CVL 4028
SELECT ISSUES IN THE LAW OF LETTING AND HIRING

The European Law Students' Association

MALTA

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Martina Camilleri (4th Year)

Select Issues in Letting and Hiring

Table of Contents

The syllabus:

- **Private Residential Leases Act**, Chapter 604 of the Laws of Malta (Act XXVIII of 2019)
- **Agricultural Leases Act**, Chapter 199 of the Laws of Malta.
- **Regulation of Urban Property (Regulation Ordinance)**, Chapter 69 of the Laws of Malta.
- Law of Letting and Hiring of Urban Immovable Property pre-1 June 1995.
- Jurisdiction of the Rent Regulation Board.
- **Housing (Decontrol) Ordinance**, Chapter 158 of the Laws of Malta.

Martina Camilleri (4th Year)

Dr Kurt Xerri

Context and Background

We are dealing with the special laws on lease. In previous years, we have dealt with the lease of movables and immovables but now the focus is specifically on urban property and special legislation.

Introduction to the Debates Surrounding the Rental Market

The initial question posed is: *what is so controversial about the regulation of the rental market?*

Certain contracts such as rental contracts and employment contracts are regulated specifically because of the presence of a substantially weaker contracting party.

In rental contracts, some suggest that the lessee is the weaker party in the contract. So, the rationale behind the specific intervention in the rental market is because there is a perception of ***asymmetry*** or ***imbalance***. The reasoning, then, is that if the contract is only regulated along very generic terms, and if these generic terms are superimposed over the imbalance created in the market between the landlord and tenant, then this imbalance will be reproduced legally and might even be consolidated by the law. In other words, the legislator intervenes in order to ***correct*** what, according to him, is perceived as an imbalance.

The debate surrounding the topic of letting and hiring, in particular dealing with private ***residential*** leases, is whether to treat the leased immovable as a home or as a commodity. That is, whether such property should be treated more favourably or less favourably than any other property because it is residential.

The various laws that have been introduced over the years are a reflection of the circumstances at the time. Throughout Maltese history, the State has had to intervene because at times, stronger emphasis needed to be made on the rental market as

concerning a home, whilst in other instances the Government had to emphasis property as an asset.

> *"Indeed, the world is not made up of private owners only, but there are also the interests of the community at large which must be taken into consideration. The existence of rights of individuals and of rights of the community is as natural a fact as the existence of society itself which gives rise to them. The regulation of the rights of the individuals between themselves is not an arbitrary imposition on the part of the law and, therefore, the limitations which are imposed on ownership are not repugnant to its nature."* – Victor Caruana Galizia.

One other underlying theme when studying the regulation of the rental market is that if our Civil Code, having been inspired by very liberal principles, relies so much on the right to property and the freedom of contract and if mainstream ideology relies on private property being the main instrument through which the market operates, how can state intervention be justified in the market?

According to this quote, special laws on the rental market are not repugnant to the values contained in the Civil Code because we are trying to regulate society as a whole.

> *" ... there is no clear-cut relationship between the degree of regulation and the size of the sector. Most importantly, while regulation is frequently cited as the key factor discouraging investment in the PRS (and is therefore blamed for the sector's small size in many countries), it appears that countries with low levels of regulation also tend to have smaller private rented sectors. Large private rented sectors can be found in countries such as Switzerland, France and Germany, which are relatively strongly regulated."* – University of Cambridge, The Private Rented Sector in the New Century – A Comparative Approach, 2012 p. 38.

In Malta, the norm is light regulation. In fact, when tested against the other 26 EU MS, Malta is considered to be one of the land-lord friendly jurisdictions when it comes to contemporary rentals. However, when comparing current regulation with the pre-1995 regulation, one will see the law leaning in favour of the tenant/lessee.

Definition of contract of letting and hiring of things

Article 1526(1)

1526. (1) The letting of things is a contract whereby one of the contracting parties binds himself to grant to the other ***the enjoyment of a thing*** *for* ***a specified time*** *and for* ***a specified rent*** *which the latter binds himself to pay to the former.*

When governments have intervened in the past, they usually regulate, *inter alia*, the 'for a specified ***time'*** or 'for a specified ***rent'*** elements; these elements are indispensable.

The minimum rental duration for a primary residential property is one year. Most 2020 laws do not regulate the rents *per se* but the rent increases in terms of the lease agreement.

With respect to pre-1995 rentals, the Government had to raise the rent but capped it at a certain limit, being 2%. So, it is very important when looking at the respective laws to keep in mind the framework trying to be imposed by the legislator.

Another area where special laws might diverge when it comes to the special laws of lease is the ***dissolution of the lease***. According to the Civil Code, the dissolution happens automatically upon the happening of a resolutive condition or on the ground of non-performance.

Contract ceases on expiration of term

1566. Without prejudice to the provisions of articles 1531A to 1531M, a contract of letting and hiring ceases ipso jure on the expiration of the term expressly agreed upon, and it shall not be necessary for either of the contracting parties to give notice to the other:

Provided that private residential leases under the Private Residential Leases Act, shall be regulated in accordance with the said Act.

Cessation of lease upon happening of resolutive condition

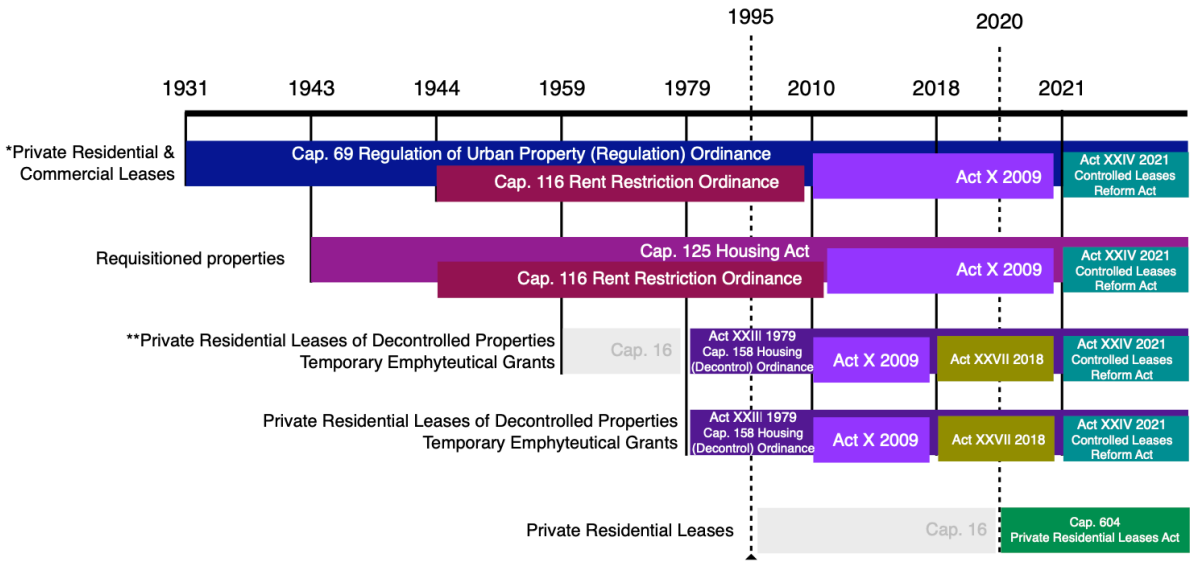
1569. (1) A contract of letting and hiring shall also be dissolved ipso jure upon the ***fulfilment of a condition*** *under which the dissolution of the contract was expressly covenanted, saving any action for damages which may be competent to the covenantee according to law.*

> <u>or on ground of non-performance</u>
> *1570. A contract of letting and hiring may also be dissolved, even in the absence of a resolutive condition, where either of the parties* ***fails to perform his obligation****;*

This is still true for post-2020 private residential leases, but not for pre-1995 leases such that the causes of dissolution are different since the government tried to intervene to make it more difficult for landlords to evict tenants.

So, whereas nowadays a landlord may evict simply because the contract expired or for any ground stipulated in the contract, with respect to pre-1995 leases, the grounds for dissolution are set by the law. A landlord can only oppose the renewal of a pre-1995 lease if he manages to prove a ground foreseen by the law.

History of Modern Rent Control Legislation in Malta: Entire Private Rented Sector



Since <u>1931</u>, things have changed a number of times, rendering the Maltese history on lease a difficult one. And one curious element about Maltese rent laws is that when the government decided to intervene at any specific point in time, it did nothing to change the situation with respect to the period which preceded its intervention. In fact, until roughly 2010, we had a situation where leases entered into in 1931 were regulated by the exact same conditions as at 1931.

When reading on Maltese rent laws, the defining moment is 1995 because in that year, the market was finally liberalised. However, this was done by setting a cut-off date which meant that pre-1995 leases continued to be regulated by pre-1995 laws. So, the market was liberalised from 1995 onwards but nothing was done with respect to leases entered into pre-1995.

Regarding pre-1995 leases, the government finally did something in 2009 with the introduction of Act X of 2009. This came as a reaction to backlash coming from the ECHR with respect to pre-1995 leases which had remained controlled by the respective laws enforced at the time of their commencement, or at any point during the course of that particular lease. The pre-1995 market was reformed but of course, in the meantime any leases entered into after 1995 were not affected by the special laws.

Registration of decontrolled dwelling-houses (Cap. 158)

3. Subject to the provisions of article 6, the Land Valuation Officer, on the application of an owner made in such manner as may be prescribed, shall register as a decontrolled dwelling-house any dwelling-house which -

(a) is not completed or ready for use as a dwelling-house on the appointed day; or

(b) although completed or ready for use as a dwelling-house on the appointed day, has not been occupied as a dwelling-house on or before that day; or

(c) is completed or ready for use after the appointed day by the making of the structural alterations converting one or more dwelling-houses into a larger number of dwelling-houses; or

(d) was on the first day of March, 1959, occupied by an owner as his ordinary residence and has continued to be so occupied up to and including the appointed day …

**Certain contractual stipulations deemed to be lettings (Cap. 69)*

44.(1) For the purposes of this Ordinance the term "letting" shall be deemed to include -
(a) any emphyteutical grant for a period not exceeding sixteen years …

At the time, the question was: was Act X of 2009 effective in restoring justice between the parties? Both local courts as well as European courts deemed this Act to be manifestly insufficient. This is why government had to react again.

In fact, it is argued that the rent cases that came before the Constitutional Court constitute one of the darkest chapters in the history of Maltese Constitutional law because of the heavy criticism that the Maltese Constitutional Court has received from the EcrtHR. The level of anger experienced by landlords whose properties were controlled was particularly high because of this intransigence by both the Maltese parliament and the Maltese Constitutional Court to give effect to what the EcrtHR wanted.

What happened was that in 2018 a number of households were facing the threat of eviction because there would be a constitutional case filed by the landlord, by that time, the Maltese Constitutional Court would state that there is a violation and the remedy granted to the landlord would be the declaration by the Court that the particular articles in the law regulating the situation between the landlord and the tenant would not apply.

The Constitutional Court would not order eviction, nor would it raise the rent which would be found contrary to the landlord's right to property as protected under Article 1/1, hence why it was so severely criticised by the ECHR. The Constitutional Court would instead declare that article of the law invalid and if the landlord were to subsequently challenge the tenant before the RRB, the tenant would have no defence and would be found to be occupying the property without title. This meant that the landlord would eventually manage to obtain eviction.

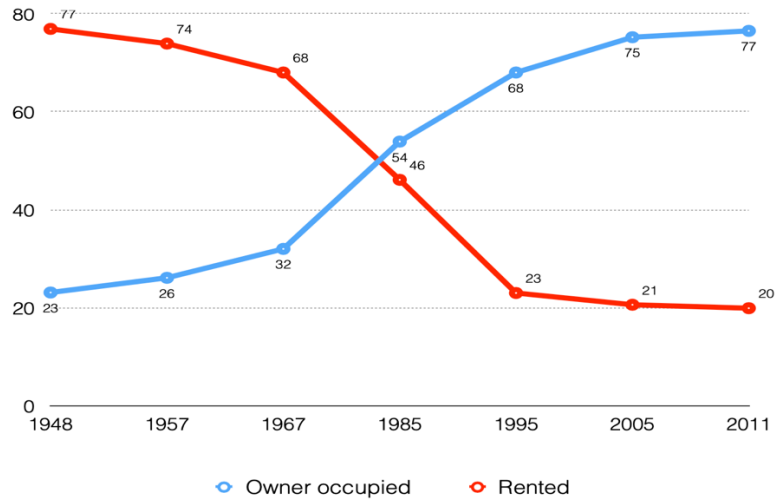
As a result, in 2018 the government, under the pressure of the ECHR yet again, introduced an amendment. At the time, a situation materialised whereby you had multiple households who were suddenly facing eviction meaning that government had to intervene. It did so first through Act XXVII of 2018, introducing principles such as the maximum rent of 2% of the freehold value of the controlled property. For example, if the property was valued at €200,000, the landlord could claim up to 2% of the freehold value per year, meaning €4000 in rent annually.

Whilst some landlords were happy with this change, others were less convinced. At the moment, we are expecting a pronunciation by either the ECHR or the Council of Ministers of the Council of Minister stating whether Malta is now in line with human rights standards or not.

In 2021, through the Controlled Leases Reform Act, an amendment which corresponded very closely to Act XXVII of 2018 was introduced with respect to all controlled leases including those controlled under Chapter 69 as well requisition dwellings.

A requisitioned property is an *ad hoc* legal situation in which the government would have taken possession of the property through a requisition order and would have used it to house tenants in need of social accommodation. In that case, there is no direct relationship between the landlord and the tenant but between the landlord and the State and the State and the tenant. It is a *sui generis* relationship, and not so much a contract of lease.

The Maltese PRS: A sector in constant decline



Something to keep in mind when dealing with the rental market is that a law must always be interpreted within its context. So, even though by 2010 pre-1995 leases had become in breach of the landlord's rights, in order to fully judge this law, one has to go back to the time when it was enacted in order to appreciate the social and economic circumstances under which the law was introduced.

Indeed, in the immediate post-Independence years, the majority of the Maltese population was prevalently made up of tenants. And this is precisely the largest part of the population which pre-1995 leases are currently regulated. So, a lot of these pre-1995 leases arose from a time when people would lease properties because

ownership was not so accessible. In fact, when the government intervened, it adopted an extremely soft approach because the people at risk of losing their households were elderly people.

Timeline

The first modern rent controls came into force in 1925. At the time, there existed a shortage of supply and landlords were charging excessive rents.

Post-war, you had the imposition of a rent freeze on top of the laws that already applied. These were very pragmatic decisions imposed by the necessity of the time. However, when you have rigorous and inflexible rent controls, the result is inevitably that the market closes, that is, landlords are completely disincentivised from offering their properties for rent.

In 1959, under British rule, the British decided to liberalise the market, but not entirely – they liberalised the market only with respect to leases entered into after 1959. When you have a completely unregulated market, over some time, you get a situation where the renting households start facing a certain housing precariousness.

Leases controlled before the war (before 1959) kept being controlled regularly, such that it was only post 1959 leases that were liberalised.

In 1979, the Housing (Decontrol) Ordinance, Chapter 158 of the Laws of Malta, reintroduced a rent control mechanism in order to control specifically those leases that had been liberalised in 1959. So, in 1979, you had a situation where once again every private residential lease was regulated.

That law also had its own purpose but, in the meantime, the island of Malta kept on developing. By 1995, we had a situation where this sector was effectively paralysed since no landlord in his right mind would rent out a property, especially to a Maltese citizen, since the property would be controlled under the strong conditions under Chapter 69 and Chapter 158. At the time, he consequence of renting was that you would give away your property and never get it back. So, the market was paralysed completely since there was no supply of rentals here in Malta.

In 1995, the Government liberalised the sector from 1995 onwards. So, any lease entered into post-1995 is in no way affected by pre-1995 statutes, primarily, Chapter 69 and Chapter 158.

In 2006, you had the ***Fleri Soler and Camilleri v. Malta*** judgement, along with ***Ghigo v. Malta*** and ***Edwards v. Malta*** were, for the first time, the EcrtHR said that with respect to pre-1995 rentals, Malta had a problem since the law was only allowing landlords minimal profits. Moreover, it criticised that most of the social and financial costs of supplying housing accommodation was being shifted onto private landlords.

Was the rent control in itself a problem? No – it was the rigorousness of the rent control that was the problem since it was shifting onto a private individual a responsibility which was fundamentally that of the State.

In 2009, we had another important judgement of ***Amato Gauci v. Malta*** which found that the applicant had been subjected to a forced landlord-tenant relationship for an indefinite period of time. Once again, it was being criticised that the control was indefinite and there was also uncertainty as to the date on which the landlord would recover the property.

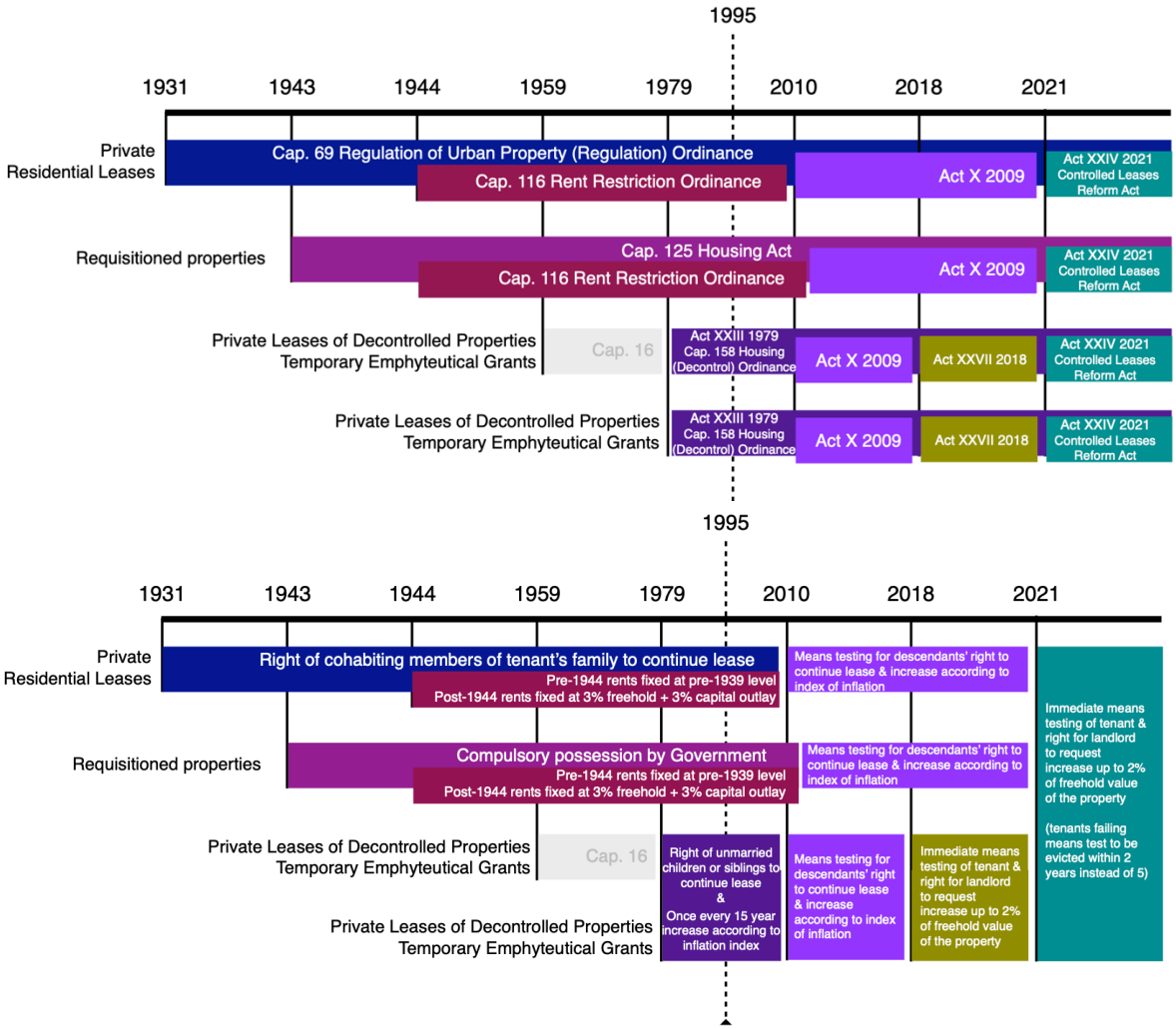
A reform was introduced in 2010. In 2010, the minimum rent was set at €185/year and although the government introduced a means test, it would be conducted not on the sitting tenant immediately but on any tenants expecting to continue the lease after their (most of the time) parents passed away.

In the meantime, there was the economic boom post 2016 with the influx of foreigners which resulted in inflation in rents. More pressure was therefore placed on the State to act with respect to pre-1995 rents. So, in the meantime you had Maltese courts and the EcrtHR criticising what Malta was doing by that time until finally in 2018 and 2021, the State was made to introduce a real, effective reform where now the landlord's rent is somehow equivalent or compares well with free market rental values.

In 2020, as a result of the new liberalised rental market that was growing and expanding, government also had to intervene with respect to post-2020 leases because you now had liberalised leases which however were causing an imbalance with this sudden influx of foreigners and the supply catching up slowly, in favour of landlords. The tenant was in a situation of a take it or leave it and therefore, the State

needed to intervene precisely to address certain situations. The 2020 intervention by government was as minimal as possible.

History of modern rent control legislation in Malta: Pre-1995 (Residential) Rent Controls



The history of Maltese rental laws is comprised of one extreme to the other, fluctuating between complete liberalisation and complete control.

What made pre-1995 laws particularly strict?

1) First of all, especially with respect to requisitioned properties and Chapter 69, you had rents which were fixed – there was no flexible mechanism reflecting the growth of the market or inflation in either the rental or property market.

2) The right of cohabiting members to continue the lease.

So, not only did the landlord have lifelong protection, but the lease could be continued following the tenants passing by any co-habiting members of his/her family who would in turn also have life-long protection. This is why the courts would refer to these leases as having an indefinite duration.

With respect to Chapter 158, you had once again the right of unmarried children to continue the lease and the only increase allowed would be once every 15 years according to the inflation index. This sounds like a valid compromise, but the problem is that when you are starting from a low base, no matter the % you apply to increase the amount, this will hardly have any effect on the rent.

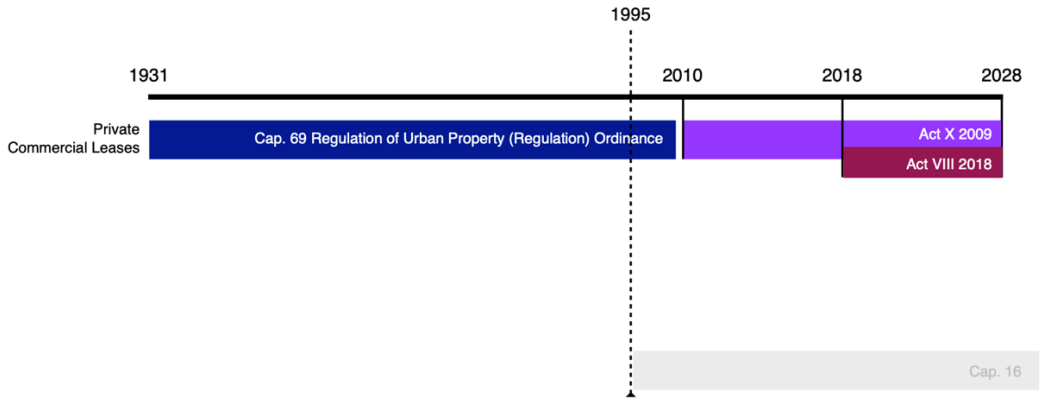
Fast forward to 2018 and 2021, the government tried to solve the pre-1995 question by first subjecting pre-1995 tenants immediately to a means test in order to ensure a process through which more affluent tenants would abandon their properties because as directed by the EcrtHR, if the State was going to intervene, it needed to intervene specifically for those cases who were deserving, and it raised the rent to a maximum of 2% of the value of the property.

The above table is showing the conditions to which leases entered into at various points in time were regulated. You can see how the problems are in the blue and purple rows because the conditions are very strict. With respect to those leases, the government said if you are a pre-1995 renting household, the first right I am going to introduce in favour of the landlord is to subject you to a means test because ***not all tenants were deserving of protection***. You had cases, and arguably we still do, where the tenant was even better off than the landlord.

The other compromise found was that for those who were allowed to stay, i.e., those found to be within the means test, they would be allowed to remain in the property but at a rent which is of a maximum of 2% of the value of the property.

In 2021, some amendments were made to Chapter 158 (the long green bar). In reality, the law which came in 2021 also made some amendments to the law which had been introduced in 2018.

History of Modern Rent Control Legislation in Malta: Pre-1995 (Commercial) Rent Controls



Private Residential Leases Act, Chapter 604 of the Laws of Malta

The Private Residential Leases Act was enacted in late 2019 and started regulating properties which would be leased out from the 1 January 2020 onwards. It is stated at the outset that this has ***nothing to do with pre-1995 rentals*** – the specific time in which it came into force was 2020 and it applies to leases entered into post-2020.

Context of the Law

When it comes to the regulation of the rental market, this is a practical matter of regulating the context at a given point in time rather than being guided by philosophy or some ideology.

What led to the enactment of the Private Residential Leases Act?

At the time the law was enacted, we had a situation where Malta was being challenged by an unprecedented influx of foreign workers on the island. The increase in foreign workers leading to our growth of GDP was resulting in an increased demand for property, be it sale or rent, which meant that property prices went up and as a result, so did the construction industry which was characterised by the boom which came post 2015.

Before 2015, we had a situation where no one was interested in renting property in Malta since buying was affordable. But then post 2015, because of the foreigners who had a preference for renting, a rental market was created in a very short span of time. All of a sudden, rents started going up and anyone in possession of a vacant property was incentivised to rent it out.

What was also changing on the island was that before, tenants were mostly households who couldn't afford ownership. But with the changes in population post 2015 we had individuals who were employed and being renumerated quite well opting for renting. So, all of a sudden, we were no longer considering the typical

profile of the tenant being the one dependant on government benefits but a new profile of tenant who was earning good money.

Another aspect was that the increase in property prices was also increasing the threshold for home ownership. In turn, this impacted the demand for rentals – because property was becoming so expensive, even locals were looking into renting, increasing overall the demand for the rental market. Moreover, tourists stopped booking hotels and started opting for Airbnb's and so on.

As you can imagine, whilst the rental supply was shrinking, the demand was growing, and this is when the rental market really became a problem.

Why were the problems that started emerging in the Maltese Private Rented Sector?

In his study titled, "A Quantitative and Qualitative Assessment of Housing Satisfaction for Migrant Workers in Private Rental Accommodation in Malta", B.Micallef points out:

> *".. housing satisfaction plays an important role in influencing migration plans for migrant workers.*
>
> *In most instances, respondents argued that the excessively high rents were not justified given the low-quality of rental property, with the most frequent complaints referring to inadequate heating and cooling systems, including the lack of air condition units, humidity and moulds, poor insulation and low-quality furniture.*
>
> *.. while 58% claimed to pay overpriced rents.*
>
> *The most common complaints refer to the lack of professionalism, problems in getting the deposits back after the termination of the contract, delays in providing critical maintenance, the under-declaration of rental income and the refusal to register the utility bills correctly, which in turn lead to higher utility bills for tenants.*

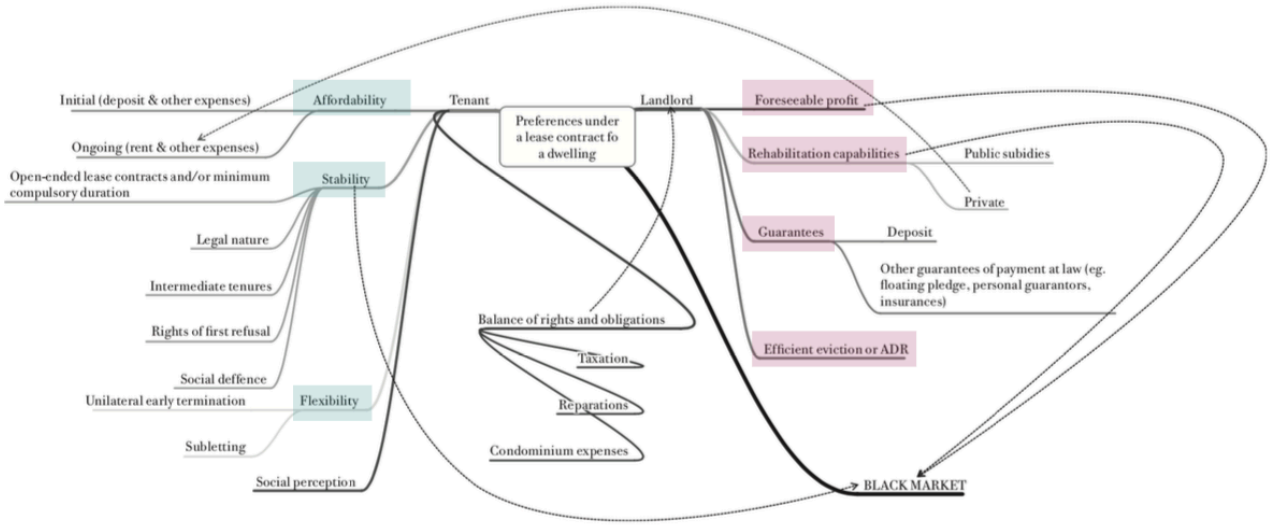
> *The discourse in some cases shed light on the helplessness that migrants experienced when dealing with inappropriate and abusive behaviour by their landlords and the lack of options that they faced in settling disputes."*

One can see that there was a problem of the low quality of the rental property and several tenants also claimed to be paying overpriced rents. More importantly, there was lack of professionalism, problems in getting back deposits, under declaration of rental income and the refusal to register the utility bills correctly. The biggest problem of all, however, was the lack of remedies or laws addressing these problems.

What are the most important considerations for landlords and tenants?

The problem in 2018 was that whilst it was undisputed that regulation was needed, the question was how to regulate. The government's previous experience in controlling the rental market was not exactly stellar with all the EcrtHR cases condemning the way in which the Maltese State was regulating the rental market with respect to pre-1995 leases.

When regulating a rental market, what aspects do we need to keep in mind in order to make sure that we are regulating it in a balanced way? That is, not favouring either party too much?



For the tenant, what is particularly important is that the rental market is affordable, stable, and if possible, also flexible because one advantage renting has over owning

is that one may leave much more easily than when one owns (in ownership, the owner is fixed in one place).

For the landlord, the most important element is profit – it is the main reason why a private person would want to put his property on the rental market. Secondly, the landlord is concerned about keeping his property in a good state of repair. In fact, one of the problems in pre-1995 rentals was that as a result of the indefinite duration of the controls, at times, properties suffered significant damages.

Also, guarantees is an important aspect for landlords because entering into contracts with people whom you do not know is one of the greater risks presented in the rental market. So, the landlord must be able to request adequate guarantees.

Also, it is important that there is an efficient eviction or alternative dispute resolution because if the tenant is in default, the landlord would need to vacate the property as soon as possible in order to rent it to someone else who would continue paying the rent.

Chapter 604 – what problems is this law trying to solve and which are those which it ignored?

What are the main practical problems generally encountered in the rental market?

Landlords	*Tenants*
Not aware of 5 mandatary criteria, determining validity of lease.	High rents.
Delays in eviction – eviction would not be ordered on first hearing in case of pending arrears.	Short rental period.
Eviction of tenant without due judicial process.	Not being informed in due time about renewal/termination.
	Overpaying water and electricity.
	Deposit unjustly withheld.

What are the realities did Chapter 604 not regulate?

From the perspective of tenant, it did not attempt to contain rents in any way. It contains no regulation of initial rents whatsoever. Also, it does not regulate an eviction without due judicial process (going to court). Can we have an eviction which doesn't involve going to court? This is not only illegal, but it is also something which is not in line with international practices.

What does Chapter 604 regulate?

With respect to the lessor:

1) Registration

First of all, Chapter 604 introduced a system of registration which is now making landlords aware of ***the mandatory criteria which determine the validity of a lease***. Pre-2020 the problem was that the law specified the 5 mandatory criteria for a rental agreement to be valid but neither landlords nor tenants were aware of what the law stated. As a result, they would enter imperfect agreements which were therefore null at law and when either party breached the contract and would go to the RRB and present their contract, the first issue which would come up was whether the contract was valid or not. There would be a rental agreement, but this was usually not in accordance with the law.

2) Delays in Eviction

Secondly, it tried to deal with the reality of delays in eviction. There are two claims a landlord can make in the case of a defaulting tenant – (1) eviction and (2) payment of any outstanding arrears.

Pre-2020, the situation was that in order to make both claims, the landlord couldn't avail himself of the possibility in the law of evicting the tenant without proceeding to trial (to summary proceedings). Because in order to do that, s/he had to relinquish the claim of outstanding arrears.

So, an amendment was introduced along with Chapter 604 which now enables the landlord to demand both at once. Now the Court is able to first decide on the eviction and have the tenant evicted without proceeding to trial, therefore, through a summary procedure, and then proceed to trial but only to determine the outstanding dues owed by tenant.

This is how the law tried to make eviction procedures even quicker than they were before.

With respect to the lessee:

3) Short rental periods

First of all, the short rental periods. Chapter 604 introduced a minimum duration for rental contracts. In this way, it tried to resolve the problem of not being informed in due time about the renewal or termination. At the time, you had situations of tenants being informed last minute that the contract would not be renewed and then it would be terminated.

4) Water & Electricity

Chapter 604 also addressed the situation pre-2020 of having tenants overpaying water and electricity bills.

5) Withholding of deposit

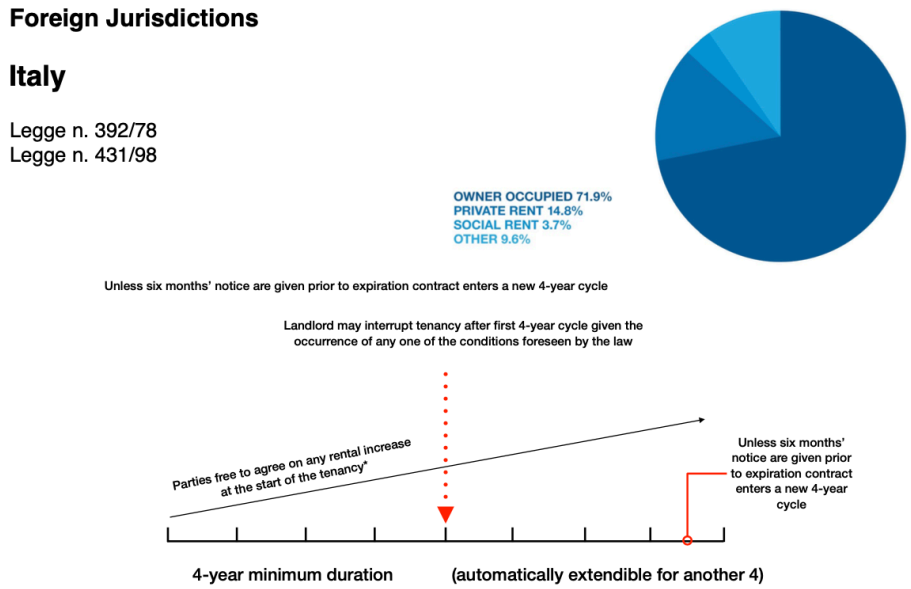
Chapter 604 also offers a new mechanism through which any disputes on the landlords right to withhold the deposit or not could be decided.

Can the Rental Market be Regulated?

In line with the judgements of the EcrtHR, it is not the regulation of the rental market that is contrary to human rights standards but regulating it in such a way that practically allows the landlord minimal profits. So, the rental market can be regulated as long as this is done in a way which observes the need for a balance between both parties.

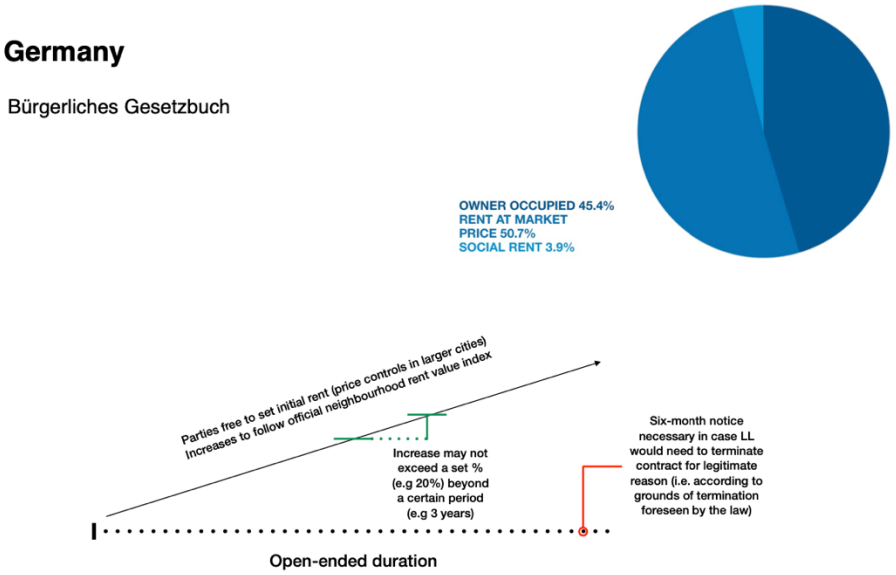
Examples in foreign jurisdictions:

Italy



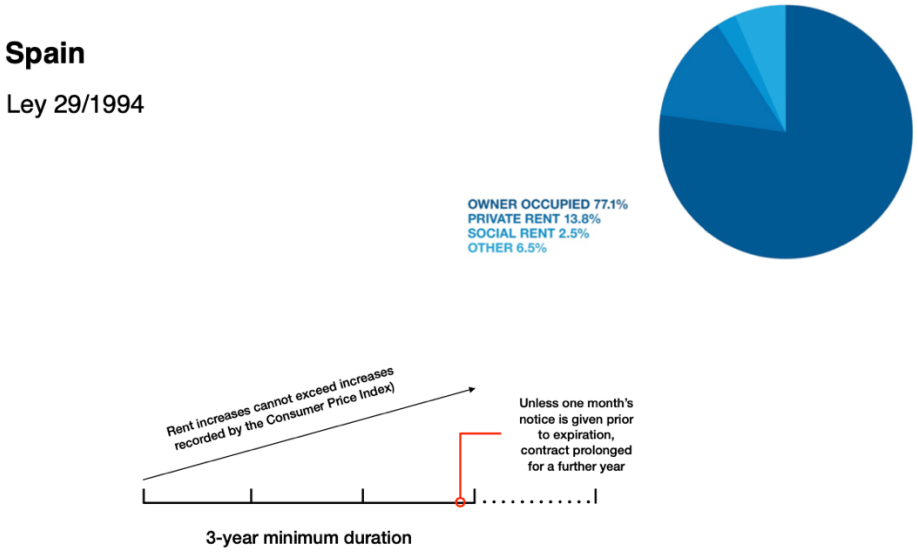
In Italy, for example, there is a 4-year minimum duration automatically extended for another 4 years.

Germany



In Germany, they are open-ended, subject however to strong guarantees in favour of the landlord to claim the property back and to a periodic increase in rent which the landlord can request in line with the average in that neighbourhood.

Spain



Other countries such as Spain impose a 3-year minimum duration.

The reason behind minimum durations imposed in rental agreements is to promote the stability of the tenant. It is for the tenant to have a guaranteed period of stability every time s/he enters a rental contract.

In order to understand Chapter 604, another consideration when regulating the rental market is that the property is the landlord's property, but it is also the tenant's home. So, the law is taking account of this ***dual relationship***.

Is there a right to housing in Malta?

Malta has endorsed the right to housing under two international instruments:

1) The International Covenant on Economic, Social and Cultural Rights, and
2) The European Social Charter (Revised). It has signed and ratified a right to housing.

However, this right cannot be invoked before the Courts because Malta neither transposed it into domestic legislation nor did it sign the optional protocols related

to these international instruments. But in principle, the idea that the tenant has housing rights comes from the principles which emanate from these provisions even though expressly there is no right to housing in Malta that can be invoked before the courts.

Article 11 of the ICESCR states:

> 11. *The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right.*

Article 16 of the ESC states:

> 16. *With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.*

Regulation of Contracts

The question posed is: if we speak about freedom of contracts, how can the government come in and control a contract? Rental agreements are considered to be contracts affected by very important ***economic*** and ***societal factors***. In fact, law comes in to fix the imbalance and asymmetry that is sometimes created between landlords and tenants.

J. Smits stated:

> *"it is beyond doubt that most contracts relevant to the average person are heavily regulated by public authorities…despite the presumption that everyone is free to conclude the contract as he or she wants, reality is different. Economic and societal factors can have a grave impact on the freedom to choose…*

> *Good examples are employment contracts and residential leases. Both contracts are characterised by the strong bargaining position of employer and landlord - in particular in times of shortage of labour and housing - and most jurisdictions therefore lay down detailed rules aiming to protect the employee (on dismissal, sick leave, safety at the workplace etc.) and the tenant (on access to the property, notice, maintenance, etc.).*"

Very importantly, this also constitutes a limitation to the notion of ***pacta sunt servanda/autonomia della volontà*** because the freedom of contract refers not only to the freedom to enter into a contract or not but also the freedom to negotiate the contents of the contract.

If the market is such that if you say refuse a contract the landlord will quickly find another tenant and impose his conditions, you have a situation where the tenant has quite some restrictions as to the negotiation of certain clauses. This is the way in which certain clauses find themselves in certain contracts – because of the power one party to the contract can have in comparison to the other.

In this respect, **J. Bell** stated:

> "*Parties to contracts are not always equal…other party to contract has no more than a choice whether to take it on the other's terms or leave it [leave it means homelessness] So freedom for one party to set the conditions, freedom for the other to take it or leave it (same principles as consumer law).*"

Also, **J. Carbonnier**:

> "*In the formation of the contract, the individual has a dual freedom: to contract or not to contract (this is the basic option), but also and above all to determine at his discretion the content of the contract. It is this last freedom that we properly call contractual freedom…Public order is the limit of contractual freedom.*"

On **pre-formulated standard agreements, J. Carbonnier** stated:

> "*Acknowledgement of a weaker party, need for legislative action to redress balance. [Stronger parties] draw up unilateral clauses, in advance through*

thoroughly studied formulas…the theory of standard contracts tends to be obsessed with the theory of unfair terms."

The Main Aspects of The Private Residential Leases Act, Chapter 604 of the Laws of Malta

Scope of Application

The Private Residential Leases Act has to be critically assessed. First of all, what is Chapter 604 trying to regulate? Below are the models of the Private Residential Leases Act:

What is for certain is that the Chapter 604 is not regulating tourists lets. What it is regulating is the letting of shared residential space – i.e., room rentals or, in some cases, the renting of parts of a property – short lets, and long lets.

Article 2 provides a number of definitions:

<u>Shared residential space:</u>

> *"letting of shared residential space" means the letting of any separate space in an apartment or building, with shared amenities, such as kitchen and bathroom facilities;*

Long private residential lease:

"long private residential lease" means any lease, negotiated for a primary residential purpose in accordance with article 8 and ***which is not a short private residential lease;***

Short private residential lease:

"short private residential lease" means any lease, negotiated for a duration of ***six (6) months****, which is meant to satisfy the need of the following categories of lessees:*

(a) ***non-resident workers*** *who are employed either for a period less than six (6) months or only to complete a specific task within a maximum period of six (6) months;*

(b) ***non-resident students*** *who are enrolled in courses for less than six (6) months;*

(c) ***residents*** *who need to rent an alternative primary residence for a period of less than six (6) months;*

(d) ***non-residents*** *who need to rent a tenement for a period of less than six (6) months,* ***provided that they would not be seeking to establish their long residence in Malta****:*

Provided that a contract of short lease shall identify the specific category within which the lessee falls into and attest it through attached documentation. In the absence of either of these requirements the contract shall be deemed to be a private residential lease in accordance with article 8:

Provided further that any short private residential lease negotiated for a period exceeding six (6) months shall also be deemed to be a private residential lease in accordance with article 8:

Provided further that short private residential leases may not be extended;

Article 8:

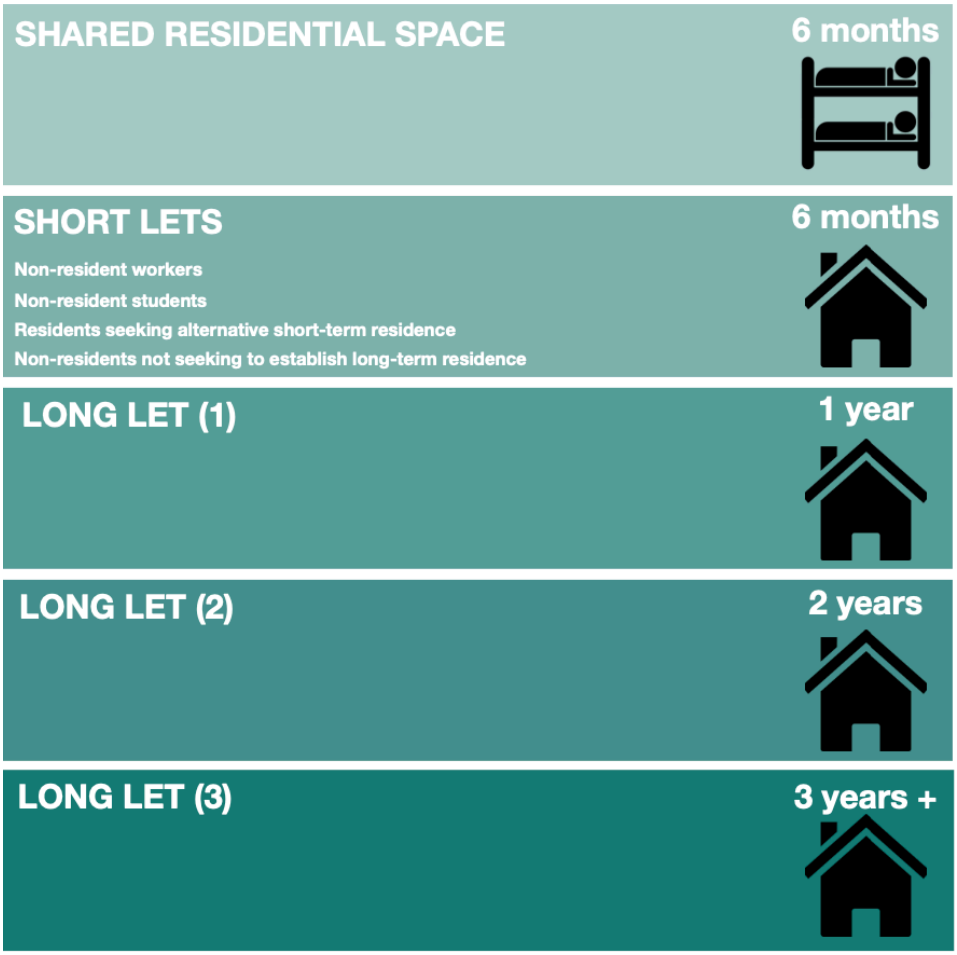
8. A long private residential lease ***cannot have a duration of less than one (1) year****. Any agreement stipulating a shorter duration shall be deemed to have been agreed for a period of at least one (1) year:*

Provided that this article does not apply to short private residential leases or the letting of shared residential space.

Short lets cannot be longer than 6 months and in order to enter into this contract, you need to prove that the tenant is a non-resident worker, non-resident student or non-resident not seeking to establish long term residence. With respect to the renting of rooms, you cannot rent for a period longer than 6 months.

Unless you are renting a room and unless you are renting a property to these non-resident people, the default becomes the 1 year. This is one of the main changes of Chapter 604 – ***the minimum 1 year duration for private residential leases***.

Overview:



Why is the law so descriptive when it comes to duration?

Because prior to this Act, in Malta we had many landlords opting to rent for a 7–8-month duration during the winter months and then rescinding the lease after the 7th or 8th month so that during the summer period they could then make the apartment

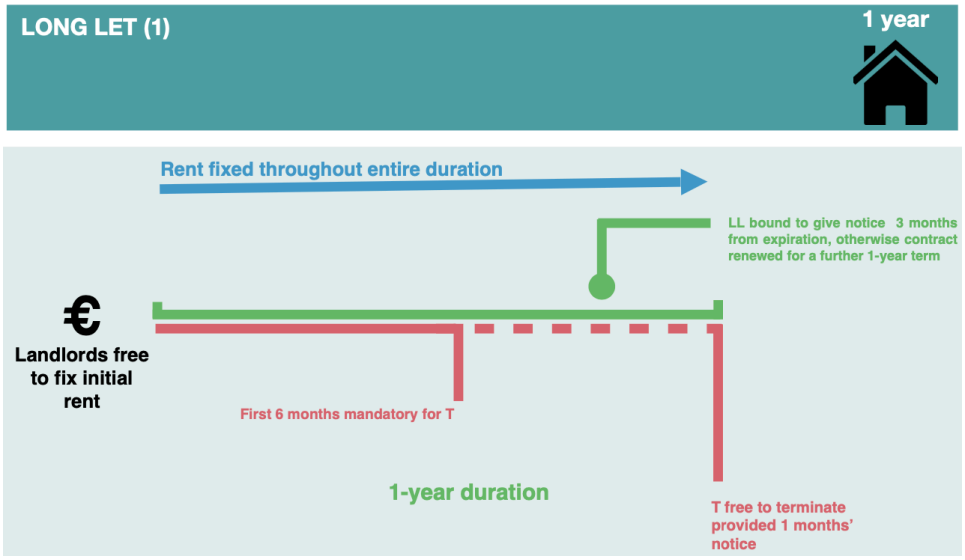
available for tourists on Airbnb. This was resulting in quite some significant shortages of rental accommodation especially during the summer months. So, what Chapter 604 is doing is making landlords commit in order to abandon this hybrid model where you rent out property to a resident for one period and to tourists for another. Landlords have to choose between the residential market and the tourist rental market.

In all cases, this must be done for ***a primary residential purpose***.

The Regulatory Model of Long Lets

The long private residential lease is any lease negotiated for a primary residential purpose in accordance with Article 8 and which is not a short private residential lease.

As we shall see, different rules apply on whether it is a 1-year lease, a 2-year lease, or 3-year lease. Most properties rented out in Malta for residential purpose are rented for 1 year.



Long leases must have, if rented for a primary residential purpose, the duration of a minimum of 1 year. Chapter 604 also introduced the division of this period into the ***mandatory period*** of the tenant followed by an ***optional*** period, as indicated above. So, tenants may withdraw from the private residential lease by giving notice to the landlord of 1 month if it is a 1-year contract after the lapse of the first 6 months of the contract which remain mandatary for the tenant.

The question is: is this unfair? A 1-year mandatary period is imposed on the landlord but then the tenant has 6 months which are mandatary and from the other 6 months the tenant my withdraw by giving 1 months' notice.

From the tenant's point of view, you are given a degree of flexibility which in the case of a difficult situation with the landlord, gives you a way out.

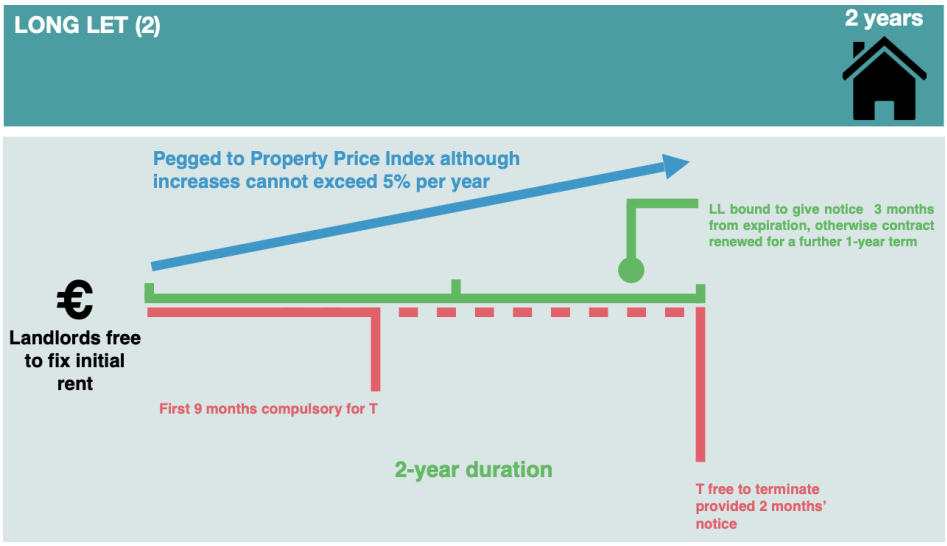
However, there are contrasting views. Comparatively, when looking at other jurisdictions, the 1-year duration is very low in Malta. Even when looking at the local rental market, landlords still have the upper hand at least when it comes to the negotiation of the contract in that they are free to dictate the period so long as it is in excess of 1 year, and they are also free to dictate the rent. So, the only 'freedom' left for the tenant is to withdraw from this agreement after a certain period of time would have lapsed.

There is also a very important obligation which is that the landlord is bound to give a ***3-month notice from the expiration of the agreement***, otherwise it is renewed for a further 1-year term. Before 2020, the law with respect to residential leases was identical to that of other kinds of leases. In other words, it stated that the contract terminated *ipso jure* upon the expiration of the time agreed upon. But Chapter 604 with respect to private residential leases derogated from this rule, now stating that unless the landlord gives 3 month notice from the expiration of the contract, it shall be renewed for another year.

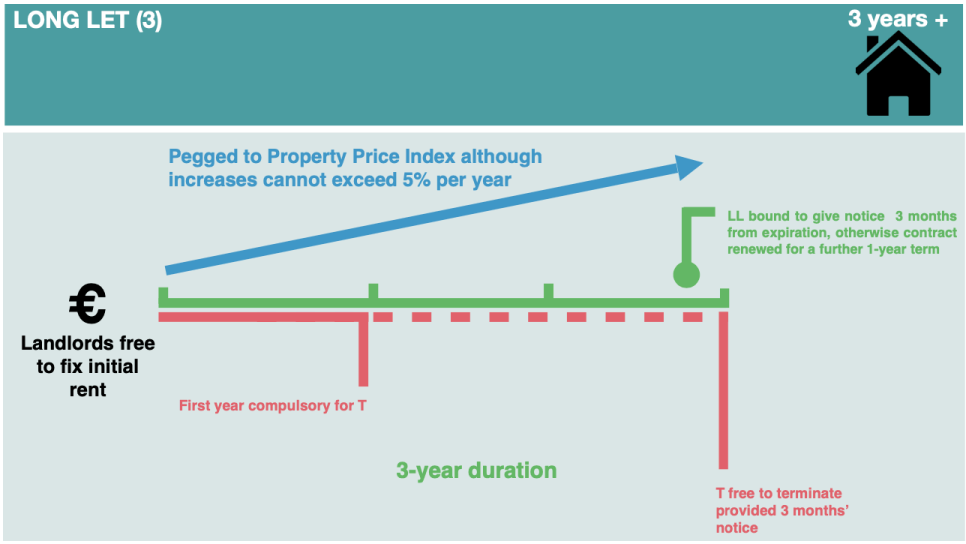
Again, this is controversial, with some deeming it unfair that unless notice is given it is automatically renewed.

However, the law wants to ensure that the tenant has a guaranteed period during which he will be allowed to look for another property in the case that the landlord will want to increase the rent or in the case that the landlord will want to rent it to another tenant. This was important because pre-2020, the landlord would promise an extension of the contract but then on the eve, he would impose the condition that he will only renew if a higher rent is paid. In most cases, the tenants would have no option to accept because relocation would be too onerous.

The model is the same for two- and three-year leases, including those in excess of three years, the only difference being that the mandatory period of the tenant increases along with the duration of the contract.



So, in the case of a two-year private residential lease, the tenant has 9 months which are compulsory, and, once that period lapses, the tenant can only free himself by giving two-months' notice.



With three or more-year leases, the first year is compulsory for the tenant and the tenant after the first year may give notice of termination but three months before the expiration in order to prevent the renewal of the contract for one year.

Also notice that with respect to the two year and three-year leases, the rent is pegged to the Property Price Index although increases cannot exceed 5% per year.

Registration

Post-2020 an additional formality was included, that of ***compulsory registration***. The validity of the rental agreement now depends on registration.

Pre-2020, the Civil Code in Article 1531A already stated that with regard to the letting of urban property, a residence and a commercial tenement, a contract of lease made after 1 January 2010 has to be made in writing and shall stipulate: (1) the property to be leased; (2) the agreed use of the property let; (3) the period for which that property will be let; (4) whether such lease may be extended and in what manner; (5) the amount of rent to be paid and the manner in which such payment is to be made.

Hence, 5 criteria. Since 2020, with respect to private residential leases, these have increased to 7 as stated in Article 1531(AA): (6) any amount deposited by the lessee by way of security, for the performance of his obligations, and (7) an inventory attesting the condition of the tenement as well as the state of any furniture and domestic appliances supplied by the lessor.

Conditions for letting of private residential lease

1531AA. With regard to the letting of any private residential lease entered into after the 1st January, 2020, the contract of lease shall be made in writing and shall stipulate the conditions specified under the Private Residential Leases Act, namely:

(a) the tenement to be leased;
(b) the agreed use of the tenement let;
(c) the period for which that tenement shall be let;
(d) whether such lease may be extended and in what manner;
(e) the amount of rent that shall be paid and the manner in which such payment is to be made;
(f) any amount deposited by the lessee by way of security, for the performance of his obligations; and
(g) an inventory attesting the condition of the tenement as well as the state of any furniture and domestic appliances supplied by the lessor.

The ***inventory*** is important because when you have disputes arising after the tenant leaves the property as to who created the damage, or whether it pre-existed the agreement, the only document capable of resolving such disputes would be the inventory duly signed by both parties at the beginning of the lease.

Now, if the contract is not accompanied by a signed inventory, it would not be registrable.

The question is: ***why registration?*** Registration gives certainty to both parties. The problem that existed pre 2020 was that the parties would sign an agreement, but they were completely unaware whether it satisfied the criteria laid down by the law or not. Now the parties are given a registration number, and the Housing Authority can confirm whether their agreement is valid or not. If the agreement is ***duly registered*** that means gives 100% certainty, whether to the landlord or to the tenant, that the rental agreement is valid.

Water & Electricity

Article 17 of the PRLA also introduces new obligations with respect to water and electricity expenses.

Landlord bound to acknowledge number of tenants occupying premises and allow them access to billing accounts

Tenant may recover additional expenses due to Landlord's lack of compliance by deducting them from rent payment

ARMS not to interrupt provision of water and electricity where residents are shown to be occupying a property

Water and electricity services

17. (1) The lessor is bound to ensure an adequate supply of water and electricity whenever a tenement, or any part thereof, is leased for a residential purpose:

Provided that this article shall be without prejudice to the supplier's rights to suspend the supply of water and electricity under the Electricity Supply Regulations and Water Supply Regulations, in the case of non-payment of an account or where such powers are specifically reserved to the Chairman of the electrical distribution system operator or the Water Services Corporation as the case may be.

(2) The lessor is bound to acknowledge the number of persons residing in the tenement for the purpose of calculating the correct tariff applicable for electricity and water supply, and to grant the lessee access to the account details relative to the leased tenement:
Provided that the lessor's obligations under this sub-article shall be without prejudice to the lessee's possibility of applying for his temporary recognition as a consumer by the service provider and to assume responsibility for the payment of bills relative to the leased tenement, in his own name.

(3) Any additional amounts incurred by the lessee as a result of the lessor's default to maintain his obligations stipulated in sub- article (2) shall be recoverable by the lessee: Provided that the lessee may retain part of the rent due for the purpose of reimbursement of such expenses.

(4) The lessee shall ensure that no arrears for water and electricity services are pending with respect to the period of the lease:

Provided that the non-payment of water and electricity bills during any period of the lease shall be considered as a partial default and it shall entitle the lessor to demand the dissolution of the contract in accordance with article 1570 of the Civil Code:

Provided further that the tenant shall not be bound to pay the utility services until he is provided with a copy of the bill, unless he would have direct access thereto.

The emphasis on water and electricity is because of the dual pricing system of ARMS. ARMS in fact imposes two different tariffs depending on whether you are residing in the property or not, one being the residential tariff and the other being the domestic tariff. There is no answer to why ARMS does this.

A problem that tenants were facing is that while they were residing in the property, they could not benefit from the residential tariffs because it depended on the landlord's signature who was usually the account holder with ARMS. Therefore, there was no way for them to access the residential tariffs and were overpaying their bills by an estimated 30%.

The law now makes sure that the landlord, whenever a tenant is residing in his property for a private residential purpose, ***duly acknowledges his presence*** in the property in a way that the bill that the tenant receives actually reflects his consumption according to the residential tariff.

The Adjudicating Panel for Private Residential Leases

Competent to hear claims relating to deposit or maintenance up to a specified amount (€5,000)

Composed of legal and technical experts

Claims to be submitted in writing and decided *in camera* unless Board deems it necessary to summon parties

Decisions appealable before Court of Appeal (Inferior)

Claims to be decided within five working days from last submission of evidence

One other important innovation is the Adjudicating Panel for Private Residential Leases. There was a need for this Panel because most of the time, what was happening was that either party – whether the tenant causing damages to the property or the landlord deciding to arbitrarily and without any reason at law withhold the deposit – were relinquishing their claims because most of the time, the amounts were so small that it was not worth going through the entire procedure.

So, you had the parties relinquishing their claims not to go through the RRB procedure of having to engage a lawyer, file submissions, appear in court and so on. Although they may have had valid claims, they were being relinquished due to a lack of an ***expeditious*** and ***cheap*** remedy available for them.

This is why Chapter 604 also sets up this Panel which is exclusively competent to hear claims relating to deposits or maintenance up to a specified amount of €5000. It is composed of legal and technical experts, claims can be submitted in writing without needing to be assisted by a lawyer and the Board is entitled to decide *in camera*, therefore without summoning the parties.

Should the parties want to appeal from a decision given by it, they can do so before the CoA in its inferior jurisdiction. Claims must be decided within 5 working days from the last submission of evidence.

This Panel is working, but the problem remains most of the time in notifying the parties, which is why cases take long. Even evictions take long because of having to notify the parties.

The Contracts that the Act Regulates

Definition of **residence** in **Article 2**:

> *"residence" means a tenement let for* ***a primary residential purpose****:*
>
> *Provided that* ***guest houses*** *or* ***dormitories*** *shall not be considered as a residence for the purpose of this Act:*
>
> *Provided further that tenements in the island of Malta and which are occupied by residents of the island of Gozo and Comino due to employment or education on the island of Malta shall also be regulated by this Act. The same shall apply to residents of the island of Malta, who occupy tenements in the island of Gozo and Comino due to employment or education on the island of Gozo and Comino:*
>
> *Provided further that any property or part of a property used as a residence must be fit for habitation;*

As its name implies, residence is crucial to the understanding of Chapter 604. Determining whether the tenement is residential is very important and it means a tenement let for a ***PRIMARY*** residential purpose.

So, if you are using a property for a residential purpose, but it is a secondary residential purpose, or for example, it is a property only used temporarily during the year, that is not regulated by this Act. In the same manner, guest houses or dormitories are not considered as residential for the purposes of Chapter 604.

However, Gozitan students and employees working in Malta and Maltese students and employees having to base themselves in Gozo are also protected by this Act.

This is a proviso mostly done with the intention of residents of either island having to work or study in the other.

In fact, the Parliamentary Secretariat for Social Accommodation stated:

> *"Full-time students and workers (see Section 1.1.4) who despite renting premises, do not use it as a primary residence (such as Gozitans studying or employed in Malta) should still be afforded protection due to the impact that housing stability has on their education and employment."*

Article 3 speaks about applicability.

(2) The provisions of the Act shall not apply to:

(a) tenements belonging to the Government of Malta:

Provided that tenements owned by private foundations set up for the purpose of providing affordable housing shall not be considered as tenements belonging to the Government;

(b) tenements let to any tourist, exclusively for tourism purposes:

Provided that if a property is registered as a holiday furnished premises in accordance with the Malta Travel and Tourism Services Act, the Act shall still apply if the applicant does not qualify as tourist;

(c) tenements which are not let for a primary residential purpose;

(d) tenements let before the 1st June, 1995.

(3) The provisions of the Act shall not apply to the letting of urban tenements where contracts of emphyteusis or sub-emphyteusis have been or are about to be converted into leases by virtue of law.

One of the exclusions of the Act are tourist lets. But ***simply because a tenement is registered as a tourist accommodation does not mean that Private Residential Leases Act doesn't apply*** – if it is registered as a tourist accommodation but is being let for a primary residential purpose, then in that case this Act applies.

"Tourist" is defined:

> *"tourist" means any person who is traveling to and staying in places outside his usual environment for not more than one (1) consecutive year for leisure, business or other personal purposes other than by taking up employment or to establish his business in the place visited.*

Therefore, if you are renting your property to someone who falls within the definition of 'tourist', the rental agreement need not be registered because it is not regulated by Chapter 604.

The question remains: ***what is a residence?*** The PRLA would have gone too far in trying to define the exact minimum period which the tenant would need to occupy for it to constitute a primary residence because the more you go into detail when regulating, the more loopholes you end up creating. So, the suggestion to define residence is to go to instances where our Courts have defined residences in the context of other legislative instruments.

In ***Agius v. Copperstone*** (25/05/1966), the Court stated: *"Il-residenza hija stat ta' fatt li trid tirrizulta mill-provi tal-kaz."* So, whether it is a primary residential purpose, a tourist purpose, or a secondary residential purpose, that is a state of fact which needs to result from the evidence.

Under Chapter 158, "ordinary residence" has been defined and one can make reference to G. *Grech & Bros Limited v. George Sammut* (09/04/2010):

> *"Jigi osservat bhala punt ta' tluq illi r-residenza abitwali ta' bniedem hu dak il-post fejn* **hu jorganizza hajtu flimkien mal-familja tieghu**. *Jikkonsegwi illi allura* ***l-abitwalita` ghandha rabta ma' l-istabilita*** *b'denotazzjoni* ***ta' certa permanenza***. *Wisq ragonevolment,* ***l-allontamenti sporadici u temporanji*** *li wiehed f'hajtu jkollu jaghmel minhabba esigenzi ta' xoghol jew ta' mard jew ghal xi raguni valida ohra, ma jwasslux ghat-telf ta' dik l-istabilita. Ukoll, id-durata ta' dan l-istess allontament mhux bilfors, u, a priori, ghandha tigi meqjusa bhala xi interruzzjoni tal-legam tal-persuna ma' dik l-istess stabilita. Tista' pero* ***takkwista riljev jekk l-allontament u s-sistemazzjoni tal-persuna f'lok iehor jassumu l-konnotat ta' l-abitwalita`***, *u dan b'mod prevalenti u permanenti fuq dak tad-dimora ta' qabel mikri lilu …"*

In *Carmel Said v. Gaetano Pirotta et* (31/05/2013):

> *"Illi kollox ma' kollox il-Qorti jidhrilha li filwaqt li l-konvenut ressaq biżżejjed provi biex juri li huwa kien ikun jirrisjedi għand zijuh, jeżistu wkoll indizji għall-kuntrarju. Oltre ddiversi persuni li xehdu, għalkemm dawn kienu reġimentati fil-mod kif xehdu, żewġ dokumenti juru li dan kien minnu;* **il-kont bankarju** *tal-konvenut (fejn kien jirċievi l-istipendju) li juri li sa mill-2005 dak kien l-indirizz tiegħu, u* **l-karta tal-identita'** *li sa minn dik is-sena ukoll tindika dan. Kontra ta' dan wieħed jirrimarka li* **l-kontijiet tad-dawl u l-ilma** *tal-familja Pirotta jindikaw li hemm erbgħa persuni jgħixu hemm (għalhekk il-konjuġi Pirotta u ż-żewġ uliedhom fosthom il-konvenut) u l-ispezzjoni* **tal-uffiċjal tal-Awtorita' tad-djar** *li qal li mar fl-2007 fuq il-fond u* **ma sab lil ħadd anzi sab ħafna leaflets u karti** *li ndikawlu li hemmhekk ma kien joqgħod ħadd.*
>
> *Il-Qorti wara illi ħasbet fit-tul tasal għall-konklużjoni li kif qalet il-Qorti fl-aħħar każ imsemmi, filwaqt li l-konvenut kien ikun preżenti ħafna fil-fond imsemmi, dan ma kienx l-uniku post ta' residenza tiegħu u kien jaqsam il-ħin bejn fejn joqogħdu l-ġenituri tiegħu u żijuh li kien ġuvni u jgħix waħdu."*

The following decision lays down criteria:

Moviment Azzjoni Socjali v. Noel Borg (30/09/2010):

- The consistency of sleep and rest in the tenement.
- The fact that the individual claiming residence retains his personal belongings in the tenement.
- The fact that the individual spends his free time in the tenement where he practices his hobbies and does his personal work.
- The fact that the individual dines in the tenement.
- The fact that the individual receives his correspondence in the tenement.
- The fact that the tenement is the place where the individual entertains friends, and where third parties expect to find him

These are all matters of fact which have to be determined to see whether it is a primary residential purpose or not. These become material because if I am renting out a property for a primary residential purpose and I haven't registered it, that falls foul of the law, and I become susceptible to fines.

Others:

Coppini noe v. Vella Bonnici: *"in generali l-kliem "residenza ordinarja" jiddenota residenza f'post b'certu grad ta' kontinwita."*

Ripard et v. Stellini: *"mhux bizzejjed li wiehed jghix fil-post "in and out" jew li jkollu l-indirizz postali fuq dak il-fond."*

Bezzina v. Cachia: *"…fond uzat bhala villeggjatura, ma jistax jitqies bhala li jservi ghar-"residenza ordinarja" ta' dak li jkun."*

Residence Programme Schemes

An issue became quite topical at the time of the enactment of the PRLA was whether those foreigners acquiring their passport in Malta or those foreigners in Malta on the basis of some citizenship or residence scheme, also needed to be registered. The short answer is that if the particular scheme imposes as a fundamental requirement that the beneficiary of the scheme or the programme resides in Malta and uses the property in Malta as its primary residence, then it has to be registered. It falls within the scope of Chapter 604.

Residence Programme	Global Residence Programme Rules S.L.123.148	Granting of Citizenship. For Exceptional Services Regulations S.L.188.06	Malta Residence and Visa Programme Regulations S.L.217.18	Malta Permanent Residence Programme Regulation L.N. 121 of 2021	Residence Programme Rules S.L.123.160
Primary Residence Requirement	Occupies the qualifying owned property or qualifying rented property **as his primary residence**	No requirement.	No requirement.	No requirement.	Occupies the qualifying owned property or qualifying rented property **as his primary residence**

Sample agreement: Residential Letting Agreement

RESIDENTIAL LETTING AGREEMENT

- **The term will commence on the 10th February 2023 and end on the 10th December 2024 (304 days). Payment is always one month in advance according to the rules and policies of Airbnb.**
- **Airbnb will deduct a 3.5% fee from the monthly rent according to the rules and policies of Airbnb.**
- **In case the agreement is broken: Cancellation of this agreement is in according to the terms, rules and policies of Airbnb. Guest only gets full refund 48 hours after booking on Airbnb, after those 48 hours, guest. Will have to pay for the next 30 days. Following the cancellation date, the service fee. And the cleaning fee according to the rules and policies of Airbnb.**

Is this agreement in regular? (it is meant to say December 2023). It is not one year in accordance with Article 8 and therefore, this agreement would not be registered on the basis that it is falling short of the minimum duration set by law.

We also need to see whether the tenant is a tourist or not because if the tenant is a tourist, he is also not regulated by Chapter 604 and hence, this agreement would be valid. But if the tenant is employed in Malta, and he falls beyond the definition of tourist, then the landlord here is in breach of the law for 2 reasons: (1) because of the duration of the contract and (2) as a consequence of that, the contract would encounter difficulties in being registered. So, the landlord would end up being in a non-compliant position.

Sample agreement: Long Private Residential Lease

LONG PRIVATE RESIDENTIAL LEASE

By the present private writing there appear on the one [the Lessor].

And on the other part Money Ltd a company registered in Malta with registration C12345 and having its registered address at [Company's Registered Office], represented hereon by [company representative], in his capacity as director of Money Ltd in accordance with the company's Memorandum & Articles of Association of the said company, hereinafter referred to as the lessee. Furthermore, the Lessee shall also represent [Occupant], occupant lessee of the tenement hereunder mentioned.

And hereby the lessor is granting by title of lease to the lessee who under the same. Title of lease accepts [Address of Leased Property] hereinafter referred to as the premises, subject to the following terms and conditions: …

Is this a private residential lease? You have a lessor renting the property to a company.

This contract is foreseeing 3 figures: the lessor, the lessee and the occupant. This is done because usually the occupant would be registering the company as the lessee to be able to claim the fiscal benefits but in the meantime, it would still expect to be protected as the occupant of the property.

Does this fall within the parameters of Chapter 604? Technically speaking, it is a residential lease because the occupant will be residing in a residential apartment, but he is not registered as the lessee. So, such an agreement would not be registrable because in this case, a private residential lease cannot be entered into with a company; it has to be a natural person.

The Effect of Registration

Obligation to register private residential lease contracts

4. (1) All private residential lease contracts entered into after the entry into force of the Act, including their renewal, whether express or tacit, shall be registered:

Provided that contracts of private residential leases which are not registered in accordance with the provisions of the Act shall be null and void.

(2) It shall be ***the duty of the lessor*** *to register,* ***within ten (10) days*** *of the commencement of the lease, the private residential lease contract with the Authority: Provided that such registration shall be made subject to an administrative fee levied by the Authority:*

Provided further that registrations made later than the time specified in sub-article (2) shall be subject to an additional fee.

(3) The registration shall have a ***retrospective effect*** *from the date of commencement of the lease.*

(4) If the lessor fails to comply with the obligation stipulated in sub-article (2), the lessee ***may proceed to register the lease contract himself****, at the expense of the lessor:*

Provided that the lessee shall have the right to retain part of the rent for the purpose of reimbursement of the administration fee paid to the Authority.

Registration is a further formality imposed by Chapter 604 – before, a number of requisites were laid down in the Civil Code and now on top of the requisites, which increased to 7, the contract also needs to be registered. It is the duty of the lessor to register the contract within 10 days and the registration shall have ***a retrospective effect*** from the day of commencement of the lease. The lessee may proceed to register the contract himself and he may also deduct the fee from the rent.

What happens if the contract is not registered?

First of all, you no longer benefit from the RRB as per Article 16B of Chapter 69 and then there are fines.

> Board shall not determine causes relative to leases that are not registered
> *16B. The Board shall not deal with any demand made by either party to the lease, if the agreement, contracted after the entry into force of the Private Residential Leases Act,* ***is not registered*** *in accordance with article 4 of the Private Residential Leases Act:*

What might also be relevant is that registration of rental agreements was already foreseen in 2010. In fact, Article 1622A of the Civil Code foresaw a system where there would be a modern contract of lease which would also be deposited in a registry. This was an idea materialised 10 years later.

Occupation without title

This refers to when a tenement is occupied for a residential purpose by any person or persons who are not the owners of the tenement and who would be occupying the tenement without a valid title of lease, for the sole reason that the lease contract does not satisfy the requisites *ad validitatem* in writing of a contract of lease or that although it satisfies the requisites *ad validitatem* in writing, it is not registered in accordance with the provisions of the Act.

If there is a *de facto* lease agreement but it is not registered, that is a legally obscure situation which the PRLA terms as ***"occupation without title"***. So, when you have a *de facto* lease, i.e., someone residing in the property for a primary residential purpose, paying rent monthly but the agreement is not registered.

In ***Paul Muscat et v. Caroline Grace Leonard et*** (13/03/2023), the RRB held:

> *"Illi għaldaqstant filwaqt li l-liġi tistipula n-nullita` tal-kirja jekk din ma tiġix reġistrata, tiprospetta wkoll ċirkostanza fejn il-kirja tiġi reġistrata tardivament u tali reġistrazzjoni jkollha effett retrospettiv. Il-Bord jirrileva li l-liġi tiprospetta din il-possibilita` fejn jirrigwarda kirjiet li ġew stipulati wara d-dħul fis-seħħ tal-Att Dwar il-Kirjiet Residenzjali Privati. Tali disposizzjoni ma ġietx inkluża fejn jidħlu kirjiet ta' wara l-1995 u qabel ma l-istess Att ġie fis-seħħ.* ***Madanakollu, fil-fehma tal-Bord, huwa ċar li l-ispirtu tal-liġi huwa favur li ftehim lokatizju jiġi salvat dment li ssir ir-reġistrazzjoni tiegħu, anke jekk tardivament****. Dak li ried il-leġislatur huwa li ma tiġix offruta protezzjoni lis-sidien sakemm il-kuntratti lokatizji ma jiġux reġistrati. Tali protezzjoni tibda tingħata biss wara li jiġu hekk reġistrati. Kwindi fil-fehma tal-Bord, la darba l-kirja de quo ġiet reġistrata fit-30 ta' Ġunju 2021, anke jekk ġiet hekk reġistrata wara li ġew intavolati dawn il-proċeduri, l-istess kirja ma tistax titqies bħala waħda nulla u bla effett, tant li l-Awtorita` tad-Djar fil-fatt irrikonoxxietha bħala kirja valida ai termini tal-Kapitolu 604 tal-Liġijiet ta' Malta."*

Fines/Enforcement Procedure

There is a civil avenue and a criminal avenue. In every case so far, only the criminal action has been pursued.

Criminal Sanction

Enforcement procedure

20. (1) If it appears to the Authority that any tenement is occupied for a residential purpose by any person or persons who are not the owners of the tenement and who would be occupying the tenement without a valid title of lease, for the sole reason that the lease contract does not satisfy the requisites ad validitatem in writing of a contract of lease or that although it satisfies the requisites ad validitatem in writing is not registered in accordance with the provisions of the Act, hereinafter in the Act referred to as ***"occupation without title"****, the Chairperson, or any officer authorised by him, shall issue an* ***enforcement notice to the person or persons granting the enjoyment of the tenement*** *without having formalised their relationship according to law:*

Provided that no enforcement notice shall be issued in relation to any lease contract validly entered into before the entry into force of the Act, saving the provisions of article 5.

(2) The Authority shall, in the case of occupation without title referred to in sub-article (1), require the person or persons granting the enjoyment of a tenement without title, ***to comply with the rules established in the Act within such time specified by the Authority.***

(3) In enforcing the terms of sub-article (2), the Authority may:

(a) order to whoever grants the enjoyment of a tenement without title to conform with the obligations contained in the Act for a minimum period of one (1) year and at a rent which does not exceed seventy-five percent (75%) of the rental value of the tenement; or

(b) if an agreement in writing according to the terms of the Act, ***already exists*** *between the parties, and the Authority deems such conditions to be in line with the average market conditions, require the person or persons granting the enjoyment of a tenement without title to register such agreement in accordance with article 4:*

Provided that the compliance with either one (1) of such requests shall not prejudice the Authority's right to take further action in accordance with article 22:

Provided further that for the purposes of establishing the rental value of the property, the Authority shall engage an architect to assist it:

Provided further that a copy of the architect report shall always be presented to the person or persons granting the enjoyment of a tenement without title.

Offences

22. (1) Any person who:

(a) is found granting any tenement, or any separate space therein, for a residential purpose, which is not in accordance with the provisions of the Act;
[…]

shall be guilty of an offence against the Act and shall be liable, on conviction, to a ***fine (multa)*** *of not less than* ***two thousand and five hundred euro (€2,500)*** *and not exceeding* ***ten thousand euro (€10,000)****:*

Provided that if upon the serving of an enforcement notice under article 20, the person found guilty of violating the terms of the Act proceeds to conform with the Authority's request within the time specified by the Authority, the fine (multa) shall not exceed five thousand euro (€5,000).

First of all, the person granting the enjoyment exposes him/herself to an enforcement notice. The authority will request the landlord to conform itself with the articles of the law and if it doesn't, fine is imposed of a minimum of €2,500 and never in excess of €10,000. In reality, this is not a fine issued by the Housing Authority but by the Court of Magistrates.

The procedure is that you go before the Housing Authority which takes you before the Court of Magistrates which then decides the penalty. Where the landlord is found guilty, most of the time the landlord is only ordered to pay the minimum of €2500.

Civil Sanction/ Additional remedy for the occupant without title

From a practical aspect, imagine you are a tenant, paying rent, and your contract is not registered. You go to your landlord and ask him to have your contract registered for whatever reason. The landlord refuses. Would you report your landlord? The answer is no, since the tenant will suffer the repercussions.

Chapter 604 foresees another remedy – a tenant, together with the report, can request the Authority to file an application before the Board in their name, and if it is found that the landlord has been renting the property without registering the agreement, whilst being aware of this requirement, the Housing Authority may request the RRB that I as the tenant whose contract was not registered request the imposition of a lease on the landlord for the period of 3 years at 75% of the market value of the tenement. So, this makes sure that any consequences for reporting the tenant will not be suffered by the tenant.

This is stated in Article 21:

(1) Without prejudice to any other remedy in terms of the Act, in the event that a person served with an enforcement notice under article 20 fails to comply with any of the requirements of such notice within the time therein specified, the Authority may file an application before the Board demanding that, if the Board is satisfied that an occupation without title according to sub-article 20(1) is in existence, a written

contract shall be entered into for a period of three (3) years at a rent which does not exceed seventy-five percent (75%) of the market rental value of the tenement.

(2) The Board may order that any amount be paid as compensation for the occupation of the tenement to the person granting the enjoyment of a tenement without title, whilst the hearing of an application filed in terms of sub-article (1) is pending:

Provided that the remedy under sub-article (1) shall not apply in the case of the occupation without title of shared residential space:

Provided further that if there exists sufficient evidence to determine that the agreed amount for the occupation without title was lower than seventy-five percent (75%) of the market rental value of the tenement, the rent shall be fixed at such amount agreed by the parties.

This additional remedy for the occupant is backed up by literature:

C. U. Schmid stated:

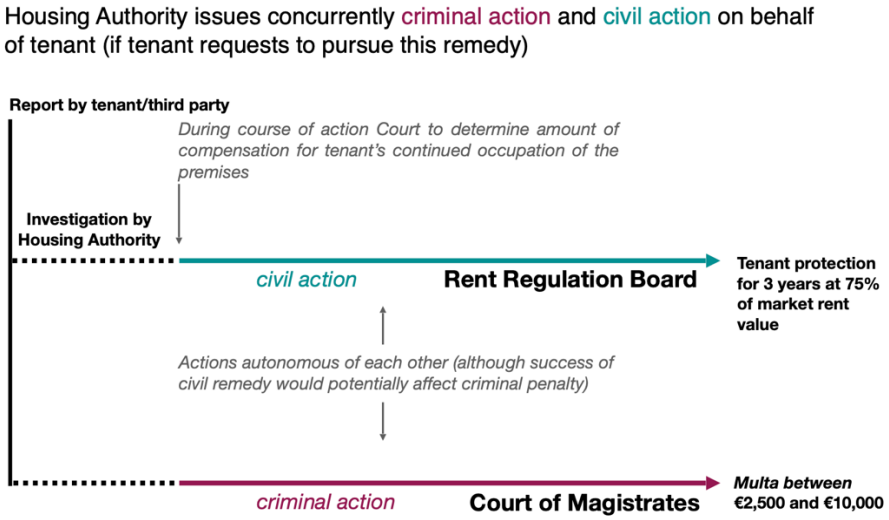
> *"The absence of a written contract or the violation of registration duties* ***should not affect the tenancy negatively*** *as long as the tenant is able to prove the existence of a contract through regular rent payments. In these cases, the tenant should have a claim to receive a full (default) rental contract, that is normally a contract for a longer period of time or an open-ended contract.* ***Any sanctions or other negative legal consequences for disrespecting registration duties should only lie with the landlord.*** *Such measure would reintroduce informal (typically oral) contracts into the legal sphere, and the blackmail potential of the landlord would be reduced. This 'good practice' may already be found in several EU states including Austria, Germany and Italy."*

And E. Bargelli & R.Bianchi:

> *"A legislative amendment to the art. 13 of Law 431/1998…established, on the one hand,* ***the exclusive obligation of the lessor to provide for the registration of the contract*** *(paragraph 1) and, on the other, that, in the event of the landlord's failure to register the contract…; the tenant may request the judge to ascertain the existence of the contract and to fix the rent within the limits of that provided for [regulated tenancies]. In this way, the legislator has*

once again confirmed the possibility of making the effects of a contract initially not registered."

Overview of both actions



This was also explained by the Court of Magistrates ***Il-Puluzija v. Sacha Said*** **(20/10/2022):**

"Ġie kkonfermat mix-xhud li l-kirja ma ġietx reġistrata mal-Awtorita' tad-Djar.

Id-difiża argumentat ukoll li l-liġi tiddsiponi li n-nuqqas ta' reġistrazzjoni twassal għal nullita' tal-kirja, u għaldaqstant la m'hemmx kirja m'hemmx obbligu ta' reġistrazzjoni. Bid-dovut rispett, dan l-argument huwa wieħed fallaċi. L-obbligu tar-reġistrazzjoni huwa l-obbligu primarju li jinkombi fuq sid il-kera, hekk kif jirriżulta mill-artikolu 5(2) tal-Kapitolu 604 tal-Liġijiet ta' Malta.

Magħdud ma' dan, l-inkwilin jista' jirreġistra lkirja iżda a spejjeż ta' sid il-kera. Ċertament li l-iskop tal-introduzzjoni ta' reġistrazzjoni ta' kirja huwa multepliċi u dan billi jservi ta' protezzjoni kemm għas-sid tal-kera kif ukoll għall-inkwilin u dan sabiex ma jkunx hemm abbużi ta' drittijiet u naturalment ukoll min-naħa tal-erarju pubbliku jista' jkun hemm aktar kontroll inkwantu dħul tal-individwi u kumpaniji.

Il-fatt li meta kirja ma tkunx ġiet reġistrata titqies bħala nulla dik hija l-konsegwenza ċivili ta' tali nuqqas. Dan juri kemm il-leġiżlatur qies l-importanza

tar-reġistrazzjoni. Madankollu l-inadempiment tal-obbligu impost bil-liġi ta' reġistrazzjoni jwassal f'dan il-każ għall-azzjoni kriminali u għal konsegwenzi ċivili."

Registration of Partial Amount

A curious question that comes up at times is the registration of a partial amount. It seems to be a wide practice amongst certain landlords to declare part of the amount on the lease and have that agreement registered with the Housing Authority but then concluding a separate, secret agreement in which they claim an additional amount.

For example, the rent is €800 in total, the landlord registers with the Authority a contract showing rent at €400 and then in another separate agreement not shown to the Authority, the lessee pays an additional €400. This, therefore, creates problems because if on one particular occasion the tenant decides to pay just €400 without paying the additional €400, can the tenant be in default?

We have had no precise case deciding on this but for sure Article 15 states:

> Terms contrary to law
> *15. (1) Any agreement, whether verbal or in writing, determining any condition which does not result from the written and registered contract* ***shall be considered as void.***
>
> *(2) In the cases referred to in sub-article (1), the lessee may request the restitution of any amounts paid in excess of the total amount resulting from the written and registered contract.*
>
> *(3) Any clause intended to derogate the minimum contractual duration established by the Act shall be null and void.*

What is interesting is that one of these agreements did come up before the Panel (ADJ) in ***Nadia Xuereb v. Rita Massia*** (01/10/2020). In this case, the landlord made a claim on the deposit which was in excess of the deposit that she had written down in her contract. So, it would seem that she had retained a separate amount. It is likely that any secret agreement will not be given effect by the Court, which is in line with Italian jurisprudence.

The ADJ held:

> *"Din it-tilwima tikkonċerna talba da parti tas-sid biex iżżomm id-depożitu, skond hi fl-ammont ta' €646. Il-Panel ra l-kuntratt reġistrat li bih jirriżultaw kera ta' €500 fix-xahar u depożitu flistess ammont.* ***Il-Panel allura jirrileva illi huwa jista' biss jieħu konjizzjoni ta' talbiet għal ritorn ta' depożitu kif jirriżulta mill-kuntratt reġistrat.*** *Kwalunkwe ftehim ieħor mhux reġistrat, ai termini tal-Artikolu 4(1) u Artikolu 15(1) tal-Kap 604 tal-Liġijiet ta' Malta huwa null u allura mhux enforzabbli minn dan il-Panel.*
>
> *Hawnhekk jirriżulta illi hemm diverbju dwar x'kera għandha titħallas mill-inkwilina. Is-sid qed tgħid li fadal bilanċ minħabba illi l-partijiet kienu ftehmu li f'punt partikolari l-kera ma tibqax aktar ta' €500 u ssir €650.* ***Kif ingħad diġa' din l-allegazzjoni l-Panel ma jistax jikkunsidraha, mhux biss għaliex kif diġa' ingħad ftehim lil' hinn minn dak riżultanti fil-kuntratt reġistrat hu null****."*

The position of Italian Jurist **F.Gigliotti** is as follows:

> *"An agreement on any 'under the table' rental payment, in excess of the amount declared in the registered contract, is null. Such nullity 'vitiatur sed non vitiat' (it is the condition that is null and not the entire agreement) means that only the agreement on the surreptitious surcharge is incurably null, regardless of any subsequent registration."*

Automatic Renewal and Premature Renewal

Notice of termination of long private residential leases by lessor

9. (1) A private residential lease shall cease to have effect upon the expiration of its term, whether such term is conventional, legal or judicial, ***provided that the lessor gives notice to the lessee at least three (3) months before by registered letter****:*

Provided that for the purpose of proving the fulfilment of his obligation under sub-article (1), it shall be sufficient for the lessor to provide evidence that the registered letter has been sent within the stipulated time, and to the correct address.

(2) If the lessor does not serve the lessee with a notice of termination within the specified time, the private residential lease ***shall be deemed to have been renewed for a further period of one (1) year:***

Provided that in the absence of a notice of termination by the lessor, the lease shall continue to be renewed.

(3) This article shall not be applicable for short private residential leases or letting of shared residential space.

Chapter 604 has introduced the concept of ***tacit renewal*** – unless the landlord sends any notice of termination, the contract is tacitly renewed.

Notably, the concept of "notice of termination" (congedo) and tacit reletting is not new to Maltese law. In fact, pre-2010 this applied to urban leases where the duration had not been expressly agreed in virtue of Articles 1568 and 1536CC of the Civil Code. This is when the duration of the lease is presumed and keep in mind that these provisions are not applicable to urban leases post-2010.

The reason for this presumption is outlined by Prof. Caruana Galizia and this remains relevant because the principle is the same,

> *"If the [duration of the lease is presumed] the lease is not dissolved by the expiration of the term but* ***it is necessary that a notice be sent by one of the parties to the other some time before****: at least one month before if the presumed duration is one year, and fifteen days if such duration is less than one year. The reason for this different is* ***the difficulty which the tenant of an urban tenement may encounter in finding a new tenement*** *and in* ***contracting a new lease which is suitable to his needs****, and also* ***the difficulty which the landlord may encounter in finding a new tenant****. Consequently, that party who wants to terminate the lease on the expiration of the term presumed must notify the other in order that the latter may find a new tenement in the meantime, if he is the tenant, and in order that he may find a new tenant, if he is the landlord."*
>
> *[…]*
>
> *"Notwithstanding the expiration of [agreed] term, if the tenant continues to enjoy the thing and is allowed to do so, there would be tacit re-letting, which is based on the presumed intention of the parties and which, therefore, cannot*

take place in case of an express declaration to the contrary, i.e. a declaration made by either of the parties and notified to the other party.

Until when can this notice be served in order that it may prevent a tacit re-letting?

If the duration of the lease has been expressly established, the notice may be served even at the last moment, because the law does not require that a notice be sent beforehand; if, on the contrary, the term is presumed and the object of the lease is ... an urban tenement [the landlord must give fifteen days' or one month's notice …] before the expiration of the term, thus allowing him to continue in the enjoyment of the tenement, or if the tenant does not notify the landlord as stated above and keeps on enjoying the tenement, a tacit re-letting would automatically take place."

Coming back to the PRLA, Article 9 speaks of ***notice*** by a ***registered letter***. The fact that notice of termination (non-renewal) needs to be given by registered letter was dealt with by the CoA in ***Veduta Estates Limited v. Milczarek Gabriela Malgorzata*** (10/12/2021):

"[L-appellanta] qiegħda tisħaq li s-soċjetà appellata ma setgħetx tipproċedi bil-proċeduri sommarji speċjali quddiem il-Bord għaliex din naqset milli tinforma lill-appellanta permezz ta' ittra reġistrata, li hija ma kienx fi ħsiebha ġġedded il-kirja in kwistjoni. Is-soċjetà appellata tiċċita l-artikolu 9 tal-Kap. 604, u tissottometti li l-intimata ġiet infurmata fit-termini rikjesti mil-liġi li hija ma riditx iġġedded it-terminu tal-kirja. Qalet li din in-notifika saret permezz **ta' att ġudizzjarju**, *jiġifieri permezz* **tar-rikors ġuramentat** *218/20,* **fejn is-soċjetà appellata talbet l-iżgumbrament tal-intimata mill-fond in kwistjoni.**

L-appellata kompliet tgħid li huwa veru li skont l-artikolu 9 tal-Kap. 604, l-avviż li l-kirja mhux ser tiġi mġedda għandu jingħata permezz ta' ittra reġistrata, iżda qalet li fil-każ odjern, **l-avviż sar bi proċedura li tmur lil hinn minn dak mitlub bl-artikolu 9 u dan għaliex sar permezz ta' rikors ġuramentat.**

… Minkejja dan, jibqa' l-fatt li s-soċjetà appellata naqset milli tosserva r-rekwiżit ċar tal-liġi li tibgħat ittra rreġistrata lill-appellanta tal-inqas tliet xhur qabel l-iskadenza tal kirja **sabiex tinfurmaha li wara l-iskadenza ta' sena, il-kirja ma**

> ***kinitx ser tiġi mġedda.*** *Id-dispost tal-liġi huwa ċar, li fin-nuqqas ta' tali avviż, il-kirja tkun meqjusa li ġiet imġedda għal perijodu ieħor ta' sena…il-liġi f'dan irrigward hija tassattiva, u tesiġi li tintbagħat ittra rreġistrata tal-inqas tliet xhur qabel l-iskadenza tal-kirja sabiex l-inkwilin jiġi mgħarraf bl-intenzjoni tas-sid li ma jġeddidx, u jibda jaħseb fejn ser imur joqgħod.* ***F'dan il-każ ma ġarax hekk****, u għalhekk tqis li l-aggravju tal-appellanta huwa ġustifikat, u tilqgħu."*

The importance for notice of non-renewal to be given by a registered letter has been emphasised by both the RRB and the Panel – it cannot be verbal or sent by email or through any other means, it has to be a registered letter. In this case, the RRB even held that not even a Court application before the RRB demanding the termination of the lease will be sufficient to replace the formality set by the law (i.e., the registered letter).

What is the penalty for premature withdrawal?

There is uncertainty as to what penalty is incurred by the tenant if he withdraws within the first 6 months. Some judgements by the Panel say it is capped at one months' rent, others argue that if it is a proper *di fermo* period (mandatory), beyond the penalty, the landlord may even claim compensation for the period during which the property will remain vacant as a result of the tenant's premature withdrawal. But this is a fine detail so don't focus too much on this.

Article 11(1) of the Act deals with the withdrawal by the lessee:

> *11. (1) The lessee may not withdraw from a long private residential lease before the lapse of:*
>
> *(a)* ***six (6) months*** *in the case where the lease is for a period of less than two (2) years;*
>
> *(b)* ***nine (9) months*** *in the case where the lease is for a period of two (2) years or more but less than three (3) years; or*
>
> *(c)* ***twelve (12)*** *months in the case where the lease is for a period of three (3) years or more:*
>
> *Provided that if the lessee withdraws from a long private residential lease before the lapse of the period stipulated in sub-article (1),* ***the lessor may retain an amount not***

exceeding one (1) month's rent from the deposit left by the lessee by way of security, so however, that the lessor may still proceed against the lessee to collect any other amount due by him:

Provided further that sub-article (1) shall **be without prejudice to the lessor's right to demand the termination of the lease in case of the lessee's non-fulfilment of any one (1) of his obligations.**

(2) From the lapse of the periods mentioned in sub-article (1) onwards, **the lessee may withdraw at any time by giving notice to the lessor, by registered letter***:*

(a) at least one ***(1) month*** *before in the case where the lease is for a period of less than two (2) years;*

(b) at least two ***(2) months*** *before in the case where the lease is for a period of two (2) years or more but less than three (3) years; or*

(c) at least three ***(3) months*** *before in the case where the lease is for a period of three (3) years or more.*

(3) The parties may agree to stipulate more advantageous conditions for the lessee in connection with the withdrawal of the lease.

(4) **No penalty may be imposed on the lessee for exercising his rights of withdrawal** *according to the periods stipulated in sub-article (1).*

(5) In the absence of an adequate serving of notice, **the lease shall be deemed not to have been terminated by the lessee:**

Provided that for the purpose of proving the fulfilment of the lessee's obligation under sub-article (2), it shall be sufficient for the lessee to provide evidence that the registered letter has been sent within the stipulated time, and to the correct address.

This lays down the compulsory period and under sub-article (2), the period of notice which applies for the tenant to be able to withdraw from the relationship beyond the termination of the compulsory period.

Relevant Judgements

In the absence of proper notification, tenant has no right to reimbursement of deposit (even if notice is given beyond 6 months):

Alex Briffa v. Clarence Pace (23/02/2021 – ADJ)

> *"Din it-tilwima tikkonċerna* ***talba tal-inkwilin biex jiġi rifuż bid-depożitu mħallas*** *u b'kera li ħallas għal erbgħa u għoxrin jum li ma okkupax fil-fond. L-intimat (is-sid) jilqa' għat-talba billi jgħid illi l-ammont mhuwiex dovut. Il-Panel jibda biex iqis illi l-Art. 11(5) tal-Kap. 604 tal-Liġijiet ta' Malta jgħid illi: "Fin-nuqqas ta' notifika adegwata tal-avviż, il-kera għandha titqies li ma ġietx terminata mill-kerrej: Iżda għall-finijiet li jipprova t-twettiq tal-obbligazzjoni tal-kerrej taħt is-subartikolu (2), għandu jkun biżżejjed biex il-kerrej jagħti evidenza li l-ittra rreġistrata ġiet mibgħuta fiż-żmien stipulat, u fl-indirizz it-tajjeb." F'dan il-każ* ***ma jirriżultax illi sar l-avviż kif mitlub mil-Liġi u allura l-Panel ma jistax iqis li l-kera hija terminata u allura ma jistax jordna ir-rifużjoni tad-depożitu jew xi ammonti oħrajn****."*

Verzhinya Zafirova v. Marco Francuski et (19/10/2021 – ADJ)

> *"Dwar iz-zamma tad-depozitu, l-Artikolu 11(2)(a) tal-Kap 604 jghid illi l-inkwilin irid jaghti avviz b'ittra rregistrata ta' mill-inqas xahar qabel f'kirja ta' dan it-tip. Hawnhekk ma jirrizultax li sar dan l-avviz, u allura* ***[is-sid] ghandha ragun li titlob iz-zamma tad-depozitu****."*

Melchior Bonnici et v. Charles Camilleri (22/10/2021 – ADJ)

> *"Din it-tilwima tikkoncerna talba da parti tal-inkwilini biex dan il-Panel jordna lis-sid intimat jaghti lura id-depozitu imhallas minnhom originarjament. Ir-rikorrenti esebew biss messaggi fuq WhatsApp. Il-Panel jaghmel referenza ghall-Artikolu 11(2)(2) tal-Kap. 604, li jghid li l-avviz ghat-terminazzjoni mill-inkwilin, irid isir b'ittra registrata; di piu il-Ligi hija cara wkoll, fis-subinciz hamra(5) tal-istess Artikolu (11), jinghad illi "fin-nuqqas ta' notifika adegwata tal-avviz, il-kera ghandha titqies li ma gietx terminata mill-kerrej". Hawnhekk ma jistax jinghad lanqas illi fil-kuntratt ta' kiri hemm stipulazzjoni aktar*

vantaggjuza ghall-kerrej dwar il-mod kif isehh l-irtirar mill-kirja, u dan stante illi l-kuntratt ma jsemmix il-metodu tal-irtirar, u allura l-Panel irid joqghod fuq dak li tghid il-Ligi."

Graeme Lord v. Claire Cilia Garrett et (27/01/2022 – ADJ)

*"Il-Kap 604 jipprovdi illi fejn il-kirja tkun ser tigi itterminata wara sitt xhur izda qabel id-data ta' terminazzjoni misjuba fil-kuntratt, l-inkwilin ghandu l-obbligu li jinforma b'dan, mill-inqas xahar qabel permezz ta' ittra registrata. Il-Panel jinnota li l-inkwilin ma pprezenta ebda prova li dan l-obbligu gie segwit minnu stante illi email jew whatsapp message ma jissodifax dan it-test. Artikolu 11(5) huwa car f'dan ir-rigward, u cioe li fin-nuqqas ta' notifika adegwata tal-avviz, **il-kera ghandha titqies li ma gietx itterminata**."*

So, even if notice is given beyond the 6 months, but not through the proper manner (registered letter), the deposit is forfeited anyway.

A registered letter sent by the lessee on the address indicated by the lessor is sufficient:

Claire Trusler et v. Vela Blu Ltd (27/10/2021 – ADJ)

*"Ir-rikorrenti baghtu ittra rregistrata; prova ta' dan hemm ir-ricevuta tal-Maltapost. Gara madanakollu illi l-ittra registrata ma waslitx ghand l-intimata anke jekk din giet mibghuta fl-indirizz provdut minnha stess. L-Art 11(2) tas-604 jghid illi t-twettiq tal-obbligazzjoni tan-notifika tista' tigi provata kemm il-darba jirrizulta illi din intbaghtet fiz-zmien adegwat, u fl-indirizz it-tajjeb. **L-indirizz utilizzat gie provdut [mis-sid] u allura ma jistax jinghad li r-rikorrenti naqsu f'dan is-sens.** Di piu il-Panel ma jistax ma jinnotax illi l-intimata telqet mill-ewwel mill-idea li zzomm id-depozitu, u d-difiza taghha f'din it-tilwima tidher li hija gabra ta' skuzanti biex tigi enforzata dik ix-xewqa. Il-Panel ifakkar illi r-relazzjoni bejn il-partijiet f'kuntratt ta' kera hija gwidata qabel xejn mill-principju tal-bona fede u l-partijiet mistennija illi jimxu b'korrettezza fil-konfront ta' xulxin."*

Retention of deposit due to failure to give notice limited to one month (interpretation of proviso to Article 11(1)):

Michelle Lungaro v. Margherita Da Riva et (31/08/2020 – ADJ)

> *"Il-Panel jibda biex josserva li d-depożitu mħallas mill-inkwilini ai termini tal-Artikolu 6(f) tal-Kap.604 tal-Liġijiet ta' Malta kien fis-somma ta' €700. Billi l-intimat ma jikkontestax it-talba, u billi jirriżulta illi filfatt l-intimati ħallew il-kirja qabel it-terminu preskritt mill-Art. 11(1)(b) tal-Kap. 604 tal-Liġijiet ta' Malta, il-Panel* ***se jawtorizza ż-żamma tad-depożitu mħallas****. Il-Liġi pero' ma tippermettix illi l-Panel jilqa' t-talba kollha tar-rikorrenti fejn qed jitlob illi għal din l-istess raġuni jiġi mħallas is-somma ta' €1,400. Il-proviso tal-Art. 11(1) jgħid ċar illi jekk il-kerrej jirtira mill-kirja qabel ma jgħalaq il-perjodu stipulat (f'dan il-każ [sitt (6) xhur] mill-bidu tal-kirja),* ***is-sid jista' jżomm biss massimu ta' xahar kera mid-depożitu ta' garanzija imħolli mill-istess kerrej****."*

The question is on the limit of the penalty that can be withheld by the landlord. That is, whether this is one months' rent in the case of breach of the di fermo period by the tenant or whether the landlord can withhold a higher amount.

Andrew Borg v. Marijan Hrvatsko (01/07/2021 – ADJ)

> *"Tajjeb illi l-Panel jiċċara qabel xejn, illi l-kunċett ta' di fermo ġie kemmxejn imċaqlaq bl-introduzzjoni tal-Kapitolu 604 tal-Liġijiet ta' Malta għaliex l-Artikolu 11 tal-istess Kapitolu tal-Liġi jillimita l-penali talli wieħed iħalli l-fond qabel iż-żmien miftiehem għal xahar kera meta l-kirja hija waħda ta' inqas minn sentejn."*

…even when mandatary period would not have expired yet:

Raymond Zammit v. Gabriele Martelli (19/10/2020 – ADJ)

> *"Jirriżulta mill-kuntratt ta' kera illi l-kirja bdiet fil-ħdax (11) ta' Mejju, Elfejn u Għoxrin (2020); is-sitt (6) xhur imsemmija mill-Artikolu 11(1)(a), effettivament għadhom lanqas għaddew sa llum, u allura l-Panel huwa konvint illi fejn it-talba tirreferi għaż-żamma tad-depożitu, minħabba li l-inkwilin irtira mill-kirja qabel it-terminu preskritt mill-istess Artikolu fil-liġi, timmerita li tintlaqa'. Biss* ***il-Panel***

> *ma jistax jawtorizza iż-żamma tad-depożitu kollu mħallas (€1,000) u dan għaliex il-proviso tal-Artikolu 11(1) tal-Kap. 604 jillimita l-ammont li s-sid jista' jżomm għal mhux aktar minn xahar kera – f'dan il-każ €750."*

Agnes Cassar v. Norov Mirjon (01/10/2021 – ADJ)

> *"Ghar-rigward tat-tieni talba u cioe it-talba tal-hlas ta' tlett xhur kera, in vista li l-inkwilini ivvakaw il-fond lokatizju b'mod prematur, il-Panel jaghmel referenza ghal Art. 11(1) liema artikolu jaghmilha cara li f'kaz ta' terminazzjoni prematura, is-sid ghandu jedd li jzomm xahar kera mid-depozitu mholli mill-inkwilini. Ghaldaqstant,* **dak li qed jigi mitlub mis-sid, u cioe li tinghata tlett xhur kera stante t-terminazzjoni permatura, imur kontra d-dettami tal-Ligi**. *Ghaldaqstant f'dan ir-rigward il-Panel ser jilqa' t-talba tas-sid li zzomm id-depozitu in kwistjoni fl-ammont ta' €800 u jichad it-talba taghha ghall hlas ta' tlett xhur kera."*

Marisa (Maria Louise) Mifsud v. Jessica Magro (15/12/2020 – ADJ)

> *"Ir-rikorrenti titlob illi titħallas il-bqija tal-kera dovuta għall-perjodu kollu di fermo kif miftiehem fil-kuntratt tal-kirja. Dwar il-pretensjoni tal-ħlas ta' kera għall-perjodu kollu di fermo, għad illi rrikorrenti sostniet illi l-intimata irtirat mill-kirja wara biss ġimgħatejn mill-bidu tagħha, f'każijiet bħal dawn, il-liġi u senjatament il-proviso tal-Art. 11(1) tal-Kap. 604 tal-Liġijiet ta' Malta, ma tippermettix illi wieħed jikseb il-kera għall-perjodu kollu di fermo, iżda biss li jżomm ammont ta' mhux aktar minn xahar kera imħolli bħala depożitu mill-kerrej. Għaldaqstant filwaqt li l-Panel sejjer jiċħad it-talba għall-ħlas ta' kera għall-perjodu kollu di fermo, sejjer jawtorizza lir-rikorrenti sabiex iżżomm id-depożitu imħallas."*

Provisions of Article 11 override any written agreement between parties authorising landlord to retain deposit (despite valid notification by tenant after lapse of mandatary period):

What if the landlord in the agreement states that the deposit will be withheld in any case even if the tenant withdraws beyond the 6 month? Is that legal? The law allows the tenant to withdraw ***without penalty***, and provided he/she gives adequate notice, beyond the 6th month.

Gaetana Agius v. Kevin Borg (02/03/2021 – ADJ)

> *"Din it-tilwima tikkonċerna talba da parti tal-inkwilina għar-radd lura tad-depożitu li jammonta għal €760. Il-Panel jinnota illi* ***għalkemm saret dikjarazzjoni bejn il-partijiet datata 30 ta' Settembru, 2020 fejn il-partijiet qablu li l-kirja tiġi itterminata, u li d-depożitu jinżamm mis-sid*** *minkejja li l-inkwilina kienet ser ittemm il-kirja wara perjodu li jaqbeż is-sitt xhur mitluba minn Artikolu 11(1) tal-Kap. 604 tal-Liġijiet ta' Malta. Issir referenza għal Artikolu 5(3) tal-Kap. 604 tal-Liġijiet ta' Malta illi jgħid li: "F'każ ta' kunflitt bejn il-kuntratt irreġistrat u l-artikoli 7, 9, u 11,* ***l-artikoli li jinsabu fl-Att għandhom jipprevalu****." Għalhekk, f'dan il-każ,* ***jipprevali Artikolu 11(1) tal-Kap. 604 stante illi anke n-notifika tal-intenzjoni tal-inkwilna, saret fiż-żmien mitlub mil-liġi u ma teżisti ebda ġustifikazzjoni biex is-sid iżomm id-depożitu****."*

The word of the law supersedes the wording of the contract. It is the law that prevails; you cannot circumvent the law through agreement, otherwise that would render the law useless.

…or contractual stipulation:

Doris Psaila v. Plamen Penev (06/04/2021 – ADJ)

> *"Din it-tilwima tikkonċerna talba da parti tas-sid sabiex titħallas is-somma ta' €700 li is-sid qed tgħid li hija dovuta bħala żamma tad-depożitu minħabba dak li tgħid klawsola tmienja (8) tal-iskrittura tal-kera u cioe' illi* ***jekk il-kirja tintemm qabel l-għeluq tagħha, is-sid ikollha dritt li żżomm id-depożitu imħallas.***
>
> *Għalhekk jifdal illi l-Panel jara jekk hemmx lok għal żamma tad-depożitu minħabba illi l-inkwilini ħallew il-kirja kmieni. Quddiem il-Panel hawn kirja ta' sentejn li ai termini tal-Artikoli 11(1)(b) tal-Kap. 604 tal-Liġijiet ta' Malta tattira l-penali taż-żamma tad-depożitu, kemm-il darba l-kerrej jirtira mill-kera qabel ma jagħlaq iż-żmien ta' disa' (9) xhur mill-bidu tagħha. Jirriżulta mill-iskrittura ta' kera illi l-kirja bdiet fl-ewwel (1) ta' Frar, 2020,* ***u l-inkwilini talbu t-terminazzjoni fl-ewwel (1) ta' Marzu, 2021 u cioe' tlettax (13)-il xahar wara.*** *Għalhekk it-talba skond il-kawżali miġjuba ma timmeritax akkoljiment, bla ħsara għad-dritt tas-sid illi ġġib kwalunkwe talba għaż-żamma tad-depożitu taħt kawżali differenti."*

If lessor terminates lease amicably (without reservation as to deposit) he relinquishes right to claim deposit:

Andre Pio Catania et v. Sdrjan Vincic (28/04/2021 – ADJ)

> *"Il-Panel ma jistax jifhem eżattament x'inhi t-talba tar-rikorrenti; hu x'inhu, il-Panel għandu quddiemu skrittura li turi illi linkwilin ma ħalliex il-kera kif imfisser fl-Artikolu 11 tal-Kap. 604 tal-Liġijiet ta' Malta, imma* ***kien hemm ftehim bejn il-partijiet****, u allura anke jekk il-Panel iqis it-talba bħala waħda għaż-żamma tad-depożitu, għal dawn ir-raġunijiet xorta waħda iqis li din ma jimmeritahiex tiġi milqugħa."*

This is referring to a case where the lessor does not object to the termination, and the landlord agrees to the termination without any dispute, but then the landlord decides to claim the deposit. If the landlord promises in any way to return the deposit, he is bound by that promise.

If lessor agrees to premature termination in writing, not entitled to retain entire deposit:

Keila Milan Soto v. Joseph Pullicino (15/09/2021 – ADJ)

Fil-mertu, il-Panel jinnota illi huwa minnu illi l-inkwilina ivvakat il-fond lokatizju minghajr ma taghat in-notifika fiz-zmien xahrejn hekk kif mitlub mil-Ligi, ai termini tal-Art 11(2). Il-Panel ma jistax ma jinnotax ukoll illi l-inkwilina hadet id-decizjoni li tivvaka l-istess fond u tidhol f'arrangament ma' sid iehor, ghal fond lokatizju iehor, ***wara li l-intimat ikkonferma ghal iktar minn darba bil-miktub li f'kaz li hija tivvaka l-fond mikri, ma kellu ebda problema li jirritorna d-depozitu****. Dawn il-messaggi gew ikkonfermati anke mill-intimat fis-sottomissjonijiet tieghu. Il-Panel jinnota wkoll li wara li l-inkwilina imxiet fuq dak li qallha s-sid u dahlet f'kuntratt lokatizju iehor, l-intimat biddel fhemtu u qallha li issa kien se jimxi mad-dettami tal-ligi. ... Il-fatti u c-cirkostanzi tal-kaz in kwistjoni huma anomali izda l-Panel ma jistax ma jinnotax li* ***f'kaz fejn hemm qbil bil-miktub u weghda da parti tas-sid, li ser jirritorna d-depozitu, ma jistax imbaghad isir abbuz mill-jeddijiet li taghti l-ligi****. Il-Panel jifhem illi l-inkwilina halliet il-fond, anke ghaliex kellha f'idejha dan l-obbligu da parti tas-sid. Ghaldaqstant, in vista ta' dan l-obbligu car da parti tas-sid (liema obbligu l-Panel ma jistax semplicement jaqbad u jinjora - anke ghaliex l-inkwilina agixxiet mohhha mistrieh,*

konsegwent ghal dan l-obbligu), ***il-Panel ser jghaddi sabiex jilqa' t-talba parzjalment fl-ammont ta' €725.***

Despite notice of termination (non-renewal by lessor), lessee still bound by notice of premature termination:

Miriam Schembri v. Nathan Jason Duncan et (27/05/2021 – ADJ)

> *"Dwar l-ewwel kap, il-Panel jikkunsidra illi għalkemm is-sid kienet informat lill-inkwilini illi hija ma kienetx bi ħsiebha iġġedded il-kirja mal-għeluq tat-terminu miftiehem,* ***l-inkwilini xorta waħda, jekk xtaqu jitilqu qabel l-għeluq tat-terminu, kellhom jagħtu l avviż ta' xahar b'ittra reġistrata kif jiprovdi l-Artikolu 11(2) tal-Kap. 604 tal-Liġijiet ta' Malta****. Għaldaqstant is-sid għandha raġun illi titlob illi in vista tan-nuqqas da parti tal inkwilini li jagħmlu dan, titlob illi iżżomm id-depożitu imħallas."*

Jonathan Bugeja v. Erika Arias (08/07/2021 – ADJ)

> *"Din it-tilwima tikkonċerna talba da parti tal-inkwilina biex tikseb lura d-depożitu imħallas, liema depożitu s-sid ma jridx jirritorna stante l-fatt illi meta s-sid ta d-debitu avviż lill-inkwilina, li ma kienx bi ħsiebu jġedded mal-għeluq tal-perjodu miftiehem, l-inkwilina qabdet, telqet mill-fond ftit jiem wara li rċeviet l-ittra, mingħajr ma tagħat id-debitu avviż. L-inkwilina tipprova targumenta illi ġialadarba l-kirja ma kienetx se tiġġedded, hija kellha l-jedd li tħalli l-fond meta trid. Hawnhekk is-sid għandu raġun; l-avviż li bagħat hu iservi biss biex l-inkwilina tkun avżata binnuqqas ta' volonta' tas-sid li jġedded il-kera mat-tmiem tagħha, bl-ebda mod ma jfisser li dan lavviż joħloq xi tqassir tal-kera jew illi b'xi mod jagħti d-dritt lill-inkwilin jaqbad u jħalli l-fond."*

Revision Questions

- ***What is the consequence if the tenant wants to terminate the lease after 4 months?*** He has to pay a penalty being that he loses his deposit. Panel's decisions are to the effect that he will forfeit one month's rent but no sum in excess of that.

- ***What happens if the tenant leaves after 8 months?*** He doesn't lose his deposit, provided due notification in the form prescribed by the law is given to the landlord. Absent this, the tenant still relinquishes the deposit.

- ***What happens if the landlord gives notice of non-renewal 6 months into the contract?*** The effect is that the contract expires on the date stipulated by the parties.

- ***What happens if the landlord gives notice one month before expiration of the contracts?*** It will be renewed, and the tenant need not do anything. By operation of the law, there is a renewal for another year.

The main amendments are:

- It introduced the minimum term of 1 year.
- It also introduced the notion of compulsory registration – failure of which, there is a fine.
- It also introduced the 3-months notion from the expiration of the lease, by the landlord. Unless the landlord notifies the tenant three months before the expiration of the term of his intention not to renew the contract, in that case the contract is renewed for a further one year. Hence, there is ***a presumption in favour of renewal.***
- There is also the premature withdrawal by the tenant. The premature withdrawal consists in the right of the tenant beyond the lapse of the mandatory period to withdraw without penalty. Different periods apply to whether it is a 1-year lease, 2-year lease or 3-year lease.

1st significant change = 1 year minimum.
2nd = first 6 months are mandatory for the tenant (cannot withdraw without penalty – the period *di fermo*) but beyond tenant may withdraw provided 1 months' notice is given (period *di rispetto*).
3rd = the landlord is bound to give 3 months' notice from expiration of non-renewal; otherwise, the contract is renewed for another term. So, if the landlord is happy with the tenant, he can do nothing, and the contract is renewed for another year. This is known as the concept of the 'rolling lease'. The lease is constituted once and unless either of the parties acts to terminate it, you have the indefinite renewal of the lease which is voluntary. The rent must remain fixed throughout the entire duration.

Forbidden Clauses

The concept of ***forbidden clauses*** is very similar to that found in consumer law. As we said, when speaking about freedom to contract, this not only means the freedom to enter into a contract but also the freedom to change certain things within a contract. When there is a shortage, in this case of accommodation, one of the contracting parties will find itself in a stronger bargaining position. This is where you start having standard terms which impose an excessive burden on the tenant who in this case would be the weaker contracting party – for the tenant, it is a simple take it or leave it and leave it means homelessness or at best, housing precariousness. This is why the PRLA, on the same basis as consumer law, on the assumption that there is a weaker party, lists a number of forbidden clauses. If a forbidden clause is included in the contract, it is completely ineffective. It is null.

These are covered in Article 7:

Forbidden clauses
7. (1) Any of the following clauses which are inserted in a private residential lease contract, shall be deemed to be without effect:

(a) clauses which provide for ***the automatic termination of the contract*** *other than the non-fulfilment of the lessee's obligations under articles 1554, 1555, 1555A and 1614 of the Civil Code or the non-observance of any one (1) of the conditions of the lease for which termination had been expressly foreseen:*

Provided that where the lessee fails to pay punctually the rent due, the lessor shall always call upon the lessee in accordance with article 1570 of the Civil Code;

[…]

Termination of lease (Article 7(1)(a))

There are certain safeguards, also dictated by public law, on an eviction procedure and we will see the problems currently in Malta which are impeding quick, rapid evictions from rental properties. The rapidity of the eviction procedure is one of the most important elements for landlords. So, by improving the eviction procedure, you make the market more appealing to landlords because if you have someone overhauling the property, i.e., someone who remains in occupation beyond the

occupation of the term, the landlord is not only not receiving rent but missing out on the opportunity to rent the property.

This clause is saying that the termination of the lease can only be demanded on the basis of clauses which expressly foresee the termination of the lease. But more importantly, is the ***proviso***:

Provided that where the lessee fails to **pay punctually the rent due**, *the lessor shall always call upon the lessee in accordance with article 1570 of the Civil Code;*

Here we are dealing with the eventuality of a tenant being in default and therefore, having a situation of a landlord who is not being compensated for the use of his property and, on top of that, needing to terminate the agreement as soon as possible so that the property can be reassigned to someone else who would start paying the rent.

Article 1570 of the Civil Code and Article 1569 foresee the cessation of the lease.

Cessation of lease upon happening of resolutive condition
1569. (1) A contract of letting and hiring shall also be dissolved ipso jure upon the fulfilment of a condition under which the dissolution of the contract was expressly covenanted, saving any action for damages which may be competent to the covenantee according to law.

(2) If the dissolution of the contract is covenanted in the event of either of the parties failing to perform that which he has promised, the dissolution shall take effect only from the day on which the covenantee shall have, by means of a judicial act, given notice to the covenantor of his intention to avail himself of the covenant.

(3) In the cases referred to in this article, no time for clearing the delay can be granted to the party in default.

Or on the ground of non-performance
1570. A contract of letting and hiring may also be dissolved, even in the absence of a resolutive condition, where either of the parties fails to perform his obligation; and in any such case the party aggrieved by the non-performance may elect either to compel the other party to perform the obligation if this is possible, or to demand the dissolution of the contract together with damages for non-performance:

Provided that in the case of urban, residential and commercial tenements where the lessee fails to pay punctually the rent due, the contract may be terminated only after that the lessor would have called upon the lessee by means of a judicial letter, and the lessee notwithstanding such notification, fails to pay the said rent within fifteen days from notification.

Article 1569 foresees the cessation of a lease upon the happening of a resolutive condition, whilst Article 1570 foresees the termination of a lease on the ground of non-performance. The difference between the two is that Article 1569 foresees the dissolution *ipso jure*; by operation of law. This is when the cause of dissolution is ***expressly agreed as a resolutive condition***. Upon the happening of that event, the lease is dissolved *ipso jure*.

Both Articles involve a default by the tenant but in Article 1570, the default would not have been agreed expressly as a resolutive condition in the contract. So, the effect is that although there is a default, the contract is not dissolved *ipso jure* – in this case, a Court case must be instituted, and you have to prove the ground of dissolution and the effects must be determined by the judge. There is no dissolution by operation of law in which case the judge would have his hands tied since the parties would have agreed for the contract to be dissolved on the happening of a particular event.

Under Article 1570, if the default is non-payment of rent, there is an additional procedure which the lessor must follow contained in the proviso. In such case, the contract may be terminated only after the lessor would have called upon the lessee by means of a judicial letter and the lessee notwithstanding fails to pay the said rent within 15 days from notification. So, Article 1570 is stating that it is not sufficient that the lessee does not pay the rent; the lessor must undertake further procedure by calling upon the lessee by means of a judicial letter and the default only happens if the lessee doesn't honour his obligations within 15 days from the letter.

In accordance with the proviso, if the tenant in a private residential lease is defaulting in payment, the landlord must summon the lessee by means of a judicial letter and wait 15 days for the tenant to pay.

The question is: if this is contemplated under Article 1570, why did the PRLA make reference to it? The reason is in the ***pre-2020 judgement*** of ***Emanuel Muscat v. Maria***

Elsdon (CoA 16/05/2017). In this case, the residential lease agreement contained the following clause:

> *"Should the lessee fail to pay the rent within two weeks from the due date, the Lessor should have the right to rescind without warning this agreement ipso jure and this without prejudice to his claims for payment of any amount which is still due."*

The nature of this clause is clearly that of an express resolutive condition. However, when the landlord filed the case for eviction, the tenant objected and said it wasn't notified in accordance with the procedure of Article 1570. The landlord, in turn, argued that in this case, dissolution in case of non-payment of rent was agreed as an express resolutive condition and the procedure is only tied to when it is not an express resolutive condition because Article 1570 is dealing with non-performance but in this case, the applicable article is Article 1569. The argument of the landlord, hence, was the dissolution *ipso jure* upon the lapse of the 14 days as agreed in the contract. They could prove that 2 weeks following the due date, rent was not paid, the resolutive condition came in immediately and therefore, the contract is dissolved.

The Court upheld the reasoning of the landlord but in so doing, it rendered the safeguards that the legislator tried to introduce in Article 1570 as ineffective because as a matter of fact, whenever you have the two parties agreeing on an express resolutive condition in the case of non-payment of rent, the safeguard where you have to summon the tenant by means of a judicial letter becomes redundant because that article did not apply.

The CoA held:

> *"Il-qorti ma tarax li kien hemm htiega li ssir l-interpellazzjoni li jikkontempla l-artikolu 1570(2) tal-Kodici Civili gialadarba klawzola 16 qeghda tikkontempla l-hall tal-kirja ipso jure wara li jinghata avviz minn sid il-kera. L-artikolu 1570 qieghed jikkontempla l-kaz fejn fil-ftehim ma jkunx hemm espressament miftiehem il-hall tal-kirja tant hu hekk li qieghed jipprovdi x'jigri meta parti ghall-kuntratt tonqos minn obbligazzjoni u fil-kuntratt ma jkunx hemm il-kundizzjoni rizoluttiva espressa."*

This position can no longer be upheld for private residential leases and in fact, the proviso in Article 7(1)(a) is addressing precisely what came out of this case.

So, Chapter 604 is trying to ensure that in the case of private residential leases, the landlord must always in the case of non-payment of rent adhere to the procedure laid down in the proviso to article 1570 – before filing an action for dissolution on the basis of non-payment for rent, the landlord has to summon by means of a judicial letter + 15 days.

Practical Questions

Scenario 1:

The tenant is in default of more than 2 months. He receives this letter and asks you whether he is bound to leave the apartment.

> [Address of Lessee]
>
> **Without Prejudice**
>
> I write for and behalf of my client [The Lessor]
>
> Reference is made to the [Lease Agreement] dated the [Date of Agreement] relative to [Property Address]. You are hereby being formally called upon to surrender the free and vacant possession of the said tenement by not later than the 15th March, 2024 in view of the fact that you are in default of the monthly rent payments which were due on the 1st February, 2024 and 1st March, 2024 in violation of the lease agreement and of law, and, furthermore, you have also failed to effect payment of the utility bills for the period from 1st December, 2023 onwards.

This is a legal letter, i.e., a letter sent by a lawyer without any additional formality. It is not, therefore, a judicial letter which must be filed in the registry of the law courts.

The tenant receives this letter, they admit that they haven't paid rent for the past 2 months and he/she comes to you. The question is: is the tenant under a legal obligation to leave on the 15th of March? No. For starters, this is not a judicial letter as necessitated under Article 1570. Moreover, even had it been a judicial letter, the tenant would have 15 days within which he can pay the arrears and therefore, fix his

position. Lawyers often send legal letters as an attempt to resolve the issue without going to court.

Scenario 2:

The tenant is in default of more than two months. The landlord changes the locks in virtue of the following clause: *"may rescind this agreement ipso iure and resume effective possession of the tenement without the need to institute proceedings in court. In such cases possession vests ipso iure in the lessor from the date of default."*

In this case, the lessee is not paying rent, and the landlord goes and changes the lock of the property. The tenant challenges him and the landlord points him to this clause in the agreement. So, both parties agreed that if there is default by the tenant, the contract would be dissolved *ipso jure* without needing to go to Court. Moreover, in such case possession would vest ipso jure in the landlord.

This clause is ***illegal*** in a way that it transcends civil law and goes into a breach of criminal law. This has always been illegal – this is ***spoliation*** under civil law and ***ragion fattasi*** under criminal law. The law doesn't want people to take the law into their own hands.

The situation before 2020 was such that you would have landlords not changing the lock but limiting the supply of water and electricity, rendering the property non-utilisable.

What is important is that the landlord doesn't take unilateral action by evicting the tenant forcibly (either by changing the lacks, reducing supply of water and electricity, etc).

Remember that *ragion fattasi* is an offence under Article 85 of the Criminal Code:

> *Provided further that in cases of arbitrary or forced evictions of an occupant from the property which he occupies as his primary residence, including any unpermitted entry into the property, removal of furniture, appliances or personal belongings from the property, or the suspension or interruption of water and electricity services, in whichever manner, including the installation of devices which enable the owner to suspend the direct supply of water and electricity services to the property, the fine*

(multa) shall not be less than one thousand five hundred euro (€1,500) and not more than four thousand euro (€4,000).

Moreover, this is a matter of human rights law – in fact, under the **International Covenant on Economic, Social and Cultural Rights**, signed and ratified by Malta, the UN Human Rights Committee (HRC) says:

> *"The Committee binds States not only to refrain from carrying forced evictions but also to ensure the necessary legislative means to prohibit such action on the part of private persons or bodies."*

We can see a convergence between public law (the right to housing) and private law (the action of spoliation). Understand that ***an eviction cannot take place arbitrarily***.

This has also been discussed by our Courts:

Trevor Arends et v. Veroncia Mizzi (FHCC 10/10/2011)

> *"[Il-konvenuta/sidt il-kera] taccenna għall-Artikolu 15 tal-kuntratt li jgħid li f' kaz li l-inkwilin jikser xi kundizzjoni tal-kirja jew jonqos li jħallas il-kera fi żmien ġimgħa, hija "may rescind this agreement ipso iure and resume effective possession of the tenement without the need to institute proceedings in court. In such cases possession vests ipso iure in the lessor from the date of default." Tispjega li meta saret taf li kien hemm terzi persuni li kienu qegħdin juzaw il-fond, hija applikat l-Artikolu 15 tal-kuntratt.*
>
> *Illi f'din il-kawża il-konvenuta ma tistgħax tiddefendi ruħha lanqas billi tgħid li skond l-iskrittura hija setgħet tirriprendi l-pussess għaliex saret taf li l-fond gie mgħoddi lil terzi. L-ewwel nett il-provi li kellha ma huma xejn ħlief persuni li qalu li raw terzi fil-fond. **Barra minn hekk ebda artikolu f'kuntratt ma jista' jagħti poter lil xi parti li minn jeddha tieħu l-liġI b'idejha. Propju dak li l-istitut tal-actio spolii jrid jarġina**."*

William Charles Merchant v. John Bartolo et (FHCC 28/02/2014)

> *"Illi ai termini tal-klawsola sitta (6) tal-kuntratt ta' kera, kien hemm patt espressa bejn il-partijiet li jipprovdi għal terminazzjoni awtomatika tal-kuntratt tal-kera. Fil-fatt din il-klawsola tistipola illi:*
>
> *"F'każ li l-inkwilin jonqos milli jħallas skadenza waħda ta' kera, jew inkella jikser xi obbligazzjoni oħra ta' dan il-ftehim u jibqa' hekk moruż sa żmien seba' (7) ijiem minn meta jigi avzat b'dan in-nuqqas permezz ta' ittra registrata jew ufficjali jew affissjoni, din il-lokazzjoni tigi tterminata awtomatikament mingħajr ebda bzonn ta' xi formalita' oħra ... allura din il-lokazzjoni tkun ipso jure terminata għall kull fini u effett tal-liġi u l-inkwilin jkun qed jippossedi l-fond mingħajr titolu u illegalment."*
>
> *L-argument tal-konvenuti illi l-kuntratt gie terminat ipso jure ma jregix – **dan ma jintitolaħhomx jaqbdu u jbiddlu s-serratura u f'każ li l-attur jibqa' fil-post mingħajr dritt li jagħmel dan kellhom jirrikorru għall-proċeduri legali u mhux jieħdu l-liġI b'idejhom."***

Scenario 3:

Tenant is in default of more than 2 weeks. The landlord wants to file a claim for eviction immediately in virtue of the following contractual stipulation: *"Should the lessee fail to pay the rent within two weeks from the due date, the lessor shall have the right to rescind without warning this agreement ipso jure and this without prejudice to his claims for payment of any amount which is still due."*

Scenario 4:

Landlord owns a property in Mosta which is currently in possession of the tenant, in virtue of a lease dated 29 January 2020. The lease was duly registered with the Housing Authority. On the 29 January 2021, it was automatically renewed for a further year in accordance with Chapter 604. Following the renewal, the lessee failed to pay rent or utility bills, amounting to €8,153.17.

In this case, everything is regular in the sense of registration. Following the renewal, the lessee failed to pay the rent and utility bills and the landlord comes to you for a

remedy. Assume you have summoned the tenant, given her time to pay and the tenant still hasn't paid.

We now have to file a court action. What does one demand from the RRB?

- Declaration of default and consequent eviction of tenant.
- Declaration of rent arrears.
- Payment of water and electricity arrears.
- Penalty clauses.
- Judicial fees.

First of all, a declaration of the rent, rental arrears, and arrears of utility bills and if we want, we could go even further in the case of any penalty clauses and also the judicial fees. Also, compensation for the period during which the tenant would have occupied the property beyond the expiration of the lease.

One of the important aspects emerging from this example is that simply because the lease was renewed does not mean that you cannot take action against the tenant during the additional term of 1 year of the lease. The renewal doesn't mean tenant protection to the extent of allowing the tenant to occupy the property without paying rent. Despite renewal, the moment the tenant misses a rental payment, he becomes susceptible to action by the landlord first under the proviso Article 1570 and now, the Court action seeking to obtain eviction.

The scenario is: the tenant hasn't paid rent, we have sent a judicial letter which has been notified to the tenant, we have waited 15 days for the tenant to pay, the tenant remains in default and so, at this point we need to file an action for eviction.

The Eviction Procedure Before the Rent Regulation Board

Under Maltese law, there exists a special court – the Rent Regulation Board (RRB) – dealing only with cases relating to lease. The ***constitution of the RRB is found under Chapter 69*** and not in Chapter 604.

Article 16(4) of Chapter 69:

(4) Without prejudice to any other law the Board shall also decide **all matters affecting the leases of urban property including residential as well as commercial property** *in terms of Title IX of Part II of Book Second of the Civil Code, Of Contracts of Letting and Hiring, including causes relating to* **the occupation of urban property where such leases have expired after the termination of the rent**, *and* **any damages resulting during such period of occupation:**

Provided that matters relating to the validity of a contract of lease, shall be examined by the courts of civil jurisdiction, so however, that **any other matter following the determination of such matters relating to validity** *shall fall under the competence of the Rent Board.*

The Rent Board shall also have the competence to **decide demands related to maintenance, repairs, defects and faults of the tenement including latent ones, damages or improvements, amounts due for water and electricity and any amount left by way of security deposit by the tenant,** *where such demands are included in other demands or pleas made before the Board, over which the Adjudicating Panel has no jurisdiction.*

Powers of the Board (Article 16A(1)(a)):

16A.(1)(a) In actions before the Rent Board, where the demand is solely for the eviction of any person from the lease or sub-lease of any urban, residential or commercial tenement, with or without a claim for rent or any other consideration due or by way of damages for any compensation, up to the date of the surrender of the tenement, **it shall be lawful for the applicant to demand in the sworn application that the Board gives judgment allowing his demand, without proceeding to trial:**

*Provided that when the demand for eviction is made with a claim for rent or any other consideration due or damages for any compensation***, the Rent Board shall decide the demand for eviction at the first hearing before deciding any other demands made by the applicant:**

Provided that the applicant shall, in his sworn application state that the respondent has no defence to the action:

Provided further that the applicant shall also file together with the application a sworn affidavit containing facts relative to the claim, and confirming that such facts are within

his knowledge. The applicant may also file together with his application an affidavit of any other third party confirming facts relative to the claim.

This Article, introduced in 2009, states that the landlord may demand eviction ***without proceeding to trail***. "Without proceeding to trial" means the '*giljottina*' (special summary proceedings).

What is its main characteristic? This doesn't mean not listening to both parties but means that this is a special procedure wherein the defendant (in this case, the tenant) is not requested to present a formal reply. Rather, he is simply summoned by the Court after the Court would have received the application of the landlord to appear in Court without filing any judicial act, on that specific date, and to present the Court with a *prima facie* justification as to why he should remain in occupation of the property.

So, the landlord makes a demand and goes for this procedure (it is important that the landlord makes clear this action as the Court cannot apply it *ex officio*), the Court will simply summon the tenant and hears him, and if it finds that the tenant has no reasonable justification for remaining in occupation of the property, the Court ***will proceed on that same day to order the tenant's eviction from the property.***

This is laid out in **Article 16A(5)**:

(5) (a) If the respondent fails to appear to the sworn application, or if he appears and does not contest the proceedings taken by the applicant, on the ground of irregularity or inapplicability, or, having unsuccessfully raised such plea, does not by his own sworn evidence, or otherwise, satisfy the Board that he has a prima facie defence, in law or in fact, to the action on the merits, or otherwise discloses such facts or issues of law as may be deemed sufficient to entitle him to defend the action, the Board shall forthwith give judgement, allowing the applicant's claim. The respondent may make his submissions to contest the proceedings taken by applicant on the ground of irregularity or inapplicability by means of a note to be filed in the registry of the Board or during the hearing.

If the respondent successfully contests the proceedings on the ground of irregularity, or inapplicability, or if he satisfies the Board that he has a prima facie defence to the action, or discloses such facts or issues of law as may be deemed sufficient to entitle him to defend the action or to set up a counter-claim, he shall be given leave to

defend the action and file a reply within twenty days from the date of the order referred to in paragraph (d).

Where leave to defend is given, the action shall be tried and determined, on the same acts, in the ordinary course as provided in this Ordinance.

The order giving leave to defend shall be made orally, a record thereof being kept in the proceedings.

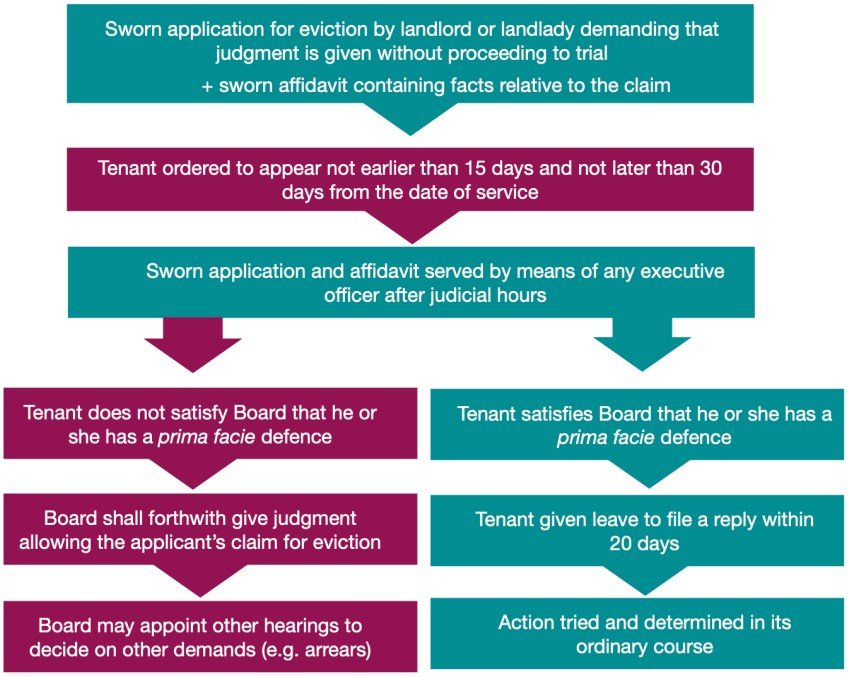
"*The RRB shall decide the demand for eviction at the first hearing before deciding any other demands made by the applicant.*" This means that if on top of the demand for eviction, the landlord also has additional demands (demand for arrears, rental arrears, etc), they are ***not*** also decided on the day. In virtue of an amendment to Chapter 69 introduced through the PRLA, the judge will first determine the urgent matter of eviction and then it will proceed to trial but only with respect to the other demands that need the presentation of further evidence.

The Court will grant the tenant 3 weeks within he can file a reply and from then, the case will take the ordinary course.

The fact that a magistrate is to pronounce eviction on first hearing regardless of any other pending matters including arrears was an amendment introduced through Act XXVIII of 2019. Before 2020, there was a massive problem – the landlord would make a concurrent demand both for the eviction of the tenant and for the payment for arrears. Even if the matter for eviction would be clear, the magistrate would not be able to order the eviction because there would still be elements to prove with respect to the arrears. So, there was something which was prohibiting the judge from ordering the eviction on that date. Now, the magistrate presiding the RRB may order the eviction through summary proceedings and then, if there are any other pending matters, such as arrears, will proceed to trial normally. But at least the order for eviction is out.

Note that the special summary proceedings have to be demanded specifically by the landlord, i.e., that the RRB doesn't proceed to trial.

Special summary proceedings under Article 16A:



How does it take for a landlord to obtain an eviction order from the RRB?

If the process works efficiently, the law gives the impression that an eviction can take as early as 15 days from the date of the service.

> 16A *(3) In the cases referred to in sub-article (1), the sworn application shall be served on the respondent without delay; and he shall be ordered to appear not earlier than fifteen days and not later than thirty days from the date of service:*
>
> *Provided that in the case of non-observance of the provisions of this article the Board shall not stop proceedings by special summary proceedings but shall give such orders as it may consider appropriate so that the rights of the parties be not prejudiced.*

However, in **K. Xerri & S. Cutajar**, "The Adjudicating panel on private residential leases: A review of the first eighteen months":

> *"From an analysis of the judgements delivered by the Rent Regulation Board covering the 30-month period between January 2020 until May 2022, one may*

> *argue that the summary eviction process in Malta and Gozo remains a relatively slow ordeal, despite the steady progress registered over this same period. In 2020, the RRB delivered 18 summary eviction decisions dealing exclusively with the eviction of tenants from residential properties and it took, on average, 220 days or 7.3 months, for a landlord to effectively evict a tenant from his or her property after filing the initial application in the Court Registry. In 2021, the RRB delivered 20 summary decisions and the average duration of these procedures went down to 176 days or 5.9 months, an improvement of little less than a month and a half when compared to the previous calendar year."*

This is the period from the day of the filing of the sworn application to the date until when the tenant is allowed to remain in occupation of the property after the eviction order. The eviction order will not order the tenant the following day but within a month or two, and sometimes even 3.

K. Xerri and S. Cutajar identified 4 main themes or underlying reasons observed from the qualitative analysis of these judgements vary from:

1) The manifest difficulties experienced by the Court Registry and plaintiffs in effectively notifying tenants that the judicial action has been instituted against them…

2) The lack of uniformity in the peremptory periods for the vacation of the dwelling house by the tenants [the period it takes because the court ordering the eviction will give the tenant a month or two or three].

3) The judicial acts were served in Maltese despite the tenants being foreigners who could neither speak nor understand the language, and the lengthy process of appointing deputy curators for either unknown tenants or foreign tenants who had left the country prior to the commencement of the judicial proceedings.

4) There were several instances wherein the tenant did not have legal representation at the time of his or her effective notification, and the Board reasonably delayed the delivery of the judgement until the tenants in question contacted the Legal Aid Malta Agency or a local lawyer of their choice.

A case in point is ***Natalie Caruana v. Jonathan Sant*** **(RRB).** In this case, the tenant was in default of payment and the landlady filed a claim for eviction on 28 December 2021. However, the decision didn't come before the 25 November 2022.

In this case, the first sitting was appointed for the 14 February. But when they appeared, they found that the tenant had not been notified. If you keep sending the Court marshal and he doesn't serve notice because he cannot find the tenant because he is rendering himself unavailable, you proceed to another procedure which is the publication. Of course, that takes time. In this case, the tenant was only notified before the 4 July. When notified, the Court appointed the judgement for the 15 July, on which date the Court was satisfied that the tenant had no *prima facie* valid defence and therefore, ordered the eviction. The Court gave the tenant one month to evict.

On the 15 July, the Court decided on the eviction in line with the procedure laid down in the law and it deferred the case for evidence to be presented by the claimant:

> *"Illi wara li eżamina r-rikors ġuramentat tar-rikorrenti u l-atti processwali l-Bord huwa tal-fehma li r-rekwiżiti proċedurali kollha li titlob il-liġi taħt lArtikolu 16A tal-Kapitolu 69 tal-Liġijiet ta' Malta, ġew sodisfatti.*
>
> *Għaldaqstant, il-Bord huwa tal-fehma li fiċ-ċirkostanzi, t-talba kif dedotta fir-rikors promutur, hija ġustifikata, u hemm lok li s-sentenza tingħata bid-dispensa tas-smigħ tal-kawża a tenur tal-Artikolu 16A tal-Kap. 69 ghal dak li ghandu x'jaqsam ma l-ewwel*
> *erba' (4) talbiet tar-rikorrenti.*
>
> *DECIDE*
> *Għal dawn ir-raġunijiet, dan il-Bord jaqta' u jiddeċiedi billi jilqa' l-ewwel erba talbiet tar-rikorrenti ghal dak li ghandu x'jaqsam mat-talba ghall-izgumbrament ta' l-intimat*
> *mill-ambjenti in kwistjoni u f'dan is-sens jordna l-izgumbrament ta' l-intimat Jonathan Sant ID 449685 mill-fond mikri, ossia 282, 'Highlands', Block A, Flat 4, Triq il-Bazilika, Mosta inkluz il-garage bin-numru disa' (9) fil-livell -1 fl-istess kumpless u jordna lill istess intimat sabiex jirritorna c-cwievet relattivi lir-rikorrenti entro terminu ta' xahar mil-lum liema terminu huwa wiehed perentorju."*

Eventually, after deciding the eviction, the Court also settled the matter relating to the arrears. The case continued and then you had a second judgement on the 2 December 2022 which closed the matter completely by ordering the tenant to pay the pending arrears.

> *… it-total ta' arretrati ta' kera u hlas ghall-okkupazzjoni minn Mejju 2021 sal-15 ta' Awwissu 2022 jammont ghal hmistax il-elf u hames mitt Ewro (€15,500). Il-Bord hu tal-fehema li minn dan l-ammont ghandu jitnaqqas id-depozitu ta' €1,000 li jirrizulta li thallas lill-attrici mal-kuntratt u li ma ngabet ebda prova mill-attrici li fil-kalkoli talammonti reklamati minnha tali depozitu kien gja ttiehed in konsiderazzjoni. Ghalhekk l-ammont dovut huwa ta' erbatax il-elf u hames mitt Ewro (€14,500). Kwantu ghall-kontijiet tad-dawl u ilma mill-11/10/21 sa 12/7/22 oht l-attrici tghid li dawn jommontaw ghal €409.*
>
> *KONKLUŻJONI*
>
> *Illi għal dawn il-motivi, il-Bord qieghed jiddisponi mill-kumplament tat-talbiet tar rikorrenti billi jilqa' l-hames u s-sitt talbiet attrici u jikkundanna lill-intimat Jonathan Sant ID 449685 (M) iħallas lir-rikorrenti s-somma ta' erbatax il-elf disa mija u disa Ewro (€14,909) rappreżentanti:*
>
> *(i) arretrati ta' kera dovuti skond l-iskrittura ta' kera tad-29 ta' Jannar 2020 rigward il-fond in meritu ghal perijodu minn Mejju 2021 sa Jannar 2022,*
> *(ii) hlas ta' okkupazzjoni tal-istess fond minn Frar 2022 sal-15 ta' Awwissu 2022 u;*
> *(iii) arretrati ta' kontijiet ta' dawl u ilma mill-11/10/21 sa 12/7/22 bl-imgħax mid-data ta' din is-sentenza u*
> *(iv) bl-ispejjeż inkluz dawk relatati mal-publikazzjoni ghal fini ta' notifika kontra l-istess intimat.*

This is just a practical example through which one can understand the difficulties faced by landlords most of the time in notifying the tenant in time to trigger the proceedings. But at least, one can see how the law is written in such a manner as to make sure that when the landlord obtains a remedy, he obtains as extensive a remedy as possible, going beyond the eviction, trying to mitigate any losses he could have made during that course of time when the tenant was occupying the property without paying any rent.

Over-holding and Occupation without Title

Article 18 of the PRLA:

Over-holding of rented premises by tenant

18. (1) A tenant in default of his obligations, who remains in occupation of the rented tenement beyond the lapse of his title, shall be bound to pay the lessor an amount equivalent to the rent until the date of the effective eviction of the property.

(2) A demand for such compensation may be made simultaneously with the demand for termination of the lease and, or for the eviction of the lessee from the rented tenement.

(3) Nothing contained in sub-article (1) shall preclude the lessor's right to obtain compensation for any greater damage.

This states that when a tenant is in default of his obligations by remaining in occupation of the property, the landlord may, in the demand for eviction, also make a demand to be compensated for an amount equivalent to the date until the eviction.

So, to be in addition compensated, such as in the case of ***Natalie Caruana v. Jonathan Sant*** (RRB), for the period during which the tenant would have remained in the occupation without paying the rent because eviction proceedings are ongoing. Now the law expressly allows the landlord to demand compensation for the period during which the tenant would have over-held the property.

Article 1559 of the Civil Code:

1559. Where the lessor and lessee have made a description of the condition of the thing let, the lessee is bound to restore the thing in the same condition in which he received it, according to the description, except as regards that which may have perished or deteriorated through age or irresistible force.

Penalty Clauses

Jesmond Psaila et v. Kevin Attard (11/01/2018 – RRB)

"Jikkundanna lill-intimat jhallas dik is-somma dovuta ammontanti ghal €3,961 oltre l-imghax legali mill-15 ta' Marzu 2016 kif ukoll tikkundanna lill-intimat ihallas dik is-somma hekk likwidata ta' €200 kuljum ghad dewmien biss bhala danni mill-1 ta' Settembru 2017, bl-imghax legali sal-effettiv zgumbrament."

Compensation Based on Potential Rent

Maryanne Brincat v. Alfred Mamo (04/08/2016 – RRB)

> *"[Talbiet] jikkundanna wkoll lill-intimati jhallsu lill-esponenti flimkien u in solidum danni in linea ta' kumpens ghall-okkupazzjoni illegali fit-termini tal-ligi, bir-rata ta' €950 fix-xahar b'effett mill-1 ta' April 2016 sad-data tac-cediment tal-fond.*
> *[Decizjoni] Ghaldaqstant, il-Bord … qieghed jilqa' t-talbiet kollha tar-rikorrenti u dan fil-konfront biss ta' l-intimat Alfred Mamo u ghall-fini ta' zgumbrament qed jipprefiggi zmien tletin (30) jum mil-lum, spejjez a karigu ta' l-istess intimat."*

Dr Rachel Loporto Montebello noe v. Alex Caruana Soler (FHCC 10/07/2014)

> *"Irid jigi issa kalkolat l-ammont dovut ghall-okkupazzjoni bla titolu tal-fond mill-1 ta' Lulju 2010 sal-ahhar ta' Gunju 2011. Il-Qorti tqis gust kif inghad li dan jigi kalkolat b'gustizzja lejn il-partijiet mhux skond ir-rata miftehma bejn il-partijiet ghal perjodu ta' okkupazzjoni bejn l-1 ta' Lulju 2011 u l-ahhar ta' Settembru tal-2001 cioe €4,816.66 fix-xahar izda a bazi tal-offerta li kellu l-attur ghall-blokka cioe €105 kuljum u li jidher li l-attur kien propens jaccetta li kieku ma kienx hemm il-problema tal-okkupazzjoni mill-konvenut. Billi irid jigi kalkolat sena ta' okkupazzjoni bla titolu l-ammont dovut mill-konvenut ghal dan il-perjodu hi ta' €38,325 (€105 x 356 jum)."*

So, penalty clauses are allowed. Compensation on potential rent is also allowed. These are very much in line with Article 18 which is reproduced above to substantiate

Article 18 further and to show how the situation was pre-2020 but post-2020, the situation is being consolidated.

Where the Person Occupying Property is Not a Recognised Tenant

Where the person occupying the property is not a recognised tenant, that doesn't mean that the landlord has no alternative, but it means that the landlord may apply for a special summary procedure under Article 167 COCP.

167. (1) In actions within the jurisdiction of the superior courts or the Courts of Magistrates (Gozo) in its superior jurisdiction, where the demand is solely -
[…]

(b) for the eviction of any person from any urban or rural tenement, with or without a claim for ground rent, rent or any other consideration due or by way of damages for any compensation, up to the date of the surrender of the tenement, or
[…]

it shall be lawful for the plaintiff to pray in the sworn application that the court gives judgment allowing his demand, without proceeding to trial:

Provided that the plaintiff shall, in his declaration made in terms of article 156(3) state that in his belief there is no defence to the action:

Provided further that the plaintiff may also file a sworn affidavit of any other person, containing facts relative to the claim, and confirming that such facts are within the knowledge of such a person.

(2) In the cases provided for in this article, the sworn application shall be in writing according to the prescribed form and shall contain an order to the defendant to appear before the court, on an appointed day and at a stated time.

Forbidden Clauses (continued)

(b) clauses which authorise the lessor to reduce, without equivalent consideration, any benefits stipulated in the contract;

(c) clauses that exempt the lessor from any of the responsibilities to which he is bound by law, including those foreseen in articles 1545 and 1546 of the Civil Code, without equivalent consideration;

(d) clauses which impose the payment of additional considerations, other than the rent, the deposit, the insurance on the contents of the tenement and any contributions foreseen in accordance with article 11(4) of the Condominium Act:

Provided that any expenses relating to the ordinary maintenance of the common parts of a condominium shall be limited to those duties which, in accordance with the Civil Code, are at the charge of the lessee:

Provided further that the lessee may request the restitution of any amounts unduly paid;

(e) clauses which impose on the lessee any additional consideration for the use of the movables, beyond the payment of rent for the use of the dwelling:

Provided that the lessee may request the restitution of any amounts unduly paid;

(f) clauses which stipulate the payment of a fixed amount, separate from the rent, for the consumption of water, electricity or other utility service if such amount does not reflect the actual consumption of such utility services by the lessee calculated at the rate reflecting the primary residential use of the tenement and the total number of occupants residing therein;

(g) clauses which limit the use which one is expected to make of a residence, subject to the observance of the provisions relating to the maintenance and improvement contained in the Civil Code and the rules of good neighbourliness.

(2) The registration of the private residential lease contract by the Authority shall not imply the validation of any unlawful terms contained therein.

Sub-Article (c)

Scenario 5:

The landlord claims in the contract that he will not be responsible for the lift repairs in virtue of the following clause: *"The Landlord will not be held responsible in any way for the administration, maintenance and upkeep of the common parts of the block or for any inoperable machinery/services within the common parts of the block."*

So, the landlord is effectively telling the tenant that should they have a problem, they should speak to the administrator. This is not lawful because it is a fundamental duty of the landlord to keep the property in a good state of repair. This is a forbidden clause, and it is up to the landlord to make sure that the lift is fixed if it was rented out with a functioning lift.

A clause exempting the lessor from their duty to maintain the common parts arose in ***Andre Karl Camilleri et v. Jasmine Traskoska*** (23/06/2020 – ADJ). This was a request by the landlord to retain the deposit, and the tenant claimed that the amount was not due since the lift was malfunctioning. The contract contained the following clause: *"The Landlord will not be held responsible in any way for the administration, maintenance and upkeep of the common parts of the block or for any inoperable machinery/services within the common parts of the block."*

The Panel held:

> *"Il-Panel ikkunsidra illi l-ligi taghti* ***obbligu lis-sid*** *permezz ta' Artikolu 1539(b) tal-Kap. 16* ***illi jzomm il-haga mikrija fi stat li wiehed jista' jaghmel minnha l-uzu li ghalih giet mikrija****. Ma jirrizultax lill-Panel li kien hemm xi ftehim li l-inkwilini jigu prekluzi milli jutilizzaw il-lift u allura t-tgawdija mistennija tinkwludi wkoll l-access tal-proprjeta permezz tal-lift. ...*
>
> *Ta' min ifakkar illi ai termini ta'* ***Artikou 7(1)(c) tal-Kap. 604****, ghandhom jitqiesu bla effett klawsoli illi "jezentaw lil sid il-kera minnn kwalunkwe wahda mir-responsabbiltajiet li huwa ghandu fil-ligi, inkluzi dawk previsti fl-artikolu 1545 u 1546 tal-Kodici Civili." ...* ***Huwa fatt illi l-inkwilini f'dan il-kaz ma setghux***

> *jutilizzaw il-lift hekk kif huwa fatt li l-obbligu tat-tgawdija ta' fond mikri huwa reponsabbilta' tas-sid u mhux ta' xi terz iehor. ...*
>
> *Il-Panel* ***japprezza illi s-sid ghamel pressjoni mal-amministratur sabiex jirranga l-lift, biss dan ma jezonerahx mill-obbligu impost fuqu mil-ligi;…***
>
> *Il-Panel iqis ghalhekk illi* ***l-inkwilini kienu gustifikati ihallu l-fond*** *u ghalhekk m'ghandhomx ibatu s-sanzjoni tat-telf tad-depozitu. ... il-Panel qieghed jichad it-talba tar-rikorrent u jordna r-rifuzjoni b'mod immedjat tad-depozitu fl-intier tieghu lill-intimati."*

Sub-Article (d)

Other examples of forbidden clauses: payment of additional fees, such as clauses on reimbursement of agency fees. These are not allowed.

This arose in ***Kenneth Debattista et v. Amor Ben Nouraddine*** (14/01/2021 – ADJ)

> *"Għar-rigward tal-Agent fee: l-Artikolu 7(1) tal-Kap. 604 tal-Liġijiet ta' Malta jiprovdi għall-klawsoli li huma meqjusa mil-Liġi bħala klawsoli projbiti.* ***Is-sub-inċiż (d)*** *jgħid illi huma bla effett "klawsoli li jimponu l-ħlas ta' konsiderazzjonijiet addizzjonali, minbarra l-kera, id-depożitu, l-assigurazzjoni fuq il-kontenut tal-fond u kwalunkwe kontribut previst skont l-artikolu 11(4) talAtt dwar il-Condominia". Kwalunkwe ftehim dwar ħlas ieħor huwa projbit. Bl-istess raġunament,* ***il-Panel jikkunsidra illi jekk huwa jagħti xi rimbors għall-ħlas ta' agent fees, huwa jkun hu stess qed imur kontra l-ispirtu ta' dan l-Artikolu fil-Liġi.*** *Filwaqt li l-Panel jifhem il-frustrazzjoni ta' min ikun ħallas spejjeż ta' aġenti bil-prospett li l-kirja iddum għal ċertu perjodu u jdaħħal ċertu introjtu, u mbagħad il-kerrej iħalli l-fond ferm qabel, ma jfissirx daqstant li l-Panel jista' jordna rimbors tal-agent fees imħallsa.."*

Sub-Article (f)

Scenario 6:

Tenant comes to you with the following concern: From the beginning of the contract, the landlord insisted on them paying 100 per month in advance, promising to recalculate an amount of payment as soon as he gets actual bill from arms ... Landlord still refuses to give us access to arms account, and just one bill (for the first three months) was provided for all the time.

So, the landlord is making the tenant pay €100/month for water and electricity. This is no longer allowed – this practice was very often leading to the overcharging of the tenant. The tenant was being charged in excess of what he was actually consuming. If I am consuming €30 worth of electricity, why am I being charged €100?

So, clauses on flat rates for utility payments are not allowed. This was held in Oleg Novakhatnii et v. Mina Mansy (03/02/2021 – ADJ):

"From the beginning of the contract he insisted on us to pay 100 per month in advance, promising to recalculate an amount of payment as soon as he gets actual bill from arms ... He still refuses to give us access to arms account, and just one bill (for the first three month) was provided for all the time."

Filwaqt li ma huwiex il-kompitu tal-Panel illi jsolvi id-diżgwit bejn il-partijiet fejn m'hemmx talba li taqa' fil-kompetenza tal-Panel, il-Panel iħossu obbligat ifakkar lill-partijiet fid-dispożizzjonijiet tal-Artikolu 7(1)(f) u tal-proviso tal-Artikolu 17(4)(b) tal Kap. 604 tal-Liġijiet ta' Malta."

In respect of ***water & electricity***, make reference to Article 17. This ensures that the landlord acknowledges the number of persons residing in the tenement. This is because, unfortunately, due to the system operated by ARMS, the number of persons registered as residents of that particular unit made a difference as to the applicable tariff.

ARMS has a dual tariff system – if you reside in the property as a resident, it charges you a discounted amount, but if you are not a resident of that property, the ordinary

amount would apply. So, unless tenants are acknowledged as residents of the property with ARMS, the tenants will end up being over-charged because they will be charged at the domestic rate when in reality they would be entitled to the residential rate. This is how Article 17 must be understood.

Moreover, the lessee is now entitled to request a copy of the bill prior to paying water and electricity arrears.

Provided further that the tenant shall not be bound to pay the utility services until he is provided with a copy of the bill, unless he would have direct access thereto.

This has been upheld by the Panel time and time again:

- *Konrad Sultana v. Dominic Scerri* (11/08/2020): "*Għar-rigward tal-allegat konsum tal-ilma, dawl, u Internet, ir-rikorrenti ma provax suffiċjentament l-ammont attwali li ġie ikkonsmat. F'dan ir-rigward il-Panel ifakkar illi huwa prinċipju bażilari tal-liġi illi min jallega irid jipprova, u f'dan il-każ il-Panel mhux sodisfatt sal-grad rikjest mil-liġi li t-talba f'dan is-sens ġiet sodisfaċentament ipprovata.*"

- *Nadia Xuereb v. Rita Massia* (01/10/2020) & *Josette Devitt Vassallo v. Wei Fang* (29/07/2021): "*Dwar it-talba għall-kontijiet tal-utilitajiet, il-Panel iħoss illi kienet ġustifikata l-oġġezzjoni tal-intimata milli tħallas il-kontijiet sakemm tiġi preżentata b'kont uffiċjali u attwali. Dan in linea ma' dak li jgħid il-proviso tal-Artikolu 17(4) tal-Kap. 604 li jgħid illi "l-inkwilin ma għandux ikun marbut li jħallas servizzi ta' utilita' sakemm ma jkunx provdut b'kopja tal-kont, sakemm ma jkollux aċċess dirett għalih.*"

- *James Psaila v. Seby Thomas Puthenveettil* (26/10/2020) & *Jiyeon Eom v. Stephen Caruana* (10/06/2021): "*Il-Panel jinnota illi l-Bill Calculator preżentat mir-rikorrent fih disclaimer ċar illi dan huwa "self-help tool intended for illustrative purposes only. ARMS Ltd neither guarantees the accuracy of the calculation nor gives warranty or representation of any kind in any circumstance." Fid-dawl ta' dan id-disclaimer u fid-dawl ta' dak li jgħid l-Artikolu 17(4) tal-Kap. 604 tal-Liġijiet ta' Malta, il-Panel ma jistax joqgħod fuq il-Bill Calculator bħala li jissodisfa il-vot tal-liġi biex it-talba titqies ipprovata.*"

The Adjudicating Panel for Private Residential Leases

Establishment of the Adjudicating Panel for Private Residential Leases
23. (1) There shall be an Adjudicating Panel for private residential leases, hereinafter referred to as the "Adjudicating Panel".

(2) The Adjudicating Panel shall have exclusive jurisdiction to decide disputes relating to private residential leases to which the Act applies, in so far as the claim does not exceed the value of five thousand euro (€5,000), involving issues mentioned in:

(a) articles 1540, 1541, 1542, 1543, 1545, 1546, 1548, 1556, 1559, 1561, 1562, 1563 and 1564 of the Civil Code in as long as these do not include a demand for the termination of the lease;

(b) article 17 in so far as the dispute is solely between the lessor and the lessee; and

(c) any dispute relating to the retention or reimbursement of any amount left by way of security deposit as indicated under article 6(f):

Provided that a demand made in accordance with the articles mentioned in sub-article (2) may also be included in other demands or pleas made before the Board, in any action affecting private residential leases, over which the Adjudicating Panel has no jurisdiction, including where the demand is made for the termination of the lease or the eviction of any person from the lease:
Provided further that the Adjudicating Panel shall only hear claims relative to registered contracts.

(3) The administration and organisation of the Adjudicating Panel and the administrative control of its officers and employees shall be the responsibility of the Chairperson of the Authority.

Keep in mind that this Panel is created *ad hoc* to deal with claims relating to the matters contained in articles (a), (b), (c), mostly relating to the retention of the deposit and repairs made necessary after the tenant's departure. Moreover, it only hears money claims up to €5000 and it has ***NO POWER TO DECIDE ON EVICTIONS***.

There is also no competence on rental arrears, but this might be amended soon.

There are some judgements which state that deposit retention is the ***exception*** and not the rule.

For example, in ***Eva Li Johanna Felicetti v. Vincent Galea et*** (19/05/2021) where the ADJ said:

> *"Il-Panel jikkunsidra illi fin-nuqqas ta' raġuni kontemplata mil-Liġi li tiġġustifika iż żamma tad-depożitu, ir-rimbors huwa r-regola u mhux l-eċċezzjoni. Għaldaqstant, il-Panel ma jistax jiġġustifika ż-żamma tad-depożitu jekk ma tkunx sorretta b'raġunijiet sostnuti bi provi."*

So, it is imposing new standards – before, a problem with the private rental market was that landlords would retain deposits at times without having any just or valid reason at law. Now, there is the Panel which is at least giving a forum where the tenant can go and contest the redemption by the landlord.

Refer to slides 57-80 on judgements.

Martina Camilleri (4th Year)

Dr Phyllis Aquilina

Reletting of Urban Property (Regulation) Ordinance, Chapter 69 of the Laws of Malta

Introduction

In this section of this study unit, we will be covering the special law of Chapter 69, the Reletting of Urban Property (Regulation) Ordinance. Up till now, we have covered Chapter 604 of the Laws of Malta which applies to leases entered into after 2020, and which regulates all aspects as a special law on residential leases.

When dealing with Chapter 69, one must be placed into the historical picture in which this law came about, and which has stayed with us now for almost 100 years.

Context

The first Maltese law on letting in a written and compiled form was the law in the Civil Code, i.e., the ordinances. At the time of the coming into effect of the Civil Code, these provisions were the only law regulating leases and they applied across the board. That is to say, they regulated all kinds of leases, whether they were residential, commercial, or of other tenements including rural leases.

After WWI and because of the dire social conditions which developed after that war, the legislator at the time felt the need to introduce limitations to the freedom of contract of the parties ***in order to favour the tenant***. The first way in which this was done was through a temporary law in the form of an ordinance which was the precursor of Chapter 69. This was the first legislative initiative to restrict the freedom of contract of lessors and lessees in relation to urban immovable properties. So, ***not all kinds of tenements*** but only urban immovable properties.

That temporary law, because of the social conditions at the time, became a permanent ordinance in 1931 and it is still with us today – Ordinance XXI of 1931, the Reletting of Urban Property (Regulation) Ordinance.

Applicability

It must be understood that this Ordinance applies ***only from the moment in time that the original term of the lease expires***.

What is meant by 'original term of the lease'? If one were to look at the Civil Code prior to the coming into force of Act X of 2009, one will find that ***a lease could be contracted verbally***, i.e., the written form was not an essential requirement for its validity and also, ***it was not necessary for the parties to agree on the period of lease***.

Today, the written form and the express stipulation of the time are *sine qua non* requirements in terms of Article 1531 et seq of the Civil Code. To the contrary, prior to Act X of 2009, both of these elements were not necessary *ad validitatem*. This means that whilst they could be obeyed, this was not a requirement at law.

Moreover, since the stipulation of time was not a requirement, the old Article 1532 of the Civil Code made provision for a presumed term of the lease in the case that the parties failed to stipulate it in writing. This Article still exists, however it now expressly states that it does not apply with regard to the lease of urban, residential, and commercial property made after 1 January 2010.

One will note that the presumed term of the lease was and is linked to the payment of the rent. If the parties agreed on an annual rent, then the presumed term of the lease was a one-year term.

Hence, the *'original term of the lease'* is either: (1) the term for which the parties would have ***expressly agreed*** that the lease would continue, or (2) ***the presumed term*** in terms of the old Article 1532 in the case that the parties didn't agree on the term.

Once this has been defined, it is now stated that ***for the duration of the original term of the lease, Chapter 69 does not apply***. Chapter 69 comes into play from the date of expiration of the original term of the lease onwards.

To be clear, during the original term of the lease, the Civil Code would continue to apply. From the point that the original term of the lease expires, whether express or implied, onwards, the lease would be regulated by Chapter 69 if the tenement and the tenant satisfy the definitions which we have in Article 2 of this Ordinance.

So: up till now, we have said that we started with a situation where all leases were regulated by the Civil Code, irrespective of the type of tenement being let. The first legislative intervention came in 1929 which was pro tenant, the purpose being ***security of tenure***. That temporary law became a permanent law in 1931 and is still with us today, being Chapter 69.

The Reason Behind Intervention

The question posed is: *why was there this intervention? What purpose did the legislator intend to achieve with the enactment of this very complex special law?*

Simply put, the two salient purposes for this legislative intervention were ***to secure the tenure in favour of the tenant at a controlled rent (rent freeze)***.

So, ***two purposes***:

1. To ensure that the tenant can continue enjoying the tenement with respect to which he had entered into a lease, i.e., to continue in occupation by title of lease, and

2. To take away the freedom of the lessor to demand and enforce increases in rent.

Fast forward to 1995, Act XXXI of 1995 was the law that ended the applicability of Chapter 69 but ***only for leases which were still to be created***. Therefore, it was only with prospective effect. This meant that ***leases of urban immovable properties which started after 1929 but before the 1st of June 1995, and were leases of urban immovable properties, are (some of these leases are still in existence) subject to this Ordinance.***

This is expressly stipulated in Article 46 of Chapter 69:

Operativeness of this Ordinance
46. (1) The foregoing provisions of this Ordinance shall not apply to the lease of any premises entered into on or after the 1st June, 1995:*
Provided that articles 16 to 45 shall also apply to all leases made after the 1st June, 1995.
For the purposes of this article -
(a) the term "lease" includes any letting as defined in article 44(a), (b) or (c) and includes a sub-lease;
(b) the renewal of a lease on or after the 1st June, 1995 (whether such renewal be conventional, legal, customary or otherwise) shall not be deemed to be a lease entered into on or after the 1st June, 1995.

Therefore, the first question to ask when you have a problem or client before you in connection to a lease is ***when did the lease start?*** That is the fundamental question under the Maltese regime of letting and hiring. If the lease started between 1929 and 1995, the second question to ask is ***what kind of tenement is being let?*** If that tenement falls within the scope of the definition of 'premises' in Article 2 of Chapter 69, i.e., it is an urban immovable property, then the extension of the lease (reletting) in that case is subject to the Chapter 69.

A judgement with an explanation of this time bracket (1929-1995) is ***George Briffa et v. Raymond Gauci et*** (First Hall 06/05/2009):

> *"Illi l-atturi qed jitolbu l-iżgumbrament tal-konvenuti mill-fond imsemmi fir-rikors. Il-konvenuti qed jeċċepixxu li l-Qorti mhix kompetenti ai termini tal-Kap. 69 tal-Liġijiet ta' Malta, li huma dejjem ottoperaw ruħhom ma' dak li ġie miftiehem fil-kuntratt ta' lokazzjoni, u li huma għandhom titolu validu biex jokkupaw il-fond.*
>
> *Kif wieħed jista' faċilment jikkonstata l-kwistjoni f'din il-kawża hija jekk il-kirja in kwistjoni taqax taħt il-provvedimenti tal-Kap. 69 jew inkella taħt dawk tal-Kodiċi Ċivili. L-iskrittura saret fit-2 ta' Lulju 1996 u kellha tibda tiddekorri fl-1 ta' Awissu 1996. Il-kera kienet ta' Lm5.50c kuljum, pagabbli kull xahar bil-quddiem u togħla b'lira kuljum kull erba' snin. Għalhekk il-kera ġiet awmentata fis-sena 2000 u fis-sena 2004 iżda fit-3 ta' Lulju 2008 l-atturi bagħtu ittra uffiċjali lill-konvenuti li permezz tagħha nformawhom li ma kienux se jerġgħu jġeddu l-kera u talbuhom jiżgumbraw mill-post.*

Kif sewwa rrimarkaw l-atturi fin-nota ta' sottomissjonijiet tagħhom l-Att XXXI ta' l-1995 ħareġ 'il barra mill-effetti tal-Kap. 69 il-kirjiet kollha li kellhom isiru wara l-ewwel ta' Ġunju 1995. L-uniku diffikolta' li kien hemm kienet jekk dan l-att kienx japplika wkoll għall-fondi kummerċjali u dan minħabba li l-isem ta' dak l-att kien propjament **Att biex jemenda l-Liġijiet tal-Kiri tad-Djar.** *Allura kien hemm dubju jekk il-fondi kummerċjali jaqgħux taħt din il-liġi. Kif pero' qalet il-Qorti ta' l-Appell fil-kawża fl-ismijiet* **"Iris Scott vs Alfred Borg"** *(14 ta' Jannar 2002), l-Att XXXI tal-1995 dikjaratament jemenda l-Ordinanza li tirregola t-tiġdid tal-Kiri ta' bini (Kap 69) billi jintroduċi artikolu 46 li jistipula sempliċement li 'Id-dispożizzjonijiet ta' qabel din l-Ordinanza ma għandhomx japplikaw għall-kiri ta' xi fond li jsir fl-1 ta' Ġunju 1995 jew wara dik id-data'. B'din l-emenda l-leġislatur sempliċement jiddikjara li kull kera ta' fond, hu x'inhu, li jsir wara dik id-data, ma kienx igawdi mill-protezzjoni tal-Kap. 69. Il-Qorti qalet ukoll li ma kien hemm ebda dubju dwar l–intenzjoni tal-leġislatur u ladarba l-liġi ma kinitx tiddisingwi bejn kirjiet ta' djar residenzjali u fondi kummerċjali, ma kienx konsentit għall-Qorti illi tiddistingwi fejn il-liġi ma tiddistingwix.*

Stabbilit dan allura huwa ċar li fil-każ in eżami japplikaw il-provvedimenti tal-Kodiċi Ċivili. L-iskrittura li permezz tagħha saret il-kirja ma tindikax durata tal-lokazzjoni iżda biss li l-kera kellha togħla kull erba' snin kif fil-fatt sar għal darbtejn. Ladarba l-kuntratt ma ndikax terminu, japplika l-artikolu 1532 (a) tal-Kap. 16 illi jipprovdi illi l-kiri ta' bini jitqies magħmul għaż-żmien li għalih ikun meqjus il-kera, jiġifieri għal sena jekk il-kera jkun ġie miftiehem tant fis-sena, għal xahar jekk il-kera jkun ġie miftiehem tant fix-xahar, u għal ġurnata jekk ikun ġie miftiehem tant kuljum. Għalhekk f'dan il-każ strettament il-kera kienet bit-tant kuljum u allura kienet tiġġedded kull ġurnata, iżda peress li l-kera kienet titħallas kull xahar huwa naturali li kienet qed tiġġedded kull xahar. F'kull każ l-atturi ssodisfaw dak li jipprovdi l-artikolu 1568 billi nfurmawhom anke uffiċjalment permezz ta' att ġudizzjarju li riedu jtemmu l-kirja, ossija ma jerġgħux iġedduha. Kwindi meta ntemm il-perjodu relattiv il-konvenuti ġew qed jokkupaw il -fond bla titolu."

Definitions

Let us start considering the definitions which establish the scope of operation, that is, the circle within which this special law applies. The majority are found in Article 2.

1) Letting

The first definition is that of 'letting' which we have in Article 44 of Chapter 69. *'Shall be deemed…'* implies that here there is an irrebuttable presumption.

> *44. (1) For the purposes of this Ordinance the term "letting" shall be deemed to include -*
> *(a) any* ***emphyteutical grant for a period not exceeding sixteen years****; and*
>
> *(b) notwithstanding any stipulation to the contrary, any agreement in pursuance of which any person has been accommodated* ***in consideration of payment periodically recurrent*** *in any premises other than a hotel or lodging-house licensed as such by the Police; and*
>
> *(c) any other agreement whereby* ***any real or personal right on any premises****, which right includes that of occupation of those premises, is granted under* ***an onerous or commutative title for a period of time****, whether such time is established by fixing a certain specified day or whether it can be established by reference to a certain or to an uncertain future event.*
>
> *(2) The provisions of this article shall not apply to accommodation provided by the Government in requisitioned premises.*

From this definition, one can immediately note the very extensive scope of operation for which this Ordinance applies. It doesn't only cover a relationship which the parties expressly agree to be a lease – besides the contract of lease, this Ordinance extends its application to emphyteutical grants which are granted for less than 16 years and any other agreement through which a person is accommodated in return for payment, except for a hotel or lodging house.

So, irrespective of what the parties agree, stipulate or how they classify their relationship, that is still considered to constitute letting for the purposes of this Ordinance.

In practice, this means that the protections of security of tenure and the rent freeze afforded by this Ordinance and applicable to the renewed term of the lease also extend to these kinds of contractual relationships.

For obvious reasons, in recent years, this so-wide an extent of protection afforded for so many decades and irrespective of the social and economic changes which our society witnessed, have been repeatedly criticised in human rights judgements.

In particular on the definition of 'letting' in Article 44, one should refer to ***Jeremey Cauchi et v. Avukat Generali et*** (Constitutional Court 26/01/2022).

In this judgement, one will find reference to another special and controversial law, the Housing Act, Chapter 125 of the Laws of Malta. Under older versions of this law, the Housing Secretary (ex-Housing Authority) had the power of requisitioning private property, very often residences but not invariably so, to grant them to third parties for occupation purposes.

Regarding Article 44(2), the Court held:

> *"Rigward ir-referenza li saret għall-Artikolu 44(2) tal-Kapitolu 69 tal-Liġijiet ta' Malta, il-Qorti tirrileva illi dan is-sub-artikolu jeskludi biss l-applikazzjoni tal-Artikolu 44 u mhux tal-Kapitolu 69 tal-Liġijiet ta' Malta fl-intier tiegħu.*
>
> *Għalhekk fil-fehma tal-Qorti huwa ċar li f'dawn iċ-ċirkostanzi, fejn il-kera kienet ilha tiġi mħallsa direttament mis-sidien u aċċettata minnhom minn qabel l-1995 u fid-dawl tal-konsiderazzjonijiet legali magħmula, inħolqot relazzjoni ta' lokazzjoni bejn is-sidien u l-intimati Caruana ben qabel il-ħruġ tal-Ordni ta' Derekwizizzjoni. Għaldaqstant dan l-aggravju tal-atturi huwa fondat u qiegħed jiġi milqugħ."*

2) Premises

the expression "premises" means any **urban immovable property**;

Going through Article 2, especially when looking at the definitions of 'shop' and of 'tenant', express reference is made to two important kinds of urban immovable

property which are subject to this Ordinance, provided of course that they have been let before 1 June 1995. These two important urban properties are ***shops*** and ***dwelling houses***. In today's terms, these refer to ***commercial tenements*** (and the definition of shop lists the different possibilities of a commercial tenement) and ***residential tenements***, respectively.

Dwelling house

A dwelling house is defined in another special law which is still part of our statutes but has lost almost all of its importance – the Rent Restriction (Dwelling Houses) Ordinance, Chapter 116 of the Laws of Malta. This is defined in Article 2:

> *"dwelling house" means a building, a part of a building separately let, or a room separately let, which is let mainly as a dwelling or place of residence, and includes land occupied with the premises under the tenancy, but does not include a building, part of a building or room when let with agricultural land;*

This Ordinance set out ***the concept of fair rent*** which was tightly linked to the rent freeze (i.e., no possibility of change in rent) which was a principle purpose of Chapter 69. The concept of fair rent, without being deleted from the law, lost its relevance when Act X of 2009 set the minimum rent to €185/annum for all residential tenements where the lease had started before 1 June 1995. That minimum rent is set out in Article 1531C of the Civil Code.

In order to understand what the Courts interpret to be included and excluded in the definition of 'premises' for the purposes of Chapter 69, refer to a ***Major Peter Manduca v. Prim Imhallef Professur Hugh Harding*** (Court of Appeal 13/06/1995). The merits of this case regarded a house with a big garden in Sliema and the question before the Court was whether this garden or field annexed to the house was also subject to the protection afforded for the advantage of tenant by Chapter 69 (i.e., security of tenure and rent freeze).

The facts were as follows:

Plaintiff owned a house in Sliema with a large garden attached. Following a deed done before a notary, the garden was segregated, and the segregated part was let out to defendant. The principal issue before the Court was whether this part of the

garden constituted an "urban property" and therefore, whether it fell within the remit of Chapter 69.

This was important because had it not been considered 'urban property', then the Court would have no jurisdiction to hear the case and the same action would need to be instituted before the Bord tal-Kera.

The whole issue surrounded the fact that under the Maltese version of Chapter 69, *"fond"* is defined as *"bini"*. The Court made reference to the decision of the First Court, in particular that when interpreting the law, the starting point is always the ordinary meaning of the terms used and then it is assessed whether the law changed the natural and common meaning, creating a new connotation.

At first instance, the Court started off by going into the definition of a garden, defining it as a *"biċċa art destinate għall-koltivazzjoni ta' fjuri u siġar tal-frott."* It then considered the *ratio legis* of Chapter 69 and the intention of the legislature when promulgating it:

> *"…huwa evidentissimu illi l-leġislatur Malti kien l-aktar ippreokkupat fuq il-protezzjoni ta' djar ta' abitazzjoni…"*

In coming to its decision, the Court made reference to the title of the Act, the definition of 'premises', Article 9(b), Article 10(a)(iii), Article 15(2), Article 25(2), Article 44(b). It concluded:

"…ma tistax tasal għall dik li l-abbli Qorti ta l-Appell issejjaħ "indikazzjoni ċara, inekwivoka u ineluttabbli fil-Kapitolu 69 li dan is-sinjifikat tal-kliem "fond" jew "premises" għandhom jiġu estiżi għall-kelma ġnien f'area urbana ***u dana 'l għaliex ol-kliem "fond" jew "premises" fl-intendiment Ġenerali tal-liġi jidhru illi jirreferu għal djar ta' abitazzjoni jew stabbilimenti kummerċjali*** *u bl-ebda sforz ta' immaġinazzjoni ma jwassal biex "ġnien" waħdu jibda jissejjaħ kostruzzjoni għal-użu ta' abitazzjoni jew għall-użu kummerċjali."*

The CoA agreed with this statement and in reply to the argument in favour of the ordinary meaning of the term, it held:

"L-appellant jistrieħ fuq il-prinċipju li mhux leċitu li l-Qorti tinterpreta kliem fil-liġi li hu ċar – li m'għandhiex tiddistingwi fejn il-liġi ma tiddistingwix. Dan mhux pero' prinċipju assolut u jeħtieġ jiġi temperat fejn hu ovvju – kif hu f'dan il-każ – illi l-interpretazzjoni litterali tkun in contrast mal-kumplament tal-liġi jew l-ispirtu tagħha jew estraneja għaliha….

…l-intendiment Ġenerali tal-liġi kien li jipproteġi djar ta' abitazzjoni, bini, ħwienet jew imħażen….Il-provvedimenti singoli ta' l-Ordinanza kif ukoll l-istruttura Ġenerali tal-leġislazzjoni ma jħalli l-ebda dubbju fil-moħħ ta' min jaqrah quid unum illi organikament il-leġislatur irid jipprovdi għall-protezzjoni tal-kirijiet – anke billi jipprovdi għal tiġdid mill-ġdid tagħhom bil-liġi – ta' fondi maħsuba għall-użu ta' abitazzjoni jew għal użu kummerċjali….

Il-fraži qualunque proprieta' immobiliare urbana għandha tiftiehem u tista' biss tapplika għall-fondi li huma "bini" li jservi għall-abitazzjoni jew ħwienet fis-sens tal-liġi. Ma tista' bl-ebda mod tiġi estiża biex tapplika għal ġnien jew del resto għal tip ta' fondi oħra immobbiljari li mhumiex "bini". Konsegwentement, il-kirja tal-ġnien…hi rregolata mill-providimenti tal-Kodiċi Ċivili."

Consider that in this case, the lease of the garden was not done with the intention that the garden becomes one with the house. It was to be returned at the end of the rental period agreed upon in a good state.

3) Shop

When it comes to 'shop', we have and have always had in Chapter 69 an express definition.

the expression "shop" means any premises principally leased for the sale of any wares or merchandise, whether by wholesale or retail, any market stall, warehouse and any premises licensed for the sale of wine and spirits or refreshments, any cinema hall or any other premises principally leased for the exercise therein of any art or trade or for use as a club;

Censinu Micallef et v. Katald Muscat et (CoA 19/05/2004), *"…biex il-fond in ezami "jigi kompriz fid-definizzjoni ta' "hanut" u cjoe jigi meqjus bhala fond kummercjali regolat mill-provvedimenti tal-Kap 69 irid ikun fond li ghalkemm jissejjah garage (jew*

remissa) ma jkunx hekk, jigifieri remissa fejn titpogga vettura (jew karettun), izda mahzen ghall-merkanzija, li ghall-iskop tal-ligi (Kap 69) jitqies fond kummercjali. Garage/remissa m'huwiex fond kummercjali tant illi s-sid jista' jinghata l-permess biex jirriprendi l-pussess tieghu jekk ikollu bzonn juzah huwa stess jew il-membri tal-familja tieghu. Tip ta' ripreza li mhiex possibbli fil-kaz ta' fondi kummercjali.

Tajjeb li jigi precizat ukoll, bhala konsiderazzjoni pacifika tad-dritt f'materja konsimili, illi meta l-ligi tal-kera semmiet mahzen bhala fond protett minnha ma riedetx tinkludi f'din il-klassifika ta' fondi kwalunkwe fond fejn wiehed jerfa' xi affarijiet, ikunu x'ikunu, imma riedet tikkontempla fondi konnessi man-negozju, jew ahjar fondi li huma "mahzen" fejn wiehed izomm il-merkanzija tan-negozju tieghu Ghalhekk persuna li ghandha hanut u zzomm band'ohra l-merkanzija taghha tkun qeghda tezercita f'dan il-post l-arti jew il-mestjier taghha (Kollez Vol XXX pI p5). Biex allura r-remissa tircievi l-protezzjoni tal-ligi irid ikun hemm dik l-accessorjeta` necessarja bejn in-negozju tal-hanut u l-istess remissa b'mod li tirrendi l-uzu taghha parti minn dak in-negozju u talment inseparabbli minnu li jifforma haga wahda mieghu."

4) Club

Club is also defined,

the expression "club" means any club registered as such at the Office of the Commissioner of Police under the appropriate provisions of law;

Any urban immovable tenement used for a commercial purpose in the widest sense, irrespective of the nature of the activity, and including a club, are premises for the purposes of the Ordinance and therefore, the regime of this law applies also to such tenements if the lease started before 1 June 1995.

When looking at older Court judgements, especially pre-1995 judgements, one will find the distinction often made between the lease of bare commercial premises and the lease of a going concern (*'ħanut avvjat'*). Our Courts have established that for the purposes of Chapter 69, a 'shop' includes only the ***bare commercial premises*** and does not include ***a business concern***. So, if the original lease was concluded in regard to a business concern – for example, a shop which is already being run, there is a commercial activity, and the tenant is hiring the shop as currently operated with the

concern that there is, i.e., the good will, etc, then that lease falls outside the scope of Chapter 69.

So, for the purposes of the definition of shop, the commercial tenement coverable by Chapter 69 is the bare commercial premises. At the time of letting, the object of the lease must have been a bare commercial tenement.

This distinction is explained in:

- *Dr. Louis Vella nomine v. Mediterranean Trading Shipping Co. Ltd* (CoA 07/07/2003):

  "Jibda biex jinghad illi huwa indiskuss illi "mahzen" jirrientra fit-tifsira li l-ligi specjali (Kap 69) taghti lill-kelma "hanut", basta li tali fond huwa attinenti ghan-negozju principali ta' min jikrieh. Kif jinghad fid-decizjoni "Alessandro Cortis –vs- Michele Bugeja", Appell, 10 ta' Marzu 1952, mill-istess kuntest fejn jinsab kollokat jidher li l-ligi "riedet tikkontempla fondi konnessi ma' negozju, jew ahjar fondi li huma mahzen fejn hemm "wares" jew "goods" li huma l-oggett tan-negozju ta' min jikrihom."

  Dan ghaliex ukoll, "il-ligi ghalhekk ma jidherx li tikkontempla bhala "mahzen" protett minnha bhala "hanut"kwalunkwe fond fejn wiehed jerfa' xi affarijiet, ikunu x'jkunu" –"Ferdinand Fiott –vs- John Galea", Appell, 23 ta' Frar 1973; "Adelina Azzopardi et –vs- Karmenu Vassallo", Appell Kummercjali, 15 ta' Dicembru, 1978.

  Issa hu principju pacifiku illi "min jallega tibdil ta' destinazzjoni tal-fond minnu mikri ghandu jipprova sew id-destinazzjoni originarja kemm it-tibdil taghha ghax il-provi li jsostnu l-azzjoni jmissu lill-attur u l-konvenut ma ghandux jipprova l-fatt negattiv" -"Francesco Mallia –vs-Salvatore Guillaumier", Appell, 12 ta' Jannar, 1962."

- *Francesca Zammit v. Carmelo Azzopardi* (Court of Appeal 12/11/1951).

- *Joseph Zerafa v. Alfred Briffa* (Court of Appeal 04/05/1988):

  This dealt with the lease of a bakery.

"…Il-ġurisprudenza tagħna hija fis-sens li mhux għax wieħed iħalli ftit oġġetti f'ħanut b'daqshekk ikun qiegħed jikrih bħala "business concern" meta l-kumpless taċ-ċirkostanzi l-oħra kollha juru l-kuntrarju…

In this case, the Court considered that it could not be said that only a few objects were left in the premises. Moreover, it noted that the contract spoke of the lease of a "bakery" and licenses. For these reasons, the Court concluded that this was a lease of a business concern and was therefore regulated by the Civil Code.

- *Carmen Bugeja et v. John Tanti* (Court of Appeal 25/02/2005):

In this case, the principal issue was whether the lease concluded between plaintiff and defendant was that of a ***business concern***, regulated exclusively by the Civil Code, or whether this was simply the lease of an urban tenement being used as a shop, and therefore, of a ***bare premises***, which is regulated by Chapter 69. This was important because:

"*Jekk ikun jirrizulta li l-ftehim bejn il-partijiet kien li jinkera post vojt biex jintuza bhala hanut allura mat-terminazzjoni tal-perjodu originali tal-lokazzjoni, bis-sahha tad-dispozizzjonijiet tal-Kapitolu 69, kien ikun hemm rilokazzjoni tal-fond skond il-ligi, u f'dan il-kaz il-kompetenza ma tibqax tal-Qrati ordinarji izda ssir tal-Bord Li Jirregola l-Kera.*"

The Court concluded:

"Il-fatt enfasizzat mill-appellant li l-iskrittura in kwistjoni ma ssemmix espressament l-avvjament, mhijiex lanqas cirkostanza determinanti ghall-kwistjoni li qeghda tigi investigata. Dan ghaliex dak li huwa verament determinanti huwa li wiehed jistabilixxi x'kien il-veru oggett tal-ftehim milhuq bejn il-partijiet meta sar in-negozju in kwistjoni bejniethom. Biex jiddetermina gustament din il-kwistjoni wiehed irid jezamina akkuratament l-iskrittura ta' lokazzjoni in kwistjoni, kif ukoll ic-cirkostanzi kollha relevanti tal-kaz, kif jemergu mill-provi akkwiziti fil-process. Ghalhekk, wiehed ikun irid jistabilixxi jekk il-lokazzjoni in kwistjoni kienitx tirrigwarda unikament il-bini nnifsu tal-hanut bhala bare premises, jew inkella din il-lokazzjoni kienitx tinvolvi mhux biss il-bini tal-hanut, izda wkoll u principalment, il-hanut gia` mrawwem, diga` armat ghan-negozju, bil-licenzji kollha mehtiega mill-

awtoritajiet u bl-avvjament li diga` kien igawdi u cioe` b'dawk l-elementi kollha li jikkostitwixxu a going concern

Dak li jrid jigi determinat minn din il-Qorti huwa ezattament jekk l-oggett tal-lokazzjoni in kwistjoni kienx fond gheri, kif isostni l-appellant, jew inkella kienx wiehed ta' hanut avjat u cioe` a going concern, kif jallegaw l-atturi. Fil-fehma konsiderata ta' din il-Qorti, l-fatt li l-appellant inghata d-dritt tas-sollukazzjoni minn terza persuna, basta li din tkun ben vista lis-sid, huwa fatt pjuttost newtrali li bl-ebda mod ma jista' jghin biex tissolva l-kwistjoni devoluta lil din il-Qorti, u li ghadha kif issemmiet.

…wiehed ma jistax ma josservax illi l-ewwel Onorabbli Qorti waslet ghall-konkluzjoni gusta dwar l-oggett tal-lokazzjoni in kwistjoni. Dan kien jikkomprendi mhux biss il-bini tal-hanut in kwistjoni, izda kien jinkludi hanut diga` mrawwem sewwa, diga` armat ghan-negozju li kien qieghed jigi gestit fih fil-mument meta gie konkluz il-kuntratt tal-lokazzjoni, bil-licenzji kollha mehtiega mill-awtoritajiet, u bi klijentela stabbilita u avjament li diga` kien igawdi, f'kelma wahda lokazzjoni ta' "a going concern". Jirrizulta car li meta saret il-lokazzjoni lill-appellant, il-fond in kwistjoni kien ilu ghal hafna snin jintuza bhala hanut, jew ahjar bar debitament licenzjat biex jinbieghu dawk l-oggetti li soltu jinbieghu minn bar, inkluzi wines and spirits. M'hemmx dubju wkoll li l-lokazzjoni kienet tikkomprendi l-istock u l-attrezzi li kienu jezistu fil-hanut fil-mument meta saret il-lokazzjoni in kwistjoni u dan evidentement biex l-appellant ikompli jmexxi l-hanut ghall-ispacc tal-generu li kien li qed jitmexxa qabel. Il-fatt li l-appellant irritorna xi oggetti li kienu jinsabu fil-hanut lura lis-sid fi ftit granet wara li bdiet issehh il-lokazzjoni kif ukoll il-fatt li jidher li l-appellant immodernizza u kabbar in-negozju, ma jbiddlu xejn mis-sustanza tal-punt li ghadu kif gie rilevat u cioe` li l-lokazzjoni ma kienitx tikkoncerna bare premises izda kienet lokazzjoni ta' a going concern."

5) Tenant

(a) in the case of a dwelling-house:

(i) that person ***who has been recognised as a tenant in accordance with any law*** *validly applicable before the 1st June 2021;*

(ii) ***the widow or widower of a tenant****:*

Provided that the widow or the widower shall not have the right to be considered a tenant if he did not inhabit the dwelling-house for four (4) out of the last five (5) years prior to the 1st June, 2008 and, in the case of this sub-paragraph did not continue living with the tenant until the date of his death;

(iii) ***the siblings of the tenant who have continued the lease in solidum together with him:***

Provided that the siblings shall not have the right to be considered as tenants if they did not inhabit the dwelling-house for four (4) out of the last five (5) years prior to the 1st June, 2008, and, in the case of this sub-paragraph did not continue living with the tenant until the date of his death:

Provided further that following the coming into force of the Controlled Residential Leases Reform Act, 2021, no person who has not yet been recognised as the tenant of a dwelling-house up to that date shall qualify as a tenant of a dwelling-house in terms of this definition, except for those who qualify in accordance with sub-paragraphs (ii) and (iii):

Provided further that persons who do not qualify under sub-paragraphs (i), (ii) and (iii) and have lived in the dwelling-house for four (4) out of the last five (5) years before the 1st June, 2008 and have continued to live with the tenant until the date of the demise of the tenant shall continue occupying the dwelling-house for a period of five (5) years from the date of death of the tenant, at the end of which period they shall vacate said dwelling-house. The compensation for the occupation of the dwelling-house that shall be payable to the lessor during the aforementioned period shall be equal to the highest rent amount that may have been payable by the tenant:

Provided further that following the death of the tenant the lessor may file an application in accordance with the provisions of article 4A and if these persons who do not qualify under sub-paragraphs (i), (ii), and (iii) do not satisfy the income and

capital assets criteria of the means-test, the Board shall make a decision in terms of sub-article (4) of article 4A;

(b) in the case of a shop, where the tenant leaves no widow or widower, such persons as are related to the tenant by consanguinity or affinity up to the degree of cousin inclusively, provided, in the latter case, such persons are the heirs of the tenant;

(c) in the case of a club, the person or persons from time to time succeeding in the management or direction thereof,

that it includes any sub-tenant in relation to the tenant

One would ask, why does the Ordinance have to define 'tenant'? Isn't the tenant the person who originally obtained the lease?

The extensive definition of 'tenant' which we will now be considering is the way in which the legislator ensured that the objectives of this law (i.e., the security of tenure and the rent freeze) continue to apply across generations.

The beneficiary of the protection is not only the original lessee (i.e., the tenant who contracted the lease of the premises after 1929 and before 1995) but also ***other third parties***. Generally speaking, these are members of the family of the original tenant who continue the lease of the premises with the reletting being regulated by this Ordinance for as long as they continue to satisfy the definition of tenant.

So, the protection which this Ordinance affords goes to the original tenant, but not only – it goes to all other persons who satisfy the definition of tenant in Article 2 of the Ordinance.

Notably, this definition of 'tenant' has been changed twice.

(1) We started off with the definition in place until the enactment of Act X of 2009 and then Act X of 2009 did a rebus, that is, it changed the definition of tenant without amending the definition itself by adding Articles 1531F and 1531G in the Civil Code, and (2) Act XXIV of 2021 which repealed Articles 1531F and 1531G but amended that content and inserted it into the definition of tenant in Chapter 69.

∴ The definition of tenant in Chapter 69 has undergone 3 periods:

1. ***1929-2009***: the period up to Act X of 2009.

2. ***2009-2021***: in 2009, we had the addition of Articles 1531F and 1531G which revised the definition without a change in Chapter 69.

3. ***2021-now***: finally, after Act XXIV of 2021, we have the deletion of Articles 1531F and 1531G and the new overall definition of tenant in Article 2 of Chapter 69 which is the definition applicable today.

The first initial definition was very wide in its nature, not only referring to the original tenant but also to his/her spouse and members of their family (children, grandchildren and other descendants), giving them the right to continue in the lease as subject to the protections in Chapter 69. With the introduction of Articles 1531F and 1531G, a restriction was imposed on the circle of members of the family of the tenant who were entitled to the same benefits as the original tenant under the Ordinance.

The situation today is even more narrow – the persons entitled to the benefits which this Ordinance affords are those listed in the definition of 'tenant' in Article 2. What is very striking with this new definition is that for the first time in almost 100 years, in regard to leases subject to this Ordinance, after Act XXIV of 2021, ***there will be no more succession of the lease (and therefore, of the protection afforded by the Ordinance) in favour of descendants***. The last generation of tenants who are going to benefit from this Ordinance is the current generation. This was the most recent amendment that we had through Act XXIV of 2021. So, the actual tenant, the spouse (if all the requirements are satisfied) and the siblings.

Besides these family ties criteria, the definition of 'tenant' lays down a means testing criterion. So, besides being the tenant, the spouse or the sibling, we need to look at the means of the person who is claiming to be entitled to the protection afforded by this Ordinance.

There exists a subsidiary law – Continuation of Tenancies (Means Testing Criteria) Regulations, S.L. 16.11 – which sets out in detail how the means test is carried out. This is a two-tier test – the first tier refers to the ***capital means*** of the person claiming the protection and the second tier is the ***income tier***, i.e., the level of income of the

person claiming the protection. The monetary limits differ according to the age of the person claiming to be the tenant.

Take the following situation: someone comes to you and asks you whether the person today occupying a dwelling house in an old lease which started before 1995 is entitled to benefit from the protections afforded by the Ordinance. How would you determine whether that person is a lawful tenant?

You must first start by asking two questions:

1) *Has the lessor accepted that person as tenant in the controlled lease (i.e., the lease subject to the Ordinance)?*

If the person has been accepted as the lawful tenant by the lessor, normally through acceptance of the rent, that is typically enough to conclude that he is the lawful tenant as at 1 June 2021.

2) *Does he fall within the definition of 'tenant'?*

If there has been no such acknowledgement, for example, if the rent was not accepted, then we need to look at the definition of tenant at the time when he succeeded to the lease.

So, the circumstances are normally that the tenant who would have contracted the lease before 1995 would have passed away and a member of his family has continued the lease in his stead. We would need to look at the definition of tenant as it was at the time of his succession to the lease to determine whether he is entitled to the protection. If he falls out of that definition, but the lessor has accepted him as tenant in particular through the acceptance of the payment of the rent, then it would mean that he shall be deemed to have been the tenant on 1 June 2021.

∴ ***family ties + means test*** – the family ties are now very restricted and only if that person satisfies the means tests (his capital and income are less than the minimum prescribed in the regulations).

The Operative Provision

The most important provision of this Ordinance is the operative provision – Article 3. This provision ensures the security of tenure and the rent freeze mentioned earlier.

> *3. It shall not be lawful for the lessor of any premises,* ***at the expiration of the period of tenancy*** *(whether such period be conventional, legal, customary or consequential on the provisions of this Ordinance),* ***to refuse the renewal of the lease*** *or* ***to raise the rent*** *or* ***impose new conditions for the renewal of the lease*** *without the* ***permission of the Board.***

Let us dissect the provision:

- ***"It shall not be lawful"*** – this is a blanket prohibition, the only exception being where the Rent Regulation Board gives permission. So, the permission of the RRB is the only way by which one can free themself from this blanket prohibition.

- ***"…for the lessor"*** – the lessor/s can be the owners of the property, and they normally are, but not necessarily so. The lessor can also be the emphyteuta or the usufructuary – both have the right to grant on lease since lease is a personal right.

- ***"…of any premises"*** – the premises is the place being rented out – (1) the lease must have started before 1995 and (2) the property must satisfy the definition of premises, that is, it must be an urban immovable property. This can be a dwelling/residential tenement, it can be a shop, it can be a commercial tenement (but not a business concern), and it can be any other urban immovable property.

  In ***Major Peter Manduca v. Prim Imhallef Professur Hugh Harding*** (Court of Appeal 13/06/1995), the Court gave a very clear explanation of what the law means by 'urban' as against 'rural':

  "…waqt li d-distinzjoni bejn bini u raba' – żewġ aġġettivi – tibqa' dejjem f'ċerti sitwazzjonijiet dubbja, soġġetta għall-interpretazzjonijiet varji u soġġettivi. Aġġettivi li jikkwalifikaw l-immobbli in relazzjoni mal-lokalita' fejn jinsabu u mhux man-natura intrinsika tagħhom u l-iskop li għalihom huma maħsuba, kostruwiti u utilizzati. La l-immobbli hu deskritt in relazzjoni mas-sit u l-ispazju li jokkupa fih, hu soġġett li jibdel in-natura tiegħu maż-żmien sempliċiment għax jinbidel l-ambjent

fejn ikun sitwat anke jekk hu nnifsu jibqa' ma jintmessx. Allura ***dak li hu rustiku llum jista' għada jsir urban, għax jersaq lejn l-iżvilupp. JIsta' anke jiġri vice-versa. Isir allura konċepibbli li villa jew blokk ta' appartamenti għall-abitazzjoni mdawwra bl-għelieqi ftit 'l barra minn raħal jew belt, jitqiesu li huma rustiċi…"***

- ***"….at the expiration of the period of tenancy"*** – this means following the expiration of the original term of the lease. The original term of the lease must have expired, and this prohibition applies every time that the lease is renewed. Very often, in these kind of leases, the lease is verbal, that is, there is no express agreement on the term and therefore, even the renewed term will be tied to the time for which the rent is agreed. Every time the lease comes for renewal, this prohibition applies.

The scope of prohibition is on 3 different levels:

1. When the lease is up for renewal, the lessor cannot ***increase the rent***.

2. The lessor cannot ***impose new conditions*** (e.g., maintenance and repair conditions).

3. The lessor cannot ***refuse to renew***.

This all except with the permission of the Rent Regulation Board. This is how the protections of security of tenure and the rent freeze in leases to which this Ordinance applies have been secured through the decades and even after the death of the tenant – the prohibition would have continued to apply if the new occupier of the premises satisfied the definition of tenant as it was in force at the time of the succession to the lease. The only way out was and still is through proceedings before the RRB. There were: (1) proceedings for the changing of the rent, to a very limited extent, because of the restrictive concept of fair rent, (2) proceedings for changing the conditions, and (3) proceedings under Article 9 of this Ordinance for the lessor to obtain permission not to renew the lease.

All of this very wide scope of protection for the tenure must be considered against the backdrop of very conservative and pro tenant interpretations by the RRB and also, with reference to Article 15 of the Ordinance. Article 15 was substituted by Act XXIV of 2021 and now states:

15. Clauses that bind the tenant to conditions which are significantly less advantageous than those provided in this Ordinance, whether such clauses have been stipulated prior to the 1st June 2021 or afterwards, shall be considered null and void.

The wording of the provision before Act XXIV of 2021 was even stricter and more pro tenant. In both cases, however, the law is making it unlawful and unenforceable for the tenant to renounce all the benefits which the law affords him. So, if the tenant accepts in writing to give up any of the benefits which this law gives him and therefore, binds himself to obligations which are more onerous on him than what the law provides, those stipulations are null and void. This is another very important pro tenant measure. So, ***protecting the tenant even against himself***.

Lecture summary

We covered the important definitions in order to determine the scope of operation of this law and we also went into the operative provision in Article 3. A basic rule which one must keep in mind is that this law is o***nly applicable to leases which have started before 1 June 1995***. Hence, the first question we must always ask when faced with a question on letting and hiring is when did this lease start? The answer to that question will point to the laws that apply to that particular lease.

Also, another fundamental point about this law is that as the name implies, this law comes into play on ***the reletting***, that is, the extension of the lease. Distinguish, therefore, between the original term of the lease and the renewed term of the lease. So, the time for which originally the letting was contracted (the original term) and any subsequent extension is a renewed term. Chapter 69 comes into play when and whenever there is reletting.

The operative provision – the control/restriction which this law imposes on the freedom of contract of the lessor consists in the obligation of the lessor to continue renewing the lease at the same rent and on the same conditions, every time that the lease comes up for renewal. ***This for as long as the occupier who asks for the renewal, satisfies the definition of 'tenant'.***

That is the way in which up to this day we come to have leases of urban tenements, particular residential and commercial tenements which have been going on for decades because of this very extensive control on the freedom of the lessor directed towards the security of tenure and the rent freeze for the benefit of the tenant.

Act X of 2009

A very important change in the whole outlook and perspective of this law came first in 2009 with the enactment of ***Act X of 2009***. Act X of 2009 was the consequence of a very wide and extensive debate on the reform of old rent laws. Back in 2006, the State had launched a wide public debate on possible reforms to the regime of controls on old commercial and residential leases, the reason being that it was very much felt that these controls had by that time became too far reaching and potentially not proportionate, therefore bringing into the picture a potential violation of Article 1/1 of the ECHR.

An attempt to reform the old rent laws had already occurred in 1995. Act XXXI of 1995 put an end to the application of these special laws, including Chapter 69, to leases contracted after 1 June 1995, but that Act stopped short of addressing the applicability of this law (Chapter 69) to leases contracted before 1 June 1995.

Fast forward to 2008/2009, the time was up for assessing these controls and seeing whether they should be retained or whether they should be reformed. The ultimate decision taken was that reforms ***were necessary***.

This was all taking place in the context of a very important judgement which the EcrtHR delivered in 2006 against Poland, ***Hutten-Czapska vs. Poland*** (19/06/2006). This was the first judgement in which the EcrtHR went into national, restrictive laws of letting and investigated whether they breached Article 1/1. This is in fact the yardstick which determined all of the reforms which we had from 2009 up to this day.

In this case, the EcrtHR investigated a law very similar to Chapter 69 which imposed far-reaching controls in order to secure the tenure and the capacity to pay the rent in favour of tenants of residential tenements. The Court asserted the power of the State to enact and keep in force restrictive legislation controlling the freedom of the parties when it comes to contracts of letting and hiring for the purpose of securing adequate housing possibilities to people whose means are restricted. In principle, therefore, ***the objective behind these controls was accepted***.

However, the Court went on to say that besides the lawfulness and the legitimate aim in the public interest of the legislative measure controlling the freedom of contract,

that legislation must also satisfy a third criterion, which the Court refers to as the principle of a "fair balance". In a nutshell, this principle of fair balance is breached if the restrictive measure to which the State interferes with the freedom of contract of the parties, imposes a **"disproportionate and excessive burden"** on the lessor.

> *"The notion of "public" or "general" interest is necessarily extensive. In particular, spheres such as housing,* ***which modern societies consider a prime social need*** *and which plays a* ***central role in the welfare and economic policies of Contracting States****, may often call for some form of regulation by the State. In that sphere decisions as to whether, and if so when, it may fully be left to the play of free-market forces or whether it should be subject to State control, as well as the choice of measures for securing the housing needs of the community and of the timing for their implementation, necessarily involve consideration of complex social, economic and political issues.*
>
> *Finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, the Court has on many occasions declared that it will respect the legislature's judgment as to what is in the "public" or "general" interest unless that judgment is manifestly without reasonable foundation. These principles apply equally, if not a fortiori, to the measures adopted in the course of the fundamental reform of the country's political, legal and economic system in the transition from a totalitarian regime to a democratic State.*
>
> *Not only must an interference with the right of property pursue, on the facts as well as in principle, a "legitimate aim" in the "general interest", but* ***there must also be a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the State****, including measures designed to control the use of the individual's property. That requirement is expressed by* ***the notion of a "fair balance"*** *that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole. In each case involving an alleged violation of that Article the Court must therefore ascertain whether by reason of the State's interference the person concerned had* ***to bear a disproportionate and excessive burden****."*

For a restrictive measure to satisfy Article 1/1, it must: (1) come out of the law; (2) be directed to achieve a legitimate aim in the general public interest; and (3) strike a fair balance between the interests of the lessor and those of the lessee. In this judgement, the Court found that in so far as the restrictions were coming out of a law, Polish ordinary law, and in so far as that law was directed to secure social housing for people whose means were restricted, then the first criteria were satisfied. The far-reaching extent of the controls for the benefit of the tenant, however, ***breached the third requirement*** given that they imposed a disproportionate and excessive burden on the lessor and because of that, the national legislation was found to be in breach of Article 1/1.

That was the backdrop of the reform which was launched in Malta in 2007/2008 culminating into Act X of 2009. Act X of 2009 ***restricted the definition of tenant***, thereby decreasing the number of people who may be entitled to the benefits of Article 3 of Chapter 69. Besides that, it added Articles 1531A-1531M into the Civil Code.

Unfortunately, the addition of these provisions in the Civil Code gave rise to huge problems of interpretation and huge confusion. This is because these provisions include amendments to the content of the special laws of lease, including Chapter 69. Understand the issue here: we ended up with changes to Chapter 69 and Chapter 116, the Rent Restrictions (Dwelling Houses) Ordinance, not in the ordinances themselves but in the Civil Code.

Notably, these changes included the addition in our law of a minimum rent for residential tenements which were originally let out before 1 June 1995. This meant the doing away with the concept of "fair rent" in Chapter 116 without repealing it because in actual fact, Article 1531C ***stipulates a minimum rent for residential tenements as at 2010 in the amount of €185/year***. Keep in mind that in 2009, many residential tenements locked in these controlled leases had rents which were much less than €185/year.

Another reform through Act X of 2009 is ***the mechanism for annual increase in rent for commercial tenements*** and for ***the increase in rent of residential tenements every 3 years***. These are stipulated in Articles 1531C and 1531D of the Civil Code.

The increase in the case of residential tenements is carried out on the basis of the index of inflation which is published for the purposes of the Housing (Decontrol) Ordinance, Chapter 158. Conversely, with respect to commercial tenements, the increases were set by percentage rates – four consecutive increases for every year from 2010 at 15% and thereafter, at 5% per annum.

In the case of commercial tenements, Act X of 2009 added also a cut-off date for the continuation of the application of the renewal obligation in Article 3 of Chapter 69, set out in Article 1531I. The cut-off date for the obligation of renewal in regard to commercial tenements or shops as defined in Chapter 69, is the 31 May 2028. After this date, the obligation of renewal at the rent increased in terms of Article 1531D in regard to commercial tenements will end. There will be, as the law stands today, no further obligation of renewal.

Also, Act X of 2009 terminated the obligation of renewal in regard to leases of private car garages, and summer residences. In regard to private car garages (therefore, not commercial tenements), and summer residences, the obligation of renewal under Article 3 of Chapter 69 stopped with effect from 1 June 2010. So, there was no such obligation anymore after that date, according to Article 1531H.

In regard to urban tenements falling within the definition of 'clubs', Act X of 2009 added Article 1531J and subsequently, we have the coming into force also of the subsidiary legislation titled Conditions Regulating the Leases of Clubs Regulations, Legal Notice 195 of 2014, S.L. 16.13. In the case of clubs, the obligation of renewal was retained without any end date, and we have new stipulations on how to determine the rent payable by the club.

All of these very far-reaching changes were added by Act X of 2009. Generally speaking, the purpose behind these reforms was to try and attain the 'fair balance' between the rights of the lessor and the rights of the tenant in the wider picture of the necessity of social protection for tenants with restrictive means.

Up until then, however, ***we had no remedy in the ordinary laws, particularly in Chapter 69, for increasing the rent***. By Act X of 2009, the minimum rent was set at €185/annum, and it would go up every 3 years in terms of the index of inflation published for the purposes of Chapter 158 which in reality, was very minimal. Just to put things in perspective, till now, this index has got the minimum up to around

€210/annum. Hence, Act X of 2009 stopped short from addressing the problem of the increase in rent to come to relate to the new commercial reality that has developed over time in the property market in Malta.

So, notwithstanding change, we still had a very big disparity. That disparity with no remedy whatsoever for the lessor to request an adequate increase in rent over time has led the EcrtHR also to find breaches of Article 1/1ECHR by our special legislation on lease. The first pronouncements were in regard to the Housing (Decontrol) Ordinance, Chapter 158 of the Laws of Malta within which one will find the right of conversion from emphyteusis to lease under Article 12.

The first violations which the EcrtHR found against Malta referred to Chapter 158 but eventually, the EcrtHR found also fault with our Chapter 69.

Amato Gauci v. Malta (15/09/2009) was on Chapter 158. This concerned an original grant in temporary emphyteusis which had expired, and contrary to the owner's expectation that the property would revert to him vacant on termination of the contract, the 1979 Act gave the tenants the right to retain possession of the property under a new lease. He argued that the fact that he retained ownership in circumstances in which he was unable to foresee when, if ever, the property would revert to him, was a violation of Article 1/1 ECHR.

The Court stated that Article 1/1 requires that any interference by a public authority with the peaceful enjoyment of possessions be lawful. It must be in the general interest, however, any such interference must also satisfy the requirement of proportionality. A fair balance must be struck between the demands of the general interests of the community and the requirements for the protection of the individual's fundamental rights. The requisite balance will not be struck where the person concerned bears and individual and excessive burden.

The Court highlighted how in this case, whilst the applicant remained the owner of the property, he was subjected to a ***forced landlord-tenant relationship for an indefinite period of time***. Moreover, the applicant did not have an effective remedy enabling him to evict the tenants, either on the basis of his own need or that of his relatives, or on the basis that the occupants were not deserving of such protection as they owned alternative accommodation. To add on top of that, the tenancy could be

inherited and the amount of rent received was "certainly low", contrasting starkly with the market value of the premises.

> *"The Court considers that, State control over levels of rent falls into a sphere subject to a wide margin of appreciation by the State and its application may often cause significant reductions in the amount of rent chargeable. Nevertheless, this may not lead to results which are manifestly unreasonable, such as amounts of rent allowing* ***only a minimal profit****."*

It concluded:

> *"In the present case, having regard to* ***the low rental value which could be fixed by the Rent Regulation Board****, the applicant's state of* ***uncertainty*** *as to whether he would ever recover his property, which has already been subject to this regime for nine years, the* ***lack of procedural safeguards*** *in the application of the law and the rise in the standard of living in Malta over the past decades, the Court finds that* ***a disproportionate and excessive burden was imposed on the applicant****. The latter was requested to bear most of the social and financial costs of supplying housing accommodation to Mr and Mrs P. (see, mutatis mutandis, Hutten-Czapska). It follows that* ***the Maltese State failed to strike the requisite fair balance between the general interests of the community and the protection of the applicant's right of property****.*
>
> *There has accordingly been a violation of Article 1 of Protocol No.1 to the Convention."*

Zammit and Attard Cassar v. Malta (30/10/2015), concerned a shop, hence regulated by Chapter 69. It also made reference to Articles 1531I and 1531D of the Civil Code. The lease agreement was entered into already when Chapter 69 was in force.

The applicants submitted that the renewal of the lease by operation of the law constituted an interference with the peaceful enjoyment of their possessions and that in the circumstances of the case, the RRB had not been of any use since no increase was allowed. They contended that in the 1970s when the original lease contract has been entered into, landlords could not have foreseen that markets would change so drastically in the years to come. Nor could they have expected that once such market

changes had come about, no provision would have been made for commercial rents to be increased accordingly.

> *"In the present case the Court observes that the applicants' predecessor in title knowingly entered into the rent agreement in 1971. It is the Court's considered opinion that, at the time, the applicants' predecessor in title could not reasonably have had a clear idea of the extent of inflation in property prices in the decades to come. Moreover, the Court observes that when the applicants inherited the property in question they had been unable to do anything more than attempt to use the available remedies, which were to no avail in their circumstances. The decisions of the domestic courts regarding their request thus constitute interference in their respect*
>
> *The Court observes that in the present case the lease was subject to renewal by operation of law and the applicants had no possibility to evict the tenant on the basis of any of the limited grounds provided for by law. Indeed, any such request before the RRB, in the circumstances obtaining in their case, would have been unsuccessful, despite the fact that the tenant was a commercial enterprise that possessed other property (a matter which has not been disputed), as the latter fact was not a relevant consideration for the application of the law. Furthermore, the applicants were unable to fix the rent – or rather to increase the rent previously established by their predecessor in title. The Court notes that, generally, increases in rent could be done through the RRB. They were, however, subject to capping, in that any increase could not go beyond 40% of the fair rent at which the premises were or could have been leased before August 1914. Indeed, in the applicants' case no increase was possible at all, because the rent originally fixed in 1971 was already beyond the capping threshold.*
>
> *Consequently, the application of the law itself lacked adequate procedural safeguards aimed at achieving a balance between the interests of the tenants and those of the owners."*

The court referred to the 2009 amendments:

> *"While the applicants do not have an absolute right to obtain rent at market value, the Court observes that, despite the 2009 amendments, the amount of rent is significantly lower than the market value of the premises."*

The Court also highlighted the fact that there existed an underlying private interest of a commercial nature. Moreover, it said that unlike in other rent-control cases where the applicants were in a position of uncertainty as to when and if they would recover their property, in the present case, the applicants' property would be free and unencumbered as of 2028. However, the Court could not disregard that by that time, the restriction on the applicant's rights would have been in force for nearly three decades.

> *"The Court finds that, having regard to the relatively low rental value of the premises and the lack of procedural safeguards in the application of the law, a disproportionate and excessive burden was imposed on the applicants, who have had to bear a significant part of the social and financial costs of supporting a commercial enterprise. It follows that the Maltese State failed to strike the requisite fair balance between the general interests of the community and the protection of the applicants' right to the enjoyment of their property.*
>
> *There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention."*

Cassar v. Malta (30/01/2018) also concerned a contract of temporary sub-emphyteusis entered into for 25 years in 1962 and which was converted into a lease by operation of law (Chapter 158). In this case, applicants had bought the property knowing it to be subject to an indefinite lease.

> *"However, the Court has not excluded that there might be particular cases where an applicant who bought a property in full knowledge that it was encumbered with restrictions may subsequently complain of an interference with his or her property rights, for example, where the said restrictions are alleged to be unlawful."*

The EcrtHR quoted the ***Zammit and Attard Cassar case*** in which the applicant's predecessor in title had knowingly entered into a rent agreement in 1971 with relevant restrictions (specifically the inability to increase rent or to terminate the lease). In that case, the Court held that, at the time, the applicants' predecessor in title could not reasonably have had a clear idea of the extent of inflation in property prices in the decades to follow. It also observed that when the applicants inherited the property, the had been unable to do anything more than attempt to use the available remedies, which had been to no avail.

The EcrtHR applied the same reasoning with respect to the person who had originally entered into the lease agreement. With respect to the applicants who bought the property already subject to a restricted lease, the Court noted how ***they did not have the possibility to set the rent themselves or to freely terminate the agreement.***

It concluded:

> *"In the present case, having regard to the low rental payments to which the applicants have been entitled in recent years, the applicants' state of uncertainty as to whether they would ever recover their property, which has already been subject to this regime for nearly three decades, the rise in the standard of living in Malta over the past decades, and the lack of procedural safeguards in the application of the law, which is particularly conspicuous in the present case given the situation of the current tenant as well as the size of the property and the needs of the applicants, the Court finds that a disproportionate and excessive burden was imposed on the applicants. It follows that the Maltese State failed to strike the requisite fair balance between the general interests of the community and the protection of the applicants' right of property.*
>
> *There has accordingly been a violation of Article 1 of Protocol No. 1 to the Convention."*

On ***band clubs*** see Bradshaw and Others v. Malta (23/10/2018); Grech and Others v. Malta (04/06/2019); Portanier v. Malta (27/11/2019),

Martina Camilleri (4th Year)

With respect to ***Bradshaw and Others v. Malta***, below is how the case unfolded:

Sean Bradshaw et v. L-AG (King's Own Band Club)

FHCC 08/10/2013

Facts = the club's market value was initially calculated in the 1940s. At that time, the market value was substantially lower than at present such that a rent of £500 was considered sufficient. Of course, when this case was instituted, this was no longer the situation due to increases in market value, however, due to the protection afforded to the tenant under Chapter 69 which was applicable since the lease was entered into prior to 1 June 1995, the landlord was unable to increase the rent.

It was argued that:

- Landlords are being discriminated against as ***Article 1531J*** ***is only putting such heavy restrictions on club owners***.
- The rent laws under Maltese law violated Article 1/1 to the ECHR on peaceful enjoyment to one's possessions. In the same way, this contradicted article 37 of the Constitution.

Held = The Court established that the value of the property, when taking into account the central area in which it is situated, was significantly lower than the acceptable amount. **The FHCC held that article 1531J breaches lessors rights** and ordered the club to pay €300,000 as a form of **compensation**.

Constitutional Court

However, the judgement was appealed and the Constitutional Court in turn reversed the previous judgement declaring that there had been no violation of human rights. The Court noted that the applicants had entered into such agreement with a complete understanding of the fact that the lease agreement could not be changed, and that the rent due would be at a fixed annual sum.

EcrtHR 2018

Applicant said that only does the legislation hinder their right to peaceful possession of their property, but also:

- Such club does not serve a public purpose although it is a band club – the ground floor was transformed into a bar & restaurant; therefore, such interest was purely commercial.
- Applicants also pointed out that whilst band clubs carry a highly important & cultural role, such club need not occupy such a prominent building in the centre of the capital.
- Moreover, while there were amendments to the law to potentially raise the rent due to club owners, such amount still did not reflect the market value.

Held = the EcrtHR came to a unanimous decision that Article 1/1 was indeed violated, and the state was ordered to pay €610,000 in damages.

- Tesaferrata Bonnici and Others v. Malta (30/06/2020) dealt with a school.

- Cauchi v. Malta (25/06/2021).

One can appreciate that here we have one line of judgements but with respect to two different kinds of tenements: ***residential*** and ***commercial***.

Residential leases

In the case of residential tenements, the Constitutional Court and the EcrtHR have been more accepting that the legislation, in this case Chapter 69, is directed to achieve a legitimate aim (hence, the first two requirements are satisfied) but because there was ***no remedy for adjusting the rent to the reality of the property market nowadays, the fair balance requirement was not satisfied***.

The first time that the Constitutional Court in Malta accepted that argument in regard to a residence and following the principles laid down in these judgements of the EcrtHR was in the case ***Anthony Debono et v. Avukat Generali*** (Constitutional Court, 08/10/2020).

Indeed, the Constitutional Court in Malta was always very reluctant, because of the consequences that were being anticipated, to declare that the provisions of Chapter 69 violate Article 1/1 ECHR in so far as leases of residential tenements are concerned. Understand that such a conclusion meant that the Constitutional Court would have to declare that the tenant in that particular case could not rely any further on Article 3 of

Chapter 69, that is, could no longer invoke the right to continue in occupation of the tenement in question, meaning that when the term was up for renewal, that tenant was obliged to vacate the tenement. And this when most of these tenants were either passed retirement age or almost dead (so with restricted means).

Because of the far-reaching consequences of this ruling on the occupancy of tenements for residential purposes let before 1 June 1995, the above judgement triggered a very quick legislative initiative which led to the enactment of **Act XXIV of 2021**, adding the very important **Article 4A** to Chapter 69.

Commercial leases

In regard to commercial tenements, the rulings of the Constitutional Court where Chapter 69 was challenged for violating Article 1/1 are a little bit different. In the sense that where commercial leases were challenged, because of the protection afforded to the tenant by Chapter 69 now as amended through Act X of 2009, our Courts have found that this regime breaches both the second and the third requirements in the ***Hutten-Czapska vs. Poland*** judgement.

In other words, the Courts, including the Constitutional Court, have said that the protection afforded to commercial tenements, considering the commercial reality in Malta today, no longer serves a legitimate aim in the public interest. Moreover, the rent increase mechanism and the cut-off date in 4 years' time still do not strike a fair balance between the rights of the lessor and the rights of the tenant.

In fact, we have various cases in which the Courts have ordered that the tenant of a commercial tenement let out before 1 June 1995 can no longer rely on the provisions of Chapter 69 to continue in occupation at a controlled rent:

Agnes Gera de Petri Tesaferrata v. Avukat Generali et **(Constitutional Court 29/11/2019)** concerned Lombard Bank. In brief, the facts were that a private writing was signed back in 1977 with Lombard Bank, giving the property in Valletta on lease for 30 years. On the expiration of this period, Lombard Bank was able to keep possession of the property by virtue of Chapter 69.

Defendants argued that the initial lessor was conscious of the application of Chapter 69 when entering into such private writing. However, in referring to the judgements

of the EcrtHR, the Court held that the lessor could not have foreseen the drastic change in the commercial market or that the quantum of rent was going to remain controlled.

It was also argued that a fair balance was achieved through the amendments of Act X of 2009. Reference was made to Articles 1531D, stating accordingly, the calculations were made on rent which was far lower than market value. Also, in line with Article 1531, plaintiffs still had to wait 9 more years until they could take their property back. In the meantime, they were bound to receive such low rent and carry this excessive and disproportionate burden.

> *"B'dana li l-Qorti tikkonsidra li l-qaghda finanzjarja u ekonomika tal-pajjiz minn meta gew fis-sehh id-dispozizzjonijiet tal-Kap. 69 sallum tjiebet ferm u allura naqas l-estent tal-interess generali ghall-protezzjoni ta' intraprizi kummercjali, u konsegwentement in-necessita` tal-mizuri opportuna taht dan l-att fl-interess pubbliku. Hawn ghalhekk twieled il-principju ta' proporzjonalita` li dwaru l-ewwel Qorti tosserva li fil-kaz odjern mhux qed jinzamm fil-konfront tar-rikorrenti."*

- *Periti Ian Cutajar et v. Avukat Generali et* (Constitutional Court, 06/10/2020) concerning a police station.
- *Mario Cachia et v. Supermarkets (1960) Limited et* (Constitutional Court, 20/07/2020) concerning a M&S outlet.
- *Dr Louis Bianchi et v. Avukat tal-Istat et* (First Hall, Constitutional Jurisdiction, 19/11/2021) concerning a pharmacy.

Compensation is awarded whenever a finding of a breach of a human right is made and now, we have a formula which has come to us from a ruling of the EcrtHR how to compute that compensation. This is explained in ***Jeremy Cauchi v. Avukat tal-Istat et*** (Constitutional Court, 26/01/2022):

> *"Il-Qorti tosserva illi llum-il ġurnata l-likwidazzjoni tal-kumpens dovut f'dawn it-tip ta' każijiet issegwi l-kriterji ta' komputazzjoni stabbiliti fis-sentenza tal-Qorti Ewropea fl-ismijiet Cauchi v. Malta (QEDB, 25/03/2021). F'din is-sentenza ġie spjegat, in sucċint, illi sabiex jiġi likwidat kumpens xieraq għandu jsir tnaqqis ta' ċirka 30% mis-somma li kienet tkun perċepibbli mill-atturi fuq is-suq liberu minħabba l-għan leġittimu tal-liġi mpunjata, u tnaqqis ieħor ta' 20% fuq is-somma riżultanti sabiex jittieħed kont tal-inċertezza illi l-atturi kien jirnexxilhom*

jżommu l-proprjeta` mikrija tul iż-żmien relevanti kollha għall-prezzijiet indikati mill-perit tekniku. Mis-somma riżultanti għandha mbagħad titnaqqas il-kera perċepita mill-atturi, jew il-kera li kienet perċepibbli skont il-liġi.

F'dan il-każ jirriżulta li l-kera pagabbli lill-atturi fuq is-suq liberu skont ir-relazzjoni teknika minn April 1976 sa Lulju 2019 kienet tkun fl-ammont ta' ċirka €100,913. Minn dan l-ammont għandu mbagħad isir tnaqqis ta' 30% kif spejgat, li jwassal għall-ammont ta' ċirka €70,639, u mbagħad tnaqqis ta' 20% li jwassal għall-ammont ta' ċirka €56,511. Minn dan l-ammont għandha mbagħad titnaqqas il-kera mħallsa mill-konvenuti Caruana matul dan il-perjodu, li jirriżulta li kienet fl-ammont ta' ċirka €5,933. Għaldaqstant l-ammont ta' kumpens pekunarju xieraq għandu jkun fl-ammont ta' €50,578 (ħamsin elf, ħames mija u tmienja u sebgħin ewro).

Inoltre, ma jirriżultax illi l-Ewwel Qorti akkordat kumpens non-pekunarju għal-leżjoni sofferta mill-atturi. Ikkonsidrat illi l-leżjoni in kwistjoni damet għaddejja għal aktar minn erbgħin sena u l-ammont ta' danni sofferti mill-atturi, u fid-dawl tal-passivita` tal-atturi għal numru twil ta' snin, il-Qorti tqis illi l-kumpens non-pekunarju pagabbli lill-atturi għandu jkun fl-ammont ta' tmint elef ewro (€8,000)."

Both pecuniary and non-pecuniary (moral) damages are awarded in these rulings were a finding of breach is made. This is seen above and in ***Mary Borg et v. Avukat tal-Istat et*** (Constitutional Court, 25/01/2023):

"Għal dak li jirrigwarda l-kumpens non-pekunjarju, ir-rikorrenti jippretendu somma ta' €500 għal kull sena. Il-kumpens non-pekunjarju ma jintiritx. Għalhekk ir-rikorrenti għandhom jedd għall-kumpens non-pekunjarju mid-9 ta' Marzu 2014, ċioè meta wirtu lil Maria Stella Sammut. Minn dakinhar għaddew sitt snin. Il-Qorti hi tal-fehma li somma ta' €2,000 bħala kumpens non-pekunjarju hi suffiċjenti meta tikkunsidra wkoll li ma kien hemm xejn x'iżomm lir-rikorrenti milli jippreżentaw il-kawża qabel."

Articles 4, 4A, 5, 6 and 7 of Chapter 69

These articles are grouped together as they all deal with the possibility of the lessor increasing the rent in the lease of a residential tenement regulated by Chapter 69. Hence, we will be focusing on ***leases of residential tenements only***.

Article 4 has to be read together with Article 3:

Lessor not to refuse renewal of lease or raise the rent without the permission of the board

3. It shall not be lawful for the lessor of any premises, at the expiration of the period of tenancy (whether such period be conventional, legal, customary or consequential on the provisions of this Ordinance), to ***refuse the renewal of the lease*** *or* ***to raise the rent*** *or* ***impose new conditions for the renewal of the lease*** *without the permission of the Board.*

First of all, such demand necessitates a ruling of the RRB, i.e., the special tribunal which under our law is vested with exclusive competence to determine disputes involving leases. So, irrespective of when the lease was contracted and which law applies to that lease, all leases fall within the exclusive competence of this special tribunal.

An increase in rent cannot be done between the lessor and the lessee through an agreement (when we are speaking of a lease regulated by Chapter 69) but the increase in rent requires determination or approval by the RRB.

Article 4

Power of Board to permit increase of rent, etc

4. The Board ***shall*** *grant the said permission:*

(a) if the lessor is bound to carry out or has reasonable cause for making any ***alterations*** *or* ***works*** *other than ordinary repairs;*

(b) if the new lease established in accordance with the provisions of this Ordinance is ***not more than two per cent (2%) per annum of the freehold value of the tenement on the open market.***

The law mentions two circumstances in which the RRB ***shall*** allow the lessor to increase the rent on renewal:

1. When the lessor proves that he has carried out or is carrying out improvements (not repairs) to the tenement let, or

2. Were the lessor demands an increase in rent which does not exceed 2% per annum of the freehold value of the tenement let on the old market.

Increase in rent for improvements

With respect to the increase in rent for improvements, there is Article 7 of the Ordinance which has never been amended, and also have Article 5 which explain how that increase is calculated and imposed. This applies when the improvements are carried out at the expense of the lessor.

Increase of rent in view of improvements on the premises
7. (1) Where the lessor desires to increase the value of the premises by works or alterations to be carried out at the termination of the lease, he must apply to the Board for permission to do so.

(2) If the application is granted, the Board shall allow an increase of rent having regard to the cost and importance of such improvements.

(3) The increase of rent shall commence as from the day of the completion of the works.

Increase of rent
5. (1) In the case referred to sub-article (1)(a) of the last preceding article, the Board shall allow such increase as it may deem justified, having regard to the benefit resulting from the alterations or works.

(2) Any such increase shall take effect from the date of the completion of the alterations or works.

Increase of rent through Means Test

More importantly, and this has been added by Act XXIV of 2021 to address the consequences of the Constitutional Court rulings mentioned above, Chapter 69

includes a new right granted to the lessor of a residential tenement which is subject to the protections in Chapter 69 to ***demand an increase in the rent up to 2% of the freehold market value of that particular tenement***. The procedure and the requirements for such demand for an increase in rent is set out in detail in **Article 4A** which has also been added by Act XXIV of 2021.

Article 4A

Continuation of a lease of a dwelling-house

4A. (1) When a person is in occupation of a dwelling-house on the basis of a lease which commenced before 1st June 1995 through the application of the provisions of this Ordinance, the following conditions shall, provided they are inconsistent with the provisions of the said articles of this Ordinance, ***apply in respect of such lease from 1st June 2021 notwithstanding the provisions of the said articles of this Ordinance or of any other law.***

(2) The lessor shall be entitled to file an application before the Board requesting that the rent be reviewed ***to an amount not exceeding two percent (2%) per annum of the free and open market value of the dwelling-house on 1st January of the year in which the application is filed and in order to establish new conditions regarding the lease.***

(3) (a) When the request is made by the lessor in accordance with sub-article (2) and the leased tenement is ***a dwelling-house****, the Housing Authority shall be notified with the application and shall have the right to participate fully as intervenor in the proceedings;*

(b) the tenant shall in any case be entitled to the benefit of legal aid provided by the Housing Authority in proceedings filed in terms of this article:

Provided that this shall not prejudice the rights of the lessor who shall be entitled to the benefit of legal aid provided by the Legal Aid Agency in proceedings filed in terms of this article if he is not in full-time gainful employment;

(c) at the initial stages of the proceedings, ***the Board shall conduct a means test of the tenant****, which shall be based on the means test provided for in the Continuation of Tenancies (Means Testing Criteria) Regulations issued under article 1622A of the Civil Code and any regulations that may from time to time replace them. The means test shall be based on the income of the tenant between the 1st January and the 31st December of the year preceding the year in which the proceedings are commenced*

and the capital of the tenant on the 31st December of the said year. The means test shall be conducted with particular reference, inter alia, to regulations 4 to 8 of the Continuation of Tenancies (Means Testing Criteria) Regulations which shall apply mutatis mutandis:

Provided that when the lessor has the suspicion that the tenant may have transferred his property, both movable or immovable, with the intention of hiding these assets, he shall have the right to request that the means test on the capital assets shall go back to the 1st January 2021 or according to sub- regulation (5) of regulation 4 of the Continuation of Tenancies (Means Testing Criteria) Regulations, whichever date comes earlier, and when it is established that the tenant has disposed of these assets for malicious purposes, the Board shall nonetheless take them into consideration in its means test.

(4) Where the tenant **does not meet the income and capital criteria of the means test** *the Board shall, after hearing any evidence and submissions produced by the parties, give judgement* **allowing the tenant a period of two (2) years to vacate the dwelling-house**. *The compensation for occupation of the dwelling-house payable to the lessor during the said period shall be determined by the Board as the case may be.*

(5) Where the tenant meets the income and capital criteria of the means test the Board shall proceed according to the following sub-articles.

(6) The Board, in any case, after summarily hearing the parties and examining any evidence which it considers relevant, may also order that an increased amount of rent be paid during the hearing of a pending application filed in terms of sub-article (1).

(7) When the rent amount is established in accordance with sub-article (2), that rent may increase according to the regulations published by the Minister responsible for housing from time to time:

Provided that the demand for this increase shall be without prejudice to the lessor's right to request the revision of the rent in accordance with sub-article (2), after a period of six (6) years from when the new rent would have been fixed in accordance with the same sub-article (2), unless an agreement is reached between the parties.

(8) The lessor may, whenever it transpires that the **economic circumstances of the tenant have changed**, **file a new application** *before the Board wherein he requests that a new means test of the tenant is conducted according to paragraph (c) of sub-article (3) and if the tenant does not satisfy the income and capital assets criteria of the means test, the Board shall decide the case in terms of sub-article (4).*

(9) The provisions of this article shall also apply to cases wherein a community of property on the dwelling-house exists and the tenant is a co-owner of the same dwelling-house. When this is the case the Board shall consider the tenant's share in the leased dwelling-house and subtract any part of the new rental amount payable by him to the other co-owners proportionally.

The law is giving prevalence to this right in Article 4A over any other contrary restriction imposed on the lessor in Chapter 69 itself or in any other law. So, whatever is said in any other law, this right to demand an increase in rent and to demand the execution of a means test on the tenant prevail over all the other provisions which apply to these leases.

Sub-article (2) states that the demand of the lessor can be two-fold: (1) an increase in rent, and/or (2) a change in conditions. So, the prohibition which we have in Article 3 not to increase the rent and not to change the conditions on renewal is tempered through this remedy.

The application required is the ***rikors*** which is the simplest form which we have in our law of procedure for filing proceedings and the RRB is vested with full discretion as to which percentage to apply for the increase in rent. However, in practice, the RRB is very often increasing the rent to the maximum 2% of the free market value of the tenement in question.

How will these proceedings progress? The parties to the proceedings are the lessor (plaintiff) and the lessee (defendant). In sub-article (3), the law stipulates that the Housing Authority must participate in the proceedings with a right of reply and also to present evidence, the reason being that we have in place a system of state aid administered by the Housing Authority as a form of subsidy to tenants who satisfy the means test. The Authority administers the subsidy to the tenant and the tenant is obliged to pay the increased rent to the lessor.

The procedure for the 2% increase in rent before the RRB has two parts to it:

1. Means Test

At the initial stage, the RRB carries out a means test in terms of the Continuation of Tenancies Means Testing Criteria Regulations, S.L. 16.11. This is set on two levels: (1) capital and income and (2) the thresholds vary depending on the age of the tenant.

So, the first part of the judicial process for increasing the rent is the carrying out of the means test. At this stage, the tenant is required to present evidence of his capital assets – liquid or immovables or investments – and his income. The RRB will examine whether the tenant satisfies the thresholds in the Regulations. If the tenant satisfies/is below those thresholds, then he would be entitled to ***continue renewing the lease without an end date***. On the other hand, if his capital and income exceed the thresholds, he will only be allowed to continue in occupation of the tenement for a maximum of ***2 years***.

After that first stage in the proceedings, the RRB will appoint two technical members (i.e., architects) who visit the tenement and report to the RRB on the free market value of the tenement as at the 1st of January of the year in which the application for the increase in rent is filed. This appointment of the technical members is regulated in detail in Article 23 of Chapter 69. This is the provision which lays down the circumstances in which the RRB must appoint the technical members and the manner in which their technical opinion is to be presented to the RRB.

Normally, the RRB allows the parties the right to cross-examine the technical members in writing and the technical members will be required to file in writing their answers to those questions.

2. Judgement

Following that, the RRB will proceed to deliver judgement declaring whether the tenant satisfies or not the means test and stipulating the new increased rent which is normally due from the date of judgement (the RRB decides on this point) by the tenant to the lessor.

Note that this demand of increase in rent cannot be made again ***before the lapse of 6 years*** from when the new rent would have been fixed by the RRB.

Sub-article (7) mentions that the parties may come to an agreement on the increase in rent. But in actual fact, by way of policy, the Housing Authority does not administer subsidies on rents unless the increase is fixed in a judgement of the RRB. So, in practice, every increase will normally require a ruling by the RRB.

The law also provides for a remedy for requesting the means test to be administered to a tenant when his economic circumstances have changed. So, besides the instance when the increase in rent is demanded, the RRB can be asked to carry out a means test in regard to the tenant if the lessor contends that the economic circumstances of the tenant have changed to the extent that he may no longer satisfy the definition of tenant. If that is the case, the obligation for continued renewal under Article 3 may no longer be applicable (Article 4A(8)).

Sub-article (9) then speaks of a scenario when ***the tenant of the dwelling house let is a co-owner of that dwelling house***. This is quite a common occurrence. In practice, this would mean that the tenant is entitled to a share of the rent payable and therefore, there would be *opere legis*, a set-off of that part of the rent.

A question arose in the case ***Bunce v. Bunce***, and this is currently waiting for judgement by the Court of Appeal, as to whether the rules on the administration of the means test apply also to this case where the tenant is a co-owner. What is certain is that there is the right to demand an increase in rent against such a tenant, but what is debated is whether the rules on means testing apply also to a tenant who is a co-owner.

On Article 4A see:

- *Raymond Mifsud et v. Theresa Lanzon* (RRB, 04/10/2021)

In this case, the RRB considered that the potential development of the tenement should also be considered in its valuation.

- *Alexander Attard et v. Grace Bonnici* (RRB, 21/11/2022)

This case provides a good example of the procedure in Article 4A. The first two criteria that the RRB will have to establish are that plaintiff is the owner of the property in question and that the defendant is the lessee of that same property. In this case, there was no doubt that this was the case and that the rent had been going on since before 1995.

The RRB then considered that defendant's income, calculated in accordance with Regulation 3(a) of the Regulations did not exceed that established in regulation 5(7) of the same. Moreover, with respect to her capital calculated in accordance with regulation 3(b), it resulted that neither did that exceed that established in regulation 6(6). Hence, defendant satisfied the means test in terms of Article 4A(5) of Chapter 69 and therefore, there was no need for an application of Article 4A(4).

The RRB then proceeded to lay down the value of the property concluded by the technical members.

In calculating the % of the value to establish the rent, the RRB referred to the case *Carmelo sive Charles Caruana et v. Lorenza Vincenza sive Lora Zarb* (03/02/2021) in which the Court analysed the amendments introduced by Act XXVII of 2018,

> *"il-Qorti tikkonkludi li d-dħul fis-seħħ ta' dawn l-emendi fil-liġi kienu maħsuba biex jindirizzaw u joħolqu bilanċ bejn il-jeddijiet tas-sidien li altrimenti kienu ser jibqgħu jirċievu ħlas ta' kera irriżorju għall-proprjetà tagħhom wara li ilhom imċaħħda minnha snin, u l-jeddijiet tal-inkwilini li jibqgħu jgħixu fid-dar li ilhom snin jagħrfu bħala r-residenza ordinarja tagħhom"*

The RRB set the rent at the full 2% of the market value of the property. This meant €5,800 rent/annum.

- *Mary Ellul v. Athony Gauci et* (RRB, 05/12/2022)

In this case, defendant also demanded the application of Article 4A(6). On this point it held:

> *"Illi fit-tieni talba tagħha, ir-rikorrenti titlob illi l-kera tiġi awmentata waqt il-pendenza tas-smiegħ tar-rikors odjern. Illi meta l-Bord iqis li l-proċeduri ġew intavolati fil-21 ta' Jannar 2022 u li ġew konklużi b'din is-sentenza, il-Bord ma jarax li dawn il-proċeduri ħadu xi tul ta' żmien u b'hekk ma jarax li għandu jilqa' din it-talba."*

- *John Grima et v. George Vella et* (RRB, 03/02/2023).

In this case, defendants satisfied the means test. They went on to say that they didn't have other means to pay the higher rent and they should not be evicted on this basis. Notwithstanding the RRB still concluded the rent to be 2% of the market value of the property. In coming to its determination, it stated:

> *"Fid-dawl ta' dan kollu l-Bord iqis illi rigward il-kwistjoni ta' b'liema perċentwal għandha tiġi kkalkolata ż-żieda fil-kera, filwaqt li jagħmel referenza għall-Artikolu 4A(2) tal-Kap. 69 u tenut kont ta' dak kollu appena espost, kif ukoll tenut kont tal-lok fejn jinsab il-fond u l-potenzjal tiegħu,* ***kif ukoll li f'ċerti ċirkostanzi, jista' jingħata sussidju mill-Awtorità tad-Djar****, il-Bord huwa tal-fehma li l-awment fil-kera għandu jkun fl- ammont ta' tnejn fil-mija (2%) tal-valur liberu u frank fis-suq miftuħ tal-fond de quo..."*

Plaintiffs also requested that the RRB ***varies the conditions of the lease*** in the sense that the obligation of extraordinary repairs is placed onto the defendants. The RRB accepted.

Lecture Summary

So far, we have seen that this Ordinance obliges the lessor, where the tenant satisfies the definition of 'tenant' and the premises satisfy the definition of 'premises', to continue renewing the lease at the same rent and on the same conditions without an end date. We have seen the constitutional ramifications of this open-ended obligation of renewal, and we have considered the changes that have been introduced in 1995, in 2009, and in 2021 to address those constitutional human rights ramifications.

We have seen the establishment of a minimum rent in 2009 for residential tenements at 185€ per year. Also, that these amendments also introduced a mechanism for an increase in rent (Article 1531C for residential tenements and 1531D for commercial

tenements). There was the introduction of an end-date for the renewal of commercial leases which are protected under the Ordinance and as recent as 2021, Article 4A was introduced with a new mechanism to demand an increase in rent which can go up to and goes up to 2% of the free market value of the premisses.

Articles 8 & 9

We have seen that Article 3 of Chapter 69 states that on forced renewal, the lessor cannot increase the rent, cannot change the conditions of the lease, and cannot refuse to renew the lease without the permission of the RRB. Now we will be considering the instance where a lessor can successfully demand permission from the RRB not to renew the lease.

So, in exception to the obligation set out in Article 3, Articles 8 and 9 of the Ordinance lay down the reasons for which the RRB can grant the lessor permission not to renew the lease which is a controlled lease under Chapter 69.

Before analysing these two provisions, distinguish between:

- ***Permission not to renew*** the lease, and
- ***Dissolution*** of the lease.

Today, this difference has no practical consequences. However, in the past, especially before Act X of 2009, this difference had extremely big consequences.

When we are speaking of 'permission not to renew', we are necessarily referring to a lease which started before 1 June 1995, and a lease which is regulated by Chapter 69. Also, we are speaking of an action under Articles 8 and 9 of Chapter 69 based on one of the grounds listed in Article 9. Here, the outcome which is being sought is the permission not to renew the lease for the purposes of Article 3 of Chapter 69.

When we are speaking of 'dissolution of the lease', the remedy of dissolution can be requested for any kind of lease. So, lease of any kind of tenement except an agricultural tenement, and the grounds on which the dissolution can be requested are those which come out of the general law, i.e., the Civil Code. Dissolution can be requested in regard to a lease irrespective of when that lease started and whether or

not that lease is regulated by the general law only or the general law and the special law/s.

In the past, especially before Act X of 2009, the distinction between the two actions was particularly important because an action for permission not to renew the lease, therefore under Articles 8 and 9 of the Ordinance, fell within the exclusive competence of the RRB. Whilst actions for dissolution, even if the demand was made in regard to a lease regulated by Chapter 69, fell within the exclusive competence of the ordinary courts. At a point, this had to be filed before the Court of Magistrates, but the law was subsequently amended and had to be filed before the First Hall of the Civil Court.

This big headache for lawyers was eliminated completely by Act X of 2009 because that law granted the RRB exclusive competence over all disputes having to do with leases, barring one small exception. But generally speaking, whether the action is for permission not to renew or for the dissolution of the lease, after Act X of 2009, both actions fall within the exclusive competence of the RRB.

So, after Act X of 2009, what we need to decide is: in this particular case, what outcome are we after? If we are invoking a ground listed in Article 9 of the Ordinance, in regard to a lease which is regulated by this Ordinance, then the correct remedy is the remedy for permission not to renew the lease. If the termination of the lease is being sought on the basis of a breach of obligation of the tenant which comes out of the Civil Code, then the correct action to file is the action for dissolution of the lease.

Hence, now the determining factor is: on the basis of which law are we seeking this remedy? And therefore: which remedy are we seeking? The point is that there no longer exists the risk of filing the action before the wrong forum because now both kinds of action fall within the scope of competence of the RRB.

We will be covering *the action for permission not to renew a lease of urban immovable property which has started before 1 June 1995 and which is regulated by the Reletting of Urban Property (Regulation) Ordinance, Chapter 69*:

Article 8

Application by lessor for resuming possession of the premises
8. (1) Where the lessor ***desires to resume possession of the premises at the termination of the lease*** *he shall apply to the Board for permission to do so.*

(2) The provisions of this article shall not apply to premises belonging to or administered by the Government.

Article 8 provides an exclusion – State property which is owned by the government or administered by the government, and which has been let out before 1 June 1995 where the premises are urban immovable property and the tenant still satisfies the definition of tenant under Chapter 69, the government need not pursue an action before the RRB to resume possession.

That is the only exception such that any other lessor subject to the obligation in Article 3 of Chapter 69 is required to demand and obtain permission from the RRB to take back possession of his tenement, therefore freeing himself from the obligation to renew the lease.

Article 9

Cases in which application for resumed possession of premises may be granted
9. The Board shall grant the permission referred to in the last preceding article in the following cases:

(a) if the tenant has in the course of the previous lease failed to pay punctually the rent due by him, or has caused considerable damage to the premises, or otherwise failed to comply with the conditions of the lease, or has used the premises for any purpose other than that for which the premises were leased, or has sublet the premises or made over the lease without the express consent of the lessor.

For the purposes of this paragraph:

(i) the tenant shall be deemed to have failed to pay punctually the rent due by him if in respect of each of two or more terms he has not paid the rent within fifteen days from the day on which the lessor has called upon him for payment;

(ii) any subtenancy of a portion only of the premises, made on or after the l3th day of July, 1945, for the use of the portion sublet otherwise than as a shop and the residue of the premises continuing to be occupied by the tenant or by any member of his family, shall not be deemed to be a subtenancy referred to in this paragraph;

(iii) any subtenancy or assignment of lease of any premises, including a shop, made at any time between the 10th day of June, 1940, and the l3th day of July, 1945, both days inclusive, shall not constitute a good reason for the grant of the permission referred to in article 8;

(b) if the lessor requires the dwelling-house for his own residence or for that of any of his ascendants or descendants, whether by consanguinity or affinity, and the Board is satisfied that the tenant has alternative accommodation, holding it in title of ownership, which is reasonably suitable to the means of the tenant and his family as regards size and state of repair and proximity to his place of work (if he is employed): Provided that the Board shall also consider properties of the tenant which despite being in the possession or detention of third parties, may be recovered by the tenant within a short period of time:

Provided further that the Board shall also consider properties, the use of which would have been granted to third parties under any other title including lease for the malicious purpose of evading the effects of this article:
Provided further that this article shall not be applicable where the tenant is sixty-five (65) years of age or older:

Provided further that this article shall be without prejudice to the lessor's right to obtain the termination of the lease in the case that the tenant does not meet the income and capital criteria of the means test mentioned under article 4A…

Article 9 is made up of two parts: paragraph (a) and paragraph (b) with many provisos. The latter was extensively amended by Act XXIV of 2021 which introduced Article 4A. The former has been with us as is for several decades.

*"The RRB **shall** grant the permission referred in the last preceding article in the following cases"*

Note the mandatary provision. The RRB is obliged to grant permission not to renew where any of the grounds set out in Article 9 are proved to its satisfaction. And the outcome of the action, if successful, will be a declaration by the RRB that the lessor is authorised not to renew the lease. In practice, because these actions last longer than

the length of a term of the lease, if the action is successful, the RRB would be authorising the lessor to resume possession (i.e., to take back control) of the premises let.

Normally, the time of rent will be per year – these leases entered into before 1 June 1995 did not have a written lease agreement and Article 1532 on the presumed length of the lease would apply, depending on the term for which the rent was agreed. And normally, that would be by the year. Almost invariably an action for permission not to renew will last longer than one year, meaning that if the action is successful, at the end of the action, the RRB would be immediately authorising the lessor to resume possession of his premises because the length of the term would have lapsed.

In paragraph (a), we have 5 fault-based grounds on the basis of which the lessor can seek permission not to renew the lease. Fault-based grounds in the sense that if proved, they involve some breach of obligation on the part of the tenant.

The 5 fault-based grounds on which the lessor can demand permission not to renew are the following:

1. The tenant failed to pay punctually the rent due.
2. The tenant caused considerable damage ('*ħsara ħafna*') to the premises.
3. The tenant has failed to comply with the conditions of the lease.
4. The tenant has used the premises for a purpose other than the purpose for which the premises were leased.
5. The tenant has sub-let the premises or made over ('*ċeda*') the lease without the express consent of the lessor.

In paragraph (b), we have a 6th ground on the basis of which the lessor can seek permission not to renew. This ground is only available in regard to dwelling houses, i.e., it applies only in the case of residential leases which are protected and controlled under Chapter 69. And it is available where the lessor can prove that he requires the tenement for his own residential use or for the residential use of specific relatives.

That paints the picture of the grounds on which a lessor can demand permission from the RRB to free himself from the obligation of renewal set out under Article 3 of Chapter 69.

An analysis of each ground:

Ground 1

> *(a) if the tenant has in the course of the previous lease* ***failed to pay punctually the rent due by him****...*[…]
>
> *For the purposes of this paragraph:*
>
> *(i) the tenant shall be deemed to have failed to pay punctually the rent due by him if in respect of each of two or more terms he has not paid the rent* ***within fifteen days*** *from the day on which the lessor has called upon him for payment;*

What does the law mean by 'pay punctually the rent due'? Sub-paragraph (i) lays down an irrebuttable presumption – if the lessor manages to prove that the tenant has failed to pay the rent for two or more terms within 15 days from when the rent fell due, there is an irrebuttable presumption that the tenant failed to pay punctually the rent due. The burden of proving all of these requirements fall on the lessor who files the action.

A common defence which tenants raise to try to justify their failure to pay the rent when due is some form of defect or shortcoming in the premises let. For example, the tenant would say I didn't pay the rent because the property is damaged, and the lessor didn't fix the problem as he was obliged to.

The Courts have repeatedly said that ***the remedy for the lessor's failure to ensure full and continuous enjoyment of the premises let according to what had been agreed to is not through non-payment of the rent.*** The rent must still be paid and must be paid punctually. The ordinary law (Civil Code) gives the tenant remedies, including remedies now before the RRB, how to enforce the carrying out of works or repairs where the lessor is duty-bound to do so. Hence, there is no justification for not pursuing such an action and instead not paying the rent.

This was stated by the CoA in ***Renzo Abela v. John Gauci*** (02/08/1958):

> *"Non ostanti li l-lokatur ikun naqqas minn xi obligazzoni tieghu, u minhabba f'hekk l-inkwilin ibati menomazzjoni tad-dgawdija tal-fond, jekk b'dan kollu l-*

inkwilin jibqa' fil-pussess tal-fond, hu ma jistax "marte proprio" jzomm jew inaqqas il-hlas tal-kera; salvi l-kazijiet espressament stabbiliti mill-ligi, u salv il-kumpens ghall-indennizz li jista' jigi wara rikonoxxut lilu.

And in the more recent ***Joseph Darmanin v. Giljan Cutajar*** (23/11/2005).

"Hi disposizzjoni cara tal-ligi illi kerrej jiddekadi mid-dritt tieghu tal-godiment tal-fond lokat jekk "fil-kors tal-kiri ta' qabel ma jkunx hallas puntwalment il-kera li kellu jaghti".

*Dan fir-rigward ta' "kull wahda minn zewg skadenzi jew izjed" u dan zmien hmistax-il jum minn dakinhar tat-talba tas-sid domandanti l-hlas. [Artikolu 9 (a) (i), Kapitolu 69]. Teknikament ghalhekk biex tissussisti l-morozita` jehtieg li jkunu saru zewg interpellazzjonijiet ghal hlas ghal zewg skadenzi diversi (**Kollez. Vol. XLVIII P I p 87**) u jkun hemm ukoll nuqqas ta' hlas fit-termini preskritti dekorribbli mill-interpellazzjoni (**Kollez. Vol. XLVII P I p 287**);*

*Opportunement, pero`, tajjeb li jigi registrat illi l-ligi, u izjed u izjed, il-gurisprudenza ma jidherx li jikkontentaw ruhhom bis-semplici konstatazzjoni teknika f' materja ta' morozita`. Effettivament, fil-prattika, huwa konkordament ricevut illi l-morozita` ma kellhiex titkejjel semplicement fuq il-metru tal-kelma tal-ligi in kwantu dan jitqies ferm il-boghod mill-ispirtu tal-ligi appozitament promulgata biex tipprotegi lill-kerrej. Biex tabilhaqq ikun jidher li qed issir verament gustizzja kien jokkorri li l-materja tigi ezaminata fir-realta tac-cirkustanzi kollha attendibbli. Dan bl-iskop li jigi accertat "jekk kienx hemm xi gustifikazzjoni oggettivament ragonevoli u legalment sostenuta biex jiggustifika l-morozita`." Ara f' dan is-sens id-decizjonijiet fl-ismijiet "**Maria Concetta Vella -vs- Federico Galea nomine**", Appell, 24 ta' Jannar 1997 u "**Doris Attard -vs- Julian Borg**", Appell, 28 ta' Gunju 2001. Indubitament, anke ghaliex dan hu hekk pacifiku, "meta jkun hemm cirkustanzi li jiggustifikaw l-atteggjament ta' l-inkwilin fin-nuqqas tieghu li josserva l-obbligi, huwa ma jiddekadix mid-dritt tieghu biex tigi lilu mgedda l-lokazzjoni." Ara **Kollez. Vol. XL P I p 269** u **Vol. XXXIII P I p 385**, fost bosta ohrajn;*

Dan premess, fil-kaz prezenti l-appellant iressaq b' gustifikazzjoni ghal fatt li ma sarx minnu l-hlas tal-kera dovut illi r-rikorrenti sidien ikkrejaw problemi u ostakoli bhala pretest biex igibuh in mora. Huwa jiddeskrivi dan l-atteggjament

> *ta' sid il-fond bhala maniggar malizzjuz. Kelma din li timporta mala fede u din tekwivali dolo.*
>
> *[…]*
>
> *Innegabilment, ghas-sostenn ta' din l-asserzjoni tieghu kien jinkombi fuq l-appellant li jiprova wkoll, b' mod konklussiv u konvincenti, illi sid il-fond kienet irrifjutat l-accettazzjoni tal-kera meta dan gie offrut lilha. Jekk jirnexxielu f' dan "il-lokatur ma jkunx jista' eventwalment jippretendi li l-konduttur kien hekk moruz; ghax ma jistax jitqies li kien hemm morozita` meta l-adempiment ta' l-obbligazzjoni gie ostakolat u mpedut mill-istess kreditur, u kwindi ma hux moruz l-inkwilin jekk ikun mar ihallas il-kera u s-sid irrifjutah, u huwa ma ddepozitax il-kera wara dak ir-rifjut." (**Kollez. Vol. XXXIX P II p 689**)."*

You will find, especially in the latter case, reference to the position which over the decades was taken by the RRB in its pro-tenant stance, requiring the lessor to serve on the tenant a request for payment through a judicial letter in order for the irrebuttable presumption which we have in paragraph (1) to be satisfied. That is not expressly stipulated in the law, but the Courts have for many decades asserted that for the lessor to resume possession on this ground, he must also prove that he had requested the payment of the rent through a judicial letter and the payment still wasn't effected.

Ancillary to this ground, Act X of 2009 added a clear stipulation in regard to the case were the tenant fails to pay the rent (*'kien moruz fil-ħlas tal-kera'*) through Article 1570 of the Civil Code. This article was added in its actual form by Act X of 2009:

Cessation of lease on the ground of non-performance

1570. A contract of letting and hiring may also be dissolved, even in the absence of a resolutive condition, where either of the parties fails to perform his obligation; and in any such case the party aggrieved by the non-performance may elect either to compel the other party to perform the obligation if this is possible, or to demand the dissolution of the contract together with damages for non-performance:

Provided that in the case of **urban**, **residential** *and* **commercial tenements** *where the lessee fails to pay punctually the rent due, the contract may be terminated only after that the lessor would have called upon the lessee by means of a judicial letter, and*

the lessee notwithstanding such notification, fails to pay the said rent within fifteen days from notification.

Note that the law is speaking of ***dissolution***.

What is the purpose of this proviso to Article 1570? The legislator wanted to ease the requirement of proving the two requests for payment, which the courts had introduced, and is making it clear here that what is required is proof of only one request for payment through the service of a judicial letter on the tenant. So, the position today is that ***the lessor must prove that he has requested payment of the rent through a judicial letter which has been served on the tenant and that notwithstanding, the tenant failed to pay the rent within 15 days.***

Two more recent judgements on this interpretation are:

- *John Gauci Maestre et v. Anthony Agius et* (CoA 22/09/2021)

In this case, the lessee failed to pay the rent due even though he was notified by means of a judicial letter requesting payment. The lessors argued that since 15 days had passed from notification, according to Article 1570 there existed reasons for termination. In his defence, the lessee argued that Article 1570 was not applicable, but that Article 9(a)(i) of Chapter 69 was applicable and that requires two intimations for each deadline to pay the rent.
The Court of Appeal held:

> *"Il-liġi mkien ma tgħid li għal kull skadenza jrid ikun hemm żewġ interpellazzjonijiet differenti, iżda trid li l-kerrej jitqies moruż meta jkun hemm żewġ skadenzi ta' kera jew aktar, u l-kerrej jibqa' ma jħallasx fi żmien ħmistax-il jum minn dakinhar li sid il-kera jitlob il-ħlas għal kull waħda miż-żewġ skadenzi."*

Regarding the claim that the articles of the Civil Code had to be applied and not those in Chapter 69:

> *"L-appellanti spjegaw li l-azzjoni tagħhom hija maħsuba biex tindirizza l-morożità fil-kera kemm jekk il-liġi applikabbli hija l-Kap. 69, u anki f'każ li l-liġi applikabbli hija l-Kap. 16. L-appellanti spjegaw li r-relazzjoni kontrattwali bejn il-partijiet bdiet meta l-fond inkwistjoni ingħata b'titolu ta' konċessjoni*

enfitewtika temporanja lil Anthony Agius fl-1980 u meta din il-konċessjoni ġiet fi tmiemha, it-titolu tal-fond ġie kkonvertit f'kera ope legis. L-appellanti qalu li l-kirjiet ikkostitwiti bis-saħħa tal-Kap. 158, għandhom ikunu regolati mil-Kodiċi Ċivili, u l-artikolu 5(3)(b) tal-Kap. 158 jispeċifika li f'każ ta' morożità fil-ħlas tal-kera, hija meħtieġa biss sejħa waħda għall-ħlas ta' żewġ skadenzi, filwaqt li d-dispożizzjonijiet tal-Kap. 69 ma japplikawx għaċ-ċirkostanzi odjerni.

Il-Qorti, wara li kkonsidrat il-fatti kif seħħew, tqis li dan l-aggravju huwa mistħoqq u tilqgħu, filwaqt li taqbel fiċ-ċirkostanzi tal-każ kif seħħew, kien il-Kodiċi Ċivili bis-saħħa ta' dak li jipprovdi l-Kap. 158, li kellu japplika għall-każ."

- *Daniel Saliba et v. Austin Darmanin et* (CoA 18/05/2022).

This case concerned the lease of a shop.

"Il-Qorti tgħid li kif sewwa qegħdin jikkontendu l-appellanti, il-Bord naqas milli jikkonsidra d-disposizzjonijiet tal-artikolu 1570 tal-Kodiċi Ċivili, li jipprovdi li l-ħall mill-kirja jista' biss jintalab mis-sid wara li l-inkwilin jiġi notifikat b'interpellazzjoni għall-ħlas permezz ta' ittra uffiċjali, u huwa jonqos li jeżegwixxi l-obbligu tiegħu tal-ħlas fi żmien ħmistax-il jum min-notifika…

Iżda l-Bord f'dan kollu naqas milli jikkonsidra l-eċċezzjoni li kienu qajmu l-appellanti quddiemu, li qabel jagħmel it-talba tiegħu quddiemu għall-ħall mill-ftehim lokatizju, is-sid għandu jottempora ruħu mad-disposizzjonijiet tal-artikolu 1570 tal-Kodiċi Ċivili billi kif diġà ngħad, huwa jinterpella l-inkwilin permezz ta' ittra uffiċjali u dan jonqos milli jagħmel il-ħlas fi żmien ħmistax-il jum min-notifika. Dan kellu jsir qabel tiġi mistħarrġa l-allegata morożità tal-appellanti."

Ground 2

If the tenant has in the course of the previous lease…caused ***considerable damage to the premises****…*

What is meant by 'considerable damage'? The Maltese text of this provision reads *'ħsara ħafna'* which is the correct translation from the original Italian text. What do the Courts understand by 'considerable damage'? Are there any rules on how to interpret it?

The interpretation of considerable damage is ***a matter of fact***. So, the RRB will appoint its technical members, who are two architects, require them to exceed into the premises and to describe and explain the damages, if any, and the manner in which they can be remedied.

There are no stipulated rules for interpreting this 'considerable damage'. Traditionally, the RRB gives a very strict interpretation and will only grant permission not to renew if satisfied that the damages are ***structural and very serious***, requiring extraordinary repairs, and also, that such damages have been caused ***exclusively through the fault of the tenant.***

The CoA, in Frances Cassar et v. B&M Supplies Ltd (01/12/2004) said:

> *"Skond kif imfisser "it-terminu "hafna" hu kapaci li jigi apprezzat oggettivament imma hu wkoll miftuh ghall-interpretazzjoni soggettiva ta' min irid jiggudika. Anke* ***ghaliex tali hsarat iridu jkunu relatati mhux biss mal-kwalita` u l-kundizzjoni tal-fond lokat imma wkoll mal-mod kif dawn il-hsarat kienu jippregudikaw il-godiment tal-fond u l-interessi tal-lokatur."*** *- "Elizabeth Darmanin -vs- Rev. Kan. Anton Galea et", Appell, 24 ta' April 1998;*
>
> *Issokta ghalhekk jinghad f' din l-istess decizjoni illi* ***"mhux kull nuqqas ta' manutenzjoni adegwata tal-fond mill-inkwilin, anke fejn din hi responsabilita` tieghu, ghandha twassal biex tiggustifika r-ripreza tal-fond fuq din il-kawzali. In-nuqqas irid ikun tali li jipprovoka hafna hsarat";***

> *Fi kliem iehor il-hsara trid tkun* ***ta' certa entita`*** *u mhux ta' importanza zghira. Kif deciz, "minn dawn il-kliem tal-ligi, kemm fit-test Malti kemm fit-test Ingliz, huwa evidenti li l-hsara konsiderevoli hemm kontemplata hija dik materjali fil-fond, u mhux hsara ohra …" (Kollez. Vol. XXXVIII P I p 211);*
>
> *Dan affermat, jinsab enuncjat ukoll illi "certament wiehed mill-kriterji li jeskludi din l-entita` jista' jkun dak* ***tal-facili riparabilita` tad-dannu****" (Kollez. Vol. XLVII P I p 264) u li allura tintitola lis-sid ifittex ir-rimedju li jgieghel lill-kerrej tieghu jaghmel it-tiswijiet necessarji minflok l-adoperu tas-sanzjoni estrema ta' l-izgumbrament. Ara wkoll f' dan is-sens sentenza fl-ismijiet "Paolo Farrugia -vs- Amante Murgo", Appell, 29 ta' April 1996."*

So, if the damages are such that they do not prejudice the ownership rights of the lessor, and they can be easily remedied through ordinary repairs, then those damages do not constitute 'considerable damage' for the purposes of this ground.

See also:

- *Santo Tonna v. Salvatore Portelli* (CoA 10/12/1951).
- *Grazio Gerada v. Salvatore Pace et* (CoA 05/03/1984) and

- *Louis Apap Bologna et v. Alexander Borg Caruana* (CoA 26/09/2019).

In the last case, this concerned a lessee who caught the leased property on fire. The RRB, whose decision was appealed, said:

> *"Fil-kors tal-izvilupp tal-gurisprudenza twila ta' dan il-Bord u tal-Qorti tal-Appell fuq din il-kawzali tar-ripreza, gie spjegat li l-uzu mil-legislatur tal-frazi 'hsara hafna' turi bic-car il-hsieb tieghu li* ***mhux kull nuqqas, minimu jew rimedjabbli, li jigi riskontrat fil-fond mikri, kellu jaghti lok ghat-twaqqif tat-tigdid, u l-konsegwenti zgumbrament tal-inkwilin****. Fis-sentenza Santo Tonna vs Salvatore Portelli, il-Qorti tal-Appell spjegat li '[b]iex l-inkwilin jista' jigi zgumbrat taht il-Ligi tal-Kera minhabba li jkun ikkaguna danni fil-fond, hemm bzonn li dawn id-danni jkunu* ***konsiderevoli'****. Aktar tard, fis-sentenza Grazio Gerada vs Salvatore Pace, l-istess Qorti ziedet tghid li, minhabba li d-danni jridu jkunu konsiderevoli,* ***il-lokatur irid jipprovdi 'li dawn id-danni gew ikkagunati mill-kerrej'****. Dwar dan it-tieni rekwizit, fis-sentenza Frances Cassar et vs B & M Supplies Limited, il-Qorti tal-Appell (Inferjuri), fuq l-iskorta tal-*

gurisprudenza citata minnha spjegat li 'dan ma jfissirx illi trid issir il-prova ta' azzjoni dannuza attiva da parti ta' l-inkwilin, imma hu bizzejjed li jigi stabbilit li ***l-inkwilin naqas mid-dover tieghu mpost bil-ligi li jiehu hsieb tal-fond lilu lokat uti bonus pater familias*** *… tali hsarat iridu jkunu relatati mhux biss mal-kwalita' u l-kundizzjoni tal-fond lokat imma wkoll mal-mod kif dawn il-hsarat kienu jippregudikaw il-godiment tal-fond u l-interessi tal-lokatur'.*

Fl-istess sentenza Cassar et vs B & M Supplies Limited, il-Qorti tal-Appell (Inferjuri) qieset il-kliem tal-ligi biex tasal ghal x'ried ifisser il-legislatur b'din il-kawzali ta' 'hsara hafna'. Hija kkonfermat il-gurisprudenza li 'l-hsara trid tkun ta' certa' entita' u mhux ta' importanza zghira … 'Certament wiehed mill-kriterji li jeskludi din l-entita' jista' jkun dak tal-facli riparabilita' tad-dannu (XLVII.i.264) u li allura tintitola lis-sid ifittex ir- rimedju li jgieghel lill-kerrej tieghu jaghmel it-tiswijiet necessarji minflok l-adoperu tas-sanzjoni estrema tal-izgumbrament'.

Fis-sentenza Joseph Frendo vs C & H Bartoli Limited, il-Qorti tal-Appell (Inferjuri) ziedet li dan il-kriterji ta' 'hsara hafna' 'ghandu jigi apprezzat minn min irid jiggudika sew oggettivament kif ukoll soggettivament, 'anke ghaliex tali hsarat iridu jkunu relatati mhux biss mal-kwalita' u l-kondizzjoni tal-fond imma wkoll mal-mod kif dawn il-hsarat ikunu ppregudiukaw il-godiment tal-fond u l-interessi tal-lokatur' (Kathleen Darmanin et vs Rev.Kan. Anton Galea et, Appell, 24 ta' April, 1988 per Imhallef Joseph Said Pullicino).' Dwar ir-rekwizit tan-nuqqas ta' riparabilita' tal-hsara, l-istess Qorti f'din is-sentenza wriet il-fehma li 'mhix tali li ghandha tincidi fuq l- apprezzament ut sic tal-gravita' in kwantu, kif ritenut', 'ftit hija l-hsara li mhux suxxettibbli ta' tiswija u ma jidhirx gustifikat li wiehed jesigi anke dan l-element'."

The RRB had concluded that in this case, it was not proven that the fire happened because the lessee's failed to act as a *bonus paterfamilias.* Moreover, the forensic expert said that nothing indicated that the fire happened as a consequence of the use of multiple electric sockets. It also resulted that the damages to the property could be remedied, and it is actually to the lessor's benefit because they get a new building. The lessors could make the lessee do the necessary repairs and make the necessary payments, and therefore there was no need to go to the extreme of eviction.

On appeal, plaintiff argued that in accordance with Article 9 of Chapter 69, this constituted a valid reason for the non-renewal of the lease. Moreover, once liability was found, the RRB had to accede to the lessor's demand. The Court of Appeal said:

> *"Illi din il-Qorti rat li fid-decizjoni appellata l-ewwel Onorabbli Bord, ghalkemm sab li:*
> *(i) il-hsarat fil-kaz odjern kienu konsiderevoli,*
> *(ii)li l-istess hsarat kien responsabbli ghalihom civiliment l-inkwilin appellat odjern u wkoll*
> *(iii) ikkonkluda li l-hsarat kienu rrendewha mpossibli ghall-intimat u l-familja tieghu li jibqghu jghixu fil-fond,*
>
> *liema konkluzjonijiet ilkoll jissodisfaw il-kriterji ghall-applikabilita' tal-artikolu 9 tal-Kap. 69 tal-Ligijiet ta' Malta f'termini ta' gurisprudenza, b'mod kontradittorju ghall-ahhar il-Bord fid-decizjoni odjerna wasal ghall-konkluzjoni li ma kienx hemm l-estremi tal-'hsara hafna'."*

The CoA said that the lessee was in fact responsible for the damage that ensued and therefore, had not acted as a *bonus paterfamilias.* The CoA ordered the non-renewal of the lease and the eviction of the lessee. Note that damages are given in a case of liability in tort.

Ground 3

If the tenant has in the course of the previous lease… otherwise ***failed to comply with the conditions of the lease****.*

One would ask: if the lease was originally entered into without a written agreement, as is normally the case with these pre-1995 leases, what would the conditions of the lease be? In the absence of a written lease agreement, the conditions of the lease are the obligations which the general law imposes on the tenant. On the contrary, if there is a written agreement of lease, then it is that written agreement which stipulates the conditions of the lease.

Such conditions normally include the obligation of the tenant to enjoy the premises let as a *bonus paterfamilias*, the obligation of the tenant not to carry out structural changes in the tenement let, and the obligation of the tenant not to assign or transfer the lease nor to sub-let the premises either absolutely or else without the consent of

the lessor. Those are examples of the conditions of a lease which come out of the Civil Code, and which are normally also stipulated in a written lease agreement.

Where the lessor proceeds for permission not to renew on this ground, the lessor must identify the condition/s which he is invoking. Moreover, the burden of proving that the obligation constitutes a condition of the lease and of the breach of that condition through the fault of the tenant, rests on the lessor.

A very common condition on the basis of which lessors seek permission not to renew is the obligation of the tenant not to carry out structural changes in the tenement without the consent of the lessor. And the RRB and the CoA have on several occasions declared that it is not every minimal change in the premises let which would satisfy proof of a breach of this condition. They have listed the requirements that need to be proved for such breach to lead to the termination of the lease. These are essentially 5 requirements.

For the change not to constitute a breach of this condition, it must:

1. *ikun parzjali u mhux ta importanza kbira;*
2. *ma jbiddilx id-destinazjoni espress jew preżunt tal-lokazzjoni;*
3. *ma jippreġudikax id-drittijiet tal-propjeta';*
4. *jistgħu jkunu rimessi f'lokhom fit-tarf tal-lokazzjoni* (they can be reversed at the end of the lease);
5. *ikunu neċessarji, u utili ghall-godiment tal-post.*

Where the structural changes satisfy all of these 5 requirements, then those structural changes would not constitute a breach of the conditions of the lease. However, where ***any one*** of those requirements are not satisfied, then the change would constitute a breach of the conditions of the lease.

See:

- *Giuseppe Triolo v. Giuseppe Deguara* (CoA 10/01/1953).
- *Giuseppe Magro v. Eric Mizzi* (CoA 21/01/1957).

- *Yvonne Pullicino pro et v. Erdgar Mifusd et* (CoA 12/11/2002),

This case concerned a property that was being used as a residence of the deceased and as an ironmongery. The property hadn't been used for around 4 years so much so that the 'non uso' was causing it harm. Lessees had done a number of structural repairs to the property.

The Court made reference to ***Theuma v. Mercieca*** (1996):

> *"hu s-sid li jrid jipprova dak li jallega cioe' li l-inkwilin bla kunsens tieghu ssulloka l-fond jew ceda l-kirja tieghu. U tali prova mhux bizzejjed li tkun indizju jew probabilita'. Jehtieg li tkun univoka u kredibbli sal-punt li twassal lill-gudikant ghall-konvinciment illi l-inkwilin ma hiex ghadu bhala fatt juzufruwixxi mid-drittijiet lilu kompetenti bhala kerrej u li kien ghadda dawn l-istess drittijiet komprizi fit-tgawdija, tal-haga lilu mikrija lil haddiehor. Is-sid allura jrid jipprova sodisfacentement illi l-inkwilin ma kienx zamm ghalih b'mod reali u mhux fittizzju l-kirja u li konsegwentement ma jkunx ihossu dwarha responsabbli ghall-oggett lokat versu s-sid"*

The request for the non-renewal of the lease couldn't be met because the lessees were entitled to sub-let and to do structural repairs in the contract of lease.

- *Carmen Cassar v. Marianne Aquilina* et (CoA 30/11/2022)

In this judgement, the condition of the lease which was invoked was ***the obligation of the tenant to carry out ordinary repairs and maintenance throughout the lease***. If that is breached, and it can be proved that structural damage requiring extraordinary repairs is now necessary as a result of that breach, then this third fault-ground will be satisfied.

> *"Fil-każ odjern, l-intimati evidentement jużaw kejl differenti fil-mod ta' kif jieħdu ħsieb ħwejjiġhom, u l-mod kif jieħdu ħsieb jew ma jieħdux ħsieb il-garaxx mikri lilhom mir-rikorrenti, kif jindikaw id-diversi ritratti esebiti fil-proċess. Ċertament li l-kura tal-fond bħala bonus paterfamilias* ***kienet timporta li ssir manutenzjoni regolari fuq il-fond b'tali mod li l-affarijiet ma jiddeġenerawx sal-punt li l-fond iġarrab ħsara strutturali, jew is-saqaf tal-fond ikollu jintrifed bi travu****. Il-Qorti sejra għalhekk tilqa' dan l-aggravju tar-*

*rikorrenti, u tagħtieha raġun fit-talba tagħha għar-ripreża tal-fond abbażi tal-kawżali li l-intimati naqsu milli jaqdu l-obbligi **imposti fuqhom mil-liġi bħala inkwilini**, ewlenin fosthom li jieħdu ħsieb il-fond bħala bonus paterfamilias, li jagħmlu t-tiswijiet kollha meħtieġa fuq il-fond minbarra dawk strutturali, kif ukoll li jwieġbu għat-tgħarriq u għall-ħsara mġarrba fil-fond tul il-kirja, sakemm ma jippruvawx li dan it-tgħarriq u ħsara ma ġrawx mingħajr ħtija tagħhom.*"

Ground 4

*If the tenant has in the course of the previous lease…**used the premises for any purpose other than that for which the premises were leased**.*

This ground is referred to as '*bdil tad-destinazzjoni*' and includes also 'non uso'. Here, the law is speaking about the purpose of the lease, that is, the use for which the premises were let.

- If the premises is a dwelling house, then the purpose of the lease is residential, and the tenant must use the dwelling house for his own residential purpose.

- If the premises is a shop as defined in the Ordinance, then the tenant must use the shop as a commercial outlet for the purpose for which it was originally let or for the purpose for which it has been used throughout the lease.

If the lease had been contracted by a written agreement, then the use may result from the lease agreement itself. If no express use is stipulated, then the use has to be identified from the factual circumstances of the lease. For example, if there is no written agreement or there is one, but it does not stipulate a particular use and the tenement has always been used as a barber shop, then the use for which the lease has been contracted is that of a barber shop.

A ***change of use*** or ***non-use*** of the premises let satisfy this ground. So, if the lessor can prove that the tenant has changed the use without the lessor's consent or that the tenant has stopped making use of the premises let for the purpose for which they were let, then the RRB will grant permission not to renew on this ground.

To see how in practice the RRB and CoA interpret this ground see:

- *Alfred Cassar et v. Antoine Agius et* (CoA 07/12/2005).

In this case, a property was leased out for the purpose of using it as a cold store of fruit and vegetables. Notwithstanding, the lessees *"bidlu d-destinazzjoni tal-fondi lilhom mikri billi ghamlu uzu divers tieghu."* In particular, they started using the property as a commercial kitchen. Afterwards, the use was changed by not making use of the property and leaving it closed. Once the lessor became aware of the change, he started to refuse the rent. Ultimately, the Court decided in favour of the lessees as it was convinced that the property continue to be used according to the use stipulated in the lease agreement.

Regarding *non uso*:

> *"...Galea vs Vella" (Appell mill-Bord, 24 ta Marzu 2000), "il-fatt kien li l-intimat seta ghal xi raguni jew ohra naqqas xi ftit l-attivita kummercjali tieghu u allura l-fatt kien illi l-fond ma baqax jigi uzat bl-istess frekwenza kif kien jintuza precedentement, ma jammontax ghan-non uso fis-sens tal-ligi. Is-sidien rikorrenti kellhom jissodisfaw lill-Qorti illi l-inkwilin* ***kien effettivament abbanduna l-fond lilu mikri billi ma baqax juzah ghall-iskop li ghalih inkera****. Provi din li tigi newtrallizzata jekk l-inkwilin da parti tieghu jissodisfa l-Qorti li hu baqa juza l-fond skond il-htiega tan-negozju tieghu."*
>
> *"F' kazijiet ta' din ix-xorta gew bosta drabi enuncjati mill-Qrati taghna dawn il-principji:-*
>
> *1. L-uzu divers li jsir* ***anki minn parti biss minn fond*** *igib tibdil ta' destinazzjoni a sensu ta' l-Artikolu 9 (a) tal-Kapitolu 69 ("Pietro Galea -vs- Filippo Farrugia", Appell, 7 ta' Dicembru 1956). Dan hu hekk, hlief fil-kaz fejn ikun jitratta minn kambjament parzjali komplimentari ghad-destinazzjoni u kwazi konsegwenzjali taghhom; b'mod li t-tibdil ikun accessorju ghall-uzu principali u b' mod li jibqa' dejjem shih l-uzu stabbilit fil-ftehim ("Giuseppe Magro -vs- Farmacista Eric Mizzi", Appell, 21 ta' Jannar 1957);*
>
> *2. Iz-zamma ta' fond maghluq ghal zmien twil huwa parifikat ghal kambjament tad-destinazzjoni. Dan fuq it-taghlim tal-Laurent li jghid "non si usa della cosa secondo la sua destinazione non usandone" ("Elena Magri et -vs- Andrea Piscopo", Appell, 12 ta' Mejju 1950)."*

- *Censinu Micallef et v. Katald Muscat et* (CoA 19/05/2004).

- *Dr Louis Vella nomine et v. Meditteranean Trading Shipping Co Ltd* (CoA 07/07/2003).

In this case, the premises was let to be used as a commercial warehouse. It was later discovered that the lessees started storing a boat in the small premises, taking up the majority of the space. The minute they became aware of this, the lessors stopped accepting the rent. In their defence, defendants argued that the premises was still being used as a 'store' for the spare parts of boats, rafts, oxygen cylinders, and other material connected with the principal business of the company (ship agents, ship suppliers, charters).

The Court started off by considering the definition of "mahzen", stating that this fell within the definition of 'shop' so long as it was related to the principal business of the lessee. It isn't, therefore, any premises used to store things.

The parties were in agreement on the original use of the premises. The Court held:

> *"Fil-kaz de quo jista' ragjonevolment jinghad illi l-uzu divers anke ta' parti biss mill-fond lokat gab kambjament li ghalkemm parzjali ma jistax jitqies kumplimentari ghad-destinazzjoni miftehma. Lanqas ma jista' l-istess kambjament jitqies ta' importanza skarsa fil-kumpless tac-cirkustanzi jew minn dak vizwalizzat mir-ritratti esebiti a fol 21. Fuq kollox ma jidherx li l-kambjament kien biss wiehed parzjali reintranti fil-generu tal-kummerc formanti l-oggett tal-kirja; anzi jidher car li l-uzu divers jista' jitqies sostanzjali u ta' gravita` apprezzabbli.*
>
> *Is-socjeta` appellanti ssostni ukoll illi fil-fond, ciononostante z-zamma tad-dghajsa, hi ssoktat tahzen affarijiet konnessi mal-ezercizzju tal-kummerc taghha. Issa apparti l-fatt illi kif gja kostatat bejn iz-zamma tad-dghajsa u n-negozju tas-socjeta` appellanti ma hemmx dik l-accessorjeta` necessarja biex tirrendi dak l-uzu parti minn dak in-negozju jew inseparabbli minnu (Vol XLII pI p404), din il-Qorti tara wkoll illi dak li f'epoka partikolari seta' kien il-generu principali ezercitat fil-fond (magazinagg ta' "goods"), jidher li mat-trapass taz-zmien dan sar sekondarju u talment marginali li, kif ravvizat mill- Bord,*

minhabba l-ispazju okkupat mid-dghajsa ftit ferm baqa' wisa' ghall-affarijiet tan-negozju."

- *John Abela v. Joseph Micallef proprio et nomine* (CoA 11/02/2004).

In this case, plaintiff claimed that he needed the property back for himself and for his family. Moreover, the premises let had been closed for a number of years and was not in use.

The CoA referred to the judgement given by the RRB where it said:

"Jirrizulta pruvat li ghal madwar erba' snin u nofs il-fond m'hux qed jintuza bhala mahzen. Hemm fih biss xi armar li jintuza fit-trade fair. Ghalkemm mahzen mhux hanut (fis-sens li jinghata lill-kelma fil-hajja ta' kuljum) ghaliex hanut irid jinfetah biex ibiegh u mahzen jigi uzat skond il-htigijiet ta' negozzju, f'mahzen trid tinzamm merkanzija li ghandha rabta ma' negozzju. Il-gurisprudenza taghmel distinzjoni fondamentali bejn fond li jkun mikri biex fih jigu mahzuna oggetti u merkanzija in konnessjoni ma' negozju attiv u attivat u fond mikri biex isir hazna ta' oggetti mhux konnessi ma' tali attivita' kummercjali."

The CoA had not doubt that the premises was let for a commercial purpose. It made two important points:

1) What is stated in the receipt of payment is not decisive.

"Huwa pacifiku illi l-kelma adoperata fil-librett tar-ricevuti mhiex dejjem hi konferma ta' dak li fil-fatt hu jew tar-realta` tal-ftehim tal-kirja. Ara a propozitu decizjoni fl-ismijiet "Angelo Fenech et –vs- Peter Muscat Scerri", Appell, 21 ta' Marzu 1997. Hu accettat ukoll illi fiha nfisha l-kelma 'garage' ma ghandiex necessarjament kontenut legali (Kollez Vol XLIV pI p174). Xejn ma jeskludi allura illi garage jigi uzat bhala store. Kollox jiddependi mill-ftehim bejn il-partijiet."

2) Nor is what is written in the agreement decisive.

"is-semplici deskrizzjoni tal-fond mhiex konkluziva tal-uzu li ghalih il-fond ikun gie mikri, imma kollox jiddependi mic-cirkostanzi u mill-intenzjonijiet tal-partijiet. B'mod illi jekk il-fond jissemma bhala garage, mhux necessarjament ghandu jitqies

li gie mikri bhala garage sempliciment ghax il-kirja tissejjah hekk, imma ghandu jitqies garage ghax ic-cirkostanzi juru, u l-hsieb tal-partijiet kien, li l-fond jinkera bhala tali.

Jekk, imbaghad, dan il-ftehim ma jistax jigi ugwalment stabbilit x'kien, jghoddu allura l-fatti li jirrizultaw mill-provi. Minn dawn il-provi, senjatament dawk prodotti mir-rikorrenti stess, irrizulta li dak li fl-ewwel ricevuta issejjah garage kien fil-fatt inkera ghall-uzu bhala mahzen, u allura ma kienx hemm ghalfejn tibdil tal-kelma fir-ricevuta.

Anke kieku dan ma kienx hekk il-kaz huwa wkoll daqstant iehor pacifiku illi ma hemm xejn x'jimpedixxi illi patt originarju dwar l-uzu jigi varjat jew rinunzjat bil-kunsens, anki tacitu, tal-partijiet."

With respect to the non-use:

"Jinghad fl-ewwel lok illi hi gurisprudenza konkordi illi n-non uso ta' fond, hu x'inhu, ghal zmien twil hu parifikat ghal tibdil fid-destinazzjoni tieghu. Biex dan ikun hekk il-kaz **hemm bzonn li jghaddi tul ta' zmien valutabbli** *skond ic-cirkostanzi tal-kaz, u li jkun volontarju u mhux determinat minn xi gustifikazzjoni ragjonevoli."*

In this case, it was sufficiently proven that the premises was closed for years. The Court acknowledged that a 'store' doesn't necessarily imply that it is open all the time or that it offers a service directly to clients. Notwithstanding, in this case, the premises was just being used to store goods not related to the business.

- *Michael Casha et v. Mario Gatt et* (CoA 13/04/2016).

Incidental to this ground, is Article 1555A of the Civil Code which was added by Act X of 2009. This defines, drawing on court judgements, what the law means by 'non-use' of a tenement.

Non-use of tenement *1555A.(1) In the case of a residential tenement, failure to use the tenement for a period exceeding twelve months shall be deemed to be bad use of the thing leased in terms of article 1555:*

Provided that when a person has failed to use the leased tenement due to being temporarily absent from the tenement due to work, study or health care, then such failure shall not be deemed to be bad use.

(2) When the lessee of a lease which started before the 1st June, 1995 is recovering in hospital or in an old people's home, and where such institution certifies or where it conclusively results that the same tenant is permanently dependent on the institution, the lease of that tenement shall be transferred to the person mentioned in article 1531F:

Provided that when the tenant does not remain in the tenement due to total dependence on the institution as certified by the same institution or as it otherwise results and there is no right of transfer of the lease as herebefore mentioned, or the transfer is not accepted by the person qualifying therefor, the lessor may request the dissolution of the contract.

(3) In the case of commercial premises, failure to use the said tenement for a commercial purpose in accordance with the provisions of a contract of lease shall be deemed to be bad use of the thing leased in accordance with the provisions of article 1555.

(4) The provisions of article 1555 shall also apply in the case of rural tenements, if the lessee abandons the cultivation thereof, or does not cultivate the said tenement as a bonus paterfamilias, and the lessor may thereby suffer prejudice in respect of which no security was given to him.

(5) In any of the aforesaid cases, apart from those cases where the lessee forfeits the lease due to his recovery in an institution, the lessee shall also be liable to pay damages.

Ground 5

If the tenant has in the course of the previous lease… ***sublet the premises or made over the lease without the express consent of the lessor****.*

What does the law mean by 'made over'? A lease can be made over in different ways:

a. There can be an outright transfer of rights (*'ċessjoni tal-kirja'*) defined in Article 1469 of the Civil Code; or

b. The tenant can enter into a sub-lease, thereby creating a new lease agreement where he becomes himself a lessor (*'sulokazzjoni'*); or

c. The tenant can enter into some other form of agreement with a third party effectively transferring control of the premises let but hiding it under some other title, the classical example being the ***management agreement***.

This fault-based ground covers all forms of transfers of effectual control over the premises let. So, if the tenant is in practice and in reality handing over the enjoyment and use of the premises let to someone else, even if on paper he continues to feature as the tenant, then this ground for permission not to renew would be satisfied.

On this see:

- *Spiridione Ellul v. Giuseppe Buttigieg et* (CoA 12/05/1950).

- *Joseph Gauci nomine v. MCL Ltd* (CoA 20/10/2003).

This case made reference to ***John Debono v. Giuseppe Ciantar (22/05/1967)*** where it was held:

> *"Illi biex ikun hemm il-kunsens tacitu hemm bzonn essenzjalment ta' zewg rekwiziti, cioe` li dak li jikkonsenti jkun pjenament konsapevoli tal-vera portata u l-effetti tal-att li jinghad li huwa qieghed tacitament jakkonsenti jew jaccetta, u di piu` illi l-komportament tieghu jkun tali li jkun inkonsiljabbli mal-volonta` tieghu, b'mod li l-kondotta tieghu ma tkunx tista' tigi sjegata b'mod iehor hlief li huwa accetta l-operat li ghalih ikun qed jigi allegat li akkonsenta.*
>
> *Din l-accettazzjoni hija ta' stretta interpretazzjoni, u dan huwa tant aktar veru fil-kaz in ezami billi l-art. 10 tal-Kap 109 (illum Art 9 tal-Kap 69) li jaghti d-dritt lis-sid li jiehu lura l-fond fit-terminazzjoni tal-lokazzjoni f'kaz ta' trasferiment tal-inkwilinat, jitkellem fuq meta l-inkwilin ikun ittrasferixxa "l-kiri minghajr il-kunsens espress ta' sid il-kera. Huwa veru illi gie kemm il-darba deciz illi anki meta jkun hemm il-kunsens tacitu u mhux espress, is-sid jiddekadi minn dan id-dritt, izda l-kliem tal-ligi, li ssemmi l-kunsens espress, jippostula illi dan il-kunsens ikun jirrizulta car u mhux inekwivoku u minn fatti tant inspjegabbli b'mod iehor, illi l-kunsens tacitu jkun in effetti jekwivali ghal kunsens espress".*

And *Angela Azzopardi et v. Carmelo Mifsud et* (30/11/1964):

> *"kemm ilha fis-sehh il-ligi specjali ma jidherx li qatt gie dubitat illi jekk fil-kuntratt tal-kiri ma jkunx gie miftiehem ebda patt specjali dwar is-sullokazzjoni, u l-inkwilin jissulloka l-fond minghajr il-kunsens tal-lokatur, dan jista' bis-sahha ta' din il-ligi, fi tmiem il-lokazzjoni jitlob li jiehu lura l-fond minhabba dik is-sullokazzjoni…Patt koncepit b'dan il-kliem ma jzid u ma jnaqqas xejn ma' dak li tghid il-ligi stess u kif qal il-Bord, ma hemmx ebda raguni fil-logika u l-bon sens ghaliex ghandu jkun hemm interpretazzjoni u applikazzjoni diversa tal-ligi skond jekk ma jkunx hemm jew ikun hemm dik l-interpretazzjoni specjali fil-kuntratt ta' kera".*

- *Gino Trapani Galea Feriol pro et noe v. Paola Deguara et* (CoA 01/12/2004).

This case concerned a lease of a piece of land which was allegedly subleased to a farmer without the consent of the lessor. However, the lessee argued that the lessor was aware of the sub-lessee and had therefore consented tacitly. Hence, it was not the sub-lease that was being contested but the acceptance thereof.

What is interesting in this case is that Chapter 69 was not applicable on the basis that the law speaks of 'express' consent. This, therefore, seems to contradict what was said in the above.

> *"Huwa mill-ewwel distingwibbli l-kaz, trattandosi ta' kirja ta' fond rustiku minn dak fil-kaz ta' kirja ta' fond urban billi din ta' l-ahhar skond Artikolu 9 (a) tal-Kapitolu 69, id-dritt tar-ripussess tal-fond hu koncess, f' kaz ta' sullokazzjoni jew trasferiment tal-kirja meta tali jsiru "minghajr il-kunsens espress ta' sid il-kera". Kif ahjar interpretat f'gurisprudenza affermata f' dan l-ahhar kaz prospettat "il-ligi, precizament biex tevita l-kwistjonijiet u supposizzjonijiet ta' approvazzjoni u kunsens tacitu, trid li l-kunsens ghas-sullokazzjoni jkun espress. Li kieku l-ligi kienet trid li semplici kunsens tal-lokatur ikun bizzejjed, kien kif kien, anki tacitu, ma kienx ikun hemm ghalfejn jinghad li l-kunsens mehtieg kien il-kunsens espress."*

The Court also distinguished between sub-lease and transfer of rights:

> *"Precizata din l-osservazzjoni, biex wiehed jibqa' in tema ghall-materja hawn ezaminata jinsab assodat illi s-sullokazzjoni, a differenza ta' cessjoni ta' drittijiet,*

> *oltre li ma tirrikjedix il-miktub ghas-sussistenza taghha "**tohloq kuntratt gdid ta' kiri**, li ghalih sid il-kera principali huwa totalment estraneu u li hu nettament distint mill-kuntratt orginarju tal-kirja principlali; u ghalhekk, quddiem sid il-kera, is-subinkwilin huwa terza persuna.*
>
> *Kwantu ghal fatt tat-trasferiment tal-kirja li jsemmi d-dispost tal-ligi in diskussjoni, kif drabi ohra rilevat, dik il-lokazzjoni ma hijiex limitata ghac-cessjoni kif kontemplat fil-Kodici Civili izda ghandha konnotazzjoni aktar wiesgha u "tikkolpixxi kull forma ta' trasferiment tal-kirja li ssir minghajr il-kunsens espress tas-sid, u ma taghmel ebda distinzjoni bejn trasferiment oneruz u gratuwitu; u konsegwentement mhux rikjest li jkun thallas xi korrispettiv biex jissussisti t-trasferiment tal-kirja kontemplat bl-Artikolu 9 tal-Kapitolu 69."*

On tacit acceptance, the Court held that it is not sufficient if the lessor has a hunch that the premises is being sub-leased. The concept has to be clear and unequivocal.

- *Captain Charles Kerr v. Marcello Eminyan* (CoA 02/10/2009).

The Court made reference to *Carmen Vassallo v. Alfred Dimech* (05/03/2005):

> *"Hi ligi li meta kirja tkun dahlet fil-fazi tar-rilokazzjoni l-kerrej ma jistax jissulloka minghajr il-kunsens espress ta' sid il-kera (Art 9(a) tal-Kap 69), u fil-fatt jinsab enuncjat illi "l-ligi specjali thares b'dizfavur lis-sullokazzjoni maghmula minghajr il-kunsens espress tas-sid..." Dan hu spjegat f'din l-istess decizjoni fuq il-bazi tar-ragjonament tal-legittimita` tal-interess tas-sid li ma jhalliex lill-kerrej tieghu jispekula u jaghmel profitt minn fuq hwejgu. Huwa ghal dan l-iskop li l-ligi tinsisti ghall-kunsens espress tas-sid ghas-sullokazzjoni. Oltre dan tista' tizdied l-osservazzjoni illi l-fatt li l-ligi trid espressament il-kunsens espress jeskludi l-kunsens tacitu."*

In this case, there was no contestation regarding the fact that there was a sub-lease and that this was done without the consent of the lessor. However, the lessee argued that in the contract of lease, there did not include a clause accepting sub-lease nor a clause prohibiting it. They based their argument on Article 1614 of the Civil Code which gives the right to sub-lease unless the contrary was agreed.

> *"Issa l-Artikolu 1614 tal-Kapitolu 16, li mieghu jappilja ruhu l-appellanti, jsofri limitazzjoni jew modifikazzjoni importanti hafna bil-ligi specjali meta l-kirja tkun tinsab fil-fazi tar-rilokazzjoni. Hu diffatti koncess mill-Artikolu 9 (a) tal-Kapitolu 69 illi sid il-fond jista' jirrikorri lill-Bord ghat-tehid lura tal-post fejn il-kerrej tieghu "ikun issulloka l-fond jew ittrasferixxa l-kiri minghajr il-kunsens espress ta' sid il-kera". Proprju, ghar-rigward ta' din il-kwestjoni jinsab ritenut illi "biex il-kerrej ma jinkorrix fis-sanzjoni tal-ligi mhux bizzejjed li huwa jkun issulloka l-fond bil-kunsens tacitu jew prezunt tas-sid, imma jehtieg li dan il-kunsens ikun espress. Anzi, il-fatt li l-ligi trid espressament il-kunsens espress, jeskludi l-kunsens tacitu.*

Concluding Point on Fault-Based Grounds

These fault-based grounds would not benefit the lessor if it is proved that the lessor expressly or tacitly accepted the breach committed by the tenant. Such acceptance can be made through the continued acceptance of the rent by the lessor despite his knowing or possibility to know about the breach. The fact that the lessor accepts the rent when he knows or should have known that there was some form of breach of obligation on the part of the lessee amounts to a renunciation to the right of the lessor to seek to get the tenement back on that basis of the breach to the lessee. That is because the acceptance of the rent is considered as an acceptance on the part of the lessor of the factual circumstances of the lease and the premises let at the time of such acceptance.

So, if there is doubt as to whether the tenant is in breach, then we should always advise the lessor not to accept the rent. Because acceptance of the rent is tantamount to acceptance of the actual condition of the premises let, if there is damage for example, or of the conduct of the tenant which can constitute a breach of obligations.

Ground 6 – Article 9(b)

(b) if the lessor requires the dwelling-house for **his own residence** *or* **for that of any of his ascendants or descendants,** *whether by consanguinity or affinity, and the Board is satisfied that the tenant has alternative accommodation, holding it in title of ownership, which is reasonably suitable to the means of the tenant and his family as regards size and state of repair and proximity to his place of work (if he is employed):*

Provided that the Board shall also consider properties of the tenant which despite being in the possession or detention of third parties, may be recovered by the tenant within a short period of time:

Provided further that the Board shall also consider properties, the use of which would have been granted to third parties under any other title including lease for the malicious purpose of evading the effects of this article:
Provided further that this article shall not be applicable where the tenant is sixty-five (65) years of age or older:

Provided further that this article shall be without prejudice to the lessor's right to obtain the termination of the lease in the case that the tenant does not meet the income and capital criteria of the means test mentioned under article 4A…

This ground for requesting permission not to renew is not fault-based and it is only available in regard to residential tenements where the lease is subject to Chapter 69. Notably, this paragraph has been largely amended by Act XXIV of 2021 in light of the constitutional challenges that arose.

This remedy is available to the lessor if he proves that:

1. The premises let is a dwelling house.

2. The lessor requires the premises let for his own residence purposes or to be used as a residence for any of his ascendants or descendants by blood or marriage.

3. The tenant has the right of ownership over alternative accommodation which is reasonably suitable to the tenant's means and those of his family regarding size and condition and also as regards proximity to his place of work.

   This third requirement is satisfied even if the alternative accommodation which the tenant owns is currently occupied by third parties, but the tenant can recover its vacant possession within a short time. It is also satisfied if the lessor can prove that in the past, the tenant had the ownership of adequate alternative accommodation but disposed of it in order to evade the effects of this ground.

4. The tenant is less than 65 years old.

If all these requirements are satisfied, then the RRB will allow the request for re-possession in favour of the lessor.

The Courts have had several opportunities to discuss what is meant by 'requires' in the first element. What kind of necessity must be proved for its purposes? The Courts have said that this element calls for the proof of a *'grad ragenevoli ta' bzonn'*. What that means in the particular case is left to the discretion of the RRB or the CoA after taking into account all the circumstances of the case.

In ***Catherine Caruana pro et noe v. Godwin Gauci et*** **(CoA 20/05/2003)**, the Court said:

> *"L-ewwel rekwizit biex sid jitlob ir-ripreza ta' pussess ta' fond hu x'inhu ghall-okkupazzjoni tieghu taht dik id-disposizzjoni tal-ligi, huwa illi hu 'requires' li jaghmel hekk. Din id-dispozizzjoni kienet giet modellata fuq il-ligi Ingliza ta' l-1933. Huwa car li l-kelma 'requires'* **tindika bzonn u mhux semplici xewqa jew preferenza**. *Il-piz tal-prova ta' dan il-bzonn hu fuq is-sid li jehtieg juri mhux biss illi hu qieghed jagixxi in buone fede imma anki* **li hu ghandu bzonn li jirriprendi l-pussess tal-fond.** *Certament mhux mehtieg li tigi pprovata necessità assoluta izda ugwalment hu cert li jehtieg li jigi pruvat* **grad ragonevoli ta' bzonn**.
>
> *Il-bini kif definit fl-art 2 tal-Kap 69 jinqasam mill-istess ligi f'erba' kwalitajiet: (a) djar ta' abitazzjoni, (b) hwienet, (c) kazini u (d) kull kwalità ohra, in generali … Il-protezzjoni specjali akkordata mill-Kap 69 lil dawn il-kwalità ta' fondi (i.e. (d) hija l-inqas wahda mill-erbgha u hija l-protrezzjoni generika kif espressa fl-artikolu 9(b) … Hawnhekk il-ligi tghid biss:*
>
> *'jekk is-sid ikun irid il-fond'… il-kontroll li huwa msejjah li jaghmel il-Bord qabel ma jikkoncedi lis-sid li jirriprendi l-pussess tal-fond,* **huwa li dan verament irid il-fond ghall-uzu tieghu jew tal-membri tal-familja tieghu, u ghall-ebda skop iehor**. *Per ezempju, ma tinghatax ripreza meta l-iskop ikun wiehed ta' spekulazzjoni kummercjali jew ta' lokazzjoni lil haddiehor u simili. Ghalhekk 'ma japplikawx ghal kiri ta' garage ghall-uzu domestiku konsiderazzjonijiet ta' hardship u l-paragun bejn it-tbatija tas-sid jekk ma jirriprendix il-pussess tal-fond u dik ta' l-inkwilin jekk jigi minnu zgumbrat."*

In this case, the tenement in question was being leased to be used as a garage. The lessor argued that he needed it back for one of his family members who had to keep her car out on the street because she had no garage within which she could store her car. Her parents had a garage but would use it to store their own cars. The CoA, however, was of the opinion that the parties were in bad faith. Her car had been placed in another garage more than twice, and although this wasn't a definitive indication that there wasn't a need, it definitely put that need in doubt. It transpired that the real reason behind requesting non-renewal was so that they could sell the garage.

In *Rita Mula v. Carmel Attard* (CoA 17/11/2004), the lessor had requested the RRB to declare the non-renewal of a room since she needed it for her own personal use. This room was being used by the lessee as an office who argued that the lessor was an old woman who lived alone and who definitely did not need the room.

> *"Huwa pacifiku fil-gurisprudenza illi l-kelma 'requires' fit-test tal-art 9(a) bil-Malti 'bzonn' tippostula veru bzonn u mhux semplici xewqa jew preferenza.* ***Mhux mehtieg illi tigi ppruvata necessita' assoluta*** *imma ghandu jigi pruvat grad ragonevoli ta'bzonn."*

The old woman argued that she needed the room since she was growing old and wanted a carer but had nowhere to house them. However, the CoA concluded that she hadn't managed to prove that she really needed the room: it was not shown that her house wasn't big enough to fit in another person; the Court was of the belief that there existed ulterior motives.

> *Rigwardata ghalhekk din il-materja mill-ottika ta' l-nterpretazzjoni akkordata fis-sentenza accennata din il-Qorti ma ssibx raguni sodisfacenti biex tiddiskosta ruhha mill-konkluzjoni tal-Bord fuq dan il-punt. Dan ghaliex fil-kaz partikolari ma jidherx li l-bzonn vantat hu "veru bzonn" izda pjuttost "xewqa" manifestanti semplici pretest biex is-sid tiehu taht idejha l-kamra lokata. Ghalkemm f' kazijiet ta' din ix-xorta, fejn il-fond ikun adebit ghall-ufficcju, ma jinsorgux aspetti ta' "hardship", xorta wahda l-kerrej maghandux jigi disturbat bla bzonn fid-dgawdija tal-fond meta tonqos il-prova kardinali tal-"veru bzonn."*

In the old judgements (pre-2021) on Article 9(b), one will find reference to the relative hardship test. That test existed under the old paragraph (b), but no longer exists in the revised Article 9(b) after Act XXIV of 2021.

Important: this ground does not apply in regard to ***commercial tenements*** or **shops**. In regard to commercial tenements, the only grounds on which the lessor can demand permission not to renew and re-possession are the fault-based grounds stipulated in Article 9(a).

Lecture Summary

So far, we have discussed different parts of Chapter 69. There is an important definition section, we saw how it was revised in the last 15 years in order to restrict the controls and therefore, make less stringent on the lessor the obligation of renewal which is found in Article 3 of the Ordinance.

We saw that some tenements were completely freed from these controls and those tenements are ***garages for private use***, and ***boat houses***. Other urban immovable properties which had been let before 1 June 1995 are still subject to this Ordinance if the occupier satisfies the definition of tenant. That definition was first shrunk in scope in 2009 by Act X, therefore limiting the group of people who are entitled to the renewal and further restricted in 2021 Act XXIV of 2021 which limited further the circle of people who satisfy the definition of tenant. Therefore, restricting further and further the controls which this Ordinance puts on pre-1995 leases.

We saw how the 2021 Act introduced a very important new remedy as instigated by human rights judgements in order to allow revision of the rent. So, an increase in the rent and we have the new provision Article 4A. We saw the procedure which is followed in order to demand that revision in rent.

We also discussed the grounds on which the lessor can request permission not to renew. We went into Article 9 of the Ordinance paragraphs (a) and (b) which are the different grounds on which non-renewal of the lease may be sought.

The Rent Regulation Board

Throughout all of our discussions thus far, we have been mentioning the special tribunal which is vested by law with the competence to determine disputes arising under this Ordinance and the Civil Code in so far leases are concerned. That special tribunal being the RRB. We will now be considering this Tribunal in more detail, focusing on its competence, the powers with which it is vested, and which disputes it can determine

History of The Rent Regulation Board

As its name implies, the RRB was originally created within the ambit of Chapter 69 to regulate rent.

Originally, the RRB's competence was limited to two situations: (1) the determination of 'fair rent' for dwelling houses and (2) the grant of the permission not to renew a lease subject to Article 3 of Chapter 69.

At the time (pre-1995), there existed the concept of 'fair rent' ('*kera ġust*') which arose under another special law, the Rent Restriction (Dwelling Houses) Ordinance, Chapter 116 of the Laws of Malta. Albeit this Ordinance still exists, after the introduction of Act X of 2009 which set the minimum rent for dwelling houses at €185 per annum, the content of this Ordinance became a dead letter. The point is that prior to the change in law, the tenant of a dwelling house was entitled to contest the amount of rent on which he would have agreed with the lessor if that rent exceeded the fair rent as defined in Chapter 116. And originally, the RRB was created to determine these disputes.

The RRB was also the correct forum to grant permission not to renew a lease in exception to Article 3 of Chapter 69.

There exist many judgement pre-2009 discussing the parameters of the competence of the RRB and where the Court would find that those parameters were exceeded, it would state that all other disputes had to be determined by the Court of Ordinary Jurisdiction which is either the Court of Magistrates in its Civil Judicature or the First Hall of the Civil Court.

For example, we had distinguished between a request for the permission not to renew a lease under Article 9 of Chapter 69 and a demand for the dissolution of the lease under the provisions of the Civil Code. Prior to Act X of 2009, although these two actions still had the same result if successful, i.e., the termination of the lease, they had to be filed before different tribunals – the demand for permission not to renew fell within the exclusive competence of the RRB according to Chapter 69, whilst, at the time, the power to determine a demand for dissolution of the lease fell within the competence of the ordinary Courts.

When filing an action, therefore, the lawyer had to be very careful about the nature of the demand and the basis or ground on which that demand was being pursued because all of that would determine which forum was competent to decide on the dispute.

It is noteworthy that at the time, no provision existed allowing for the transfer of cases from one court or tribunal to another as we have today. This meant that if you filed the action before the wrong tribunal, that action would be rejected without being considered. You will see in the law of procedure that the plea of lack of competence can be raised *ex officio* by the Court or tribunal itself. This was therefore a headache for the lawyer to be very careful what kind of action he was filing and that the action was filed before the competent forum.

All of this changed radically with the coming into force of Act X of 2009 since for the first time, this Act extended the competence of the RRB to cover ***all disputes connected to a lease*** independently of when that lease started, which law regulates that lease, or whether the lease is still in course or has expired or been terminated.

The only question connected to a lease which was left out of the special competence of the RRB was the question of ***the validity of a lease***. If the very existence of the lease is in dispute, then the competent forum to hear and decide the action to determine its validity or lack of existence is the First Hall of the Civil Court and not the RRB.

The huge problem which we had with Act X of 2009 was the lack of clarity and bad drafting of the law. At times, the English and Maltese version did not even tally and unfortunately, all of that gave rise to several conflicting judgements, even at CoA-level. This was until 3 judgements by the CoA in its Inferior Jurisdiction in December

of 2015 went very deeply into the Parliamentary Debates on Act X of 2009 and set to rest once and for all the entire confusion of judicial interpretation which we have over the 6 years between 2010 and 2015.

Relevant Provisions Regulating the RRB

This is a cause of many problems with interpretation since these provisions regulating the RRP are scattered in the Civil Code where we have Article 1525 and Chapter 69 which has Article 16 onwards.

Although the RRB is a special tribunal and not a court, it is set out in the law as forming part of the Superior Courts of Malta. Notwithstanding, it is presided over by a magistrate and not by a judge (because of the volume of cases at present, there are 3 magistrates sitting on the RRB). Moreover, appeals from decisions of the RRB are heard and decided by the CoA in its Inferior Jurisdiction. That is, the CoA presided over by one and not three judges.

Additionally, when there is a ***technical issue*** which is to be determined by the RRB, the magistrate appoints two architects in the composition of the Board from a panel of architects assigned to it. These two architects are not technical referees – they are not experts in front of other judges – but ***they form part of the composition of the Board***. This means that where they are appointed, the composition of the Board consists of 3 members: the presiding magistrate and the two architects.

The Competence of the Board

Against this backdrop, **Article 1525(1) of the Civil Code**, in its second paragraph says,

> *The Rent Regulation Board (hereinafter referred to as the "Rent Board") established under the Reletting of Urban Property (Regulation) Ordinance* ***shall decide all matters affecting the leases of urban tenements including residential as well as commercial tenements*** *including* ***causes relating to the occupation of urban tenements where such leases have expired****, and* ***any damages resulting during such period of occupation****. Other leases fall under the competence of the courts of civil jurisdiction while matters relating to agricultural leases shall fall under the competence of the*

Rural Leases Control Board appointed according to the provisions of the Agricultural Leases (Reletting) Act:

Provided that ***matters relating to the validity of a contract of lease****, shall be examined by the courts of civil jurisdiction, so however, that any other matter following the determination of such matters relating to validity shall fall under the competence of the Rent Board.*

The same provision but in different wording (hence the difficulty of interpretation) is included in Article 16(4) of Chapter 69. Both of these provisions have been newly added by Act X of 2009. Article 16(4) says:

(4) Without prejudice to any other law the Board shall also decide all matters affecting the leases of urban property including residential as well as commercial property in terms of Title IX of Part II of Book Second of the Civil Code Of Contracts of Letting and Hiring, including causes relating to the occupation of urban property where such leases have expired after the termination of the rent, and any damages resulting during such period of occupation:

Provided that matters relating to the validity of a contract of lease, shall be examined by the courts of civil jurisdiction, so however, that any other matter following the determination of such matters relating to validity shall fall under the competence of the Rent Board.

The Rent Board shall also have the competence to decide demands related to ***maintenance****,* ***repairs****,* ***defects*** *and* ***faults of the tenement*** *including latent ones,* ***damages or improvements****,* ***amounts due for water and electricity*** *and any amount left by way of* ***security deposit*** *by the tenant, where such demands are included in other demands or pleas made before the Board, over which the Adjudicating Panel has no jurisdiction.*

All of this means that insofar as leases of urban immovable tenements are concerned, whether they are residential or commercial tenements, and whether the lease has started before 1 June 1995 or between I June 1995 and 1 January 2010 or after 1 January 2010, all disputes have to be determined by the RRB, irrespective of the nature of the claim and irrespective of whether the lease is still running, has expired or has been terminated.

It is only when the very validity and existence of such a lease is contested that the action has to be filed and determined by the FHCC. Moreover, where some of the

demands fall within the exclusive competence of the adjudicating panel constituted under Chapter 604 but there are other demands which fall outside the competence of that panel, then all of the demands together must be heard and determined by the RRB.

The three very important judgements of the CoA in its inferior jurisdiction all decided on the 16 December 2015 by Judge Anthony Ellul which has laid down these important parameters of the competence of the RRB are the following:

- *Catherine Darmanin et v. Miriam Cutajar Fiorini et.*

In this case, defendant bought a ½ undivided share in the property at issue. Plaintiffs alleged that following this purchase, defendant was occupying the property with no valid title at law. At first instance, the RRB said that it had no competence to hear and decide the case since the merits did not concern the obligation of the parties with regards to an existent lease or an obligation of the lessee to evict after a valid termination. This was about whether a lease was still valid or not since the lessee purchased ½ undivided share.

The CoA made reference to Article 16(4) of Chapter 69 which provides that the RRB has the competence to decide on all matters dealing with urban tenements, which applies to all pre-1995 rents.

There was no doubt that the object at issue was an urban tenement. What had to be determined was whether through acquiring the ½ undivided share, the rent ended. The CoA quoted the White Paper titled 'Il-Htiega ta' Riforma Sostenibilita', Gustizzja u Protezzjoni' (2008):

> *"Il-qafas tal-legislazzjoni kurrenti jissepara r-rikors ta' konflitt bejn il-Qrati u l - Bord tal-Kera. Dan ir-rapport jargumenta li din is-separazzjoni tohloq kumplessitajiet bla bzonn.*
>
> *Ghalhekk qed ikun propost li, bhala parti mir-riformi, materji li ghandhom x'jaqsmu mal-kera* ***jitnehhew mill-gurisdizzjoni tal-Qrati u titwaqqaf entita amministrattiva wahda li jkollha gurisdizzjoni sija fuq ir-regolamentazzjoni u l-governanza tas-suq tal-kera biex ikun zgurat li materji relatati jkunu indirizati b'mod effettiv****. Dan ir-rapport jirrikkmanda li din ir-responsabbilta*

> *ghandha taqa' fuq Bord ghar-Regolamentazzjoni ta l-Kera strutturat mill-gdid…….*
>
> *Ir-regolamentazzjoni u l-governanza tas-suq tal-kera ghandhom jitqieghdu taht entita wahda biex ikun zgurat li jkun hemm strument effettiv ghal soluzzjonijiet legali f'materji ta' din ix-xorta, u f'dan ir-rigward ghandha tinghata gurisdizzjoni shiha lill -Bord ghar-Regolamentazzjoni tal-Kera li gh andu jkun ristrutturat."*

In the CoA's view, the words *"l-Bord ghandu wkoll jiddeciedi l-materji kollha li jolqtu kirjiet ta' fondi urbani"* in Article 16(4) included the case before it. Plaintiffs were alleging by obtaining the ½ undivided share, the rent had ended since defendant couldn't be the lessee of the other ½ undivided share.

Although plaintiffs had alleged that the defendant was occupying the property with no title valid at law, the CoA said that it was obvious that it had to first assess whether the rent had finished. It made reference to Article 39(5) of Act X of 2009 and from this, it understood that this confirms just how wide the competence of the RRB is and the intention of the government in introducing that law. ***With the introduction of Act X of 2009, the rule, and not the exception, is that where urban tenements are concerned, the RRB has exclusive jurisdiction.*** It was only those cases that were already pending before the Court that had to remain being heard and decided by that court or tribunal.

In this respect, the Minister said:

> *"Materji li ghandhom x'jaqsmu mal-kirjiet ma jibqghux taht id-diskrezzjoni tal-qrati imma jibdew jaqghu taht il-kompetenza tar-Rent Regulation Board. L-eċċezzjoni tkun li dawk il-kawżi li nfethu qabel din il-ligi jibqghu taht il-kompetenza tal-qrati."*

- *Trevor Buttigieg v. Martin John Easby.*

This was an appeal from a decision of the Small Claims Tribunal which decided that it didn't have the competence to hear and decide the case that concerned a request for payment of €2000 of water and electricity expenses and damages caused by the lessees (defendants) whilst they were renting the premises. This in view of Article 1525 of the Civil Code. This was appealed on the basis that the Tribunal had applied wrongly the amendments of Act X of 2009.

The CoA re-cited Article 1525 which says, "*kompetenza esklussiva li jiddeċiedi kwistjonijiet konnessi ma' kuntratti ta' kiri.*"

> *"Il-hlas li jippretendi l-attur, illum appellant, huma obbligi konnessi mal-kirja, in kwantu:*
>
> *i. Skond il-kuntratt ta' kiri, l-inkwilini kellhom l-obbligu li jhallsu ghall-konsum ta' dawl u ilma;*
> *ii. L-inkwilini kellhom l-obbligu li jzommu l-fond fi stat tajjeb, u jirritornah lura lill-inkwilin fi stat tajjeb.*
>
> *L-attur harrek lill-konvenuti sabiex jonoraw l-obbligi kuntrattwali li jifformaw parti mill-kuntratt ta' kiri.*
>
> *Ilum stess il-qorti tat sentenzi li fihom ikkonfermat li l-Bord Li Jirregola l-Kera hu wkoll kompetenti li jisma' kawzi konnessi ma' kuntratti ta' kiri minkejja li l-kirja tkun spiccat. A skans ta' ripetizzjoni bla bzonn, il-qorti taghmel ampja riferenza ghal dawk is-sentenzi u taddotta r-ragunament li sar fihom ghal din is-sentenza wkoll."*

- *Salvatore Bartolo et v. Anthony Deguara et.*

This was again an appeal from the Small Claims Tribunal which declared that it had no competence to hear and decide the case.

Plaintiffs brought a case before the Small Claims Tribunal where it requested the sum of €3,322 as arrears as well as other payments but the Tribunal declared that it didn't have the competence to decide the case.

The CoA made reference to Articles 1525 of the Civil Code (***'l-kompetenza esklussiva li jiddeciedi kwistjonijiet…***') and Article 16(4) of Act X of 2009 (***'l-materji kollha'***).

From the evidence it resulted that the contract of lease was done in writing in 2007 for a period of 6 years. The first 5 years were *di fermo* and the last year was *di rispetto*. Moreover, in the contract it was stated that the parties were agreeing that the lessee may terminate the lease at any time so long as they inform the lessor by registered letter 6 months in advance of the intended termination date.

In 2011, the defendants no longer remained in occupation of the property and plaintiffs alleged that they had the right to be paid the rent until 2012, i.e., the date when the 5 years were up. The case was instituted in 2012 and therefore, ***there was no doubt that at that date, there was no rent. However, the CoA said that it remains a fact that the case is based on the non-payment of rental arrears. It is an obligation emanating from the contract of lease.***

The CoA assessed the parliamentary debates referred to in ***Darmanin v. Cutajar Fiorini*** above. It said that in Act X of 2009 there are 3 articles regarding the competence of the Board being Articles 2, 38 and 39(5). This fact doesn't help and, to the contrary, it creates uncertainty. This apart from the fact that in these same provisions, there is a situation where the English text doesn't reflect the Maltese one.

> *"Il-qorti hi tal-fehma li jkun ghaqli li l-legislatur jintervejni sabiex il-materja tal-kompetenza tal-Bord Li Jirregola l-Kera tigi regolata minn provvediment wiehed tal-ligi li jkun car u li ma johloqx il-problemi li l-imsemmija provvedimenti qeghdin joholqu. Il-posizzjoni attwali tidher li qeghda sservi biss ghal incertezza u telf ta' zmien ghal min ikun kostrett jipproponi proceduri gudizzjarji f'kwistjonijiet fejn is-suggett hu l-kiri ta' fond urban."*

Regarding competence the CoA said:

> *Ghal finijiet ta' kompetenza, il-ligi ma taghmilx distinzjoni jekk fiz-zmien li l-attur jipproponi l-kawza l-kirja tkunx ghadha fis-sehh jew le. Mill-Artikolu 1525 tal-Kodici Civili ma jirrizultax li l-komptenza tal-Bord tiddependi mill-ezistenza ta' lokazzjoni fiz-zmien li tigi proposta l-kawza. Ghalkemm l-atturi argumentaw li: "… meta giet intavolata l-kawza ir-relazzjoni bejn il- partijiet ma baqghetx dik ta' inkwilin u sid, imma saret dik ta' kreditur u debitur u ghalhekk il-forum korrett fejn ghandha tigi ntavolata kawza bhal dik odjenra huma l- Qrati Civili Ordinarji" u ghalhekk il-kawza taqa' fil-kompetenza tat-Tribunal, il-qorti ma taqbilx. Il-pretensjoni tal-atturi hi bazata fuq obbligi kuntrattwali li jemanu mill-kuntratt ta' lokazzjoni li kien hemm bejn il-kontendenti. Gialadarba l-Artikolu 1525 tal-Kodici Civili jipprovdi li l-Bord ghandu: "…* ***l -kompetenza esklussiva li jiddeciedi kwistjonijiet konnessi ma' kuntratti ta' kiri 4*** *ta' fond urban u ta' dar ghall-abitazzjoni u ta' fond kummercjali", ghal din il-qorti hu evidenti li t-talba ghall-hlas ta' kera taqa' fil-kompetenza tal-Bord irrispettivament jekk il-lokazzjoni ghadhiex in vigore jew le. Provvediment li ma jaghmilx distinzjoni*

f'liema perjodu jkun sar il-kuntratt ta' lokazzjoni. L-istess jinghad fir-rigward tal-Artikolu 39(5) tal-Att X tal-2009 li jipprovdi:

"Il-Bord tal -Kera mahtur bis-sahha tal -Ordinanza Li Tirregola t-Tigdid tal-Kiri ta' Bini, ghandu jkollu gurisdizzjoni esklussiva li jiddeciedi ***kwistjonijiet konnessi ma' kirjiet ta' fondi urbani 5*** *li jinkludu kemm fondi kummercjali kif ukoll fondi residenzjali. B'dan izda li kawzi li jirrigardaw kuntratt ta' kiri li fl-1 ta' Jannar 2010 ikunu pendenti quddiem Qrati jew Tribunal ohra ghandhom jibqghu trattati mill-istess Qrati jew Tribunali".*

Il-qorti taf li hemm gurisprudenza li tghid mod iehor. Hekk per ezempju l-kawza ***Enriketta Bonnici vs Gordon Borg****, deciza minn din il-qorti6 fl-4 ta' Dicembru 20137. Il-qorti ser tillimita ruhha biex tosserva li jidher li d-decizjoni tal-qorti kienet bazata fuq interpretazzjoni tal-Artikolu 16(4) tal-Kap. 69. Fir-rigward tal-Artikolu 1525 tal-Kodici Civili, il-qorti osservat:*

"il- Qorti tqis illi l-kliem tal -artikolu 16(4) Kap. 69 cioe' 'minkejja d-dispozizzjonijiet ta' kull ligi ohra ghandha tiftiehem illi anke jekk ghal grazzja tal -argument hemm divergenza fil- portata tat-tifsira li ghandha tinghata lill-artikolu 1525(1) tal-Kap. 16 u artikolu 16(4) tal-Kap. 69, ghandu jipprevali dak li qed jinghad fl-ahhar imsemmi artikolu. P ero din il - qorti tqis li ma hemm ebda divergenza izda biss aktar kjarezza fil-kliem tal -artikolu 16(4)".

Din il-qorti tosserva li:-
i. Il-qorti ma tara l-ebda raguni ghalfejn l-Artikolu 16(4) tal-Kap. 69 ghandu jipprevali fuq l-Artikolu 1525 tal-Kodici Civili. Iz-zewg provvedimenti tal-ligi gew introdotti bis-sahha tal-istess ligi, u l-applikazzjoni ta' wiehed ma jiddependix mill-iehor.

ii. Wiehed jista' jargumenta li l-Artikolu 16(4) tal-Kap. 69 japplika fejn il-kirja tkun ghadha fis-sehh in kwantu jipprovdi li l-Bord ghandu jiddeciedi "..l-materji kollha li ***jolqtu kirjiet*** *ta' fondi urbani…." , u fit-test Ingliz: "…* ***affecting the leases*** *of urban property". Il-kelma "jolqtu" bl-Ingliz "affecting" taghti lil wiehed x'jifhem li tirreferi ghal kirja ezistenti u mhux li tkun spiccat. Il-kliem "…. inkluz kawzi dwar okkupazzjoni ta' fondi urbani* ***fejn il -kirjiet ikunu intemmu*** *….", jistghu jkomplu jsahhu l-fehma li l-kelma* ***kirjiet*** *fl-ewwel parti tal-provvediment qeghda tirreferi ghal kirja li ghadha fis-sehh. Pero' l-*

interpretazzjoni tal-Artikolu 1525 tal-Kodici Civili m'ghandhiex tiddependi mill-interpretazzjoni tal-Artikolu 16(4) tal-Kap. 69. Fil-fatt l-Artikolu 16(4) hu ntiz biss biex jaghti lill-Bord ***ukoll*** *il-kompetenza li jiddeciedi l-materji li jissemmew f'dak il-provvediment. Tant hu hekk li fl-Artikolu 16(4) tal-Kap. 69 jinghad li "…. il-Bord ghandu* ***wkoll*** *jiddeciedi l-materji ……". Ghalhekk il-kompetenza tal-Bord m'hijiex limitata biss ghal materji li jissemmew fl-imsemmi provvediment.*

iii. L-Artikolu 1525 jipprovdi li l-Bord hu kompetenti jiddeciedi ***" kwistjonijiet konnessi ma' kuntratti ta' kiri"****. Din id- disposizzjoni ma taghmilx distinzjoni bejn kirjiet in vigore u ohrajn li ntemmu, u ghalhekk fil-fehma tal-qorti m'ghandhiex tkun hi stess li tintroduci distinzjoni li l-ligi ma taghmilx.*

iv. Ir-realta' tibqa' li kawza fejn jintalab hlas ta' kera hi kwistjoni ntrinsikament marbuta mal-kuntratt ta' kera, u dan minkejja li l-kirja ma tkunx ghadha fis-sehh. Il-qorti ma tara l-ebda raguni ghalfejn bil-mod kif inkiteb l-Artikolu 1525 tal-Kodici Civili, il-Bord ghandu kompetenza li jisma' u jiddeciedi kawza ghall-hlas ta' kera meta l-kirja tkun ghadha fis-sehh filwaqt li m'ghandux tali kompetenza ghas-semplici raguni li l-kirja tkun inhallet. L-Artikolu 1525 tal-Kodici Civili ma jatix lill-qorti x'tifhem li l-legislatur ried jiddistingwi. Wara kollox huma kwistjonijiet relatati mal-obbligi kuntrattwali ta' inkwilin.

This conclusion has been consistently abided by ever since.

Another important ***transitory provision*** which the Court referred to for its final interpretation in these 3 judgements is <u>Article 39(5) of Act X of 2009</u>:

> *(5) The Rent Board appointed by virtue of the Reletting of Urban Property (Regulation) Ordinance shall have exclusive jurisdiction to decide matters connected with the letting of urban property including both commercial tenements and residences. Sohowever that causes relating to lease contracts which on the 1st January, 2010 are still pending before the Courts or other Tribunals shall still be dealt with by the same Courts or Tribunals.*

Besides the last bit of this transitory provision, we have a very clear statement to which the Court gave prevalence in these 3 judgements stating that ***the RRB has exclusive jurisdiction to decide any matter which has to do with the lease or urban immovable properties.***

The Composition of the Board – Technical Opinion

Regarding the composition of the Board, the relevant provision is **Article 23 of Chapter 69**. This is the provision which regulates the composition of the RRB where a technical opinion is necessary.

A 'technical opinion' means any opinion of expertise of an architect and would include:

- Valuations of the market value of a tenement (this is now necessary for the purposes of Article 4A of Chapter 69);

- Opinions on whether adequate maintenance and repair works have been carried out; whether alterations have been executed.

All of these considerations are of paramount importance in actions requesting permission not to renew under Article 9 of Chapter 69 or for the dissolution of the lease either because of a breach of obligation under the contract of lease, or on the basis of a breach of a legal obligation under the Civil Code.

Article 23 of Chapter 69 says:

23. (1) Whenever a question arises before the Board requiring the valuation of any premises or any other technical opinion in connection with any case before the Board, the Chairman [the magistrate] ***shall*** [this is an obligation] *assign two of the members of the Panel* [panel of architects not panel under Chapter 604] *to examine the premises in question, or to take cognizance of the record of the case relative to the matter in which the technical opinion is requested; and such two members shall present their report to the Chairman during the sitting or file the said report in the registry of the Board as the Chairman may direct:*

Provided that where the valuation of any premises or any other technical opinion in respect of premises is required before the board and where:

(i) it results that the valuation or other technical opinion in respect of the same premises was given before a court by an Architect or Civil Engineer appointed by such court with the agreement of the lessor and the tenant who were parties to the said case before the court and who are also parties to the case before the board; and

(ii) the said valuation or other technical opinion was confirmed in a final judgment of a court,

the chairman may, after hearing the parties, decide to rely on the said valuation or technical opinion to such an extent as he deems fit instead of assigning two (2) members of the Panel to examine the premises in accordance with this article:

Provided further that the chairman may also decide to rely on any valuation or other technical opinion instead of assigning two (2) members of the Panel as aforesaid where all the parties to the case agree.

(2) The Chairman may also require the members of the Panel assigned to a case to attend the sitting of the Board when that case is being considered by the Board if the said members require additional information from the parties or need to hear any particular witnesses.

(3) The Chairman shall only be bound by the reports of the Panel whenever the reports of the two members of the Panel assigned to a particular case are unanimous; where unanimity is not reached by the said two members, the Chairman shall on the basis of the reports submitted by the two members, decide the matter himself.

This long proviso was added by Act IV of 2022 to cater for technical opinions given in the course of constitutional proceedings attacking the continuation of a lease under the controlled regime, where subsequently, the remedy to raise the rent is pursued. The objective was to avoid duplication of work and expenses.

Where the opinion is already given and already accepted in a final judgement, then the RRB may decide to adopt that opinion instead of assigning its own members to give that opinion again. If that opinion has not yet been approved in a judgement, the parties may agree, in order to avoid duplication of work, to ask the RRB to adopt that same opinion instead of assigning its two members to grant it afresh.

In summary: in Article 16B, we have an explanation of the competence of the RRB which stops because of the special, limited competences of the Panel set out under Chapter 604. Then Article 20 is the provision which considers the RRB as part of the Superior Courts. Article 23 is on technical opinions and the composition of the RRB when it includes 2 architects. And then the right of appeal from the decision of the RRB before the CoA in its inferior jurisdiction set out in Article 24(2) of Chapter 69.

Board shall not determine causes relative to leases that are not registered
16B. The Board shall not deal with any demand made by either party to the lease, if the agreement, contracted after the entry into force of the Private Residential Leases Act, is not registered in accordance with article 4 of the Private Residential Leases Act:

Provided that the Board shall not have jurisdiction to determine any demand made by either party to a lease entered into after the 1st June, 1995, but before the coming into force of the Private Residential Leases Act, which is renewed or extended beyond the 1st January, 2021, and which is not registered in accordance with article 5 of the Private Residential Leases Act.

24 (*2) The appeal shall be brought before the Court of Appeal as constituted in terms of article 41(9) of the Code of Organization and Civil Procedure by means of an application, within twenty days from the day on which the decision of the Board is delivered.*

Now we have an idea of what the RRB is and the extent of its competence.

How to Proceed Before the Rent Regulation Board

How does own proceed before the RRB? That is, how is an action initiated or filed before the RRB? There is very little formality set out in the law for initiating an action before the RRB.

For historical reasons, the mode of proceeding before the RRB is through an application (*rikors*) which is the simplest of the judicial acts by which an action can be filed before a court or tribunal. Specimen applications have been included in the Schedule annexed to this Ordinance. The Schedule includes 3 forms: Form A, Form B, and Form C.

Upon taking a quick look at these forms, one will immediately notice the simplicity required for these applications. These applications, however, refer to the older remedies envisaged in Chapter 69 which fell within the original competence of the RRB. They do not cover the extended competence of the RRB after Act X of 2009. However, in practice, all additional actions which fall within the competence of the RRB are generally pursued through the filing of an application which need not be

sworn, and which is made up of statements of fact or premises of fact (normally they are numbered) and then the demands ('*it-talbiet*').

So, ***there are no specific and rigid formalities or requirements for initiating an action before the RRB***. There is, however, ONE EXCEPTION which is the special summary proceedings ('*proceduri bil-giljottina*'). These are a special kind of action introduced for the first time before the RRB through Act X of 2009. They are imported from Article 167 COCP but before Act X of 2009, they did not exist for the RRB. Act X of 2009 made this addition through a new provision in Chapter 69 which is **Article 16A of Chapter 69**.

Article 16A gives in detail the procedural formalities that need to be satisfied, including the form of the Act with which special summary proceedings are initiated for these proceedings to be valid.

The provision states:

Powers of the Board

16A.(1)(a)In actions before the Rent Board, where the demand is solely for the eviction of any person from the lease or sub-lease of any urban, residential or commercial tenement, with or without a claim for rent or any other consideration due or by way of damages for any compensation, up to the date of the surrender of the tenement, it shall be lawful for the applicant to demand in the sworn application that the Board gives judgment allowing his demand, without proceeding to trial:

Provided that when the demand for eviction is made with a claim for rent or any other consideration due or damages for any compensation, the Rent Board shall decide the demand for eviction at the first hearing before deciding any other demands made by the applicant:

Provided that the applicant shall, in his sworn application state that the respondent has no defence to the action:

Provided further that the applicant shall also file together with the application a sworn affidavit containing facts relative to the claim, and confirming that such facts are within his knowledge. The applicant may also file together with his application an affidavit of any other third party confirming facts relative to the claim.

Special summary proceedings are 'special' because the defendant *('il-konvenut'/'l-intimat')* has ***no automatic right of defence***. The defendant will only be allowed a right of defence, i.e., the right to file a sworn reply with his pleas, if in the first hearing the RRB is satisfied that the defendant has *prima facie* grounds for contestation.

The demand that can be pursued through special summary proceedings before the RRB ***must include a demand for eviction*** (*'tkeċċija'*). Eviction is distinct from termination of the lease. The difference between the two is that when you are asking for the termination of a lease through a dissolution or permission not to renew, ***you are accepting that the lease still exists***, i.e., the lease is still valid, and you are asking for it to be stopped. On the contrary, eviction will follow ***if*** the lease is terminated. So, when you are asking for the eviction of the tenants, you are declaring that the lease no longer exists. Therefore, in that case, it must be proved that the lease has somehow ended, either because its term has expired and there was no valid renewal, or else because it was terminated in terms of the lease agreement.

Understand that you cannot institute special summary proceedings if the rent is still ongoing. For a demand of eviction to succeed, the lease must have ended and for special summary proceedings to be validly pursued, a demand for eviction is required. Besides the demand for eviction, ***a demand for payment can be included*** with the demand for eviction and the payment can be of different dues – it can be of overdue rent, of damages, of reimbursement of expenses (e.g., water and electricity bills). But the special summary proceedings ***cannot be used only for a demand for payment***. A demand for eviction must be there.

(b) In the cases provided for in this article, the sworn application shall be in writing according to the prescribed form and shall contain an order to the respondent to appear before the Board, on an appointed day and at a stated time.

(c) In the cases provided for in this article, the sworn application shall also indicate clearly that the procedures conducted are special summary procedures where judgement shall be given at the first hearing of the case should the respondent fail to appear at that sitting or should he fail at that sitting to show that he has a valid defence to put forth to rebut the applicant's claims.

(2) A copy of the sworn application shall be served upon the respondent.

(3) In the cases referred to in sub-article (1), the sworn application shall be served on the respondent without delay; and he shall be ordered to appear not earlier than fifteen days and not later than thirty days from the date of service:

Provided that in the case of non-observance of the provisions of this article the Board shall not stop proceedings by special summary proceedings but shall give such orders as it may consider appropriate so that the rights of the parties be not prejudiced.

(4) The sworn application, and the affidavit produced therewith, and any order referred to in sub-articles (2) and (3) shall be served by means of any executive officer of the courts after judicial hours.

If the requirements are satisfied, the special summary proceedings must be filed through ***a sworn application*** (*'rikors guramentat'*) which is exceptional before the RRB. That sworn application will be appointed for hearing and must be accompanied by a sworn declaration of the applicant that to his knowledge, defendant has no defence to raise against the demand/s and it must also include an affidavit of the relevant facts in which the applicant must confirm that those facts are personally known to him.

Very importantly is that the sworn application must declare at the beginning that it is special summary proceedings in which judgement will be given in the first hearing without allowing defendant the right of defence, if defendant fails to appear for the hearing and fails to convince the RRB that s/he has a valid defence to put forward against applicant's demands.

∴ It is two cumulative requirements in special summary proceedings: (1) the physical presence of the defendant/respondent for the hearing is a *sine qua non* requirement (that is, if he is not present, the RRB will immediately pass to judgement) and (2) s/he must convince the RRB that they have a valid defence to put forward.

Special summary proceedings have the added advantage of being appointed for hearing in a very short while. So, the RRB will or should fix a date for the first hearing at a time between 15 and 30 days from when the defendant is served with the sworn application.

(5) (a) If the respondent fails to appear to the sworn application, or if he appears and does not contest the proceedings taken by the applicant, on the ground of irregularity

or inapplicability, or, having unsuccessfully raised such plea, does not by his own sworn evidence, or otherwise, satisfy the Board that he has a prima facie defence, in law or in fact, to the action on the merits, or otherwise discloses such facts or issues of law as may be deemed sufficient to entitle him to defend the action, the Board shall forthwith give judgement, allowing the applicant's claim. The respondent may make his submissions to contest the proceedings taken by applicant on the ground of irregularity or inapplicability by means of a note to be filed in the registry of the Board or during the hearing.

(b) If the respondent successfully contests the proceedings on the ground of irregularity, or inapplicability, or if he satisfies the Board that he has a prima facie defence to the action, or discloses such facts or issues of law as may be deemed sufficient to entitle him to defend the action or to set up a counter-claim, he shall be given leave to defend the action and file a reply within twenty days from the date of the order referred to in paragraph (d).

(c) Where leave to defend is given, the action shall be tried and determined, on the same acts, in the ordinary course as provided in this Ordinance.

(d) The order giving leave to defend shall be made orally, a record thereof being kept in the proceedings.

Sub-article (5)(a) gives a list of the scenarios in which the RRB will proceed to judgement on the date of first hearing without allowing defendant the right to reply. If defendant (1) fails to appear, (2) if he appears but does not satisfy the RRB that the special summary proceedings are irregular or inapplicable, or else does not convince the RRB that he has a *prima facie* defence in law or in fact to raise against the demands, the RRB will pass to judgement, upholding the demands immediately.

If you leaf through judgements in special summary proceedings before the RRB, it is quite difficult to manage to obtain judgement immediately without allowing defendant the right of defence. So, the RRB tends to be quite liberal in favour of defendant in its interpretation of whether the special summary proceedings as special summary proceedings can succeed.

What we are saying is that the minimal indication of a *prima facie* defence which defendant can show will most probably convince the RRB to allow him the right to file a reply. Obviously, that doesn't mean that the RRB will then reject the demands; it will all depend on the evidence produced but from then onwards, the proceedings will

continue as a normal action. So, both parties have the right to produce evidence through documents and testimonies, both parties have the right to make submissions – oral or in writing – and the judgement then will follow.

To repeat, ***special summary proceedings are not available for terminated a lease***. They are available for evicting a tenant after the lease has ended, either because of expiration of the term or because it has been terminated according to contract.

The special summary proceedings are the only process before the RRB which is not initiated through a simple application. ***All other proceedings before the RRB start with an application (rikors)***. The special summary proceedings need to start with a sworn application with all the additional requirements which we have set out under Article 16A of Chapter 69.

If the RRB is not satisfied that it can continue and terminate the case as a special summary proceedings, the proceedings are ***converted into ordinary civil proceedings***.

Here, refer to a relatively recent addition to our law of civil procedure: the right of transfer between courts and tribunals. This makes our life as lawyers a little bit easier – Article 741(b) & (d) COCP. This addition came with Act IV of 2016.

It shall be lawful to plead to the jurisdiction of the court -

(b) when the action, although one within the jurisdiction of the courts of Malta, is brought before a court different from that by which such action is cognizable:

Provided that if the court considers that the plea is justified, the court shall by a decree in camera, which shall not be subject to appeal, order that the acts of the proceedings be transferred to the court, board or other tribunal by which it considers that such action is cognizable:

Provided further that if the court, board or other tribunal to which the acts of the proceedings are transferred considers that it is not vested with jurisdiction to take cognizance of the action transferred to it, the court, board or other tribunal shall within ten days from the receipt of the acts of the proceedings or from the first hearing of the action before it transmits the acts of the proceedings to the court of appellate jurisdiction entitled to take cognizance of appeals from judgments of the court, board

or other tribunal which court shall within thirty days and by a decree in camera determine by which court, board or other tribunal such action is cognizable;

(d) *Any reference to a "court" in the first sentence and in paragraph (b) of this article shall be deemed to include a reference to a Board or Tribunal established by law, so however that when a cause is commenced before a Board or Tribunal it may also be transferred for hearing before a court in accordance with the provisions of paragraph (b) of this article. When a cause is transferred to be heard in front of the Court, Board or Tribunal in accordance with paragraph (b) the said Court, Board or Tribunal may give all orders and make provisions as necessary, subject to such conditions and time limits as appear to them to be appropriate, so that the hearing of the cause will proceed in accordance with the formal and procedural requirements, including those relating to the payment of fees, applicable before that Court, Board or Tribunal.*

This means that if an action falling within the exclusive competence of the RRB is wrongly filed before any other court, the action can be saved and transferred to the correct court or tribunal to be heard and determined, instead of being thrown out.

This amendment came very early in 2016, immediately after those December 2015 judgements mentioned earlier, and the reason for this amendment was that there was so much confusion at the time on what was the correct parameter of the competence of the RRB that this safety valve was added to ensure that actions are not simply thrown out because of the difficulty to interpret the extent of the competence of the RRB.

Obviously, this serves other purposes because as drafted, it is not limited to the RRB but applies to any action generally in the civil law realm, and therefore, if a civil law action is wrongly filed before a court or tribunal which is not competent, then it can be transferred by a simple decree (*'digrit'*) to the competent court or tribunal for hearing and determination.

The rest of Chapter 69 (Articles 27 et seq until Article 43) – we have formal provision on the different aspects of the procedure before the RRB, the CoA from decisions of the RRB and exceptionally, the procedure of re-trial (hearing the case again) against a decision of the RRB. These are simple provisions, many of which are old and have not been amended recently.

Article 44 was considered when dealing with the definition provision because there we have a wide definition of 'letting'. Article 46 is the provision which sets out the time parameters of the applicability of Chapter 69. Basically, that Articles 1-15 apply only to pre-1995 lease, Articles 16-until the end apply to all leases, so even post 1995 leases.

Martina Camilleri (4th Year)

Dr Vince Galea

Housing (Decontrol) Ordinance, Chapter 158 of the Laws of Malta

Whilst this Ordinance entered into force in 1959, today it is the most attacked constitutionally precisely because it is still valid. In fact, it is being submitted that around 60-80% of constitutional cases nowadays are on this law.

Background

As a preamble, Chapter 158 states:

> *"To provide for the* ***decontrol*** *and* ***registration*** *of certain* ***dwelling houses****, and for matters connected therewith, and to permit an adjustment in the rent payable in respect of a controlled dwelling-house where improvements have been carried out with the consent of the tenant."*

Chapter 158 was enacted by Act XIXA of 1959 and was subsequently amended a number of times with the most important changes effected by act XXIII of 1979. The 1979 amendments had 4 main objectives namely:

1) The protection of tenants of decontrolled dwelling houses from eviction at the end of the lease.

2) The regulation of other aspects of lease of decontrolled houses, namely: repair and maintenance, lease of furniture, and payment of premium.

3) The elevation from hardship of owners of old houses in need of repairs.

4) The conversion of the emphyteusis of dwelling houses at its termination into a lease or into perpetual emphyteusis and the continuance of occupation of the house under such a lease or emphyteusis in return for a rent or ground-rent computed as indicated in the Ordinance.

In simple terms, with its introduction in 1959, this Ordinance created a special class of dwelling houses known as ***"decontrolled dwelling houses"*** in respect of which the special rent laws do not apply.

The cumulative effect of such protectionist laws (i.e., the special laws) was that landlords were no longer willing to grant their tenements under title of lease due to various disadvantages imposed on them by these special rent laws namely: the obligatory renewal of the lease under the same conditions (Chapter 69); the restrictions on the amount of rent payable (Chapter 116); as well as the fact that such dwelling houses could potentially be the subject of a requisition order issued under Chapter 125.

These 3 laws were in no way conducive to the development of the economy in this particular sector. Given that 1959 was a few years post war and there was quite a shortage of properties at that time, this Ordinance came about.

In its name, 'decontrol' is referring to the removal from the control. It is the decontrolling of property – the government could not apply the special rent laws to that type of property. The ultimate aim of this law in 1959 was ***the liberalisation of the rental market***.

Upon its enactment, leases of dwelling houses subject to decontrol were essentially governed solely by Chapter 158 and the provisions of the Civil Code. However, in time it was felt that the lack of an entitlement to an automatic renewal of the lease under Chapter 69 severely affected the interests of the tenant of dwelling houses, the decontrol of which had been registered in virtue of the provisions of Chapter 158. It was for this reason that Chapter 158 was amended by Act XXIII of 1979 in order to bring back certain benefits, especially of renewal which the tenant would have been entitled to prior to the enactment of such Ordinance.

Applicability

Registration of decontrolled dwelling houses

3. Subject to the provisions of article 6, the Land Valuation Officer, on the application of an owner made in such manner as may be prescribed, shall register as a decontrolled dwelling-house any dwelling-house which -

(a) is not completed or ready for use as a dwelling-house on the appointed day; or

(b) although completed or ready for use as a dwelling- house on the appointed day, has not been occupied as a dwelling-house on or before that day; or

(c) is completed or ready for use after the appointed day by the making of the structural alterations converting one or more dwelling-houses into a larger number of dwelling-houses; or

(d) was on the first day of March, 1959, occupied by an owner as his ordinary residence and has continued to be so occupied up to and including the appointed day; or

(e) was acquired under a scheme as is referred to in the Home Ownership (Encouragement) Act, and in respect of which the right to register as a decontrolled dwelling-house has been granted as an incentive in accordance with that Act; or

(f) is on the date of the application, occupied by the owner as his ordinary residence and has been so occupied by him, under any title, throughout the period of ten years immediately preceding the date of the application. For the purpose of this paragraph the expression "ordinary residence" does not include a summer residence.

Article 3 speaks of how to register a decontrolled dwelling house. Houses built after the 10 April 1959 are not automatically decontrolled but the **owner**, ***usufructuary*** or ***emphyteuta*** of said property are entitled to apply for such decontrol.

Take the following scenario: at the time this law came into effect, i.e., 1959, a tenant was already in the property (a sitting tenant) and the owner deregistered the property according to this law. What would be the position of the tenant in that property? Are

the rights of the tenant affected in any way? Has the lease agreement been removed from the control of the special rent laws? Can the tenant rely on the special rent laws?

In such case, the tenant could not rely on the special rent laws because the property has been decontrolled. The tenant had certain rights previously, being the renewal of the lease, but the law has now changed. However, a law cannot come about and remove those rights unless he is compensated.

In *Gatt v. Attard* (CoA 08/01/1971), the Court seemed to suggest that a sitting tenant would not be prejudiced buy the acquisition of such decontrol certificate. In Maltese, it is a '*dritt kwezit*' (the tenant has acquired a right to have the property renewed according to the previous laws).

According to Dr Galea, if I had obtained a right, then that right cannot be removed from me without any form of compensation. That is a right given by the Constitution.

Later case law such as *Andreanna Caruana et noe v. Salvatore Mangion* (15/06/1989) and *Antonio Vella v. Pauline Jones* (CoA 16/04/1993) suggest the opposite. If a decontrol certificate is obtained while the tenant is in occupation of the dwelling house, the effect of such decontrol is also applicable to the said tenant. Therefore, the owner is entitled to demand an increase in the rent payable from such tenant.

In the latter case, the plaintiff (lessor) demanded an increase in rent that was opposed by the defendant (lessee). The facts were that the property had been rented out for the past 30 years for Lm10.50 payable every 3 months. After the Decontrol Ordinance came into force in 1979, the property was decontrolled and in 1990, the lessor advised the lessee that from that date onwards, the rent was going to double in accordance with the new law.

Defendant replied by saying that she did not intend on paying the increase in rent since such increase was not demanded on the first payment after the Act came into force.

The FHCC held,

> *"Il-Qorti tifhem li kig ġie deċiz, is-sid m'għandux dritt jitlob l-arretrati b'effett minn Ġunju, 1979, meta daħlet in vigore din il-liġi, iżda meta jiddeċidi li mhux ser iġedded il-kirja jissubentraw id-dispossizzjonijiet tal-liġi l-ġdida li jissottomettu għalihom kemm is-sid kid ukoll il-kerrej. Din il-Qorti taqbel perfettament mal-konklużjoni li waslet għaliha l-Prim' Awla fil-kawża Caruana v. Mangion meta qalet li "…il-mument deċisiv li l-liġi bl-emendi trid tirregola jirrikorri,* ***meta sid il-kera tal-fond iddeknotrollat – jirrifjuta li jġedded il-kirja****."*
> *Kif ġa ngħad, dan il-mument avverra ruħu bl-ittra tad-19 ta' Settembru, 1990,* ***u minn dak il-mument ir-relazzjoni tal-partijiet ġiet irregolata bl-emendi fuq imsemmija u l-attriċi setgħet titlob l-awment kif indikat fl-avviż****. Din hi l-interpretazzjoni deskritta mill-Qorti fil-kawża Caruana v. Mangion bħala waħda "flessibbli u volontarja" fejn din il-Qorti, bir-rispett iżżid ukoll "raġonevoli" konformi mat-tagħlim ta-dritt Ruman li "Lex semper intendit quod convenit rationi."*

An appeal was filed, and it was argued that once the property was decontrolled during the lease, that decontrol did not apply and consequently, neither did Act XXIII of 1979 apply.

> *"Dawn l-emendi abrogaw fil-każijiet kongruwi, terminazzjoni tal-lokazzjoni kif ukoll id-dritt ta' awment tal-kera f'dawk il-każijet fejn il-fond, ġa mikri lill-inkwilin partikolari, wara li tispiċċa l-ewwel lokazzjoni, ma jkunx jista' jerġa' jiġi lokat lill-istess inkwilin b'kera awmentat. B'hekk il-liġi interveniet u biddlet sostanzjalment, a favur l-inkwilin – ir-relazzjoni kontrattwali, bejn is-sid u l-inkwilin u għalhekk fit-termini tal-Kap 158, kif inhuwa illum, ma hemmx lok li jibqgħu japplikaw il-prinċipji ta' ħaqq…*
>
> ***Il-ratio legis tal-emenda ta' l-1979 bilfors kienet illi d-dritt tal-varjazzjoni tal-kera*** *– li qabel kienet irreferita għal-liberta' kontrattwali – tiġi limitata għal mhux aktar minn darba kull ħmistax-il sena – mentri l-interpretazzjoni tal-konvenuta testendi dik il-limitazzjoni għal tletin, ħamsa u erbgħin sena, u aktar, sempliċement minħabba l-fatt illi l-kreditur ma kienx assolutament esiġenti fil-mument li għalqu ħmistax-il sena, u kull perjodu simili ta' daqshekk snin."*

Renewal Period

(4) The provisions of Title IX of Part II of Book Second of the Civil Code, Of Contracts of Letting and Hiring, shall also apply to the letting of urban tenements ***where terminated contracts of emphyteusis or sub-emphyteusis have been or are about to be converted into leases by virtue of the law:***

Provided that in the case of leases made by virtue of the Housing (Decontrol) Ordinance, the provisions of the said Ordinance defining the person to be considered as the lessee and the provisions providing for the transfer of the lease after the demise of the lessee shall continue to apply notwithstanding the aforesaid provisions of the Civil Code.

Rent of a residence

1531C.(1) Without prejudice to the rights of the lessor in accordance to article 4A of the Reletting of Urban Property (Regulation) Ordinance and article 12B of the Housing (Decontrol) Ordinance, ***the rent of a residence which has been in force before the 1st June, 1995 shall be subject to the law as in force prior to the 1st June, 1995*** *sohowever that unless otherwise agreed upon in writing after the 1st January, 2010,* ***the rate of the rent as from the first payment of rent due after the 1st January, 2010, shall, when this was less than one hundred and eighty-five euro (€185) per year, increase to such amount:***

Provided that where the rate of the lease was more than one hundred eighty-five euro (€185) per year, this shall remain at such higher rate as established.

(2) In any case the rate of the rent as stated in sub-article (1) ***shall increase every three*** *years by a proportion equal to the increase in the index of inflation according to article 13 of the Housing (Decontrol) Ordinance; the first increase shall be made on the date of the first payment of rent due after the 1st January, 2013:*

Provided that where the lease on the 1st January, 2010 will be more than one hundred eighty-five euro (€185) per year, and by a contract in writing prior to 1st June, 1995 the parties would have agreed upon a method of increase in rent, after 1st January, 2010 the increases in rent shall continue to be regulated in terms of that agreement until such agreement remains in force.

Under the Civil Code, Article 1531C states that the renewal period is every 3 years whilst Article 34 of Act X of 2009 says that the provisions of that section of the law

shall also apply to the letting of urban tenements where terminated contracts of emphyteusis or sub-emphyteuses have been or are about to be converted into leases by virtue of the law. So, the increase in rent is every 3 years, even where there is going to be the conversion from an emphyteusis into a lease.

However, Article 12(2)(b)(i) of Chapter 158:

> *(2) Where a dwelling-house has been granted on temporary emphyteusis -*
>
> *(a) for a period not exceeding thirty years, if the contract was made before 2lst June, 1979, or*
>
> *(b) for any period, if the contract is made on or after the date aforesaid, and on the expiration of any such emphyteusis the emphyteuta is a citizen of Malta and occupies the house as his ordinary residence, the emphyteuta shall be entitled to continue in occupation of the house under a lease from the directus dominus -*
>
> *(i) at a rent equal to the ground-rent payable immediately before the expiration of the emphyteusis increased, at the beginning of the lease of the house by virtue of this article, **and after the lapse of every fifteenth year thereafter during the continuance of the lease in favour of the same tenant**, by so much of the ground-rent payable immediately before such commencement or the commencement of each subsequent fifteen year period, being an amount not exceeding such ground-rent, as represents in proportion to such ground-rent the increase in inflation since the time the ground-rent to be increased was last established; and*

So, whilst we just read in Act X of 2009 that with respect to contracts of emphyteusis that are about to be converted, the rent is worked out every 3 years, here the law is saying that it is every 15 years.

So, even though there is 15 years here, the conversion is every 3 years because that is what Act X of 2009 stated.

Temporary Emphyteusis of Dwelling-Houses

The law creates different classes of temporary emphyteusis of dwelling houses:

1) Contracts entered into before the 21 June 1979 for a period of more than 30 years.
2) Contracts entered into before 21 June 1979 for a period of 30 years or less.

3) Contracts entered into after the 21 June 1979 but before the 1 June 1995 for any period.
4) Contracts entered into on or after the 1 June 1995.

Temporary emphyteusis of dwelling-houses

12. (1) Notwithstanding anything contained in the Civil Code or in any other enactment the following provisions of this article and of articles 12A and 12B shall have effect with respect to all contracts of temporary emphyteusis made at any time.

(2) Where a dwelling-house has been granted on temporary emphyteusis -

(a) for a period not exceeding thirty years, if the contract was made before 2lst June, 1979, or

(b) for any period, if the contract is made on or after the date aforesaid.

It is only in the first three classes of contracts, that the law grants the emphyteuta a right of conversion. With respect to the fourth class – contracts entered into on or after the 1 June 1995 – the law states in Article 16 that the provisions of Article 12 shall not apply. So, any contract of emphyteusis entered into on the 1 June 1995 or thereafter cannot be converted.

**16. (1) The provisions of article 5(2) to (5), article 7, article 10 and article 11, shall not apply to the lease of any dwelling house entered into on or after the 1st June, 1995.*

(2) For the purposes of sub-article (1) -

(a) the renewal of a lease on or after the 1st June, 1995 (whether such renewal be conventional, legal, customary or otherwise) shall not be deemed to be a lease entered into on or after the 1st June, 1995;

(b) the continued occupation of a dwelling house under a lease from the directus dominus at the expiration of a temporary emphyteutical concession expiring on or after the 1st June, 1995 in terms of article 12 shall not be deemed to be a lease entered into on or after the 1st June, 1995.

(3) The provisions of article 12 shall not apply to any contract of temporary emphyteusis entered into on or after the 1st June, 1995.

In its totally, sub-article (2) states:

> *(2) Where a dwelling-house has been granted on temporary emphyteusis -*
>
> *(a) for a period not exceeding thirty years, if the contract was made before 2lst June, 1979, or*
>
> *(b) for any period, if the contract is made on or after the date aforesaid, and on the expiration of any such emphyteusis the emphyteuta is a citizen of Malta and occupies the house as his ordinary residence, the emphyteuta shall be entitled to continue in occupation of the house under a lease from the directus dominus -*
>
> *(i) at a rent equal to the ground-rent payable immediately before the expiration of the emphyteusis increased, at the beginning of the lease of the house by virtue of this article, and after the lapse of every fifteenth year thereafter during the continuance of the lease in favour of the same tenant, by so much of the ground-rent payable immediately before such commencement or the commencement of each subsequent fifteen year period, being an amount not exceeding such ground-rent, as represents in proportion to such ground-rent the increase in inflation since the time the ground-rent to be increased was last established; and*
>
> *(ia) subject to the conditions laid down in subarticle 5(3)(b); and*
>
> *(ii) under such other conditions as may be agreed between them, or failing agreement, as the Board may deem appropriate.*

In ***Joseph Debono et v. Iris Giacomotto et*** (CoA 18/11/1987), the Court stated that for an emphyteuta to be entitled to exercise the right granted to him by Article 12(2), 4 requirements have to be satisfied:

1) The object of the emphyteutical grant must be a dwelling house.

2) In the case of a contract made before the 21 June 1979, the emphyteutical concession must not be for a period exceeding 30 years. Whilst in the case that such contract is made after 21 June 1979 the emphyteutical grant can be for any period of time.

3) At the termination of the emphyteusis, the emphyteuta must be a citizen of Malta.

4) At such termination, the emphyteuta must be occupying the house as his ordinary residence.

Analysis of these 4 requirements:

1. <u>The object of the emphyteutical grant must be a dwelling house</u>

Article 2 of Chapter 158 deals with definitions, one of which being that of a 'dwelling house'.

"dwelling-house" means a building or part of a building constructed or structurally adapted for occupation as a separate dwelling.

Take the following situation: a piece of land is given under title of temporary emphyteusis. Later on, you build a dwelling house on that land. Would Article 12(2) be applicable?

There are two arguments:

1) Article 12(2) would not be applicable since the piece of land given on emphyteusis wasn't a dwelling house, but it was a piece of land. So, some argue that the emphyteuta may exercise such right only in the case where the tenement was a dwelling house both at the moment in which the emphyteutical grant was given and upon termination of the said grant.

2) Article 12(2) would be applicable since you enhanced the property – you were given a plot of land, and at the end of the emphyteusis, you are going to give a house on that plot of land. Therefore, since you increased the value of that property, some authors state that even the person who received a plot of land should be entitled to renew. The reasoning also is that when one grants a plot of land on emphyteusis, whatever one builds automatically becomes part of the emphyteusis.

However, one must note that the law is not clear for it specifically refers to a dwelling house given on emphyteusis and does not mention land.

In ***Debono v. Giacomotto***, the Court had to decide whether a room forming part of a dwelling house and that was given to third parties and used as a shop, was afforded the protection given by the law.

The CoA stated that

> *"Il-legislatur ried li jipproteġi lil min qed jokkupa. Il-konventua ma tistax tingħad li qiegħda tokkupa il-ħaunt bħala parti mir-residenza ordinarja tagħha billi dan il-ħanut jinsab f'idejn haddiehor. Kieku d-dritt u l-protezzjoni mogħtija taħt l-artikolu 10B(2) illum art. 12(2), Kap. 158 kellhom jiġu estiżi għal dan il-ħanut okkupat minn ħaddieħor, ikun qed jingħata dritt li l-liġi ma tagħtix."*

Thus, the CoA found in favour of plaintiff and stated that the right to a lease at the end of the emphyteutical period was restricted to the part of the premises which the defendant **was occupying as her residence with the exclusion of the room which was converted to a shop.**

In the same sense, also refer to:

- *Alfred Farrugia noe v. Andreana Desira* (CoA 30/03/2001)

- *Maria Concetta Ascolese v. Maria Elena Micallef* (FHCC 16/12/2005)

The case was presented by plaintiffs to obtain a declaration from the Court that with respect to a particular property they have a right to make avail themselves of Article 2(4) of Chapter 158 so that the temporary emphyteusis over such property is converted into a perpetual one.

Article 12(4) states the following:

> *(4) On the expiration of a temporary emphyteusis of a dwelling house occupied by a citizen of Malta as his ordinary residence at the time of such expiration, not being an emphyteusis mentioned in sub-article (2)(a) or (b), the emphyteuta shall be entitled to convert the emphyteusis into a perpetual one under the same conditions of the temporary emphyteusis with the exception of those relating to the duration and the ground-rent. The ground-rent payable with effect from the conversion of the emphyteusis into a perpetual one and until fifteen years from that date shall be equal to six times the ground-rent payable immediately before such conversion, and shall thereafter be increased every fifteen years by so much of the then current ground-*

rent, being an amount not exceeding such rent, as represents in proportion thereto the increase in inflation since the time the said ground-rent was last established.

This concerned a temporary emphyteusis over two properties, no 45 and 47 of a duration of 99 years resulting from a contract concluded in 1882. This meant that the emphyteusis did not fall under Article 12(2) (a) and (b) since although the contract was concluded before 1979, it was for more than 30 years. Therefore, it was subject to Article 12(4).

There was also no doubt that on expiration, plaintiffs were all citizens of Malta and that property 45, together with the adjacent garden constituted a dwelling-house that was the ordinary residence of all the plaintiffs. This was uncontested.

Regrading property no 47, defendants argued that Chapter 158 did not apply since this was a shop that was entered into through the house no 45.

The Court said that from the evidence, there was no doubt that today, the property no 47 was not a dwelling-house. For a long period of time, this property was used as a shop even though the contract of emphyteusis referred to properties 45 and 47 as one. The Court said that in such cases, it doesn't extend the application of Article 12(4) to properties which are not dwelling houses.

The Court referred to ***Debono v. Giacomotto et*** where the conversion, in that case from emphyteusis to lease, was not extended to an adjacent room to the dwelling-house that was being used as a shop. The Court also referred to ***Victor Montebello et v. Alfred Grima et*** (05/05/2005) where the FHCC said:

> *F'din il-kawza, jirrizulta wkoll li l-enfitewta kien ikkonverta parti mid-dar f'hanut, u meta skada t-terminu tal-koncessjoni enfitewtika, dik il-parti kienet hekk utilizzata u, fil-fatt, hekk ghadha tintuza sal-lum. Kwindi, anki jekk l-atturi ghandhom ragun fuq il-meritu,* ***jibqa' l-fatt li dak li jistghu jitolbu hija l-konverzjoni fit-titolu tal-parti uzata bhala rezidenza biss, u mhux ukoll tal-parti uzata bhala hanut****. Fuq il-parti wzata bhala hanut,* ***it-titolu ta' enfitewsi spicca, u ma fadalhom ebda jedd li jibqghu in okkupazzjoni tal-istess.***

Regarding the garden of property no 45, it was shown that it was always a part of that property and that it was never separated therefrom. Therefore, whilst the conversion

was legally acceptable regarding the house and garden, the same could not be said regarding property no 47.

The Court concluded:

> *1. tiddikjara u tiddecidi illi l-atturi huma intitolati jipprevalixxu ruhhom mid-dritt sanzjonat fis-subartikolu 12(4) tal-Att XXIII tal-1979 biex jikkonvertu f'enfitewsi perpetwa l-enfitewsi temporanea li huma kellhom bhala utilisti tal-fond illum 45, Arcade Street, Paola, inkluz il-gnien attigwu, izda mhux inkluz il-hanut numru 47, Arcade Street, Paola;*
>
> *2. tikkundanna lill-konvenuti jaddivjenu ghall-pubblikazzjoni tal-att notarili relativ li bih l-enfitewsi temporanea tal-fond illum 45, f'Arcade Street, Paola, inkluz il-gnien attigwu u bil-pertinenzi taghhom kollha eskluz il-hanut numru 47, Arcade Street, Paola, tigi kkonvertita f'wahda perpetwa, b'effett mill-1 ta' Marzu, 1981 skond it-termini tal-artikolu 12(4) tal-Kap 158 tal-Ligijiet ta' Malta, u cioe versu c-cens annwu u perpetwu ta' sitt darbiet daqs kemm ser jigi ratizzat ic-cens dovut in rigward ghad-dar u il-gnien eskluz il-hanut numru 47, liema cens kien ta' Lm6.00 fis-sena ghas-sit intier kollox inkluz, dana ghall-ewwel hmistax -il sena, bl-awmenti stipulati fl-istess artikolu u bil-kondizzjonijiet l-ohrajn stipulati fl-att tas-6 ta' Jannar 1882 pubblikat min-Nutar Gregorio Spiteri;*

- *Victor Montebello v. Alfred Grima* (CoA 29/02/2008)

In 1950, the deceased, husband and father of plaintiffs, had acquired a garage with a mezzanin under the title of temporary sub-emphyteusis for 51 years. The mezzanin was used as a dwelling-house but the garage was eventually converted into a shop which continued to be used as such. The emphyteutical concession expired in 2001 and plaintiffs availed themselves of their right under Article 12(4) of Chapter 158 to convert the temporary emphyteusis into a perpetual one.

Regarding the shop, the FHCC considered that the garage was still being used as a shop. It also resulted that there was and always was access from the shop to the mezzanine and that the two tenements had the same electricity and water meter that was situated in the shop. For these reasons, plaintiffs argued that the two should be considered as on and that therefore, Article 12(4) applied to the entire property. On

the contrary, defendants claimed that given the garage was being used as a shop, it could not qualify as a dwelling-house under Chapter 158 and therefore, could not be converted.

The Court referred to ***Debono et v. Giacomotto et***:

> *"Jekk parti mid-dar biss tkun okkupata bhala r-residenza ordinarja ta' l-enfitewta, u l-bqija tad-dar ma tkunx hekk okkupata ghax tkun mikrija lil terzi bhala hanut, l-enfitewta jkun jista' jibqa' jzomm b'kiri dik il-parti biss li jkun jokkupa bhala r-residenza ordinarja tieghu, u ma jibqaghlu ebda dritt fuq il-parti l-ohra tad-dar li ma kinitx hekk okkupata."*

The FHCC considered that at the time of expiration, the garage was being used as a shop. Hence, with respect to that part of the property, the emphyteusis expired and could not be converted.

With respect to the mezzanin, it was considered that plaintiff was registered in the electoral register with that address and that it was her postal and telephone address.

Regarding the definition of 'ordinary residence':

> *"Il-Kap. 158 ma jipprovdi l-ebda tifsira tal-kelma "residenza ordinarja" u allura dawn b'necessita` kellhom ikunu interpretati skond ic-cirkustanzi tal-kaz partikolari, purche` dejjem fl-ambitu tal-ligi. Inghad a propozitu illi "meta l-kelma mhiex definita, s-sinjifikat taghha jista' jvarja skond il-kuntest partikolari u l-iskop tal-uzu taghha f'dak il-kuntest" – Kollez. Vol. XLVI.I.119. Gie ribadit ukoll mill-Onorabbli Qorti tal-Appell (Sede Inferjuri) fil-kawza "Agius vs Agius", decisa fit-2 ta' Dicembru, 1994, l-osservazzjoni kaptata mis-sentenza tal-Qorti tal-Magistrati tat-3 ta' Novembru, 1982, fil-kawza fl-ismijiet "Bianco vs Flores", illi* ***"l-element tar-residenza gie interpretat mill-gurisprudenza taghna fis-sens li mhux bizzejjed li jkun hemm "mere physical presence" imma jehtieg li l-post kien "permanently his ordinary residence" u "his only residence."***
>
> *Dan il-hsieb jattalja mal-konsiderazzjoni maghmula mill-Onorabbli Qorti ta' l-Appell fis-sentenza taghha tat-8 ta' Frar 1971, fil-kawza fl-ismijiet "Coppini noe vs Vella Bonnici". Fiha nghid illi* ***"in generali l-kliem "residenza ordinarja" jiddenota residenza f'post b'certu grad ta' kontinwita`. Id-durata mhux***

> ***kriterju esklussiv u necessarjament determinanti. Hu pero` kriterju tajjeb dak li jirrigwarda l-mod kif bniedem ugwalment jorganizza hajtu … In definitiva ebda kriterju wiehed ma hu a priori konklussiv u f'kull kaz iridu jitqiesu c-cirkostanzi kollha.***
>
> *Fil-kawza "Gatt vs Mercieca", deciza mill-Qorti tal-Magistrati (Malta) fis-16 ta' Lulju 1982, gie osservat li r-residenza, biex taghti l-protezzjoni mahsuba bil-ligi,* ***ma tridx tkun specjali, okkazzjonali jew kazwali****. Fil-kawza "Ripard et vs Stellini", deciza minn din il-Qorti fil-21 ta' Marzu 1981, intqal li residenza timplika* ***okkupazzjoni permanenti****, u* ***mhux bizzejjed li wiehed jghix fil-post "in and out" jew li jkollu l-indirizz postali fuq dak il-fond****. In-necessita` li r-residenza tkun wahda reali u permanenti jirrizulta wkoll mill-gurisprudenza li stabbilit li fond uzat bhala villeggjatura, ma jistax jitqies bhala li jservi ghar-"residenza ordinarja" ta' dak li jkun – ara, per ezempju, l-kawza "Bezzina vs Cachia", deciza mill-Onorabbli Qorti tal-Appell (Sede Inferjuri) fil-5 ta' Mejju, 1989."*

In this case, the evidence showed that plaintiff had changed her residence by going to live with her sister because of her old age.

> *"Biex wiehed jista' jistabilixxi jekk persuna jkollhiex ir-residenza ordinarja taghha f'post partikolari huma relevanti c-cirkostanzi kollha tal-kaz illi jistghu jindikaw jekk il-membru tal-familja kienx qieghed jaghmel uzu mill-fond in kwistjoni ghal dawk l-iskopijiet li wiehed jifhem b'residenza ordinarja.*
>
> *Dawn jinkludu l-irqad u mistrieh regolari fil-fond in kwistjoni; l-fatt li fil-fond in kwistjoni jinzammu l-oggetti personali u l-hwejjeg ta' min jippretendi li ghandu residenza; il-fatt illi f'din ir-residenza huwa jghaddi z-zmien liberu tieghu fejn hu jipprattika d-delizzji tieghu u jaghmel ix-xoghol personali tieghu. Tindika wkoll il-kelma 'residenza', l-fond fejn wiehed jippranza u jiccena, fejn wiehed jircievi l-korrispondenza u anke fejn jircievi l-hbieb, u fejn il-hbieb u terzi jistennew li jsibu lil min hu hemm residenti.*
>
> *Il-Qorti hi konvinta li l-fond 7, Misrah Dicembru Tlettax ma hu qed jintuza minn hadd bhala r-residenza ordinarja tieghu, u l-uzu tieghu hu biss "on and off" jew sporjadiku, b'mod li, allura, l-ex-enfitewti mhumiex intitolati li japprofitaw*

> *ruhhom mid-disposizzjonijiet tal-Artikolu 12(4) tal-Kap. 158 tal-Ligijiet ta' Malta."*

On appeal, the CoA said:

> *"Il-ligi invokata mill-atturi m'hijiex u ma kienet qatt intiza biex testendi l-beneficcju li jissemma' fiha ghal kull residenza li l-enfitewta jkun igawdi f'gheluq it-terminu ta' koncessjoni enfitewtiku. Huwa invece beneficcju limitat ghal dik ir-residenza biss fejn l-enfitewta,cittadin Malti, ikun ukoll jirrisjedi ordinarjament. Fi kliem iehor, jekk jirrizulta li dan jew din imorru fil-frattemp jirrisjedu x'imkien iehor- kostatazzjoni ta' fatt - allura jigi nieqes wiehed mill-elementi essenzjali li jissemma' fil-ligi. Dan mhux semplicement ghaliex persuna seta' kellha pluralita` ta' residenzi, imma ghar-raguni li l-enfitewta jkun mar effettivament jirrisjedi band'ohra."*

The CoA upheld the judgement of the FHCC.

2. <u>In the case of a contract made before the 21 June 1979, the emphyteutical concession must not be for a period exceeding 30 years. Whilst in the case that such contract is made after 21 June 1979 the emphyteutical grant can be for any period of time.</u>

Note that the *directus dominus* and the emphyteuta can agree that at the end of the original emphyteusis the emphyteuta can continue to occupy the dwelling house on emphyteusis. However, it is imperative for one to ascertain whether the parties intend to be bound by a completely new emphyteutical grant or by an extension of the original one.

In other words: I do a contract of temporary emphyteusis with the direct owner, and it is about to expire. We can agree that instead of converting the emphyteusis to a lease, we enter into another contract of temporary emphyteusis. Nothing prohibits this agreement, however, it is advised that if the parties enter into a new temporary emphyteutical grant, they are careful how to state what is happening in the contract.

In the sense, if the parties intend this new emphyteutical concession to be a new emphyteutical concession only, then at the end of this second emphyteutical concession, provided that all the conditions contemplated by Article 12(2) concur, the

emphyteuta will be entitled to exercise the right contemplated therein. We saw that under Article 12(2), the right of conversion is from temporary emphyteusis to rent.

So, if this new grant is specifically that, i.e., a new grant, then at the end of this second temporary emphyteusis, the emphyteuta, if his situation concurs with the law, will have the right to convert to a lease.

Distinguish this from a situation where the parties desire to ***extend the duration of the original emphyteusis***, for example, they do not do any new emphyteutical grant, and say we are extending the period of emphyteusis with 20 years.

There is a very big difference – this is known as *'proroga tal-emfitewzi.'* In that case, the second temporary emphyteusis is basically a continuation of the first temporary emphyteusis. And ***when there is a continuation between the first and the second, the periods of time amalgamate together***.

For example, the first concession is for 17 years, and the second contract is for another 17 years. If the parties specifically state that this is a new emphyteutical concession, at the end of the second 17 years, the temporary emphyteusis will be converted into a lease. If this distinction is not made, the law will say the second temporary is a continuation of the first, and since 17+17 is more than 30 years, there is also a conversion, not to lease but to perpetual emphyteusis.

This is in the exam (☺).

3. <u>At the termination of the emphyteusis, the emphyteuta must be a citizen of Malta</u>

Two situations:

1) If when the dwelling house is granted on temporary emphyteusis (at the moment of giving), the emphyteuta is not a Maltese citizen but at the termination of such emphyteusis, he has become a Maltese citizen. Does this emphyteuta qualify for the conversion? Yes, because the requirement speaks of 'termination'.

2) If citizenship is obtained after the termination of the emphyteusis, what is the position of the emphyteuta? There is no right to conversion.

Interestingly, in ***Maria Agius v. Angela Gauci Borda*** (CoA 13/01/1992), citizenship was obtained after the expiration of the emphyteusis but whilst the court case on conversion was pending. The Court stated

> *"id-diġitura tal-liġi hija preċiza u tippostula illi l-element essenzjali taċ-ċitadinanza jkun jissusisti fil-puntum temporis relevanti u cioè fit-tmiem l-enfitewzi."*

She wasn't given the conversion.

4. At such termination the emphyteuta must be occupying the house as his ordinary residence

What is an ordinary residence? How can you classify a property as being an ordinary residence? Under Chapter 158, "ordinary residence" has not been defined.

One can make reference to ***G. Grech & Bros Limited v. George Sammut*** (09/04/2010):

> *"Jigi osservat bhala punt ta' tluq illi r-residenza abitwali ta' bniedem hu dak il-post fejn* ***hu jorganizza hajtu flimkien mal-familja tieghu****. Jikkonsegwi illi allura* ***l-abitwalita` ghandha rabta ma' l-istabilita*** *b'denotazzjoni* ***ta' certa permanenza****. Wisq ragonevolment,* ***l-allontamenti sporadici u temporanji*** *li wiehed f'hajtu jkollu jaghmel minhabba esigenzi ta' xoghol jew ta' mard jew ghal xi raguni valida ohra, ma jwasslux ghat-telf ta' dik l-istabilita. Ukoll, id-durata ta' dan l-istess allontament mhux bilfors, u, a priori, ghandha tigi meqjusa bhala xi interruzzjoni tal-legam tal-persuna ma' dik l-istess stabilita. Tista' pero* ***takkwista riljev jekk l-allontament u s-sistemazzjoni tal-persuna f'lok iehor jassumu l-konnotat ta' l-abitwalita`****, u dan b'mod prevalenti u permanenti fuq dak tad-dimora ta' qabel mikri lilu …"*

Also, in ***Carmel Said v. Gaetano Pirotta et*** (31/05/2013):

> *"Illi kollox ma' kollox il-Qorti jidhrilha li filwaqt li l-konvenut ressaq biżżejjed provi biex juri li huwa kien ikun jirrisjedi għand zijuh, jeżistu wkoll indizji għall-kuntrarju. Oltre ddiversi persuni li xehdu, għalkemm dawn kienu reġimentati fil-mod kif xehdu, żewġ dokumenti juru li dan kien minnu;* ***il-kont bankarju*** *tal-konvenut (fejn kien jirċievi l-istipendju) li juri li sa mill-2005 dak kien l-indirizz*

tiegħu, u ***l-karta tal-identita'*** *li sa minn dik is-sena ukoll tindika dan. Kontra ta' dan wieħed jirrimarka li* ***l-kontijiet tad-dawl u l-ilma*** *tal-familja Pirotta jindikaw li hemm erbgħa persuni jgħixu hemm (għalhekk il-konjuġi Pirotta u ż-żewġ uliedhom fosthom il-konvenut) u l-ispezzjoni* ***tal-uffiċjal tal-Awtorita' tad-djar*** *li qal li mar fl-2007 fuq il-fond u* ***ma sab lil ħadd anzi sab ħafna leaflets u karti*** *li ndikawlu li hemmhekk ma kien joqgħod ħadd.*

Il-Qorti wara illi ħasbet fit-tul tasal għall-konklużjoni li kif qalet il-Qorti fl-aħħar każ imsemmi, filwaqt li l-konvenut kien ikun preżenti ħafna fil-fond imsemmi, dan ma kienx l-uniku post ta' residenza tiegħu u kien jaqsam il-ħin bejn fejn joqogħdu l-ġenituri tiegħu u żijuh li kien ġuvni u jgħix waħdu."

The following decision lays down criteria:

Moviment Azzjoni Socjali v. Noel Borg (30/09/2010):

- The consistency of sleep and rest in the tenement.
- The fact that the individual claiming residence retains his personal belongings in the tenement.
- The fact that the individual spends his free time in the tenement where he practices his hobbies and does his personal work.
- The fact that the individual dines in the tenement.
- The fact that the individual receives his correspondence in the tenement.
- The fact that the tenement is the place where the individual entertains friends, and where third parties expect to find him.

Victor Montebello v. Alfred Grima (FHCC 05/05/2005) confirmed by the CoA on the 29/02/2008. The Court held:

"Il-Kap. 158 ma jipprovdi l-ebda tifsira tal-kelma "residenza ordinarja" u allura dawn b'necessita` kellhom ikunu interpretati skond ic-cirkustanzi tal-kaz partikolari, purche` dejjem fl-ambitu tal-ligi. Inghad a propozitu illi "meta l-kelma mhiex definita, s-sinjifikat taghha jista' jvarja skond il-kuntest partikolari u l-iskop tal-uzu taghha f'dak il-kuntest" – Kollez. Vol. XLVI.I.119. Gie ribadit ukoll mill-Onorabbli Qorti tal-Appell (Sede Inferjuri) fil-kawza "Agius vs Agius", decisa fit-2 ta' Dicembru, 1994, l-osservazzjoni kaptata mis-sentenza tal-Qorti tal-Magistrati tat-3 ta' Novembru, 1982, fil-kawza fl-ismijiet "Bianco vs Flores",

> *illi "l-element tar-residenza gie interpretat mill-gurisprudenza taghna fis-sens li mhux bizzejjed li jkun hemm "mere physical presence" imma jehtieg li l-post kien "permanently his ordinary residence" u "his only residence".*
>
> *Dan il-hsieb jattalja mal-konsiderazzjoni maghmula mill-Onorabbli Qorti ta' l-Appell fis-sentenza taghha tat-8 ta' Frar 1971, fil-kawza fl-ismijiet "Coppini noe vs Vella Bonnici". Fiha nghid illi "in generali l-kliem "residenza ordinarja" jiddenota residenza f'post b'certu grad ta' kontinwita`. Id-durata mhux kriterju esklussiv u necessarjament determinanti. Hu pero` kriterju tajjeb dak li jirrigwarda l-mod kif bniedem ugwalment jorganizza hajtu … In definitiva ebda kriterju wiehed ma hu a priori konklussiv u f'kull kaz iridu jitqiesu c-cirkostanzi kollha"."*

The fact that I live in a particular place for 1 months, 2 months doesn't necessarily mean that it is my ordinary residence.

Take the following scenario: a contract of temporary emphyteusis is entered into whereby a dwelling house and a garage are given to the emphyteuta. Does the garage form part of the dwelling house?

In ***Muscat v. Cachia*** (Court of Magistrates 06/07/1992), the ground-rent due for the house and the garage were different. But the other conditions were the same and the emphyteuta wanted to convert both properties into a lease. The Court in this case stated that the case concerned an emphyteutical grant of two separate premises because there were two ground rents. Implicitly, it is stating that if there was one ground-rent for both properties, then there could have been a conversion. In this case, although the two premises were attached, they were totally separate because there were two ground rents.

Equations under Chapter 158

Article 12
and on the expiration of any such emphyteusis the emphyteuta is a citizen of Malta and occupies the house as his ordinary residence, the emphyteuta shall be entitled to continue in occupation of the house under a lease from the directus dominus -

(i) at a rent equal to the ground-rent payable immediately before the expiration of the emphyteusis increased, at the beginning of the lease of the house by virtue of this article, and after the lapse of every fifteenth year thereafter during the continuance of the lease in favour of the same tenant, by so much of the ground-rent payable immediately before such commence- ment or the commencement of each subsequent fifteen year period, being an amount not exceeding such ground-rent, as represents in proportion to such ground-rent the increase in inflation since the time the ground-rent to be increased was last established; and

How is the increase in rent to be calculated?

$NR = PR \times I_2/I_1$
OR
$NR = PR \times 2$

NR – new rent.
PR – previous rent.
I_2 – inflation index for the current year, that is, the year when the lease is to be renewed or established as the case may be.
I_1 – the inflation index for the year when the previous ground rent was established.

Example 1

A contract of emphyteusis was entered into in 1976 for 17 years. The ground rent was fixed at €116.47/annum.

I_1 = what was the rate of inflation in 1976? 256.20.

I_2 = what was the rate of inflation in 1993 (date when the emphyteutical grant came to and end)? 495.60.

_____ = 116.47 x 469.60 divided by 256.2 = **€225.30**

The previous rent was €116.47 so in order to check whether this increase is allowed by law, we have to do 116.47 x 2 = NR = 232.94.

This means that the law allows you to go up to a maximum of €232.94. The rent we worked out is €225.30 which means that the increase is allowed by law.

Example 2

A contract of emphyteusis was entered into in 1980 for 30 years. Ground rent was fixed at €116.57. The emphyteusis is going expire in 2010.
I_2 = 366.06
I_1 = 770/07

NR = €116.47 x 770.07 divided by 366.06 = NR = €245

116.47 x 2 = NR = €232.94 → this formula gives you the maximum allowed by law. In this case, the maximum has been surpassed. In that case, you cannot go more than €232.94. This is the maximum that the landlord can claim.

Can the parties agree otherwise?

Keep in mind the fact that although the law establishes the rent due, it is permissible for the parties to agree impliedly or explicitly, that the rent due would be less than that established by law. So, even though we came to the figures above, ***there is nothing holding the parties back from agreeing that the lessor receives less rent.***

In fact, in ***Anthony Galea v. Vincent Galea*** (CoA 19/07/1982), the CoA stated that the parties were not prohibited by law to fix a different amount to that established by law as long as that amount was less. However, an agreement to have the amount of rent payable less than that given by law must be ***clearly and unequivocally manifested.***

If, for example, the *dominus* doesn't realise that the emphyteusis has terminated, and he receives the old ground rent, then that would not be tantamount to acceptance.

In such a case, the *dominus* would be entitled to demand the increase backdated to the day following the termination of the emphyteusis.

In this regard, refer to ***Maria Peresso v. Alfred Cuschieri*** (CoA 05/06/1987). In this case, Alfred Cuschieri was in occupation of the premises on temporary emphyteusis which expired in 1979. The *dominus* had not known that the concession had expired, and Alfred Cuschieri remained in occupation of the premises (under a title of lease) and paying an amount of ground-rent which according to the law should have been increased had the bare owners demanded rent as opposed to ground rent.

Notably, the Court said that ***emphyteusis also includes sub-emphyteusis.*** The Court also noted that the provisions in Chapter 158 do not preclude that the parties agree otherwise, such as subjecting the lease to the ordinary provisions in the law. For this reason, the Court had to assess what really happened between the parties when the sub-emphyteusis terminated – whether the emphyteuta availed himself of his rights under Chapter 158 or whether the parties had agreed to a new lease.

> *"Jidher għalhekk mill-istat tal-provi li ma kienx hemm fit-terminazzjoni tal-enfitewsi de quo xi ftehim ġdid ta' lokazzjoni bejn il-kontendenti. Ma kienx hemm l-idem placitum consensus li jeħtieġ li jkun hemm bejn il-kontendenti biex jeżisti ftehim ta' lokazzjoni. Fl-istess ħin, pero' ma jistax jiġi nnegat li l-intimat appellat ried ikompli jokkupa d-dar ta' abitazzjoni b'titolu ta' lokazzjoni meta spiċċat l-enfitewsi, tant li offra l-kera, u għalhekk huwa intitolat li jkompli jokkupa l-istess dar taħt id-disposizzjonijiet..."*

The Court fixed the increased rent in accordance with Chapter 158.

Conditions of the Lease

Article 12 *and on the expiration of any such emphyteusis the emphyteuta is a citizen of Malta and occupies the house as his ordinary residence, the emphyteuta shall be entitled to continue in occupation of the house under a lease from the directus dominus -* *(ii) under such other conditions as may be agreed between them, or failing agreement, as the Board may deem appropriate.*

As regards the other conditions of the lease, these may, according to Article 12(2)(ii), be agreed upon by the parties and, failing such agreement, they will be determined by the RRB.

Refusal to Renew

Decontrolled premises and the Rent Ordinances
5. (1) Subject to the following provisions of this article and of article 6, the provisions of the Rent Ordinances shall not apply to any decontrolled dwelling-house from the day on which the house is registered in accordance with the provisions of article 3.

(2) Where on the expiration of the lease of a decontrolled dwelling-house (whether such period be conventional, legal, customary or otherwise) the tenant is a citizen of Malta and ***occupies the house as his ordinary residence****, the provisions of sub- article (3) shall have effect and the provisions of the Reletting of Urban Property (Regulation) Ordinance shall also apply but only in so far as they are not inconsistent with the said provisions of this article.*

Article 5 lays down the situations where the lessor (*dominus*) can refuse to renew the lease. The law uses the word 'only'.

Another interesting point to make is: a property given under title of lease during the temporary emphyteusis. So, I have a property under temporary emphyteusis, and I give the property under title of lease to someone else. In that case, what happens at the end of the temporary emphyteusis? What is the position of the lessee?

X gave a property under temporary emphyteusis for 20 years to Y and Y rents out the property to Z. The temporary emphyteusis has expired but the lease is still ongoing. Does the lease expire? Is the temporary emphyteusis converted into a lease?

Victor Borg Bartolo v. John Bonello (CoA 14/07/1988) concerned the lease of a premises on temporary emphyteusis. The emphyteuta argued that in renting out the property, he was within his rights at law and that therefore, this lease had to be respected.

> *"…mat-terminazzjoni ta' l-enfitewsi, l-utilista kellu dritt tal-liġi li jibqa' jokkupa l-fond de quo b'titolu ta' lokazzjoni liema lokazzjoni bil-kunsens tas-sid f'dal każ kienet ser tkopri l-fond kollu. Ċertament pero' dan id-dritt ma kienx jinkludi*

> *wkoll id-dritt li jissulloka in toto jew in parti l-fond lilu konċess peress li s-sid impona d-divjet tas-sullokazzjoni u l-inkwilin aċċettah. Dan ifisser li jekk tull l-enfitewzi hu kellu dritt jagħti parti mill-fond b'lokazzjoni dan id-dritt spiċċa meta spiċċat l-enfitewsi u ċertament ma setax u ma jistax jippretendi drittijiet ta' sublokatur jew lokatur li ma kienx ikollu fi kwalunkwe każ mat-terminazzjoni ta' konċessjoni enfitewtika. Infatti, jekk qabel l-Att XXIII ta' 1979 il-posizzjoni kienet li mat-terminazzjoni ta' l-enfitewzi, l-utilista jispiċċalu kull dritt fuq il-fond de quo, bl-Att XXIII ta' l-1979, kull ma tbiddel kien li jekk meta daħlet fis-seħħ din il-liġi, l-utilista kien għadu jokkupa l-post bħala residenza tiegħu seta' jibqa' hekk jokkupah pero' b'titolu ta' lokazzjoni iżda ċertament ma ngħatax l-istess drittijiet reali li kellu fuq il-fond tul id-dekorrenza ta' l-enfitewsi…*
>
> *Meta spiċċat l-enfitewsi l-intimat ippretenda li dik il-lokazzjoni ssir sullokazzjoni meta kien jaf ben tajjeb li ma kellux dritt jissulloka u li din l-istess sullokazzjoni tkun turbot ukoll lir-rikorrent għaż-żmien kollu tal-lokazzjoni. B'hekk jiġi li l-intimat appellant kien qed jippretendi drittijiet li altrimenti ma kienx ikollu fuq il-fond de quo u li jimponi fuq is-sid piżijiet li l-istess Att XXIII ta' l-1979 ma kienx jikkontempla fiċ-ċirkostanzi ta' dan il-każ u dan kollu hu inaċċettabbli għax infondat legalment.*

For these reasons, the Court upheld the decision of the RRB which held for plaintiff.

Thus, where on the expiration of the temporary emphyteusis the dwelling house is occupied by a person by title of usufruct or habitation, the right to continue in occupation of such dwelling house shall also be competent to such occupier. So, the law makes a distinction between the person who was given the emphyteusis and the occupier. It is as if he were the tenant of the dwelling-house. So, in this case, the occupier will remain in occupation.

The Duration of the Lease

The law states that the increase happens every 15 years. However, as we saw, through Act X of 2009 the increase now happens every 3 years.

Refer to **Article 16(2)(b)**:

(b) the continued occupation of a dwelling house under a lease from the directus dominus at the expiration of a temporary emphyteutical concession expiring on or after the 1st June, 1995 in terms of article 12 shall not be deemed to be a lease entered into on or after the 1st June, 1995.

The Position Prior to the 1979 amendments

Refer to Articles 1522, 1530 and 1531 of the Civil Code.

Effects of reversion
1522. In all cases of reversion, any hypothec, burden or easement, even though such easement may have been created without the act of the emphyteuta, shall be dissolved both in regard to the tenement and to the improvements; and the tenement together with the improvements shall revert unencumbered to the dominus, saving, in regard to any lease thereof, the provisions of articles 1530 and 1531.

According to **Article 1522**, when an emphyteusis comes to an end, the tenement reverts back to the direct owner unencumbered. This was the position prior to the 1979 amendments. The law saving in regard to any lease thereof the articles of 1530 and 1531.

Prior to the 1979 amendments, Article 1530 and 1531 applied to leases.

Letting made by person possessing thing under entail or in usufruct, etc
1530. (1) The letting made by a person possessing the thing under entail or in usufruct or under any other temporary or dissoluble title, shall be valid even in regard to his successors, if it is made on ***fair conditions*** *and for a term* ***not exceeding eight years, in the case of rural tenements****, or* ***four years, in the case of urban tenements****, or an ordinary period according to usage in the case of movable property, or for any period, shorter than the said periods respectively, in the case of property the letting of which for a period exceeding such shorter period is prohibited.*

(2) The letting made for any longer period by a person possessing the thing as aforesaid shall, on the demand of his successors in the possession of the thing, be reduced to the reasonable period above-mentioned, to be reckoned from the date of the contract.

When lease for a longer period is authorised by a competent authority
1531. The provisions of the last preceding section in so far as they restrict the duration of the lease shall not apply where a longer period of lease has been covenanted with the authorization of the competent authority according to law.

Before the introduction of the 1979 amendments, when there was the situation of a temporary emphyteusis which was about to expire and the emphyteuta would lease the property, and the term would expire, according to Article 1530, if the lease was made under fair conditions and it didn't exceed a period of 4 years, the lessee was able to stay in the property for that period of 4 years.

This was an equitable solution before the promulgation of the Ordinance. But after this Ordinance came into force, a problem arose because at the expiration of the period for which the temporary owner had let the thing, the lease could be prolonged indefinitely under Chapter 69. In other words, when Chapter 69 came into effect, there was this issue of conflict between Article 1530 where it is saying that the property could not be kept for more than 4 years after the expiration of the original title.

The courts struggled with this problem for several years and for some time, it seemed that they had approved and consolidated an equitable solution based on the Article 1530 which balanced the need of the tenant for security of tenure with the justified expectations of the owner by allowing the tenant to enjoy the unelapsed period of the lease subject to the maximum period allowed by Article 1530 and recognising the lessor's right not to renew the lease after it expires.

In ***Catherine Zahra v. Saverio Frendo*** (CoA 21/07/1969), the Court observed that the owner who is bound to observe a lease according to Article 1530 of the Civil Code is as much a lessor for the purposes of Chapter 69 as if he had initially made the lease himself and as such, is bound to refuse the renewal of the lease.

So, prior to this case, upon the expiration of the original temporary emphyteusis, you could keep the property for a maximum of 4 years according to Article 1530 and therefore Chapter 69 would not be applicable. But then, with this case, the Court said that even after the lapse of those maximum 4 years, the ***lessor*** (therefore, the person who had initially given the property under temporary emphyteusis because the Court deemed to him to be the lessor) could not refuse the renewal of the lease.

Therefore, we had the situation where the Decontrol Ordinance was aimed at decontrolling the property from the special laws, including Chapter 69, and then all of a sudden, this judgement effectively put back the Decontrol Ordinance under the other special laws.

The position after the 1979 amendments was modified by Article 12(3):

> *(3) Where on the expiration of an emphyteusis as is mentioned in sub-article (2)(a) or (b) the dwelling-house is subject to a lease, the provisions of the Reletting of Urban Property (Regulation) Ordinance, shall not apply in respect of such lease:*
>
> *Provided that where the tenant under the said lease is a citizen of Malta and occupies the house as his ordinary residence he shall, on the termination of the lease, be entitled to continue in occupation of the house under a new lease from the directus dominus at the same rent and under the same conditions as are mentioned in sub-article (2)(i) and (ii) in respect of the emphyteuta.*

Whilst the successor of the lessor who held the house under a temporary title is still bound by a lease made by his predecessor so long as the lease complies with the conditions set out in Article 1530 (fair conditions, etc), ***he would not be bound to renew the lease after it expires (after the max period of 4 years) unless the tenant is a citizen of Malta and occupies the dwelling-house as his ordinary residence.***

If you have a summer residence, does that qualify as an ordinary residence? If I am sick, and I go there to breath fresh air, and I stay there for a year or two, would that qualify as my residence? That question is important because if a summer residence was given under a title of emphyteusis originally and then was given out under title of lease, and that residence does not qualify as a dwelling house, then there will be no protection in that case.

There are 2 requirements in sub-article (3):

1. On the termination of the temporary emphyteusis, the dwelling house must be subject to a lease given in accordance with Article 1530.

2. The tenant must be, on the termination of the temporary emphyteusis, occupying the premises as a citizen of Malta and as his ordinary residence.

In terms of the first requirement, one must be careful because there may be cases where it may not be all that easy to ascertain whether on the termination of the temporary emphyteusis the dwelling house is in fact subject to a lease. How could it be difficult to ascertain? For example, a person living in a property which has been requisitioned (when the Government takes your property and leases it out). What title does that person have?

So, a problem arises in cases where the person in the premises at the termination of the temporary emphyteusis is occupying such premises in virtue of a requisition order. In *George Azzopardi v. Alfred Cauchi* (31/10/1991), the Court observed that unless and until the person in occupation is recognised as a tenant by the owner, it cannot be said that a lease exists between the owner and the occupier so much so that until such recognition is effected, the occupier continues to pay 'compensation' and not 'rent'. So, until the person occupying the property is recognised, he is not paying rent but compensation.

In terms of the second requirement, one can make reference to the interpretation of ordinary residence by our courts above.

In *Maria Stella Debono v. Dr Alfred Cachia Zammit* (Court of Magistrates 01/03/1998), the Court stated that the term "ordinary residence" does not equate to the term "domicile". This was confirmed in another decision *Father Carmelo Gatt v. Emmanuel Mercieca* (16/07/1982).

The Conditions of the Lease

If the above-mentioned requirements are satisfied, on the termination of the lease, the tenant will be entitled to a new lease from the direct owner at the same rent and under the same conditions mentioned in sub-article 2 paragraphs (i) and (ii) in respect of the emphyteuta. This was also decided in *Fedele Magro v. Alfred Mc Elhatton* (CoA 25/01/1989).

Furthermore, as was stated in *Lawrence Vassallo v. Emanuele Portelli* (07/12/1981), the right to a new lease under sub-article (3) will not be considered to have been waived by the tenant unless this results clearly and unequivocally.

Conversion into Perpetual Emphyteusis

We know that the temporary emphyteutical grant must be given before the 21 June 1979 and for more than 30 years. This is why we had mentioned that when a temporary emphyteusis is about to expire and the parties enter into another contract of temporary emphyteusis, they must be clear that the second contract of emphyteusis was not a renewal of the first.

Now we are considering perpetual emphyteusis and we know that, under the law, in such cases the ground-rent may be redeemed, owning the freehold.

Take the following example: I gave a house under temporary emphyteusis in 1930 for 31 years or, most commonly, 99 years which is therefore going to expire in 5 year's time. The temporary emphyteusis is converted into a perpetual emphyteusis and I proceed to redeem the perpetual emphyteusis. This means that if the house was worth £500 in the 1900s and I converted it by paying the increase according to the formula under Article 1530 (6x as much), I got the house for a pittance since that property would be valued at much more today. One can appreciate the breach of rights of the dominus in this case.

Article 12(4) states:

> *(4) On the expiration of a temporary emphyteusis of a dwelling house occupied by a* ***citizen of Malta as his ordinary residence*** *at the time of such expiration, not being an emphyteusis mentioned in sub-article (2)(a) or (b), the emphyteuta shall be entitled to convert the emphyteusis into a perpetual one* ***under the same conditions of the temporary emphyteusis with the exception of those relating to the duration and the ground-rent****. The ground-rent payable with effect from the conversion of the emphyteusis into a perpetual one and until fifteen years from that date shall be equal to* ***six times the ground-rent payable immediately before such conversion****, and shall thereafter be increased every fifteen years by so much of the then current ground-rent, being an amount not exceeding such rent, as represents in proportion thereto the increase in inflation since the time the said ground-rent was last established.*

Don't forget what we said before regarding Act X of 2009 when the law over here mentions that the ground rent shall increase every 15 years. Act X of 2009 refers to 3 years and that applies even here.

The same issues we were discussing with respect to sub-article (2) also apply here. Where the tenement given under temporary emphyteusis was a dwelling house both at the time of constitution and at the moment of termination, that creates no problems. In that case, there is no doubt that as long as the requirements of the sub-article of the law are adhered to, ***the emphyteuta can continue to occupy the dwelling house under perpetual emphyteusis.***

However, an issue arises when someone receives a piece of land under temporary emphyteusis and in the meantime builds a dwelling-house thereon. Therefore, at the termination of the temporary emphyteusis there is a dwelling house. There are arguments for and against in this case and both have their merits since there are no judgements on this issue.

In this case, note that the law doesn't require that the emphyteuta himself on such termination be a citizen of Malta and occupy it as his ordinary residence. ***It is sufficient if there is an occupier***. This is in complete contrast to sub-article (2).

Sub-article (4) starts "*On the expiration of a temporary emphyteusis of a dwelling house occupied by a citizen of Malta...*" It must be the emphyteuta himself who occupies the dwelling house.

If the conditions are met, then the emphyteuta may convert the temporary emphyteusis into a perpetual emphyteusis.

The Conditions of Perpetual Emphyteusis

"...the emphyteuta shall be entitled to convert the emphyteusis into a perpetual one under the same conditions of the temporary emphyteusis with the exception of those relating to the duration and the ground-rent."

The law states that the conditions will be the same as those of the temporary emphyteusis with the exception of the ***duration*** and the ***ground rent***.

With respect to the duration, this will now be ***perpetual*** instead of temporary and concerning the ground rent, the new ground rent will be payable with effect from the conversion of the temporary emphyteusis into a perpetual one at a rate of 6x the

ground rent payable immediately before such conversion. Although the law states every 15 years, in truth the ground rent is increased every **3 years** in proportion to the increase in the cost of living, subject to a maximum of twice the amount.

For example: if the ground rent payable before the conversion was €23.29 per annum, the ground rent payable during the perpetual emphyteusis would be €139.76 (6x). That is the conversion from temporary emphyteusis to perpetual emphyteusis and then every 3 years from the commencement of the perpetual emphyteusis, the ground rent payable can be increased according to inflation but cannot be more than double. So, if after 3 years the €139.76 became €290, that would not be acceptable.

When the law says that the conditions remain unaffected, this means that if I redeem the ground rent and the temporary emphyteusis was subject to the condition of *altius non tolendi*, for example, where there is a conversion, that condition will remain the same – ***the only conditions changing are the time and the ground rent payable.***

Rights of Occupier

Sub-Article (5)

(5) If the emphyteuta does not exercise the right granted to him by sub-article (4) ***within six months from the date such right is exercisable****, such right shall, with the necessary modifications,* ***pass to the occupier of the house who shall be entitled to demand, to the exclusion of the emphyteuta, that the dwelling-house be granted to him by the owner in perpetual emphyteusis*** *under the same conditions as could have applied if the emphyteuta had converted the emphyteusis into a perpetual one.*

So far, we have said that the temporary emphyteuta can convert the emphyteusis to perpetual emphyteusis. But say there is someone else in the property and the emphyteuta does nothing upon the expiration of the temporary emphyteusis. In that instance, the occupier can convert the property into a perpetual emphyteusis.

Importantly, sub-article (5) gives the temporary emphyteuta 6 months within which to exercise this right of conversion, i.e., 6 months within which to convert from when the temporary emphyteusis expires. ***The occupier, on the other hand, has no time limit.*** This means that he can convert the property into a perpetual emphyteusis whenever he wants, even though everything has expired.

Sub-Article (6)

(6) Where the emphyteuta or the occupier is entitled to convert a temporary emphyteusis into a perpetual one under sub-article (4) or (5), he may require that a notarial deed be entered into to this effect, and the dominus or the owner shall comply with such request.

I have a right upon conversion to ask the *dominus* to do a contract with me detailing the conversion. So, I am converting from temporary emphyteusis to perpetual emphyteusis, and I want to do it by means of a contract – in that case, the *dominus* or the owner must comply with such requests.

If the *dominus* or the owner doesn't appear or doesn't want to do a contract, how can the emphyteuta or occupier do a notarial deed? The legal route would be to take him to court and in the writ of summons, in the sworn application you state that you want to convert from concession from temporary to perpetual and that you have a right that the owner or *dominus* signs a notarial deed. Then you ask the judge that if this person doesn't appear on the appointed day for the signing of this contract, appoint someone to appear in his name or instead of him.

Regarding this situation see: Rosario Balzan v. Pauline Calafato (01/02/1998). In this case, the defendant gave the plaintiff a dwelling house on temporary emphyteusis for 50 years which commenced in 1986. When the temporary emphyteusis was terminated, it was occupied by Portelli who was a Maltese citizen and used the place as his ordinary residence. Plaintiff claimed that she was entitled to convert the temporary emphyteusis into a perpetual one by virtue of Article 12(4) and request a notarial deed by virtue of Article 12(6). Some of the defendants claimed that such requirements were lacking and were not ordered to sign the contract.

The Court concluded that plaintiff satisfied the requisites of Article 4 and was entitled to the conversion and, in addition, by virtue of Article 12(6), he could also demand a notarial deed be entered into to that effect. The Court said that the *dominus* or the owner must accept such demand by the emphyteuta to declare *quote omnes* that the temporary emphyteusis was converted into a perpetual one.

Cases of Expiration Pre-21/06/1979

Sub-Article (7)

(7) Where the date of expiration of the emphyteusis is ***a date prior to 21st June, 1979****, the foregoing provisions of this article shall apply only if the emphyteuta or the tenant, as the case may be****, still occupies the house as his ordinary residence on that date*** *and* ***shall not apply if he so occupies the house under an agreement entered into by him after the expiration of the emphyteusis.***

This deals with the situation where the temporary emphyteusis not only qualifies as one given before the 21 June 1979, but also ***terminates before such date***. If the requirements mentioned by law are satisfied, the emphyteuta or the tenant, as the case may be, shall be entitled to exercise the rights contemplated under Article 12, sub-articles (2), (3), (4), and (5).

The two conditions that must be satisfied are the following:

1. On the 21 June 1979, he must still be in occupation of the house as his ***ordinary residence***; and

2. He must not be occupying the house under an agreement entered into by him after the expiration of the temporary emphyteusis.

Condition (1)

He must on the 21 June 1979 still be in occupation of the house as his ordinary residence. In respect of this first requirement, the position in relation to sub-articles (2) and (3) is clear. But in respect of sub-articles (4) and (5), some clarification is necessary.

We said that sub-article (2) dealing with conversion to lease from temporary emphyteusis requires that it is the same person, but this isn't necessarily the case in sub-article (4).

According to sub-article (4), after the termination of the temporary emphyteusis, the emphyteuta will be entitled to continue in occupation on perpetual emphyteusis as long as ***on termination***, the dwelling house is occupied by a citizen of Malta as his

ordinary residence. As one may recall, the emphyteuta may exercise the right contemplated in sub-article (4) ***even if it is not the emphyteuta himself who so occupies the dwelling house on the termination of the temporary emphyteusis.***

However, if the case falls under sub-article (7), that is, cases where the temporary emphyteusis terminates before 21 June 1979, the position is different, since in such case, the emphyteuta may exercise the right contemplated in sub-article (4) only if on the termination of the temporary emphyteusis ***it was the emphyteuta himself who occupied the house as his ordinary residence***. Therefore, he would not be entitled to exercise the said right were the house was occupied by someone else. This conclusion can be sustained because sub-article (7) says that the emphyteuta may exercise the right contemplated in sub-article (4) if he still occupies the house as his ordinary residence on the 21 June 1979.

The words "still occupies" imply that the emphyteuta must have occupied the house as his ordinary residence ***both on the termination of the temporary emphyteusis and on the 21 June 1979***.

With regards to sub-article (5), if the temporary emphyteusis terminates prior to the 21 June 1979, the right given by this sub-article may not be exercised by any occupier. The only occupier entitled to exercise such a right would be ***the tenant*** as long as he still occupies the house on the 21 June 1979 as his ordinary residence.

Condition (2)

With respect to the second condition, here one must distinguish between the case where on the 21 June 1979 one is occupying by virtue of an agreement entered into between the parties and the case where on the said date one is in occupation on the basis of some factor which is extraneous to the will of the parties.

In *Doris Borg et v. Marthese Portelli* (FHCC 20/10/1982, CoA 15/03/1991), the facts of the case were the following:

The defendants, Portelli, had granted to the plaintiffs, Borg, a dwelling house on temporary emphyteusis which temporary emphyteusis terminated in 1977 (before the amendments of 1979). Following such termination, the defendants had requested the plaintiffs to vacate the premises and in May 1979, Borg accepted the defendant's

request on condition that they would be allowed 3 months within which to vacate the premises.

[Do not forgot that this case started prior to 1979 and the temporary emphyteusis was terminated in 1977. The agreement between Borg and Portelli was reached in May 1979 ***during the court case*** because Portelli had filed a court case against Borg to declare that the temporary emphyteusis expired and for Borg to vacate].

Portelli agreed to Borg's request and the parties then requested the Court to pass judgement on the basis of their agreement, something which the Court did in May 1979.

In August 1979, Act XXIII of 1979 was enacted. So, in May there was a judgement which reflected the agreement between the parties that after 3 months, Borg would leave the property and in August, this Act was enacted. For this reason, Borg filed an action against Portelli (the owner) and claimed that they had the right to occupy the premises by title of lease by virtue of Article 12 sub-articles (2) and (7). The defendants, Portelli, argued that sub-article (7) was not applicable because there had been an agreement after the termination of the temporary emphyteusis. So, in 1977 the temporary emphyteusis expired and in May 1979 there was agreement which was reflected in a judgement.

In quoting Article 12(2), the Court said that according to sub-article (7), sub-article (2) applies also in the case where the date of termination of the temporary emphyteusis is a date prior to 21 June 1979, as long as the emphyteuta still occupies the house as his ordinary residence on that date and as long as he does not occupy the house under an agreement entered into by him after the expiration of the temporary emphyteusis.

So, in May 1979, there was the judgement, with the agreement that Borg is going to leave the property, August the law was enacted which said that anyone who was occupying the property prior to the 21 June 1979 could qualify under sub-article (7). *Prima facie, Borg qualified*.

The Court said that therefore, it had to decide as to whether what took place between the parties ***amounted to an agreement binding the plaintiffs to vacate the premises within 3 months.***

The Court said that if the Court had delivered judgement ordering the plaintiffs to vacate the premises within a time limit fixed by the Court at its discretion, Portelli would not have been able to claim that sub-article (7) did not apply.

Do not forget that Portelli and Borg agreed to a time limit; it wasn't imposed by the court. A time limit imposed by the court can be extended by the court but if there is agreement, that has to be respected. Besides that, in this case Article 14 stated that the provisions of Article 12 shall have effect notwithstanding any agreement undertaking promise or other act or thing contrary to or limiting or purporting to limit any of the rights conferred by it. The Court observed that the words 'other act or thing' includes judgements. The Court said that therefore, the plaintiffs could not argue that they were occupying the premises by virtue of a judgement, but they occupied the premises in terms of an agreement incorporated in a judgement.

The Court gave judgement in favour of the defendants and the CoA confirmed the judgement of the First Hall.

From which date is the rent due?

Whenever Article 12(7) applies, the tenant or the emphyteuta as the case may be is bound to pay the rent or ground rent established in terms of sub-article (2) or (4) as from the date of the termination of the temporary emphyteusis and not as from 21 June 1979. So, if the emphyteusis had terminated 10 years prior, for example, it is from that date that the emphyteusis and the increase would be due.

In ***Paul Zahra v. Spiteri*** (FHCC 31/01/1983), plaintiffs had granted a dwelling house on temporary emphyteusis for 17 years starting from the 15 January 1962 to the defendant. The temporary emphyteusis terminated on the 14 January 1979, on which date the defendant was a citizen of Malta and occupied the house as his ordinary residence. 8 months later, Act XXIII of 1979 was enacted, on which date the defendant was still occupying the house as his ordinary residence and no agreement had been entered into by him after the expiration of the temporary emphyteusis.

Therefore, the defendant satisfied the requirements of sub-articles (2) and (7) of Article 12 to be entitled to continue in occupation by a title of lease under the conditions stipulated by the said Act. However, a problem arose as to the time from

which the rent established by virtue of the said act was to start falling due. The Court said that the relevant date is the date of the termination of the temporary emphyteusis, being the 15 January 1979 and not the date when Act XXIII came into effect.

So, when an issue arose from when the rent was due, whether it was the 21 June 1979 or the 15 January 1979 when the original temporary emphyteusis terminated, the Court said that the rent is due from the date of termination, being 15 January 1979.

Article 12(8)

So far, we have seen that according to Article 12(2), where a dwelling house was given on temporary emphyteusis for a period not exceeding 30 years, and the contract was made before 21 June 1979, and on the termination of the temporary emphyteusis the emphyteuta was occupying the house as a citizen of Malta, and as his ordinary residence, ***he would be entitled to continue occupation under a title of lease.***

Then we also saw that according to Article 12(3), if on the expiration of a temporary emphyteusis above mentioned, the dwelling house is subject to a lease, and on the termination of the temporary emphyteusis, the tenant is a Maltese citizen and occupies the house as his ordinary residence, the tenant will, on the termination of the lease, ***be entitled to a new lease.***

However, the above mentioned is subject to what is contemplated in Article 12(8).

(8) Where, in the case of an emphyteusis mentioned in sub-article (2)(a) and expiring after the 21st June, 1979, the emphyteuta or the tenant occupying the house as his ordinary residence on the expiration of the emphyteusis is a person different from the person occupying the house as his ordinary residence on 21st June, 1979, the provisions of sub-article (2) or (3), as the case may be, shall apply only -

According to this Article, in the case of any temporary emphyteusis above mentioned, if such temporary emphyteusis terminates after the 21 June 1979, the emphyteuta or the tenant, as the case may be, occupying the house as his ordinary residence on the expiration of the temporary emphyteusis will be entitled to exercise the rights contemplated in sub-articles (2) or (3) ***only if he was the same person who occupied the house on the 21 June 1979***.

This is saving two exceptional circumstances:

1) <u>The first exception is contemplated in sub-article 8(a):</u>

> *(a) if-*
>
> *(i) the person occupying the house on the date aforesaid* ***continued in occupation of the house as his ordinary residence until his death****; and*
>
> *(ii) the person occupying the house as his ordinary residence on the expiration of the emphyteusis* ***resided with the emphyteuta at the time of his death and had then all the other qualifications to be treated as a tenant for the purposes of this article****; or*

This contemplates the case where the person who occupies a dwelling house on the 21 June 1979 continues to ordinarily reside in the dwelling house until he dies and the person who occupies the house at the end of the temporary emphyteusis as his ordinary residence has resided with the deceased until the latter dies and qualifies as a tenant.

A problem which arises here is the requirement that the person occupying the immovable property at the termination of the temporary emphyteusis must ***at the time of death of the emphyteuta*** have qualified as a tenant.

In an article titled 'Rent Legislation Malta' Issue IV by <u>Gannino Caruana Demajo</u>, he states that the case contemplated in Article 8(a) must have been meant as a straightforward application of the definition of tenant for the purposes of this Article of the Ordinance because 'tenant' includes certain specific members of the first tenant's family who reside with him at the time of his death.

However, as <u>Mr. Justice Caruana Demajo</u> points out in his article here mentioned, the wording is rather strange, and it seems to limit the applicability of this first exception to cases where the emphyteutical grant was for a period not exceeding 16 years.

In fact, the occupier, on the expiration of temporary emphyteusis, ***must have resided with the emphyteuta as a member of his family at the time of the latter's death***. This excludes the lessees, except in the unusual case where the emphyteuta has left the house to a member of the family but remained also in occupation of the house.

However, although not a lessee, the occupier must paradoxically qualify as a tenant. He would acquire this quality as a member of the emphyteuta's family who resided with him at the time of his death only if the emphyteuta himself qualifies as a tenant. And the emphyteuta is considered as a tenant only when the period of emphyteutical rights is less than 16 years.

One should also note that when the law says that the person concerned must qualify as a tenant, the term 'tenant' should be understood as defined by Article 2 as qualified by the proviso to the said Article.

In *Salvatore Borg v. Maria Strati* (CoA 09/06/1989), the facts were as follows:

Reverend Joe Mizzi took a dwelling house on temporary emphyteusis on the 3 January 1968, for 17 years from Salvatore Borg (plaintiff).

The temporary emphyteusis should have come to an end on the 2 January 1985. However, Reverend Mizzi died on the 28 June 1982. Strati was a first cousin of Mr Mizzi and had lived with him in the said dwelling house since the beginning of the said grant until his death.

The heirs of Reverend Mizzi had given the dwelling house under title of lease to the defendant Strati, on the 3 August 1982. The emphyteutical grant terminated on the 2 January 1985, at which time the dwelling house was subject to the said lease.

The defendant, Strati, claimed that she was entitled to continue in occupation under a title of lease by virtue of sub-articles (3) and (8) of Article 12, Chapter 158. The plaintiff claimed that the defendant (Strati) had no such right because at the time of the death of the emphyteuta, defendant did not satisfy the qualifications to be considered as a tenant for the purposes of Article 12, Chapter 158.

The Court stated that Reverend Mizzi satisfied the requirements of sub-article (8)(i), that is, he continued to reside in it until his death. However, the Court stated that the requirements of sub-article (8)(a)(ii) were not satisfied. This is because although the defendant had occupied the premises as her ordinary residence at the time of the emphyteuta's death, she did not satisfy the qualifications to be considered as a 'tenant' of the premises for the purposes of Article 12, Chapter 158.

Since the defendant (Strati) was a cousin of the deceased, she did not qualify for protection.

For a further examination of the proviso in relation to the definition of tenant, we can refer to the case Vincent Curmi et v. Maria Carmela Galea (CoA 06/05/1990). In this case, the Court held that the words 'that are not married' refers only to the brother or sister of the lessee and not to the children.

Another difficulty that arises with the definition of a tenant is whether a married child who has been widowed qualifies as a tenant under the proviso. The difficulty is whether for the purposes of the definition of tenant he is to be considered as married or unmarried.

2) The second exception is found in Article 12(8)(b):

(b) if-

(i) the person occupying the house as his ordinary residence on the date aforesaid derived the title under which he so occupied the house from the emphyteuta occupying the house as his ordinary residence on the expiration of the emphyteusis or, if the emphyteuta from whom the said title was derived dies before the expiration of the emphyteusis, from the emphyteuta whose heir occupies the house as his ordinary residence on the expiration of the emphyteusis; and

(ii) until the expiration of the emphyteusis, no person other than the person aforesaid and the said emphyteuta, or his heir, and members of their family living with them, occupied the house in any manner whatsoever; and

(iii) not later than 30th September, 1979, notice is given in writing to the Housing Authority of the title under which the house is occupied on 21st June, 1979, stating the nature of that title, the expected duration thereof and the name of the person occupying the house under that title.

This is a rather obscure provision which operates only so as to create a lease in favour of an emphyteuta. It does not, however, operate in cases where on the expiration of

the temporary emphyteusis the house is subject to a lease, because on that date the house must be occupied by the emphyteuta or his heir.

The law also contemplates the following situation: for example, on the 1 of January 1966, A grants a house on temporary emphyteusis to B for 20 years. On the 1 January 1971 B grants the same tenant to C on temporary sub-emphyteusis or lease, or any other temporary title for 10 years.

Therefore, on the 21 June 1979, C would be occupying the house under a title which he derived from B, the emphyteuta, who gave the necessary written notice to the Housing Authority. On the expiration of the temporary sub-emphyteusis or lease or other temporary title on the 31 December 1980, C gives the house back to B who continues in occupation until the original temporary emphyteusis expires on the 31 December 1985.

On that date, B would be entitled to continue in occupation under a lease from A, even though he did not occupy the house on the 21 June 1979.

On this point, see ***Dr. Anthony Cuschieri v. Alfred Francica*** (CoA 08/11/1991). The CoA confirmed the judgement given by the Court of Magistrates and stated that:

> *"Kif kienet il-ligi dak iz-zmien, bl-artikolu 12(8) tal-kap. 158 kien jipprovdi li fil-kaz ta' emfitewsi temporanja, kuntratt li sar qabel il-21 ta' Gunju 79, fil-kaz tal-emfitewta jew kerrej li jkun jokkupa d-dar bhala residenza ordinarja tieghu, meta taghlaq l-emfitewsi u dan ikun persuna differenti min dik li kienet tokkupa id-dar bhala residenza ordinarja taghha fil-21 ta' Gunju 1979, id-dispozizzjonijiet tal-artikolu 12(2) u (3) tal-kap 158 kienu japplikaw biss fil-kazijiet imsemmija. Dan il-kaz odjern ma kienx igib il-protezzjoni tal-ligi, u ghalhekk gie deciz li ma kienx japplika l-artikolu 12(3) tal-kap 158."*

Which is the competent court to hear a case concerning the eviction of a defendant from an immovable property?

In ***John Debono et v. Mario Buhagiar*** (14/03/2015), the plaintiffs asked the Court to order the defendants to relinquish the possession of a property given to them under title of temporary emphyteusis upon the expiration of the 99-year term.

The defendants stated that the **First Hall** did not have the required competence (*ratione materia*) to decide this case. The Court disagreed and ordered the continuation of the proceedings.

Article 12A

All you need to know about this is that it deals with dwelling-houses subject to more than one emphyteusis.

On ***dwelling-houses***, see:

- ***Moviment Azzjoni Socjali v. Noel Borg*** (30/09/2010) – definition of ordinary residence.

  "Ir-residenza hija stat ta` fatt li trid tirrizulta mill-provi tal-kaz…

  Sabiex jigi stabbilit jekk persuna kellhiex ir-residenza ordinarja taghha f'post partikolari huma relevanti c-cirkostanzi kollha tal-kaz illi jistghu jindikaw jekk il-membru tal-familja kienx qieghed jaghmel uzu mill-fond in kwistjoni ghal dawk l-iskopijiet li wiehed jifhem b'residenza ordinarja. Dawn jinkludu l-irqad u mistrieh regolari fil-fond in kwistjoni, il-fatt li fil-fond in kwistjoni jinzammu l-oggetti personali u l-hwejjeg ta' min jippretendi li ghandu residenza, il-fatt illi f'din ir-residenza huwa jghaddi z-zmien liberu tieghu fejn hu jipprattika d-delizzji tieghu u jaghmel ix-xoghol personali tieghu. Tindika wkoll il-kelma 'residenza', il-fond fejn wiehed jippranza u jiccena, fejn wiehed jircevi l-korrispondenza u anke fejn jircevi l-hbieb, u fejn il-hbieb u terzi jistennew li jsibu lil min hu hemm residenti.

  *Fis-sentenza "**Agius vs Copperstone et**" (op. cit.) inghad hekk -"biex membru tal-familja jista' jitlob b' success il-protezzjoni tal-Kapitolu 109 (illum Kapitolu 69) ir-residenza tieghu mat-tenant ma tridx tkun kazwali jew saltwarja, jew ghal semplice kumdita` ahjar, jew ta' semplici pjacir, jew ispirata minn dik il-htiega ta' kambjament ta' ambjent li anke taghmel gid ghas-sahha u ghall-mohh imma trid tkun ir-residenza ordinarja tal-bniedem, anke jekk ghal bzonn mhux l-unika residenza tieghu, imma dejjem haga imposta minn necessita.`"*

  Ir-residenza ordinarja trid tirrizulta minn sensiela ta` fatti ppruvati. U fil-kisba taghha ma hemm xejn awtomatiku. Ghalhekk il-fatt li persuna jkollha dokumenti li prima

facie jattestaw konnessjoni taghha mal-fond, bhall-inkluzjoni fir-Registru Elettorali, ir-registrazzjoni mal- Korporazzjoni ghas-Servizzi tal-Ilma u mal Korporazzjoni Xoghol u Tahrig mhumiex prova nkonfutabbli ta` residenza. Huwa pacifiku li r-Registru Elettorali jikkostitwixxi biss prova li trid tigi verifikata, li tista' tkun korroborattiva, izda mhux necessarjament u dejjem konklussiva. Lanqas il-mobbli jew effetti ohra personali li wiehed jista` ikollu fil-fond ma huma prova sine qua non.

Fis-sentenza taghha tat-8 ta` Frar 1971 fil-kawza "**Coppini noe vs Vella Bonnici noe**" il-Qorti tal-Appell osservat li b`residenza ordinarja wiehed ghandu jfisser post b` certu grad ta` kontinwita`, apparti assenzi accidentali jew temporanji. Id-durata mhux kriterju esklussiv u necessarjament determinanti. Hu pero` kriterju tajjeb dak li jirrigwarda l-mod kif bniedem ugwalment jorganizza hajtu. Residenza ordinarja timplika permanenza u abitwalita`."

- Coppini v. Vella Bonnici (CoA 08/02/1971).

- Angela sive Gina Balzan v. Hilda Lateo (FHCC 24/03/2015):

"Illi fil-fehma ta` din il-Qorti l-konnotati ta` residenza ordinarja huma derivati mill-fatti kollha f`daqqa riferibbli ghal persuna u fond. Dawn huma derivati mill-assjem tal-provi, u l-aktar influwenti huwa l-fatt ta` fejn il-persuna regolarment torqod u zzomm hwejjigha, inkluz id-dokumenti personali. Naturalment fil-post ta` residenza ordinarja persuna zzomm dak li abitwalment tilbes, kif ukoll dak li hu necessarju ghall-passatempi principali taghha. Normalment residenza ordinarja jkun fiha l-possibbilta` li bniedem jghaddi l-hin liberu tieghu, jaghmel il-kontijiet privati, jibghat l-ittri, izomm l-income tax returns, u kopji tal-kuntratti relattivi ghall-proprjeta` tieghu. Fir-residenza ordinarja bniedem izomm l-oggetti ta` valur sentimentali. Izda min-naha l-ohra mhux necessarju li bniedem jorqod hemmhekk kuljum. Il-fatt li bniedem ikollu villeggjatura ma jeskludix l-ewwel post milli tkun ir-residenza ordinarja. Normalment id-dokumenti tal-hajja civili bhal I.D. Card, registrazzjoni ma` Registru Elettorali, mal Korporazzjonijiet, jikkostitwixxu prova izda mhux necessarjament prova konklussiva (ara wkoll, Prim`Awla, Imhallef Valenzia, 26 ta` Ottubru, 1998, Borg Costanzi vs Debarro ; u Calleja vs Ellul, Appell, 29 ta` Novembru, 1996)."

- Carmelo Agius v. John Agius (CoA 02/12/1994).
- AIC Joseph Barbara et v. Nathalie Scicluna (FHCC 18/05/2010).
- Borg Costanzi v. Debaro (FHCC 26/10/1998).
- Calleja v. Ellul (CoA 29/11/1996).

Article 12B

What was the reason why Article 12B came into being? This is very relevant since at the moment, a lot of court cases are ongoing on this Article.

In 2018, because the constitutional cases dealing with Chapter 158 started piling up, something had to be done in order to avoid further constitutional cases. To place you into context: for example, you had a temporary emphyteusis and you qualified under Article 12(2), you worked out that formula, and you are set – you have a property worth millions, for which you pay a pittance of rent. For this reason, government passed Article 12B which provides that the property will be valued by a court appointed architect, following which the magistrate can give the *dominus* (owner) up to 2% of the value by way of rent. It is the individual who would need to pay that rent.

So, now if you had a property valued by the court appointed architect at €200,000, which you were renting for say €200/annum, the Court can make the tenant pay up to 2% of that amount, being €4000/annum. So, now the situation is that where before you had a temporary emphyteusis and it was converted to a lease, it could be that from €200, you start paying €4000, depending on the value of the property.

This specific piece of legislation was enacted, therefore, to try and balance the hardship of property owners so that at least, the lessee and the owner would come on somewhat of an equal footing.

In these cases, the lessor must file an application in front of the RRB, he files the original temporary emphyteutical concession stating that that temporary emphyteusis has come to an end and that the individual has opted to have the property under a title of lease, he states the amount of rent he is being paid, and he asks the RRB to appoint an architect to value the property.

There is also the means test in this article of the law. Accordingly, if a person is found to be within the parameters of the test, he will be allowed to continue in the lease. If he is found that his means are superior to the means test, then the magistrate will order the eviction of the individual.

Usually, in these type of court cases, magistrates do not go for the 2% but they split up the % over a number of years.

So, Article 12B was introduced by Act XXVII of 2018 in response to judgments of the European Court of Human Rights mainly:

- *Amato Gauci v. Malta 47045/06* (15/09/2009).

This was on Chapter 158, and concerned an original grant in temporary emphyteusis which had expired, and contrary to the owner's expectation that the property would revert to him vacant on termination of the contract, the 1979 Act gave the tenants the right to retain possession of the property under a new lease. He argued that the fact that he retained ownership in circumstances in which he was unable to foresee when, if ever, the property would revert to him, was a violation of Article 1/1 ECHR.

The Court stated that Article 1/1 requires that any interference by a public authority with the peaceful enjoyment of possessions be lawful. It must be in the general interest, however, any such interference must also satisfy the requirement of proportionality. A fair balance must be struck between the demands of the general interests of the community and the requirements for the protection of the individual's fundamental rights. The requisite balance will not be struck where the person concerned bears and individual and excessive burden.

The Court highlighted how in this case, whilst the applicant remained the owner of the property, he was subjected to a ***forced landlord-tenant relationship for an indefinite period of time***. Moreover, the applicant did not have an effective remedy enabling him to evict the tenants, either on the basis of his own need or that of his relatives, or on the basis that the occupants were not deserving of such protection as they owned alternative accommodation. To add on top of that, the tenancy could be inherited and the amount of rent received was "certainly low", contrasting starkly with the market value of the premises.

> *"The Court considers that, State control over levels of rent falls into a sphere subject to a wide margin of appreciation by the State and its application may often cause significant reductions in the amount of rent chargeable. Nevertheless, this may not lead to results which are manifestly unreasonable, such as amounts of rent allowing* ***only a minimal profit****."*

It concluded:

> *"In the present case, having regard to* ***the low rental value which could be fixed by the Rent Regulation Board****, the applicant's state of* ***uncertainty*** *as to whether he would ever recover his property, which has already been subject to this regime for nine years, the* ***lack of procedural safeguards*** *in the application of the law and the rise in the standard of living in Malta over the past decades, the Court finds that* ***a disproportionate and excessive burden was imposed on the applicant****. The latter was requested to bear most of the social and financial costs of supplying housing accommodation to Mr and Mrs P. (see, mutatis mutandis, Hutten-Czapska). It follows that* ***the Maltese State failed to strike the requisite fair balance between the general interests of the community and the protection of the applicant's right of property****.*
>
> *There has accordingly been a violation of Article 1 of Protocol No.1 to the Convention."*

- *Aquilina v. Malta 3851/12* (20/04/2015).
- *Cassar v. Malta 50570/13* (30/04/2018).

In order to address all the court findings in these judgements, further amendments were introduced – the new amendments of Article 12B, Act XXVII of 2018 which came into force on the 1 August 2018. These provide, amongst others, that 12B(2) owners are entitled to file an application before the RRB demanding that the rent be reviewed up to an amount not exceeding two percent (2%) per annum of the open market freehold value (as if its empty) of the dwelling-house on the 1st January of the year during which the application is filed and that new conditions be established in respect of the lease.

The RRB must 'means test' the tenant. If not met by the tenant, the tenant has to vacate the premises, in 2018, not later than 5 years from the judgement handed by

the RRB. And during that period, where the tenant is physically staying in the property, he has to pay to the owner double the rent payable.

If the means test is met by the tenant, the RRB shall establish the revised rent by giving due account to the means, age of the tenant and to any disproportionate burden particular to the landlord.

Another power which the RRB has in these types of cases is the power to order an increase in the rent pending the hearing of the application. So, during the course of the proceedings, one can ask that the rent of the property be increased. The revised rent shall be applicable for a period of 6 years, after which period, it shall be subject to being revised unless the parties reach an agreement.

The magistrate will say this amount of money and these conditions will remain valid for a number of years.

In the event of a material change in circumstances, the owner may file an application before the RRB requesting the revision of the conditions and in the case that the owner has evidence that the tenant is not a person in need, the owner may also demand the dissolution of the lease.

The definition of tenant for the purpose of Article 12B was introduced *in order that the tenancy will not be transmitted to any member of the family living with the tenant at the moment of the tenant's death.*

There is the publication of the Continuation of Tenancies, Means testing in respect of tenancies originating under the Housing Decontrol Ordinance. And also, the publication of the Continuation of Tenancies Means Testing Criteria.

Hence, there was a lot of movement in 2018. Now, to anyone who had filed a constitutional court case stating that he was not, for example, receiving the sufficient amount of money when compared to the value of the property, the Court would refer the applicant to Article 12B. They couldn't go before the Constitutional Court before exhausting Article 12B. There are a couple of cases arguing that Article 12B also runs counter to the Constitution and to the ECHR and therefore, this issue is all the time evolving.

Passed down notes:

In accordance with the continuation of tenancies with means testing criteria regulations, subsidiary legislation 16.11, if the means test is not met by the tenant the tenant has to vacate the premises not later than 5 years from the judgement handed by the Rent Regulation Board and during the period of 5 years the tenant has to pay the owner double the rent payable.

Some court cases regarding Article 12B. Article 12B is an important article because it tries to establish (not necessarily manages) some form of equality between the landlord and the tenant, equality in the sense that the landlord receives fair compensation, and the tenant has security of tenure to remain in that property. Up till now the constitutional court has never ordered the eviction of an individual from a dwelling house because it says that it is not its competence to do so but the competence is of the Rent Regulation Board. Don't forget that the constitutional court, here's court cases dealing with the breach of human rights amongst other things but there isn't a limit as to its powers.

For example, if there is a breach just to give an idea of the powers of that court, if there is a breach during civil proceedings, a breach occurred, judgement was given and an appeal was lodged and lost and then you proceed to go to the Constitutional Court, first it goes to the Civil Court and then it goes to the Constitutional Court. If one of those courts finds a breach heard during the first re-hearing before the First Hall the constitutional court can also say that the proceedings are sent back to the First Hall and continue from the date before that breach occurred. So, if a breach occurred for example on the 15th March 2015, and now we are in 2023. The constitutional court can say go back to 2015 before the breach occurred and continue the case from there so that is the power from which the constitutional court has.

The Constitutional Court has a lot of powers and until now it's always been stated that it is the competence of the regulation board to order the eviction from a property which was converted.

The Constitutional Court will say that the person holding the lease is not entitled to use article 12(2) of chapter 158 and the defendant in the Constitutional Court says you can't use that conversion in your advantage it is stating that you are going to be evicted, later rather than sooner.

Martina Camilleri (4th Year)

On Article 12B, refer to Catherine Cauchi v. Josephine Borg (RRB 28/10/2019).

This case links back to a judgement of the Constitutional Court given on the 2 March 2018, in ***Thomas u Catherine Cauchi v. Avukat Ġenerali u Josephine Borg***, where the said Court declared that:

> *"Ma huwiex kompitu ta 'din il-qorti li tordna l-iżgumbrament, għax huwa kompitu ta' qorti ta' ġurisdizzjoni ċivili li tgħid jekk il-konvenuta għandhiex titolu biex iżżomm il-fond. Li għandha tagħmel din il-qorti huwa li tgħid illi l-applikazzjoni* ***tal-art. 12(2)(b)(i) tal-Kap. 158*** *iwassal għall-ksur tal-jedd tal-atturi għat-tgawdija ta' ħwejjiġhom, bi ksur tal-art. 37 tal-Kostituzzjoni u l-art. 1 tal-Ewwel Protokoll; billi l-liġi li tkun inkonsistenti mad-drittijiet fundamentali mħarsa taħt il-Kostituzzjoni jew taħt il-Konvenzjoni, għandha, safejn tkun inkonsistenti, tkun bla effett, u l-konvenuta Borg* (the person in the property) *ma tistax tinqeda bl-art. 12(2)(b)(i) tal-Kap. 158 biex tivvanta drittijiet fuq il-fond li dwaru saret il-kawża."*

At the time, everyone was filing a court case in front of the Constitutional Court, which would declare that there was a breach of one's human rights and on that basis, the Court would not authorise the conversion of the temporary emphyteusis into a lease. The reasoning was that when a temporary emphyteusis was converted into a lease, the rent payable was very low in comparison to the value of the property. So, prior to 2018, the Constitutional Court found a way out by refusing the conversion of the temporary emphyteusis to rent. In 2018, the Government introduced Article 12B.

The facts of the above case were that by means of a contract of temporary emphyteusis dated 3 February 1983, Cauchi had given to Peter Barbara a dwelling house for 21 years (till 2004). The said Barbara was also given a right to transfer the property, and the dwelling house was transferred to various other people until it was eventually transferred to Carmel and Josephine Borg.

These two separated and the husband, Carmel Borg, transferred all of his rights on the dwelling house to his wife, Josephine Borg, on the deed of separation. At the termination of the temporary emphyteusis, Josephine Borg was a citizen of Malta and ordinarily resident in the dwelling house. Thus, by means of Article 12(2), Chapter 158, the temporary emphyteusis upon termination was converted to a lease and following the calculations, the rent payable in 2016 was of €273.89 per annum.

The first issue which the RRB had to decide was whether Article 12B was applicable to the case since this Article of the law had come into effect after the Constitutional Court had declared that Josephine Borg could not use the dispositions of Article 12(2)(b)(i) of Chapter 158. The RRB decided that Article 12B applied to this case even in view of what sub-article (11) of article 12B stated (since repealed).

This stated: *"The provisions of this article (12B) shall also apply in all cases where any emphyteusis sub-emphyteusis or tenancy in respect of a dwelling-house regulated under Articles 5, 12, or 12A has lapsed due to a court judgement based on the lack of proportionality between the value of the property and the amount receivable by the landlord and the person who was the emphyteuta or the sub-emphyteuta or the tenant still occupies the house as his ordinary residence on the 10 April 2018. In such cases, it shall not be lawful for the owner to proceed to request the eviction of the occupier without first availing himself of the provisions of this Article."*

In brief, the Courts were saying that you cannot convert a temporary emphyteusis into a lease because it is against the landlord's human rights. So, the legislator passed a law stating that it shall not be lawful to evict someone from that property before availing oneself of Article 12B.

The RRB then went on to decide the case. Since Borg had limited financial means, it would not order her eviction but instead raised the rent payable by 1% for the first two years and thereafter by 1.25% of the value determined by the members of the RRB.

So, the RRB did not go for the maximum, but decided to first go to 1% and then after a number of years to increase the rent payable by 1.25%.

In ***Anthony Aquilina v. Michael Camilleri*** **(RRB 18/10/2019)**, the RRB, taking into consideration all the circumstances of the case, decided against the eviction of the tenants but increased the lease from €1,888 per annum for €5,400, for the first two years per annum, an increase equivalent to 1.25% and then for €6,600 per annum for the remaining 4 years, equivalent to an increase of 1.5% of the value of the freehold value of the property on a global market.

The same reasoning was applied in ***Iana Said v. Joseph Cauchi*** (RRB 12/12/2019), whereby the rent was increased from €334 per annum to €3,150 for the first 2 years, an increase of an equivalent to 1.5% of the value, of the free capital market value and then to €3,675 for the remaining 4 years, 1.75%.

In ***Pierre Cassar v. Joseph Grima*** (16/12/2019), the increase was for 1.75% for the first two years and then 2% for the remaining 4 years.

Notice that it is very rare that the RRB will apply the 2% because it is a lot of money, depending on the value of the property. In all of the above cases mentioned, the respondents had satisfied the requirements of the means testing.

In ***Cuschieri v. Joseph Grima*** (13/02/2020), respondents satisfied the requirements of the means testing regulations, however, the main difference between this case and the others was that the respondents had a substantial amount of investments, totalling to more than €500,000. Whilst the residents in the other cases had little or no means at all. In this case, the RRB, whilst deciding against the request of the applicant for the eviction of the respondents, decided that the respondents, taking into consideration that they had the means to pay the full amount established by law, were to pay the full 2% straight away. Before they were paying €640/annum and now they had to start paying €7000/annum which is still relatively low.

So, the legislator tried to find a way how to reach an equitable solution, i.e., proportionality between the rights of the owner and the rights of the tenant. If a substantial difference is going to arise between what the law is offering and what the market is offering, Article 12B is only going to be challenged in the future.

The Constitutionality of Chapter 158

Article 37 of the Constitution & Article 1/1 ECHR. Note the importance of time. Principles change with time.

- *Zammit v. Malta* (12/01/1991) – this was given by the Commission.
- *Fleri Soler & Camilleri v. Malta* (26/09/2006).
- *Edwards v. Malta* (24/10/2006).
- *Amato Gauci v. Malta* (15/09/2009).
- *Schembri & Others v. Malta* (10/11/2009).
- *Apap Bologna v. Malta* (30/08/2016).
- *Bradshaw & Others v. Malta* (23/10/2018).

- *Galea Testeferrata v. Prim Ministru* (FHCC 03/10/2000).
- *Galea v. Briffa* (CC 30/11/2001).
- *Amato Gauci v. AG* (CC 26/05/2006).
- *Bugeja v. AG* (CC 07/12/2009).
- *Bugeja v. Calleja* (CC 11/11/2011).
- *Buttigieg v. AG* (06/02/2015).
- *Borg v. AG* (CC 11/07/2016).
- *Cauchi v. AG* (CC 02/03/2018).
- *Barbara v. Vella* (CoA 27/03/2021).
- *Psaila v. AG* (CC 27/03/2020).

Up till now, we are saying that the Constitutional Court is declaring that the conversions of temporary emphyteusis to rent or of temporary emphyteusis to perpetual emphyteusis are invalid because someone had given the property under title of temporary emphyteusis prior to the amendments of 21 June 1979. So, that was a situation where someone was caught unaware because the law was changed after he had done the contract.

What happens if you do a contract of temporary emphyteusis in 1981, when the law came into force in 1979?

Martina Camilleri (4th Year)

Dr Peter Caruana Galizia

The Agricultural Leases (Reletting) Act, Chapter 199 of the Laws of Malta

Introduction

Chapter 199 of the Laws of Malta was introduced in 1967 and this was the last law that gave protection to tenant farmers. The situation before this law was enacted was that agricultural leases in Malta were regulated by the Civil Code.

We had a situation at that time, and still to this day, that farmers in Malta hardly ever owned the land they cultivated – agricultural land was considered valuable but at the same time, encroachment was approaching and therefore, the government felt that farmers needed some protection. The situation to this very day is that usually tenant farmers hold land on an annual lease basis without a written contract. So, it is an exception to urban tenements which require a written contract. Furthermore, they tend to pay a very low rent (circa €5/*tumolo*).

The situation at that point was that roughly 1/3 of the agricultural land was owned by the government, 1/3 by the church and the remaining 1/3 by individuals, normally noble families. A lot of the agricultural land has been used up by roads and buildings. In 1992, the church in Malta transferred all the property it didn't need for its mission to the government of Malta, and this included agricultural land. It did not include churches, offices, or houses which the parish priests used. They also kept some valuable property.

Nonetheless, we can assume at all agricultural land the church once owned has now gone to the government. That is the position till this day. Also, although there was no written contract of lease and it was basically verbal and renewable verbally year to year, a lot of agricultural land goes back to the same tenant family for hundreds of years. And because farmers in the olden days used to have a lot of children, there was a lot of fragmentation of tenancies since the children would divide the *tumoli* between them.

The problem of fragmentation is that a person will not have enough land to sustain his living. So, a lot of them were part time farmers. There are very few full-time farmers. But these part time farmers usually did not do any intense farming but used the fields for the growing of wheat, and perhaps some vegetables but for their own private use.

It is important to know that Malta is small and utilised agricultural area (UAA) represents about 33% of the whole territory, which is the smallest ratio of the agricultural land to the whole area in the EU. Moreover, there are around 700 part time farmers, and this is decreasing every year. In fact, production over the years has decreased by 20% in the past 15 years. 70% of fruit and vegetables consumed in Malta are imported.

The Nature of the Agricultural Land

The law divides agricultural land into 3 types:

1) Arable land: land with its own source of water such as a natural spring whereby the farmer can draw water from the upper or lower water table. Most farmers in land have dug boreholes. This is the most valuable land because you can get more than one crop per year.

2) Dry land: this land has no direct source of water and depends in theory only on rain. They might have a well here and there, but it is not enough to dry crops in the dry season. Most of the produce is between October and May. The crops they grow are not thirsty, such as wheat, clover, potatoes, etc.

3) Xarin: this is rocky land and doesn't really have much value.

The Protected Tenant Farmer

In 1967, Chapter 199 was enacted mainly because of pressure due to building development. This law gave farmers two important rights:

1. The right to renew the lease on a year-to-year basis under the same conditions as in the previous year, which right also devolved on the death of the tenant on the spouse and children of the tenant etc.

2. The second right is the right to keep the rent at the same rate.

'Agricultural land' is defined in **Article 2**:

> *"agricultural land" means any land which is mainly let for the growing of crops, flowers, fruit-trees or vines and for cognate agricultural purposes, including the erection of glasshouses, cloches or cold frames, but does not include grazing grounds;*

Hence, grazing ground, land used for quarries, land used for hunting or land used for any other purpose than in the definition do not fall within the scope of Chapter 199.

'Lease' is also defined:

> *"lease" means a lease for an agreed total period not exceeding sixteen years for a rent in money or other consideration payable yearly in one or more instalments and includes a lease tacitly renewed from year to year or renewed by a decision of the Board under this Act, but does not include either an emphyteusis or an agreement of lease in virtue of which the produce is to be apportioned between the lessor and the tenant; it also includes "sub-lease" in relation to sub-lessor and sub-tenant;*

So, if the farmer has a lease agreement for 17 years, after that he has no protection. This is a strange definition. The government at that time decided to limit it to 16 years because it felt that this was reasonable since after 16 years, you are prosperous and no longer need protection. The definition of lease doesn't include land granted on emphyteusis.

Also, this definition makes reference to a contract for agricultural leases where the produce is divided between the owner and the tenant – the s-called '*mezzadrija*'. This kind of arrangement has no protection at law. If it is just for a year, when the year is up, the parties can terminate. It is very year because apart from some very old contracts, no farmer will agree to share the produce with the owner and work for 50%.

Another important definition is **'member of the family'**:

> *"member of the family" means a lineal ascendant, a lineal descendant, a widow or a widower, a son-in-law, and a widowed daughter-in-law while not remarried, of the tenant;*

Under Chapter 199, the inheritance of the right to renewal only goes up or down or a bit sideways – ascendant, descendant, widow or widower, son in law, and a widowed daughter while not remarried of the tenant who has died. What is excluded is if the tenant farmer was unmarried and had no issue, in which case, there is no one who had the right to renew the lease after his death because siblings do not count.

The definition of **'tenant'**:

> *"tenant" includes any member of the family who is an assignee of the lease and, after the tenant's death, where there is no such member, it includes in order of preference any member of the family who is a legatee of the lease or who, during the last year immediately preceding the tenant's death, was living with the tenant or has been working the agricultural land with him or for him or is the tenant's heir; it includes also, in relation to a sub- lessor, a sub-tenant, which expression shall be deemed in such relation to have the same meaning as tenant in its full extent.*

The word 'tenant' includes any member of the family who is an assignee of the lease. So, as opposed to Chapter 69, the tenant can assign the lease during his lifetime to a member of his family and not to an insider before he dies. So, we have a situation of what he can do before he dies.

And after he dies, then there is an order of preference for who can inherit the lease:

1. A member of the family who is a legatee of the lease. So, in his will he left the lease to X.

2. If this person lived with the tenant during the last years of his life or worked in the land with him.

Basically, because of this Chapter 199 introduced in 1967, it is very difficult to evict a tenant farmer from agricultural land. You either need to have a contract that was for

more than **16 years**, and it has now reached its termination date or else the law provides for **6 grounds for eviction in Article 4(2)**.

Grounds for Eviction

(2) The Board shall allow the lessor's application if the lessor proves that -

First Ground

(a) he requires the agricultural land to be used for agricultural purposes by himself personally or by any member of the family personally for a period of not less than four consecutive years starting immediately following the date of termination; or

The first ground is when the owner or member of his family (of the owner) wants to use the land for agricultural purposes for at least 4 years. Imagine I inherit a field from someone, and I am not happy with the rent I am receiving for it. I want to use it myself. So, the law allows this but within certain parameters. There is a test, and the Board (Rural Leases Control Board (RLCB)) has to assess hardship and to determine which party – the owner or tenant – will suffer the most. So, if I am wealthy and I do not need this income, it is difficult for me to get it back. Whereas if the tenant farmer is well-off or not even a farmer and has other income, it is likely that you will get the eviction judgement.

The RLCB will look at the returns, assets, etc but as a rule, it is not easy to get eviction.

Second Ground

(b) he requires the agricultural land, provided it is not irrigable land, for the construction thereon of buildings for dwelling, business or industrial purposes; or

The second ground for eviction allowed is if the owner requires the land for construction and development. There is a proviso to this – and the proviso is as long as it is not arable. If it has its own source of water and is arable, you cannot evict the tenant. This is because such land is important for the economy and is very valuable.

What you need for this ground, apart from the fact that it is not arable, is a development permit issued by the planning authority. This is one of the most common grounds and it is semi-watertight. There are judgements and the Board has the discretion because sometimes you won't get a permit for all the land but only for

some of it. In such cases, the Board will evict the tenant only from the area covered by a development permit and allow him to continue the lease for the remainder and will reduce the rent *pro rata*.

Third ground

(c) the agricultural land was sublet or the lease thereof transferred without the consent of the lessor to any person other than a co-tenant thereof or a member of the family; or

The third ground is if the owner can prove that the tenant has sub-let or assigned the lease to a person other than a co-tenant or a member of the family. Sub-letting is a contract whereby a tenant can sub-let to a third party. There is a distinction at law between sub-letting and assignment. With the former, the tenant former is still in the picture between the owner and sub-tenant whereas within assignment, the tenant is out of the picture because he has assigned his rent to a member of the family.

If you have an agricultural area land where there is more than one tenant on the same land (co-tenancy), then one co-tenant can assign his right to the other co-tenant, and the owner cannot do anything about it.

Fourth ground

(d) during the two years immediately preceding the date of termination, the field was allowed to lie fallow for at least twelve consecutive calendar months; or

The fourth ground is if the tenant farmer doesn't use it for crops or anything for 12 months or more. The burden of proof is on the owner.

Fifth ground

(e) during the two years immediately preceding the date of termination, the tenant has failed, in respect of two or more terms, to pay the rent, on each occasion, within fifteen days from the day on which the lessor has called upon him in writing for payment; or

The fifth ground is if the tenant has not paid the rent within 15 days from being called upon to do so on at least 2 occasions. The law imposes a demand in writing, but it needn't be to the courts or registered mail. However that is better because you can prove he has received it, and it has to happen twice. In theory, this ground is never

used because it is the tradition in Malta to pay the rent on the 15th of August every year. This is usually a period when nothing is growing so if the tenant wants to terminate the lease, it is a good period for him to do so.

Sixth ground

(f) during the two years immediately preceding the date of termination, the tenant, being bound to repair and maintain the walls of the agricultural land, failed to fulfil such obligation or habitually disregarded any other conditions of the lease or deliberately or through negligence caused or allowed to be caused damage, other than damage of small importance, to any fruit- trees in the agricultural land:

The last ground is if the tenant has failed to maintain and repair the boundary walls. The law imposes an obligation on the tenant to maintain the rubble walls. It is there at law in the Civil Code.

Chapter 199 only deals with the protection and sets up a Board for disputes, but otherwise the Civil Code applies. There is always under the Civil Code an obligation for a tenant to use the object leased as a *bonus paterfamilias*. So, obviously if you let the walls to fall into disrepair you are not acting as a bonus paterfamilias, but they have inserted it as a ground for eviction. Included is if the tenant has habitually disregarded any other conditions of the lease and failed to apply the standard of care of a *bonus paterfamilias*. So, this is reproduced here.

Judgements:

1) *Carmelo Agius v. Francis Bugeja* (Rik 12/2007, 05/10/2011)

This was a claim for eviction based on the allegation by the owner that the tenant built a room on the land without his consent and without a planning authority permit. The room was quite large and high with windows, a terrace, a generator to have electricity but nonetheless, the Board felt that the erection of the room didn't change the original destination of the land. This is another principle in lease both agricultural and urban – there is an obligation on the tenant to use the property leased according to its destination (what it is made for). The Board felt that the room did not encroach so much on the agricultural land and denied the owner's claim for eviction. It also ignored the fact that there was no PA permit.

Agricultural land cannot be treated the same as housing because of the need for it.

2) *Catherine Caruana v. Joseph Schembri* (RSCB Rik 11/2004, 11/10/2013)

Here the owner alleged that the tenant built a large garage, when the whole area of the land was only 8 tumoli, and that he got no PA permit and no consent from the owner. This was more than a room. What happened was that the tenant farmer sanctioned the works during the proceedings and the permit was issued. Also, it was vague to the extent that the owners granted consent or otherwise. Because the permit was issued, and because it was vague whether there was consent or not, the Board denied the claim.

3) Angelo Attard v. Gian Marie Attard (Rik. 25/1994, 11/10/2013)

The owner declared that he needed the field for his own use. The Board applied the estate of hardships, it compared them, and the tenant won. The claim was denied.

4) *San Martin Estates Ltd v. Antonia Chetcuti et* (23/2000, 14/11/2023)

In this case, the owners filed for eviction on the ground that the tenant failed to maintain the dry rubble wall and did not in general conform to the conditions of the lease. In this case, the claim was upheld by the Court, and it was confirmed on appeal. The Board was very concerned about the fact that the tenant put a layer of concrete on top of the rubble walls which runs counter to a lot of PA regulations. This was the main reason for the claim being upheld.

5) *Thomas Cauchi et v. Benjamin Gaffa* (9/2007, CoA 15/02/2016)

Here, the owner as the plaintiffs alleged that they needed the land for their own use. The Board in first instance had compared hardships and denied the claim. The CoA overturned the judgement, holding that the tenant did not convince the Court that the field constituted an important source of his livelihood.

6) *Perit Ian Zammit v. Andrew Abela* (CoA 11/2012, 15/07/2016)

The Board allowed the claim for eviction only on an area governed by a PA permit. This is what we said that you can get eviction on part but not on the rest.

Chapter 199 has far ensured that the tenant farmer's livelihood is safeguarded by very strong protection against eviction and that rents are kept as low as possible to avoid a burden on the farmer and also an increase of prices of agricultural produce to the consumer which would push up the cost of living. The government is always trying to ensure the *status quo*.

Human Rights Aspects

There are human rights aspects to this protection. In theory, there is a blatant violation of the right to enjoyment of one's property and there have been several constitutional cases based on Article 1/1 ECHR.

Initially, we started filing human rights cases on the rent laws for urban tenements. A lot of people have gotten a lot of money from the government as a result of being forced in a situation of a forced lease. Therefore, it was only a matter of time before owners started challenging Chapter 199.

In ***Peter Borg Costanzi & Glen Zammit v. SA*** (26/2024), the Court found a breach of Article 1/1 due to the low rent and the impossibility of terminating the lease. However, the Court didn't order eviction. With urban tenements, there has been a practice never to order eviction – the Court simply gives a declaration that the tenant doesn't have a right to renew the lease under Chapter 69, or in this case under Chapter 199, and with that judgement you can go to the Board and say you have a right to refuse renewal and you want to get the property back. The Court felt that it was not the right forum to evict a tenant, but it granted compensation to the owners. There were also moral damages.

The tenant is protected because of the law and the law is there because the government left it that. It isn't the farmers fault because he simply availed himself of a right at law.

In ***Alfred Manduca pro et noe v. Joseph Micallef et & SA*** (27/06/2023), plaintiffs claimed there was a breach of Article 1/1 and asked for remedies including compensation. The Court awarded €26,000 in damages but no eviction and there is an appeal pending by the farmers and the SA.

In ***Stefan Stilon v John Farrugia & SA* (24/01/2024)**, the Court declared a breach of Article 1/1, and the tenant was protected under Chapter 199 by the right of indefinite renewal and the Court ordered payment in compensation and also the eviction of the tenant from the land. This is a judge who stands out – remember that the Constitutional Court can give any remedy it likes and, in this case, the tenant was given 3 months to evict. He was not a full-time farmer and did not earn a living from the land. This may or may not have motivated the Court in ordering eviction however, there is an appeal pending.

In some cases, like this one, the Court has ordered eviction, but this isn't very frequent. In others the Court has refused to give compensation and has said the agricultural land is special and refused to say there was a breach of human rights.

The government reacts when these things happen. In the same way that we had a government reaction in the case of urban leases, in particular as a result of pressure from the ECHR, the government passed a law that the owner can ask for 2% of market value of rent for pre-1995 leases. It decided to have the same solution for agricultural leases but ***with a big caveat***.

The value of agricultural land shot up because the country is so small, and therefore, such land is so limited. Therefore, the government had to enact a law saying that the owner could get 2%, no farmer would continue working the land. The government tried to find a middle-road between the rights of the owners of agricultural land for a fair return on the value of that land and the necessity to continue affording protection to tenant farmers whose income is relatively low and are therefore not in a position to pay much higher rents.

Eventually, parliament approved changes to Chapter 199 to put a stop to the judicial eviction of tenant farmers. This is basically Article 3(2A) of Chapter 199.

(2A) When the change of the conditions of lease under this article consists in an increase in the rent the following provisions shall apply:

(a) the owner in his application shall indicate by how much the rent shall increase;

(b) the tenant on his part shall indicate in his reply how much the fair rent should be in his opinion;

(c) in its final judgment the Board shall determine the fair rent taking into account the value of the agricultural land when valued as agricultural land for agricultural use obtainable on the open market, the means of the tenant, the circumstances and the condition of the agricultural land and any burden that is disproportionate to the lessor;

(d) the Board may establish that any increase in rent shall be gradual;

(e) the rent revised by the Board shall not exceed one point five per cent (1.5%) per annum of the value of the land free and unencumbered made in accordance with paragraph (c);

(f) when the agricultural land includes a farmhouse used by the tenant as his sole place of residence, the rent in respect of that farmhouse alone shall not exceed two percent (2%) per annum of the free and unencumbered on the open market value of the farmhouse:

Provided that the Board shall grant the tenant the option to discontinue the lease of the farmhouse and to continue only the lease of the agricultural land at such rent as revised by the Board in accordance with this sub-article.

(g) the revised rent shall apply for a period of eight (8) years;

(h) the rent shall remain the same after the expiration of eight (8) years, unless otherwise agreed between the tenant and the lessor, or unless the lessor requests again the increase in rent according to this article.

The law now provides that an owner who wants to raise the rent of an agricultural tenement can apply to the RLCB and indicate by how much he expects the rent to increase.

When the tenant receives this application to increase the rent, it is up to him to indicate in his right how much the fair rent should be in his opinion. The Board then determines the fair value (fair rent) taking into account the value of the land when valued as agricultural land for agricultural use obtainable in the open market. It also has to take into account the means of the tenant and the condition and circumstances of the land and any burden that is disproportionate to the lessor.

The law allows for this rent increase to be gradual, and it cannot increase it up to more than 1.5% per annum of the value of the land as valued for agricultural purposes.

If there is a farmhouse on the land used by the tenant as his sole place of residence, the law allows for this to be valued separately and the owner can get 2% of the value of the farmhouse as free and unencumbered and the tenant may discontinue the lease of the farmhouse and retain just the agricultural land.

The problem with this is that we have a legal notice SL.119.02 which specifies the methodology for the open value of the agricultural land. This law provides for a base value of agricultural land which is €2570/*tumolo*. This is a base value which can be increased by the various parameters, but it is a ridiculous value, and no one will sell agricultural land for this amount.

There are 14 parameters at law for the base rent to be increased. Each parameter has a percentage. This is a complicated legal notice.

The Board appoints an expert whose not always an architect, and you start with the base value and can increase according to:

a. The accessibility of the land. In other words, how close to a road, and whether you can enter with a truck, etc. A lot of fields are not accessible by a road but have a right of passage over someone else's property. The more accessible, the more you can put up the base rent. If you have no access by vehicles, you add 0% and if you have full access, you add 10%.

b. Access to water. If there is a natural spring and it is arable, the rent can shoot up. But it is capped at 10%. Very often, if there is a natural spring in a certain area, it isn't used by just one farmer, rather they will have a reservoir and there is a roaster between all the farmers in the area. Very few farmers have their own spring for themselves.

c. The access to electricity. Here, the maximum you can get is 5% more for full access.

d. The exposure to wind. The stronger the wind, the less you get.

e. The ease of use of agricultural machinery. Whether you can go in with a tractor and things like that.

f. The gradient. The falter the land, the higher your % increase because if there is a slop, it is more difficult to cultivate.

g. The propensity of flooding. Crops get ruined by flooding.

h. The existence of elements of protected landscape. For example, if there are rubble walls, that is defined as protected landscape and since the tenant has an obligation to maintain them, the base rate doesn't go up.

i. The depth of the soil. Malta doesn't have deep soil, usually less than a metre deep and it depends on what kind of sub-soil you have.

j. The texture of the soil. Fields have different colours of soil, and it depends on how much iron and clay there is.

k. The salinity of the soil.

l. The presence of stones in the soil.

m. The existence of boundary walls. It is considered a good feature to have boundary walls. Less than 50% with a boundary wall = 0% increase, but more than 50% = 5% increase.

n. The water storage infrastructure. So, if there are wells, if there is a reservoir etc. Water is precious especially in Summer for crops and farmers go through a lot of expense to try and collect water.

Each parameter has a rating range, and the base value increases according to the points raised. These amendments are new and haven't been tested properly in court. Although they give some form of relief to the owner, they probably fall short to the right of the full enjoyment to one's property. We wonder to what extent these will stand the test of EcrtHR. The base rate falls far short of the value of agricultural land in Malta and has been arbitrarily imposed by government.

Though the law has created two values: (1) the open market value & (2) the agronomic value (worked on the base rate). In a recent case, a filed measuring 3 *tumoli* was attributed a market value of €400,000 and an agronomic value of €9000.