with legal personality".* It goes on to state that *"legal personality is acquired through the formal recognition of the State. Recognition by the State requires a specific act of recognition and no other administrative act of the State in relation to an organisation or activity shall constitute recognition. Except where legal personality is recognised or established by a law or an international treaty or agreement or is granted in virtue of registration pursuant to any special law, legal personality shall only be acquired by an organisation on its registration with the Registrar for Legal Persons in accordance with article 12".* In essence this states that there is only legal personality where the organisation is registered in terms of this second Schedule with the Registrar for Legal Persons.

Article 4(*e*) of the Interpretation Act (Cap. 249 of the Laws of Malta) states that *"in this Act and in every other Act whether passed before or after the commencement of this Act, unless the contrary intention appears the expression "person" shall include a body or other association of persons whether granted legal personality, in accordance with the provisions of the Second Schedule to the Civil Code, or not".* Therefore, we have no definition of personality, but only an explanation of the way in which personality is granted to an organisation made

up of more than physical person. The legal or physical person therefore can have a patrimony and can have rights and obligations in connection to things.

Not only does the Civil Code not define patrimony, but by and large does not even mention the concept of patrimony. However, we now have a reference to the concept and what it is about in **article 4(1) of the second Schedule to the Civil Code** which states that *"every legal person has a patrimony which shall be appropriated to a purpose or purposes in accordance with article 1".* The concept of patrimony for legal persons under the Civil Code is restricted in the sense that it exists only in relation to the purpose or purposes for which the organisation has been established. As this article 4(1) itself conveys, there is a very close link between the person and his personality as well as the patrimony and that patrimony does not refer to rights and obligations which are familial in nature (filiation, rights in marriage, rights in civil union, etc.), but those rights and obligations which have to do with things in the sense of assets and liabilities.

In the Civil Code of Quebec, we find two clear provisions on this aspect of personality and patrimony in Civil Law: articles 1-2. Introduced in 1991, they read as follows: "(1) *Every human being possesses juridical personality and has the full enjoyment of civil rights.* (2) *Every person is the holder of a patrimony. It may be the subject of a division or of an appropriation to a purpose, but only to the extent provided by law".* Patrimony is constantly changing in content, the capacity of the person to be the subject of rights and obligations in connection to things is a constant, the content of said patrimony changes all the time as the person acquires new rights whilst disposing of rights which he/she/it may have in connection to things. There are persons, physical and legal, who are constantly investing in the content of their patrimony (increasing assets and decreasing liabilities), whilst there are persons who never do anything of the sort and therefore the content of their patrimony may not change so much. There are also persons, physical and legal, who end up at any particular time with more liabilities than assets. All of these scenarios and all of these persons have the same capacity to have rights and obligations over things. As much as they have their own personality, they have their patrimony. In a Louisiana Supreme Court judgement, that of *re Howard Marshall Charitable Remainder Annuity Trust*, the Court gave perhaps the clearest explanation of the concept of patrimony, stating that *"the patrimony is a coherent mass of existing or potential rights and liabilities attached to a person for the satisfaction of his economic needs. The patrimony, as a universality of rights and obligations, is ordinarily attached to a person until termination of personality".*

This definition mirrors the concept of patrimony which was developed in the 19th century by the above-mentioned French authors, Aubrey, and Rau, who, in their theory, have expressed three important rules in connection with the relationship between patrimony and personality. They state that:

I. Every person, physical or legal, has a patrimony and only a person can have one.
II. No person can have more than one patrimony.
III. Every patrimony is held by a person physical or legal.

The rights and obligations which are included in a person's patrimony have an economic relevance. Only rights which have this economic character and can be valued in monetary

terms and be transferred can form part of a person's patrimony (known as patrimonial rights). From this understanding of the theory of patrimony we make out the close relationship between the person and the patrimony, with one being unable to exist without the other. We also make out the unity and indivisibility of a person's patrimony.

This theory of patrimony is now over two centuries old and, although as a concept the understanding of what a patrimony is has not changed, changes in laws over time have introduced exceptions to the otherwise absolute rules and principles on which these authors based their theory of patrimony. Take, for example, the Law of Succession wherein one finds the benefit of inventory (when a person dies and another person is called to his succession, the person called to succeed has the option to accept the inheritance with the benefit of inventory, and in legal terms this benefit of inventory means that the estate of the pre-deceased person is not mixed with and therefore kept separate from the patrimony of the successor), which is an exception to the second aforementioned rule. Naturally, different times and different developments in human life call for changes in the law and those changes may mark exceptions to the fundamental concepts without changing their importance as the basis for law.

The most important and practical consequence of the concept of patrimony is set out in article 1994 of the Civil Code which states that *"whosoever has bound himself personally, is obliged to fulfil his obligations with all his property, present and future"*. Therefore, the content of the person's patrimony is automatically the guarantee for his obligation in favour of his creditors.

Luca J. Camilleri IV

RIGHTS: REAL, PERSONAL, AND *PROPTER REM*

Real rights and personal rights are the two main categories with rights *propter rem* being a smaller, third category. We have seen how as much as a person has his personality in law, he has his patrimony which marks the capacity of the person, whether physical or legal, to have rights and obligations. We did not distinguish between things in the sense of tangible objects and rights because all go into the person's patrimony so long as they have an economic value. Take, for example, a plot of land, when one speaks of the land per se it is a tangible thing with its physical existence which can be seen, touched, etc. Consider now one's right as owner of the plot of land: one does not speak of the plot of land itself, but of one's entitlement and the benefit one has by reason of the existence of one's right of ownership over that plot of land. Thus, the plot of land is the tangible object, distinct from one's right of ownership which does not have a tangible existence which is a right with important economic consequences and therefore as such forms part of one's patrimony. This case creates different rights: one's right of ownership over a plot of land is a right but is different from one's right to receive a sum of money owed to one. This is what real rights and personal rights are all about. Both of them are rights and both of them go into a person's patrimony, but they are very different in their constituent elements, implications, and their consequences. Like in the case of patrimony we do not have any definition of real rights and personal rights in the Civil Code or in some other law of Civil relevance.

However, the terms 'real right' and 'personal right' figure multiple times in the Civil Code and even in other pieces of legislation therefore making it clear that the law not only conceives of these rights but also distinguishes between them in particular insofar as their consequences are concerned. In order to find an explanation of what 'real rights' and 'personal rights' are we have to turn to juristic writings. For real rights and personal rights, the explanation which two French writers give us in their collection on the different institutes of the French Civil Code, Baudry-Lacantinerie and Wahl are preferred. The two have written in the 19th century a very extensive treatise on the institutes of the French Civil Code. These two writers, in a very general way, distinguish between real rights and personal rights, both in terms of the nature of the right as well as with reference to on what the right exists. They characterise real rights, as set out in the Civil Code, as rights which exist directly over a thing (a tangible object) and are generally regulated in the law of property. They characterise personal rights as rights which exist against another person, these are generally regulated in the law of obligations. In legal terms the real right is defined by these authors as *"the juridical power which a person who is the holder of the right has to obtain an economic utility directly from a thing".* The legal phrase for the person who is the holder of the right is the *active subject.* In a real right relationship, the active subject enjoys an advantage which has financial relevance over a thing and in that sense the legal relationship in a real right is direct and immediate between the active subject - the holder - and the thing over which the right exists.

Real rights can be of two kinds under the Maltese Civil Code:

1. Principle real rights (also known as real rights of enjoyment), these are
    a. the right of ownership – see article 320 of the Civil Code,
    b. the right of usufruct – see article 328 of the Civil Code,
    c. the right of use – see article 392(1) of the Civil Code,

   d. the right of habitation – see article 393 of the Civil Code,
   e. the right of emphyteusis – see article 1494(1) of the Civil Code, and
   f. the predial easements – see article 400 of the Civil Code),
2. the real rights of security (also known as accessory real rights), these are guarantees and do not afford in themselves a right to enjoy but give a right of security directly over a thing,
   a. the right of hypothec – see article 2011 of the Civil Code,
   b. the right of privilege – see article 1999 of the Civil Code,
   c. the right of pledge – see article 1964(1) of the Civil Code, and
   d. the right of antichresis – see article 1987(1) of the Civil Code.

All rights in both categories are equally real rights which a person has directly over a thing.

Personal rights are described to be *"the juridical power which a person has to obtain an economic benefit from another person".* The person having the right is referred to the active subject and there is also the person against whom the right exists who is bound by the corresponding obligation, known as the passive subject. In a personal rights relationship, the economic benefit which the active subject has in virtue of the right can consist in either of three entitlements: either the doing of an act, or the giving of a thing, or even the not-doing of a thing. All three possibilities have to have an economic value for them to be the object of a personal right. Also, an obligation can be either unilateral or bilateral, wherein the latter there is reciprocity in the personal rights relationship, meaning that at one and the same time the persons involved are both active subject and passive subject (the classical example of a bilateral personal rights relationship is the promise of sale agreement, wherein one will find that after the parties are mentioned the very first paragraph would be that A binds himself to sell the property to B who binds himself to purchase it). Here there are three elements: the active subject (the creditor of the obligation), the passive subject (the debtor of the obligation), and the object of the right (an act).

If one were to compare both kinds of rights one would immediately identify the difference. A real right refers to a right directly over a thing, whereas when one speaks of a personal right, even the expression is different as one speaks of A being entitled to something from B, another person. The aforementioned French jurists mention that the real right can only exist over a tangible item of property, they also mentioned that such tangible item of property must be determinate. The real right is absolute and valid against everyone; because it is a right which exists over a thing - there is nothing in between - it is valid and effective against whoever may be holding the thing itself (*erga omnes*).

Finally, a real right attaches to the thing over which it exists and continues to follow that thing irrespective of who maybe exercising control over that thing at any particular time. The situation is completely different for personal rights where the object is not a tangible object but is the doing of an act, the not doing of an act, or the giving of a thing. Secondly, because of that the thing involved in a personal right may be indeterminate (may not yet have a physical existence). Thirdly the personal right is only relative, not absolute, and relative because it exists only against the passive subject. Fourthly, the personal right is not guaranteed by anything in particular and the only guarantee for a personal right is the

patrimony of the person who is the passive subject (see article 1994 of the Civil Code). See *Salvatore Farrugia v Giuseppe Farrugia* (Fist Hall - 4/09/1955).

Rights *propter rem* lie somewhere in between real rights and personal rights. They are not real rights in their nature and content, but they exist to support a real right; in particular, rights *propter rem* are mentioned in theory in connection with servitudes, easements, and condominiums. See *Mercury PLC v Persona Ltd* (First Hall – 10/09/2019).

THE CONCEPT OF THINGS & THE CLASSIFICATION OF THINGS WHICH WE HAVE IN OUR CIVIL CODE

We will be looking at provisions in our Civil Code, in particular **articles 307-319**. We have two headings: Part I, Title I of things and their different kinds. We are looking at Book II of the Civil Code. Article 307; moveable or immoveable property, '*all things which can be the subject of private or public ownership are either moveable or immoveable property*.' In Maltese, this provision reads, '*il-hwejjeg kollha lli jistghu jkunu l-ogett ta' propjeta pubblika jew privata huma beni mobli jew immobli.'* In this article, we have, so-to-speak, three pillars of the law of property introduced in one and the same provision. So, things (*hwejjeg*), property (*bine*), and ownership (*propjeta*).

Do the terms *"things"* and *"property"* refer to one and the same concept in the substance of the law of property? Of course, we refer to this law as the law of things or the law of property. However, in substantive law, are these two concepts one and the same concept? Do they mean the same thing? The answer is no, as explained precisely in **article 307**. The law, here, is distinguishing between things and property by reference to the real right of ownership. Because this article 307 forms a sub-group within the wider group of things by reference to ownership in the sense that only those things which can be privately or publicly owned are property. So, while 'things' in general refers to any object, any item which exists, only those items which can belong to the state, that is publicly owned, or belong to a person, that is privately owned, constitute items of property, and are therefore regulated by the law of property. In this sense, only those things which can give an economic utility (a benefit in the financial sense) fall within the definition of property and are therefore regulated by the rules which we will be discussing during these lectures. In Italian, things in general are referred to as *"cose"* whilst property is referred to as *"beni"*. In the French language things as *"l'chose"* whilst property is "*bines".*

The best explanation for what constitutes property is given in the Roman Digest and the definition is given by Alpien, *"bene eco che capace di arricare utlita agli uomini e di essere assoget e queste … kwalifikazzjone juridica".*

Property is that which is capable of giving a utility to the person and to be the subject of their authority, it is this characteristic of property and not its physical structure which determines this legal classification as property.

The French author Carbonnier from this provision, article 307, which was reflected precisely in the French civil code draws two conclusions:

1) Not all things are property precisely because only those things which can be publicly or privately owned constitute property,
2) Not all property are things. What Carbonnier understands by this conclusion is that not all items of property have a physical, tangible existence. So, property can consist of a tangible object, an object which has a physical existence and can be seen as such, but property can also consist in a right (the two biggest groups of rights are personal and real). Rights in themselves are also items of property and as such, the right itself has no visible, physical existence. but that does not mean it is not property, it can be equally an item of property if it can be publicly or privately owned.

In regard to public ownership, so, ownership in the general interest by the state as a representative of the generality, refer to **article 327** of the Civil Code and Act XXV of 2016, the Civil Code Amendments No. 3 Act of 2016, which introduced a new title in this part of the Civil Code, which is title IIA, this new title is called *"of property belonging to government"* and distinguished between public property and public domain.

Besides distinguishing between things and property, our Civil Code gives us a classification of property. So, in **article 307** we have the law introducing these three important pillars, things, property, and ownership. We are saying that property are those things which can be owned, publicly or privately. The law does not stop there. the law, for our ease and clarity of legal consequences, goes on to classify property in different groups. This idea of classification is not new to the Civil Code trend. So, it was not invented as an idea with the Civil Code because under Roman law, we already had several heads of classification of property, for example, *re incommercio* and *res extra commercium*, *res mancipi,* and *res nec mancipi*. The Civil Code did not adopt any of the Roman heads of classification. It took on the idea of classifying property but not the kind of classifications that we had under roman law. the civil code adopts a fresh head of classification, and it classifies property into moveable property and immoveable property. That classification is introduced straight away in article 307 itself.

The classification of movables and immovables is not merely academic. It is not just a question of knowing which items the law places under the heading of movables and which items are set as immovables. It is important to be able to distinguish between both categories because that classification has determining consequences on various aspects of regulation in regard to any particular item of property. We do not have a definition of immoveable property, but we have, in **article 312**, a definition of movables. So, article 312 says, "*all things animate or inanimate, which without any alteration of their substance can move themselves or be moved from one place to another are movables by nature".* First of all, we know what a moveable is, it is a living or non-living item of property which can move or be moved from one place to another. Therefore, by exclusion, immoveable property are those items of property which cannot move or be moved from one place to another because they are fixed to land. Secondly, article 312 mentions the phrase "*moveable by nature".* The law is making this qualification because besides the general classification of property into movables and immovables, each class is sub-divided into two further classifications, meaning property can be either an *immovable* (immovables by nature + immovables by reason of the object to which they refer) or a *movable* (movables by nature + movables by regulation of law).

"By nature" are classifications made by reference to the nature of the item of property, whether it can be physically moved or not. The other two sub-groups are classifications made by the law itself and therefore, we have to look at the relevant provisions to make out which are these items of property so classified.

Immovables (*propjetà immobli*) are regulated under **article 308** of the Civil Code. We do not have a definition of immovables, but we have a list of what are generally immovables by nature.

> **308.** *The things following are immovable by their nature:*
> (a) *lands and buildings;*
> (b) *springs of water;*
> (c) *conduits which serve for the conveyance of water in a tenement;*
> (d) *trees attached to the ground;*
> (e) *fruits of the earth or of trees, so long as they are not separated from the ground or plucked from the trees;*
> (f) *any movable thing annexed to a tenement permanently to remain incorporated therewith.*
>
> *Unless a different intention appears from the circumstances, such thing shall be deemed to be so annexed to a tenement if it is fastened thereto by any metal or cement, or if it is otherwise so affixed that it cannot be removed without being broken or damaged or without breaking or damaging the tenement.*

308(f): As long as it is moving or can be moved, it is a movable. When it is integrated in the ground or in a building, it automatically transforms to an immovable by nature.

The proviso: the distinguishing criterion in so far as items of property can be movable and immovable at the same time but in different circumstances. So, if this item of movable property is affixed to a building and cannot be removed without causing damage, then once it is so affixed, it becomes an item of immovable property.

Vide:

- *Victor Bonavia v. Cesarin Borg* (CA 15/03/1994)
- *Daniel Camilleri v. Kunsill Lokali Hamrun* (FH 12/10/2004) in this judgement, "*kemm il darba iċ-ċirkostanzi…ħsara tal-ħaġa infisa jew tal-fond*."

As a consequence, the things in mentioned in paragraphs (c)-(f) of article 308 once again become movables by nature as soon as they are separated from the ground, tree, or tenement, although they have not been removed elsewhere (article 309). See *Daniel Camilleri v. Kunsill Lokali ta' Hamrun* (FH 12/10/2004).

Immovables By Reason of the Object to Which They Refer

These are regulated by **article 310** of the Civil Code which reads as follows:

> **310.** *The following are immovables by reason of the object to which they refer:*
>
> (a) *the dominium directum or the right of the dominus on the tenement let out on emphyteusis, and the dominium utile or the right of the emphyteuta on such tenement;*
>
> (b) *the right of usufruct, or use of immovables and the right of habitation;*
>
> (c) *praedial easements;*
>
> (d) *actions for recovering or claiming any immovable thing or any of the rights mentioned in paragraphs (a), (b) and (c) of this article; or for a declaration that an immovable is not subject to any of such rights; or for claiming any inheritance or part thereof, or the reserved portion or any other portion of hereditary property given by law.*

Here we have incorporeal property, meaning non-tangible property. In paragraph (a) we find the different real rights arising from emphyteusis. In paragraph (b) we find the real rights arising from usufruct, use, and habitation. In paragraph (c) we find all predial easements (servitudes arising over land or buildings). All of these rights are real rights, and they are classified as immovables insofar as they exist only over immovables by nature. Paragraph (d) refers to what we call *real remedies,* those remedies in defence of these real rights, and by legal fiction also the remedies arising under the law of succession. The right to claim the reserved portion is also, by legal fiction, is also classified by an immovable by reason of the object to which they refer. These are rights that exist largely on immovables by nature, meaning by legal fiction they too are classified as immovables. This list of immovables by reason of the object to which they refer is not an exhaustive one. Therefore, an important instance of an immovable by reason of the object to which it refers which we have outside this article 310, and even outside the Civil Code, is the right to receive compensation from the State for land or buildings which have been expropriated. This right is expressly classified as an immovable by reason of the object to which it refers in article 54 of the Government Lands Act (Cap. 573 of the Laws of Malta).

Movable Property

Article 312 defines movable property as *"all things, animate or inanimate, which, without any alteration of their substance, can move themselves or be moved from one place to another are movable by nature, even though such things form a collection or a stock-in-trade".* In the case of movable by nature the law offers an explanation of the elements that must be satisfied for an item of property to be classified as a movable by nature. We also find provisions on particular movables by nature.

Article 313 mentions materials derived from a building which has been demolished and gathered for erecting a new building, with such materials being movables until they are used in a construction (in virtue of article 308(f)).

Article 314 then deals with vessels, stating that *"ships or other water-craft, baths or other floating structures are also movables"*; meaning whether they are self-propelling or otherwise they are classified by the law itself as movables.

Articles 318 and **319** are particularly relevant for the purposes of the law of succession. In the former we find an explanation of what furniture is, for the purposes of law, whilst the latter defines the phrase *"a house with all that it contains".* When a will is drafted where the testator has bequeathed furniture by particular title (when the testator leaves a particular item of property to a particular person, known as a *legacy*) this is what the law understands by the term *"furniture".*

Movables By Regulation of Law

Movables by regulation of law are listed in **article 315** and they are set out in three different paragraphs.

> **315.** *The following things are movables by regulation of law:*
> (a) *shares or interests in commercial or industrial companies, even if immovable property is owned by such companies; in which latter case such shares or interests shall be deemed to be movables with respect to each shareholder and only as long as the company lasts;*
> (b) *life or perpetual annuities, including capitals for annuities ad formam bullae and debts due for interest on capitals invested in the fund formerly existing under the name of Massa Frumentaria, provided such perpetual annuities, capitals and debts are not subject to entail;*
> (c) *generally, all obligations, actions, even if hypothecary, and rights not considered immovable under the provisions of the last preceding sub-title.*

With regards to a business concern which is not corporate – and therefore has no separate juridical personality – the court decided in *Anthony Debono noe v. Dr Grazio Mercieca noe* (Commercial Appeal – 28/07/1984) that a going concern has a separate existence from its constituent elements (not separate personality) and constitutes movable property.

The Importance of Classifications

It is important in practice to be able to determine whether an item of property is a movable or an immovable for various important practical consequences which make it absolutely necessary for the legal practitioner to be able to make this classification. The most important of these is that there is a completely different method for transferring movables and immovables. All movables and all immovables have a distinct and specific method for being validly transferred. Movables, unless the law specifically says otherwise (such as in the case of the transferring of motor vehicles and ships), can be validly transferred without any formality. For movables which have no law requiring a formality, none is required for their valid transfer. The situation is completely different for immovables wherein all immovables require the solemn form (the public deed) for their valid transfer and additionally require

registration (the registration of the public deed in the public registry, and where, applicable, the registration of said public deed in the Land Registry) for that transfer to be effective vis-à-vis third parties.

A second important difference involves acquisitive prescription – the mode of acquiring a right by exercising it for a period of time. In the case of movables, if a person is possessing a movable, he is immediately the owner of that movable unless there is proof to the contrary. For immovable property, acquisitive prescription requires a period of time to have passed, meaning the possession must continue for that period of time which varies from 10 to 30 years (see **articles 2140** and **2143** of the Civil Code).

Another such difference is that only immovables can be subject to hypothecs (a kind of guarantee). The only movable property which can be subject to a hypothec is a ship because the Merchant Shipping Act (Cap. 234 of the Laws of Malta) expressly provides for this situation.

The final difference arises in Private International Law – that branch of the law which regulates any transaction with cross-border elements. It is a universal rule of PIL that immovable property, irrespective of where it is situated and who its owner is, is regulated by *lex situs,* the law of the place where the immovable property is situated. For movables the situation is different – the law regulating movables can vary from the law of the domicile of the owner or possessor to the law of his habitual residence.

There are other classifications not mentioned in the Civil Code but are instead found in the writings of Continental jurists. The French author Carbonierre gives us two other heads of classifications relevant to Civil Law:

1. **The Distinction between Consumable and Non-Consumable property:** The former is that property consumed by use, whereas the latter are those items of property which withstand their repeated use without losing their nature or essential characteristics. This distinction is necessary for the purposes of considering the contract of loan.
2. **The Distinction between Fungible and Non-Fungible property:** This distinction is drawn on the physical consideration of the property. The former refers to those items of property that are exchangeable and easily replaceable by things of the same kind and value, whilst the latter refers to those items of property which have an individual existence and an individual character and therefore cannot be replaced by other objects of the same kind. This distinction is relevant for the purposes of set-off (a mode of extinguishing an obligations). For an obligation to be set-off against another there must be fungibility of the item which is the subject of the obligation.

The French authors Baudry-Lacantinerie and Wahl distinguished property under two other classifications:

1. **The distinction between Principal and Accessory items of property:** The former are those items of property which have an independent existence, whilst the latter are those items of property which exist only in relation and are subordinate to principal things (what in civil law we call “fruits”).

2. **The distinction between Particular items of property and a Universality of property:** The former has an individual existence whilst the latter is tied to its collective nature (meaning it is made up of more than one unit and between the multiple units there is some common element).

The Italian jurist Torrente further distinguishes between divisible things and indivisible things. It is not a question of whether the object can be simply physically divided. The item must be able to be physically divided with the divided sections preserving their economic worth. This is relevant for the purposes of co-ownership. He also distinguished between present items of property, which are those already in existence, and future property, which are those items of property which have not yet come into existence. This distinguishes ownership (a deed of sale) and the promise to transfer ownership (a promise of sale).

THE RIGHT OF OWNERSHIP

This a very important part of the Law of Property. The right of ownership is a content of our patrimony, it is a real right, and it can exist over movable and immovable property alike. The right of ownership is defined in **article 320** of the Civil Code which states that *"ownership is the right of enjoying and disposing of things in the most absolute manner, provided no use thereof is made which is prohibited by law".* It is worth noting that this provision has never been amended and retains its originality since the Ordinances were first compiled into the Civil Code. This provision replicated article 544 of the *Code Napoleon* and also article 436 of the old Italian Civil Code of 1865. This provision was virtually the definition of the right of ownership which Napoleon came up with. This provision is composed of two parts:

1. **The positive part - *ownership is the right of enjoying and disposing of things in the most absolute manner*:** The right of ownership is so important because it is the most extensive, complete, right over property. It gives extensive benefits and advantages to the person who has the right. The owner is entitled to enjoy the item of property which he owns, to transfer (*dispose*) this property, and in the most absolute manner. When we speak of ownership under Roman Law, we have three benefits:

a. The right to use the item of property,
b. The right to take the fruits produced by the item of property (in Roman Law we speak of *civil fruits* which are whatever profits which can be gained from the item of property),
c. The right to destroy/dispose of (in both a legal and physical sense) the item of property.

These are the benefits which the right of ownership vests in the owner and they apply in favour of the owner irrespective of the nature of the item of property which he owns. In the most absolute manner, the Law frames this advantageous limb of the definition of the right of property with the words *in the most absolute manner* because the right of ownership carries with it the right to exclude others from taking any one or more of these advantages out of an item of property which a person owns. Thus, the law gives the owner the remedies necessary to protect the advantages of his ownership by excluding others, these include judicial actions. These remedies include the right of the owner to mark the boundaries of his immovable property. Ownership is absolute and exclusive but also perpetual. That is to say the owner is entitled not to use his property whilst being able to retain his right of ownership merely through non-use. The right of ownership is not extinguished by time but is perpetual in nature. The aspect of exclusivity and perpetuity do not come out of the definition under article 320, but instead have been developed by jurists on the basis of the provisions which we find in the other parts of the Law of Property explaining the characteristics of ownership. Ownership is an absolute, exclusive, real, and perpetual right over property. The absolute nature of the right of property does not mean there are no limitations on its use.

2. **The negative part - *provided no use thereof is made which is prohibited by law*:** All the benefits which the owner has in virtue of his right of ownership over the property which he owns are subject to not being prohibited by law. This is the crucial restriction for the right of ownership. Here we have to distinguish between two branches of the law: public and private law. The reference to law in article 320 covers both because there are both public law rules and private law rules which can effectively restrict the rights of the owner to enjoy and take the benefit of his property.
    a. **The public rules:** There are various public law rules which restrict the enjoyment of the right of property and in general they are all rules of administrative law nature which are enacted and designed to protect the general good, the stability of the generality, and the good functioning of the institutions operating within the State. Take, for example, environmental and planning legislation, and trading licenses legislation. If the owner can do whatever he likes with his property, then he can build whatever he likes on his tenement, excavate as much as likes below it, and use it as he pleases without obtaining any licenses from authorities. If this were the case it would be anarchy and the State, in order to preserve good order and to protect the general interest of all the people living within it, sets out rules on planning and on trading licenses and permits.
    b. **The private rules:** Private law rules normally come out of private laws, principally the Civil Code, and they are rules which restrict the exercise of

> ownership in the interest of particular people in particular circumstances. Take, for example, in the case of easements, in the interest of neighbours. These are more specific than public law rules and the purposes behind them are in the interest of particular persons in particular circumstances. The law of predial easements is the key example in this regard. The law which can restrict the powers and the benefits which the owner has in virtue of his right of ownership is both under public and private law insofar as the provisions limit the freedom of the owner to do whatever he likes with his property then there are limitations to the right of ownership in the form of legal provisions.

Do the imitations of ownership only come out of these private rules, public rules, contracts, etc.? Jurists point to another important limitation to the exercise of ownership, what they call the abuse of rights theory. This theory refers to the clash of exercise of ownership by different owners in regard to their respective property. This theory points to the clash between the exercise of ownership by the different owners in regard to the respective property. Take, for example, two adjoining terraced houses where one lives and owns in one. Said owner is precluded from making loud noises during the night, prohibiting the adjoining owner from enjoying his rights. The limit to enjoying one's property is that he cannot do anything that would preclude any other owner from enjoying the rights of his respective property. It turns into abuse when one exceeds the proper limits of the exercise of one's right to ownership. There is no express provision in Maltese law setting out this abuse of rights theory, but the courts have consistently applied this theory and they base the adoption of this theory on **article 1030** of the Civil Code, a provision in the law of obligations. Article states that *"any person who makes use, within the proper limits, of a right competent to him, shall not be liable for any damage which may result therefrom".* In practice, the courts establish the proper limits of use in a particular scenario when faced with such an action. It is an exercise which the court conducts on a case-by-case basis depending on the evidence of the inconvenience produced and on the overall particular circumstances of the case. In *Bugeja v Washington* (FH 5/5/1897) the Court says that *"the right of the owner to make use of his tenement as he wishes and to make the changes which he deems convenient stops where it causes grave inconvenience to the neighbour".* This grave inconvenience is the terminology used to deem the property as having been used beyond the proper limits. Generally, the court appoints a technical referee, but it would determine whether in the particular case there is a gross inconvenience, as opposed to a tolerable one.

The consequences of the three attributes to the real right of ownership

Articles 321-326 of the Civil Code set out the consequences in practice of the absolute, exclusive, and perpetual nature of ownership. **Article 321** states that *"no person can be compelled to give up his property or to permit any other person to make use of it, except for a public purpose, and upon payment of a fair compensation".* This provision has been part of the law since the original enactment of the Ordinances making up the Code. In actual fact, the content of this provision has subsequently been elevated to a fundamental human right and is now enshrined in article 37 of the Constitution and, to a wider extent, in article 1 of the first protocol to the European Convention on Human Rights and Fundamental Freedoms which is included in Cap. 319 of the Laws of Malta. Over 100 years before the enactment of the Maltese Constitution and the inclusion in Maltese Law of the ECHR, in Maltese Law there already was a prohibition of the taking by the State of private property except to serve a public

purpose and upon the payment of fair compensation. Over time this area of the law has expanded continuously. Cap. 88 of the Laws of Malta regulates expropriation has since been abrogated, and expropriation is now regulated under Cap. 573 of the Laws of Malta. In short, that law regulates, very strictly, the circumstances in which the State can take the right of ownership over property from private individuals, as well as the manner in which compensation is to be paid when there is a forced taking by the State of the right of ownership over property pertaining to private individuals. We have a history of the State taking private property without paying compensation as well as of the State taking private property and the private owner not having any way to contest the alleged public purpose or the compensation offered. Over time and following the instigation of the judgements of the ECoHR we have a detailed procedure that the State must follow to ensure that private property is not taken away from the private owner except for a purpose which serves the general good and upon the immediate payment of adequate compensation. See:

- *Perit Duminku Mintoff et v Prim Ministru et*
- *Paulu Cachia v Kummissarju tal-Art et*
- *Francis Bezzina Wettinger et v Kummissarju tal-Art*
- *Gerald Montanaro Gauci et v Kummissarju tal-Art*
- *John Caruana et v Kummissarju tal-Art*

This right of the person having the right of ownership not to be deprived of his right of ownership over property except for a public purpose and upon the payment of a fair compensation points to the absolute and exclusive characteristics of the right of ownership and shows us that there are limitations to the right of ownership. Where a public purpose exists the State can by exception take away the right of ownership even against the will of the owner. Otherwise, no one can deprive the owner from his right of ownership over property because the right of ownership is generally absolute and exclusive.

Article 322 states that "(1) *Save as otherwise provided by law, the owner of a thing has the right to recover it from any possessor.* (2) *A possessor who, after being notified of the judicial demand for the recovery of the thing ceases of his own act, to possess such thing, is bound, at his own expense, to regain possession of the thing for the plaintiff, or, if unable to do so, to make good its value, unless the plaintiff elects to proceed against the actual possessor".* This provision states that the owner of the thing has the right to reclaim it from any possessor. The remedy mentioned in sub-article (2) is the *actio rei vindicatoria.* Here we have an expression for the substantive right of the owner to exclude any third party from enjoying, taking a benefit, possessing, or otherwise exercising control over that owner's property against the will of the owner or without the owner's consent. That substantive right, which is an expression of the exclusivity of the right of ownership, is enforced through a very important remedy in the law of property which is the *actio rei vindicatoria.* It is the action through which, in the courts, the owner can reclaim his property if a third party has taken control of it against the owner's consent. This points to the characteristic of exclusivity insofar as the right of ownership is concerned.

The third consequence of these three characteristics of the right of ownership is vested in **article 323** (the presumption of vertical ownership) which states that *"whosoever has the ownership of the land, has also that of the space above it, and of everything on or over or under the surface; he may make upon his land any construction or plantation, and, under it,*

any work or excavation, and draw therefrom any products which they may yield, saving, however, the provisions relating to Praedial Easements under Title IV of Part I of Book Second of this Code and any other provision of law in regard to fortifications or other works of defence". This provision contains a presumption that the owner of land, therefore the owner of immovable property, owns also whatever lies above his immovable property and whatever lies below said immovable property. This presumption is not an absolute one but is instead rebuttable (*juris et de jure*); that is to say, this presumption of vertical ownership is a rebuttable *juris tantum* presumption meaning it can be rebutted by proof to the contrary, meaning until proven otherwise, the owner enjoys the right to not have to proof his right of ownership over that above or below his immovable property. This presumption applies also to any construction, development, improvement which may have been carried out in the airspace of and/or underground below the immovable property. In the case of *Angelika Deguara v Giuseppe Gauci* (FH 12/03/1883) the Court held that whoever owns the land is presumed to own also whatever lies above and whatever lies below up to unlimited height and depth. See also *Andrea Magri v Emmanuele Mifsud* (Court of Appeal 1/03/1984), *Mark Schembri & Associates Ltd v Daniel Vella et* (Court of Appeal 11/11/2011), *Anthony Falzon v Saviour Aquilina et* (Court of Appeal 18/07/2017), and *Carmelo Zammit et Paola Tabone et* (Court of Appeal 12/02/2018).

A consequence of this presumption of ownership is what is expressed in article 324 which states *"any construction, plantation, or work, whether on or over or under the land, shall, unless the contrary is proved, be deemed to have been made by the owner at his own expense, and to belong to him, without prejudice, however, to the rights which third parties may have acquired".* An extension of the virtual presumption of ownership is this presumption of ownership of accessories, that is to say any improvements which may have been carried out over or under the immovable property itself. Article 1234 stipulates what follows from a legal presumption, stating that *"any person having in his favour a presumption established by law, shall be exempted from any proof as to the fact forming the subject-matter of the presumption".*

Insofar as **article 324** is concerned, see *Grazju Spiteri v Catherine Baldacchino* (Court of Appeal 9/2/2001) and *Mary Spiteri et v Mario Mifsud et* (FH 20/05/2016). In practice this presumption of ownership over accessories is very often debated in separation proceedings because in such proceedings we often have a scenario where an immovable property is constructed on paraphernal property (land belonging exclusively to only one of the spouses). The question arises as to whether if that spouse only acquired that land paraphernally and the development of the land had been paid for from the community of acquests, who is the owner of the resulting tenement? This is where this presumption is important because in the absence of proof to the contrary the spouse who owned the land is presumed rebuttably as the exclusive owner also of all the development that took place over and under the land.

Articles 325 and **326** state *"every owner may compel his neighbour to fix, at joint expense, by visible and permanent marks, the boundaries of their adjoining tenements"* and *"every owner may enclose his tenement, saving any right of easement to which other parties may be entitled"* respectively. These two provisions give effect to the exclusivity aspect to the right of ownership and vest the owner of immovable property with the right to enclose the tenement belonging to that owner. Therefore, the owner is entitled to exclude any third party

from having or exercising access to his tenement against the owner's will or without the owner's consent. Article 325 expressly uses the word *compel* meaning it is not just a question of inviting the owner of the neighbouring tenement to put up a wall to separate one's tenement from the adjoining one, but the owner can enforce his right to mark the extent and boundaries of his tenement by permanent means even against the will of the owner of the neighbouring tenement. There is therefore a corresponding judicial remedy through which this substantive right can be enforced. In the same manner as we have no reference in the Civil Code to the remedy which the owner has to exclude third parties from enjoying his tenement, the *actio rei vindicatoria,* here again we have no express mention of the remedy which is given to the owner of a tenement to establish the boundaries between his tenement and the adjoining tenement. Also, in the same way, the remedy here is a Roman Law remedy which has been asserted by the Maltese courts to still form part of Maltese Law and to still benefit the owner of an immovable property. It is a remedy which falls under the same category of actions as the *actio rei vindicatoria,* meaning actions in defence of title, and it is called the *actio finium regundorum,* preserving completely its Latin name as existing under Roman Law, the *actio finium regundorum,* like the *actio rei vindicatoria* is a remedy in defence of title. It is that remedy which is to be followed in order to enforce these two substantive rights set out in articles 325 and 326, that is, the right to establish the boundary line between adjoining tenements and to mark that boundary line by permanent and visible marks through which the owner encloses his tenement. The wall which is normally built to mark by visible and permanent means the boundary line between adjoining tenements is called the party-wall (*hajt tal-appogg*, in layman's terms, dividing wall/*hajt divisorju* in legal terms). Therefore, we have considered the right of ownership beng an absolute, exclusive, and perpetual right and to a very large extent we have considered the extensive benefits and advantages which vest in the owner by reason of his having this real right of ownership.

In the law of property, we speak about the actual exercise of control over property (possession) as if whoever exercises control is the owner, and then we speak about title (the right). It is not a question of the person exercising control as if he were the owner, but the person who the owner with the right of ownership is. This applies in relation with all other real rights. There are two classes of action: those to protect the object's possession and those to protect the object's title.

Luca J. Camilleri IV

PETITORY ACTIONS

Actio rei vindicatoria

The actio rei vindicatoria is an action which derives from Roman Law. Indeed, it preserves its Roman Law name, and, to a large extent, it also preserves its Roman Law understanding and requirements. With that being said, it does not expressly feature as an action or as a name in our Civil Code or anywhere in our Civil Law. So, it is not expressly conceived and regulated in our law and yet, it has been affirmed to be the most important remedy available to this day under Maltese law in the case of an owner who has been deprived of control and enjoyment of his property against his will or without his consent.

The classical factual example in which this action can be exercised would be a squatter who refuses to give up control of that land. That action would be exercised to enforce the substantive right which we have stipulated in **article 322** of the Civil Code, which reads as follows:

> **322.** (1) *Save as otherwise provided by law, the owner of a thing has the right to recover it from any possessor.*
>
> (2) *A possessor who, after being notified of the judicial demand for the recovery of the thing ceases of his own act, to possess such thing, is bound, at his own expense, to regain possession of the thing for the plaintiff, or, if unable to do so, to make good its value, unless the plaintiff elects to proceed against the actual possessor.*

The right of action which is there to enforce this substantive right is the actio rei vindicatoria. It is the action to take back/reclaim what is mine from any unlawful or unauthorised possessor; *rivendica*.

What is the purpose of the actio rei vindicatoria?

In the Italian texts, this action is also referred to as *'azione di rivendicazione.'* Indeed, the object for which plaintiff pursues an actio rei vindicatoria is to obtain a judicial declaration (a declaration from the Court), that the property forming the merits of the action, that is the property, which is being reclaimed in the action, actually belongs to plaintiff by title of full ownership. That is the purpose of this action. So, the plaintiff demands the Court to declare that this property forming the merits of the action, be it an immovable or movable property, belongs by title of full ownership to plaintiff.

Against whom is the actio rei vindicatoria pursued? Who is the defendant?

The actio rei vindicatoria has to be filed against the person/s actually exercising control over the reclaimed property without the consent of plaintiff at the time of filing of the action. So, when I am asked to file an actio rei vindicatoria, I need to know who the person actually exercising control at the time of filing of the action over the property which is being reclaimed is. This sets the scene of who are the players in this action and what is the purpose behind this action.

Requirements of the action

Once this action is filed, how does it move on? What are the requirements for the actio rei vindicatoria to succeed? What must plaintiff prove in order to manage to obtain the declaration of ownership over the reclaimed property which he is seeking by this action? A basic rule of procedure is set out in **article 562** of the COCP, which states that *"Interdiction or incapacitation shall be revoked, when the cause of the interdiction or incapacitation shall cease to exist".*

This provision stipulates a basic rule in the law of Civil Procedure which states that the burden of proving a fact rests on the party alleging it, *'min jallega rrid jipprova',* because the burden of proving allegations of fact rests on whoever is making the allegation.

Requirements –

1. Plaintiff legitimately acquired the property;
2. Defendant is in possession of it.

In an *actio rei vindicatoria*, given that plaintiff is alleging that he is the owner of the reclaimed property, and that defendant is exercising control over it without any right, what is expected of plaintiff in order to succeed in this action? He is the party alleging therefore, he must prove.

He must prove –

1. His title of ownership over the reclaimed property and
2. Defendant/s are exercising control over the reclaimed property without any right or title.

These are the two elements of fact which plaintiff must prove in an actio rei vindicatoria for his action to be successful. Moreover, in Civil procedure, the level of proof that has to be reached is the balance of probabilities. The balance of probabilities means 'more likely than not', *'aktar iva milli le.'* In the actio rei vindicatoria, plaintiff must present evidence which convinces the Court that *'aktar iva milli le'*, he is the exclusive, rightful owner of the reclaimed property, and that defendant is exercising control over that reclaimed property without any entitlement.

Unfortunately for the plaintiff in this action, article 525(1) of the Civil Code lays down a juris tantum (a rebuttable) presumption that whoever exercises control as if he were the owner over property is its rightful owner. **Article 525** states that:

> **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.*
>
> (2) *Where a person has commenced his possession in the name of another person, he shall be presumed always to possess upon the same title unless the contrary be proved.*

So, this presumption of ownership is in favour of the person who is possessing property. Generally speaking, unless it is proved that defendant has started possessing on behalf of another person, the possessor, even if he is in bad faith, is presumed to be the rightful owner of the reclaimed property by virtue of his exercise of possession at the time of filing of the action and that presumption holds good until the contrary is proven.

So, the defendant in this action benefits from this presumption whereby it falls exclusively on plaintiff to present evidence which can be documentary evidence or viva voce evidence to convince the Court that, on a balance of probabilities, he is the rightful owner of the reclaimed property and in that way, he would be rebutting the presumption which article 525(1) lays down in favour of the possessor. If plaintiff does not manage to prove on a balance of probabilities that he has a better title of ownership than is being presumed in favour of defendant by virtue of this presumption, the actio rei vindicatoria will fail & the presumption will hold.

The defendant can stay silent and do nothing until this is proven since he is presumed to be the owner by virtue of his possession of the reclaimed property in terms of article 525(1). In virtue of article 1234 of the Civil Code[1], that presumption gives the defendant the benefit of not having to prove anything unless and until that presumption is rebutted.

In the classical understanding of the *actio rei vindicatoria* under Roman Law, plaintiff is expected to prove an original title of ownership. Given that plaintiff is the person instituting the action and given that plaintiff is alleging in this action that he is the rightful owner having a good title of ownership over the reclaimed property, then it is up to him to satisfy the Court that he truly has that right of ownership.

The kind of proof of title of ownership which is required of plaintiff in an *actio rei vindicatoria* for his action to succeed: given that plaintiff is the person initiating the action and that he is alleging that he is the rightful owner having a good title of ownership over the reclaimed property then it is up to him to satisfy the court that he truly has that right of ownership. He is expected to prove his title of ownership through either of two kinds of title of ownership:

1. **A derivative title:** A title of ownership which is derived from a third party transferring his right of ownership. Because a derivative title is a title which passes by a contract or by succession from one person (the transferor) to another (the transferee), if there was any defect whatsoever in the title of the transferer that detail is transferred to the transferee. Therefore, the derivative title is deemed to be a less good a title than the original title.
2. **An absolute title (an original title):** An original title of ownership is a title of ownership which is acquired or consolidated by the titleholder in his own right through 30-year acquisitive prescription and which is not derived from another person. The acquisitive prescription of 30 years, or 40 years in the case of ecclesiastical property, gives an original title because by virtue of acquisitive prescription one acquires in one's own right. There is no requirement of good faith and no title, contract, deed, etc. is required except the individual's having exclusive enjoyment of the property for more

[1] **1234.** *Any person having in his favour a presumption established by law, shall be exempted from any proof as to the fact forming the subject-matter of the presumption.*

than 30 years without any interruption, difficulty, impediment, etc. by the previous owner. This is the strongest kind of title which can be proved because it is defect-less.

Note, that there has been a change in the line of judgements in 2018. Under Roman Law the *actio rei vindicatoria* could only succeed if plaintiff proved an original title of ownership. Under Roman Law they devised a variant of the action known as the *actio publiciana,* as a response to the difficulty in proving the *actio rei vindicatoria,* which could succeed if plaintiff proved that he had a stronger title of ownership than that of the defendant. The level of proof required of plaintiff was thus a lower one. The outcome under Roman Law of the latter *actio* was not a declaration of ownership *erga omnes* but *inter partes.* The modern position under Maltese Law is the result of changes in jurisprudence taking place over decades. Initially, the Maltese courts stuck to Roman Law, saying that the *actio rei vindicatoria* can only succeed if plaintiff proves an original title and if plaintiff does not prove an original title, then the action is considered as an *actio publiciana* and the court will move on to see whether plaintiff managed to prove a better title. Initially, the courts resisted admitting of the *actio publiciana* as a complete variant to the *actio rei vindicatoria* and they insisted on the proving of an original title of ownership. Over time, this position was tempered and up until October 2018 the courts used to immediately shift from *actio rei vindicatoria* to *actio publiciana.* Under the Maltese law of procedure, a judgment is binding only to the parties involved, so the declaration of ownership *erga omnes* which the Romans had under the *actio rei vindicatoria* is not possible under the law of procedure, another reason why over time the courts started identifying the *actio rei vindicatoria* and the *actio publiciana* as almost one and the same action. That position was once again changed, going back more towards the original Roman Law position in the judgement *Richard England et v Joseph Muscat et* (App 29/09/2018). Here, the Court noted that even if for the past decades there have been many judgements saying that the two *actios* are more or less one and the same action and where plaintiff fails to prove an original title he can just pass on to prove a better title than that of the defendant, that is not the correct position and the *actio publiciana* and the comparison of titles can only occur when both parties claim to have derived their titles from the same previous owner. Where this is not the situation the plaintiff must prove an original title to succeed in the *actio rei vindicatoria.*

The Courts explain what a "better title" with reference to the explanation given by the French jurists Baudry-Lacantinerie and Wahl who give three practical scenarios:

1. **Where plaintiff proves a title and defendant does not bring any evidence whatsoever of a title and relies completely on the presumption of ownership set out in article 525 of the Civil Code:** If plaintiff proves that his acquisition of ownership is by virtue of a title which precedes the date on which the defendant took control of the reclaimed property, then that title would be a better title than that of the defendant because as a matter of time the presumption of ownership starts from the moment of his starting to possess the reclaimed property.
2. **Where both plaintiff and defendant prove a title, meaning that both plaintiff and defendant claim to have acquired the right of ownership over the reclaimed property from the same previous owner:** This usually involves either fraud or error. What matters in this scenario is the date when the deed of transfer is registered in the public registry and, where applicable, in the land registry. The determining factor in

this scenario is the date because in the case of immovables the date from which the transfer of ownership is effective in regard to third parties is the date from which the deed of transferred is registered in the public registry and, where applicable, the land registry. Besides presenting the deed of transfer, plaintiff and defendant must also prove when that deed of transfer was duly registered.

3. **Where neither plaintiff nor defendant prove a title:** In this scenario, we have two fundamental rules: firstly, the burden of proof lies on whoever alleges, and secondly defendant already has a presumption of title in favour by virtue of his possession. If neither prove anything, the defendant will continue to benefit from the presumption of ownership and the plaintiff would have failed to rebut said presumption.

See the following judgements:

1. *Michele Attard noe v Felice Fenech* (28/4/1875 - VII.390)
2. *Aloysio Fenech et v Francesco Debono* (FH 14/5/1935 – XXI.2.488)
3. *Alfred Copperstone v Francesco Grech et* (FH 14/12/1951)
4. *Giuseppe Buhagair v Giuseppe Borg et* (App 17/11/1958)
5. *Carmelo Mercieca v Emmanuele Sant* (App 6/7/1968)
6. *Grazio Vella v John Buhagiar* (App 26/5/1988)
7. *Nazzareno James et v Mario Montesin et* (FH 27/3/2001)

More liberal approach (proof of better title is enough)

- *John Vella v Sherlock Camilleri* (App 12/12/2002)
- *Anna Cassar v Carmela Stafrace* (App 27/2/2003)
- *Emmanuel Agius et v Charles Mifsud et* (App 3/4/2009)
- *Tabib John Cassar et v Oliver Ruggier* (App 26/3/2010)

In October 2018 we have the case of *Perit Richard England v. Joseph Muscat et* where the court realigned the understandings of the *Actio rei Vindicatoria* and the *Actio Publiciana* to those of their original Roman Law iterations. This line of thinking was followed in *John Borg et v. Joseph Farrugia et* (App 28/2/2021) and *Francis Manduca Azzopardi prop noe v. Pauline Cassar Galea et* (App 28/4/2021).

The prescriptive period for filing an *actio rei vindicatoria*

Under the law of procedure any judicial remedy has a timeframe, that means the time during which the action can be pursued. Under Maltese law it is not a question of one having the right and thus one can wait forever to enforce said right. Every action has its own maximum time for filing, known as extinctive prescription. We have the extinctive prescriptions which are short and those which are longer. **Article 2143** of the Civil Code states that *"all actions, whether real, personal, or mixed, are barred by the lapse of thirty years, and no opposition to the benefit of limitation may be made on the ground of the absence of title or good faith".* Real insofar as the remedies are in defence of a real right, personal insofar as the action is in defence of a personal right, and mixed are those actions directed at protecting both real and personal rights. This provision makes it clear that the legislator wanted to exclude no action from the scope of this 30-year extinctive prescription. Besides stating in the clearest manner *"all actions",* it is making that doubly clear by including in the scope of this provisions all possible remedies, whether real or personal. Any action which is not expressly listed in the provisions of the short prescriptive periods is subject to this residual prescription of thirty

years. Given that there is no express exclusion for either *actio,* the intention of the legislator was that the pursuit of both actions, as real actions, would be barred for an extinctive prescriptive period of thirty years. However, the Courts have persistently and constantly said the opposite, that is, the *actio rei vindicatoria* is not barred by any extinctive prescription. The Courts argue that because the right of ownership is perpetual in nature and because it is not lost by mere non-use or non-enjoyment, then the remedy in defence of the right of ownership is also perpetually available. See the following judgements:

- *Maria Cassar et v. Dr G. Mamo Trevisan et* (Court of Appeal, 4/12/1870): Basing itself on French doctrine, the Court of Appeal insists that the *actio rei vindicatoria* is *impresscrittibile,*
- *Dr Carmel Apap Bologna Sciberras Damico Inquanez v. Emmanuel Sammut* (FH, 28/5/2003),
- *Charles Grima et v. Joseph Spagnol* (Court of Appeal, 28/4/2017).

The consequences of a successful *actio*

If plaintiff manages to have his demands upheld by the court in the *actio rei vindicatoria,* it is declared that he has the right of ownership over the item of property controlled by the defendant. The Court will order the defendant to give up that item of property and return it to plaintiff with all its fruits and accessories (any improvement on the property carried out by its previous possessor).

Although at first glance and in theory this may appear simple and straightforward, in actual fact this may be problematic. Firstly, there may be a defendant who, despite having lost the *actio* and received an order to give up the property refuses to do so. Also, substantively, the enforcement of a judgement in favour of plaintiff in an *actio rei vindicatoria* may be very complicated. Take, for example, an *actio rei vindicatoria* referable to a parcel of land which has been integrated by defendant into his own building. It is for this reason that it is so important to be careful when drafting the judicial act to file an *actio rei vindicatoria.* In this case the court has to be petitioned to grant plaintiff the right to carry out any necessary construction and demolition works to carry out the necessary separation of property under the supervision of a court-appointed architect. This represents the very far outreach of the *actio rei vindicatoria* which, if successful, gives the rightful owner the actual entitlement to take back whatever is declared to pertain to him, irrespective of the nature of the structure at the time of conclusion of the *actio*.

The *Actio Rei Vindicatoria* vs the Action for a Declaration of Ownership

Take, for example, a person who has been in continuous and exclusive possession of a piece of agricultural land for 40 years with that person's parents being in possession of it before him. No rent was ever paid as the land was abandoned once its original owners emigrated and no one ever claimed title or right over the land besides the person who has now decided to sell it. Documentary-wise, the person has nothing to show for their ownership, no deed, registration, *causa mortis,* or otherwise. In practice, in such a scenario, it may be difficult to sell for a number of reasons: firstly, today's values are high, and it is difficult to find a buyer who would purchase solely on the owner's declarations of undisturbed enjoyment, and secondly because no commercial bank would be willing to give a loan on such land. This is not a case where the owner can file an *actio rei vindicatoria* because they are already in

possession of the land, meaning they cannot achieve a judicial declaration of ownership through that avenue of approach.

For this scenario, the Courts have admitted of a different action, the action for a declaration of the right of ownership, *l-azzjoni dikjaratorja ta' proprjetà.* This would give the owner the benefit of obtaining a judicial declaration of ownership in regard to the item of property which he possesses without having any documentary evidence to show and which he would have acquired by acquisitive prescription. Normally, this action would be filed against unknown third parties who are represented by curators. The third parties would normally have been those previous owners from the past that would have abandoned the property in the first place. If granted, the Court shall grant a judicial declaration of ownership. See the following cases:

- *Stella Rapa et v. John Meli Portelli* (Court of Appeal) (18/02/2016),
- *Emmanuel Farrugia et v. Mary Doris Venezzjani* (Court of Appeal) (30/09/2016),
- *Peter Borg et v. Dr Christopher Chircop et noe* (FH) (30/01/2020).

Possessory Actions and the *Actio Finium Regundorum*

As is the case for the *actio rei vindicatoria* there is no express mention of this action under Maltese Law. In the same way as the *actio rei vindicatoria* is the right of the owners to enforce article 322, the *actio finium regundorum* is the right of action which the Maltese courts have admitted in protection of the substantive rights stipulated in articles 325 and 326. Also, in the same manner as the *actio rei vindicatoria,* the *actio finium regundorum* has existed under Roman Law and was passed down by the *ius commune.* This action is to determine, fix, and set the boundaries of an immovable property. Its purpose is for the court to establish the boundary line (*linja tal-konfini*) between adjoining tenements where those boundaries are as yet unknown or uncertain. This permanent mark has either never been made and there is contestation where it should be made, or it has been made and there is contestation where it should actually lie. The Court is asked to determine where the boundary line should be marked and to order that there are fixed and permanent ways with which the boundary line is marked onsite, typically with a wall.

This *actio* is an action between owners, that is to say the plaintiff and the defendant must be the owners of the respective adjoining tenements between which the boundary line is to be determined. The party filing the *actio finium regundorum* must be the owner of one of the adjoining tenements where the boundary line is to be determined and he must file the action against the owner of the adjoining tenements with which there is the boundary dispute. Irrespective of who is enjoying the tenement's use, the *actio* can only be filed by its owner if it were to succeed.

Here, it is not a question of plaintiff proving his title of ownership by an original title. For this *actio* the normal rules of procedure apply, meaning that the burden of proving the facts which plaintiff alleges fall on plaintiff (article 562 of the COCP) and the burden of proving whatever the defendant alleges falls on the defendant. Proof of a derivative title (a title of ownership which has been derived from another person) is enough for the purposes of this *actio.* Plaintiff can succeed if he provides proof on a basis of the balance of probabilities that he is the owner of one of the two tenements to be separated by the boundary line which the court is asked to fit and in the same manner he must prove that the defendant is the owner of the adjoining

tenement. What will decide the matter is a comparison of the respective titles which will allow the court to decide on the boundary line between the two tenements. The Court will appoint an architect as a judicial referee to give a technical opinion to the court and normally the court will rely on the technical opinion of its judicial referee. See the following judgements:

- *Marquisa Beatrice Cremona Barbaro v. John Polidano* (FH) (03/02/2005)
- *Champalin Co. Ltd. v. Emmanuel Debono et* (FH) (01/03/2004)
- *Victor Mangion v. Raphael Aquilina et* (Court of Appeal) (30/04/2009)
- *Francesca Debattista v. Antonio Grech* (Court of Appeal) (23/04/1951): If the boundary has been set and there is contestation on the location of that setting than the available remedy is not the *actio finium regundorum.*
- *Carmelo Wismayer noe et v. Carmela Dalli et* (Court of Appeal) (03/02/2009)
- *Michael Farrugia et v. Joseph Cassar et* (Court of Appeal) (28/02/2014)

If the boundaries have at some point been set on site and the owner of one of the adjoining tenements contests the location of the marking of said boundary line, the remedy to be exercised in this scenario would be the *actio rei vindicatoria*. Where the boundaries have been set, even if they are contested, the remedy is not the *actio finium regundorum* because what is being alleged is that a third party is possessing plaintiff's property without his consent. See the following judgement where these two *actios* are compared: *Charlie Joe Co. Ltd. v. Foster Clarks Product Ltd.* (Court of Appeal) (27/09/2019). The Courts have consistently said that there is no prescriptive period which bars the exercise of the *actio finium regundorum,* as the right of ownership is a perpetual right which is not lost by non-enjoyment or non-use and therefore it should be possible to defend it in perpetuity. See the following judgements on this point:

1. *David Vella et v. Victor Mercieca et* (FH) (26/06/2003)
2. *Albert Mizzi noe v. Rita Azzopardi et* (Court of Appeal) (27/03/1996)
3. *Maria Dolores Debono et noe v. Joseph Grech et* (FH) (28/04/2003)

Luca J. Camilleri IV

COMMUNITIES OF PROPERTY

Community of property is regulated in the Civil Code under articles 489 through 521. In order to be able to make sense of the content of the following lectures reference to the law is paramount. Reference will also be made to the Condominium Act (Cap. 398 of the Laws of Malta). Community of Property is Title V of the Civil Code. Up until know we have considered the right of ownership as the most extensive real right which a person can have over property and up until know we have presumed that there is one owner for one property. Thus, the property is subject to the right of ownership in favour of the owner. The situation of community of property involves one item of property but at one and the same time more than one owner. To make it more complex this concept of community of property refers also to the situation where more than one person at one and the same time have rights together over the same property, with those rights being not necessarily ownership but some other real or personal right. We can find co-owners if the common right is ownership, we can find co-usufructuaries if the common right is the real right of usufruct, we can find co-emphyteutar if the common right is the right of emphyteusis, we can find co-tenants/lessees where the common right which is shared is the right of lease.

When one reads the aforementioned provisions of the Civil Code one will note that the law is almost all the time presuming that the common right is the right of ownership and in practice that is very often the situation with the most important situations of community of property involving a scenario of more than one owner at one and the same time of the same property. Bear in mind that all of these provisions and whatever is to be discussed in relation to these provisions in actual fact apply across the board to any situation of community of property. Note that the term "share" was used, so more than one person shares in common the same right or the same property, especially if the right is the right of ownership. In legal jargon, this situation of sharing is referred to as "*pro indiviso".* For example, we say that two siblings own *pro indiviso* a plot of land in Mosta. The use of the phrase *pro indiviso* indicates that none of the siblings know where his part of the plot of land is situated and the right of both siblings extends to the entirety of property but as a fraction, in the sense that either sibling will have one half undivided share of the plot of land if the shares are equal. The shares may be equal, but the shares may not be equal, but for as long as there is the situation of the community of property every co-owner will have his right as a fraction extending over the entirety of the common property and that is what *pro indiviso* means.

On the other hand, the term *pro diviso* is used where the property which was once common has been in some way or another split up and the previous co-owners have now become owners of the separate divided parts of the property which was previously subject to a situation of community of property. Two or more person, one and the same item of property, the right, which can be a real or a personal right, is shared at one and the same time, by two or more persons over the same property, giving each person involved interest represented by a fraction of the entirety of the common property. This a situation *pro indiviso.* Once that has been terminated and every participant has his own separate and distinct part of the property which was previously common, then the situation becomes *pro diviso* and there is no longer a situation of community of property.

When one starts reading the provisions on the community of property one will notice very strikingly that the legislator has dedicated many more provisions on how to stop a situation of community of property, rather than how to regulate it while it is in course. Furthermore, one will also note that throughout these provisions the legislator continuously allows prevalence to the agreement of the participants in the state of community. Apart from one, all of the provisions listed can be contracted out of by the participants in a state of community of property if they come to some form of agreement. It is very clear that the legislator, since the original drafting of the Civil Code, disfavours this situation of community of property, and the legislator allows wide space for agreement amongst the participants, both in regard to how to regulate the state of community whilst it exists and also on how to terminate the state of community. Professor Caruana Galizia attributes this choice of the legislator to two main reasons: firstly, because in practice the state of community of property hampers trade (it is more difficult to trade property held in common than property which belongs to just one person; and secondly, the state of community of property gives rise to many disputes which very often end up in court. These are the reasons which Professor Caruana Galizia identifies as the why for the attitude of the legislator not to favour so much the continuance of the state of community of property.

Defining the Community of Property

Article 489 defines community of property as "(1) *Community of property exists where the ownership of one and the same thing, or of one and the same right, is vested* pro indiviso *in two or more persons.* (2) *In the absence of any special agreement or provisions, the community of property shall be governed by the following rules".* This definition has been used since the original iteration of the Civil Code. In this definition we note that the law gives prevalence to the terms of the agreement reached by those involved in the community of property. If the members do not agree than the provisions of the Civil Code.

With regard to the aforementioned example referring to the two siblings whose shares may either be equal or unequal, the fraction of the shares owned by each participant in a community of property can be determined by asking how the state of community came about in the first place. The state of community of property can come about in either of three ways: firstly, by operation of law (take, for example, the community of acquests, wherein every marriage celebrated in Malta automatically creates between the spouses a community of acquests which can be excluded before or after marriage by a notarial deed, but unless there is this exclusion automatically by operation of law every marriage celebrated in Malta creates this community of acquests which is basically a specific form of community of property between spouses in relation to anything which either spouses acquires during marriage except for acquisitions by donation or succession); secondly, by succession (take, for example, when two or more persons receive common bequests by a will or under intestacy, creating a state of community of property); or thirdly, by agreement between or amongst the participants (take, for example, when two or more persons agree to purchase an immovable property together and undividedly amongst them).

It is that source of the community of property which determines the share in the common property of the individual participants. In the case of community of acquests either spouse enjoy a 50% share in the community, whereas in the case of succession the will determines each participant's share, whilst in the contractual agreement made by those deciding to buy

a property together, we will find clearly marked each participant's share. In the case that the source of the community does not identify the size of the individual share *pro indiviso* of each participant in the common property, **article 490(1)** lays down a rebuttable presumption that the shares are equal. Article 490(1) states that *"the shares of the co-owners shall, unless the contrary is proved, be presumed to be equal".* Unless the contrary results from the source of the state of community, the shares of the participants are presumed to be common.

The rights and obligations of participants in a state of community

Whilst the situation of community and property exists, articles 490(2)-495 regulate the rights and duties of participants in the community vis-à-vis each other. Note that this is always subject to the rule that in this part of the law the legislator gives prevalence to the agreement of the persons involved. The law gives preference to what these participants may have agreed amongst themselves. Therefore, these provisions apply where there is disagreement, or lack of agreement, amongst the participants in the state of community.

Article 490(2): The first rule is that *"every co-owner shall participate in the advantages and burdens of the community in proportion to his share".* Take, for example, a situation wherein there are three co-owners of one and the same house which they inherited with equal shares, then they are bound to share in the benefits and in the burdens of that house equally in the proportion of one-third each, meaning that no co-owner can decide unilaterally to take exclusive control of the house, changing the locks and using the house for himself. On the other hand, if there is an obligation to pay in connection with that common house then the burden of the payment binds on the three co-owners in equal shares between them.

Article 491: The second rule is that *"each of the co-owners is entitled to make use of the common property, provided: (a) that the use be made according to the destination of the property as established by usage; (b) that it be not made against the interest of the community, or in such a manner as to prevent the other co-owners from making use of the common property according to their rights".* Under the second rule, these three conditions are cumulative, and they bind the co-owners unless they agree otherwise. They are only allowed to make use of the common property provided the three conditions are satisfied and provided further that they have not agreed to the contrary. This obligation of co-owners not to exclude the other co-owners from also making use of the common property has often given rise to disputes and we have judgements where it is explained, see:

- *Paulina Stagno et* v. *Carmelo Bugeja et* (Court of Appeal, 6/10/2004),
- *Sylvia Caruana* v. *Mary Genovese* (FH CC, 16/11/2004).

Article 492: The third rule states that *"each of the co-owners may compel the others to share with him the expense necessary for the preservation of the common property, saving the right of any of such other co-owners to release himself from his liability therefor by abandoning his right of co- ownership".* For the purposes of this rule preservation must be distinguished between preserving the property and improving it. Repairs are a form of preservation whilst in the same manner taking precautions so that the common property does not suffer damages which can be anticipated is also an act of preservation. Making changes to the common property increasing its value is not an act of preservation but is an act of improvement. Here, in article 492, the law is very specific that this right to compel co-owners to contribute in proportion to their share towards the common property is restricted to that expense, which

is required for the preservation, therefore the keeping in good state, of the common property. If preservation calls for an expense, a co-owner can only free himself from the obligation to share in that expense by giving up his right of co-ownership.

Article 493: The fourth rule reads as follows and mentions the situation in regard to improvements of the common property, stating that *"it shall not be lawful for any co-owner to effect any alteration in the common property without the consent of the other co-owners, even though he claims that such alteration is beneficial to all".* Improvements, as opposed to acts of preservation, require the unanimous consent of all of the co-owners. In regard to this rule of unanimity see the following:

- *John Grech* v. *Guza Cremona* (Court of Appeal, 29/03/1985),
- *Carmelo Cuschieri et* v. *Margret Smith* (FH CC, 22/05/2002),
- *Josephine Bedingfield pro et no* v. *Mario Caruana* (FH CC, 25/03/2002),
- *Emmanuela Farrugia et* v. *Nazzareno Fenech* (Court of Appeal, 24/11/2005),
- *Saviour Portelli* v. *Francis Portelli* (FH CC, 27/11/2003).

Condominiums

A condominium is a building where the common parts are owned or used by more than one person at the same time and the individual units belong to those persons separately. Thus, there are two separate spaces: the individual units which belong to individual owners, and those spaces within the same building which are shared in ownership or in rights of enjoyment amongst all the owners of the separate units. We have an exact definition of what a condominium is in the law which regulate condominiums, the Condominium Act (Cap. 398 of the Laws of Malta), with **article 2(1)** of this act stating that *"condominium is a building or group of buildings where the ownership or the use or the enjoyment of the common parts thereof is vested pro indiviso in two or more persons and the ownership of the various separate units in the building or group of buildings is vested pro diviso in the same two or more persons".* In this definition we find the link between condominiums and community of property through the use of the Latin phrases *pro indiviso* and *pro diviso.* Insofar as the separate units are individually owned or enjoyed by individual owners, they are held *pro diviso.* Insofar as the common parts are subject to the co-ownership or the common right of use amongst all the different owners of the separate units, then the common parts are held *pro indiviso.*

We have an important proviso to this which excludes particular buildings from the definition of condominium, stating that *"provided that two or more tenements one or more of which overlies another and where there only exists a number of servitudes of the tenements over each other, and only the drains, or the drainage system or other piped or cabled services are owned in common, or where two or more tenements only have a common outer staircase or common outer landings, shall not be considered a condominium".*

Note that **article 4** of the Condominium Act which states that *"the provisions of Title V of Part I of BOOK SECOND of the Civil Code shall not apply to property held* pro indiviso *in the common parts of the condominium".* This is referring to part of the Civil Code containing the provisions on community of property, thus even if the common parts in a condominium are strictly speaking common property in terms of the definition in article 489(1) of the Civil Code, the provisions in the Civil Code which regulate community of property do not apply to the

common parts in a condominium. Whenever we have a dispute which concerns the common parts in a condominium, we have to look at this particular law on condominiums, and not the Civil Code. In order to be able to do this we need to know very clearly what constitutes a condominium and what does not, where article 2 of the Condominium Act is involved. We also need to know what the common parts of the condominium are, that is to say, which spaces in a particular building qualify as common parts.

The answer to this comes in **article 5** of the Condominium Act which states that:

> **5.** *Unless otherwise resulting from the title of the owners of the separate units, or unless it is otherwise agreed by the Condomini by a public deed, the common parts of a condominium are the following, even if one or more of the Condomini do not make use thereof:*
>
> (a) *the land on which the condominium is constructed, the foundations, the external walls, including the common dividing walls with neighbouring tenements, the roofs, the shafts, the stairs, the entrance doors, the lobbies, corridors, the stairwells, the courtyards, the gardens, the airspace above the whole property and in general, all the other parts of the property which are intended for the common use;*
>
> (b) *the parts used as a reception and as a common washroom and the parts used as a porter's lodge, for the central heating equipment, and for all other facilities intended for the common use; and*
>
> (c) *lifts, wells, cisterns, aqueducts, sewers, drainage pipes, all installations for water, gas, electricity, heating and similar services up to where the said installations branch off to the exclusive property of each condominus, and works, installations and objects of whatever type intended for the common use or benefit.*

Condomini are the owners of the separate units in the condominium. This article also contains lists of the spaces which the law classifies common parts of the condominium. Unless otherwise resulting from the title of the condomini or from a public deed amongst the condomini stipulating otherwise, the spaces and services which are listed in paragraphs (a), (b), and (c) of article 5 of the Condominium Act are the common parts of the condominium and therefore their use, enjoyment, and the rights over them are not regulated by the law of community of property in the Civil Code, but are regulated exclusively by the provisions in the Condominium Act. They are still found in a situation of community of property, that is to say held *pro indiviso* amongst the condomini, but by express provision of the law they are regulated by this particular Act.

Having established that the common parts of a condominium, even if held *pro indiviso,* the provisions in the Civil Code regulating community of property do not apply.

If there is disagreement amongst the participants in a state of community in regard to the way in which the common property is to be administered and enjoyed, a remedy is given by the legislator in **article 494** of the Civil Code which reads as follows: "(1) *Where the co-owners fail to agree, the court shall give the necessary directions as to the management and better enjoyment of the common property, and may appoint an administrator, even from among the co-owners themselves.* (2) *The court shall give effect to the opinion of the majority, regard being had to the total number of the co-owners, unless the dissentient co-owners show they will be prejudiced thereby".* Note that the figure of the administrator has nothing to do with the figure of the administrator found under the Condominium Act. The administrator mentioned in article 494 is not the same kind of administrator which is extensively regulated by the Condominium Act. The former type of administrator may be appointed even from amongst the co-owners themselves and acts in order to better direct the common enjoyment and the proper management of the common property.

Although on paper this may appear to be a good solution for the time whilst the state of community is in course, in practice this remedy does not work as intended in the sense that in order for the court to give these directions and, if it deems it necessary, to make this appointment of the administrator, a fully-fledged judicial action must be filed, which falls within the residual competence of the First Hall of the Civil Court, and in all probability it may take years to be decided because all the parties under the law of procedure must be cited in judgements, all of the parties have a procedural right to produce their own evidence and to participate fully in the action, and so it shall take time. In practice, unless there is some matter of urgency and the court gives a provisional order, the appointment of the administrator will only come at the end of the process in the judgement which can then be appealed and so in all probability it will as a so-called never-ending story. That is why no judgements implementing this remedy can be found, despite the fact that in theory said remedy can be pursued.

A legal question which has been arising in recent years in judgements is the rights in connection with the foundations of immovable property. Said foundation is that structure hidden underground which is crucial for the stability of the overlying construction. The tendency today is to rise higher and higher above street-level, meaning that the mass of the construction over the foundations is always on the increase. Putting condominiums aside, recent judgements have decided that, in spite of the fact that they are situated beneath the lowest building and so there is the presumption in **article 323** (saying that whatever lies below and whatever lies above, unless otherwise proved, belongs to whoever owns the land), the foundations belong to all overlying tenement owners in common. This developing jurisprudence is the result of increasing disputes concerning changes to foundations of existing buildings.

See the judgements of:

- ***Estelle Azzopardi Vella v. Michael Zammit*** **(Court of Appeal, 27/07/2007):** Here, the Court held that the foundations are the common property of all the overlying buildings insofar as the foundations serve to sustain and support all the overlying buildings. The Court, however, does not explain the conflict between this conclusion and the rules of community of property and also the presumption of vertical ownership which we

have stipulated in articles 323 and 324 of the Civil Code. This conflict was subsequently highlighted by the Court of Appeal in the following judgement.

- ***David Hillman v. G.R.A.P. Ltd*** **(Court of Appeal, 3/02/2009):** Here, the Court drew a distinction between the foundations themselves and the space or improvements, which are not foundations, which underly the lowest lying tenement. On the basis of article 323 the Court ruled that the owner of the lowest lying tenement can carry out works in the space underlying his tenement because unless the contrary is proved that space is presumed to belong to him, but he cannot do anything to reduce the strength of the foundations because the foundations *per se* are the common property of all owners of overlying tenements.
- ***B. Tagliaferro & Sons Ltd et v. Alfred Debattista et*** **(FH, 16/01/2014):** Here, the Court ruled very clearly that the foundations, in this case of a condominium, are commonly owned amongst all condomini, and applied to the foundations the restrictions listed in articles 491B and 493 of the Civil Code against a condominus who owned a garage underlying a block of apartments and who intended to carry out structural alterations in his garage. The Condominium Act expressly states that the rules in the Civil Code on community of property do not apply to condominiums. It can be that the Court considered the building not to constitute a condominium in its entirety because the garage was separate from the overlying block. If one looks at article 5 of the Condominium Act, we have a clear stipulation that the law considers foundations of the block constituting the condominium to be a common part and insofar as it is so the rules in the Condominium Act stating that no condominus can alter the common parts without the consent of the other condomini applies.

Ending a Community of Property (Articles 495 onwards)

Note that there are far more provisions dealing with how to bring the state to an end rather than regulating the state in the course of its existence. How can a state of community be brought to an end? Here we must distinguish between the law as it stood before Act XVIII of 2004 and the law after the coming into force of said Act. Act XVIII of 2004 is a very important law which extensively overhauled Maltese law of succession and also introduced very important changes to the law on community of property, essentially it added two new methods through which a state of community of property can be terminated, as opposed to the two traditional methods, bringing the total methods up to four. The traditional methods are partition and sale by sale by licitation, Act XVIII of 2004 introduced the methods of the sale of an undivided share in the common property (**article 495(3)** of the Civil Code) and the sale of the entirety of the common property by will of the majority of co-owners (*vide* **article 495A** of the Civil Code).

Before considering these four methods for the termination of a state of community, one would be well-served to read **article 496** of the Civil Code which reads as follows:

> **496.** (1) *No person can be compelled to remain in the community of property with others, and each of the co-owners may, at any time, notwithstanding any agreement to the contrary, demand a partition, provided such partition has not been prohibited or suspended by a will under the provisions of article 906.*

> (2) *Nevertheless, an agreement to the effect that property shall continue to be held in common for a fixed period not exceeding five years is valid; and any agreement for a longer period, is null in so far as it exceeds five years.*
>
> (3) *Any such agreement may be renewed.*

This article 496 is a rule of public policy so, in contrast to all the provisions which have been considered to this point in which it has been stated that the law gives preference to the agreement of the participants in a state of community, the rule in article 496 is binding on all participants even if they agree otherwise. That is to say, no agreement is valid if it binds the participants in a state of community to continue in that state for more than five years. If the participants agree after the expiration of the five years, they can renew for a further five years. If there is no such agreement or stipulation in the will wherein the community arises from the succession, every participant in the state of community is entitled at any point in time and irrespective of the size of his share, to demand that the state of community be terminated. If the parties agree to be bound in a state of community for more than five years, any one of them can challenge the validity of that agreement and can successfully gain judgement that it is only valid and binding for a maximum of five years.

Article 497 states that:

> **497.** (1) Notwithstanding the prohibition or agreement referred to in the last preceding article, it shall be lawful for the court, if serious and urgent reasons so require, to order the dissolution of the community of property, and any waiver of the right to demand a partition in similar cases is null.
>
> (2) Where any of the co-owners has, through his fault, given cause to the existence of the reasons referred to in sub-article (1), the court may, according to circumstances, in ordering the dissolution, condemn such co-owner in all damages.

The court is entitled to interfere in an agreement to differ to a later date the dissolution of the state of community even if that agreement is for a term of up to five years. Whilst that agreement is valid, if the court finds that there are serious reasons for terminating immediately the state of community, the court is entitled to do so and will order the dissolution of the state of community even if in their agreement the participants would have waived this right. The powers given to the court to terminate an agreement for a community of property are extremely wide. Articles 496 and 497 are both rules of public policy.

The Four Methods for Terminating a State of Community

We have two methods which have been with us since the original enactment of the Ordnances comprising the Civil Code, partition (*divizjoni*) and sale by licitation (*bejgh bil-licitazzjoni*). Act XVIII of 2004, which is a very important law that changed to a very large extent the law of succession, introduced two other remedies for liquidating and terminating a state of community, the sale of the undivided share (regulated in article 495(3)) and the sale

of the entirety of the common property against the will of the minority co-owners (regulated in article 495A). It has been considered the rule of public policy which we have in the law of community of property, which is exceptional to the general principle adopted by the legislator in this part of the law, as well as having seen that article 496 prevents the participants in the state of community from agreeing to continue in that state for more than five years, the maximum term for an agreement excluding the termination of the state of community, a rule of public policy which the participants in the state of community cannot contract out of and if they do any party can successfully challenge that agreement on the basis of article 496.

Partition: This is the actual physical splitting up of the common property amongst the participants in the state of community to reflect their individual undivided share. Take, for example, a scenario with three identical flats which are co-owned amongst three co-owners each with 1/3 undivided share and these flats have exactly the same layout and market value, partition would mean that each participant in the state of community is assigned by title of partition one particular flat. In legal terms, in the Civil Code, we do not have a definition of what partition is and when/how it is possible. However, we have an explanation of the circumstances in which the termination of the state of community can be carried out by a sale by licitation. Reading this explanation, *a contrario sensu* we can make out what the legislator requires for a partition to be possible.

Article 515(1) states that: "(1) *Where common property cannot be divided conveniently and without being injuriously affected, and compensation cannot be made with other common property of a different nature but of equal value, it shall be sold by licitation for the purpose of distributing the proceeds thereof.* (2) *The same rule shall apply if, in a partition of things in community, there are some which no one of the co-partitioners is able or willing to take".* For partition to take place the common property must be such that either it can be conveniently divided without being injuriously affected in accordance with the different shares of the co-owners, or the common property cannot be conveniently divided to reflect the shares of the different participants, but compensation can be made with other common property of a different nature but of equal value so that each co-owner receives his share in kind. These are the two possibilities from a practical point of view for partition, that is the actual splitting up in physical terms of the common property, to take place. By *"divided conveniently and without being injuriously affected"* the law means that in the actual splitting up of the common property (which can include items of a different nature in the same community) the resulting portions must preserve their value, must, as far as possible, preserve their benefits and must preserve its potential. whilst on paper a rural field can be split up into ten different portions it will depend on its size and configuration whether in actual fact the resulting portions will make sense (that is to say be large enough to be used conveniently, will have a configuration which allows adequate access, and all other considerations of a technical nature which may arise in connection to the particular property). In practice this assessment, where immovable property is concerned, will be conducted by a technical person, very often an architect. If the partition is being carried out under court authority the court will appoint its own architect (referred to in the law of procedure as a technical referee) who will visit the property/properties, make the assessment of whether they can be so split up, and, if yes, will present for the court's and the parties' consideration his technical conclusions which may include a plan for partition (*pjan ta' qasma*). This entire exercise is not necessarily done by the court because the participants in the state of community can agree amongst themselves

to instruct an architect, or a different expert depending on the nature of the common property, by agreement and request a technical opinion on whether partition in kind of the identified common property is possible or not and, if it is, to make recommendations for a plan for partition.

The importance of partition and this exercise for determining whether it is at all possible or not lies in the fact that partition, where possible, can be enforced, pursuant to **article 502** which expressly states that *"each of the co-owners may claim his share of the property in kind".* If there are five participants in a state of community each with equal undivided shares and this state of community includes tow immovable properties which are developable land and four of the participants would prefer that these two parcels of land are sold in their entirety because they believe that in that manner the gain would be maximal. However, the fifth participant insists that he wants to receive his share in kind (as a physical portion of the land) and also shows that the land is big enough for it to be split up amongst these five participants, each taking a portion of the land equivalent in value to the fraction which each holds *pro indiviso* whilst the property is still common. In this case the fifth participant in the state of community can enforce his right to receive his share in kind even if he is a minority co-owner to the extent that that right can be enforced also through court proceedings. If even one of the participants in a state of community, irrespective of the size of his share, can show that he can receive his share in kind and at the same time the other participants can receive their respective shares on partition by receiving portions in kind, that right can be enforced.

Rights and Obligations of the Co-Partitioners: If partition is possible, presuming that this examination is successful, and is carried out, what are the rules which apply insofar as the assignment of the resulting portions is concerned. We find different rules in the Civil Code which specify rights and obligations of the co-partitioners:

1. **Partition may be requested and will be allowed if it is possible even though one of the co-partitioners is enjoying separately and exclusively a portion of the common property (article 498):** This problem arises quite frequently where the state of community comes about as a result of succession. Is the exclusive state of enjoyment of the common property a bar to partition? No, so long as the co-partitioner who is enjoying exclusively the common property has not acquired it by prescription, that is to say so long as acquisitive prescription does not grant that co-owner exclusive title of ownership over what used to be the common property. The simple fact that there is a person occupying a property which is held in common amongst different participants does not stop the right of the different owners to enforce partition so long as that occupier has not acquired full ownership by acquisitive prescription.
2. **Where the partition includes immovables it must be carried out by virtue of a public deed which must be registered in the Public Registry and also in the Lands Registry if the immovable property being partitioned falls within a compulsory land registration area (article 499):** Where the partition is carried out by a court judgement the court may either effect the partition and the assignment of the different portions to the co-partitioners by virtue of the judgement itself or in the judgement it may order that the partition be carried out by virtue of a public deed, and therefore it would appoint a notary to publish said deed, and it will also appoint what we call curators, who are lawyers practicing before the courts specially instructed for this

particular purpose, to appeal on the public deed of partition and represent those of the co-partitioners who fail or refuse to attend for publication. In either case (both if the division is carried out in the court judgement itself or if the contract is ordered in the judgement) the partition has to be registered in the Public Registry and, where applicable, in the Lands Registry.

3. **If the co-partitioners agree, the partition can be carried through in its entirety, and therefore be completed, by agreement, therefore without any court intervention at all (article 500):** Here we see the effort of the law to allow participants in a state of community to reach an agreement and if they manage to do so they can complete the partition by virtue of a public deed if it involves immovables without court intervention. If the co-partitioners fail to conclude the partition by agreement, then any co-owner, irrespective of the size of his share, may request the court to carry out the partition itself. The judicial action must include all the participants in that state of community which is being terminated (whether as plaintiffs or defendants). If the partition involves immovable property and it is carried out by the court the court will appoint its own experts to determine whether the common property can be conveniently divided without being injuriously affected and, if possible, to draw a plan for partition. Normally, the courts adhere to and adopt the technical opinion provided by their experts. However, the court is not bound to adopt a technical opinion if it is not convinced about its correctness and also the parties can criticise that technical opinion, can put questions in cross-examination to the technical referee, can present their own *ex parte* technical opinions, and also they may ask for the appointment of three architects to give a fresh opinion and counter-balance the first opinion given by the technical referee appointed by the court. These three architects are referred to as *periti addizzjonali.* At the end of the action the court will decide who will pay which expenses.

If the partition is carried out by the court, what other rules are applied in the splitting up of the common property? **Article 503**[2] gives the right to a co-owner who owns an immovable by nature situated adjacent to the common property to be assigned the adjacent common property if there are other common immovables which can be assigned to the other co-partitioners. This right is granted by the law in the interest of consolidating immovable properties.

When the court forms the different portions to be assigned to the co-partitioners it will avoid burdening the portioning property with easements, as well as avoiding the dismemberment of tenements.

The ways in which the assignment of the different portions can be carried out: This is carried out either by lot or by assignment. The latter means that the court identifies itself which portion goes to whom (as is most often the case when the shares are unequal). When the shares are equal the court typically orders that the portions be assigned by lots amongst the co-partitioners, pursuant to **article 510**. If there is minimal difference in value between the

[2]**503.** *A co-owner possessing property immovable by its nature adjacent to any of the immovables in community about to be divided, may demand that such immovables be assigned to him upon a valuation, provided there be other immovables in community out of which an approximately equal portion may be assigned to each of the other co-partitioners.*

correct amount that should be assigned to the co-partitioner and the value of the assets included in the portion which is assigned to him, the court will order the payment of an owelty (*ekwiparazzjoni*), a sum of money to bring the portion to the correct value due to that particular co-partitioner.

The effects of partition one complete: We find the effects of partition regulated under the provisions of succession. In particular we have **articles 946-948** and the law lays down that upon the completion of the partition each co-partitioner acquires full title over the items of property which are included in the portion assigned to him and that full title operates retrospectively from the date on which the state of community would have come into effect. The law says that they are deemed never to have had the ownership of the other property and always, therefore, to have had title over the property which is assigned to them. In parallel to the warranty of peaceful possession under the law of sale the co-partitioners warrant in favour of each other the distinct portions against molestations and evictions unless they agree otherwise. **Article 514** contemplates the remedy for the payment of a supplement where a co-partitioner proves that the portion assigned to him was less than three-fourths of the fair value of his share *pro indiviso.* If that claim is proved he may demand the payment of a supplement in money from the other co-partitioner. This remedy is barred by a short prescriptive period of two years.

If an item of common property has been inadvertently left out of the partition, any of the co-partitioners may demand what is referred to as a supplementary partition, that is, the partition of that remaining common property. If the partition in kind is not possible than it will be sold, and the proceeds shared in accordance with the shares *pro indiviso* of the co-owners (article 514(4)). If a co-owner has filed an action for partition and the court concludes that the common property cannot be conveniently partitioned without being injuriously affected or there are not sufficient items of common property which can be partitioned amongst the co-owners so that each of them receives his fair share in kind, in the same judicial action the court will proceed to order the sale by licitation of the common property. The court will ask the technical referee to estimate the current market value of the common property which, as discussed above, the parties can contest, and finally the court in its judgement will order the sale and establish the price. Here again any of the co-partitioners may take the initiative and demand the sale by licitation irrespective of the size of his share *pro indiviso* in the common property.

Sale by licitation: Article 516 states that *"any of the co-owners, whatever his share of the property, may demand the sale by licitation, where competent".* A sale by licitation is a judicial sale by auction which is conducted under the authority of the First Hall of the Civil Court. The rules which apply to any judicial sale by auction as set out in articles 305-356 of the COCP generally apply to a judicial sale by auction. Each co-owner can demand the court to allow third party bidders to participate in the sale by auction and the sale by licitation is advertised publicly and therefore open to the public for participation. Here again, in the same manner as under the section for partition, the law allows complete freedom to the co-owners to carry out the sale as they decide in agreement. Even after the court has ordered that the common property be sold by licitation, nevertheless the parties are allowed free space to agree on the way forward. If they still cannot agree than anyone of them will have to request the court to

organise the judicial sale by auction of the property. If they proceed to a private sale, in practice they generally can secure a better price.

Sale of the undivided share (article 495): The first of the two new methods for liquidating the state of community of property. The proviso under sub-article (2) created a lot of problems before the enactment of Act XVIII of 2004. Take, for example, three houses which are co-owned amongst ten co-owners, each having a one-tenth undivided share. Every co-owner owns his share in the common property and can transfer/alienate or hypothecate his undivided share in the common property provided that that alienation or hypothecation will only be valid on the part of the common property which is assigned to that co-owner on partition. This sale would have remained in suspension until the partition is completed and when it is completed it would be valid for that part of the common property which comes to me on partition with the consequence that if partition is not possible and therefore there will be no assignment of any part of the common property to me, than the sale will never be valid, because when the common property is sold I would only receive my share of the proceeds of the sale of the common property. This was the situation until the enactment of Act XVIII of 2004.

Act XVIII of 2004 added a very important sub-article to article 495, sub-article (3). Where all of the requirements of this sub-article are satisfied, each and every item of common property, separate and distinct from all the others, is deemed to belong to all the co-owners, each in their *pro indiviso* share. Therefore, where all these requirements are satisfied the sale and hypothecation of the undivided share is valid effective and final from the date of the transfer or hypothecation. The requirements are as follows:

1. The community of property must have arisen from succession,
2. The succession must have happened more than three years ago,
3. No co-owner has filed an action for partition before a court or tribunal,
4. The portions of the co-owners must be equal in all of the common property.

Where all of the said requirements are satisfied than each co-owner can freely and validly transfer his undivided share in any one or more of the items of common property. However, there is a proviso excluding particular scenarios from this rule: "(a) *when property held in common is subject to any right of habitation, use or of usufruct, for such time during which such right is in force; or* (b) *when the property held in common consists of property which of its very kind has of necessity to be kept indivisible; or* (c) *when persons who are holding the property deriving from the succession in common agree otherwise".*

The sale of the entirety of a common property by will of the majority co-owners (article 495A): Take, for example, a house owned by five co-owners where four of the co-owners have agreed to sell it to buyer Y for a determinate price and at determinate conditions but the fifth co-owner refuses to cooperate and is adamant on not signing the promise of sale. Article 495A provides the majority co-owners who wish to sell the common property with a remedy to seek authority from the court to carry on with the sale of the entire common property even without the consent and cooperation of the minority co-owner. The conditions that must be satisfied for this remedy to be available are as follows:

1. Co-ownership must have lasted for more than three years,
2. None of the co-owners have proceeded in court for the partition of the common property,
3. The co-owners fail to agree in regard to the sale of a particular common property,
4. The common property are not the common parts in a condominium and is not a situation of necessary community of property.

If said conditions are satisfied the majority co-owners in terms of shares may file an application before the First Hall of the Civil Court stating the different shares of each of the co-owners in the common property, including those of defendant/s who are not willing to sell, and also explaining when the community of property arose, how it has arisen, and the proposed selling price and other conditions of sale. This application is served on the defendant/s who have a twenty-day time period to file their reply explaining their objections to the proposed sale. The examination which the court will carry out is to check whether the defendant/s will be seriously prejudiced by the sale. This assessment will determine whether the court approves or refuses the requested authorisation for the sale of the entirety of the common property. In practice, for the carrying out of this assessment once again the court will appoint a technical referee to get an opinion about the correctness of the price and also the correctness of the other proposed conditions of the sale. In the judgement the court will authorise the sale of the entirety or reject said demand. **Article 495A (7)** lists the possible outcomes in such a proceeding.

EASEMENTS

Unfortunately, this topic is difficult to picture. In order to understand what an easement is we need to imagine what we are speaking about. Returning to what has been said previously and that discussed under Roman Law, imagine that the right of ownership covers a big box split up into one hundred smaller boxes, the full right of ownership. It has been seen how there are several real rights which are a diminution of the right of ownership, and in this list, we include easements. Easements are real rights, therefore, a right which a tenement enjoys over another tenement, and they are a diminution of ownership, thus not the full right of ownership but with some of the attributes of ownership. Under Roman Law, there were two classes of easements (i.e., servitudes): personal easements/servitudes, and predial easements. In fact, in the Digest itself we have a very clear statement that servitudes can either be personal or predial (Digest 8.1.1). If one looks up personal servitudes in the Civil Code one will not find it, not because the Civil Code does not conceive and regulate personal servitudes. Personal servitudes are the right of usufruct, the right of use, and the right of habitation. However, for historical and political reasons Napoleon, in the French Napoleonic Code omitted this classification of personal servitudes because to him it had connotations of people serving which was counter to the ideals of the French revolution which ultimately led to the French Civil Code. However, only the name was omitted whilst the personal servitudes themselves are regulated by the Civil Code in great detail (Article 300-399). Note that personal servitudes are still real rights. They are personal because they give an advantage which is necessarily enjoyed by a person, and because they are necessarily exercised by a person, but their legal classification is that of real rights. Usufruct is regulated under **articles 328-388**. The rights of use and habitation are regulated under **articles 389-399**.

With regard to the predial easements *vide* Title IV **articles 400-488**. Predial easements are those real rights, therefore attaching to an immovable property, which exist and benefit another immovable property irrespective of the identity of the owner, possessor, or holder of both immovable properties. Essentially, two tenements, A and B. A real right relationship exists between both, irrespective of who is the owner, possessor, or holder of either tenement, one tenement enjoying a benefit to the detriment of the other which is burdened with the corresponding obligation. Take, for example, two fields in an agricultural setting and one tenement enjoys the right to pass over the other tenement. One tenement has the benefit of the right of way whilst the other is burdened with the corresponding obligation of allowing the way. We have a very clear definition of what a predial easement is in the law itself, introducing us to the legal language of easements, in **article 400(1)** which states that: *"An easement is a right established for the advantage of a tenement over another tenement belonging to another person, for the purpose of making use of such other tenement or of restraining the owner from the free use thereof".* As one may note this definition introduces one also to another fundamental rule in the law of easements: the tenements which are bound by this real right relationship must necessarily belong to different owners. No person can have an easement on his own property. This rule exists for obvious reasons, if one is the owner of a tenement, he cannot reduce his ownership to that of a person with a right of easement. A person can only enjoy the right of easement over the property of another. The two tenements must belong to different owners. The right of this advantage may either consist in the making use of the burdened tenement or in the advantage which may consist

in restraining the owner of the burdened tenement from using it as he pleases. Take, for example, the predial easement of *altius non tollendi* which is the easement restricting the burdened tenement from making constructions beyond a certain height. This is an example of an easement involving turning the owner of the burdened tenement into a restraint from making use of his own tenement.

The elements of a predial easement are all listed in this definition in article 400(1): it is a right, involving two tenements, both tenements must belong to different owners, the advantage afforded by the easement may consist in making use of the burdened tenement or restraining the burdened tenement from its free use.

Article 400(2) continues to introduce the terminology of easements: *"The tenement subjected to the easement is called the servient tenement; and the tenement in favour of which the easement is created is called the dominant tenement".* The tenement which enjoys the right to access an adjacent tenement is the dominant tenement because it has the advantage of the easement whilst the tenement which is bound to allow that access is called the servient tenement.

How do predial easements come about?

There are two methods through which predial easements are created: either by law (legal easements) or by acts of man (conventional easements). *Vide* **article 401** which stipulates the sources of easements.

Legal Easements

Here we find another subclassification; legal easements may either be created by law for the purposes of public utility or may be created by law to serve private utility. As those laws creating easements for a public utility, *vide* public laws and regulations, including the Code of Police Laws (Cap. 10 of the Laws of Malta), the Development Planning Act (Cap. 552 of the Laws of Malta), and the various subsidiary legislation enacted under the latter Act. With regard to the COPL, this Code contains several archaic and outdated rules in connection with building and sanitary requirements. However, they still form part of the law and are still an important source of easements for public utility, in the sense that they restrict the freedom of whoever constructs a building of any kind whatsoever by imposing obligations and stipulating requirements intended to protect or enhance the safety and the general good of the public at large. These rules can be found in various provisions of the COPL, such as articles 97 (laying down rules to be observed in the course of constructing houses), 105 (obliging the owner of a house to allow the Director of Public Works to fix ventilators to the main sewer on the external wall), 114 (obliging the owner of a building to paint the official civic number of the tenement over an external wall for identification purposes), 117 (stipulating the duty of the owner of a building to keep his sewage pipes and connections in a good state of repair and to prevent any flow therefrom), and other similar rules in this Code which are all obligations imposed on tenements (therefore making them servient tenements) to serve a general good, be it public health, safety, security, or otherwise.

With regard to the Development Planning Act within it one will find various restrictions on owners of tenements in regard to how they can develop their tenement if they can develop it at all. There are the structure plans and the local plans which determine the areas where

development can take place, and also the areas which cannot be developed, we have strict procedural formalities for applying for and obtaining permissions to develop, we have a wide definition of development which includes also a change of use as a development and we have different subsidiary legislation under the Act stipulating obligations on owners or possessors of tenements in the general public interest (*Vide* SL 552.15, the Development Planning (Use Classes) Order, stipulating the classes of different developments insofar as uses are concerned and the requirements for obtaining permission for the different uses. These are all examples of public laws and regulations which **article 402(1)** of the Civil Code refers to as *"special laws or regulations"* and which create easements for purposes of public utility.
Vide the judgements of:

1. *Alexander Eminyan v. John Musu pro et noe et* (COA, 28/02/1997), where the court described these easements as *"limitazzjoni tad-drittijiet tal-proprijeta skont … bejn individwu u iehor".*
2. *Michael Risiott et v. Carmel Bajada noe et* (COA, 5/10/2001): *"il-posizzjoni legali hi … girien, sidien privati".*
3. *George Felice et v. Keith Attard Portughes et* (COA, 30/09/2016),
4. *Andrew Zammit et v. Joseph Pavija et* (COA, 26/01/2018).

These public laws and regulations are both administrative rules as well as creating a legal easement for a public utility which concerns the relationship of that other easement with all other neighbours.

With regard to easements for a private utility, **article 402(2)** states that *"Easements are also created by law for private utility; and such are those established in the following provisions of this sub-title".* Private utility points to the burden/benefit relationship concerning only particular tenements and their owners or possessor from time to time. Bear in mind that as real rights, all predial easements will continue to benefit or burden the dominant or servient tenement until the easement is extinguished if it is at all ever extinguished. It will not cease to exist simply by a change in the owner or a change in the possessor of the dominant or servient tenement because the right exists in favour of the tenement itself and burdens the servient tenement itself irrespective of who is its owner or possessor. These are created by the Civil Code itself and are stipulated in **articles 402-453**. In the *Risiott Bajada* judgement the COA stated that these provisions give an exhaustive list of legal easements for private utility.

The five different classes of legal easements for private utility found established by the Civil Code are as follows:

- §I Easements arising from the Situation of Property (**Articles 403-406**),
- §II Of Walls and Ditches which separate Neighbouring Tenements (**Articles 407-433**),
- §III Of Distances required in certain cases (**Articles 434-444**),
- §IV Of Eavesdrop (**Articles 445**),
- §V Of Right of Way and of Watercourse (**Articles 446-453**).

§I Easements Arising from the Situation of Property (Articles 403-406)
Here we have the legislator establishing, by operation of law, legal easements for private utility because of the situation in which a property lies.

Article 403 states that:

> **403.** (1) *Tenements at a lower level are subject in regard to tenements at a higher level to receive such waters and materials as flow or fall naturally therefrom without the agency of man.*
>
> (2) *It shall not be lawful for the owner of the lower tenement to do anything which may prevent such flow or fall.*
>
> (3) *Nor shall it be lawful for the owner of the higher tenement to do anything whereby the easement of the lower tenement is rendered more burdensome.*

Here, the law is regulating the relationship between tenements (i.e., immovable properties) which lie at different levels. With regard to the real rights and obligations emanating from this easement, tenements which lie at the lower level are bound to receive all waters and materials which fall or flow naturally from the tenement situated at the higher level *"without the agency of man",* meaning that this easement therefore burdening the lower tenement is limited only to those waters and materials which fall and flow naturally without human intervention. This is the right and the burden involved in this easement. In sub-articles (2) and (3) of this provision we find another fundamental rule in the law of easements: the owner of the servient tenement cannot do anything to take away any of the benefits of the easement for the dominant tenement and, correspondingly, the owner of the dominant tenement cannot do anything which renders the burden of the easement bigger for the servient tenement, this is the balance that the law seeks to ensure in the law of easements. Yes, one tenement is burdened for the benefit of a second tenement whose benefit is the result of the said burden, but the balance needs to be kept and is determined by the actual content of the right involved in the easement. Therefore, the owner of the lower tenement cannot do anything which prevents the natural flow or fall of waters or materials from the higher tenement and at the same time the higher tenement cannot do anything which renders more burdensome the extent of the obligation to receive waters and materials flowing naturally off the lower tenement.

Article 404 refers to springs of water and states that *"Whosoever has a spring within his tenement may make use of it as he pleases, saving any right which the owner of a lower tenement may have acquired by title or by prescription".* Note the similarities and differences between this easement and that found in article 403: again we are speaking of a situation where the adjacent tenements are situated at different levels, but if there is a spring in the higher tenement the higher tenement where that spring is situated has full power and discretion to do whatever he pleases with that natural source of water and the lower tenement is not entitled to any right on that spring of water. The lower tenement can only acquire rights on that spring of water by act of man because title and prescription are two of the three ways in which easements can be created by act of man. The legal easement is established in regard to the spring of water in favour of the higher tenement in which the spring is situated. Any rights which the lower tenement can pretend or claim on that spring of water must arise from act of man if properly created by title or prescription.

Article 405 refers to water running through public roads and states that:

> **405.** (1) *The owner of the higher tenement may cause the water which runs through the public road to be led into his own tenement, in preference to the owner of the lower tenement.*
>
> (2) *In the case of owners of tenements placed on the same level, each of such owners may cause the water which runs on that half of the road, which is contiguous to his tenement, to be led into such tenement.*

These provisions are as originally drafted by Sir Adrian Dingli, meaning one must take into consideration that when they were written the situation of property in Malta was different. The law is mentioning the owner who may cause the water to be led into his own tenement at preference to the owner of the lower tenement.

Exceptionally, in **article 406**, we find an order of preference for the use of that water, depending on who needs it:

> **406.** *The provisions of the last preceding article shall not apply in the case where one of the owners requires the water for the use of man, or for watering animals or for watering trees which are ordinarily watered; in any such case the right of preference over others who require the water for other uses belongs -*
>
> (a) *to the person who requires the water for the use of man;*
> (b) *to the person who requires it for watering animals;*
> (c) *to the person who requires it for watering trees.*

This means that the rule in article 405, which remains the general rule, is excepted where the water which runs through the public road is required for either of these three uses found in article 406. Where those uses occur then the rule in article 405 does not apply because the preference goes according to the use found in article 406.

As can be seen, these are legal easements for private utility because the benefits and burdens involved in them are not established for serving a general utility, such as sanitary requirements under the Code of Police Laws. These are specific to the tenements involved and for the benefit of those tenements only. *Vide* the following judgements:

- *Cauchi v. Busietta Gardens Madliena Ltd* (FH CC, 01/12/1995),
- *Carmelo Wismayer noe v. Chev. Anthony Falzon noe et* (CoA, 29/04/1996),
- *Aldo Laferla v. Albert Mizzi noe et* (CoA, 01/12/2006).

§II Of Walls and Ditches which separate Neighbouring Tenements (Articles 407-433)

Here we come to the famous party-wall. This particular wall and the easements established in regard to it create a lot of disputes between neighbours. The following is some terminology to bear in mind:

- The ***'party-wall'*** is also known as the dividing wall or *'il-hajt tal-appogg'* in Maltese common parlance or *'il-hajt divizorju'* in legal Maltese.

- We will also encounter the phrase ***'the common wall'*** which is sometimes used to refer to party-wall but in law we must be careful about using this phrase as in law when we say a *'common wall'* we are referring to a wall which is commonly owned between the owners of the neighbouring tenements which it separates.
- Another phrase to bear in mind is the ***'boundary line'***, known as *'il-linja divisorja'.* The boundary line is not a wall but is that fictitious mark on a plan which can be plotted by a surveyor on the land, and which marks the exact point where one tenement ends, and the adjacent tenement starts.
- The ***'dividing wall'*** may be constructed on the boundary line precisely to mark where the boundary line is situated, or it may be built elsewhere.

Article 407 establishes an easement involving the thickness of the party-wall and states that *"A wall which serves to separate two buildings or a building from a tenement of a different nature must have a thickness of not less than thirty-eight centimetres".* We know that buildings are developed tenements, but what about a tenement of another nature? A tenement of another nature may either be a garden or a field. Where the party-wall divides two buildings, or a building from a garden, it must have a thickness of not less than thirty-eight centimetres. This easement, although it is set in mandatory terms, is largely disregarded, meaning in practice the dividing wall which separates two buildings or a building from a garden or field is not at least thirty-eight centimetres thick but is often roughly half of the prescribed thickness. The easement exists and, if necessary, the law can still be enforced. The law establishes this thickness for security and safety purposes, but also for privacy purposes.

The second easement refers to the manner in which the party-wall is built, with **article 408** reading as follows:

> **408.** *A party-wall between two courtyards, gardens, or fields, may be built of loose stones, but must be -*
>
> (a) *three and one-half metres high, if it is between two courtyards, or between two gardens in which there are chiefly orange or lemon trees;*
>
> (b) *two metres and forty centimetres high, if it is between two gardens in which there are chiefly trees other than those mentioned above; and*
>
> (c) *one and one-half metres high, if it is between two fields.*

These heights are minimum heights, with these figures representing the least height which the law wants for a party-wall separating these kinds of tenements. The framing of the law is in the form of a mandatory rule but very often these rules are disregarded. Bear in mind that because they are legal easements for private utility only the owners of the tenements involved have an interest to enforce them. Therefore, they may decide to agree on waiving the easements, thus extinguishing it.

The following is the question of the ownership of the party-wall. The law gives five different hypotheses based on different situations of property:

1. **Where the party-wall separates two buildings of the same height: Articles 409(1)** states that *"In the absence of a mark or other proof to the contrary, a wall which serves to separate two buildings is presumed to be common up to the top, and, where such buildings have not the same height, up to one metre and eighty centimetres from the point at which the difference in height begins".* Here we have actually two hypotheses, firstly, two buildings of the same house. Take, for example, two terraced houses with two stories each and a party-wall dividing them. In the absence of any mark or proof to the contrary the wall is presumed to be commonly owned between the owners of the two tenements being separated. As to what sort of mark or other proof that can rebut this presumption, the proof can come in a public deed which may state that the party-wall is exclusively owned by one of the separated tenements, and the mark will be on site. There are particular building marks which indicate who built the wall. When a party-wall is built anew where the neighbouring tenement is undeveloped, there are often protruding alternate bricks or alternate indents to allow the building of a new tenement to fit in the pre-existing wall. This indicates that the wall was built before the new tenement, thus, the presumption of common ownership is rebutted. Where there is no such proof the *juris tantum* presumption subsists.
2. **Where the buildings have a different height:** Found under **article 409(2)**, this presumption directly stems from the second presumption above. The presumption of co-ownership of the party-wall does not extend to the entire height of the party-wall, but to a height of 1.8m from the point where the difference in height begins. This 1.8m is the minimum height in law for the *opra morta*, the part of the party-wall above the roof. It is up to the minimum height which is assumed to be owned in common. The part of the wall above the 1.8m from the point where the difference in height begins where the buildings are of a different height is presumed to belong to the owner of the higher tenement.
3. **Where the party-wall is separating a tenement of a different nature:** Under **article 409(3)** the wall is presumed *juris tantum* to belong entirely to the owner of the building. The law makes this presumption because it believes that it was in the interest of the building to erect that wall and so it is more likely than not that the wall would have been built by the owner of that building.
4. **Where the party-wall separates courtyards, gardens, and fields from each other where they are situated at the same level: Article 410(1)** states that *"A dividing wall between courtyards, gardens, or fields, shall also be presumed to be common, in the absence of a mark or other proof to the contrary".* This is a rebuttable presumption and can be rebutted by proof or mark. If there is no such proof or mark then the dividing wall separating courtyards, gardens, or fields from each other is presumed to be owned in common in equal shares by the owners of the tenements which it separates.
5. **Where the wall separates courtyards, gardens, or fields at separate levels: Article 410(2)** states that *"Where the wall separates courtyards, gardens or fields, placed the one at a higher level than the other, the part of the wall which, having regard to the lower tenement, exceeds the height respectively prescribed in article 408 is presumed to belong to the owner of the higher tenement".* That part of the party-wall which exceeds the minimum height set out in article 408 is presumed to belong to the higher tenement. Here we are not speaking about tenements situated at the same level, but at different levels. Take, for example, a tenement situated at a level which is higher

> than another tenement but there is a party-wall separating them. The law states that that part of the party-wall which exceeds the minimum legal height is presumed to belong exclusively to the higher tenement.

Presuming that the party-wall in a particular circumstance belongs exclusively to the owner of one of the tenements which it separates, can that party-wall be rendered common? Can the owner of the other tenement acquire co-ownership rights in regard to that party-wall? **Article 418** reads as follows:

> **418.** (1) *Every owner may also make common, in whole or in part, a wall contiguous to his tenement by reimbursing to the owner of the wall one-half of its total value, or one-half of the value of that portion which he desires to make common, and one-half of the value of the land on which the wall is built, and by carrying out such works as may be necessary to avoid causing damage to his neighbour.*
>
> (2) *The provisions of this article shall not apply in the case of buildings destined for public use.*

The law is saying, at least on paper, that a party-wall can be rendered common by paying and by carrying out such works as may be necessary to avoid damage to the neighbour. It is by virtue of the payment of the compensation stipulated in this provision that community of ownership rights can be acquired on the party-wall. For more than eighty years the Maltese courts have consistently departed from this method of acquiring co-ownership of the party-wall. The courts have consistently said that co-ownership of the party-wall, where it is exclusively owned by only one owner of the neighbouring tenements, is automatically acquired when the owner of the other neighbouring tenement makes use of the party-wall. The method stipulated in article 418 (i.e., the payment) is deemed by the courts to be only a consequence of acquiring community of ownership rights over the party-wall. Take, for example, a terraced house adjacent to a field. As part of the construction of the terraced house the party-wall was built, and it serves to separate the terraced house from the field. We saw under article 409(3) that in that scenario the owner of the building is presumed to be the exclusive owner of the party-wall. Imagine that the owner of the field now has a permit and can develop his field into another terraced house and for some reason he wants to integrate that existing party-wall into his building as well. Therefore, rendering common that party-wall, and, by consequence, acquiring co-ownership rights thereof. According to article 418, the owner of the field can only acquire co-ownership rights over the party-wall by affecting the stipulated payment and carrying out the necessary works not to damage the terraced house. The courts have declined this method, instead following the rules under Italian Law in preference to the contents of Maltese Law and have consistently said that the moment the owner of the field inserts his building into the party-wall and the said wall forms an integral party of his building as well, the party-wall becomes part of his building, serving as a sufficient use of the said wall, automatically investing in the owner of the field co-ownership rights over the party-wall. As a consequence of acquiring those co-ownership rights, therefore taking away some of the rights the owner of the building enjoyed, the owner of the field has

to pay the compensation to the owner of the building in terms of article 418. The courts have clearly and voluntarily departed from the wording of the law insofar as the method for acquiring co-ownership of the party-wall is concerned.

Owing to this conceptual departure of the courts from the wording of the law, the courts have distinguished between the nature of the right to acquire co-ownership of the party-wall, and the nature of the right of the previously exclusive owner of the party-wall to receive compensation. The first right being the right itself to acquire co-ownership of the party-wall and the second being the right to receive compensation from the new co-owner of the party-wall and compensated in the manner stipulated by article 418(1). The courts have said that the right to acquire co-ownership of the party-wall is an easement (i.e., a real right with all the attributes and consequences thereof) whilst the right to receive compensation as consideration for that transfer of rights is not a real right but only a personal right (therefore, a distinct and separate right against the person) against the originally exclusive owner of the party-wall. The courts have distinguished these two rights even on a conceptual level.

This different characterisation of the two rights has important consequences, in particular, the prescriptive period for enforcing the right is different. The extinctive prescription to enforce a real right is thirty years whilst the time required to kill the action to enforce a personal right is, at maximum, five years (*vide* **article 2156(*f*)** of the Civil Code). Because the right to receive compensation is a personal right and because it is barred by a short prescriptive period, one may very well end up in a situation where one's neighbour has made use of the party-wall, acquired co-ownership thereof, but the right of action to receive the compensation due in terms of article 418 has been extinguished. The co-ownership rights *per se* do not extinguish themselves because they are distinct, real rights which attach to the tenement itself and have been acquired by the tenement independently of whether the compensation is paid or not or can be enforce or not. There are other consequences in regard to this qualification of the right to receive compensation being a personal right (take, for example, the fact that the compensation can be paid without the drawing up of a public deed, or the fact the forum which is competent to hear and decide on the action for the payment of the compensation is not the court which is generally competent to hear actions involving real rights, i.e., the First Hall of the Civil Court, but is instead either the Small Claims Tribunal or the Court of Magistrates, or possibly the First Hall depending on the amount of compensation).

Vide the following judgements on the matter:

- *Carmelo Busuttil et v. Giuseppe Vella et* (FH CC, 11/02/1931),
- *Emmanuel Cauchi v. Charles Byers* (CoA, 14/03/1995),
- *Mario Aquilina v. Pawlu Seychell* (CoA, 20/02/1997),
- *Joseph Apap v. Philip Grima* (CoA, 20/02/1956),
- *Carmelo Bonnici v. Achille Spiteri* (CoA, 15/10/1951),
- *Terence Edward Cossey v. Mario Blackman* (FH CC, 25/05/1965),
- *Neil Bianco v. A. Bonello Ltd* (CoA, 30/11/2012),
- *Aluminium Ltd v. Earli Ltd* (CoA, 16/02/2004).

With regard to the raising or reconstruction of the party-wall (take, for example, an existing party-wall supporting two adjacent buildings of the same height, two stories each, wherein

one of the buildings is replaced by a new construction which will rise higher than the remaining building), can the party-wall be increased in height? And if yes, who is entitled to raise it, and what are the rights and obligations arising in regard to that additional height? One needs to consider **article 414** of the Civil Code which states that:

> **414.** *Every co-owner may raise the height of a common wall, but he shall be liable for the expenses necessary -*
>
> (a) *for raising the height of the wall;*
>
> (b) *for keeping in good repair the part raised above the height of the common wall;*
>
> (c) *for carrying out such works as may be necessary for the support of the additional weight resulting from the raising of the wall, so that the stability of the wall will not be impaired.*

The first phrase one should consider is *"common wall",* note that in this provision the law is speaking about the common wall, therefore, the law is presuming that the party-wall has been common from the start or has been rendered common and therefore the two adjacent tenements own in co-ownership between them the party-wall. Either of the co-owners are entitled to raise the height of the party-wall which is common between them and the obligations that flow from that right are those which we have listed in this provision. The co-owner who raises the height of the party-wall is responsible to pay the expense of raising it. He is also obliged to keep the extended part in a good state of repair at his exclusive expense. Also, he must carry out any works which may be necessary from a technical point of view for supporting the additional weight of that extension of the party-wall to ensure that the party-wall itself does not lose its stability.

Article 416 states that *"In each of the cases mentioned in the last two preceding articles, the party raising the height of the wall is moreover bound to make good to his neighbour any damage which the latter may suffer in consequence of the raising of the wall or the reconstruction".* If the raising of the party-wall causes damage to the neighbouring tenement the co-owner who is raising the height of the party-wall is obliged to compensate and make good for that damage.

Article 417 states that *"The neighbour who has not contributed to the raising of the height of a common wall may acquire co-ownership of the additional height by paying one-half of the cost thereof and the value of half the land used for the additional thickness, if any".* This article, in actual fact, mirrors the rule which can be found in article 418 regarding the acquisition of co-ownership of the party-wall. In the same manner as article 418, 417 states that the additional height of the common wall can be acquired by the other neighbour by paying the neighbour who has raised the party-wall one half of the cost of the extension in addition to one half of the value of the land which may have been taken up for the additional thickness of the party-wall. In the same manner as for article 418, the Courts have confirmed that the payment stipulated in article 417 is due, but it is not the manner in which co-ownership of the extension of the common wall is acquired. Co-ownership of that extension is acquired as soon as the neighbour makes use of that extension, i.e., integrating that extension into his own construction. Is the right to raise the height of the party-wall absolute? That is to say, is one of the co-owners of the party-wall invariably entitled to raise its height? The Courts have

said no, meaning this right is not absolute. If it is proven to the satisfaction of the court that the co-owner of the party-wall who wants to raise its height is simply doing so for no benefit of his own but with a clear intent of causing damage or inconvenience to the neighbour, then the right does not exist because exercising the right would constitute actually an abuse of right. An important judgement which explains this reasoning is that of *Emmanuel Cauchi v. Charles Byers* (Court of Appeal, 14/03/1995).

In the same provisions which are being considered, the law also mentions the right to reconstruct the party-wall. **Article 415** says that *"Where the common wall is not in a condition to sustain the additional height, the person desiring to raise its height must have it entirely reconstructed at his expense, and the additional thickness must be taken on his own side".* If the party-wall is in such a state that it cannot support the additional weight which its extension will put on it then whoever wants to raise the height of the party-wall must, at his expense, remove the old party-wall and reconstruct it anew any additional thickness which may be required for the party-wall to be stable and safe, naturally this is an appreciation taken by an architect or engineer, must be built on the land of the co-owner who is carrying out the works. In the same manner, if, in the course of the reconstruction, damage is caused to the neighbouring tenement, the co-owner who is carrying out the works must make good such damages.

With regard to the party-wall in its entirety, independently of whether it has been extended or reconstructed, who is responsible for keeping it in a good state of repair and what are the exact obligations in this regard? **Article 411** states that:

> **411.** (1) *The repairs to a common wall or its reconstruction shall be at the charge of all those who have a right thereto in proportion to the right of each.*
>
> (2) *Nevertheless, every co-owner of a wall may relieve himself of the obligation of contributing to the expense of the repairs to the said wall or of its reconstruction by waiving his right of co-ownership, provided the common wall does not support a building belonging to him.*
>
> (3) *Such waiver, where competent, shall not relieve the party making it of his liability for such repairs or reconstruction as may have been occasioned by him.*

When article 411 is speaking of reconstruction, it is not the reconstruction which becomes necessary because of an extension to the party-wall, but the party-wall may need reconstruction even without raising its height. In the repair or reconstruction of the party-wall, those works must be carried out at the charge of all the co-owners of the party-wall in proportion to their share, making this an application of the general rule seen under community of property where whoever has a share in the community of property is obliged to contribute to the repair and maintenance of the property in accordance with the size of his shareholding.

With regard to article 411(2) we again find an extension of the general rules of a community of property. If the party-wall is integrated in the construction of his property, he cannot relieve himself of the obligation to contribute to repair and, if necessary, reconstruction costs.

Under article 411(3) if the cause of the damage is deriving from the co-owner who wants to relieve himself of the obligation to contribute to the expenses, then he has no means of relieving himself of the obligations attached to co-ownership and must make good the monies necessary for the repairs of that damage caused.

Article 412 states that *"Where a common wall supports a building which the owner wishes to demolish, he may not release himself from his liability for the repairs or reconstruction of the wall by waiving his right of co-ownership, unless he carries out for the first time such repairs and works as are necessary so as to avoid causing to the neighbour any damage by the demolition of the building".* If the co-owner who wants to free himself from the obligation to contribute towards the expense of repairing or reconstructing the party-wall is actually the cause of the damage, then he can only relieve himself from that obligation after carrying out the necessary repairs or reconstruction.

In order to protect the stability and the good condition of the party-wall, the law gives us a list of prohibitions, acts which the neighbours cannot do in regard to the party-wall, contained in **article 419**:

> **419.** *It shall not be lawful for one of the neighbours -*
> (a) *to make, without the consent of the other neighbour any cavity in the body of a common wall;*
> (b) *to cause any new work to be affixed to or to lean against a common wall, without the consent of the other neighbour, or, in case of his refusal, without having first determined by means of experts the necessary measures to be taken in order that the new work shall not injuriously affect the rights of the other neighbour;*
> (c) *to deposit manure or other corrosive or damp substance in such a manner as to be in contact with the common wall;*
> (d) *to heap earth or other matter against a common wall without taking the necessary precautions in order to prevent such heaps from causing, by pressure or otherwise, damage to the other neighbour.*

Any holes made in the party-wall may damage the wall's structural integrity and is therefore prohibited. Sub-article (b) is problematic as it states that a neighbour cannot affix anything to the party-wall and cannot add any new construction leaning against the party-wall without the consent of the other neighbour. In actual fact, the Courts have, not only allowed the neighbour to make use of the party-wall without the other neighbour's consent but have actually stated that this is the manner in which the party-wall is rendered common. Therefore, this paragraph, at face value, conflicts with the judicial line of decisions stating that co-ownership of the party-wall can be acquired by actually making use of the party-wall, affixing to it a new construction, or having the new construction leaning against it, and that this

process does not require the consent of the neighbour. Sub-article (c) is clear, with the law prohibiting the neighbours from allowing discharge of adverse substances into the construction of the party-wall itself, again to enhance the preservation of the strength and stability of the party-wall. Sub-article (d) seeks to achieve the same purpose of preserving the party-wall by prohibiting the putting of building material in such a manner as would exert pressure on the party-wall itself which may result in the causing of serious damage to the said wall. *Vide* the judgement in the case of *Mario Aquilina v. Pawlu Seychell* (Court of Appeal, 20/02/1997).

What is the situation where a building next to the party-wall has different stories belonging to different owners which is not a condominium? That is to say, where a building in a tenement consists of different stories belonging to different owners, who is responsible for the repairs and maintenance of the party-wall? **Article 423** states that *"Where the several storeys or other parts of a building belong to different owners, the contribution of each of the owners to the expense of the repairs or reconstruction which may be required shall be in proportion to the benefit which the respective part of the building derives from such repairs or reconstruction".* Where the building is made up of different stories owned by different owners, we have to look at the location in the party-wall where the repairs are necessary and determine the benefit which the respective owners of the different stories will derive from the works. Take, for example, a scenario in which the repairs are to be carried out on the foundations of the wall, then all the different stories will benefit from the works because the entirety of the wall cannot exist without the foundations being in a good state. Different considerations will apply if the maintenance is to be carried out in a particular point of the wall, because the benefit there may not be the same for all the different owners of the different stories.

Also, **article 428** states that *"Each of the neighbours is bound to carry out in his own tenement such works as may be necessary to prevent any damage which may be caused to the party-wall by the cisterns or sinks existing in his tenement or by any flow of water or filth".* As can be seen repeatedly, the laws lay down obligations on the owners of the tenements which are separated by the party-wall to ensure that no damage is done to the structure of the party-wall and that the stability of the party-wall is in no way prejudiced or reduced.

Vide articles 426 and 427. The former speaks about another wall, known as the external wall, that is the wall which separates the public road from where a tenement is accessible from the tenement itself. **Article 426** states that *"When the storeys of a house belong to different owners, each of such owners may, in his own storey, make, in the external wall, a balcony, window, door or other opening, provided the stability of such wall is not affected thereby".* In the external wall, whilst we always said that in the party-wall no change can be made without the consent of the co-owners except when initial use is made in order to acquire co-ownership, in regard to the external wall the situation is different wherein the owner of a tenement can make openings without requiring the consent of anyone and this right arises also where the different levels of the tenement belong to different owners, the only limitation being that such openings must not prejudice the stability of the entire construction.

Article 427 returns to the party-wall and regulates what in Maltese common parlance is known as the *l-opramorta,* being that part of the party-wall starting from the level of the roof

upwards. Take, for example, the roof of two terraced houses, the part of the party-wall that starts from the roof and moves upwards is known as the *l-opramorta.* Article 427 establishes the minimum height which this part of the party-wall must have where the roof is accessible. Article 427 reads as follows:

> **427.** (1) *The person in whose building there are stairs leading to the roof, is bound to raise at his own expense the party-wall to the extent of one metre and eighty centimetres above the level of the roof.*
>
> (2) *The portion of the wall above the level of the roof must be of the same thickness as the party-wall below such level.*
>
> (3) *Where both neighbours have stairs leading to their respective roofs, each of them may compel the other to contribute half the expense necessary for raising the height of the party-wall as aforesaid.*

This minimum height is largely disregarded in practice. The law establishes this height for privacy and stability/safety purposes. The height of 1.8m is roughly the average height of a person. In practice the height is reduced because these are easements for a private utility so it is not an administrative one, meaning it is only enforced by the parties involved and if none of them object to the party-wall being lower in height then there is no problem but either of the owners can insist on the party-wall being raised to at least 1.8m above the level of the higher roof which is accessible by stairs.

In rural tenements the boundary line can be marked either by a rubble wall or by trees. **Article 433** states that *"The trees which are on the boundary-line between two tenements shall, in the absence of proof to the contrary, be deemed to be common; and each of the neighbours may demand that such trees be uprooted or cut if he proves that the damage they may cause to his tenement is greater than the benefit he himself may derive therefrom".* The same principles which the law applies in regard to the party-wall are extended to trees where they serve the same function, that is where they mark the demarcation line between neighbouring tenements. In the absence of proof to the contrary they are presumed to be commonly owned between the owners of the tenements which they separate. If they cause damage and the damage is proved to be greater than the benefit of having them to mark the boundary line either of the owners of the tenements can demand that they be removed or cut, once again the same principles which apply to the party-wall in general.

Legal Easements for Private Utility III: *Of distances which are required in certain cases*

For an explanation as to why we have these easements *vide* the case of *Carmel Zammit v. Anthony Sultana* (FH CC, 31/01/1994). The requirements that they are only enforceable where the neighbour objects and that the objection must be made in good faith, based on good grounds, and not be malicious are central principles in the way these easements have been interpreted by the Courts.

Articles 434-436 contain the **first easements for distances**. Where is the party-wall to be constructed? So far, we have seen how it is built, how thick it should be, how tall it should be, who owns it, how to become an owner of it, and the rights and obligations associated with ownership. **Article 434** states that *"Every person may construct any wall or building on the boundary-line of his tenement, saving the right of the neighbour to acquire co-ownership of the wall as provided in article 418".* The boundary line is that fictitious line which exists on paper which is determined by an architect or a surveyor on site and which marks the end of one tenement and the start of the adjacent tenement. Where there has never been a party-wall the dividing wall can be constructed on the boundary line (*vide* the *actio finium regundorum*). Once the wall is constructed and is therefore presumed to belong to the owner of the building which has been developed, the owner of the adjacent tenement can make use of it thereby acquiring co-ownership and the obligation to pay compensation as stipulated in article 418.

Article 435 states that:

> **435.** (1) *Even where the construction is not made on the boundary-line, the neighbour may, if a distance of at least one and one-half metres has not been left, demand co-ownership of the wall, and may build up to, and against such wall, on paying, besides the value of half the wall, the value of the ground which he would thus occupy, unless the owner of the ground prefers to extend his building, at the same time, up to the boundary-line.*
>
> (2) *If the neighbour does not wish to avail himself of such power, he must construct his wall or building in such a manner that there shall be a distance of three metres from the wall or building of the other party.*
>
> (3) *The same rule shall be observed in any other case where the construction of the other party is at a distance of less than three metres from the boundary.*
>
> (4) *The mere raising of the height of a house or wall already existing is deemed to be a new construction.*

Take, for example, two adjacent tenements which were originally undeveloped plots where one has been developed but it transpires that the dividing wall was not built on the boundary line and was built into the area of the tenement which has been developed, meaning between the wall and the boundary line there is a space which has not been utilised. The law states that that space must be up to 1.5m. In that scenario the owner of the undeveloped plot of land in terms of article 435(1) is entitled to extend his building over the unutilised land belonging to the neighbour up to the pre-existing party-wall, making use thereof, therefore acquiring co-ownership, and then paying the owner of the neighbouring tenement the value of the land which is taken up and which belongs to that owner of the neighbouring tenement, plus half of the value of the wall. As to why the law gives this right, it does so because the law wants to avoid having narrow unutilised passages between developed tenements. In order to

avoid this taking up of his land the original developer can extend his building to the boundary line, but if not the owner of the neighbouring tenement can take up for himself the unutilised land. If he does not want to take up the unutilised land and the original developer does not extend his building to the boundary line, then according to article 435(2) the owner of the neighbouring tenement must leave a distance of three metres from the original party-wall to his construction. This is another rule which is completely disregarded. In practice, where the owner of the tenement which is developed later does not want to acquire co-ownership of the party-wall, he would build a new, separate, and independent party-wall in parallel to the pre-existing party-wall. If the party-wall which was originally built is not built on the boundary line then the unutilised land will be taken up by the owner of the neighbouring tenement without leaving any distance between the party-walls.

Article 436 states that *"The provisions of the last two preceding articles shall not apply in the case of buildings destined for public use, or of walls bordering on public squares or streets".* Where the adjacent tenement is destined for public use as a building or as a road or public space these rules do not apply.

The **second easement of distance** concerns the planting of trees close to the party-wall, not on the boundary line. **Article 437** reads as follows:

> **437.** (1) *It shall not be lawful for any person to plant in his own tenement tall-stemmed trees at a distance of less than two metres and forty centimetres, or other trees at a distance of less than one metre and twenty centimetres from the boundary between his tenement and that of his neighbour.*
>
> (2) *Vines, shrubs, hedges, and all other dwarfed trees not exceeding the height of two metres and ten centimetres, may be planted at a distance of not less than forty-five centimetres from the said boundary.*
>
> (3) *The neighbour may, unless the period required for prescription has elapsed, demand that trees planted at a lesser distance, or which, notwithstanding the observance of the aforesaid distance, are causing him damage, be uprooted at the expense of the owner.*
>
> (4) *The court, however, may grant to the owner of such trees the option either to uproot them, or to cause ditches or other works to be made at his expense sufficient to prevent all damage to the tenement of his neighbour.*
>
> (5) *The provisions of this article shall not apply in cases where the adjoining tenements are separated by a wall, provided the aforesaid trees, shrubs or plants are so kept as not to exceed the height of the wall.*

In this case we are not speaking about the trees which mark the boundary, but trees which are planted in one's tenement close to the boundary. Article 437(1) marks distances from the boundary which must be respected when it comes to planting trees in that area. Tall stand trees must not be planted at a distance of less than 2.4m from the boundary line. Other trees must be planted at a distance of 1.2m from the boundary line or more. Vines, shrubs, hedges, and other low trees which are not taller than 2.1m may be planted at a distance of not less than 45cm from the boundary line. As to why the law establishes these minimum distances for the planting of trees close to the boundary, it is because of the potential damage which the roots can cause to the neighbouring tenement, in particular to the constructions therein, because the roots have a tendency to cause cracks, and also because of the potential inconvenience to the neighbour having overarching branches and leaves onto his space. In fact, article 437(3) states that the owner of the neighbouring tenement can have the trees removed if he proves that the roots are causing damage to his property, even if they are within the legally mandated distance. Therefore, trees can be removed if the minimum distances have not been observed or where despite their having been observed it is proved that the trees are causing damage to the neighbouring tenement. In any such case article 437(4) applies. Under article 437(5) these distances and the right to petition the court for the trees to be removed do not apply where the boundary line is marked by a party-wall and the trees do not exceed the height of the said wall.

The **third easement of distance** is perhaps the most important today and is the distance which must be kept in the case of excavations next to a party-wall. This is a circumstance which nowadays gives rise to many disputes. *Vide* **articles 439** and **440**. Both provisions preserve their original drafting and states that:

> **439.** *It shall not be lawful for any person to dig in his own tenement, any well, cistern or sink, or to make any other excavation for any purpose whatsoever at a distance of less than seventy-six centimetres from the party-wall.*
>
> **440.** (1) *Notwithstanding the observance of the distance prescribed in the last preceding article, whosoever makes any excavation, shall be bound to make good any damage caused by such excavation to his neighbour's building, provided such building has been constructed according to the usages and the rules of art prevailing at the time of its construction.*
>
> (2) *Nevertheless, no liability for damages is incurred, if the excavation is made at the distance which the court, upon the demand of the party wishing to make the excavation, shall have fixed, according to circumstances, or if such party has executed such works as, according to circumstances, shall have been ordered by the court so as to avoid causing any damage to the neighbour.*

Take, for example, two terraced houses next to one another and one of which was built in 1980s, is separated by a single-leaf party-wall, and has been pulled down to make way for

basement garages and flats. No basement was ever excavated so excavations are necessary. In that scenario, article 439 creates a legal easement for private utility in favour of the owner of the neighbouring tenement and this legal easement consists in the obligation of the owner developing his tenement not to carry out any excavations or any digging of rock within the distance of 76cm from the party-wall. This is a legal easement for private utility and therefore it is enforced if the owner of the neighbouring tenement insists on the easement. The purpose behind this easement is the preservation and the stability of the party-wall itself and the construction in the neighbouring tenement. If this distance is respected and nevertheless damage is caused to the neighbouring tenement then whoever carried out the excavations, despite his respecting this minimum distance, is obliged to make good for the damage caused in the neighbouring tenement and the only way in which the developer can free himself from the obligation to make good for the damages is by following the course stipulated in article 440(2) and going to court before carrying out the excavations and asking the court to give him precise details of how and where to carry out the excavations, a remedy which, as can be imagined, is not feasible to anyone who is interested to excavate because of the duration of time and because of the risk of the method statement imposed by the court and therefore in practice whoever carries out excavations has to carry along the risk of having to make good the resulting damages to the neighbouring tenement. The remedy to enforce this easement is to demand an interim measure from the court whilst the excavation is still in course or is still to start and the court, in a warrant of prohibitory injunction, will order that no excavation takes place or continues to take place before the court determines the matter in a final and definitive judgement. If the excavation in a distance less than 76cm has been completed the interim measure will not work but we have instances where the court in judgements ordered the reversal of the excavations through permanent closure of the space which should not have been excavated.

Vide the following judgements:

- *Giovanni Coleiro pro et noe v. Domenico Camilleri et* (FH CC, 18/02/1936),
- *Salvatore Grixti et v. George Schembri* (CoA, 12/06/1959),
- *Eric Fenech Pace et v. Bajja Developments Ltd* (FH CC, 14/10/2004),
- *Joseph Mangion v. Julian Borg* (FH CC, 03/02/1983),
- *Brincat v. Salina Estates Ltd* (CoA, 25/02/2004),
- *John Busuttil et v. Tapa Ltd* (CoA, 31/05/2013),
- *Carmen Pecorella pro et noe v. Lino Stafrace et* (CoA, 20/07/2020),
- *A & N Properties Ltd v. Charles Busuttil* (FH CC, 29/02/2012)

Also *vide* the Building Regulation Act (Cap. 513 of the Laws of Malta) and the Avoidance of Damage to Third Party Property Regulations (S.L. 513.06). The latter is an administrative law, setting up the Building and Construction Agency and these regulations stipulate in detail the administrative process which is now to be followed when excavations are to be carried out. Both of which were introduced following the tragic accidents caused by unregulated excavations.

The **fourth easement of distance** concerns the distance which applies to windows opened close to the party-wall, and whether windows or other openings can be opened in the party-wall itself. *Vide* **articles 425** and **443** of the Civil Code.

Article 425 states that *"It shall not be lawful for one of the neighbours without the consent of the other to make in the party-wall any window or other opening".* This rule, according to jurisprudence, suffers two exceptions: the first exception refers to what in Maltese is called *'rewwieha'* or *'ventiere'* in Italian. These are openings in the party-wall and are normally exactly under the ceiling and more or less one *franka* stone by one *franka* stone in terms of dimensions, with the aim of increasing air circulation and natural light. The courts have made an exception to the rule in article 425 insofar as *rewwiehat* are concerned. The courts have made this exception on the strength of their argument that because of the size of a *rewwieha* and because of its location it does not cause any harm to the owner of the neighbouring tenement, whilst giving an advantage to the tenement where it is situated. Normally, on the other side of the rewwieha there would be an open, undeveloped space and so the damage, harm, and inconvenience which it causes to the neighbouring tenement is negligible. Therefore, the courts presume that the *rewwiehat* are tolerated because they are not prejudicing the exercise of the right of ownership of the owner of the neighbouring tenement. Keep in mind that a *rewwieha* is not a window and does not serve the same purpose as one. *Vide* the following judgements where the *rewwieha* is explained as well as the reasoning of the court:

- *Angela Micallef v. Giuseppe Muscat* (FH CC, 05/06/1950): *Rewwiehat* are allowed by way of exception to article 425 but they do not constitute an easement because they do not cause a burden to the owner of the neighbouring tenement, they are presumed to be allowed on tolerance, and the owner of the neighbouring tenement can only close them but can close them when he develops the space onto which they overlook.
- *Edward Niame v. Louis Tabone* (CoA, 04/05/1988),
- *Emmanuel Vella v. John Galea et* (FH CC, 09/10/2003).

The second exception refers to a window overlooking undeveloped property. Take, for example, a case with two plots, one of which built and the other not. He who built first built the party-wall and opened a window into the body of said party-wall, therefore overlooking undeveloped land. As to whether the window can be opened without the consent of the owner of the undeveloped land, whether such window would constitute an easement, and whether it can at any time be closed, the courts have answered these questions applying the same principles which they have applied with regard to the *rewwiehat.* The courts consider that because the adjacent tenement is still undeveloped, the existence of a window in the party-wall overlooking it will not harm, prejudice, or burden in any way the owner of the undeveloped land. Because of that, the courts consider this kind of window as not constituting an easement so they say that it can be opened and kept even without the consent of the owner of the undeveloped land, but it will always continue to be considered as being tolerated by the owner of the undeveloped land who will be entitled to close it on building against the party-wall when developing his tenement. *Vide* the cases of:

- *Maria Brincat v. Giuseppe Caruana et* (CoA, 09/04/1954),
- *Joseph George Micallef v. Joseph Spiteri et* (FH CC, 20/10/2005).

The undeveloped tenement unto which the window in the party-wall can look must be completely undeveloped and cannot be an internal yard or shaft. A window which overlooks an internal yard or shaft constitutes an easement and falls within the prohibition in article 425. *Vide* the case of *George Camilleri v. Carmelo Curmi* (CoA, 03/07/1995).

Saving for these two exceptions, any window or other opening in the party-wall is hit by the prohibition in article 425 therefore the consent of the owner of the neighbouring tenement is required.

Article 443 then stipulates the distance which must be respected for windows which are opened in a building close to the party-wall and states that:

> **443.** (1) *It shall not be lawful for the owner of any building to open windows at a distance of less than seventy-six centimetres from the party-wall.*
>
> (2) *In the case of balconies or other similar projections, the distance prescribed under sub-article (1) of this article shall be measured from the external line of that side of the balcony or other projection, which is nearer to the party-wall, to the internal line of such wall.*

Here, we are not speaking of windows in the party-wall itself, but the minimum distance between the party-wall and a window close to the party-wall in the neighbouring tenement, with that minimum distance being 76cm. *Vide* the following cases:

- *Carmel Zammit v. Anthony Sultana* (FH CC, 31/01/1994),
- *George Camilleri v. Carmelo Curmi* (CoA, 03/07/1995).

§IV Of Eavesdrop (Article 445)

Article 445 states that *"Every owner shall construct the roofs of his building in such a manner that the rainwater shall not fall on the neighbouring tenement".* This easement is making it clear that every construction or development should see to the way in which rainwater is channelled into that same building and therefore does not burden any adjacent building. According to the Code of Police Laws rainwater that falls onto the roofs of tenements is to be channelled directly into a well.

§V Of Right of Way and of Watercourse (Articles 446-453)

The fifth and last group of legal easements for private utility. In legal jargon, the easement which we will be considering is referred to as the necessary right of way. A right of way (*dritt ta' passagg/access*) is an easement and the benefit involved in this easement is that the dominant tenement enjoys the benefit of access and passage/way over the serving tenement and, correspondingly, the servient tenement is bound to allow the dominant tenement to exercise those access and way over some part of the servient tenement. For the moment we will be considering the legal right of way, that right of way which is created by law to serve a private utility for the benefit of the dominant tenement only and which arises only in the circumstances set out in these **articles 446-453**. We shall see that the right of way can also be conventional and not legal so it can also be created by man in favour of a particular tenement in situations which are completely different to those contemplated in articles 446-453.

The circumstances in which the legal easement of right of way arises: These are twofold and very well explained in articles 446 and 447 respectively. **Article 446** states that:

> **446.** *Every owner is bound to grant access to and a way over his tenement, provided such access or way be necessary, for the purpose of repairing a wall or other work belonging to his neighbour or held in common.*

The different between access and way is that the former refers to entry into the servient tenement whilst the latter refers to actually going over the servient tenement for a particular purpose. The crucial qualification in this provision is the term *"necessary",* by which the law means reasonably required. When the owner of the dominant tenement reasonably requires an access or a way over the servient tenement in order to repair a wall or other part of his building or even to carry out repairs to any structure or space which is commonly owned between the dominant tenement and the servient tenement, then this legal easement of access to and passage over the neighbouring tenement arises. There are often circumstances where this right of way and access is denied, in which case this legal easement can be enforced through judicial proceedings.

The second kind of necessary right of way is arguably the most important of the two and is regulated by **article 447**:

> **447.** (1) *Any owner whose tenement has no outlet to the public road, may compel the owners of the neighbouring tenements to allow him the necessary way, subject to the payment of an indemnity proportionate to the damage which such way may cause.*
>
> (2) *Such right of way shall be exercised over that part where it will be least injurious to the person over whose tenement it is allowed.*

Take, for example, a large field which becomes a development zone and is parcelled into plots, but the public road is not part of the field but is constructed outside the borders of that field. In that manner, the plot can end up completely land locked. The law refers to that kind of tenement as a tenement having no outlet to the public road. The requirements to be satisfied for this legal easement to arise are as follows:

1. **Ownership:** Note the repetition of the term *"owner"* in article 447(1), as easements are real rights, and they bind and exist between tenements and can be enforced against the owner of the servient tenement at the time when the dispute arises.
2. **No outlet to the public road:** Does the law require that the dominant tenement have absolutely no opening onto the public road? The courts have tempered this wording of *"no outlet to the public road"* and allowed this legal easement also in favour of tenements having uncomfortable or inadequate outlets or openings onto the public road. Take, for example, an outlet which is too small for the tenement to be adequately accessible from the public road. The way which is allowed is limited strictly to what the dominant tenement requires to have adequate access to the public road and this is where the Courts apply in practice the fundamental rule in the law of easements that they should be interpreted in such a manner as the advantage

involved in the easement is secured in favour of the dominant tenement with the least possible harm, damage, and inconvenience to the servient tenement. When the courts have to determine the direction and the width of the necessary way over the servient tenement the courts adhere strictly to this rule of interpretation. Striking this balance between the interest of the dominant tenement and that of the servient tenement is what the courts do when interpreting in practice this particular easement of necessary right of way.

3. **Indemnity:** The law grants the owner of the servient tenement the right to receive compensation to cover the interference which this legal easement puts on the exercise of ownership of the servient tenement. As has been seen in regard to the compensation for acquiring co-ownership of the party-wall, the indemnity is a personal right so it is a right to the payment of a credit which exists against the actual owner of the dominant tenement who is benefiting from the necessary right of way.

If there is more than one adjacent tenement over which this necessary right of way can be exercised, here again applying the principal of balancing the interests of the dominant tenement and the servient tenement the court will determine over which tenement this necessary way is exercised depending on the way which causes the least injury and damage to the servient tenement but securing the benefit contemplated in the law in favour of the dominant tenement.

Vide the following judgements:

- *Sammut v. Borg* (FH CC, 28/02/1926),
- *Sant v. Cassar* (COA, 11/03/1934),
- *Angela Borg et v. Anthony Sciberras* (COA, 31/01/2011),
- *John Cassar et v. Innocent Camilleri* (COA, 27/10/2017),
- *Pauline Xerri et v. Lawrence Vella et* (COA, 31/10/2017).

Once we have established that this legal easement of necessary right of way in favour of a locked tenement exists, will that easement continue to exist in perpetuity? Article 449 states that:

> **449.** *Where the right of way granted as aforesaid shall, in consequence of the opening of a new road, or of the incorporation of the tenement with another tenement contiguous to the public road, cease to be necessary, the owner of the servient tenement may demand the discontinuance of such right of way on restitution of the indemnity received or the cessation of the annual payment agreed upon.*

Where the legal easement of necessary right of way in favour of a locked tenement exists it will end as soon as a new road is opened and the previously locked tenement has now an outlet onto the public road, or when the locked tenement becomes part of another tenement which has a direct outlet onto the public road. With this there shall also be the cessation of the obligation to pay the indemnity if it is in the form of a periodical payment. If it was paid as a lump sum, there is the right of restitution.

In regard to the indemnity, refer to **article 451** which states that:

> **451.** *The action for the payment of the indemnity under articles 447 and 450 is subject to prescription: and the right of way or of watercourse may continue to be exercised, although the action for the payment of the indemnity can no longer be maintained.*

This is the same principle which was seen during discussions regarding the compensation due for acquiring co-ownership of the party-wall. The easement itself is a real right but the right to receive the indemnity is a real right, meaning the extinctive prescriptive period for it is 5 years pursuant to article 2156(*f*). Therefore, we may end up with a situation where the payment of the indemnity is no longer actionable, but the legal easement still exists and can continue to be exercised in terms of the law.

One exception to the rule that a locked tenement is entitled to a necessary way over an adjacent tenement is set out in **article 448** which states that:

> **448.** *Where the tenement has become enclosed on all sides in consequence of a sale, exchange, or partition, the vendors, the parties to the exchange, or the co-partitioners are bound to grant a foot-way, horse-way or cart-way, as the case may be, without any indemnity.*

If the plot has been made land locked as the result of an *inter vivos* agreement, then the participants in the agreement are bound to give themselves the necessary right of way without any right to receive compensation. The law makes this restriction because insofar as possible the law avoids the creation of legal easements where there are other possibilities which can serve the same purpose because an easement is a restriction on ownership. *Vide* the following judgements:

- *Captain Giuseppe Leonardini et v. Joseph Xuereb et* (COA, 06/02/1950),
- *Edward Cauchi et v. S.O.C. & K. Company Ltd* (COA, 29/04/2016).

Under **article 453**, with regard to the observation that two or more tenements can be servient tenements, the law says as follows:

> **453.** (1) *Where the enjoyment of the way or the watercourse can be had in or over two or more tenements belonging to different owners, the easement shall be imposed on that tenement to the owner of which it is least injurious.*
>
> (2) *Where the easement will not affect one tenement more injuriously than another, the easement shall be imposed on that tenement where it shall be more convenient to the person demanding it, and it shall not be lawful for such person to choose another tenement without the consent of its owner.*

This is the balance which is always applied in the interpretation of easements.

Articles 450 and **452** both refer to the right of watercourse.

> **450.** (1) *Any person who cannot receive water into his own tenement from fountains or other deposits of public water, except through rural tenements belonging to other persons, may compel the owners of such tenements to grant him, in such manner as shall least injuriously affect them, the right of watercourse, subject to the payment of an indemnity proportionate to the damage.*
>
> (2) *It shall not be lawful for such person to compel the said owners to allow him to make new channels, if they grant to him watercourse by means of the existing channels; in which case the indemnity shall be determined having regard to the value of such channels, and the expense necessary for their first repair, and the person who makes use of them shall remain bound to contribute to the expense of their upkeep as provided in article 452.*
>
> **452.** *Any person who is entitled to make use of the channels made for the passage of water is bound to contribute to the expenses for their necessary repairs, saving his right to relief, where competent, against the persons through whose fault the channels have been damaged.*

Legal Easements Created by Man

We shall explore how the owners of neighbouring tenements can create servitudes between them. We shall consider articles 454 onwards. **Article 454** states that:

> **454.** *It shall be lawful for owners to establish, in accordance with article 400, any easement which is in no way contrary to public policy.*

Which easements can be created by act of man? All easements which are not contrary to public policy, and which satisfy the requirements of the definition section in article 400. These are the only limits imposed on servitudes which can be created between the owners of neighbouring tenements: that it does not break public policy and that the requirements in article 400 are met. So long as these two conditions are fulfilled then the easement created by act of man is fine, valid, and can be enforced.

How are easements created by act of man? The response is not straightforward because the law first offers a categorisation of easements, and then, according to the classification of the said easement, states how they may be created validly. Therefore, we shall first consider the classification of easements under law pursuant to **articles 455** and **456**. In the said articles we have six different classifications for easements, which are as follows:

1. Continuous,
2. Discontinuous,
3. Apparent,
4. Non-apparent,
5. Affirmative,
6. Negative.

Every easement created by act of man has to have three of these classifications, meaning it must be either continuous or discontinuous, apparent or non-apparent, affirmative, or negative. In articles 455 and 456 we have the definition of each classification and by exception the law also gives examples of easements in each category.

Easements are continuous if their enjoyment is or may be continuous without the necessity of any actual interference by man. The examples which the law gives of continuous easements are the right of watercourse, eavesdrop, prospect (a window), and others of a like nature. These are servitudes whose advantage is continuous, and the owner of the dominant tenement needn't do anything to enjoy such an advantage.

On the other hand, easements are discontinuous if their enjoyment can only be had by the actual interference of man. The examples which the law provides are the right of way, the right of drawing water, and others of a like nature. The criterion is whether there is the necessity of a human intervention for taking the benefit of an easement.

An easement is apparent if their existence appears from visible signs. The law offers the door, the window, or the artificial watercourse as examples.

An easement is non-apparent if they have no visible sign of their existence. The examples which the law provides are the prohibition to build on a certain land (*servitu non edificandi*) or the prohibition to build above a certain height which is the *altius non tollendi.* These are easements which, if you look at the dominant tenement and the servient tenement, one will not see any indication of their existence.

An easement is affirmative if they consist in the right to make use of the servient tenement. An easement is negative if they consist in the right to restrain the owner of the servient tenement from the free use thereof. Take, for example for the latter, the *altius non tollendi* as the owner of the servient tenement is restrained from raising the height of his building beyond a certain point.

These are the six headings of classification of easements which the law provides. The classification of any easement to be created by man under these headings determines the manner in which that easement can be validly created.

Article 457, on the creation of continuous and apparent easements, states that:

> **457.** *Continuous and apparent easements may be created -*
> (a) *by virtue of a title;*

> (b) *by prescription, if the tenement over which such easements are exercised may be acquired by prescription;*
> (c) *by the disposition of the owner of two tenements.*

Article 469(1), on easements that cannot be acquired by prescription, states that:

> **469.** (1) *Continuous non-apparent easements, and discontinuous easements, whether apparent or non-apparent, can only be created by a title; they cannot be created by prescription or by the disposition of the owner of two tenements.*

In order to determine the way in which an easement can be validly created by act of man we need to consider the nature of the easement, what is the advantage involved, and how it will be obtained, and on this basis we have to classify the easement as continuous or discontinuous, apparent or non-apparent, and if the easement is both continuous and apparent it can be created in either of the three ways listed in article 457. Otherwise (i.e., if it is discontinuous or non-apparent), it can only be created by title.

Taking into account article 457 and the three ways mentioned therein as ways to create continuous and apparent easements (be they affirmative or negative), let us explore them:

Title: By *"title",* the law means a public deed *inter vivos* or a public will as drawn up by a notary. In the case of a deed *inter vivos* the easement will only become valid and effective vis-à-vis third parties from the date of registration of the public deed in the Public Registry. If the dominant or servient tenement fall within a compulsory registration area under the Land Registration Act that public deed must also be registered in the Land Registry, and it is from that point that the easement exists in regard to third parties. There may a specific contract for the creation of the easement, or the public deed can involve some other transaction, for example a deed of partition, creating at the same time easements burdening the land partitioned or a part thereof in favour of the remaining land. Where the servient tenement is subject to a right of usufruct the consent of the usufructuary for the creation of the easement is required if the easement effects the enjoyment of the tenement by the usufructuary, if he consents then the easement will be valid even if there is such a diminution by the easement of the usufructuary's enjoyment (pursuant to **article 459**). Where the servient tenement is co-owned, the valid creation of the easement requires the unanimous consent of all the co-owners (pursuant to **article 461**). If the consent of all the co-owners is not forthcoming the easement will bind only the co-owner who constituted it and its existence will remain in abeyance until all of the other co-owners offer their consent to it (pursuant to **article 460**). The public deed usually contains the identifications of the dominant and servient tenements through the reference to a plan, and in the deed itself we find a description of the easement *per se*. It is important that these details are registered in the Public Registry and, where applicable, in the Land Registry. Any easement created by act of man, irrespective of its classification, can be created by title.

Acquisitive Prescription: The second mode of creating continuous and apparent easements (which does not apply to any easement which is not continuous and apparent) is acquisitive prescription, the mode of acquiring a right through the actual exercise of that right over a period of thirty years. Actually exercising a continuous and apparent easement for more than thirty years continuously without any physical or legal interruption, openly without any contestation, and clearly and unequivocally, will create the easement validly. Take, for example, a person who opened a window in the party-wall where one did not exist before and where it should not have been. This window stood there without opposition and openly for a period of thirty years. After the lapse of thirty years this becomes an easement created by man and can be so even if it breaches a rule of the legal easements for private utility. *Vide* article 462 which states that:

> **462.** (1) *In order to acquire an easement by prescription, possession for a period of not less than thirty years is necessary.*
>
> (2) *If the servient tenement is subject to entail or belongs to a church or any other pious institution, the prescriptive period is forty years.*
>
> (3) *In the cases referred to in this article, the person pleading prescription is not bound to produce a title, and no plea on the ground of bad faith can be set up against him.*

The person pleading prescription is not bound to produce a title and no plea on the ground of bad faith can be made against him. In order for an easement to be created by acquisitive prescription, all of the requirements of the thirty-year acquisitive prescription must be satisfied. There is no requirement of good faith, nor of title, but possession for the whole required time with all the requirements stipulated in article 2107 of the Civil Code must be proved. Whoever pleads acquisitive prescription as the source of the creation of the easement must prove these requirements. If the servient tenement belongs to the Church, the same requirements apply but the period of prescription is ten years longer.

In the case of affirmative easements (those that consist in the right to make use of the servient tenement, *vide* **article 456(2)**), the possession for the purposes of acquisitive prescription starts from the day on which the owner of the dominant tenement proves to have started making use of the servient tenement. In the case of negative easements (those easements which consist in the right of the dominant tenement to restrain the free-use of the servient tenement, *vide* **article 465(3)**) possession starts from the day on which the owner of the dominant tenement by means of a judicial act has restrained the owner of the servient tenement from the free-use thereof (*vide* **article 463**). The burden of proving all of these requirements under **articles 462** and **463** always fall on the owner of the dominant tenement who contends that an easement has been created in favour of his tenement by virtue of acquisitive prescription.

Article 469(2) states that: *"Nevertheless, the easement of right of way for the use of a tenement may be acquired by the prescription of thirty years, if such tenement has no other outlet to the public road".* Of note here is the question as to why the law mentions the right

of way when a tenement has no access to the public road in these provisions relating to easements created by act of man when the right of way is an easement of public utility created by law. Furthermore, how is the law saying that the right of way can be created by the prescription of thirty years if **article 455(3)** states that the right of way is a discontinuous easement. The courts have explained that this sub-article (2) of article 469 refers to the direction and width of the necessary right of way which the law itself creates in favour of a tenement without an outlet on the public road under **article 447(1)**. It has been said that the law creates a servitude in the interest of the enclosed tenement to access the public road. What article 469(2) is saying is that whilst preserving its nature as a legal easement, prescription can benefit the owner of the dominant tenement by giving him a right to continue exercising the necessary right of way in a particular direction and for a particular width over the servient tenement if the necessary right of way has been exercised for those direction and width for more than thirty years, satisfying all the requirements of article 2107. That notwithstanding, the easement will preserve its nature as a legal easement and will cease to exist if the enclosed, therefore dominant, tenement subsequently acquires an outlet to the public road. for as long as it exists the dominant tenement can insist on keeping the same direction and width of the necessary way over the servient tenement if those direction and width have been enjoyed for more than thirty years.

Vide the following judgements:

- *Joseph Zammit et v. Carmelo Psaila et* (FH CC, 01/10/2001),
- *Francis Baldacchino et v. George Debono et noe* (FH, 16/01/2003),
- *John Cassar et v. Innocent Camilleri et* (COA, 27/10/2017).

Disposition of the Owner of Two Tenements: The law defines this phrase in **article 468** which states that *“An easement is created by "the disposition of the owner of two tenements" if it is proved that the two tenements, now divided, belonged to the same owner, and it was such owner who placed or left things in the state which gives rise to the easement”.*

This article has the following requisites:

1. The dominant tenement and the servient tenement must have belonged to the same owner, meaning in the past the dominant tenement and the servient must have belonged to the same owner.
2. That common owner must have made the things in the position which now gives rise to the easement.
3. And finally, that common owner must have subsequently transferred the right of ownership of at least one of the tenements to a different owner.

Take, for example, a ground floor and an overlying maisonette developed by the same owner with two separate entrances, no common parts, but with windows in the upper tenement which overlook spaces in the lower tenement. Those windows, even if they are not expressly mentioned in the deed when the common owner transfers any one of them, constitute an easement because they were put in place by one and the same owner of the two tenements which now belong to different owners. This way of creating conventional easements applies only to continuous and apparent easements.

Vide the following cases:

- *Godwin Azzopardi v. Paul Azzopardi* (FH CC, 31/01/2003),
- *Herman Magro v. Mark Anthony Borg* (FH CC, 23/01/2004).

The Manner in which Easements are Exercised

Articles 470 through 478 contain the rules for interpreting easements, that is to say the rules for identifying the advantages of the easement and how to interpret the easement in the context of a dominant tenement whose interest is to amplify that advantage and a servient tenement whose interest is to restrict as far as possible the extent of the easement. These rules for interpreting easements apply to all easements, whether it be legal or created by man, whether it serves a public purpose or a private interest.

Article 470 states that *"The creation of an easement shall be deemed to include the granting of all that is necessary for the enjoyment of such easement with the least possible damage to the servient tenement. Thus, the right of drawing water carries with it the right of way, and the right to cause water to be led over another person's tenement includes the right of way along the sides of the channel in order to watch over the flow of the water, and to clean the channel and make the necessary repairs".* This principle is the central rule for interpreting easements. Making out the advantage intended by the easement and without taking anything away from that advantage the easement is interpreted in a way which causes the least possible damage to the tenement which is burdened by the easement. The right of drawing water carries with it the right of way. The right to cause water to be led over another tenement also includes the right of way for the channel to pass as well as to clean and make repairs thereto. As the examples are showing the easement is interpreted to include any accessory right which, in practice, is necessary for the dominant tenement to take the full advantage of the easement. Anything which may be required for the effective exercise of the easement and for taking the advantage intended by the said easement is included as an accessory right in the easement itself.

As a consequence, pursuant to **article 471**, *"Any person to whom an easement is competent may carry out at his expense and in such manner as to cause as little inconvenience as possible to the owner of the servient tenement, the works that are necessary for the exercise and preservation of the easement".* The owner of the dominant tenement has the right and the duty to carry out at his expense any works which may be required for the exercise and preservation of the easement causing the least possible damage to the servient tenement. Where the owner of the servient tenement is required by his deed of title to bear the expense for the exercise and preservation of the easement that obligation is a real obligation and will continue to bind the servient tenement irrespective of who is its owner. The owner of the servient tenement cannot do anything to take away any part of the advantage intended by the easement in favour of the dominant tenement (pursuant to **article 474(1)**).

If, however, the easement can continue to be exercised with the same advantage for the dominant tenement over a different part of the servient tenement taking away some of the burden otherwise imposed on the servient tenement, then the easement can be varied by agreement between the owners of the dominant and servient tenement or by a court judgement, pursuant to **article 474(2)**. The law repeatedly seeks to strike a balance between

preserving the advantage of the easement in favour of the dominant tenement and causing the least possible damage to the servient tenement.

Article 475 tells us that the owner of the dominant tenement may not render the easement more burdensome on the servient tenement, stating that *"Any person having a right of easement shall exercise such right in the terms of his title, and it shall not be lawful for such person to make either in the servient or in the dominant tenement, any alteration which may increase the burden on the servient tenement".* Keeping the burden on the servient tenement as small as possible without taking away any part of the advantage intended by the easement.

If there is doubt as to the extent of the advantage intended by the easement, that is to say, what if the advantage of the easement were to be disputed between the dominant and the servient tenements, **article 476** states that *"In case of doubt as to the extent of an easement, its exercise shall be restricted to what is necessary, having regard to the destination of the dominant tenement at the time the easement was created and to the convenient use of such tenement, with the least damage to the servient tenement".* This is maintaining the idea of keeping the damage to the servient tenement to a minimum without taking away any part of the advantage for which the easement was granted to the dominant tenement according to its destination and convenient use at the time when the easement was created.

On the interpretation of easements *vide*:

- *Giorgio Zammit v. Francesca Borg* (COA, 24/06/1960),
- *Louis Gauci v. Angelo Attard* (FH CC, 09/12/2002),
- *Herman Magro v. Mark Anthony Borg* (FH CC, 23/01/2004).

The Manner in which Easements are Extinguished

There are various ways in which an easement can be extinguished, and these are set out in **articles 479** to **488**. The simplest way in which any easement can be extinguished is through a consensual renunciation to the easement expressed in a public deed which is registered in the Public Registry and, where applicable, the Land Registry. This is essentially extinguishment through title, a public deed where the owner of the dominant tenement renounces to the easement and that renunciation is accepted by the owner of the servient tenement.

The second way in which an easement can be extinguished is where the servient tenement is such that the easement can no longer be exercised unless it is restored to a state allowing for the exercise of the easement prior to the lapse of time required for extinctive prescription, pursuant to **article 479** which reads as follows:

> **479.** (1) *An easement is extinguished when the things subject thereto are in such a condition that it can no longer be exercised.*
>
> (2) *Nevertheless, the easement will revive if the things are restored in such a manner that it can be again exercised, unless a period of time sufficient to raise a presumption of the extinguishment of the easement under article 481 shall have elapsed.*

The third way in which an easement can be extinguished is through the merger of the dominant tenement and the servient tenement into one and the same owner. We have seen how no person can have an easement on his own tenement. Therefore, if one and the same person becomes the owner of both the dominant and the servient tenement, and *ergo* there is a merger of title in relation to the same person, the easement is extinguished. Exceptionally, if following that merger any of the tenements is subsequently transferred to a different owner and at the time of such transfer there is a visible sign of the easement without any declaration that the easement has been extinguished, then the easement will revive in favour of the originally dominant tenement and burdening the originally servient tenement, pursuant to **article 480**.

The fourth manner in which an easement is extinguished is through extinctive prescription, what the law refers to in **article 481** as *"non-user".* Article 481 states that:

> **481.** (1) *An easement is extinguished by non-user for the period of forty years, in the case of property belonging to the Government of Malta or to a church or other pious institution, and of thirty years, in the case of any other property.*
>
> (2) *The provisions of this article shall not apply where the non-user was due to the conditions referred to in article 479 provided the owner of the dominant tenement could not, according to law, cause such conditions to cease.*

An easement can cease to exist if it is not exercised for more than thirty years, or forty in the case of Church or State property. These periods run from the date of the last exercise of the easement if the easement is discontinuous. If the easement is continuous it runs from the date when the first act done in violation of the easement takes place, pursuant to **article 482**.

Vide the case of *Ester Degabriele et v. Joseph Rocco* (COA, 26/02/1965).

The fifth way in which an easement is extinguished is when the servient tenement is acquired in full ownership by original title, pursuant to **article 483** which states that *"In regard to a third party in possession of the servient tenement, the easement shall be extinguished by the lapse of the time required for the prescription of the ownership of the tenement itself according to the provisions relating to prescription under Title XXV of Part II of Book Second of this Code".* If the formerly servient tenement is acquired in full ownership by acquisitive prescription, therefore without any limitation of an easement, then any previously existing easement would be extinguished.

Article 488 states that:

> **488.** (1) *Any easement acquired by the husband in favour of a dotal tenement, or by an emphyteuta in favour of the emphyteutical tenement, shall not be extinguished on the*

> *dissolution of the marriage or on the termination of the emphyteusis.*
>
> (2) *Easements, however, imposed over the said tenements by the said persons shall be extinguished.*

When a tenement is subject to an emphyteusis any easement which the emphyteuta may have gained in favour of the tenement subject to the emphyteusis will continue to exist after the termination of the emphyteusis, but any easement which he would have suffered on the emphyteutical tenement is extinguished when the emphyteusis comes to an end.

The Actions in the Area of Easements

If one contends that one's tenement enjoys an easement and is being unlawfully deprived of the advantage of the said easement, or, alternatively, if one contends that one's tenement is not subject to an easement which is being unlawfully exercised to the detriment of my tenement, what is one's remedy? Here we do not have provisions in the Civil Code stipulating actions in the area of easements, and once again we resort to those actions which existed under Roman Law in this area. For these purposes we find two different actions serving different purposes exist:

1. The *actio confessoria servitutis*: The action to declare an easement.
2. The *actio negatoria servitutis*: The action to deny the existence of an easement.

Both actions are actions in defence of title, therefore in defence of the real right, and both actions are to be pursued between the owners of the tenements involved. In the former, the owner of the tenement requests the court to declare that his tenement is a dominant tenement vis-à-vis the tenement belonging to defendant, and therefore enjoys an easement over the defendant's tenement. In the latter actio, the owner of the tenement burdened with the exercise of an easement by defendant's tenement seeks a declaration that the easement does not exist and therefore the defendant's tenement does not enjoy any right of easement over plaintiff's tenement. There is no particular requirement of proof for either action and therefore the rules of Civil Procedure stating that who alleges must prove and that the proof produced must satisfy the balance of probabilities hold fast.

Vide the following judgements:

- *Actio confessoria servitutis*:
  - *Andrew Zammit et v. Joseph Pavia et* (COA, 26/01/2018).
- *Actio negatoria servitutis*:
  - *Rudi Carbonaro et v. Samuel Spiteri et* (COA, 28/01/2022),
  - *Carmel d'Amato et v. Baldacchino Holdings Ltd* (COA, 26/05/2021).

Luca J. Camilleri IV

POSSESSION

The role of possession in Civil Law

Possession has the following important roles and functions:

1. **It is protective of the social order:** *Possideo quia possideo* - I possess because I possess. An important role and function in the Civil Code is to protect the social order the way that any person who wishes to change or challenge an existing state of affairs one has to do so through the means of legality. Possession in itself protects the status quo of the social order, protecting a certain social peace and is a deterrent from taking the law into one's hands. No one is allowed to take the law into one's hands.
2. **The possessory actions:** There are two principal possessory actions – *actio manutentionis* and the *actio spolii*, both protecting possession *qua* possession.
3. **Regulating the relations between the possessor and the owner:** What are the roles, responsibilities, and rights of both the possessor and the owner. This is determined by the difference between possession in good faith and possession in bad faith.
4. **Acquisitive prescription:** A certain type of possession for a certain period of time is a way of acquisition of ownership (*usucapio*). Note Part II of Book II of the Civil Code, which attempts to regulate modes of acquiring and transferring property and property rights over things. Therefore, acquisitive prescription falls under this context, being a mode of acquiring and transmitting ownership. Generally speaking, ownership is acquired either by contract (donation, sale, exchange, etc.), or by succession, or by acquisitive prescription.
5. **The Law of Possession creates a number of important and defining presumptions:** Take, for example, the fact that a person is presumed to possess in its own name and in virtue of a title if otherwise proven. In other words, there are a number of other very important presumptions which acquire relevance in the context of acquisitive prescription.

Defining Possession

Article 524(1) defines possession as *"the detention of a corporeal thing or the enjoyment of a right, the ownership of which may be acquired, and which a person holds or exercises as his own".* The first thing to note is that there is possession and quasi-possession. The former is the detention of a corporeal thing, in other words it is the actual holding of a corporeal thing, whilst the latter is the enjoyment or exercise of a right which in the Civil Law tradition has come to be known as quasi-possession. This corporeal thing or this right must be *in commercio,* meaning the ownership of which is capable of being acquired, therefore one will no doubt see the link between possession and acquisitive prescription which is a mode of

acquiring ownership of something (a right or a corporeal thing). Things *extra commercio* simply cannot be bought on the market and therefore they are not capable of being possessed.

The second part of this definition is that a person holds or exercises that which is in his possession as one's own. This is traditionally the *animus domini* (to hold *animo domini* - the *animus rem sibi habendi* (the intention)). Note the link between possession, acquisitive prescription, and this intention to hold or exercise as one's own: this is the defining characteristic of technical possession, in other words it is not alone sufficient that a person holds or exercises a right but there has to be the intention to hold and exercise as if it were one's own. This leads us to the traditional requisites of possession which are known as the *corpus* and the *animus,* meaning the detention of a thing or the enjoyment of a right (corpus) with the intention to hold and possess as one's own (*animus*). To that end, there is not the knowledge that one knows that one will never own what one possesses.

There two things of note here: firstly, prescription is a question of fact – the material control or material exercise of possession. There is this defining factor that possession has to be actually exercised. When one speaks of a possessor the question arises as to how this possession is manifested, which is through the actual holding of the thing and exercising of the right because in many ways the possessor is the reflection of the owner. For acquisitive prescription to happen a person has to behave publicly as if he or she were the owner of the thing or right, meaning there is an essential element of materiality – the power of a person over a thing or right with a relationship of control of one over the other. The second reflection is that at all times we have to be aware, and one has to find out for oneself, of the distinction between technical and factual possession. The former is in terms of article 524(1) where there is the *corpus* and the *animus,* the detention and exercise of a right both *in commercio,* with the intent *animus rem sibi habendi*. On the other hand, possession is very often used in a wider sense in the sense that a person may be in control of a situation and loosely referred to, that is to say not in the technical sense, as the possessor.

Another notion which flows from the first rendering and first definitions of possession is the difference between a possessor and a holder. Possession as we have seen is the material holding or exercise of a right compared with the *animus rem sibi habendi.* The holder is a person who holds, enjoys, has the use and exercise of a right in the name of someone else. Examples include the lessee, the usufructuary, the depositary, the security trustee, and the custodian who all have actual material control but not technical ownership. There is distinction between the technical possessor with both the control and the required intent to hold as owner, and the person who holds and is aware that the holder is holding in the name of another. The actual possessor who may or may not be owner possesses through another person, the holder/*detentor*. The owner in usufruct possesses through the usufructuary. Note two figures: the possessor who holds by means of the person with the holding, pursuant to **articles 524(2)** and **(3)** which read *"a person may possess by means of another who holds the thing or exercises the right in the name of such person"* and *"a person who has the detention or custody of a thing but in the name of another person, is called a holder",* respectively. The tenant holds in the name of the possessor, i.e., the landlord who in turn possesses through the lessee. One can possess through the actual exercise of the right, or through another. The landlord is possessing but through someone else, i.e., the tenant. Therefore, we have two

sides of the same coin, a person may possess by means of another who holds or exercises the right in the name of the first person, and a person who has the detention or custody of a thing in the name of a person is a holder, and therefore not a possessor. Note the following two points: the wider law of property is based on the relationship between a subject and an object (a corporeal thing or a right) and possession is one aspect of the law of property insofar as it is a facet of the ownership between the subject exercising control and there is the distinction between ownership and possession. The possessor is a reflection of, but not the same as, the owner, because *possideo quia possideo.* In many ways possession is a detraction in the sense that is a consequence of ownership, but it is not the same thing.

Acquisitive Prescription through the lens of Possession

Article 2107(1) states that *"prescription is a mode of acquiring a right by a continuous, uninterrupted, peaceable, open, and unequivocal possession for a time specified by law".* Prescription is a mode of acquiring a right and through a certain type of possession, not only with *corpus* and *animus,* but it must be *continuous, uninterrupted, peaceable, open, and unequivocal.* The role of possession here is in acquiring a right and therefore note that there is this link between acquisitive prescription and the general notion of possession.

The *Causa Detentionis* (Cause of Holding)

Why does a tenant have control? Why is a tenant protected against even the lessor? What is the difference between a tenant with a title of tenancy and a person with none? The difference lies precisely in this *causa* because it is the legal justification of why a person holds something. The *causa* is found in the control in which possession is granted. In eviction proceedings one will immediately understand that the *causa detentionis* is a reason to challenge and oppose eviction proceedings. The *causa* defines the cause and reason of detention, defining why a person holds something, linking it to the materiality of the possession. One controls something, but does one do so for a legal reason? Such a legal reason backing the control of the right would be in the *causa.* Without one, there will be no legal reason to hold. Note that there exists something known as the cause of detention and is the legal reason behind why someone holds a corporeal thing or a right.

Corpus vs *Animus*

Bearing in mind the requisites of *corpus* and *animus,* not the polemic on the subject of possession between German jurists Friedrich von Savigny and Gasper Rudolf Jhering. The discussion focused on which is the predominant factor in possession, the *animus,* or the *corpus.* Savigny argued in favour of the subjective intention, arguing that it is what defines possession. Jhering emphasised more the way a possessor behaves, not the intention inside the head.

Presumptions

The presumption by virtue: The exercise of possession is a mirror of ownership. **Article 525(1)** states that *"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".* The possessor is presumed to hold in his or her name and in virtue of a title. Here we find the distinction of possession in one's name and possession in the name if another, found in sub-article (2). This is a *juris tantum* presumption that can be rebutted by

proving that a person commenced to possess in the name of another person. Note that commencing of possession is not technical possession but wider possession, and the relevant moment is the commencement of possession (known as the *adprehensio possessionis*). The initial presumption that a person possesses in his or her name, therefore not on behalf of someone else, and by virtue of a right of ownership is disproved if it is shown that such person commenced possession in the name of someone else.

Article 525(2) states that *"where a person has commenced his possession in the name of another person, he shall be presumed always to possess upon the same title unless the contrary be proved".* Even this continuity of holding/possessing in the name of someone else can be challenged by evidence, (take, for example, evidence of a loss or interruption of possession).

Article 528 states that *"any person actually in possession who proves that he formerly possessed shall, in the absence of proof to the contrary, be presumed to have continued to possess during the intervening period".* This means that subject to contrary evidence past possession and present possession raises a presumption of possession during the interim period. Given that this evidentiary situation can be excluded or shown otherwise if one establishes past and present possession this raises a presumption of possession in the interim. This presumption of continuity of possession is very relevant for the purposes of the requisites found under article 2107. Very often, when acquisitive prescription is pleaded, there is the need to show continuity. The prescriptive period can be established by the presumption found under this article. There is a given evidentiary fact that there is former possession and current possession.

Does actual possession raise a presumption of former possession? Under **article 529** it is established that current actual possession does not raise a presumption of former possession unless there is a title. Here, title means title of ownership, in other words, possession today does not raise the presumption of past possession unless there is a title. If there is a title and actual possession, there is a presumption of continued uninterrupted possession since date of title till today. Article 529 reads as follows: *"actual possession shall not operate so as to raise a presumption of former possession unless the possessor has a title; in which case, in the absence of proof to the contrary, he shall be presumed to have possessed since the date of the title".*

Under **article 530** there is what is known as the conjoining of possession, in other words in the case of succession by universal title (*causa mortis* succession) the heir continues without the need of any formality in possession. This is not automatic but has to be claimed and established in the case of a successor in the case of a singular title (*inter vivos* succession: acquirer, lessor, donate, etc.). Article 530 reads as follows: "(1) *Possession continues as of right in the person of a successor by universal title.* (2) *A successor by a singular title, whether gratuitous or onerous, may conjoin his own possession with that of his predecessor in order to claim and enjoy the effects thereof".*

The Commencement of Possession

The following articles have to be read in conjunction with article 2107(1) on acquisitive prescription because it establishes the moment possession commences and therefore the

moment useful possession commences. These are relevant first and foremost to acquisitive prescription (possession which is open, peaceful, etc.), and also to the possessory actions.

Article 526 states that *"acts which are merely facultative or of mere sufferance cannot found the acquisition of possession".* This may be considered as a misleading translation from the original Italian iteration and so it may be beneficial to consult the original Italian text to fully explore the meanings of the words chosen in this article. First of all, note the link with and the relevance of the acquisition of possession. *"Facultative"* refers to acts of concession, where an owner allows a third party to hold a corporeal thing or exercise a right on the basis of concession. Likewise, *acts of mere sufferance* refers to acts of tolerance. The relevance of 2107(1) is best exhibited in the element of unequivocal possession, that is to say that the exercise of a right or the holding of a corporeal thing cannot be done in a manner which leaves doubt as to the *animus domini.* That is to say acts of tolerance, or concession, or sufferance cannot found the beginning of unequivocal possession, owing to a lack of the required *animo domini* intention.

In the same manner **article 527(1)** states that *"acts of violence or clandestine acts cannot found the acquisition of possession".* Acts of violence are linked with the general notion that there is the protection of the social order and therefore any unilateral, arbitrary act which does not follow due process is an act of violence. Note what was previously stated that possession is a question of fact. Clandestine acts arise when there is some loss of possession by stealth. One cannot deprive a person of possession clandestinely. These have two obvious and important links: firstly, the link to the *actio spolii*; and secondly to the acquisitive prescription requirements that possession be *open* and *peaceable*. Open possession is the opposite of clandestine possession so that if one says that useful possession has to be open and peaceable the other side of the coin is the acts found in article 527. Time here is a very relevant factor.

However, **article 527(2)** does allow possession to commence, hence the beginning of the prescriptive period, hence the possessory actions, hence the rights and obligations of the owner, when violent or clandestine acts cease, meaning when the state of affairs is no longer hidden, or violence has stopped or has been remedied. Note that acts of faculty or mere sufferance which cannot found the acquisition of possession do not have a similar statement as we find for violent and clandestine acts. However, there does exist something called *inter versio possessionis*, meaning changing the cause to which one holds (take, for example, a tenant who begins acting as an owner and remains unchallenged).

Held as one of the cornerstones of the Civil Code and the Civil Law traditions, good faith was historically known as the *bona fides.* This is a difficult concept to understand, being the basis for contracts. The extent of disclosure for good faith is continuously debated today. Good faith remains an elusive and difficult concept to define because each Civil Law jurisdiction has its own flavour, so to speak. Good faith is relevant for acquisitive prescription because a title requires something capable of ownership plus ten years of good faith possession. One will recall the aforementioned Savigny-Jhering debate, wherein Savigny believed viewed possession through a subjective view of intention and here we find that good faith is when one truly believes that he or she possesses is one's own. The subjectivist tradition is that the all-important factor is intention. Intention is therefore good faith because if one truly believes

that what one possesses is one's own than its ownership is in good faith. The Jhering view is that it is not a question of what one believes, but that it should be based on external, objective facts. The Maltese Civil Code took a pragmatic view with **article 531(1)** which states that *"a person who, on probable grounds, believes that the thing he possesses is his own, is a possessor in good faith".* Therefore, it is not a subjective belief, but it has to be based on grounds, and note the shift in meaning as it is not a possible ground but must be probable, not certain. Thus, the likelihood that the person has acted in good faith is based on a balance of probability.

Conversely, **article 531(2)** states that *"a person who knows or who ought from circumstances to presume that the thing possessed by him belongs to others, is a possessor in bad faith".* There is this ongoing question about acquisitive prescription being theft, with it being argued that if one possesses what belongs to another it is tantamount to the offence of theft. The phrase *should know* is based on what a reasonable person would know. There can be situations were possession for thirty years in bad faith leads to acquisitive prescription.

Controversially, **article 532** provides that *"good faith is presumed, and the party alleging bad faith is bound to prove it"*. This presumption of good faith is relied upon where there are gaps in possession to establish title, wherein the presumption of good faith is a factor to determine the acquisition of title alongside the ten-year acquisitive period. There are two views on the strength of acquisitive prescription as a title of acquiring ownership: one, is that it is an original and not a derivative title (the latter means that the title can be traced to a previous owner); and another view that land acquired through acquisitive prescription is flimsy at best as there is no objective evidence of title and possession.

Article 533 contains the rule that *"save as otherwise provided in this Code, the provisions of the following articles of this title shall be observed with regard to the rights and obligations arising from possession".* This often-overlooked statement extends, unless otherwise provided for in the Civil Code, the applicability of what is stated here to possession wherever in the Code. This makes the articles of possession applicable to the civil rights and obligations found within the Code, including the concepts of good faith and bad faith.

The Possessory Actions

Note the distinction between the petitory actions and the possessory actions. The former are those normally, but not invariably, associated with real rights, but which have as their basis a right of ownership or a lesser right thereof. Take, for example, the *rei vindicatoria*, the *actio finium regundorum,* the action for the division of undivided family property, the *actio confessoria servitutis* (a declaratory action to establish the existence of a servitude), the *actio negatoria servitutis* (an action to challenge the existence of a servitude. The latter are open to the possessor, but the cause of action is possession, wherein one is acting *qua* possessor. In the case of the possessory actions the *locus standi* is held by possessors with the action being based on the alleged quality of a possessor in the wider sense, meaning plaintiff must prove that he is one. The remedy is possessory in nature, that is to say the possessory actions say and establish nothing about ownership or real rights. Ownership without possession is irrelevant, as owners in such scenarios have access to the petitory actions.

There are two relevant possessory actions:

The *actio manutentionis*: This action is a precautionary action to preserve and maintain possession and is exercisable where a possessor claims that he or she is a possessor and that possession is threatened or challenged, that is to say, *molested.* This action is intended to be an action to protect and intervene against disturbances to possession. It does not apply and is inapplicable where possession is lost, this would be the *actio spolii,* applying only where possession continues but is molested. The object of this act is for possession (*manu tenere*) to be maintained. These possessory actions are in many ways actions of civil procedure. It is implied that a person petitions the court to intervene and order that the molestations cease, and that possession be retained and protected, making it a precautionary action that takes place before possession is lost but whilst it is being threatened.

Article 534 reads as follows: *"where any person, being in possession, of whatever kind, of an immovable thing, or of a universitas of movables, is molested in such possession, he may, within one year from the molestation, demand that his possession be retained, provided he shall not have usurped such possession from the defendant by violence or clandestinely nor obtained it from him precariously".*

- "Whatever kind" means any kind of possession, be it in good faith, bad faith, illegitimate, legitimate, technical, non-technical, de facto, factual, etc.
- *"Of an immovable thing, or of a universitas of movables"*: A universality is a collection, movables moved or aggregated together either because of their similarity or because they are destined for a specific purpose. The *universitas mobiles* means either they are of the same nature or destined for something specific.
- Molestation means a threat or challenge to the actual or continued exercise of possession which however falls short of actual loss of possession. Take, for example, somebody who starts entering or making use of another's garage space, or somebody who periodically writes someone else a legal letter prohibiting from using what he rightfully has the use of. Therefore, there are molestations of fact and molestations of law. The former is where a person is actually impeded from exercising possession, the latter are legal challenges.

The remedy is that within one year from molestation the party alleging molestation is entitled to demand that it be maintained in possession, hence the *manutentionis*. Each separate molestation gives rise to an action but the one year starts to elapse in respect of each molestation. See the following judgements:

- *Stacy Chircop v. Maria Spiteri* (Court of Appeal, 11 July 2016),
- *Giuseppa Spiteri v. Anthony Bezzina* (FH CC, 27 October 2016).

It is relevant to state that the proviso provides that claimant has not usurped from respondent possession through violence or clandestine acts, nor obtained precariously. These exclusions are relevant to the respondent, meaning if possession has been taken from someone who is not the respondent, *cioe* a third party, then the action is admissible, and the defence does not apply. For the defence to apply the taking of possession is to have happened through violence or clandestine acts from respondent. The second exclusion is relevant to defendant or respondent, not against all, and the exclusion is where possession has been obtained precariously. There has been a shift in its meaning (see *Theresa Vella v. Carmena Bolderini*), and in this context, precariously carries a specific meaning given in the specific Code on the contract of *precarium,* which is a contract where one gives an object on a title which is

revocable at will. This exclusion is limited and specific, and so where the relationship between claimant and respondent is one of a *precarium* the action is not permissible. The shift in meaning is that before precariously was given a wider meaning with no tolerance but the Court of Appeal concluded that it refers specifically to the contract of *precarium* (which is distinct from *commodatum,* a loan for use with terms). Note the two exclusions preclude the action.

The *actio spolii*: Found in **article 535**, *spolium* is technically Latin for 'to undress', meaning possession is actually taken away. Consider the following Latin maxims:

- ***Possidesse spoliatum fuisse infra bimestre deduxisse***
- ***Spoliatus ante omnia restituendus***

Note that the Maltese *actio spolii* has Canonical origins and it is not identical to the French or Italian Codes, making it specific in nature. It is *par excellence* the action which is destined to restore possession. Subject to the following, be aware that this action is available where there has been a spoliation and loss of possession. Contrast this with the *actio manutentions* where there is no loss of possession, but instead possession is just threatened. The object of this action is the reinstatement of the former state of affairs, hence *ante omnia restituendus.* This is a very popular action.

"Possession of whatever kind" is in common with the *actio manutentions* but goes beyond to include the *"detention"*, making this action available to the *detentor.* Therefore, where there is simple detention, this action is available. The object in respect of which this applies is wider in the sense that it applies in the case of a movable or immovable thing. However, the spoliation has to happen through violence or clandestine acts, therefore, the *spolium* is essentially and unavoidably linked to violence or clandestine acts. Obviously, it may be tautological but if loss of possession does not happen through violence or clandestine acts it is not a *spolium* as a *spolium* is not every loss of possession.

The action must be brought within two months and cases are now settled that the two months are from the *ies facti* (the happening of the event), not from the date when the plaintiff is informed of the *spolium* (hence, *possidesse spoliatum fuisse infra bimestre deduxisse*). Again. the object is the reinstatement of possession.

Under article 535(2) the action is also available to and can be ordered by the Court to take action against the owner. The owner cannot take the law illegitimately in his hands to force the issue. Likewise, the reinstatement is not a bar to any other possessory action open to any other person.

Article 791 of the COCP reads as follows:

> **791.** (1) *The defendant in a spoliation suit brought within the period of two months from the day on which the spoliation took place may not raise any plea other than dilatory pleas, before he shall have restored the thing to its former condition and fully revested the party despoiled within the time which, according to*

> *circumstances, may have been fixed in the judgment, without prejudice to any other right appertaining to the defendant.*
>
> (2) *The provisions of this article shall also apply in the case where a tenant has been dispossessed of the thing let out to him whether by the lessor or by a third party.*
>
> (3) *The court shall limit its inquiry to the question of possession or detention, and to the question of spoliation.*
>
> (4) *In a spoliation suit the depositions of witnesses given in criminal proceedings for an offence under article 85 of the Criminal Code for the same conduct concerned in the suit shall be admissible as evidence in the suit without prejudice to the right of the other party to cross-examination.*

This article refers to pleas which may be raised in spoliation suits. The article provides that in a spoliation suit which is brought within the period of two months from the day on which the spoliation took place, may not raise any plea other than dilatory pleas (as opposed to peremptory pleas, dilatory pleas are those pleas which do not determine the merits of the case but rather postpone). On the other hand, peremptory pleas are those which define the merits and create a *res judicata* on said merits (take, for example, a suit for payment, a suit involving prescription, etc.). In terms of article 791 of the COCP the court can only examine dilatory pleas (whether the case is before the right court, whether the court has competence, etc.), before there is restoration. The court will not consider any other defence before there has been restoration (hence, *spoliatus ante omnia restituendus*, meaning the restitution must occur before all other rights are invoked). This also applies where a tenant has been dispossessed, even by the lessor, or if possession has been lost by violence or clandestine acts.

Under sub-article (3) the court cannot enter into other issues because these acts or a social urgency to restore the situation to what it was formerly. The court is ordered by this article to limit its inquiry to the question of possession or detention, or spoliation.

There is a bit of an unclear area with the maxim *vim vi repellere liget.* This is a maxim which has been approved by the courts, but its extent of application is unclear. It basically means that force can be repelled by force. The structure is *liget repellere vim vi* (it is licit to repel force with force). Under this maxim, if possession is being taken by force it can be resisted, with this enjoying a degree of validity as it allows a person to respond to force with force, within the limits of proportionality.

Minor Possessory Actions

There are two minor possessory actions that allow a person whose possession may be threatened which allow a person whose possession is threatened or molested through building to take a possessory action, although in practice they are rarely used to their inefficiency as the proper remedy is a warrant of prohibitory injunction.

1. **Article 538**

2. **Article 539**

The Obligations of The Possessor Towards the Owner (Articles 540 And 541)
Obligation to Return Fruits

The following does not happen too often in practice, but knowledge of its existence is still important. Remembering that possession has various functions, possession has an important function in regulating the possession between possessor and owner. The context is the obligations, if any, of the possessor towards the owner and this relates to the entitlement of an owner towards interest, fruits, etc., collected by a possessor, and also regulates the reciprocal rights and obligations between an owner and a possessor regarding improvements. Take, for example, a possessor who has invested in a property which is not his own, how far is there entitlement towards compensation and what are the rights of the owner? This also regulates certain rights of recovery of the owner. This is a part of the law of possession heavily influence by the Canon Law and so the influence of good or bad faith is often determining.

Firstly, the obligations, if any, of a possessor to account for lost income, rent, interest, dividends (the fruits), from something possessed which is not owned by the possessor. Where a period of possession has ended, and the question is how far the possessor should account for loss of fruits. Here we see a striking diametric difference in the treatment between possessors in good faith and possessors in bad faith. Under **article 540** a possessor in good faith acquires the fruits of the thing possessed, in other words where the possessor shows or establishes good faith the possessor in good faith acquires fruits by virtue of the fact that it possessed in good faith and is only responsible to refund to the owner what was collected or could have been collected through *bonus paterfamilias* diligence after a judicial intimation (the service of a judicial demand). It may be argued that a judicial intimation, judicial letter, or judicial notice/demand is sufficient to put a possessor in bad faith, and therefore impose on the possessor to refund what was collected or could have been collected from the moment of acquisition.

On the other hand, **article 541** imposes on the possessor in bad faith the duty to restore everything which was collected or could have been collected from the moment that unlawful occupation begun.

The Entitlement of the Owner/Possessor for Expenses Made by the Property

With regard to the question of expenses and improvements, **article 545** states as follows:

> **545.** (1) *Necessary expenses are those without which the thing would have perished or deteriorated.*
>
> (2) *Useful expenses are those which ameliorate the thing by making it more convenient, or capable of yielding more fruit, but the omission of which is not prejudicial to the thing.*
>
> (3) *Decorative expenses are those which serve only to adorn the thing, without rendering it more convenient or capable of yielding more fruit, and which if omitted would not cause the thing to deteriorate.*

> (4) *Decorative expenses may, however, in certain cases, be considered as useful expenses, regard being had to the condition of the owner, or to the existence of particular circumstances which may afford the owner an immediate opportunity of deriving profit from such expenses.*

The relations at the end of a possessory term between the possessor and the owner. Consider **article 542** which reads as follows:

> **542.** (1) *A possessor in good faith may demand from the owner the reimbursement of the necessary expenses whether their effect continues or not.*
>
> (2) *As regards useful expenses, the owner is bound either to refund to the possessor the cost of the work or, at his option, to pay to him a sum corresponding to the enhanced value of the thing.*
>
> (3) *The court may, according to circumstances, direct that the refund of the expenses made on an immovable, be effected by the owner by means of a rent-charge secured by the hypothecation of the immovable, or in any other manner as to fully satisfy the debt and which is at the same time less onerous to the debtor.*

Article 542(1) relates to the situation of the possessor in good faith and the possessor in good faith is entitled to demand reimbursement from the owner of all necessary expenses with the reasoning behind this being that these expenses were necessary for the continued good condition of the property and had the possessor not carried them out the owner's property would have suffered prejudices.

Under **article 542(2)** there is a change in emphasis in the sense that, in the case of useful expenses, the owner has an option either to refund the cost of work, to be carried out by evaluation or a sum corresponding to the increase in value. This depends on whether or not the effect of the useful expenses continues because it is possible that even though there may have been useful expenses, their effect has over time been lost and has not given any enhanced value to the property, or because of these useful expenses the increase in value has gone far beyond the actual costs of the works.

Possessor in Bad Faith

Article 543 speaks of the situation of the possessor in bad faith. In respect of necessary expenses in the case of a possessor in bad faith the owner is obliged to refund these whether or not their effect continues. We can illicit this conclusion because of the language used: *"In relation to a possessor in bad faith, the owner has, in respect of necessary expenses, and of useful expenses for meliorations which cannot be removed, the same obligations as an owner has in relation to a possessor in good faith …".* Note the proviso that *"possession of the thing*

shall not have been obtained by theft or some other offence which does not fall under the class of contraventions".

Article 546 categorically excludes any rights of the possessor for compensation of expenses where possession has been obtained by theft or any other offence which is not a contravention, and the owner is entitled to require that the possessor remove objects to which the owner requires at the sole cost of the possessor and also to make good any damage which the owner may have suffered. Here again we see the moral content of these articles with regard to possession in bad faith.

Returning to article 543, we have seen that in the case of a possessor in bad faith there is the right to compensation for necessary expenses. With regard to useful expenses there is a confusing distinction between those meliorations which cannot be removed and those useful expenses which can be removed. The context is always article 543(2) and (3) and the entitlement, if any, of the possessor in bad faith for refunds for useful improvements which cannot be removed, here the same applies for a possessor in good faith. Here, even in the case of a possessor in bad faith, the owner has to option to pay the cost of works or pay for the increase in value.

It may be that the effect of the useful improvements is lost over time and therefore there is no significant value increase, or the effect of the useful improvements may survive over time, and we see an increase in value which is far more than the actual cost of the works.

Under **articles 543(2)**, **(3),** and **(4)** where the useful expenses can be removed the owner has the option to either remove or retain these improvements. If the owner asks for removal of the improvements the possessor has to remove at its own cost and the risk of damage during removal. If, on the other hand, the owner decides to keep the useful improvements which can be removed the owner is to compensate either the cost of works or the increased value of the thing, subject to the owner's discretion.

Possessor in Good Faith cont.

Article 547 is slightly confusing because it is in contradiction with article 540 because the possessor in good faith is not bound to return any fruits made from the property. The context of article 547 is the possibility that there is a set off (extinction of payment where two persons owe each other money), on the one hand the obligation of the possessor to account and pay fruits, as against the potential obligation of the owner to pay the possessor, because the owner may owe the possessor compensation for expenses and the possessor may owe the owner past interests. Article 547 includes the possibility of a set-off. Article 547 states that *"the set-off of the fruits against the expenses mentioned in the foregoing articles shall take place even with regard to the possessor in good faith",* which clashes as in the case of a possessor in good faith there is no obligation to account for past interests. There are two possible interpretations: firstly, it could be that whilst there is no obligation to account for past interests in the case of a possessor in good faith, this exemption does not apply in the case of set-off because it would be arguably unfair for the possessor even in good faith to have made use of and enjoyed the property, albeit in good faith, but then claim compensation.

On the other hand, the proviso holds that *"provided such possessor shall, besides the fruits which he is bound to restore according to the provisions of article 540, be bound to bring into account only the fruits which he shall have collected during the five years preceding the judicial demand of the owner",* this discards the previous hypothesis because it says that if the possessor choses to claim compensation for expenses for improvements then the possessor has to notionally factor in and account interests which could have been collected five years before the demand. Whilst indeed the possessor in good faith is not bound to account or refund interests collected prior to a judicial notification, if however, the possessor claims compensation for improvement then even notionally past interests have to be factored in the equation. In this event where there is a claim for compensation for improvements by the possessor in good faith such possessor has to notionally account in the claim for improvements five years interests, income, prior to the demand (second and final interpretation). Therefore, in the sense that we have just this qualifies and limits the extent of operation of article 540.

Article 548 is hardly relevant.

Article 549 is relevant in the sense that in the equation of set-off necessary expenses are not included in the sense that the possessor is always entitled to claim these and cannot therefore be deducted from any compensation due by the owner. In other words, if the owner is under no obligation to compensate, the necessary expenses are always secure.
Where the possessor in good or bad faith is entitled to claim reimbursement or set-off of expenses there exists a right of retention. In other words, if the owner does not pay the possessor what the possessor is due to the possessor for improvements, the possessor has the right to retain the object, i.e., the right of retention.

Obligations in the Condition of the Object Formerly Possessed

Reciprocal rights and obligations of a thing formerly possessed (losses, damage, etc.). Again, the role of good faith is evident and decisive, and the moral content of these articles is that in the case of a possessor in good faith there is an exemption from liability but only to the extent that the possessor has not derived any benefit. In other words, where the possessor has derived benefit the possessor carries responsibility. Note the context in which these provisions were written. In the 19th century there was a lot of debate within a society where things did not change hands as rapidly as they do today. It was considered that the law of succession and possession was based on the desire to retain property in the family, and it was a measured response to the French Revolution which abolished both property and succession. These articles were written and conceived in a society where wealth was concentrated in the hands of a few and as such possession of an inheritance was something important because families looked at situations to keep property within the family and their descendants. Today, the same thing happens as wealthy families create trusts and foundations with family members as beneficiaries without dividing the estate. There is an argument that the Civil Code written by Dingli served Maltese society well.

Having mentioned the deriving of benefits, bear in mind the context that a possessor either transfers or damages the property belonging to another.

Article 553 defines the deriving of a benefit through damage or alienation:

> **553.** *For the purposes of the provisions of the last two preceding articles, the possessor is deemed to have derived a benefit from the said damage or alienation in each of the following cases only:*
>
> (a) *if the subject of the benefit so derived is found, at the time of the judicial demand, to exist separately from the things belonging to the possessor;*
> (b) *if, where the subject of such benefit has been intermixed with things belonging to the possessor, his estate is found, at the time of such demand, to have been enhanced thereby;*
> (c) *if, where the subject of such benefit has been consumed by the possessor, such possessor has in consequence saved his own things, and such saving still exists:*
>
> *Provided that it shall be lawful for the possessor in any of the foregoing cases to retain the subject of such benefit on paying to the plaintiff the value of the things at the time he shall have disposed thereof or their value at the time of the demand, whichever is the greater.*

Articles 551 and **552** state that the possessor in good faith is only bound to compensate for damage or restore any portion of an inheritance to the extent of benefit derived. It seems that this also may imply that article 552 includes bad faith, but this could be an error in drafting. The quantum of compensation is either the actual disposal price or the value at the commencement of proceedings, whichever is more (see article 553 proviso).

Article 554 states that *"a possessor in good faith is not, even in the case of possession of an inheritance, bound to restore the value of things given, lost or destroyed without profit"*.

Articles 556 imposes on the possessor the obligation to restore all things wrongfully occupied and *"where such possessor has, whether voluntarily or through his own fault, ceased to possess any of such things, he shall be bound to restore to the plaintiff any profit which he may have derived therefrom or, at the option of the plaintiff, to pay to him the value of the thing at the time of the cesser of possession or the value thereof at the time of the demand, whichever is the greater, notwithstanding that, in such case, he shall not have derived any profit therefrom"*.

Article 557 states that *"a possessor in bad faith shall also be liable for all damage which may have been occasioned by his own act as well as for that occasioned by a fortuitous event unless, whatever the manner in which he may have obtained possession of the thing, he shows that the thing would have equally perished or deteriorated if it had been in the possession of the owner".* The possessor in bad faith is responsible not only for its fault but also for *casus* (a chance event) and *force majeure,* unless the possessor in bad faith can establish, in the case

of fortuitous event, that the damage would have likewise occurred had the object been in possession of the owner.

Article 558 reproduces a historical principle which today has been largely overridden by amendments to the Civil Code and other laws. this rule says that in case of movables by nature (corporeal tangibles), possession by third parties in good faith produces title. To put this in context, there were no systems of registration. The rule also historically applies to securities to bearer. Article 558 states that "(1) *In the case of movables by nature, or securities to bearer, possession shall produce in favour of third parties in good faith the same effects as the title, saving, in regard to vessels, the provisions of any other law.* (2) *The provisions of this article shall not apply in the case of a universitas of movables"*. Bearer bonds were essentially cash, capable of being cashed with no questions asked. The effect of anti-money-laundering regulations has essentially killed these off. If a bearer book is found it could be cashed, with a number of judgements safeguarding the owner. The relevance of this provision is in those unregistrable movables to bearer. In terms of the article, it does not apply to *universitas* of movables (a collection of movables) and vessels, as well as anything which is today movable by nature and registrable (such as motor vehicles). If one acquires in good faith a movable by nature one's possession in good faith can produce title. this rule is intended to protect genuine acquirers of value who acquire in circumstances which are legitimate. A typical question which arises and is not entirely satisfactorily resolved is ownership of what is bought at auction, because the auctioneer will not guarantee title. This also applies when one buys from apparently legitimate owners.

Article 559 is the hypothesis of losing something or being robbed and seeing the lost or stolen item in the hand of a third party. We have in the case of fiduciary rights some form of following and tracing, in other words, where there is an improper alienation of a trust asset this can be followed and traced. Meaning if the trustee wrongly sells something belonging to the beneficiary the latter can attempt to trace either the object or the proceeds gained therefrom. Here we find the hypothesis that the owner may recover an object which belonged to him and which has been either lost or stolen can be recovered by the possessor on indemnifying the possessor (that is to say, paying the possessor its buyer). The owner will have to show ownership and will have to show that it was lost or stolen and that it is in the hands of a third party and will have to pay the fair market value. This is further qualified by article 559(2) in the sense that there is a right of recovery without any obligation to indemnify the possessor if said possessor has not acquired the thing in good faith for value, under onerous title, and from a person who is presumably the owner or authorised by the owner. That is to say there is a right of recovery without indemnity if it can be shown by the person alleging on the balance of probabilities that it was acquired not in good faith, not for value, and not from a person presumably the owner or authorised thereby. The initial reading is that A claims B's possession X is the property of A and alleges that B did not acquire it legitimately. On prima facie basis it appears that A must prove all of this and that a case can fail if the court decides that the requisite level of proof simply has not been met. In Civil proceedings there is a pendulum, in other words when one establishes a fact one puts on the other the burden of proof to disprove what is established by this fact. A party brings forward evidence and puts on the other party the responsibility to essentially 'swing back' the assertion by making a counter-assertion disproving the first assertion.

Prescription:
What are relevant for our purposes are **articles 2154(2)** and **2155**. Article 2154 states that:

> **2154.** (1) With regard to the prescription of civil actions for damages arising from criminal offences, the rules laid down in the Criminal Code relating to the prescription of criminal actions shall be observed.
>
> (2) Nevertheless, any person who has stolen a thing, or who has become the possessor thereof by means of an offence of fraud, or who has received or bought such thing, knowing it to have been stolen or fraudulently acquired, cannot prescribe for it, notwithstanding any lapse of time.

This establishes the rule that a person who has stolen a thing or became the possessor thereof by means of fraud or received or bought the thing knowing it was fraudulently acquired cannot prescribe, notwithstanding any lapse of time. This is intended to counter a situation where one knows their possession was stolen but have had it for a lengthy period of time and thus acquired it through acquisitive prescription. In contrast, **articles 558** and **559** state that in regard to third parties' possession in good faith produces title.

Under **article 2155** the action for a recovery from a third party of a movable which has been lost or stolen and which is allowed by article 2155 is barred for two years if the item has been received in good faith. If the third party has acquired in good faith the owner cannot act to reacquire the item after two years. Whilst the owner is protected the third party which has acquired in good faith can no longer be challenged after two years which leads to suggest that in the case of corporeal movables are protected by an extinctive (and not only acquisitive) prescription. Thus, after two years in good faith there is ownership.

Finally, if an object is received, lost, or stolen in bad faith then no amount of time can validate the possession and prescription (article 2155(2)). **Article 2154(1)** refers specifically to the thief, **article 2154(2)** refers to a situation of either the thief or possession in guilty knowledge and no amount of time will validate this possession, article 2155 is the extinctive prescription for an acquirer in good faith of two years and in the case of acquisition of something lost or stolen in bad faith then there is no extinctive prescription.

In fine:

1. In the case of possession in good faith of movables by nature/corporeal movables, such possession in good faith produces the effect of title,
2. An owner of a movable thing which has been lost or stolen may take back this object on indemnifying the possessor, if the actual possessor is in good faith the action for recovery against indemnification is barred by two years after which acquisitive prescription will start to operate in favour of the possessor in good faith leading to acquisition,
3. In the case of theft, possession by fraud, or receipt or acquisition under onerous title of a person with guilty knowledge there is no extinctive prescription nor acquisitive prescription.

Article 560 is centrally in the Napoleonic Civil Code which is structured around the modes of acquiring and transmitting property and other rights over or relating to things and states that: "(1) *Ownership and other rights over things, or relating to things, may be acquired and transmitted by succession, or by virtue of an agreement or by means of prescription*. (2) *Ownership may also be acquired and transmitted by occupancy or by accession".* This statement is often overlooked.

PRESCRIPTION

Acquisitive Prescription

We still follow acquisitive and extinctive prescription under the same Title, even though under the French Code they are treated separately. As has been seen in article 560, acquisitive prescription is a mode of acquiring a right. Prescription is historically controversial, having in some instances been equated with theft. In truth, the *raison d'être* for acquisitive prescription is social utility, meaning title cannot be challenged forever, with their coming a point where one has to draw a line for reasons only of social utility and certainty of title. The requisites are:

1. **Useful possession:** Possession has to be clearly *corpus* and *animus* with the *animus rem sibi abendi* (useful possession in bad faith). The moment of taking possession is important here. There is also a link to the *causa detentionis,* as lessees, usufructuaries, etc. cannot benefit from effective possession. The moment of commencement of possession is relevant to show that actual possession has commenced and for the purposes of time limits. Useful possession means that the vesting of possession cannot be vitiated. Possession must be a clear, unequivocal statement. The *causa detentionis* precludes useful possession. The default prescriptive period is thirty years, but when one possesses in good faith in virtue of title it is ten years. However, members of the Church or the nobility (referred to as entails, a perpetual usufruct known as primogeniture) must possess for 40 years.
2. **Continuity:** The exercise has to be regular. This therefor shows the *de facto* and factual exercise of possession, that it is exercised over a period of time with regularity.
3. **Uninterrupted:** Possession is interrupted either by natural loss of possession (physical loss) or interrupted civilly (service with a judicial protest).
4. **Peaceable:** This links with the uninterrupted character and goes back to the exclusion of useful possession through violence. Peaceable is the reverse of the vitiation caused by violation, meaning it cannot be peaceable if it is acquired by violence. The moment of commencement of possession has to be not violent, but it can commence when violence stops.
5. **Open:** The possessor behaves as the owner in a clear, external manifestation of possession. The exercise of possession is a mirror of ownership and therefore the owner has to behave externally, openly, in a public way which can be observed, exercising a right, as it were, of ownership. Openness links with the unequivocity of possession.

6. **Unequivocal:** Possession is clear; therefore, it means that there should be no question that the possessor is behaving as it were the owner and with the required *corpus* and *animo domini.* Link this unequivocal possession with the statement in the opening articles of possession that possession cannot be acquired where it is ambiguous, an act of faculty (meaning it is a concession), or where it is based on tolerance. All of these characteristics are the other side of the coin of unequivocity.

In conclusion, possession to lead to the acquisition of a right of ownership has to have not only the character of useful possession (in the sense that it not vitiated by tolerance, concession, ambiguity, violence, or clandestinity) but its exercise has to be regular, continuous, without any material loss or civil challenge of possession, and the possession has to be unequivocal for a period specified by law.

Extinctive Prescription

Vide **article 2107(2)**. The basis of extinctive prescription is the inactivity of the creditor to exercise a right. This passivity, therefore, has the sanction (the releasing oneself of an action). Note the deliberate language of article 2107(2) which is a method of releasing, due to the failure of creditors to exercise a right for a period established by law. However, key is the term *action,* which is deliberate in the sense that what is lost is the action, and therefore this comment is gleaned from the 1854 report on the COCP, and it was a deliberate way to avoid the discussion whether through the passage of time a right is lost. The debtor is released from an action, not a right. The effect could be that the right is lost but this depends on whether prescription is pleaded. By way of a reminder this Title discusses both acquisitive and extinctive prescription, and sometimes one has to figure out whether it is referring to one or the other or both.

In the following articles we find a number of articles where it applies to both: prescription cannot be renounced beforehand (addresses a question whether one can sign a contract to agree not to raise prescription), it is invalid to extend the period of prescription (extinctive and acquisitive) beyond that period provided by law. However, it is possible to renounce to prescription which has elapsed. The language of the law is here again deliberate. With regard to **article 2108(2)** note that what has elapsed is renounceable. Note the term *acquired* because the ways to acquire ownership or rights over thing are through succession, accession, specification, and prescription, and this therefore tallies with the point that prescription may either be the acquisition of a right or the acquisition of a means to avoid an action. Therefore, even though one may have possessed for twenty years it may be said that he is renouncing to the prescription. Renunciation may be express, declared, and stated, or it can be inferred (that is to say, concluded from the behaviour of a person), *vide* **article 2109(2)**. Renunciation by a person who is under a disability to alienate cannot renounce a prescriptive right acquired (if there is some legal impediment renunciation cannot be carried out).

It is necessary to note that the plea of prescription is not a plea which the court can give effect of its own action (*motu proprio* or *ex officio*). Examples of pleas *ex officio* include, *inter alia,* arbitration clause, competence, and jurisdiction. On the other hand there are pleas which only the parties are at liberty to raise, take, for example, the plea of payment, something the court would not raise by itself because of the general procedural rule that in civil matters the court is to decide according to the claim in the writ and the defence pleas and it is only in

matters of public order that a court is empowered to raise itself without the point being plead by the parties. This point has been recently developed that it sometimes happens during proceedings that a court may think, after having heard the evidence, that it could base its judgement on a particular point not argued or defended. In the past it was a source of controversy to find a judgement based on a point which is not pleaded or debated. This has been extended that if a court considers that there is a point not discussed on which it may base its judgement it should formally inform the parties or their lawyers and invite evidence and submissions on the point. There are certain defence pleas where the situation is not clear, take, for example, *res judicata.* If the parties have not raised the issue of prescription the court cannot do so *ex officio,* as, in particular prescription, because of its conscience implication parties may not wish to raise it and the court has to respect their renunciation to the plea. However, prescription may be raised at any stage, even at appeal. There is a general rule of procedure that all preliminary pleas on the merit have to be raised on the filing of the defence statement and what is not raised initially may only be subsequently raised with the permission of the court and there has to be explanation for why this was not pleaded originally. To that end, prescription may be raised at any stage.

Article 2113 allows the plea of prescription to be raised by creditors or those having an interest. Take, for example, a creditor X of party A who is sued by party B. The situation is such that there are insufficient assets to pay both X and B. A, for whatever reason, can avoid the action brought by B by pleading prescription but does not. X can ask to intervene in the proceedings between B and A and plead prescription on behalf of A because X has an interest that B does not succeed against A to allow X to be paid (extinctive prescription).

Likewise (acquisitive prescription), the same applies in the case of a possessor A who has acquired from B on the basis of acquisitive prescription and C is acting to vindicate from B (C is claiming to be the owner). B does not plead against C acquisitive prescription to resist the claim, so that if B loses title A loses his own (as he has acquired from B). therefore, A has the right to ask to intervene to plead acquisitive prescription in favour of B because A has an interest that B's title is upheld.

Prescription applies only to things which are *in commercio* and does not apply to things *extra commercio.*

Article 2115(1) comes purely out of history, and states that *"prescription applies to rights and actions vested in any person …"*, because in the past certain classes of person were above prescription. This article goes on to include any *"institution, or body corporate".* This latter point applied to ecclesiastical properties and historical foundations. With regard to ownership of the walls of a convent or city the *universitas rerum* means assets owned by the city or by a convent, so we found in the past situations where the convent is bound by the vow of poverty but is simultaneously rich. Finally, this article includes *"property subject to entail",* meaning property subject to primogeniture.

Nevertheless, pursuant to **article 2115(2)**, except in the case of debts, acquisitive prescription does not apply against the government. If one possesses for generations property which belongs to the government one can never say that he has acquisitive prescription vis-à-vis the government.

Where a matter is referred to arbitration in terms of the Arbitration Act it has the same effect as if a case were instituted before the court, pursuant to **article 2117A**.

Sub-Titles 1-3

Sub-Titles 1 through 3 refer to three different things: causes which prevent prescription (those legal situations which preclude prescription from even commencing, as long as this legal fact or situation exists prescription cannot commence), causes which suspend prescription (meaning prescription has started, stops, and continues when the reason for suspension ceases), and the interruption of prescription.

Sub-Title 1 – Causes Preventing Prescription

Article 2118 (Persons holding on behalf of others cannot prescribe in their own favour): The *causa detentionis* excludes this *animus rem sibi habendi* (the *animo domini*). A *causa detentionis* of, for example, a lessee, custodian, depositary, *commoditarius*, or usufructuary generally those who do not own as their own, in the case of control of those who do not own and possess with the *animus rem sibi habendi* these people can never acquire because if you hold in the name of others or the heirs of such others the fact that a thing is held in the name of another, therefore, the *causa detentionis* is the other, precludes prescription.

Article 2119 (but may do so upon change of title): *Interversio possessionis* are not situations which happen every day but regardless they are situations where the *causa detentionis* is changed from holding in the name of another to holding in one's own name. This may occur if, for example, A is a tenant who starts externally and publicly behaving as an owner, not paying rent, changing the structure and destination of the thing, interconnecting the property with another's, and the passivity of the owner coupled with A's own external behaviour which is unequivocal in the sense that it leaves no doubt of the unequivocity of A's intention (*animo domini*), then there is a change in the *causa detentionis* because of A's external behaviour which leads to a situation where A holds *animo domini* and the acquiescence and inactivity of the owner. In acquisitive prescription abandonment *per se* does not lead to loss of ownership, but it is the abandonment combined with possession by a third party which leads to prescription and loss of ownership (opposition to be made to the right of the owner).

A more frequently found example is in family situations where people would have lived for generations in different family properties without formally dividing the parents' estate. The question is, is there an undivided situation? Am I possessing as a co-owner? Or because I assert possession *animo domini* I acquire by acquisitive prescription? Therefore, one who occupies as a co-owner transitions slowly and unnoticed into an exclusive owner. There is a change in situation from the holding in the name of another (thereby preventing acquisitive prescription), to possession to commence. This *Interversio possessionis* transmutes a situation from holding in the name of another and not prescribing, to changing the context whereby possession in one's own name commences, leading to acquisitive prescription. This may happen either through opposition to the right of the owner (tenant example) or a cause flowing from a third party (family example, where there is undivided property through generations).

Article 2120 (Persons acquiring from tenant, etc., may prescribe): Clarifies that if a person acquires from a tenant or other mere holder, this former party may nonetheless acquire through acquisitive prescription. If one buys from a tenant and possesses unchallenged for thirty years, or ten in good faith, it is possible for one to acquire through acquisitive prescription notwithstanding that one acquired from a holder and that the holder's title was vitiated. It is possible to acquire through acquisitive prescription an acquisition from a holder even though the original transferor was a holder and not the owner.

Article 2121 (Prescription against own title): Nobody can unilaterally vary the title by which one holds (the cause of detention, *causa detentionis*). For one to change the title by which one holds there has to be an external behaviour vis-à-vis those who have an interest in the thing. It is not, therefore, something which happens unilaterally, but must be changed externally by starting to behave in a manner which is different from the cause for which one holds, and this external behaviour is unchallenged. Acting unilaterally has no effect. A depositor cannot alone say that what he holds is his but can try to become the owner and acquire through acquisitive prescription by behaving as the owner vis-à-vis the original owner. This change is to be evidenced by behaviour which shows externally the intention to possess and hold *animo domini* and is communicated to the owner. In the trail of cases where *interversio possessionis* is pleaded as a basis for acquisitive prescription, the critical factor is the knowledge of the owner and the inactivity thereof. Therefore, that is the sense and the meaning that no one can prescribe unilaterally and change the title by which one holds.

However, this is to be qualified as if a person is a debtor one can prescribe against one's title as a debtor through extinctive prescription, thus changing one's status.

Sub-Title II – Causes Suspending Prescription

Article 2122 (Prescription runs against any person generally): Article 2122(*d*) links up with the fact that prescription runs indiscriminately, with the rule being that unless a situation falls within the parameters of the exceptions laid down in this sub-title, prescription runs. The rule is that prescription runs, and the exception is that it does not. Therefore, we have situations listed in this article against whom prescription runs. Where there is a situation of rights and obligations of the *de cuius* and no one is appointed to take action, prescription still runs against the rights included in the inheritance, even though there is no heir or heir apparent. Also, prescription runs against the heir during the time for making up the inventory or for deliberating (article 2122(*b*)).

Take, for example, a hit and run collision and the victim finds out who the perpetrator when the period for taking action to recover damage has elapsed. At which moment does the prescription period commence, given that the victim reasonably cannot take action against the perpetrator? A person avoids this by filing a judicial letter to interrupt a judicial letter against those unknown persons who caused the action. **Article 2137** explicitly states that prescription is *"subject to any other provisions of the law".* It states that prescription runs *"from the day on which such action can be exercised".* Thus, prescription begins running when the victim establishes the perpetrator's identity because it is at that point when he may bring action to recover damages. However, prescription runs irrespective of the state or condition of the person to whom the action is competent, meaning it is not necessarily an argument that a person was unable to exercise a right because of a personal condition. This is subject

to the other provisions of the law, we are speaking of extinctive prescription, and the right could not on the subjective grounds of incapability be exercised.

Article 2123 (Exceptions): To plead suspension one has to pigeonhole the plea in these articles.

Article 2124 (Minors, persons interdicted, etc.): Note the phrase *"save as otherwise provided by law",* as there are situations, such as actions for damages and the *actio redhibitoria* (action with regard to latent defects in a sale), where prescription can run against minors and persons interdicted. However, as a general rule it does not. *Vide* articles 2157-2159 (exceptions to the rule that prescription does not run against minors or persons incapacitated). These short prescriptions run against minors and persons interdicted, saving their right to relief against a negligent tutor or curator. Article 2124(3) is relevant where damages arise from a criminal offence committed against a minor. Hereunder it will be noted that for damages *ex delicto* the term is two years. In the cases of criminal offences, it is the prescriptive period of damages in the Criminal Code, but the moment of commencement for prescription in a criminal offence against a minor is the day of majority.

Article 2125 (Other cases of suspension of prescription): There are other instances of suspension of prescription. One of which is found under article 2125(*a*), where a right vests subject to a condition, the term of prescription (certainly extinctive but possibly even acquisitive) commences from the moment that the condition is fulfilled. Prescription is suspended such that the action cannot be exercised unless and until the condition is fulfilled. There are two types of conditions: suspensive (meaning an obligation does not come into effect until the moment that a condition is verified, therefore it suspends the coming into effect of an obligation) and resolutive (a condition which, if verified, terminates/resolves the obligation from day one, not the moment the condition happens). The remaining lectures are fairly straightforward.

Article 2126 (Prescription continues after cessation of cause of suspension): If prescription has commenced and then there is a supervening cause of suspension, the time running will stop and as soon as the cause of suspension ceases suspension starts running again and the subsequent period is added to the period prior to suspension. Therefore, the scenario looked at here is: prescription commences, something happens to suspend prescription and at a point this cause of suspension ceases, prescription recommences. The initial time prior to suspension is not lost, in favour of the person trying to escape an obligation or prescribe in his favour and is added to the subsequent period which recommences when the cause of suspension stops, and prescription may recommence. Therefore, prescription elapsed is not lost. This is different from interruption; wherein whatever prescription has elapsed is lost in the sense that prescription in favour of the creditor commences afresh.

The philosophy behind the causes for interruption of prescription are generally that a person is unable to exercise a right and hence, because of this fact that a person is unable to exercise a right, prescription does not continue acting. The basis of this title is that a person is unable for any reason to exercise their right. Note the Latin maxim *contra non valentem agere non currit praescriptio* (prescription does not run against those who are not valid at law).

Sub-Title III – Causes Interrupting Prescription

Article 2136 (Period already elapsed not to be reckoned): *"Where prescription is interrupted, the portion of the prescriptive period already elapsed shall not be reckoned for the purpose of prescribing".* However, prescription may recommence. Furthermore, there is a distinction between periods of prescription (*perjodu ta' preskirozzjoni*) and periods of forfeiture (sometimes known as peremptory periods, *perjodu ta' dekadenza*). The distinction is that in the case of the former the time limit can be extended and interrupted through the reasons discussed in this sub-title. In the case of the latter the proceedings have to be commenced with no question of interruption or extension (take, for example, the period of one year in the case of non-apparent latent defects in the case of sale).

How are the two distinguished from one another? Unless otherwise provided terms arising from the Civil Code are prescriptive terms and thus can be extended, but this is not always the case (take, for example, the terms to challenge paternity). On the other hand, in commercial matters the terms are generally peremptory, with the reasoning being that business requires quick resolutions (take, for example, the five-year term to act on a bill of exchange).

Article 2127 (Interruption of prescription by eviction of possessor): With regard to acquisitive prescription, natural interruption is a de facto loss of possession of the object for more than a year.

Article 2128 (Interruption of prescription by judicial act): A very common way of losing prescription that applies to both acquisitive and extinctive prescription. It refers to the filing and serving of a judicial act. This is known as legal interruption, and it deprives the possessor from the right to eventually plead and claim acquisitive prescription. In the case of a creditor this refers to extinctive prescription and it therefore nullifies and precludes the debtor from raising a plea of extinctive prescription. Generally, prescription is frowned upon and whilst obviously weary whilst making such a generalisation, it can be said that there is a discernible trend in the courts to react against prescription in the sense that where there is some doubt the tendency is to rule against prescription because it is a means of acquiring something which should not be acquired or avoiding something which should not be avoided.

Article 2129 (Interruption operative even if act is irregular, etc.): Saves the interruption from failing if the judicial proceeding, protest, or letter has a formal defect or is filed against the wrong court.

Article 2130 (Time within which act is to be served): Attempts to address a delicate question between service and interruption because interruption (as found in article 2128) happens if the act is served. This is relevant because if interruption happens when time has elapsed then it is useless because the prescriptive term establishes the moment when a right is acquired through acquisitive prescription or an action lost through extinctive prescription, and therefore anything has to happen during this period to interrupt prescription. The moment time is irrevocably up the situation is finite and closed. Therefore, if the two years in case of damages *ex delicto* have elapsed, it is pointless trying to interrupt after the lapse of two years. This matter is of utmost importance because it establishes the moment of interruption and potentially whether something is in time or out of time. The rule is that if one files a judicial

protest and serves it 25 days later, that is to say service happens within a month of filing, interruption takes place from date of filing because the plaintiff has served within a month. If service takes place beyond a month from filing prescription runs from date of service. There is an expedient, known as publication in the Government Gazette. If a party is outside the country and therefore unlikely to manage to serve within thirty days, then there is a procedure to notify by means of requesting the appointment of a curator to represent the absent party and simultaneously to get a summary of the judicial letter/protest published in the Government Gazette. Whilst it is unlikely to manage to get service within thirty days at least there is the remedy that publishing in the local GG a summary of the claim and in one or two newspapers is a moment of notification.

Article 2131 (Interruption by judicial demand): Prescription is interrupted by a judicial demand and while it is stated that prescription is interrupted even though there has not been service, this statement is clearly not unqualified as the creditor has to show diligence and attention in seeking to notify the judicial demand and if the debtor is abroad or absent then curators have to be appointed to represent the absentee and the use, in the case of Hague Convention, of the methods of service outside jurisdiction. Although prescription is interrupted by a judicial demand the proviso says that there has to be diligent follow-up and the concluding statement says that there has to be a judgement on the demand which is favourable to the claims advanced in the judicial demand.

Article 2132 (Interruption to be inoperative if action is withdrawn, etc.): Provides that interruption by a judicial demand will be inoperative if claimant plaintiff withdraws the procedure or abandons it, or if the claim is dismissed. In these three instances, notwithstanding that a judicial demand has been filed, there is no interruption. However, in the event of withdrawal or dismissal, not desertion, prescription is not lost if claimant whose action has been withdrawn or dismissed reinstitutes within thirty days and follows up diligently. Presumably, a claimant is not stupid enough to file again on the same grounds within thirty days, so a claim would be withdrawn or dismissed but the same claim would be filed on different grounds. The prescription is deemed to be interrupted by the first writ and the second writ within thirty days, meaning there is continuity and no loss of prescription. This applies to both acquisitive and extinctive prescription.

There are two further methods of interruption:

1. **Acknowledgement of the debt (article 2133):** This has the obvious meaning that the debtor acknowledges the debt. This also applies to the acknowledgment of ownership. Even the plea that the claim is excessive is an acknowledgement of the right, as well as the plea of payment. It is not easy to plead simultaneously prescription and payment because the latter in some ways acknowledges the existence of the right of the claimant and so one cannot plead them concurrently. The better, but riskier, approach is to make it very clear that if payment is pleaded it is absolutely without prejudice to the fact that the claim is in any case time barred. The fact that payment is pleaded does not imply an interruption of prescription.
2. **Payment on account (article 2134):** This is essentially an acknowledgment made by a debtor or a person representing the debtor, thus interrupting the prescription. Even the plea of set-off is considered either an acknowledgement or a payment on account.

> It is in any event a recognition of the debt. With regard to accounts current (not the familiar current account, but instead a reciprocal relationship between two businesses), the period of time of prescription, which is normally five years, commences either from when parties close accounts or from the last transaction because this raises questions of acknowledgment, payment on account, and the time at which the period starts running.

An interruption against the debtor interrupts prescription against the guarantor and this applies in the case where there is joint and several responsibilities, where the guarantor binds itself *in solidum.*

The Times Required for Prescription

These are, in a sense, mechanical. Note the proviso to **article 2137** that makes it *"subject to any other provisions of the law".* Prescription commences when the action *"can be exercised, irrespective of the state or condition of the person to whom the action is competent".* Take, for example, the case of an action for damages when the victim is made aware after with their being an argument that it is only at the moment when said victim can take action that prescription can commence with the counter-argument being that nothing stopped the victim from interrupting prescription by asking the court to nominate curators to represent unknown tortfeasors and serve a judicial letter against the curators holding these unknown persons responsible. It is hardly fair to deny a person access to the courts when through reasonable diligence proceedings could not have been commenced. The position is unclear in Maltese jurisprudence. The courts are generally sympathetic to victims, however, and prescription is considered a *lex odiosa,* meaning it is given a restrictive interpretation.

It is a difficult question to identify whether article 2137 applies to extinctive prescription only or also to acquisitive prescription, because the law refers to the prescription of an action. It can be argued that the article applies to both. We are told that prescription runs by days (not only working days) and not by hours.

Article 2139 is slightly tricky. It notes that *"prescription is completed immediately upon the expiration of the last day of the prescriptive period".* That is to say time is up when the last day elapses. With regard to interruption through judicial means prescription can be interrupted even on the last day of the prescriptive period. However, in the case of judicial interruption the filing of a judicial act or the filing of a judicial demand this must be done within court hours, meaning the closure for business of the registry. When we read this provision that prescription is completed immediately on the expiration of the last day of the prescriptive period it is true, but it is not unqualified. Remember that prescription passes even during court holidays. If a prescriptive period elapses during the period when the registry is closed (take, for example, weekends and public holidays), it is safer to simply file in advance.

Article 2139(2) is of some use if the last day is a weekend or public holiday, *"prescription shall be completed upon the expiration of the next following day, not being a Saturday or a public holiday".* There is an old rule that terms of the Civil Code dealing with prescription run even though there is a public hold. In the case of judicial interruption the law is clear that the prescriptive period runs in days and includes, *inter alia,* public holidays, Holy Week, summer, the weekends, and Christmas, and if the last day of the prescriptive period which is to be

interrupted by a judicial act is a day when the registry is not open for filing prescription of judicial acts can be interrupted and will not be deemed to have expired except on the close of business of the next working day.

Longer Prescription Periods

Vide articles 2140-2146.

Articles 2140-2142: The first prescription is clearly acquisitive, lasts for a period of ten years, and refers to immovables. It means that possession for a ten-year period in good faith under a title capable of transferring ownership transfers ownership. *Vide* article 2107 with regard to the requisites for useful possession. *Vide* those articles on the moment of commencement of possession and the qualities of such possession (clandestine acts and violence). The characteristic of this ten-year prescription is that it has good faith and possession has to derive under a title capable of transferring ownership. We have seen how the rights of ownership transfer through inheritance, contract, sale, exchange, donation, prescription, etc. Here, the existence of a title capable of transferring ownership is essential. This relatively short period is intended to validate a situation where a party has entered into a contract or an act capable of transferring ownership through legacy and has honestly behaved as owner for ten years. This is a matter of ratifying a potentially annullable acquisition. Good faith is defined as a person who believes on probable grounds that the thing possessed is his own and it is therefore the subjective belief allied with grounds which are reasonably objective.

If the title derives from an act which is registrable in the Public Registry (take, for example, sale, donation, etc.) and some acts in the case of immovable property require the public deed to be registered, the ten years commence from the day of registration. An otherwise potentially annullable contract or potentially stronger title is defeated by the ten-year acquisitive prescription. This provision says nothing about the *actio publiciana*. Note that good faith has to exist not only at the time of acquisition, but continuously throughout the entire prescriptive period. Notaries once relied on this ten-year acquisitive prescription by arguing that good faith is presumed by this view has been shaken by judgements which say that searches must extend backwards for thirty years.

Article 2142(1) attempts to address the question whether it is possible for an acquirer to possess on the basis of title in good faith for the ten years if the predecessor in title was in bad faith. The bad faith of a predecessor in title does not preclude the operation of the ten-year prescriptive period in good faith. Naturally, returning to the articles on possession, one will note that with regard to possession one can conjoin the possession of one's predecessor in title with one's own for the purposes of enjoying possession. Here, the possessor cannot conjoin the possession of a bad faith transferor when transferred to a good faith transferor. With regard to whether one can conjoin good faith possession of the transferor with the good faith possession of the transferee, the two can be conjoined if the good faith is prevalent throughout and unbroken.

Article 2143: With regard to thirty-year prescription, note the use of the phrase *"all actions",* opening up the provision to both acquisitive and extinctive prescription. A real action is one based on an action to claim a real right. Personal rights are those arising from personal relationships. Mixed are those actions where there is both the real element involved as well

as a personal action against the debtor. Furthermore, *"no opposition to the benefit of limitation may be made on the ground of the absence of title or good faith"*. The way this provision has been applied and interpreted and the way on which the thirty-year acquisitive prescription has been based is that possession in bad faith will bring title if lasted for thirty years. Vitiated possession can never bring title. This provision is acquisitive because possession, notwithstanding bad faith, leads to acquisition and it also has the extinctive implication. This thirty-year period has a level of finality with contracts being valid for thirty years unless extended or interrupted, such as hypothecs. Here it is clear that there are two sides, the acquisitive and the extinctive (all actions are barred by the lapse of thirty years).

Article 2144: Prescribes a prescriptive period of forty years for property subject to entail or Church ownership. This also applies to seldom rights, those rights very rarely exercised.

Article 2146: Refers to annuities. Here, after twenty-five years the creditor of an annuity which is to continue for more than thirty years there is the right to compel the debtor to acknowledge in writing the debt.

The Brief Prescriptive Periods

These are mostly extinctive prescriptions and range from one year to five years, and, more specifically, come in periods of either one year, eighteen months, two years, or five years. The laws governing prescription reflect the culture and the society within which they were written and from which Codes they were modelled from.

Articles 2147 concerns actions barred by the lapse of one year and states that:

> **2147.** *The following actions are barred by the lapse of one year:*
>
> (a) *actions of masters and teachers of sciences or arts, for lessons given by the day or by the month;*
>
> (b) *actions of keepers of inns, taverns or lodging-houses for lodging and board furnished by them;*
>
> (c) actions of domestic servants or other persons paid by the month, of artificers or day-labourers for the payment of their wages, salaries or the supplies due to them;
>
> (d) actions of carriers by land or water referred to in articles 1628 to 1631 for the payment of their hire or wages.

Article 2148 concerns actions barred by the lapse of eighteen months and reads as follows:

> **2148.** *The following actions are barred by the lapse of eighteen months:*
>
> (a) *actions of tailors, shoemakers, carpenters, masons, whitewashers, locksmiths, goldsmiths, watchmakers, and other persons exercising any trade or mechanical art, for the price of their work or labour or the materials supplied by them;*

(b) *actions of creditors for the price of merchandise, goods or other movable things, sold by retail;*
(c) *actions of persons who keep educational or instructional establishments of any kind, for the payment of the fees due to them;*
(d) *actions of persons for the payment of their salary;*
(e) *actions of brokers for brokerage fees;*
(f) *actions of any person for the hire of movable things.*

Note that these time limits could sometime be displaced by another provision which provides that where there is a writing which is not a public deed the term is five years.

Article 2149 states that:

2149. *The following actions are barred by the lapse of two years:*
(a) *actions of builders of ships or other vessels, and of contractors in respect of constructions or other works made of wood, stone or other material, for the works carried out by them or for the materials supplied by them;*
(b) *actions of physicians, surgeons, obstetricians and apothecaries for their visits or operations or for medicines supplied by them;*
(c) *actions of advocates, legal procurators, notaries, architects and civil engineers, and other persons exercising any other profession or liberal art, for their fees and disbursements;*
(d) *actions of procurators ad litem or other attorneys or mandataries, for their remuneration, the expenses incurred by them, indemnities due to them for losses sustained, and for the reimbursement of advances made by them.*

In any serious engagement there is a letter of engagement setting out the respective rights and obligations of the parties, covering such topics as hourly fees, to costs in respect of litigation, to compliance and disclosure for money laundering, privacy policy, ownership of the intellectual property of the documents created, the right to terminate the engagement if the client does not pay or does not comply, etc. In the event that there is such a letter, does this change the prescriptive period from two to five years? This remains an open question.

In the case of advocates the Code dedicates particular rules under **article 2150** which reads as follows:

2150. (1) *In regard to the said actions of advocates, legal procurators or procurators ad litem, the prescriptive period shall commence to run from the day of the final decision or of the*

> *compromise of the lawsuit or from the day of the cessation of their mandate.*
>
> (2) *For the purposes of this article, any act which, although not forming part of the proceedings of the suit, is, nevertheless, connected therewith, shall be deemed to be part of such proceedings.*
>
> (3) *In regard to fees for advice and to fees or expenses for judicial letters, protests, warrants, applications or other acts or services not connected with a suit pending or commenced within two years from the day on which the advice, act or service has been given or has taken place, the prescriptive period shall commence to run from that day*.

It is clarified in sub-article (2) that an act which not necessarily forms part of the proceedings but is connected thereto shall be deemed to be part of proceedings. The Maltese system is archaic in the sense that is based on the sense that legal costs are what a party can collect before the other party. This is outdated in the sense that the work of a lawyer is increasingly taking place outside of the court room and a situation focusing on judicial costs is at times hopelessly unfair because it is assessed *ad valorem,* whilst on the other hand there could be very little work involved with the fee being based on a percentage of the funds recovered. Article 2150(3) has a catch in the sense that where there are services in respect of which no proceedings have been commenced prescription commences on the day of the service (take, for example, a client who seeks advice from a lawyer but opts out of moving forward with the suit). If the matter involves litigation prescription begins from the date on which the matter is settled or concluded by the courts. If the service is sporadic or ongoing it begins from the moment of the first service.

This reasoning is reflected in **article 2151(1)** which refers to the four preceding articles and states that *"In the cases referred to in the last four preceding articles, prescription takes place, even though there may have been a continuation of supplies, deliveries on credit, labour, services or other work".* This is very important because there is a widespread idea, particularly in the retail trade, that if you keep on making deliveries prescription does not elapse. Another misconception is that because you get an invoice and a statement every month then prescription does not elapse. These are both wrong as prescription *does* elapse in either case. However, under **article 2151(2)** *"Nevertheless, in such case, where the claim in respect of such supplies, deliveries, labour, services, or other work is evidenced by an approved account or other written declaration of the debtor, the action shall not be barred except by the lapse of five years to be reckoned from the date of such account or declaration".* This is something which today is normally catered for by a letter of engagement and raises delicate questions of data protection. It is suggestable that the GDPR are not in entire harmony with laws of professional confidentiality.

Article 2512 expressly states that:

> **2152.** (1) *Advocates and legal procurators are released from any obligation to account for papers relating to lawsuits or advice on the expiration of one year from the day when such lawsuits have been decided or otherwise disposed of, or such advice given.*
>
> (2) *They are likewise released from any obligation to account for any papers which may have been delivered to them for the purpose of commencing a lawsuit, on the expiration of two years from such delivery, if within such time the lawsuit has not been commenced.*
>
> (3) *They may, however, be called upon to declare on oath whether they are in possession of such papers, or whether they know where such papers are to be found.*

If papers have been delivered to commence a lawsuit which has not commenced the lawyer's obligation to retain such papers is dispensed with two years after the fact. Lawyers can be called to declare under oath whether they are in possession of such papers or are aware of their whereabouts.

Under the law of damages there are two important rules:

1. **Article 2153:** Damages *ex delicto*, arising from an unlawful act or omission not being neither a criminal offence nor contractual violation, are barred by the lapse of two years. This is a term of prescription which can be interrupted. This two-year prescription applies where there is no pre-existing contractual relationship. If such a relationship exists, the prescriptive term is five years.
2. **Article 2154:** With regard to prescription of civil actions for damages arising from criminal offences the prescriptive terms in the Criminal Code will be applicable. However, there is here a problem because how does one know that the original action is a criminal offence?

It has been mentioned that the prescriptive period for damages *ex delicto* is two years whilst for damages *ex contractum* it is five. There are two problems: firstly, it is not entirely free from doubt, although there are judgements which accept it, whether *kumul* is accepted under Maltese Law. *Kumul* is an action where, simultaneously on the same writ, a case for damages is advanced both on an *ex delicto* and *ex contractum* basis. There is an argument that there is a gross violation of a contract in such cases (take, for example, a contractor who causes damage in his client's home). However, there is an argument that the damage caused is not within the scope of the contract, therefore the damage would fall out of the scope of contractual violation, making it an *ex delicto claim.* In practice, these two grounds tend to overlap, and it is not easy to draw a line in the sense that when it is one fact it could be simultaneously an *ex contractum* and an *ex delicto* violation. Some judgements have admitted *kumul* whilst others have declined the possibility.

Article 2156 refers to the five-year prescription and reads as follows:

> **2156.** *The following actions are barred by the lapse of five years:*
>
> (a) *actions for payment of yearly ground-rent, perpetual or life annuities, interest on annuities ad formam bullae created before the 14th August, 1862 and for the payment of fines due upon a sale or other alienation of emphyteutical tenements;*
>
> (b) *actions for payment of maintenance allowances;*
>
> (c) *actions for payment of rent of urban or rural property;*
>
> (d) *actions for payment of interest on sums taken on loan or for any other cause, and, generally, of any other thing payable yearly or at other shorter periodical terms;*
>
> (e) *actions for the return of money given on loan, if the loan does not result from a public deed [vide article 2143];*
>
> (f) *actions for the payment of any other debt arising from commercial transactions or other causes, unless such debt is, under this or any other law, barred by the lapse of a shorter period or unless it results from a public deed;*
>
> (g) *except as provided for in any special law, actions of the Government of Malta for the payment of judicial fees, customs or other dues:*
>
> *Provided that actions referred to in paragraphs (a) and (c), where such payments are due to the Government of Malta, shall be barred by prescription by the lapse of ten years.*

These are important prescriptions and somehow have to be present owing to their wide reach. Note that the article's wording is silent on whether the right is lost, as it speaks only of the barring of actions.

Article 2157: There is an action known for the rendering of accounts, in other words when one has an administrator/tutor/curator/mandatory/etc. there is the duty to account and this is specifically protected in the Code of Civil Procedure because an action for the rendering of accounts exists in the sense that any of the above are bound to give accounts and this action is barred by the lapse of five years from when a management or administration stops or one year from the death of the tutor/curator/mandatory/administrator.

Article 2158: The brief prescriptions may be set up even against the party who has paid for the debtor and is suing said debtor, unless there was a situation of suretyship or joint debtors or payment at the request of the debtor, in which event the term is five years because the default prescriptive period referred to in commercial obligations applies.

Article 2159: Returning to earlier articles dealing with those causing suspending prescription, *vide* article 2124(1). Article 2159 is a case where it is otherwise provided by law in the sense that the brief extinctive prescriptions do run against minors.

Article 2160: Known as the *giuramento decisorio,* this article is at the centre of the following cases:

- *Bottega del Marmista Ltd v. Paul and Carmen Mifsud* (Court of Appeal (Inferior Jurisdiction), 26/01/2018),
- *P & S Ltd et al v. Noel and Stephanie Zammit* (FH CC, 16/01/2018),
- *Bank of Valletta Plc v. Renald Camilleri* (FH CC, 1/11/2019),
- *FX Borg Furniture Ltd v. Sandro galea* (Court of Appeal (Inferior Jurisdiction), 7/04/1998).

The traditional position prior to the 2017 amendments was that a creditor chasing money who faced the plea of extinctive prescription had various choices. The traditional rules, jurisprudence, and thinking were that once a debtor pleads prescription the debtor indicated the article, and this threw back the onus on the creditor to show why the action was not time-barred. The creditor had various choices to try and argue and show that there was interruption, acknowledgement, payment on account, that the prescriptive term pleaded is inapplicable to the action. The creditor had also another option which is to differ the oath to the debtor. This was the former position and is no longer applicable. The justification for this is a last-ditch appeal to the conscience of the debtor who may be uncomfortable stating under oath that he does not owe anything. It was very clear that the creditor had to make a choice, deciding either to plead interruption, payment on account, or that the particular prescription is inapplicable, or to ask the debtor to testify and once an option was taken the creditor could not change course. As the law was it was that the alleged debtor, given this *giuramento decisorio,* had to declare that he is not a debtor, or that they do not remember whether it has been paid. This was, in the terms of the law, a sacramental formula. The plea of prescription would fail in the past unless the debtor, being put to the oath, did not declare on oath that he or she is not a debtor or did not remember whether he or she had paid. Failing these exact terms, the plea of prescription would fail.

After 2017 it is no longer the case where the plea of prescription will fail unless the debtor, of his or her own initiative, declares that he or she is not a debtor or does not remember whether he or she has paid. Today, the plea of prescription *will* fail unless the party pleading prescription takes, of its own accord, the witness takes the stand and says the sacramental formula (that he is not a debtor or that he does not remember whether he has paid). whereas before the creditor had the option to compel the debtor to state the sacramental formula under oath, today it is a requisite for a successful case.

Prior to the 2017 amendments in the case of the brief prescriptions (articles 2147, 2148, 2149 [not damages *ex delicto*], 2156, and 2157) the philosophy was that these brief prescriptions related to every day social life, and therefore there was a presumption that that was paid, hence, once it was pleaded it had a twofold presumption: one to rebut the presumption that these payment are settled quickly, and the second was an appeal to the conscious of the debtor. The history of this was that if a debtor pleaded prescription this threw the burden of proof on the creditor to either plea interruption, payment on account, etc., or the creditor

could ask the debtor pleading prescription to testify. As it was, the plea of prescription would fail unless a debtor does not remember whether it has been paid.

Article 2160 was a rather sacramental formula, and it was up to the creditor to show interruption, inapplicability of the article or to opt for the *giuramento decisorio.* The plea of prescription would fail unless the debtor declared on oath that he or she was not a debtor or remembers whether it has been paid. This has changed and has shifted responsibility on the debtor pleading the brief prescriptions to take the initiative itself, with the law saying, *"do not of their own accord declare on oath, during the cause, that they are not debtors, or that they do not remember whether the thing has been paid".* Thus, the debtor has to, of its own initiative, take the witness stand. This raises a number of questions. Firstly, can prescription be pleaded and as well as other defence pleas which are based on the merits? Furthermore, it carries the risk that if a debtor of its own accord takes the witness stand and says something else beyond either that he is not a debtor or that he does not remember whether it has been paid there will be a self-defeating of the plea of the debtor. There is a real difficulty here which has been recognised, as to how to work this article. It seems that initially the debtor has to take the witness stand of its own accord, in the case of the brief prescriptions, and say either that he is not a debtor or that he has not been paid. The guidance given so far is that the *giuramento decisorio* has remained but what has changed is the fact that now it is no longer an option of the creditor but a mandatory obligation on the debtor to, at the beginning of its evidence, state that he is not a debtor.

What happens after this is that the court will state that it wishes to hear evidence on everything which potentially defeat the plea of prescription because the debtor has stopped short of uttering the words or maybe this would be reasonably understood that the debtor has to confirm on out and return the burden to the creditor and the point of prescription will be decided. As it is there is uncertainty and a practical problem as to how to deal with the problem. Some judgements have been openly critical whilst others have commented that the debtor did not understand the article, others simply state that nothing has changed except for simply the way in which the case happens.

Article 2160(2) still speaks of if the oath is deferred. Here, in the case of a debt which is claimed against the heirs of an alleged debtor we have the old system with the oath being deferred. The plea of prescription will fail unless the heirs do not declare that they do not know that the thing is due. In the case of government debts relating to ground rents and government rents the 2017 amendments increased the prescription to ten years and the party pleading prescription has to declare on oath that he or she is not a debtor, and such party will be required to give such reasons why he or she believes him or herself not to be a debtor. In the case of government rents and ground rents it is not sufficient to plead prescription, taking the initiative to declare oneself not a debtor, but one must give reasons too.

USUFRUCT (Article 328)

Usufruct is a real right, and there is a *numerus clausus* on real rights. There is the right to agree advantage of one property over another as long as it is not against the law. Usufruct is the real right to enjoy and make use of and enjoy a thing which belongs to others, but this right is limited in the sense that it is subject to the obligation of preserving substance with regard both to matter and to form, the Roman *salva rerum substantia.* Two general considerations on usufruct: firstly, usufruct is still very much alive today and it is historically linked with maintenance, and it enjoys widespread use and invariable use in the case of testamentary practice in the sense that usufruct is linked to the traditional rules of property and succession law which cantered around the family in a formal marriage. There is no exact correspondence and the rules of civil unions and cohabitation refer to usufruct in some instances but limitedly. There is not the same measure of a right of the survivor in a civil union or a cohabitation situation as in the case of formal marriage. Also, usufruct can happen by law. important examples are that of the surviving spouse over the former residence, including furniture and movables unless the surviving spouse passes to a second marriage. There are also important provisions in legal usufruct of parents over the assets of their minors. So generally speaking, usufruct happens either by default provision of the law or because it is created by contract (agreement) or by testament. Thus, usufruct still plays an important part in the social community because of its links to maintenance.

The second reflection, and here one has to admire the elegance of the hidden hand of the drafting, is that usufruct is linked with maintain property in the family. Now, we have discussed entails (primogeniture), however, usufruct is linked with keeping property in the family and the right of substitution in inheritance, meaning one nominates his son as his heir and if his son predeceases him, he nominates his son's children as substitutes. Again, when this was written in the mid-eighteenth century there was the context of the French revolution which had abolished usufruct, entails, and even legitim as well as substation. This was partly restored when the revolution came to an end and the 1804 Code was written. Therefore, when this was written the problem of how far one wanted property to remain in a family was very relevant. Remember the various influences at work, including the birth of the middle class and the industrial revolution. The choice made by the Code is that usufruct is something which dies with the death of the usufructuary. Usufruct is a temporary right because it can be created either conditionally or for a period and finishes with the death of the usufructuary. There are two important windows here in the case of trusts and foundations. If one creates a family trust, he may nominate unborn descendants as a way of keeping property in the family and a trust terminates after 150 years and a foundation *per se* does not finish. The question is whether this can be indefinitely maintained by settling assets on beneficiaries such that the property will remain indefinitely in the family.

Another issue in the case of trusts is the matter of deterioration. A usufruct can last for a long time and it is questionable as to who is responsible at the end of a usufruct upon deterioration of the thing. In general terms, subject to proper maintenance and absent malicious damage or gross negligence the usufructuary is not liable. In the case of usufruct ownership is split into two ownerships: the bare ownership and the usufruct which together make up full ownership. Whereas usufruct cannot be inherited *nuda proprietas* can because it is a property

right and implied in judgements is the fact that because usufruct is a temporary right there will be at some point consolidation and a return of full ownership.

Article 329 refers to the usufruct of fungibles, generally money. Their use includes consumption. There is indication of concern not only of return at the end of usufruct but of the condition in which the usufruct is returned. It is clear that the usufructuary is entitled to make use of the objects as a *bonus paterfamilias* would, however, there is an important distinction: it is either the obligation of *"paying the value thereof according to the valuation made at the commencement of the usufruct"* (this imposes the duty on the intelligent usufructuary to carry out a valuation at the commencement of the usufruct) or absent such a valuation to return like quantity, quality, or value at current price at the end of the usufruct. This is the first point of concern at the termination of the usufruct.

Article 330 states that usufruct can happen either at law (the will of man) or by disposition. In the case of immovables this requires registration in the Land Registry.

Under **article 331** note that usufruct can be constituted conditionally, suspensive or resolutive, or for a specified period. Sub-articles (2) and (3) speak of the creation of either a joint usufruct or a successive usufruct or a joint and successive usufruct. Joint means that the multiple nominated usufructuary simultaneously and together are called to enjoy of the usufruct. Successive means one nominates A and when B passes it is C, therefore A's usufruct terminates and a new one begins upon A's death for B. Also, note that this is not a substation. It can also be both joint and successive where people are called to enjoy simultaneously, and this succeeds to the others. Article 331(3) underlines the concern of not leaving things forever, and states that *"where the usufruct is granted to several persons to be enjoyed by them successively, it shall be operative only in favour of those persons who are alive at the time when the usufruct devolves upon the first usufructuary".* This is a limitation on the indefinite succession of the usufruct where it is granted to several person successfully, through an important limitation as it may only be operative in favour of those who are alive in favour of those alive in favour of the first vesting. At that point the die is cast and cannot be further extended.

The Rights of the Usufructuary

The Code is structured in a manner that first we find the rights and then the obligations of the usufructuary. Upon careful reading one asks oneself whether these rights are conditioned. The usufructuary has the right to take all kinds of fruits, industrial (that which requires cultivation), natural (that which grows spontaneously), or civil, owing to the agricultural context in which the Roman Law provisions were drafted. Today, usufruct operates almost exclusively within the contexts of interests and return on investment, be they returns on financial assets, property, profits from a business, proceeds from the cashing of an insurance, rents, ground rents, annuities, pensions, dividends, etc. Usufruct has another important benefit which is the role of transmission of wealth from one generation to the other retaining control by the party transmitting by way of usufruct. With regard to residences, it may be tax efficient to transfer bare ownership to children whilst parents retain the rights of use and habitation to live till they day in the donated property. With regard to shares, parents donate shares but retain usufructs to be entitled to dividends, vote in general meetings, appoint directors, etc. without owning the shares. Note the role of usufruct in the transmission of

wealth from one generation to another. This is often done for tax purposes. With regard to emphyteusis we fill see that there is the right of the *dominus* to get a *laudemium,* an entitlement of the usufructuary.

Article 338 states that *"If the usufruct includes things which, without being consumed at once, are subject to gradual deterioration by use, the usufructuary has the right to make use of them for the purpose for which they are intended, and he is only bound to restore them, at the end of the usufruct, in the condition in which they may be, provided they have not been damaged through his malice or negligence".* Here we find a situation where things deteriorate through gaining and normal use. The hypothesis is that things, through normal use, deteriorate over time. If the usufructuary uses them properly, and for the purpose intended, and as *bonus paterfamilias,* it is lawful and legitimate that these are returned in the condition of deterioration through normal and proper use, provided there has been no malice or negligence. The three key points here are: one, things which deteriorate through normal use over time, the second is proper and diligent use, and the third is the return of such things which deteriorate through normal use in the condition they are at the end of the usufruct without any further responsibility of the usufructuary provided there has been no malice or negligence. For negligence read failure to act as a *bonus paterfamilias.*

Under **articles 340** and **341** the usufructuary may assign the right of usufruct. Of course, usufruct is a temporary right, but it may be transferred either gratuitously or against a consideration. Usufruct is a real right but a personal servitude, as it is a right created in favour of a designated person, not, as in the case of predial servitudes, a right enjoyed by a property over another property where there are the dominant and servient tenements. Note that servitudes can be either personal or predial (property, right of way, etc.). Therefore, even though there is an assignment there is no change in the constitution of the servitude in the sense that when the usufructuary dies it terminates with him. A usufructuary may also lease out the property subject to usufruct. Whilst Dingli and his Code tried to be fair to the usufructuary he never lost sight of the temporary nature of the right and how full ownership must always be returned with the interests of the owner needing protection. Article 341 poses this question: *is it lawful for a usufructuary to lease out property which is subject to the usufruct?* Although the answer is yes, the lease is valid but is subject to two qualifications (note the distinction between urban and rural property, with the latter being that property attached to fields): firstly, the period of time must be to a customary period current on the market but which cannot, in the case of rural immovable property, exceed eight years, and, in the case of urban property, exceed four years; secondly, it has to be done on fair conditions. Over time the meaning of fair conditions has evolved in meaning, where in the past fair conditions were linked to the old rent laws which froze rent and condition at very unfavourable conditions to the landlord, however in the 1980s we saw a change where fair conditions meant market conditions, meaning willing lessor, willing lessee, operating at arm's length in an open market condition without undue constraints.

Under **article 343** any active easements or servitudes to the property subject to usufruct, in other words where the property subject to usufruct is a dominant property, are enjoyed by the usufructuary. The owner cannot act in any manner to prejudice the right of the usufructuary and, in conjunction with article 348, the usufructuary is entitled to bring forward any real action (not possessory action) to defend passively and actively his title.

Article 347 has been criticised as unfair on the usufructuary, but it underlines the fact that the law is ultimately on the side of the property owner. This is due to the fact that article 347(1) clearly states that at the end of the usufruct the usufructuary is not entitled to any compensation for improvements carried out on the property, and any investments made, even though the value of the property may have increased significantly as a result thereof. The usufructuary knew or should have known that he or she was not there forever and that he enjoyed the property improvements whilst enjoying the usufruct. The only right which the usufructuary has where there is no case of set-off against damages is to remove those improvements which are useful to the usufructuary at the cost of the usufructuary unless the owner opts to keep them and pay their value at the time of their removal.

The Obligations of the Usufructuary

The comment as was made in the rights of the usufructuary is that these tend to overlap. There are a number of general points which define these obligations, and they may be briefly summarized as follows:

1. The obligation of verification of inventory,
2. The security to be given by the usufructuary to the owner (having important implications: verification of the condition and the guarantee),
3. The administration and, more specifically, repairs,
4. The specific attribution of liabilities (the apportioning of liabilities between the owner and the usufructuary).

Vide articles 349 and the following articles.

I. The Obligation of Inventory

Article 349(1): The usufructuary takes the thing in the condition they are at the time the usufruct vests. The usufructuary has to ask himself what the condition of the usufruct is because at the moment of vesting the usufructuary has to take whatever there is in the state that it is in. Whilst this is a truism, the corollary is that the usufructuary has no action/remedy against the owner to improve or restore or make acceptable the usufruct. Rather, the usufructuary has to be careful not to land itself into a situation where it may indeed have to contribute because of the costs of ordinary repairs (extraordinary repairs are generally at the expense of the owner). The usufructuary has to be careful that what is supposed to be ordinary repairs and maintenance does not turn out to be an unexpected/unforeseen business.

Article 349(2): Another important consideration is that unless the usufructuary has acted negligently or maliciously damaged the property the obligation at the end of the usufruct is to return the usufruct in the condition at the end of the usufruct. This is a consistent theme. We find this repeated and replicated in the rights of the usufructuary in the sense that there is no right to compensation, however there is the right to set-off. This is reflected in, although not identical to, article 338 in the case of things which are subject to gradual deterioration through aging and normal use. The same point is reflected also in article 329 in the case of the usufruct of fungibles and if there is a valuation at the beginning then the obligation is to pay an equivalent amount. If there is no valuation at the commencement of the usufruct, then

the valuation absent an initial assessment is payment of the value at the end of the usufruct or return an equivalent amount (with regard to fungibles under articles 339).

The next articles relate to an inventory. Technically, the inventory is always due unless it has been exempted in the act creating the usufruct. Almost invariably this is dispensed with. In the act creating a usufruct it is common practice to dispense with this requirement in the will/testament creating the usufruct with testators exempting each other from creating this obligation and giving security. Furthermore, the court has a discretion to exempt a usufructuary from making an inventory if the value of the assets is moderate and do not justify a formal inventory. Often, in these situations, the inventory is substituted by what is known as a descriptive note, a statement confirmed on oath. Part of the reason for this is that an inventory is a cumbersome, expensive, and formal process. The details are found in the COCP, and such an inventory must be overseen by a notary because at the end there has to be the publication of a notarial deed recording the contents of the inventory. Moreover, it is also the fact that the inventory is published in a daily newspaper and the Government Gazette where it will be stated that the publication of the inventory of the usufruct of a particular estate will be taking place at a particular date and time at the particular office of the particular, named, notary.

Article 350: The inventory itself has to record the movables and the value, the list and condition of the immovables (which will almost invariably engage the fees of an architect to carry out valuation), and the owner has to be informed and notified by a judicial letter telling him that the usufructuary will be carrying out the inventory at the listed date, time, and place and it must be carried out by public deed unless the act creating the usufruct allows a private writing to which the owner agrees (**article 351**).

II. The Obligation of Security

Article 352: With regard to the security or guarantee of the usufructuary, it is done through a general hypothec on all the property present and future of the usufructuary, engaging all property indiscriminately. The purpose of this obligation is that a guarantee is an asset which makes good for an obligation called the principal obligation and this guarantee, which may be personal (given by a person) or real (on specific items), is engaged (meaning the creditor can enforce this guarantee) in the event of default of the principal obligation. The question arises as to which are the principal obligations to be guaranteed by the security put up by the usufructuary. The response is fourfold:

1. Enjoyment as a *bonus paterfamilias*: It is implied that the right of the usufructuary is burdened with the *bonus paterfamilias* ordinary diligence obligations.
2. The movables have to be restored,
3. The movables have to be paid back (in the case of fungibles, *vide* article 329), and
4. The amount of damages must be made good, as well as the amount of the security (capital assets), assets, movables, and the cost of repairs at the charge of the usufructuary calculated over five years.

The Civil Code creates an exemption by law to certain categories of persons who are exempt by law from giving up the security (*vide* **article 353**). These are:

1. those whose usufruct derives from the law;

2. the vendor or the donor who has retained the usufruct for himself;
3. the usufructuary of things which are, or are to be, administered by others.

Article 354: One must be careful and aware of the cut-off date imposed within this article. This says that, in the event that the usufructuary does not give security, either before the commencement of the usufruct or within one year from the commencement of exercising the rights of a usufructuary, the owner may not demand security. This year is very relevant and must not be forgotten. After this year security can only be requested if the owner proves that the financial condition or the enjoyment of the usufructuary of the usufruct is such as to endanger the obligations of the owner and risks damage to the usufruct.

Article 355: Failing security, the owner is entitled to demand the appointment of an administrator. The court will allow the usufructuary a period of time to provide for security, failing which the usufructuary forfeits the administration of the usufruct. Therefore, we have a situation, that there is distinction between the administration of the usufruct and its enjoyment. The fact that the usufructuary does not administer the usufruct, but there is involved an administrator, does not mean that the usufructuary is deprived of the entitlement. One may find the articles on the role of the administrator difficult to understand. Note that the language of the article is that the administrator is appointed by the court and shall be a competent person who has to look to the interests of both the owner and the usufructuary.

Article 356: The term *"shall"* is strange, as it is questionable why the administrator should be bound to sell the immovables if they are serving a good purpose. This is most likely an issue of translation from the original Italian Code. However, it does make sense that sums of money are to be properly invested.

Article 359: These are the familiar articles that the administrator is accountable, must render a yearly account and, during the administration, the statement of account is given only to the usufructuary. At the end of the usufruct the account has to be given both to the owner and to the usufructuary.

III. The Rules of Repairs and Maintenance (Articles 363-369)

In general terms, the usufructuary is responsible for ordinary repairs and maintenance. The distinction between ordinary repairs and maintenance, and extraordinary repairs is occasionally difficult to ascertain. The latter are more serious and tend to refer to the possibility that the usufruct is indeed fit for enjoyment. Examples of ordinary repairs are the customary whitewashing, replacement of minor items, roof maintenance, etc. Examples of extraordinary repairs mainly involve structural repairs, such as the replacement of beams, the roof, something which has caved in, etc.

The distinction in **article 363** is clear unless these have been occasioned by failure by the usufructuary to carry out ordinary repairs in which event neglected ordinary maintenance resulting into extraordinary maintenance shifts to the responsibility of the usufructuary. The usufructuary has to be careful of the situation at the beginning of the usufruct as he liable to those ordinary repair needs required at that time.

Article 364: An example of extraordinary repairs. This is the only part of the Civil Code which has been transposed beyond the articles of usufruct with clear examples of ordinary and extraordinary repairs, stating: *"The repairs to walls and vaults, the replacing of beams, and the entire renewal of the roof, staircase, or pavement of any part of a building, are extraordinary repairs".* Therefore, this article has found wide meaning throughout the Civil Code.

Article 365: The usufructuary has no action against the owner to compel the latter to carry out the repairs at the charge of the owner. The usufructuary therefore cannot act judicially to compel the owner to carry out extraordinary repairs. However, if the situation to the usufructuary becomes unbearable he is given a remedy to petition the court to be authorised to carry out at the expense of the usufructuary those extraordinary repairs generally at the charge of the owner. Provided the usufructuary formally notifies the owner of the costs involved, the usufructuary is entitled to recover what was spent without interest at the end of the usufruct. This notification of the account of expenses has to be given by the usufructuary to the owner within six months of completion and the owner is entitled to challenge these provided the owner declares the intention to challenge within two months of receipt of notification of the account of expenses. In the event that the usufructuary does not inform the owner, what the usufructuary is entitled to recover is basically only any retaining utility, if any, at the end of the usufruct. If, however, the owner does indeed carry out the extraordinary repairs the owner is entitled to recover during the usufruct the interest on what was paid by the owner. This addition of interest is subject to a court decision declaring and approving these expenses.

Article 367 contemplates the situation where a building or part of a building collapses through age or a fortuitous event. This article makes applicable the rules of responsibility and compensation of the obligations of the owner where a building falls down in the following events, i.e., the building has to be either a necessary accessory for the proper enjoyment of the usufruct, or an accessory of the principal building subject to usufruct.

Article 369 has a historical background, stating that, apart from the whitewashing of buildings, the cleansing of cisterns or sinks when ordered by the police in the cases provided for by law shall be charged to the usufructuary. This is indicative of the partition of responsibility.

IV. The Payments of Specific Liabilities and Responsibilities

This has to be read in a historical context where there existed either specific items subject to usufruct or a general usufruct of an estate. The usufructuary is bound to pay ground rent and all annual charges on the tenement. There are situations where the usufructuary has the usufruct of single specific items and is burdened by ground rent or annuities (**article 370**).

Article 371: Where the usufruct is of one or more specific, particular, tenements, not a general usufruct of an estate, the usufructuary is not bound to pay debts for which the usufruct is charged or hypothecated. Therefore, the liability is limited to the payment of ground rents and annuities found in the preceding article. In the event of debts, it is not the responsibility of the usufructuary, who may claim regress if compelled to pay. There is a contradiction between articles 370 and 371 on this basis as the former imposes the obligation

on the usufructuary to pay annual charges whilst the latter, however, dispenses annuities charging a tenement. This rises the rhetorical question, are not annuities annual charges?

Article 372: Speaks of the hypothesis of the usufruct of an entire estate. By way of background, historically, Dingli was here looking at the Sicilian Code, the French Code, the Italian Code of 1865, etc. Whilst articles 370 and 371 refer to usufructs of specific tenements, article 372 refers to the usufruct of entire estates, contemplating a situation where a person has a usufruct of the entirety of assets and liabilities. However, this is again a balancing exercise, particularly in the case of liabilities, with article 372 giving various options. What is obvious is that the usufructuary of an estate is bound to pay maintenance allowances, perpetual or life annuities, or interests on debts to which the estate is liable, without any right of recovery. Also, it is unwritten and unstated but is clearly there, the non-payment of the debts may create a context in which the parts of the estate may be sold through proceedings of the creditor. Therefore, we have this balancing exercise in the context of the usufruct of an estate on which debts are due. The usufructuary is entitled to advance the amount (pursuant to article 372(2)) and is entitled to repayment thereof without interest at the end of the usufruct. If the usufructuary is willing to advance the loan the usufructuary is paying the debt but is in reality loaning the money to the owner without interest. If the usufructuary is not willing to make such an advance the owner has the option to either pay the amount due and charge the usufructuary the interest or sell off the property or part thereof subject to usufruct, terminating the said usufruct in the process. the sale of a property subject to usufruct does not terminate the usufruct and this is the exception to that rule.

Vide **article 373** (to be read in context with **article 348**) and **article 374.**

The Termination of Usufruct

Vide **articles 378** onwards. As indicated, usufruct terminates with the death of the usufructuary. The question does not arise whether usufruct is inherited and there are specific circumstances were a usufruct is successive or joint and successive and in a sense one can claim that it is successive but ultimately this is not a case of a usufruct really being inherited but a case of, by the terms of appointment and creation, a succession to the usufruct as created in the sense that it is not succession *causa mortis* but succession *inter vivos,* in the sense that a party is nominated to succeed. In other words, where there are successive usufructs or joint and successive usufructs the succeeding usufructuary continues in the usufruct by virtue of the appointment and deed of nomination, not by a *causa mortis* inheritance.

The next ground is the expiration of the time for which usufruct was constituted. Recall that in the opening articles of the Title on usufruct it is shown that usufruct can be constituted for a period of time or even jointly and successively (**article 331(1)**). This is nothing more than an application of the rule that usufruct terminates at the time constituted.

The next ground of termination is where there is merger of the same person of the usufructuary and the owner. This provision has been criticised for its inaccurate drafting. Where the bare owner inherits the usufructuary there is union in the same person of two limited real rights, hence consolidation and termination. It is not immediately apparent why the term reunion is used as it implies a previous separation. This is the union of two separate

persons, the continuation in the personality of two separate persons, bringing together the two different capacities. What is of note is that there is a person who owns the usufruct and a separate who owns the bare ownership and then these persons are merged, bringing about in consequence the consolidation of the real rights. It is tricky in the sense that it is not apparently clear whether, ultimately, it is the merger of the person or of the real rights. Possibly, one can defend this provision on the basis that usufruct is a real right and personal servitude of the owner in favour of the usufructuary, a nominated person.

The next is non-user of the right during thirty years. All actions, real, personal, and mixed, are extinct by the lapse of thirty years. If there is non-use of the usufruct for thirty years independently of whether anyone else is acquiring, it leads to termination of the usufruct.

The next provision speaks of the total loss of the subject of the usufruct. This is a provision which is in common with other extinguishments of obligations, such as the situation with regard to leases wherein the lease terminates should the leased object be totally destroyed.

Article 379: Speaks of a termination on the basis of wrongful use. There was a spate of case in the 1980s on the question of wrongful use, although ultimately said cases were abandoned. The rule is that there is a ground f termination on the basis of wrongful use by the usufructuary either through damage caused to the premises, or by allowing the premises to run into ruin for ordinary repairs. There are some mitigating provisions in the sense that the following sub-articles (2) and (3) which state that the court has the discretion to appoint an administrator to be charged to carry out the necessary repairs to restore the property or order the return of the premises to the bare owner on condition of paying a fixed sum every year to the usufructuary during the continuance of the usufruct *in lieu* of terminating the usufruct. This article 379(2) is silent as to whether this is a discretion which can be exercised by the court of its own motion or whether the court can only exercise this discretion if there is a demand before it, in other words if neither party asks the court to retain the usufruct can the court exercise its discretion and opt to do so? In any such case the court may this is a discretion which the court may exercise even though there is not a specific request before it. The next question is that of who would be those claiming under him? Is this not a contradiction with the provision that usufruct terminates on death? Is this an exception? This is not an exception and claiming under the usufruct refers to particular successors in title, where the usufruct is assigned *inter vivos.* There is nothing to suggest here that this is an exception to the rule that usufruct terminates with the death of the usufructuary, such that where the usufruct is for a period of time and the usufructuary dies before the usufruct terminates regardless unless there is a successive nomination. Therefore, this would tend to suggest that claiming under him means the assignees by particular title *inter vivos.* Article 379(3) makes it clear that the demand has to come from the usufructuary or any of the creditors of the usufructuary, making it a clear case where the instance has to come from the creditors of the usufructuary or the usufructuary itself. This can prevent the termination of the usufruct on three conditions: one, by giving an undertaking to carry out the repairs; two, by giving adequate security; three, this has to be offered and undertaken either before there is judgement or within fifteen days where there is final judgment. If the demand does not come from the owner would this be inapplicable? No one else would have *locus standi.* One also has to take into account the fact that a rule of interpretation is not to presume that words are superfluous, meaning an interpretation is to be given to the phrase *“on the demand of*

the owner" regardless. The last moment at which this offer is made is either before judgement is delivered or within fifteen days of the judgement becoming *res judicata,* either when the judgement at first instance is not appealed against or when an appeal judgement is delivered. At the same time there is no necessary distinction if the demand is made before judgement before first or second instance.

In **article 380(1)** the legislator wanted to discourage usufructs being given to monasteries, convents, universities, etc. because the idea of perpetual usufruct was being eliminated. Also remember the old provisions of the Mortmain Law, the *manu morta* provision which prohibited the Church from acquiring further property such that if the Church acquired more property it had to dispose of it after a period of time. *Vide* the Blue Sister Case wherein it was held that the Zammit Clapp foundation was a universality. More recently in 2007 and amendment passed where a right of usufruct is settled under trusts in favour of a trustee including a corporate trustee or a private foundation where the beneficiaries are natural persons have to be named and to have the right to enjoy the property. The right of usufruct shall operate for the lifetime of such named beneficiaries. This is linear and consistent with the rule that usufruct is with those named beneficiaries. However, a question is raised by the language *"unless expressly stated otherwise",* the penultimate line of article 380. Are we here to infer that this can be done for an indefinite period, making it a backdoor to indefinite usufruct? We are not saying that it does not terminate with their death, but whether the usufruct continues beyond nominated persons.

Article 381: Where usufruct is given by A in favour of B until C attains a certain age, the usufruct shall last for all that time even if C dies before attaining the age in question.

Article 382: Clarifies that where there is a conjoined usufruct there is a presumption of accretion. Take, for example, a usufruct created by A in favour of B and C jointly, when B passes there is accretion and B's children step into his shoes (representation). If B dies childless his shares transfer laterally to C through accretion. Where there is a joint usufruct after the death of the first usufructuary there is accretion in favour of the surviving usufructuary and termination only on the death of the second usufructuary. It is clarified that the sale of the bare ownership will not terminate the usufruct, but the sale will be valid subject to the usufruct under article 385.

Article 384: There is a right of the creditors of the usufructuary to challenge the waiver or renunciation by the usufructuary of the usufruct if the creditors can show that by this renunciation there is interest is prejudiced by having less assets over which to enforce.

Article 385: Where there is the perishing of only a part of the usufruct, the rule is that the usufruct shall continue to be operative as to the remainder.

USE AND HABITATION

These are minor real rights and versions of usufruct and habitation. Some question their utility but in practice they are still used, particularly in the scenario of transmission of wealth from one generation to another with the right of use and habitation being retained by the creator of the usufruct. Note that there is also a tax on the creation of a usufruct as it is a transfer of a real right. Use is the right of use limited to one's needs and those of the family.

Article 392 states that *"Use is the real right of a person of making use of a thing belonging to another, or of taking the fruits thereof, but only to the extent of his own needs and those of his family".*

Article 393 states that *"Habitation is the real right of a person to live with his family and according to his condition in a house belonging to another".*

The right of use of a house is the same as the right of habitation. The right of use is to use something belonging to another according to family needs whilst habitation is the right to live in a house according to one's condition and use of a dwelling house is habitation. The essential distinction here between usufruct, use, and habitation, is the limitation of rights of the person. The creation and extinguishment of a right of use and habitation are the same as usufruct with their being the need for a public deed in case of immovables.

Article 394 states that *"For the purposes of the last two preceding articles, the word "family" shall also include the children born since the commencement of the right of use or habitation, even though the grantee was not married at the time of the commencement of such right, as well as acknowledged illegitimate children, adopted children and servants".*

Article 395 states: "(1*) The grantee of a right of use or habitation shall make up an inventory and give security as provided in the case of usufruct.* (2) *The court may, according to circumstances, exempt the grantee from giving security".* The court may not exempt inventory. If the court can exempt the usufructuary it should be able to exempt the usuary. There is the obligation to use as a *bonus paterfamilias.*

Luca J. Camilleri IV

EMPHYTEUSIS

Vide article 1494 onwards. Emphyteusis is a term of Byzantine origin, and it found its way from the Eastern empire through Justinian's influence into the western Civil tradition. The emphyteusis had its distant origin in the *ager vectigalis*, meaning very long concessions given to the emperor by his friends of large tracts of territory. Today in western legal thought emphyteusis is very much out of vogue because of its feudal origin. Maltese law is derived from the 1865 Italian Code and the Maltese terms for ground rent are *cens* and *kanone*.

Article 1494(1) states that *"Emphyteusis is a contract whereby one of the contracting parties grants to the other, in perpetuity or for a time, a tenement for a stated yearly rent or ground-rent which the latter binds himself to pay to the former, either in money or in kind, as an acknowledgment of the tenure".* Emphyteusis has to refer to immovable property and must have a duration (perpetuity or stated time). The ground rent has to be paid yearly either in money or in kind as an acknowledgement of the tenure. These last words define the original contract of emphyteusis. The ground rent is not payment for consideration in return for enjoyment, as ground rent is a real right. Also, the payment of the ground rent is historically an acknowledgement of a superior title, not a compensation for use. This is the original feudal character of emphyteusis and why it has lost favour in contemporary Codes. Note that redemption of the ground rent does not bring about removal of the conditions of said ground rent, it eliminates payment obligations but not the conditions of the emphyteusis which must be paid for separately. Part of the historical appeal of emphyteusis was to create such transfers that would remain binding even after transfer.

The first party in an emphyteusis is the *directarius* or *directus dominus* (*dirattarju* in Maltese), who is the party who has two entitlements to receive the ground rent, has an interest in the observance of the conditions of the emphyteusis, and an inherent interest in the building subject to emphyteusis. The second party is the *utilista* or emphyteuta who has the *utile dominium* because the immovable of the emphyteutical concession is known as the *utile dominium.* Together, these two limited rights make up full ownership.

Article 1495: Note the term *"emphyteutical grants",* the historical overtone that a property is granted on emphyteusis. Therefore, to grant an emphyteusis there must be full legal capacity unless authorised by the competent authority.

Article 1497: Emphyteusis is null:

a) if not made by a public deed; or
b) if the grant is otherwise than in perpetuity or for a stated time to be reckoned from any certain day; or
c) if the amount of the ground-rent is not expressly stated in the contract.

Article 1498: In a situation where parties are discussing a lease exceeding sixteen years it must be done through a public deed. If the conditions are more akin to the nature of an emphyteusis rather than a lease this has to be done by a public deed. If the terms and conditions of the agreement are more compatible with the rules of emphyteusis than lease it must be done through public deed even though the parties may have called it a lease and not an emphyteusis. On the other hand, under article 1498(2) on the other hand where it is stated that the grant is emphyteusis and done by a public deed the short period of time has no effect.

Article 1499: This refers to the content of the terms and conditions which may be entered into in a contract of emphyteusis:

1. That there are certain articles which are mandatory and apply in all contracts whether or not they are included or written, and it is not possible to exclude them, and any exclusion is invalid. These refer to redemption of ground rent, divisibility of ground rent, acknowledgement of new emphyteuta and new *dominus*, and the rules on payment of *laudemium* (where there is a transfer of the *utile dominium* there is the payment of one year's ground rent).
2. Saving these mandatory articles which cannot be contracted out, parties are at liberty to agree on the conditions they deem fit as long as these conditions are not unlawful.
3. In the absence of, saving the mandatory provisions, specific agreements of the parties the rules in the Civil Code will apply by default to supplement.

The Redemption of Emphyteusis

The basic concept of emphyteusis is a feudal contract in the sense that the parties are the lord and the vassal, as was the case in medieval Civil Law. Therefore, ground rent is for the acknowledgement of superior title. Redemption means when one pays a price to release an obligation, where there are certain obligations which can be freed at a price. Now, the background to **article 1501** is that this was partly a measure to remove certain useless burdens over property and was added initially in 1981 and the idea was to give parties the possibilities to redeem these small grounds rents not worth the hassle. It was always possible to redeem by deed the ground rent but the 1981 amendments (Act XXX of 1981) created the possibility to redeem a *perpetual* ground rent. In 1981 the possibility to redeem a perpetual (not temporary) emphyteusis by a court deposit was introduced. Does this mean that a temporary emphyteusis cannot be redeemed? No, because they can be redeemed through agreement between the *dominus/directarius* and the *emphyteuta utilista.* This redemption of a ground rent through a court deposit only applied in the case of perpetual ground rent because if a temporary ground rent expires after a certain period there is a likelihood of reversion. There are two considerations to be made here: firstly, redemption of a perpetual ground rent can happen even though the ground rent is periodically revisable[3]; secondly, redemption of perpetual ground rent happened after the 15th of August 1981 but if a contract of emphyteusis was entered into before this date and provided for a different manner of redemption, then this did not apply. This amendment introduced in 1981 stated, initially, that only perpetual ground rents can be redeemed, and if, in the case of a contract entered into before the 15th of August 1981 was stipulated then the redemption by court deposit could not happen.

Under article 1501(2) in the event that there is redemption through a court deposit the ground rent is redeemed by a capitalisation of 5%, meaning twenty multiplied by the ground

[3]For background, during the 1960s building boom, there were large tracts of land granted either in perpetuity or often for a period of 150 years, and this was the policy of the Church. This revision was typically every 25 years according to various criteria, such as the minimum wage and the current value of gold. However, there was an issue in 1973 when Malta converted to the Maltese Lira, and it was held by the Court of Appeal that the Pound Sterling was pegged to the Maltese Lira. Other criteria for revision related to fluctuations in the market in the valuation of a currency. People litigate to this day on the criteria for revision, particularly when this is linked to either the cost of living or the minimum wage and can lead to at times significant increases.

rent. If we say that the ground rent is redeemed through a capitalisation of 5% it means that this perpetual ground rent is redeemed through a deposit in court of the current ground rent multiplied by twenty. Note that the lower the rate of capitalisation, the more expensive it is. If, for instance, it is capitalised at 3% it is multiplied by 33. The formula is one hundred, divided by the rate of capitalisation. The rate is 5% because of high interest rates in the 1970s and 1980s. it was felt that it was a fair return. Therefore, the rate of buying the ground rent was linked to fixed deposit rate of 5% in 1981.
Under the proviso to this article, where there is a revision which is either periodic or on the occurrence of a particular event, then there are specific rules and provisions which apply. The redemption may be opted within one year of revision or the happening of the condition. Meaning where there are no periodic revisions to a perpetual ground rent this may be redeemed at any time at the option of the emphyteutar. Where, however, there are period revisions the redemption may only happen within a year of the happening of the revision and it can only happen at the option of the emphyteutar within a year of the revision. Furthermore, the capitalisation shall be at the average rate payable by commercial banks on fixed deposit.

Sometimes it is possible that ground rent is payable to different people. Also, something which is quite popular is known as an increase in ground rent, wherein A gives a perpetual emphyteusis to B at €50 PA, and B gives to C at €75. This is a sub-emphyteusis. C is entitled to redeem both the original ground rent vis-à-vis A and the increase in ground rent vis-à-vis C. technically what should happen is that B should collect from C €75 and pay A the €50, although oftentimes B keeps the full €75, and C has a problem with A. We are told that any agreement depriving the right of the emphyteuta to redeem the ground rent is null and void and the redemption may happen either by public deed or by a schedule of deposit. This is done in the First Hall of the Civil Court and the structure of the document is the emphyteuta with details vs the *directarius* or *directarii*. What is relevant is that the immovable on which the ground rent is to be redeemed has to be described in the same manner as an immovable is described in a notarial deed as required by the notarial law because the schedule of deposit is registered in the Public Registry and the Land Registry. It therefore has to conform with the formal requirements of description. A Land Registry site plan is required to be attached and it is to be filed along with the necessary funds for the redemption. There are 304 concluding considerations and generally speaking a redemption through court is cheaper because a notarial deed would cost more. There is no difference in the tax treatment of either method. Two copies have to be served on the Public Registry and if it is a Land Registry area there is a procedure to formally notify it. The law, as written and interpreted, allowed the possibility for, where there are a number of *domini,* to redeem against one *dominus,* however it does not affect the entitlement of those who were not included.

Article 1502: With regard to the following, note that it interrogable, that is to say it applies anyway whether or not written and cannot be contracted out. This is the divisibility of the ground rent. A major amendment which happened through Act XXVII of 1976 is that each emphyteuta is entitled to demand that it pays its proportionate share of the ground rent. One has to look at the historical context of this article to fully grasp it. Prior to 1976 there existed joint and several liability of the various emphyteuta. Take, for example, a large tract of land on which a number of developments were carried out and on the entire tract of land there was an entire ground rent imposed without being divided. Technically, each of the co-

emphyteuta were responsible for the entire amount *in solidum* with the others. What used to happen is that the *dominus* would go after the emphyteuta with the deepest pockets, rather than chasing each co-emphyteuta for the relative *pro rata* share, who in turn would have to turn on the remaining co-emphyteuta to be reimbursed. This was rewritten in 1976 to give the right of each of the co-emphyteuta to demand division, that is to say here we see a right for the divisibility of the ground rent. This article retained continuity with the past (the historical article read as follows: *"The ground-rent cannot be divided without the consent of the dominus"*) whilst introducing the new amendment. The amendment retained this right of the *dominus* whilst imposing on him the obligation to recognise divisibility of the ground rent if the division asked for corresponds in substance to the physical division of the property.
This concept is further in article 1502(2) in the sense that where there is either the consent of the *dominus* for the transfer of separate parts to different persons (note that there is a procedure whereby the *dominus* cannot acknowledges the new emphyteuta which is not automatic but cannot be refused) the *dominus* would have been called to the contract to release the old emphyteuta and to recognise the new one. The consent given to apportion the ground rent is the same as an express division by the *dominus.*

Article 1503 reflects continuity and has not been changed since 1868. Its historical background is that where a co-emphyteuta pays the entire ground rent, such co-emphyteuta paying the entire ground rent is entitled to *pro rata* reimbursement from the other co-emphyteuta.

Articles 1504 through 1508 create the wide powers of the emphyteuta over the property held in emphyteusis. The emphyteuta has very wide powers to demolish, develop, and alter the form and substance of the immovable property. With regard to redemption, note that it only cancels the financial obligations of the emphyteuta, but does not extinguish conditions imposed on the emphyteusis. that is to say, if there is a condition imposed on the emphyteutical tenement, by depositing the amount in court one does not extinguish such condition. The condition may be extinguished by a public deed for a monetary sum. It is relevant because when it has been said that the emphyteuta has wide powers to alter immovable property it is always subject to the original conditions of the emphyteusis. Therefore, the moment that there is an emphyteutical concession it raises a flag and should indicate the practitioner to read the original emphyteutical agreement. Typical conditions include the obligation to keep the building below a certain height, to retain the garden as such, or to not use the property for any purpose other than a residential dwelling. The emphyteuta has all the obligations of the owner and is obliged to use the diligence of a *bonus paterfamilias.* If one were to discuss the interest of the *directarius* there are three:

1. The entitlement to receive the ground rent,
2. An interest and an entitlement to insist that the conditions of the emphyteuta are observed,
3. The right to demand the dissolution of the ground rent if the ground rent is not paid, if the conditions of the emphyteusis are not observed, or if the immovable is left to go to manifest ruin.

The *dominus* has a clear interest.

Article 1508 provides that the *dominus* is entitled to dispose of, *inter vivos* or *causa mortis,* the emphyteutical tenement. A transfer *inter vivos* requires a public deed.

Articles 1509 through 1512 relate to the acknowledgement of the new emphyteuta by the *dominus* and vice versa. The rules are the following:

1. **Article 1509:** That even though the emphyteuta may have transferred or disposed of the tenement, the emphyteuta is not released from the obligations towards the *dominus* unless the *dominus* acknowledges the new emphyteuta. Nevertheless, the new emphyteuta is also bound with the former emphyteuta for all happenings, events, and damage after acquisition (but not before) and therefore the *dominus* has a right of action for the post-transfer both against the former emphyteuta and against the new unacknowledged emphyteuta, and this situation continues until the release of the former emphyteuta. This right of the *dominus* extends to the *super invectus et illatis* (meaning the *dominus* has, for payment of ground rent and the fulfilment of the covenant, the right to seize and sell off the movable furnishings and fittings that are found on the premises).
2. **Article 1510:** The *dominus* may not refuse acknowledgement to the new emphyteuta if the emphyteuta is a competent person. This has been understood to mean that the burden of proof is on the *dominus* to show that the new emphyteuta is not a competent person (typically financially). In 1961 a very important amendment was carried out to abolish the right of first refusal in the case of transfer of emphyteusis, that is to say if there was an emphyteusis which was being transferred prior to 1961, the *dominus* had a right of first refusal to buy the *utile dominium*, on the same conditions, the emphyteusis and consolidate the full ownership.
3. **Article 1511:** This article, alongside the former, is mandatory. This article implies that the new emphyteuta may not refuse to acknowledge a *dominus* if the *dominus* has either acknowledged the emphyteuta or offered to do so. By implication, this raises the question, to which there is no clear answer, as to what would happen if the *dominus* does not offer to or actually acknowledge the emphyteuta. If the *dominus* refuses to acknowledge the emphyteuta the said emphyteuta may refuse to acknowledge the *dominus.* Therefore, the old emphyteuta would still be bound as would be the new emphyteuta, but not as the new emphyteuta.
4. **Article 1512:** This article was written far more recently and has practicality and common sense, in the sense that acknowledgement may be either express or implied and may be inferred even from payment or acceptance of a receipt, unless an express reservation is made. It is unclear how one can accept payment and then refuse to acknowledge the payee as the emphyteuta.

Vide the following judgements principally related to two issues: firstly, the point that on redemption of the ground rent by court deposit the ground rent conditions are not redeemed, and secondly, the distinction between a personal contractual obligation which is valid *inter partes,* an easement (which is a right of a property generally adjoining another), or a condition which is a real right of the emphyteutical concession which therefore follows the immovable property into whosesoever's hand it goes:

- *Coleiro Bros Ltd v. Maria Felicita Cremona* (Court of Appeal, 14/10/1987),
- *Salvino Testaferrata et al v. Hubert Mifsud* (Court of Appeal, 22/11/1995),

- *San Tumas Shareholdings PLC v. C&M Contractors Ltd* (FH CC, Judge Robert Mangion, 24/10/2019),
- *Philip Fenech et al v. A&R Mercieca Ltd* (Court of Appeal, 22/05/2008).

Laudemium

Laudemium is dealt with in **article 1513** and is, subject to the conditions of the article, the right of the *dominus* to be paid, generally from the new emphyteuta, one year's ground rent sometimes called an alienation fee although referred to at law as *"any sum by way of fine, by whatever name called".* This was substituted in 1976, meaning the original 1868 article is no longer in force, and it applies to contracts done after the 1st of July 1976. Therefore, this does not affect retroactively any entitlement to an alienation fee otherwise than by the original deed, that is to say, this applies to contracts done after the 1st of July 1976 and any contracts done before with terms different from this article remain fully in force. Furthermore, this is one of those articles which are interrogable, meaning it applies anyway whether written or not. There is indeed a hint of the *super fices,* meaning the ground is transferred as distinct from the building above it, although today this is not in fashion.

The drafting of the article refers to a *"sale or other alienation made after the 1st of July 1976, of the dominium utile or of the improvements".* The current law on emphyteusis is, firstly, that *laudemium* has to be expressly agreed upon (meaning it is not automatic), secondly, that the concession has to exceed a period of twenty years, and, thirdly, that the *laudemium* cannot exceed one year's ground rent and where it is more the emphyteuta is entitled to deduct any excess from the one year's ground rent.

The Dissolution of the Emphyteusis

Recall that the emphyteuta is obliged to enjoy as a *bonus paterfamilias* the concession, even if it is in perpetuity, because although the emphyteuta has wide rights in many ways similar to those of an owner, the *dominus* has residual rights as has been seen above (*vide* the rights to receive the ground rent, ask for reversion, oversee the property, and to reclaim the property if the conditions are not made or the ground rent not paid). Note that a 1976 amendment made applicable to promises of emphyteusis the same rules as that of a promise of sale.

The first question is what happens if the tenement perishes in whole or in part. *Vide* **articles 1515** and **1516.** Bear in mind that there could be responsibility for negligence or fault on the part of the emphyteuta, or family or tenants thereof. This potential responsibility (article 1516) extends to family, guests, or tenants, or even sub-emphyteutar not acknowledged by the *dominus.* What we are seeing here is that the emphyteuta is responsible for negligence or fault of family, guests, tenants, or sub-emphyteuta not acknowledged by the *dominus.* Furthermore, the burden of proof in the case of perishment or significant damage lies on the emphyteuta to prove that the damage has not happened through his own fault or those for whom he is responsible but was due *casus* or an irresistible force.

Returning to article 1515(1), there is dissolution if there is perishment of the entire tenement by a fortuitous event. Where there is partial destruction of the tenement, article 1515(2) is triggered. In such a case the emphyteuta may demand the dissolution of the emphyteusis

where the potential rent is less than the ground rent. The exercise is, if the emphyteuta where to rent out the damaged property, would the value be less than the ground rent? If it would, the emphyteuta has the option, but not the obligation, to dissolve and return to the *dominus* the tenement with the remaining improvements. Naturally, the question will be what happens on the termination of the emphyteusis to improvements.

Needless to say, emphyteusis is dissolved on its natural extinction if it is for a period of time and said period expires. Note that there were special laws relating to the protection of dwelling houses in the case of temporary or perpetual emphyteusis wherein the legislator has intervened to protect the sitting emphyteuta, generally either by giving a right to convert into a lease or giving a lease to convert from a temporary to a perpetual emphyteusis. These rules lie principally under Cap. 158 of the Laws of Malta. On the other hand, there have been many judgements of the European Court of Human Rights and the Constitutional Court which have ruled that this conversion violates the right of peaceful enjoyment of possession in terms of Article 1 of the First Protocol of the Convention and Article 39 of the Constitution. An analysis of jurisprudence would note that there are two trends to be discerned: the first is that there has been a consistent trend of finding a violation of the right of peaceful enjoyment of possessions and the award of compensation, the second is less clear and consistent and has been the question of whether the sitting emphyteuta can continue to enjoy or occupy the premises. This is an ongoing discussion because, on the one hand, it should be clear that for a violation of a human right created by law it is the State which should respond, whilst on the other hand it is not always clear, and one may say that there is quite a discussion here, whether title is lost. Sometimes a judgement concludes that it will not be any longer possible for the occupier to continue relying on the title which was found to be in violation of the right to the peaceful enjoyment of property. This means that the *dominus* would then be entitled to act before the competent court, not the ECtHR or Constitutional Court, to have the occupier evicted because the said occupier would be without title. On the other hand, the occupier may argue that if there is responsibility it is not his to bear because he acted with a legitimate expectation and should therefore not be made to suffer, seeing as he acted property and within the law as it stood at the time.

Articles 1517 and **1518:** The next dissolution of emphyteusis grants the *dominus* the right to demand dissolution and reversion with improvements in the following events:

1. **Article 1517:** Arrears of ground rent of a sum equal to three yearly payments. Note that it is not necessary that they be consecutive.
2. **Article 1518:** Damage or considerable deterioration where the emphyteuta has either allowed the damage to take place without repair or allowed the deterioration. This damage or deterioration has to be attributable and the fault of the emphyteuta with the presumption of fault and the burden of proof on the emphyteuta to show that the unrepaired damage or deterioration has not happened due to fault of the emphyteuta, tenants, family, guests, or unacknowledged sub-emphyteuta (*vide* article 1516).

Article 1519 is the last mandatory article and again was part of the 1976 amendments under Act XXVII. It clarified a question as to whether in the same proceedings it was open to the *dominus* to demand both dissolution and payment of the arrears concurrently. The reasoning

was thus: in the past there was a problem wherein one would offer the choice between the arrears of ground rent whilst keeping the emphyteusis in force or the dissolution of the said emphyteusis. There was a sense that accepting the payment would reinforce the contract.

Article 1519(2) also contains the power and discretion of the court to, in the case of dissolution for non-payment or damage, grant the emphyteuta a period of time to remedy the breach by paying the arrears or carrying out the necessary repairs. What typically happens is that the court will find the defendant in violation of either article 1517 or 1518 and would grant a period to carry out the necessary repairs or pay the arrears. Therefore, dissolution is not automatic. There is also the possibility for another extension if there exists a just cause for doing so.

Article 1519(3) states that this power of the court applies where a resolutive condition has been expressly agreed upon. Such a condition would say that in the event that a condition is or is not met the emphyteusis will be dissolved. The end of the sub-article states that this article will not validate or bring into effect ground rent which is otherwise not due.

It may happen that a creditor may have an interest that the emphyteusis not be dissolved. Take, for example, a creditor with a security interest over the property (a hypothec or a privilege) or the creditor may look to sell the *utile dominium* judicially through court auction, buying it himself or getting paid through the proceeds of the sale. **Article 1520** gives standing to the creditor to intervene in the proceedings for dissolution and set up the request for time being allowed and the creditor is also entitled to prevent dissolution by paying arrears of the ground rent or carrying out the necessary repairs. Furthermore, under article 1520(2), the creditor who has paid the arrears or for the necessary repairs is, firstly, normally subrogated generally in the rights of the *dominus* against the emphyteuta and, secondly, to the limited extent that the *dominus* may have a right against the other creditors there is subrogation also against the other creditors with the exception against the emphyteuta.

Article 1521 and the following articles make provision for the reversion of a temporary emphyteusis. Article 1521 is clear that a temporary emphyteusis seizes on the expiration of the time agreed upon and we are told that the immovable property in question goes back to the *dominus* by law (*ipso jure*) without the need for any particular proceedings and this happens together with improvements. Bear in mind that here we are not looking at a dissolution of the emphyteusis for deterioration, a violation of the condition, or violation of a resolutive condition, but we are discussing the case of the natural case of expiration of the emphyteusis. in the part, there was a right of renewal. Here, the rule is clear that there is no entitlement to renewal of the emphyteusis except by virtue of an express provision in the deed constituting the emphyteusis or by another public deed. Previous editions of the Civil Code granted this right, and the current iteration is consistent with the moderate and balanced philosophy of Dingli. It is clear that there is no right of indefinite renewal unless such a right has been expressly agreed upon.

Article 1522 contains the effects of reversion. Note that in the case of reversion we are speaking of natural reversion in the case of temporary emphyteusis. In the case of temporary emphyteusis, any guarantees, burdens, or easements will dissolve, and the immovable property will revert free and unencumbered by any easements, liabilities, and hypothecs. One

can see that a guarantee on a temporary emphyteusis is a diminishing one because every year that passes and the closer the emphyteusis is to reversion, the closer it is to a free and unencumbered reversion. There is a saving provision that makes reference to *"any lease thereof, the provisions of articles 1530 and 1531".* These articles relate to the law of lease which allow the creation of a lease in the case of a temporary emphyteusis and state that a lease created, *inter alia,* by a temporary emphyteuta will continue to be valid even after the termination of the temporary emphyteusis, provided that two conditions are met: firstly, in the case of urban tenements, that the lease made by the temporary emphyteuta does exceed four years, and, in the case of a rural property, that the lease does not exceed eight years; and secondly, that the lease is made on fair conditions (i.e., current market value, negotiated at arm's length between a willing lessor and a willing lessee without undue pressure or constraints saving normal market conditions). Where there is reversion, these provisions will still apply.

Article 1523 addresses the question as to whether, in the case of reversion or dissolution of the emphyteusis with the improvements, there is any entitlement of the emphyteuta to compensation for improvements carried out. There is a distinction between the situation where there is a natural termination due to expiration of the term of the emphyteusis or whether there is dissolution and reversion due to non-payment of ground rent or damage/deterioration. In the case of the former, there is no entitlement to compensation, whilst in the case of the latter there is entitlement to the cost of improvements, factoring in the increase in value and the remaining period of the emphyteusis. All of these factors will be taken into account by the court when deciding on an amount for compensation.

Article 1524 is very wisely drafted in the sense that it stipulates that the 1976 amendments apply to contracts entered into before or after the 1st of July 1976. Here we even have an example of a law which applies retroactively, except for those contracts which were terminated or dissolved either by agreement, *res judicata* (dissolved by court), or operation of the law. In these three events the law in force at the time will continue to apply. One cannot argue that by today's law a dissolution which took place in 1966 according to the law of the time is invalid.

Luca J. Camilleri IV

THE LAW OF EXPROPRIATION

The General Rule

Article 320 of the Civil Code: *"Ownership is the right of enjoying and disposing of things in the most absolute manner, provided no use thereof is made which is prohibited by law".*

Briefly, the elements of ownership are as follows:

1. Right to use, dispose, and enjoy the fruits of his property.
2. To act within the limits of the law: These limits are elastic in the sense that laws change, becoming stricter or loose depending on the legislator's wishes.
3. Absoluteness of ownership: Any restriction on the absoluteness is an exception, not the rule, with article 320 making an exception for the law itself.
4. Exclusivity.
5. Perpetuity.

However, this general rule has limitations, as noted in article 321 which states that *"no person can be compelled to give up his property or to permit any other person to make use of it, except for a public purpose, and upon payment of a fair compensation".* Here, the right is spelt out that if there is a public purpose and fair compensation one can be forced to give up his property and allow another person to use said property.

What is Expropriation?

Expropriation results in a forced sale/transfer of immovable property or the use thereof. Keep in mind that we do not only speak of ownership, but of any personal or real right over the property. It is not only ownership which may be lost.

How is an Expropriation different from Normal Sales of Property?

When one wishes to sell a property, they list it with their favoured price and a buyer comes along and the two parties negotiate the conditions of sale, possibly with the assistance of an agent. Expropriation is completely different because the owner would have no intention of selling in the first place but, assuming there is the requisite public purpose, the government forces the owner to comply anyway. In this kind of situation where the owner's hands are tied, the price and conditions are determined by a government-regulated, supposedly 'fair', system of compensation.

Direct Laws Dealing with Expropriation

Vide the following:

- Ordinance VII of 1868,
- Civil Code and also see,
- Chapter 88 (from 1935 onwards),
- See also Chapter 268 – Disposal of Government Land Act,
- Chapter 169 – Commissioner of Land Ordnance,
- Chapter 573 replaces Chapters 88 & 268,
- Chapter 563 replaces Chapter169.

Ordinance VII of 1868

14. *Ownership is the right of enjoying and disposing of things in the most absolute manner, provided no use thereof is made which is prohibited by law.* (N.B. What is now article 320).

15. *No person can be compelled to give up his property or to permit any other person to make use of it, except for a public purpose, and upon payment of a fair compensation.* (N.B. What is now article 321).

Provided that the Court, when it is satisfied that it is not easy for the owner to find a useful and fruitful use of the sum representing the said compensation, may award him an additional sum corresponding to the smaller amount between interests for one year on the said compensation up to a maximum of 5 per cent per annum, and that representing the rent for one year for which the property would have been rented. (N.B. This proviso was not carried into the modern legislation).

16. *When only part of a property is required for public use, the defendant, besides having the right to compensation for that part, also has the right to be indemnified for the depreciation which the remaining part suffers consequent thereto.*

Provided that if consequent to the said expropriation the remaining portion increases in value, in establishing the said indemnity regard shall be had to such incremental value and the if such incremental value exceeds the indemnity, the latter shall not be payable. Nobody can be forced to give up part of a building.

Furthermore, nobody can be forced to give up a portion of another tenement exceeding ¾ of the area of the whole tenement, when the remaining portion measures less than one tumolo and when the owner does not own other adjacent properties.

17. *In no case may the defendant require proof of a public purpose other than the declaration by the Head of State.*

18. *Save as otherwise provided by law, the owner of a thing has the right to recover it from any possessor.*

A possessor who, after being notified of the judicial demand for the recovery of the thing ceases of his own act, to possess such thing, is bound, at his own expense, to regain possession of the

thing for the plaintiff, or, if unable to do so, to make good its value, unless the plaintiff elects to proceed against the actual possessor.

19. *Whosoever has the ownership of the land, has also that of the space above it, and of everything on or over or under the surface; he may make upon his land any construction or plantation, and, under it, any work or excavation, and draw therefrom any products which they may yield, saving, however, the provisions relating to Praedial Easements and any other provision of law in regard to fortifications or other works of defence.*

20. *Any construction, plantation, or work, whether on or over or under the land, shall, unless the contrary is proved, be deemed to have been made by the owner at his own expense, and to belong to him, without prejudice, however, to the rights which third parties may have acquired.*

21. *Every owner may compel his neighbour to fix, at joint expense, by visible and permanent marks, the boundaries of their adjoining tenements.*

22. *Every owner may enclose his tenement, saving any right of easement to which other parties may be entitled.*

23. *Vacant property belongs to the Crown.*

Chapter 88 – Ordinance XL of 1935

Amended in:

- 1936,1937,
- 1945,1946, 1949,
- 1956,
- 1961,1962, 1963,1966, 1969,
- 1971,1974,1975, 1979,
- 1981, 1989, 1990, 1993, 1995,
- 2001, 2002, 2004, 2006, 2009,
- 2011

Contained 36 Articles. Repealed by Act XV11 of 2017 – Chapter 573. Note that after 1981 property prices began to increase exponentially whilst there were many pending expropriation cases. Because the Lands Department could not cope with the old cases whilst the amounts offered by way of compensation were increasing exponentially. The numerous amendments introduced in the noughties were a direct effort to curb property price increases. The changes in Cap. 88 gave rise to a number of Constitutional issues until it was eventually scrapped.

Chapter 573 – Act XV11 of 2017 – Not amended yet

Builds on Chapter 88, taking heed of various judgements by the Constitutional Court and the European Court on Human Rights and Fundamental freedoms. Meant to be a modern, fair, and efficient process. Regulates both pending expropriations and new ones.

But does Chapter 573 achieve its aims or were the pre-1935 Courts less restricted when addressing "public purpose" and "fair Compensation"?

Indirect Methods of Expropriation

Under Chapter 158 - Housing Decontrol Ordinance:

1. Requisition orders
2. Perpetuating leases following temporary emphyteusis (1979 amendments) and recent judgements from Strasbourg
3. Amendments to Chapter 158 – Means testing process. Benchmarks?
4. Changes introduced in June 2021.

Under Chapter 504 - Development Planning Act & E.Prot. Act (Cap 549)

- Regulating what can and cannot be built. Is the right of ownership absolute?
- Scheduled property another restriction on ownership – is public purpose and issue? – cultural and historical aspects. No compensation. Public interest becomes a public burden.

Rent Laws – Chapter 69 and Chapter 116 Rent Restriction Dwelling Housing Ordnance.

Mortmain Law (Ord XXIII of 1822 followed by Chapter 201 in 1967) – deleted in the 1980's.

Constitutional Aspects

Vide the following human rights:

- Right to peaceful enjoyment of possessions under Article 39 of the Constitution and under Article 1 Protocol 1 of the European Convention of Human Rights,
- Right to a fair hearing and to an effective remedy under Article 37 of the Constitution and Article 6 and Article 13 of the European Convention of Human Rights – Chapter 319.

Conclusion

Expropriation law are the exceptions to the absolute right of ownership. When someone possesses something, he has the absolute right to do as he wishes with it without interference, provided it is isn't taken by the State for any of the reasons under law. Expropriation is the forceful taking of property for a public purpose. When one buys property or wants to terminate a lease there is a whole process involved, with the vendor putting the property on the market. In this case, the owner or the possessor has no choice meaning the normal rules of supply and demand don't apply. The law regulates this situation by stopping owners from taking advantage of the fact that the State needs something and increasing the price in return. The law has been systematically changed since 1935 to make it harder and harder to get compensation or to minimise the cost for the government.

Defining *Land*

In the law we will find situations were words have meanings beyond their normal ones.

“Land” includes any building, tree, or anything fixed in the land and any portion of the shore, and any easement in or over land and other rights of user and any right of interference; (Cap. 88, repealed) – real and personal rights.

"Land" includes any property which is immovable either by its nature or by reason of the object to which it refers to it in articles 308, 309, 310 and 311 of the Civil Code and it also includes any land which has been formed following land reclamation and also the sea and the seabed.

Any reference to ‘government land’, or ‘government building’ includes reference to land and building administered by the Government or Government agency; (Cap. 573, in force).
The current definition is similar to the definition of an immovable property. The second part of the definition of “land” was added in the new law. Under the old law the definition was shorter and more basic, being less clear on whether or not it included land administered by the government.

“Agricultural or rural land” does not include the domestic garden of a house or building or any other land within the precincts of a house or building nor a building site nor waste land but includes farmhouses, buildings intended mainly for the keeping of store cattle or domestic animals, and other structures of a kindred nature: (Chapter 88)

Agricultural land is placed at a higher value than normal land because it generates earnings. The old law distinguished between building sites, agricultural land, and wasteland, making it important for the law to define all three.

“Agricultural” or “rural land” means land which is mainly leased or rented for the growing of agricultural crops, flowers, fruit trees or vines and for related agricultural purposes, including the erection of glasshouses, the assembly of cloches or cold frames but does not include grazing grounds. (See definition under Chapter 199). It also includes farmhouses, buildings intended mainly for the keeping of store cattle or other domestic animals, and other structures of a kindred nature. However, these words do not include the domestic garden of a house or building or any other land within the precincts of a house or building nor a building site nor waste land; (Chapter 573).

The new definition is almost of no real value as the law no longer makes these distinctions. Even though this definition was meant to replace the old one, a mistake was made with the addition of the words “mainly leased or rented”, meaning the law only makes reference to agricultural land that has leased or rented, with the word “used” being more appropriate. This is purely academic because in practice the architects will properly evaluate the land’s worth.

Who makes the request and to whom?

The Lands Authority regulates government-owned land making it the first port of call in the expropriation process. it invites the Ministry in need to submit a detailed request. Any government department, public authority, or individual can make a request. What is to be expropriated must have a public purpose and will eventually be made accessible to the public. Any use that falls into public purpose can form the basis for expropriation and the request can be made my any member of the public that would use it. If there is no need to request is typically made, but the Lands Authority will invariably say that it will not expropriate until a request is made, a decision that is purely for budgetary reasons. The Ministry making the request will send the money needed for the compensation along with the expropriation. Even though the law does not specify that a request is needed, the Lands Authority will not act unless it receives a request or has been ordered to do so by the courts.

The Lands Authority

Before Cap. 573 the Lands of Authority was one individual, the Commissioner of Lands. Today we have a Board of Governors consisting of eleven people. There is also a CEO with the Board deciding on policy and the CEO and employees putting into effect the decisions taken by the Board. The Board will ultimately issue a declaration which is the formal commencement of an expropriation.

Lands Authority – Board of Governors – Committee of 11 presided by a chairperson and represents the LA re: matters

- Relating to immovable property,
- Belonging to or possessed or administered by the Government – not necessarily owned by the State. Does this include private property, which is in the Public Domain, e.g., private property in which there is an asphalted road? Vide Pierre Chircop vs Awtorita (Dec in Parte LAB 2/2018 dec 19/2/2020) Abela vs Awtorita (Dec 13/10/21 rik 6/2018) and Angcar vs Lands (rik 3/2019 dec 26/1/22 -sub judice in appeal)),
- Or relating to the administration thereof (KTA vs P Bugeja 97/2014GM – 3rd party property in Bugibba Square, defendant placed tables and chairs on privately owned pavement property, at issue is whether the LA has jurisdiction over this private property).

The Declaration

A formal statement which in the past was issued by the head of State, today signed by the President of the Republic. It is a declaration stating the government wants and needs this land and is taking it.

1858 - 1935: No definitions for a Declaration by Head of State, only reference being that one cannot contest the public purpose – Art 17 of Ord XVII of 1858. The declaration itself was considered an act of State and proof of public purpose *per se.*

1935 – April 2017 - Chapter 88: Declaration by Governor-General. Subsequently when Malta became a Republic in 1973, by means of a Presidential Declaration (Art 3 and 4 of Chapter 88). After the Second World War we saw the introduction of Civil Law concepts in public law for the examination of acts which were considered acts of State. The line between acts of

state and ordinary acts of administration was continuously shifted until article 469A of the COCP was introduced.

April 2017 onwards – Chapter 573: The Lands Authority issues a Declaration signed by the Chairman of the Board of Governors of the Lands Authority (Art 38) – No provision for Substitute.

Publication Requirements

1858 - 1935: A Notice in the Government Gazette but the law made no requirements as to the contents.

1935 – 2009 - Chapter 88: 1. A vague and simple notice in the Government Gazette. With this description alone there is no way of properly identifying which land is being referred to.

E.g.: *Land in Benghajsa limits of Borzebbuġa measuring 225 square canes, bounded on the North by property Alfred Tonna, east by property of Joseph Attard and West by property of Baron Nikolin Trapani Galea*

2. Also published in 2 Local Papers (Maltese and English)
3. Posted on Notice Board at Police Station – later substituted for Local Council
4. Registry of the LAB
5. MAY Served through the Board to persons known to the KTA to have a legal interest in the Land

After 1st December 2009 (XXI of 2009) amending Chapter 88

Notice also fixed on site.
Also published in 2 Local Papers (Maltese and English)
Posted on Notice Board at Police Station – later substituted for Local Council
Registry of the LAB
Served through the Board to persons known to the KTA to have a legal interest in the Land.

April 2017 – (Chapter 573 - Art 39 and 40)
1. Government Gazette.

2. If physically possible, within 14 days,
   (a) Published in 2 Daily or Sunday Papers (Maltese and English).
   (b) Posted on Notice Boards at Police Station and Local Council.

3. Served by a Judicial act to occupants but this is not to be taken as an admission of any legal entitlement of such occupant.

4. Notice also fixed on or near site.

The third and fourth requirements should be done if possible but are not strict requirements and the notice period begins from the day on which the publication is made in the Gazette.

See the case of *Ivory Venue Limited v. Lands Authority* (Application no. 28/21, 17/09/2021).

Publication Contents

April 2017 onwards – Chapter 573 – Art 39

The following contents are required:

1. A statement that the land is being acquired for a Public Purpose,
2. Signed by the Chairman of the Board of Governors of the Lands Authority (strictly the Chairman, with no laws providing for a deputy),
3. The Public Purpose for which the land is being acquired (See the cases of *Randon v. Malta*, and *Trapani Galea Feriol v. Lands Authority* (Application no. 55/20/1SG*),*
4. The amount of compensation,
5. Attach An architect's valuation,
6. Attach a site plan – In Practice a Land Registry Plan is attached.

Declaration Effects

Pre 1935: No direct effect except it being an indication of the commencement of a process. The government could not enter the land before the owner was compensated.

Effect under Chapter 88: This changed in time and is one of the first pro-State changes.

1. Freezes nature of the Property for the purposes of valuation, irrespective of what the land is used for or developed into after the declaration is made,
2. Within 14 Days, The State or a person authorised by the state, can take possession but there were some limitations in respect of dwelling houses to ensure occupants are not rendered homeless. The Government could occupy the land within 14 days.

Amendment by Act XI 2002 July 2002

- Under Art 22 (8):
    - Title to the property passes to the State,
    - Compensation rights become immovable,
- To deposit funds offered in an interest-bearing account within 15 days,
- KTA registers title in the Land Registry even if it is not a Registration Area.

The government has a declaration, can enter within 14 days, and is granted the title immediately. The Lands Authority requires proof of title before the owner can be compensated, which is often complicated. This headache is purely of the owner, as the State would already be enjoying the land's title at this point.

K.I.V.: NO TIME LIMIT TO MOVE TO THE NEXT STAGE

IMPORTANT TO NOTE THE IMPACT OF ACT X1 OF 2002

- That amongst other things it introduced the obligation to state the Compensation being offered and that the declaration is to be accompanied with an architect's valuation and site plan
- That the notice is to be fixed on site
- Contestation of Public Purpose before LAB (not Constitutional) within 21 days from Publication.

- Title passes in favour of the State
- Title in favour of the state is registered in the Land Registry
- Compensation offered is deposited in an interest-bearing account and can be taken on a without prejudice basis

Under Chapter 573 (New Law)

> **52.** (1) *The authority shall deposit in an interest-bearing bank account which will guarantee a minimum of interest per annum as the Minister may by regulation under this sub-article prescribe, a sum equal to the amount of compensation offered in the Declaration drawn up by the chairperson of the Board of Governors of the Lands Authority.*
>
> (2) *If there is no contestation as referred to in article 41, the deposit referred to in sub-article (1) shall be made within a period of fifteen days running from when the time for contesting the Declaration has elapsed. If there is a contestation which is then dismissed, the fifteen-day period starts running from when the decision of the Arbitration Board or the Court of Appeal (Superior Jurisdiction) has become res judicata.*

To deposit the compensation offered in dispute in an interest-bearing account (time limit dependant on whether there has been contestation). Compensation is deemed to be a real right (Art 54). This can be taken by the persons who prove they were the owners on a without prejudice basis. On paper looks good but in practice it's another thing altogether (Art 54) because one has to prove title. It is the depositing of the money in an interest-bearing account that determines the transfer of ownership. The deposit does not need to take place immediately. Unlike in Cap. 88 under the law the deposit can only be done after the time limit for contesting public purpose has elapsed.

Upon making of deposit, title to the property passes to the State

> **53.** *Upon making the deposit as referred to in the previous article, the absolute ownership of the land to which the Declaration refers shall be deemed to be a registration area for the purposes of the Land Registration Act and the absolute ownership thereof shall, by virtue of this Act and without any further assurance or formality, be transferred to and be acquired by the Government free and unencumbered from any charge, hypothec or privilege and the absolute ownership thereof and the authority shall cause such land to be registered in the Public Registry and in the Lands Registry in its name in accordance with the Land Registration Act, provided that this shall be done within a period of three months from when the deposit has been done.*

Assume there is a declaration which is being contested. Within a week the government files the deposit and claims the land, filing a title in the Public Registry. Even if the individual loses the claim the deposit is null and at any point within 10 years the deposit can be contested. If successful, any contracts made with the land by the State are all declared null and must be redone. The government would be ill-advised to deposit funds before the proper time limit has elapsed.

If it does not already have possession, the government can only forcefully take possession 14 working days after lapse of contestation of Public Purpose period or if contested, after decision becomes a res judicata (vide re dwelling house – alternative accommodation) (Art 45).

NATURE and VALUE determined by "as at" the time the Declaration is Published.

Procedure under Cap. 88

Original 4 step procedure:1935-2002:

- Publication of the Declaration,
- Notice to Treat,
- If contested, Lawsuit filed by Commissioner of Lands followed by Public Deed (Contract),
- If not contested, followed by Public Deed.

Notice to Treat:

A Judicial Letter served through the Land Arbitration Board sent to the Owners: So, between the Declaration and the Government Gazette, the KTA (Kummissarju tal-Artijiet) would have to find who are the owners. Could also be sent to uncertain or unknown owners. Containing details of land, Government Gazette and Compensation Offered. If the owner wanted to contest the owner was to send a judicial letter within 21 days. Originally the mere contestation was enough, and one did not have to state one's ideal price. With regard to a lawsuit by KTA there was no time limit for filing. Furthermore, there was no time limit for doing contract except when stated in judgement.

Revised 3 Step Procedure (2002-2017)

I. Publication of Declaration
II. Judicial Intimation to Owners
    a. If accepted – contract done
    b. If not accepted: 20 days for owner to file Lawsuit before LAB

After Act XI of 2002: to state your price

After Act XVI of 2004 – Capping introduced – see: KTA vs Frank Calleja Rik 6/2007 APP dec 6/9/2010. KTA v. Deguara Caruana Gatto (6/9/2010); KTA v. Vica Ltd - 5/12/2014; Neriku Confectionery Ltd v. Dir.Artijiet - 28/3/2014).

Types of Expropriation

Under chapter 88 expropriation existed in five types:

1. **Absolute purchase:** The acquisition of land in full ownership, meaning the government owns the land in the most absolute manner with no restrictions on the sight, including hypothecs, servitudes, and personal rights. The government acquires the land with a completely clean slate. The government is considered to be the owner to the fullest extent.
2. **Possession and use:** This is not the same as the right of use under the Civil Code. The real rights listed in the Civil Code are the right of use, the right of habitation, the right of usufruct, and the right of emphyteusis. To conclude such a right there must be a public deed duly registered. It is not identical to a lease, but like it (see *Giovanna Caruana vs KTA dec 16/12/2015 Rik 5/12FDP*). In its original context the right to possession and use was envisioned as something temporary. This right has given right to abuse, and the government has used possession and use in order to pay less for property, happening as a result of the Second World War. In the following judgements the government changed the nature of the property:
    a. vide Maria Mifsud vs KTA – 52/2005GC, 14/10/2011
    b. vide Maria Xuereb vs Direttur tal-Artijiet – 41/2007RCP, 31/05/2011
    c. vide Igino Trapani Galea Feriol vs KTA – 18/10/13 and 31/10/14
3. **Public tenure:** Very similar to perpetual emphyteusis (a real right where the direct owner received the ground rent and the user pays the ground rent, the emphyteutar has the right to alter the property and the ground rent is a token recognising the emphyteutar's direct ownership). The institute of public tenure is a real right and when it comes to compensation payable it is the 1939 value increased by 40%. This method of case law has been challenged (Vide Melina Micallef vs KTA case 23/11, LAB dec 14/1/2015, Pa (K) JZM: 4/10/2016, Kost : 5/12/2016 & 24/11/2017, Echrt Micallef vs Malta 23264/18 dec 28/10/21). Was possible under Chapter 88 but no longer possible under Chapter 573. Unlike possession and use, it is a transfer of a real right.
4. **Preliminary investigations,**
5. **Sub-soil rights.**

Before 1935, the procedure was quite straightforward: a declaration by the head of state followed by negotiation and a contractual agreement. Should an agreement not be reached the matter was taken to court, which did not have the power to examine whether there was a public purpose, with the declaration being sufficient proof.

The procedure under Chapter 136 (later cap. 88), initial procedure:

1. Declaration, followed by ascertaining of title by KTA,
2. Notice to treat (20 days within which to reply),
3. Reply,
4. Lawsuit filed by KTA (plaintiff was KTA v. the individual),
5. Judgement,
6. Contract.

The procedure under cap. 136, as speed up in 2006:

1. Declaration (followed by title verification by KTA),
2. Judicial intimation (if sent, there were 20 days within which to contest),
3. Lawsuit by owner (the order of the parties is reversed),
4. Judgement,

5. Contract.

Changes under cap. 88:

- Backdrop to Chapter 573 – April 2017
- NEW post April 2017 Declarations
- Cases where Land was occupied but No Declaration
- Cases where there was a Declaration, but the project was not done
- Cases Where there was a Declaration + Notice to treat and not followed up
- Cases where there was a Declaration + Judicial Intimation (uncontested) and not followed up
- Cases where there was a Declaration where price was indicated but not followed up
- New remedies for all of the above cases with the procedure under cap. 573.

Types of expropriation under cap. 573:

- Absolute purchase
- Possession and use
- Public tenure - ELIMINATED
- Preliminary investigations
- Sub-Soil Rights

Meaning the government can either purchase it outright or use it.

New Expropriations - Post April 2017

Lands Authority receives request. The Lands Authority is the central authority for all matters involving expropriation. What does it do?

1. Scrutinises the purpose,
2. Draws up plans (instructing its own technical people),
3. Values the property (from their own architects),
4. Collects the funds (from the person making the request after the plans are approved),
5. Sends to Chairperson of Board of Governors for the signing of the Declaration (attached to the declaration will be the statement for the public purpose and why it is needed, the architect's report, the evaluation, and plans),
6. Publishes Declaration: Govt gazette, local papers, notifies to presumptive owners of known and fixes notice on site (when it comes to publication what defines publication is the publication of the notice in the Government Gazette and the local papers, and a 50-day limit to contest public purpose starts running once publication is complete),
7. Deposits funds in an interest-bearing account (ownership passes when the deposit makes place but vis-à-vis third parties when it is registered),
8. Registers title to property (to be done in the Lands Registry, including the plans and a declaration that the property now belongs to the government).

So, what does the owner do?

> **55.** (1) When an owner feels that the amount of compensation offered to him by means of a Declaration is not appropriate, such person may apply to the Arbitration Board for the

determination of the compensation in accordance with the provisions of this Act.

(2) Such application shall, **on pain of nullity**, state the compensation, that in the opinion of the applicant is due and it shall be served to the authority who shall have twenty days to file a reply.

(3) The application shall be filed **by not later than five years** from when the Declaration by the chairperson of the Board of Governors of the Lands Authority has been published as referred to in article 39(1) and (2), provided that if such an application is not filed, the owner shall only have the right over the deposited sums and the interests mentioned in article 52.

(4) The Arbitration Board shall determine such compensation and shall give all necessary orders and directives in accordance with this Act, **if it is satisfied that the applicant has proved that he has a valid title on that land.**

The Deposit of the Amount Not in Dispute

Under Ordinance VII of 1868: Not provided for
Under Chapter 88 – until 2002: Not Provided for

Act XI of 2002 – Amendment to Art 22
Within 15 days of Declaration - to Deposit of amount not in dispute in an interest-bearing Bank Account. With guarantee of minimum rate of interest as set by the Minister. Sum and interests may be freely withdrawn by ex-owner. Upon proof of entitlement to satisfaction of KTA. Amount paid on a without prejudice Basis.

Chapter 573 - Art 52
Deposit of amount not in dispute within 15 days of expiry of period to contest Public Purpose or, if contested, from *res judicata.* In an interest-bearing Bank Account with guarantee of minimum rate of interest as set by the Minister. Sum and interests may be withdrawn by ex-owner. Filing of Application before LAB (20 days to reply) – no time limit for case to be decided. Proof of entitlement to satisfaction of LAB. Amount paid on a without prejudice Basis. Application make be made independently or during an ongoing lawsuit.

Passing of Title/Ownership

Under Ordinance VII of 1868 and under Chapter 88 - Until 2002: Ownership was transferred by public deed with the owner. This meant that sometimes it took a long time to get there.

Under Chapter 88: Post Act XI of 2002: Art 22:(8)
Upon the Declaration by the President re land acquired on Absolute purchase:

a) The land becomes a Registration Area (Under the Land Registry Act)

b) the absolute ownership thereof shall by virtue of this Ordinance and without any further assurance or formality, be transferred to and be acquired by the competent authority free and unencumbered from any charge, hypothec, or privilege and with all the appurtenances thereof,
c) The competent authority shall cause such land to be registered in the Land Registry in its name in accordance with the Land Registration Act within three months from the issue of the Declaration of the President.

Under Chapter 573:
53. Upon making the deposit as referred to in the previous article, the absolute ownership of the land to which the Declaration refers shall be deemed to be a registration area for the purposes of the Land Registration Act and the absolute ownership thereof shall, by virtue of this Act and without any further assurance or formality, be transferred to and be acquired by the Government free and unencumbered from any charge, hypothec or privilege and the absolute ownership thereof and the authority shall cause such land to be registered in the Public Registry and in the Lands Registry in its name in accordance with the Land Registration Act, provided that this shall be done within a period of three months from when the deposit has been done. Ownership is transferred upon the making of the deposit whereas previously it was upon the declaration of the President.

The question arises whether the government can deposit the money before the completion of the public-purpose process. There is the risk that if the government loses the process all is reversed. If they deposit the funds beforehand the transfer is null.

Pigeonhole Procedures under Chapter 573 to cater for pending issues:

I. Art 63: How to Revoke a Declaration when the land has not been used.
II. Art 64: Declaration but no Notice to treat.
III. Art 65: Declaration + Notice to Treat.
IV. Art 67: Land occupied but NO Declaration.
V. Art 68: Land held on Tile of Public Tenure.
VI. Art 69: Land held on Title of Possession and use.

Cap. 573 was introduced to create a new, modern system to cater for expropriations, as well as catering for the old and uncompleted expropriations. Above are a number of procedures catering for specific situations. When the law was passed it was felt that it was comprehensive but in practice it has been revealed that it is not.

Article 63: Where Land was Subjected to a Declaration but not Acquired

The phrase *"not acquired"* means not used in this context. Under Cap. 88 there was no remedy so the owner would have had to file either a normal case petitioning the court to fix a time limit within which the government makes use of the land or a constitutional remedy to revoke the expropriation. Under article 63(1) of Cap. 573 we now have a remedy which states that *"If land which is subject to a Declaration issued before the entry into force of this Act remains unacquired in terms of one of the manners referred to in this Act and such land has not been*

used for public purposes for a period of more than ten years from the issue of the Declaration, whosoever proves to the satisfaction of the Arbitration Board that he is the owner of the land by valid title may ask for the revocation of the Declaration and for the relinquishment of the land".

This remedy has the following requirements:

1. A Declaration,
2. Issued before April 2017, and
3. REMAINS unacquired in terms of Chapter 573: When referring to Cap. 88 we saw that in 2002 there was a change in the law which provided that a declaration transferred ownership and the government could register the land in the LR in its favour. When the law says the land *"remains unacquired"* it is referring declarations made before 2002. Declarations made after 2002 automatically acquire the land.
4. The land has not been used for a public purpose for more than 10 years from Declaration,
5. Application filed by the owner who must prove a valid title.

All owners must be parties to this case. *Vide* article 495A wherein, likewise, all owners must be parties to the case on either side.

Article 63(2) lays down the procedure for this remedy, stating that *"This action shall be made by means of an application filed in the Registry of the Arbitration Board that shall be addressed against the Lands Authority who shall have the right of reply within twenty days from the day it has been served with the application".* The Lands Authority shall send two architects to survey the sight and will try to trace the Department that made the original request for the expropriation. The Lands Authority will contact the relevant Department to see whether they are still interested in the land or otherwise. If they are, the Board is faced with an old declaration that has not been used and remains unoccupied. If the LAB is not convinced that the intentions are genuine it will not release the land.

With regard to the remedy itself article 63(3) states that *"Together with the requests for revocation of the Declaration and the return of the land, one can make a request so that the Arbitration Board liquidates and orders the authority to pay for material damages and moral damages that have been suffered by the owner for all the years that the land has been kept by the Government without anything being done on it".* There could be a situation where a second declaration is issued. Both in Cap. 88 and 573 there is a section which states that the KAT can issue a second declaration solely to transfer ownership, without changing the price mechanism. *Vide* the case of *Trapani Galea v. Lands Authority* (Rik. 55/2001) in which there was an old declaration and in 2020 the government issued a second declaration and the owners contested public purpose. The phrase *"remains unacquired"* has a new meaning here because the government has not issued a second declaration. Therefore, it could mean that this phrase is not referred to the 2002 benchmark but a situation in which no second declaration is made.

Under article 63 the owner can also receive moral and material damages as well as the request for revocation of declaration for all the years that the land has been kept by the

Government without anything being done on it. With regard to material damages if the government issued the declaration within 14 days, they could enter the property, but they haven't done so. At the same time the owner is unable to sell the property. The owner could send a judicial letter to put the party in bad faith by giving them formal notice. Moral damages, on the other hand, do not need to be proven.

There is a time bar to this remedy under article 63(6) which states that *"Everyone shall forfeit his right of action in accordance with this article if he fails to proceed within thirty years from when the Declaration has been issued, provided that if upon the entry into force of this Act, a period of twenty five years already had elapsed from the date of issue of the Declaration, the action shall be filed by not later than five years from the entry into force of this Act. Such periods are peremptory and cannot be renewed".* Therefore, all declarations made before 1987 are time barred.

With regard to pre-2002 expropriations it would appear that there is no remedy apart from article 64.

Article 64: Declaration Without Notice to Treat

Titled *"Land that is subject to a Declaration without a notice of the agreement",* article 64 states that "(1) *When land is subject to a Declaration which has been issued before the entry into force of this Act and such land is in possession of Government without having issued any notice to treat or without having indicated the compensation offered for its acquisition, anyone who proves to the satisfaction of the Arbitration Board that he is the owner of the land by valid title may demand that the competent authority acquires the land by absolute purchase".* This is a procedure which hypothetically will lead to completion.

Requirements:

1. Land is subject to a DECLARATION (see the definition of "Declaration"),
2. Declaration issued before April 2017 (does not apply to Declarations under the new law),
3. Land in the possession of the Government (This is very wide description. Does it include land "occupied" or "administered" by the Government? The word possessed implies physical occupation of the land).
4. Without a notice to treat (a letter sent through the Land Arbitration Board or the Civil Court to the owner informing him of the expropriation and indicating the price) or without an indication of price offered. (Which Scenario is the law dealing with? Pre-2002 declarations which have not been followed up with a notice to treat or with a notice to treat that does not contain the price and, with regard to post-2002 declarations, those declarations with no notice to treat (all post-2002 notices to treat include the price). Problems with Pigeonhole System: *David Abela vs Lands Authority,* Rik 13/2021 NB 25/5/2022 (S)).
5. By anyone who proves he is the owner of the land (the lawyer for the plaintiff includes a property ownership form and explain the root of title to be given to the Lands Authority for its approval).
6. May demand that the Competent Authority acquires same by Absolute purchase ((Legittimu Kontradittur: *Lapsi Estates Ltd v. Lands Authority et* 14/2019 SG dec 16/4/2021). The defendant in these cases is always the Lands Authority who answers

for all other government departments or authorities. No other persons are considered suited).

Furthermore: "(2) *This action shall be done by means of an application filed before the Registry of the Arbitration Board that shall be addressed against the authority who shall have a right of reply within twenty days from when it has been served with the application".* Therefore, this application is filed before the Lands Arbitration Board and the Lands Authority itself has the right to reply within 20 days.

Moreover, when the case is appointed, if the Board feels that the requirements have been met, the Board shall begin to decide the matter of compensation: "(3) *The compensation that shall be paid for the acquisition of the land shall be the value that the land has within the period of publication of the Declaration as updated during the years in accordance to the index of inflation published in the schedule of the Housing (Decontrol) Ordinance".*

With regard to the value, the nature and price of the land are to be considered as they were at the date of publication of the Declaration, updated according to the cost-of-living index (as found in the Schedule of Cap. 158). Hypothetically, the COLI would make good for the difference in property value between the moment the declaration is published to the moment compensation is paid out. However, in estimating the COLI property is not a large factor, meaning if prices go up steeply the COLI does not go up as steeply as it is usually tied with necessities, something the purchasing of property is not. *Vide* the cases of *Robert Hornyold Strickland vs Lands Authority* (Rik 23/2018 NB dec 23/2/2022) and *Andrew Agius et vs Lands Authority* (Rik 3/2018 APPELL 17/3/2022).

Apart from price, the owner is entitled to material damages[4], moral damages[5], and interest. This section is advantageous because when the price is paid capital gains tax is paid on it, but it is not paid on moral damages, material damages, and interests: "(4) *Apart from the compensation for the acquisition of the land as established in this article, the owner can also make a request to the Arbitration Board to liquidate and order the authority to pay him for material damages and moral damages due to the excessive delay for such acquisition"*. In the pre-2002 pending declarations the nature of the land was the date of the declaration, but the price was the date of the judicial intimation. With regard to moral damages the courts generally look at the value and nature of the property, the amount of time passed, etc.

The time bar for this remedy is 30 years from the declaration or 5 years from the law's publication. This means owners can only get the compensation offered, so 1957 prices updated by the COLI and interest, assuming the prescriptive period has expired. The Metrology Act gives all conversion rates for money, etc. With regard to the question of whether the new law is truly just, the following is a comparison between it and the pre-2017 law:

New Law **Pre 2017**

[4]*Vide Joe Degiorgio vs KTA* App K 102/16 dec 29/1/2021
Andrew Agius vs Direttur Toroq 889/09 APP dec 17/3/2021
See also *Strickland Case* re evidence on Damages
[5]*Vide Camilla Scerri vs LA et LAB* Rik 14/2017SG 16/4/2021

Value Date	Declaration updated by COLI	Nature – DECL. Price - 1/1/2005
Interests	8% from date of Declaration	5% on Average price from date of occupation
Material Damages	yes	No
Moral Damages	Yes	No

Article 65: Declaration + Notice to Treat

Article 65 of the Government Lands Act reads as follows:

> **65.** (1) Whoseover proves that he is an owner by valid title of land in respect of which a Declaration and notice to treat had been issued in terms of the Land Acquisition (Public Purposes) Ordinance, may proceed before the Arbitration Board to receive compensation if the competent authority failed to effect the payment.
>
> (2) This action shall be made by means of an application filed in the Registry of the Arbitration Board that shall be addressed against the Lands Authority who shall have the right of reply within twenty days from the day it has been served with the application.
>
> (3) The authority shall indicate in its reply whether the Government is still interested in the purchase of that land.
>
> (4) If upon the issue of the notice to treat, the owner decided not to contest the price offered in the notice by means of a judicial act, the compensation due by the authority shall be that indicated in the notice to treat, as updated during the years in accordance to the index of inflation published in the schedule of the Housing (Decontrol) Ordinance.
>
> (5) If upon the issue of the notice to treat, the owner chose to refuse the price offered in the notice by means of a judicial act, the compensation due by the authority shall be that established by the Arbitration Board, which compensation shall be calculated in accordance with the value of the land at the time when the Declaration had been issued, as updated during the years in accordance to the index of inflation published in the schedule of the Housing (Decontrol) Ordinance.

> (6) The compensation established by the Arbitration Board shall not be higher than the amount indicated by the owner or lower than the amount indicated in the notice to treat.
>
> (7) Apart from the compensation for the acquisition of the land as established in this article, the owner can also make a request to the Arbitration Board to liquidate and order the authority to pay him for material damages and moral damages due to the excessive delay for such acquisition.
> (8) The peremptory period referred to in article 63(6) for filing such action shall apply mutatis mutandis to the action under this article.

Article 65:

1. Proof of ownership
2. A Declaration
3. Notice to treat – not a judicial intimation (Therefore applies to pre-2002 cases only because in 2002 the procedure was changed)
4. May demand that that he received compensation
5. To file application
6. Is it a statutory requirement to indicate your price? (What do you do? What does Lab do?)
7. LA to reply within 20 days – to declare whether it is still interested in the land
8. If price was not contested, then the amount is the original offer updated according to cost of living index (Under Chapter 88 you got the same with no increase)
9. If Contested: Amount not higher than requested amount and not lower than the offer: meaning that applicant must state his price?
10. Material and moral damages for the excessive delay
11. Time limit: 30 years from declaration or 5 years from Act.

With regard to interests, article 66 states that:

> **66.** (1) In the cases referred to in articles 64 and 65, the owner also has the right to receive interest with the simple rate of eight per cent on the compensation that has been established by the Arbitration Board as updated during the years in accordance to the index of inflation published in the schedule of the Housing (Decontrol) Ordinance and this interest shall start accruing from the date when the Declaration has been published.
>
> (2) If there is a contestation between the owner and the Lands Authority regarding the interest that shall be paid, the owner shall file an application so that the issue would be resolved by the Arbitration Board. This application shall be filed till not later than six months from when the contract of transferring the land

has been paid by the parties or from when the decision of the Board become res judicata.

(3) This application shall be served to the authority who shall have a right to reply within twenty days.

(4) The Arbitration Board shall decide the issue within a peremptory period of not longer than six months from when the application has been served to the authority.

Under Articles 64 and 65:

- Interests at 8%
- On updated price
- From date of Declaration
- If there is contestation:
- Procedure before LAB
- No interests from date of declaration till date of Judgement

Vide *Degiorgio vs KTA* - App 13/11/2018 -8% from date of Judgement.

Under Chapter 88:

- Price : Nature of land : date of declaration
    - Price: date of notice to treat (1/1/2005)
- Interests
    - initially 5% from occupation till date of payment
    - after 2006: 5% on average price from occupation
    - but if 2nd declaration issued. Till then.
- No moral damages
- No material damages

Article 67: Land Occupied Without Declaration

With regard to land occupied with no declaration, we are dealing with scenarios where the government took illegal possession of land. In the past, plaintiffs resorted to article 1077 of the Civil Code, allowing the Court to place a time limit on the government's obligations. Thus, the Court would force the KAT to expropriate the land within a time limit placed on it by the court. Another remedy was to sue for damages for the occupation with basic compensation under the law of tort. There have also been Constitutional cases but none of these remedies proved particularly effective.

Today, a remedy exists under article 67(1) which provides that: *"When land not subject to a Declaration is occupied or administered by a competent authority, anyone who proves to the satisfaction of the Arbitration Board that he is owner of the land by valid title may either request that the land be acquired by absolute purchase by the Lands Authority or else that the land be relinquished free and unencumbered from any occupation".*

For this section to apply:

a) There must be no declaration.
b) Furthermore, the land must be occupied or administered (*vide* the Power of the Lands Authority under Article 7 (2) (c) Chapter 563[6]). When land is occupied, there are physical signs. However, the law goes further to include the administration of land which is problematic because in Cap. 563 the Lands Authority is given express permission to administer land within the public domain.
c) The occupation or administration must be done by a competent authority, not "The Competent Authority". See definition clause which states that the "authority" or "competent authority" means the Lands Authority or any person or any other entity that has been entrusted by contract or by law to administer Government land.
d) A valid title. This evidence is produced before the LAB which decides on whether the applicant has a valid title: In Practice: a) property ownership form b) vetted by the staff of the Lands Authority. Eventually they declare that they are satisfied with title.

Once that evidence is produced what happens next:

I. The Individual would have filed a *rikors* and the Lands Authority have 20 days to reply.
II. In their reply they should state whether they want to acquire the land with absolute purchase or else return the land to the owner.
III. If they want to keep it, they must prove that there still is a Public Purpose.
IV. In practice very often the Lands Authority State that there is a public purpose but that they have not received a request to expropriate the land and that they have no power to do so of their own motion.
V. The Board will appoint architects to report on the use being made and superimpose the land on the photos they take.

Article 67 (5) states that *"Should the Arbitration Board be satisfied that the land is required for public purpose, it shall fix a period of time within which the owner and the authority have to declare the amount of compensation which should be paid for the transfer of the land".* This concludes STAGE 1. A partial Judgement is given, and the case is put off for continuation on part 2: Price (Compensation), Moral Damages and Material Damages. Such compensation did not exist under Cap. 88 and in order to arrive at some kind of solution the law tends to look at what occurred in Constitutional Cases wherein the court would normally establish the rental value of the land and consider said value equivalent to damages. Damages are paid both if the land is expropriated or returned. In this case the law does not require the publication of a declaration with the transfer of ownership taking place as a result of the ownership of the court and ownership itself will pass when the contract is concluded. In practice the Lands Authority routinely issues a declaration concurrently with the court's order.

Vide the case of *Pierre Chircop vs Lands Authority* (DIP 30/9/2020 Rik 2/2018):

[6](*c*) to **administer** in the most ample of manners and make best use of all the land of the Government of Malta and all land that form part of the public domain such as the coastal perimeter, foreshores, harbours, quays, wharfs, pontoons, port beaches, landing places, berthing places, waterways, aqueducts, lakes, natural springs, cliffs, valleys, public squares, streets, alleys, lanes, access routes to other public places including those leading to the coastal perimeter, woods, parks, areas of ecological or environmental importance and sites of cultural, social or historical importance;

> *"Deċide:*
> *Għar-raġunijiet hawn fuq esposti, il-Bord qed jiddeċiedi l-ewwel erba' talbiet tar-rikorrenti billi*
> *a) jiddikjara li r-rikorrenti huwa proprjetarju tal-art indikata bl-ittri B, C, D u E fuq il-pjanta Dok A annessa mar-rikors promotur;*
> *b) jiddikjara li hemm bżonn li din l-art tittieħed għall-interess jew skop pubbliku;*
> *c) jiddikjara li l-art għandha tiġi debitament esproprjata, u dan meħudha b'titolu ta' xiri assolut; u*
> *d) jipprefiġġi terminu ta' xahrejn, liema terminu huwa wieħed perentorju, sabiex il-partijiet jiddikjaraw permezz ta' nota ppreżentata fl-atti ta' din il-kawża, l-ammont ta' kumpens li qed jippretendu li għandu jitħallas għat-trasferiment ta' din l-art".*

Chapter 573: Art 67 – Occupied but no declaration
Stage 2 of the case:

- Is a Declaration Necessary – What are the powers of the LAB?
- price set by Board – vide parameters
- Value date: date of filing of application
- Sets material and moral damages (even if the land is released)
- Costs and interests
- TIME BAR: PEREMPTORY PERIOD OF 5 YEARS FROM APRIL 2017

Vide the case of *Joe Abela v. Lands* (6/2018 SG dec 30/2021) and *Angcar v. Lands* (dec 26/1/2022 3/2019NB *sub judice* in appeal).

Article 68: Land held on title of Public Tenure

Public tenure is close to an emphyteusis in the same way a title of possession is close to a lease. Taking a property by public tenure is perpetual and the compensation offered (known as recognition rent, a nod to the history of emphyteusis wherein a ground rent is deemed more an act of recognition and is not pegged to the property's value) was unalterable. Normally, there is no restriction on the use of the land taken by public tenure.

The following are the qualities of properties taken by public tenure:

- Perpetual in nature
- It refers to the owner's right consequent thereto as "residual ownership".
- The Compensation is unalterable
- The Rent, called recognition rent, is considered to be a real right
- No restriction on use and may demolish and not replace any structure
- May take any benefit from the land including treasure trove.
- Any works which the owner is obliged to carry out on the land are at the change of the competent authority

- title shall subsist even if the property is destroyed.

Whilst the rent for possession of use was the 1939 value of the property (*vide* the Rent Restriction Dwelling Houses Ordinance), with regard to public tenure there was an increase of 20% in acknowledgement of the fact that there was a change in title from a personal right to a real right. The problem that has arisen with Cap. 573 is because in Cap. 88 there was a mechanism for capitalisation wherein under this old law one capitalised at 1.4%. Therefore, we find a rent set at the 1939 value with no mechanism for increase to be capitalised at a miniscule value with no relevance for market values.

Therefore, it is no surprise that challenges to this system began to appear. Until January 1987 it was not possible to challenge the Constitutionality of a law in existence at the time. This changed when the right to individual petition was granted to the Maltese public. In Malta the Constitutionality of a measure being challenged is regulated by Cap. 319, the codification of the ECHR. When Malta signed the treaty and granted the right to individual petition it made no reservations and therefore the Courts in Strasbourg have held that they had the right to go back till January 1967 which was when Malta signed the Convention without the right to individual petition. Maltese Courts will look at what happened in January 1987 onwards whilst the Strasbourg Courts look back till 1967. That said the effect is muted as between 1967 and 1987 property prices were relatively low.

The case of *Melina Micallef v. Kummissarju tal-Artijiet* (Rik 23/11: LAB 14/1/2015) contained the first judgement issued by the Land Arbitration Board wherein the Government capitalised the rent with the multiplier. In the appeal Constitutional remedies were requested, however the LAB does not have the power to order a Constitutional reference because it is not a court. However, because these issues were raised at appeal the Court of Appeal does have the power to order such a reference. In this case the COA held that such a petition for a reference was not frivolous or vexatious and so the reference was moved forward. The Court of Appeal did a multi choice set of questions in its reference with a clear idea of where it wanted to go. Thus, the questions were very specific and pointed in order to map out the defence for the State. The Case was referred to Judge Zammit McKeon who disagreed with what the Court of Appeal was trying to imply and found a way out by declaring a breach. The State appealed to the Constitutional Court which was sat by those same judges who set the three questions who in turn refused a request to recuse themselves. They stated that when the property was taken on public tenure part of the real right was taken and the owner was left with only a residual real right. They dismissed the Constitutional Case and sent the matter back to the Court of Appeal. A petition to the ECtHR was filed and the Court of Appeal judges were requested to wait until the former Court's verdict in which they held that there was a breach of the plaintiff's rights to property and a fair hearing. The appeal was reappointed. The relevance of this case is that it offers a backdrop of what Cap. 573 is trying to address:

- **Price:** Whereas before the rent was capitalised by a multiplier, under Cap. 573 public tenure was scrapped under article 36(4). Existing public tenures were either returned, taken for a period of time not more than ten years, or purchased outright.
- **Consequences:** Article 68 uses the word "held" which is notable because when property was held on public tenure the government would issue a presidential declaration converting the title to one of outright purchase. Up to 2002 for there to

be public tenure it had to be followed up by public deed whereas after just the declaration was enough. If there was a subsequent declaration converting the property to outright purchase this provision does not apply.

- **Time limit:** The government has ten years from when the law came into force to conclude pending public tenure cases. If there is one which still exists after 2017 the title automatically reverts to the owner.
- **If the LA decides to acquire:** The law sends one back to sections 52-55 also used for converting a title from possession and use. What is of note is the value wherein it is emphasised that the value of the land at the market rate at the time when the new declaration has been issued, with no reference to be made to any subsequent improvements. On the other hand, article 64 deals with properties taken by absolute purchase with no notice to treat and no price in the declaration, and states that the price will be the price according to the nature and price range as of date of declaration updated with the Cost-of-Living Index.

With regard to property taken on Public Tenure and later followed by New Declaration Absolute Purchase before April 2017 and are still Pending, *vide* articles 55 and 63-65. With regard to damages, material and moral, we find a situation where a rent was set at 1939 rates increased by 40% with no mechanism for raising it. The LAB has general jurisdiction to award damages, but section 69 does not envisage moral or material damages. Therefore, the only remedy is Constitutional. When dealing with damages under Cap. 573 one must always make reference to the particular sections applicable.

Article 69: Land held on Title of Possession and Use

Both in respect of new expropriations and incomplete old ones. Before what became Cap. 88 title of possession and use was regulated by section 15 of the precursor to the Civil Code, stating that *"No person can be compelled to give up his property or to permit any other person to make use of it,* (che ne faccia uso) *except for a public purpose, and upon payment of a fair compensation".* Even before 1935 the law envisaged the possibility of the State taking over the use of private property without purchasing it outright.

Those sections dealing with lease speak of the enjoyment of property against compensation. Is making use equivalent to a rent? It might be. Article 86 of Ordnance VII of 1868 states that *"Use is the real right of a person of making use of a thing belonging to another* (di servirsi della cosa altrui)*, or of taking the fruits thereof, but only to the extent of his own needs and those of his family".* The right of use of a house is the same as the right of habitation. The right of use of things which are consumed by use is considered as usufruct. If so, would require a Public Deed ad validitatem. The right of possession and use is close but not quite a lease, as it is a personal but not real right with the owner giving up no part of his ownership.

Cap. 88 was a special law and under article 5 thereof the government could acquire land for any public purpose *"for the possession and use thereof for a stated time, or during such time as the exigencies of the public purpose shall require".* The Government would take property on a title of possession and use after the war to save money. Even then, when it came to rent said rent was tied at 1939 prices in the case of existing houses and those that were built afterwards would be paid 3% of the cost of land in addition to 3.25% of the capital outlay to build. In both scenarios, the rent was far less than Market value and no provision for increases

to reflect market changes. There was no mechanism for a revision of the amount paid in rent. Because most of these processionary instances arose between 1942 and 1960, the values were extremely low, giving rise to problems because of the low rent and because the original state of the property often changed. The courts lambasted the amount of rent and stated that if it was clear that the government had no plans of returning the property it should not be taken through a title for possession and use.

In time the system of conversion of title was developed, known as the capitalisation of the rent. When the government wished to take the property in ownership, they would compensate the landowner by capitalising the rent. In this case they multiply the rent by one hundred. Furthermore, there was no time limit during such time as the exigencies of a public purpose. The decision to capitalise the rent was solely within the discretion of the government.

Therefore, leading to Cap, 573 being promulgated we find:

1. Low rent and no mechanism for revision
2. Change of state of the property and cases where P & U was merely raise to save money
3. No time limit
4. Owner did not have a right to request conversion of title
5. Capitalisation rate was based on 1939 values.

Here, the law also creates a new remedy for old cases of possession and use. New cases of possession and use are dealt with in article 36 which states that:

> **36**. (1) *The authority may acquire any land required for any public purpose, either:*
>
> a) *by the absolute purchase thereof; or*
> b) *for the possession and use thereof for not more than ten years.*

With regard to duration, article 39(3) states that *"In the case of acquisition of land for possession and use, the Declaration shall indicate the number of years during which the land shall be kept by the authority, as long as that period of time does not exceed ten years, and it shall specify the whole amount of compensation that the authority is willing to pay as an acquisition rent for all the years that the land is going to be kept".* Note that the rent is period specified with a maximum of ten years and that the rent for the whole period is specified.

With regard to the payee article 39(4) states that *"Acquisition rent shall be payable to the person who is entitled to receive, or is immediately entitled to let and receive, the rental on lease of the land affected or the tutor, curator, administrator, procurator or other representative of the person so entitled".* Not merely the owner but also provides that this is paid to the Usufructuary or administrator as the case may be.

With regard to the valuation of the property, we find a marked improvement on Cap. 88 with article 61(2) stating that *"When the compensation to be established relates to possession and use only, the amount of acquisition rent for the whole period of the time until the land is being*

held shall be established in accordance with the amount which the land if leased in the open market by a willing owner might be expected to realize".

Restitution *in Integrum*
Article 69 (2) which is applicable both for old and new acquisitions and reads as follows:

> **69(2).** *"When land which has been in the possession and use of a competent authority is vacated, the competent authority may remove all buildings, erections, or other improvements erected or made thereon during the period of occupation, making such compensation to the owner of the land for the damage which may have been caused by the erection of such buildings or otherwise, as may be agreed between".*

MAY: therefore, this right is facultative.
Implies that it may build and improve – is this consistent?

Have these issues been addressed re NEW CASES?

1. Low rent and no mechanism for revision,
2. Change of state of the property and cases where P & U was merely to save money,
3. No time limit,
4. Owner did not have a right to request conversion of title,
5. Capitalisation rate was based on 1939 values.

Almost all of the above have been addressed. However, there is no remedy to make good for past lost rents or material and moral damages.

With regard to pre-2017 acquisitions on possession and use which are still pending, article 69(1) states that *"When land has been acquired by a competent authority for use and possession during such time as the exigencies of the public purpose shall require, the owner may, after the lapse of ten years from the date when possession was taken by the competent authority, apply to the Board for an order that the land be purchased or acquired by the authority with absolute purchase in same manner as defined in article 68(3) and (4) or else be vacated within a year from the date of the order".*

If there is any case where an owner is receiving possession rent, he can file an application before the rent application board to either force the government to purchase the property or to return it. In order to do so ten years must have elapsed since the P&U commenced. If the configuration of the state of the property has changed to an unreturnable state, then the state is forced to purchase the property. If the property is not acquired in any way, it must be returned within a year. The acquisition takes place through the publishing of a declaration and in doing so the price will be fixed at the current market value. Elements:

1. Effect– Articles 68 (3)
    i. 68 (3) *"In the case that the land is required for purchase the chairperson of the Board of Governors of the Lands Authority shall issue a*

Declaration in accordance with article 38 and the provisions of articles 52, 53, 54 and 55 shall apply".

a. Obligation to deposit the compensation (Art 52),
b. The effects of the deposit will apply (Art 53),
c. The right to compensation is considered as an immovable right (Art 54),
d. Procedure for collecting the amount not in dispute and contestation of compensation within 5 years (Art 55),
e. Interests at 8% p.a. with effect from date of filing (Art 61 (3)).

2. Valuation –68 (4) The value of the land shall be taken to be the amount which the land if sold by a willing seller might be expected to realize at the time when the Declaration has been issued as provided in sub-article (3):
    a. Provided that in the value, no regard shall be had to any building, erection or other improvement erected or made on the land after the date upon the possession thereof was taken by the competent authority.
    b. THE NEW Declaration determines value both as to the nature as well as to the price.

With regard to material and moral damages *vide* the case of *Melina Micallef v. Malta* (ECtHR, Application no. 23864/18 – 28/1/22) wherein the Court noted that the applicant did not complain of the low amount of rent being paid. The Court hinted that the owner also has a right to complain of a breach to his rights under article 1 protocol 1. Since Cap. 88 restricted the amount of rent payable there was an interference by the State. The ECHR looks out for the plaintiff's victim status, the existence of a loss, the existence of a public purpose, and whether the loss is the result of a law. The fair balance test, also included in article 1 protocol 1, asks whether the compensation offered is fair. In evaluated compensation the courts acknowledge that as a starting point there should be full restitution. However, there are exceptions which have tended to become the rule. The courts seem to have forgotten that owners should have a right to full compensation, saying that because there is a public purpose the owners should carry some of the burden. There is no provision for material and moral damages.

What if there is an old expropriation under title to possession and use and more than 10 years have passed, and the title has not been converted?

There is no time bar – as opposed to claims under Art.:
55 – 5 years from Declaration
63, 64, 65 - 30 years/5 years from the act
67 - 5 years from the Act
68 - 10 years from the Act.

Expropriation of Part of a Property

Under Ordinance VII of 1858, the general rule under article 16 was that *"When only part of a property is required for public use, the defendant, besides having the right to compensation for that part, also has the right to be indemnified for the depreciation which the remaining part suffers consequent thereto.*

"Provided that if consequent to the said expropriation the remaining portion increases in value, in establishing the said indemnity regard shall be had to such incremental value and the if such incremental value exceeds the indemnity, the latter shall not be payable". (Compare this to Article 571 of the Civil Code and the thinking in the *Mangion v. Aquilina* case). This is a similar thinking to the rules of accessions.

In 1868 they also distinguished between buildings and other property and the general rule was that no one can give up part of a property. The homeowner could opt to force the government to expropriate the entire building. Furthermore, nobody can be forced to give up a portion of another tenement exceeding ¾ of the area of the whole tenement, when the remaining portion measures less than one tumolo (1124m2) and when the owner does not own other adjacent properties.

Under article 14 of Cap. 88 there again was a distinction between houses and land. Article 46 of Cap. 573 co-opted this provision which states that *"An owner shall not be required to sell or convey to the authority a part only of any house or other building, if such owner is willing and able to sell and convey the whole thereof".* Under Cap. 88 the Land Authority Board has no jurisdiction unless a Declaration for the rest was issued and was followed up by a Judicial Intimation. See for example what happened in the case: *Frank Calleja v. KTA dec LAB* (24/11/2011, Rik 13/07). Therfore the LAB had no power to act beyond a declaration.

However, under article 58 of Cap. 573 the LAB can order the transfer of property and the revocation of the declaration.

When it came to land there was a difference between building sites and non-building sites. Under article 15 of Cap. 88 and article 47 of Cap. 573:

> **47.** (1) *An owner shall not be required to sell or convey to the authority a portion only of a building site, if the remaining portion measures less than two hundred and twenty square metres, or if, in the opinion of the Arbitration Board, the remaining portion, owing to its conformation and extension, will cease to be adaptable for building purposes under the laws and regulations relating to building.*
>
> (2) *In any such case the authority shall acquire the whole site:*
>
> *Provided that if the owner owns adjacent land, the Arbitration Board may declare that the foregoing provisions of this article do not apply to the land to be acquired.*

Today, in terms with article 47, the LAB, if faced with this situation, has the power to order the transfer even in the absence of a declaration.

With regard to agricultural land article 48 of Cap. 573 and article 16 of Cap. 88 both state that *"An owner shall not be required to transfer a portion only of any land if such portion exceeds three quarters of the area of the whole and the remaining portion measures less than one*

thousand one hundred and twenty-four square metres and that owner does not own any adjacent land". The government must have taken at least ¾ of the area of the whole tenement, whilst the remaining portion measures less than one tumolo (1124m^2), and the owner does not own other adjacent land. In such a scenario this right can be invoked.