CVL 2008
LAW OF PROPERTY

The European Law Students' Association

MALTA

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The Law of Property

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Introduction

The most important source of the law of property is the civil code The Civil code starts off with **the law of persons**, then moves on to **the law of things**, and in our civil law tradition, the law of things (book second of the civil code) includes and governs the law of succession. Succession, for now, will be ignored. When we speak about law of persons, we are referring to **personality** (physical and legal), **civil status** (minors up to the age of 18, the authority of the persons over minors), **marriage, separation, divorce, filiation** (who is the biological mother / father), etc. These are all aspects governed by the law of persons, book first of the civil code. There are other pieces of legislation outside the civil code that also regulates the law of persons (such as the marriage act, chapter 255), but the bulk is set out in book first of the civil code. We also have the second schedule to the Civil Code, a very long schedule that regulates legal personality. Book second takes us to the law of things. Basically, the law of things considers rights and situations which link the person to property. We need to see what property is, how that link exists (the concept of **patrimony**), the content and the consequences of those rights and obligations over property. This is what we deal with in the law of property. If I am the owner of an immovable property, what are my rights? What are my powers over that land? Are there limitations to those powers? If there are, which limitations are legitimate and which are not? If someone died and a plot of land has been passed on to three siblings in equal shares, can any one of them do what he pleases with that plot of land? If not, what is the restriction?

Which laws are relevant to the law of property?

- ***Chapter 398 — the Condominium Ac***t (the special law outside the civil code regulating condominia)
- ***Chapter 296 — the Land Registration Act*** (the law regulating the registration of rights over land and buildings where those land and buildings fall within designated areas requiring compulsory registration)
- ***Chapter 56 — the Public Registry Act*** (the law regulating the registration of rights over land and buildings, in particular, the creation and the transfer of those rights in the public registry)
- ***Chapter 378 — the Consumer Affairs Act*** (dealing with rights over property when the inquirer satisfies the definition of a consumer)
- ***Chapter 249 — the Interpretation Act***

These laws have developed to supplement the main legislation, it is important to consider and analyse the relevant special law. A very important recent law that we will be considering with Dr. Borg Costanzi is the ***Government Lands Act*** (chapter 573). This is the current law regulating expropriation (the forced taking of ones' private property by the state for a public purpose). Within this ambit of law there are a series of judgements of the European Courts of Justice against Malta because of the old regime that we had regulating expropriation (chapter 88), which was called the ***land acquisition (public purpose) ordinance*** — this law no longer exists, it had been repealed - the new law regulating expropriation is the **Government Lands Act (chapter 573)** Besides the Civil Code and these specific acts of parliament, and judgements, we are lucky to still have in circulation a copy of the Personal Notes of Sir Adrian Dingli. These personal notes were limited to the provisions of law at the time (mid 1800s); for these provisions we have notes written by Sir Adrian Dingli himself. These are found at the Melitensia. If he indicated that he took the content of the particular provision to a particular code, it would direct us to the foreign material that we can consider when properly interpreting that provision.

Doctrine

In so far as **doctrine** is concerned, normally we refer to continental writers and jurists who commented on provisions which are similar to those which form part of our law. When we are looking up doctrine, we need to make sure that what we are reading is a commentary on a law which is similar or on the same lines as ours. It is not simply 'I am fluent in Italian so I look up Italian jurists' - we must make sure that the doctrine is a commentary on a provision that is similar to our law. With Italian writings, we must thread carefully - for political reasons, Italy completely changed its Civil Code in 1942; the provisions in our law follow the Italian Civil Code of 1865 (the old Italian Civil Code) — so when we are referring to Italian Jurists, we have to make sure that they are commenting on the old Italian Civil code. Our Civil Code traditionally follows the French model — normally, French Doctrine may be the most relevant. The German Civil Code and the current Italian Civil Code are written in a tradition ***different*** to the Maltese Civil Code.

Historical background to Maltese Law of Property

We will be looking, in particular, to the provisions in the civil code which we will consider this year. Most of these provisions preserve their original drafting. The marginal note tells you how many times the law was amended. If there is no marginal note, then they preserved their original drafting and were never amended.

The most primary and earliest source of these provisions is Roman Law and in particular the content of Justinian's institutes and Justinian's digest.

The Institutes was a compilation of Private Roman Law presented in a manner adequate for students of law, while the Digest contained doctrine. The laws of property in Roman Law was not transferred lock stock and barrel to our civil code, as over time the Roman Laws of Property developed. The laws inscribed in the Digest and the Institutes are not the same law governing the end of the Roman Empire. Over the centuries, Roman Law, changed, continued to be applied, especially in European Areas, but it took on influences from two other primary sources;

- Canon Law (the law of the Catholic Church)
- Local Custom

When Roman Law began changing and merging through contact with Canon Law and Local Custom (14th/ 15th Cent.), the concept of state still was unfounded. Europe was fragmented.

With the Renaissance, the first development at the time of city states, began to flourish. At this point we had the rebirth of Roman Law in Europe. By this we mean that for the first time in history, the old rules in the compilations of Justinian started being analysed and studied critically, developing those provisions with studies into more modern rules which respond to the then new realities which didn't exist during the Roman Empire. Still, at the time of this rebirth, Canon Law was very important. The influences of Canon Law were more pronounced in procedural aspects.Substantively, this is where our private law came about.

Alongside this development, in the continent there was another very important development for law. This is what we refer to as ***codification***. At the end of the Renaissance and the beginning of the Age of Enlightenment (17th/18th Cent.), we have the movement towards codification - the push for law to be known to the people and accessible for the people. Before this, law was largely unwritten and generally not known by the people. The Enlightenment changed all this. We started having compilations of law (the law being written down in an organised form) and over time, that compilation developed into codification. The difference between **compiling** and **codifying** is that **with codification, we have the laws written down comprehensively but in a format that is readily understandable to the layman**.

The **Code de Napoleon** is the first landmark in the movement of Codification.

The provisions in our civil code which preserve their original drafting (drafted in the 19th Century by Sir Adrian Dingli in the shadows of the French Civil Code) are made up of short, simple sentences, applying simple language (reflecting the reality of the time of drafting), generally without examples, and refer to statements of rules. No philosophy, no complications, just statements. That was the underlying principle behind the movement towards codification. Making it accessible to the people and presenting it in a way which the people can relate to.

The French Civil Code (Napoleonic Code) of 1804 served as a model for various codes of states and municipalities in Europe. Many provisions were adopted in the codes word for word, and these were the codes that were promulgated in the first half of the 19th century. This is when the old Italian Civil code fell, following the Napoleonic Code, as well as when our own civil code was promulgated.

In our case, the Maltese Civil Code was written in the form of **ordinances** which were eventually compiled and organised into a single code, by topics, together making up a Code following the French, Napoleonic Tradition, as well as the Old Italian Code. Sir Adrian Dingli, while writing these ordinances, wrote side notes explaining the models he used in his drafting. Some of the provisions are his own invention.
We have Sir Adrian Dingli's ordinances + all the ordinances promulgated under British Rule + Other provisions which came about following Independence through Acts of Parliament. Some Acts of Parliament went into the Code, some didn't, and were promulgated as separate pieces of law (Land Registration Act, Condominium Act, etc).

The German Civil Code and the Current Italian Civil Code do not follow the French tradition. How do we determine the intention of the legislator ? We try to establish the expressions used by the legislator. In recent times, it may be relevant to look at Parliamentary debates

Patrimony and Legal Personality

Patrimony is the collection of one's assets and debts. Our Civil Code is made up of 2 books: Book First of Persons, Book Second of Things. The Book of Things is the same as the Roman Law of Property. Property falls under the remit of Things, along with Succession.

A person can be physical or he can be legal. The legal person is a person by operation of the law, as opposed to by nature. A group of physical persons with a particular aim or objective and subject to a particular format by law are considered to be a legal person. They are granted an equivalent personality, which invoke upon the legal person rights, duties, contractual capabilities, etc.

The attributes of identity, capacity, link to rights and obligations, etc, apply identically to the legal person. The law admits of legal persons through legislation (Companies Act, where we find three different kinds of legal persons, partnerships en nom collectif, en commandite, the Limited Liability Company, where their common feature is that they have personality separate from the people forming it).

Under the second schedule to the civil code, which starts on page 499 of the Code, we have other forms of legal persons which are regulated. We have the mention of **foundations, associations, other organisations (generally of civil and not commercial nature),** which by operation of law are vested with separate legal personality.

When it comes to property, rights over things, the counterpart of personality is what we refer to as **patrimony**. Patrimony is the capacity of the person, whether physical or legal, to have rights and obligations. Patrimony also refers to the body (group) of rights and obligations which a person has at a particular time. The content of the person's patrimony may change in time. That does not change anything in that person's capacity to be the subject of rights and obligations.

Today we will discuss the provisions of the law that indicate what patrimony and personality are under our civil law. *Indicate* is used intentionally, as we shall see how the law fails to provide definitions for either concept. The concept of Patrimony is therefore abstract, and so we must refer to theory and doctrine to discover what the concept entails.

1A. (1) Persons may either be natural persons or legal persons.

(2) natural persons as well as legal persons, unless the context otherwise requires.

When used in any law the term "person" shall include both

(3) Natural persons are regulated by Title I to Title VIII of Book First of this Code.

(4) Legal persons are regulated by the Second Schedule to this Code.

(5) Legal persons enjoy all rights and powers pertaining to natural persons except those excluded by their very nature, by their constitutive act or by an express provision of law.

Article 1 A of the Civil Code is a relatively modern addition to the Code (2007), introducing an idea as to what personality, both natural and legal, encompasses. Natural Persons are regulated by **Titles 1-8 of Book First of the Civil Code** (the area of **family law**), Legal Persons are regulated by the **Second Schedule** to the Civil Code.

Legal Persons have, in principle, the same capacity, rights, and obligations which a natural person can have, saving for those exceptions relating to acts, rights, or duties which *by their very nature* or *by their constitutive act* or by *express provision of law* cannot be owned by the legal person. The Law and the Instrument setting up the Legal Person will determine the capacity, limits, rights and obligations of that legal person.

Schedule 2 Civil Code - Regulation of Legal Persons

In 1A, the scene for legal personality is set - we have **no mention of patrimony**. If we look further through the Civil Code (provisions, not schedules), in particular the provisions which were originally drafted by Sir Adrian Dingli or which came about in the Early Stages of the Civil Code, there is **no mention of patrimony,** let alone a definition. This follows the model set by the Napoleonic Code.

The concept of Patrimony, with its roots set in Roman Law, was studied and developed by two French Authors. Even though it is not defined in the Civil Code, the underlying concept and its consequences feature repeatedly in different institutes regulated by the Civil Code, in particular in the Law of Succession. These French Authors are **Aubry and Rau,** they are old theorists, however their writings are still relevant even today. Aubry and Rau produced a treatise in which they expanded the concept of patrimony, which is so vital that it serves as the foundation of all of property law. One must thus draw the line between patrimony and personality - in legal personality, there is division between the physical person and the legal person, with a common element being the affording of rights and obligations. The Second Schedule of the Civil Code, entitled *of Legal Organisations*, refers to other kinds of legal persons which also benefit from the advantage of legal personality. On the other hand, when speaking of patrimony we refer to cultural and historical connotations of rights and duties. We refer to the capacity to own such rights and duties, be it legal or physical.

In the Second Schedule to the Civil Code, another recent addition to the Civil Code (2007), is a schedule that regulates, expressly, legal persons and organisations which are not natural persons and which are not regulated by the Companies Act or any other law.

Article 1 Schedule 2 - Legal Organisations

> **1.** (1) For the purposes of this Schedule, an organisation means a universality of persons who associate or a universality of things which are appropriated to achieve a lawful purpose having a form recognised by law, and which is capable of being a legal person in terms of law.

The Law holds that an organisation, for this purpose, **is a *universality of persons who associate or a universality of things which are appropriated to achieve a lawful purpose*.** Why does the law separate universality of persons and universality of things? Normally, Legal Persons are made up of a plurality of natural persons that form together to unite for a common objective, vesting their group with the veil of legal personality. There is, however, a legal fiction whereby legal personality is given to the assets which that organisation has. This organisation, which is an exception to the rule.

Article 3 Schedule 2 - Separate Legal Personality

> **3.** (1) Legal persons are organisations endowed with legal personality. Legal personality is acquired through the formal recognition of the State. Recognition by the State requires a specific act of recognition and no other administrative act of the State in relation to an organisation or activity shall constitute recognition. Except where legal personality is recognised or established by a law or an international treaty or agreement or is granted in virtue of registration pursuant to any special law, legal personality shall only be acquired by an organisation on its registration with the Registrar for Legal Persons in accordance with article 12.

Legal Personality is granted by Legal Fiction to that group of persons or group of things, and that legal fiction is actually affected through registration of that organisation through the Registrar for Organisations (similar to the MBR). Unlike the natural person, who is deemed a natural person capable of rights and duties the second they are born, the legal person only exists if they are registered in terms of the second schedule, with the registrar for legal persons.

Article 4 Schedule 2 - Patrimony of Legal Persons

4. (1) Every legal person has a patrimony which shall be appropriated to a purpose or purposes in accordance with article 1.

The Legal Person, in the same way as the Physical Person, has the personality and has a patrimony which must be used for the purpose for which the legal person has been set up. In the case of the Physical Person, there is no such restriction because the Personality of the Physical Person is not restricted to any particular purpose. That still leaves us with void - what is Patrimony all about?

A person's Patrimony refers to the capacity of that person, physical or legal to have rights and obligations over things which have a monetary value. Civil Status rights, rights of affiliation, marriage, etc, do not form part of a person's patrimony, because in themselves, they have nothing to do with things in particular. However, if a person buys a plot of land, his rights over the plot of land indicate that he has a Patrimony and form part of that Person's Patrimony, because it has a monetary value. The monetary value can be a + or a -. A debt or an obligation also form part of the Person's Patrimony. The Person can have this content in his Patrimony because he has personality. A person who lacks direct capacity, for example, a minor, cannot have patrimony. The capacity of a person, legal or physical, to be the subject of rights and obligations is existent from the moment of birth up till the moment of death.

The content of a person's Patrimony (what actually is in one's bag of assets and liabilities) can change throughout a person's life. At birth, the content of a person's Patrimony is 0, and throughout his or her lifetime, it can increase in value, decrease in value, etc.

The Consequences of Patrimony are discussed by **Aubry and Rau** and are framed into three general rules:

1) **Every Person, physical or legal, has a Patrimony, and only a person can have a Patrimony**
2) **No Person can have more than one Patrimony**
3) **Every Patrimony is held by a Person, physical or legal.**

We refer to 2 foreign sources - 1) The Opening Provisions of the Civil Code of Quebec (because of historic reasons, their Private Law is Continental, and not Common Law) and 2) a judgement delivered in 1998 (***Howard Marshall Charitable Remainder Annuity Trust***) by the Supreme Court of Louisiana in the United States. Again, the United States are typically jurisdictions of Common Law, but for historical reasons, the state of Louisiana has a Continental Private Law, so it is helpful to look at their provisions and their judgements. Under Louisiana Law, the Patrimony is *a coherent mass oof existing or potential rights and liabilities attached to a person for the satisfaction of his economic needs*.

We said that a Person can only have one Patrimony. In the law of succession, we have a very important exception to this - when we accept an inheritance with the benefit of inventory, by way of exception, the person takes the assets and liability of his predecessor. If the heir, however, accepts the inheritance with the benefit of inventory, he will acquire a second patrimony limited to what the deceased had.

This theory of Patrimony does not explain in legal terms the situation in Community of Acquests. In Community of Acquests there is a third, common patrimony created for the spouses together - again, another example of an exception to the rule of 'One patrimony per person'

Rights over things

In our Civil Law tradition, there are **three classes** of rights over things. Two of them are principal, the third one has been, in practice, not very common but is gradually increasing in importance.

1. **Real Rights (drittijiet reali)**
2. **Personal Rights (drittijiet personali)**
3. **Rights and obligations *propter rem***

These are the three different kinds of rights over things which a person can have and which are accepted in our Civil Law tradition. The root of these different kinds of rights and their classification comes from Roman Law and has been taken up, without express explanation, in the French Civil Code and the Codes that follow that model.

Is it only an academic exercise to distinguish between the three different classes of rights? No. In the law of things, there are very important consequences which differ, depending on the classification of the right, in particular for real rights and personal rights.

Rights *propter rem* are not expressly mentioned in the Civil Code, but they exist. Their classification comes out from Roman Law and from Theory (doctrine), in particular on the French Civil Code and the Codes that follow that model. Despite the lack of explicitly in the Civil Code, the consequences of rights *propter rem* are still there, highlighted in the provisions of Book Second of the Civil Code.
Two rights over property that emerge, very common in practical application and that are both defined in the Civil Code, are the ***Right of Usufruct (użufrutt)*** the ***Right of Lease (kiri)***

From our very generic layman knowledge, we know that both the right of usufruct and the right of lease give the person owning the right the benefit of physically enjoying and occupying an immovable property. In both rights, the person has the physical control and is taking the benefit of physically using that element for his own benefit. If you look at the definition of both rights, you will observe that the rights are very different to each other, and the extent of the benefit of the right to the right holder varies a lot. The rights of the usufructuary (the person who has the usufruct) are much more extensive over the property to the extent that the usufructuary himself is entitled to grant on lease that property to another.

The Right of Usufruct is a real right, while the Right of Lease is a personal right.

How will we determine whether the right in connection to a property is real or personal in nature? This is determined by looking at the law.

The Right of Lease

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.*

There is no mention of real rights. More importantly, in this definition of Lease, unlike in that Usufruct, there is the mention of **two persons**. In usufruct, there is only one person mentioned - the person owning the right. In Lease, there is the person who has the right and the person who is letting (min qed jikri).

Real Rights

Under our Civil Law tradition, the class of real rights (which are much stronger in nature) is a closed class (in the sense that it is the law itself which characterises real rights as real rights). Real rights are described as real rights in the law itself. There are historical reasons for the class of Real Rights. Article 328 defines the right of usufruct.

328. *Usufruct is the real right to enjoy things of which another has the ownership, subject to the obligation of preserving their substance with regard both to matter and to form.*

In this definition for Usufruct, there is the express reference to it as a **real right**. Real rights are rights which exist directly on things on an item of property. Personal rights are rights which exist against another person. It is a mistake to try to categorise a right with reference to the benefit which the right gives. The categorisation of the right comes out of the law itself. Where the right is real, the law expresses the right as real. Where the right is personal, it is personal firstly by elimination (a right that is not real is normally personal) and secondly by definition - *a right which exists against another person*. Generically speaking, real rights are a matter of the law of things, while personal rights are consequences of the law of obligations. The Civil Code does not define real rights. It states which rights are real, without defining real rights. The French Theory of the Napoleonic Code holds that a **real right is defined as *the juridical power which a person has to obtain an economic benefit directly from a thing***. The person mentioned here is the **holder of the right**. That person is referred to as the actual subject of the right. Note that this definition qualifies the benefit arising from the right by the adjective ***economic***. When we are speaking about real rights therefore we are speaking about rights which have, directly or indirectly, some sort of monetary value. In Real Rights, one of the biggest advantages is that the right exists over the thing itself, attaches to the thing, and continues to follow the thing over which it exists irrespective of who is the owner or possessor of that thing. Real rights exist either as a real right of **enjoyment** or of **security**.

Real Rights of Enjoyment

These are the rights of enjoyment. In all provisional definitions, the active subject is given the actual enjoyment, in different forms and to different extents, over the thing on which the right exists.

- the right of **ownership** (dritt ta' proprjeta'), defined under article 320 of the Civil Code,
- the right of **Usufruct**, defined under article 328,
- the right of **use** (dritt ta' użu), defined under article 392 (1),
- the right of **habitation** (dritt ta abitazzjoni), defined under article 393,
- the right of **emphyteusis** (dritt ta' ċens), defined under article 1494 (1).
- the right of **easements** (servitujiet), defined under article 400.

Real Rights of Security

The Real Rights of security block and reserve the thing as a guarantee (security) for the execution of an obligation. L-ipoteka (hypothec) is an example: A has to give money to B, and as a guarantee, B holds the right of security over a thing of A, so that if the payment fails, B keeps that item.

- the right of **hypothec** (dritt ta' ipoteka), defined under article 2011of the Civil Code
- the right of **privilege**, defined under article 1999 of the Civil Code
- the right of **antichresis**, defined under article 1987 (1) of the Civil Code
- the right of **pledge**, defined under article 1964 (1) of the Civil Code

The relationship in these real rights of security is between the subject and the thing itself.

Personal Rights

A personal right is the juridical power a person has to obtain an economic benefit consisting in either the doing of an act or the giving of a thing. The person having the right is the **active** s**ubject of the right**, the benefit must have must have a direct or indirect monetary value, and the right will consist in either of 3 benefits, referred to as the subject matter.

1) The doing / performance of an act
2) The not doing / failure to perform of an act
3) The owing of a sum of money or giving of a thing

We will see how all obligations give rise to personal rights.

The person who is obliged to give, act, or not to act, is referred to as the **passive subject of the right**. The active subject is referred to as the **creditor**, while the passive subject is referred to as the **debtor** of the obligation.

A personal rights relationship can either be unilateral or a bilateral one. It is unilateral where one party is the active subject (the creditor) and the other party is the debtor, and is bilateral where both parties are creditors and debtors of each other.

The most typical example of a bilateral personal rights relationship is the **promise of Sale agreement**. If you read a promise of sale, you will find that the vendor is obliged to sell in favour of the buyer, and the buyer is obliged to buy.

In the personal rights relationship, as against the real right relationship, we have three (not 2) constitutive elements:

1) The person holding the right (***the active subject*** or ***the creditor of the obligation***)
2) The person against whom the right exists (***the passive subject*** or ***the debtor of the obligation***)
3) The object of the right (***the subject matter***)

In a personal right, therefore, there exist these three elements - the creditor, the debtor, the subject matter.

Be mindful of the fact that when speaking of personal rights, one will not find such particular right defined as a personal right. Real rights, because of their strength and extensive consequences, are, under our tradition, a closed class (exhaustively listed). When one observes the definition of such rights in the Civil Code (real rights of enjoyment or real rights of security), he will notice that they are defined as real rights in the definition itself. This does not apply to personal rights.

We will see that our law of obligations is based on the will theory (*teorija della volonta*), meaning that contracting parties can invent themselves and create themselves personal rights, so long as there is no violation of a law, there is no violation of public policy and the obligation is not contrary to morality. When we are faced with an obligation which is personal by nature, we must be able to make out that the relationship involved is a personal rights relationship - this is done by exclusion (seeing what is not a real right) and by the listing of the three necessary constituent elements. The manner in which we normally describe rights confirms the juridical distinction between real rights and personal rights. For instance, when we speak of ownership, we usually relate the right to direct reference to the property, without referring to any person in particular. “I own a house” (the real right relationship here is between myself and the item of property). On the other hand, when we speak of a debt, we say “I owe money to him” (“I” - debtor, “owe money” - subject matter, “to him” - creditor)

Characteristics of Real Rights

French theory lists four (4) basic characteristics which all real rights possess;

1) The object of a real right is ***necessarily property***. The property, here, is either *movable* (mobbli) or *immovables* (immobbli). There is a certain and determinate item of property.

2) The thing forming the subject of the real right must be ***determinate***. This means that the item must be already in existence and particular.

3) A real right is absolute and valid against anyone. This is referred to as ***erga omnes*** - valid and effective against anyone. Anyone who may have a connection, at any particular time, with the item of property subject to the real right can have the real right asserted against him in favour of the active subject

4) A real right attaches to the property over which it exists irrespective of who has control over that property at any particular time. It can therefore be asserted against anyone who acquires factual control over that property at any particular time.

Characteristics of Personal Rights

1) The object of a personal right is not necessarily an item of property. As we have already discussed, the subject matter of the personal rights relationship can consist of actions - the doing of an act, the not doing of an act, or the giving of a thing. The thing remains always an accessary, not the subject matter. The subject matter is a performance or an action.

2) The object of a personal right may also be ***indeterminate*** (not yet determined) or ***not yet in existence***.

3) A personal right is ***not absolute*** (not ***erga omnes***), but is only a relative right, in regard to a particular person or group of persons.

4) Personal rights burden the entire patrimony of the debtor of the obligation without attaching to any particular item of property. For instance - A owes B €1000. There are no hypothecs, no privileges, no guarantee, nothing, just an obligation to pay. The only guarantee which the creditor has for the payment of that debt is the content of the debtor's patrimony. If there is no money or assets or anything positive in that debtor's patrimony, then that debt cannot be satisfied - there is no priority or preference if the only right is a personal one.

There are two rules in the Civil Code: Articles 1994 and 1995 that pertain to this final characteristic:

1994. *Whosoever has bound himself personally, is obliged to fulfil his obligations with all his property, present and future.*

1995. *(1) The property of a debtor is the common guarantee of his creditors, all of whom have an equal right over such property, unless there exist between them lawful causes of preference or there shall have been a transfer of any property by way of security or a transfer under a security trust for such purpose in accordance with this Code.*

From all these characteristics, we can therefore conclude that real rights and personal rights differ on two salient points:

1) The structure of the right - a real right is a right over a thing, a personal right is a right against another person
2) The enforcement of the right

The enforcement of the right:

A real right follows the item of property on which it exists - if it is a real right of ownership, it has what we call the *droit de suite*, meaning that it can be enforced on the item of property itself irrespective of who has control over it, while if it is a real right of security (hypothec, privilege, pledge, etc), then that real right enjoys the advantage of the *droit de preferance* (the right of priority) - for example, the creditor who has a real right of privilege will enjoy a first ranking for the satisfaction of his right over the other creditors of the same debtor).

The personal right enjoys nothing of these advantages: The enforcement of a personal right can be more problematic and riskier.

Salvatore Farrugia vs Giuseppe Farrugia *- difference between real rights and personal rights*
First Hall, Civil Court 4th October 1955

Illi fid-Dritt l-azzjonijiet ċivili jiddistingwu ruħhom f'azzjonijiet personali u azzjonijiet reali. L-azzjoni personali hija dik li tiġi eżerċitata kontra l-individwu personalment ikun obligat li jagħti, jagħmel jew ma jagħmilx ħaġa, sabiex jiġi kundannat jadempixxi l-obligazzjoni tiegħu; u f;dina l-ispeċi ta' azzjoni l-oġġett tagħha prinċipali hija l-persuna, mentri l-ħaġa hija l-oġġett ulterjuri u sekondarju; mentri l-azzjoni reali ma titnissilx minn obbligu personali tal-konvenut, ima minn dritt li l-attur ikollu fuq il-ħaġa reklamanta, independentement minn kwalunkwe obligazzjoni personali tal-konvenut, b'mod li dina l-azzjoni tigi għalhekk dejjem eżerċitata, tkun min tkun il-persuna li tippossjediha"

Numerus clausus of real rights: because real rights are valid and effective ***erga omnes***, and enjoy the benefits of *droit de suite* and *droit de preferance,* under our tradition, they are a closed class - rights are real if the law says they are.

Rights Propter Rem

Rights propter rem are not full real rights, but they complement the full enjoyment of real rights - they are also referred to as *real obligations*, which may come across as misleading. Such rights consist in accessory rights which complement real rights - for instance, the right to enjoy and the corresponding obligation to pay for the contribution for repairing common parts in a condominium. Another example - in the law of easements, the obligation of that element subject to the easement to allow the full exercise of that easement, that is set out in article 471 of the Civil Code.

These rights are accessory obligations that are stipulated in the law or that are created by agreement to **further enhance and ensure the full enjoyment of a real right**.

These Rights Propter Rem are increasing in importance (because of the complex situation of property). A recent judgement,

Mercury Plc vs Persona Ltd.
First Hall, Civil Court, 10th October 2019

Illi dawn huma l-obbligazzjonijiet marbutin ma' proprjeta` jew dritt reali ieħor fuq immobbli. Ikun obbligat sid l-immobbli jew it-titolari tad-dritt reali. Eżempji ta' dawn l-obbligazzjonijiet, u li nsibu fil-liġi, huma l-obbligu tal- użufruttwarju li jagħti lil-konċedent l-imgħaxijiet fuq is-somom imħallsin għal tiswijiet straordinarji tal komproprjetarju li jikkontribwixxi għall- konservazzjoni u tgawdija tal-ħaġa komuni; l-obbligu tal-komproprjetarji ta' ħajt komuni li jikkontribwixxu għall-ispejjeż ta' tiswija u bini mill-ġdid tiegħu. In kwantu l-obbligazzjonijiet reali huma marbutin mal-proprjeta` ta' immobbli, id- debitur jista' jeħles minnhom għall-futur billi jabbanduna l-oġġett;

Classification of Property

307. All things which can be the subject of private or public ownership are either movable or immovable property.

The Maltese text of the law holds that

"*il-ħwejjeġ kollha li jistgħu jkunu l-oġġett ta' proprjeta' pubblika jew privata huma beni mobbli jew immobbli"*

In this provision we highlight three terms:

- Things (ħwejjeġ)
- Ownership (proprjeta')
- Property (beni)

Ownership / dritt ta' proprjeta'

Ownership is a real right. The right of ownership is the defined in article 320 of the Civil Code, and is the highest level of right one can have over a thing.

Things and Property / ħwejjeġ u beni

Things are anything which has an existence. Anything which is tangible or intangible. Not all things are property. When we discussed patrimony, we said that only those items of property which have a patrimonial (and thus monetary) consideration of value can be considered in one's patrimony.

S. 307 holds that property (beni) regulated as such under our law (the law of property) includes only those things which can be publicly or privately owned. Under the law of property we have the regulation of anything over which either a person or the state can have a real right. The reference to the right of ownership, in article 307, is there because ownership is the most extensive, strongest, and complete right one can have over things. This distinction between hwejjeg and beni is also reflected in legal languages. In French Law, we find the distinction between *chause* (things) and *biens* (legal term for property). In Italian Law, there is the distinction, property is *beni,* while things are *cose*. In Justinian's digest, there is a statement by Ulpian on what *beni* are;

Property is that which is capable of giving a benefit or advantage to the person and to be subjected to their rights. It is this aspect of property, not its physical appearance, that determines the attributes of the juridical qualification.

Property is any thing or object which can be subjected to a real right in favour of the person or the state. When it is subject to the state, it is public ownership, and when to the person, it is private ownership. The French writer Carbonier makes out two important consequences arising from the distinction between property and things

1) ***That not all things are property because only those things which can be owned constitute property***
2) ***Not all property are things.***

This is because items of property can be intangible, they can include rights. Property is thus not only an object which has a tangible existence over which the real right can exist. Besides that, property includes the rights themselves. Rights over property are also, in themselves, items of property. A common element tying in all items of property, whether tangible or intangible, is the economic relevance; the financial significance underlying the item of property. There must be some sort of monetary association to the thing for it to be deemed property. Insofar as public property is concerned, we refer to Title II A (S.327), which refers to ***property of the Government***. This Title was added in 2016. There is also a distinction between public property and public domain.

Further Classification of Property

Article 307 introduces the very important distinction between movable and immovable property. Under Roman Law, we had different heads of classification of property.

We had *res incommercio* and *res in extra commercium.* (Things that can / cannot be traded)
We had *res mancipi* and *res nec mancipi* (based on the value of the item of property)

All of this was abrogated in the napoleonic Code, and for reasons of certainty and simplicity of the law, a completely new head of classification was developed. This new head split up property into 2 main classes:

Movables and Immovables

Movable property are those items of property which can be moved from one place to another. Immovable property are those items of property which are fixed in their location. We get the impression, through this distinction, that property is only corporeal (physical and tangible). In both cases (movables/immovables), there can be both corporeal things and incorporeal things. Whether tangible or intangible, the common element of all movables and immovables remains the economic advantage one gets when he is in possession of that item. Each of these two classes is further subdivided,

Division of Immovables

Immovables by Nature

Article 308

308. ***The things following are immovable by their nature:***

(a) lands and buildings;

(b) springs of water;

(c) conduits which serve for the conveyance of water in a tenement;

(d) trees attached to the ground;

(e) fruits of the earth or of trees, so long as they are not separated from the ground or plucked from the trees;

(f) any movable thing annexed to a tenement permanently to remain incorporated therewith. Unless a different intention appears from the circumstances, such thing shall be deemed to be so annexed to a tenement if it is fastened thereto by any metal or cement, or if it is otherwise so affixed that it cannot be removed without being broken or damaged or without breaking or damaging the tenement.

Tenement (Maltese: Fond) refers to an immovable property where we are not specifying the nature of that immovable (Land, Gardens, Fields, House, Block of Flats, Underground Development with an overlying space which has not been developed, etc). Basically a tenement is a generic term used to describe an immovable property, whether there has been development or not.

Lands and buildings, whether developed are not, are the most immovable by nature. In time and through custom, another item which has acquired existence as an immovable by nature, almost in its own right, is airspace (arja). When referring to airspace we talk about the space overlying land or building which has or may have a separate and distinct existence and owner from the underlying land or building. Now we are also speaking of underlying space, which refers to space which may have an independent existence of the land or any construction on the land and which is normally situated below street level.

There are also immovables by nature, for they are attached to the ground. So are the fruits of the trees, unless they are plucked.

Any immovable property which is permanently integrated into land or building with a clear intention of forming an integral part thereof is also deemed immovable by nature. This is all subject to a proviso - that if a movable is permanently attached to an immovable, in a way which it cannot be removed without causing damage, then it becomes immovable.

Victor Bonavia vs Cezarin Borg
Court of Appeal (inferior) 15th March 1994

Il-persuna li tkun xtrat "Arja" tiddependi mill-bini li l-proprjetarju ta' l-ewwel sular jesegwixxi, u għalhekk f'kuntratti bħal dawn, min jixtri l-"araja" jkun qed iħallas ukoll għall-prezz tat-travi li fuqhom huwa eventwalment ikun irid jibni

Daniel Camilleri vs Kunsill Lokali Ħamrun
First Hall, Civil Court, 12th October 2004.

Meta l-attur daħal fil-fond wara li ngħata ċ-ċwievet, l- irħama kienet ġà maqlugħa u, li kieku saret il-ħsara fil- fond biex inqalgħet, din il-ħsara kienet tidher. Rajna iżda illi l-attur stess għamel stqarrija li, għallinqas għal dak li jidher, il-fond kien f'kondizzjoni aċċettabbli. Lanqas ma nġiebet xi prova li saret ħsara fl-irħama nfisha. Għalhekk ma jistax jingħad illi l-irħama aċċediet ma' l-immobbli għax kienet "mgħaqqda b'mod li ma tistax tiġi maqlugħa mingħajr ksur jew ħsara tal ħaġa nfisha jew tal-fond".

Immovables by Reason of the Object to which they refer

Article 310

***310.** The following are immovables by reason of the object to which they refer:*

(a) the dominium directum or the right of the dominus on the tenement let out on emphyteusis, and the dominium utile or the right of the emphyteuta on such tenement;

(b) the right of usufruct, or use of immovables and the right of habitation;

(c) praedial easements;

(d) actions for recovering or claiming any immovable thing or any of the rights mentioned in paragraphs (a), (b) and (c) of this article; or for a declaration that an immovable is not subject to any of such rights; or for claiming any inheritance or part thereof, or the reserved portion or any other portion of hereditary property given by law.

These are all rights - the right arising from ċens (emphyteusis), the right arising from usufruct, the right arising from servitudes, and the rights of action (remedies) - namely declaration that an immovable is not subject to any such rights, the right to claim inheritance, etc.

The difference between substantive rights and procedural rights are classified as immovables by reason of the object to which they refer. This classification is made by legal fiction, so it is the law that creates these rights and describes them as immovables. **The list is not exhaustive**.

One of the most important immovable by reason of the object to which they refer. This is the *right to compensation when the Government expropriates your property*.

Article 54 of the Government Lands Act

The Government Lands Act is the law regulating expropriation. Expropriation is the forced taking of private property by the state. We know that the state is only allowed to take private property if it is in the public interest - s.37 of the Constitution, as well as upon the payment of **fair and adequate compensation**. The whole concept and institution of expropriation under Maltese law is now regulated by Chapter 573 - the Government Lands Act. This law has been introduced in April 2017. Prior to April 2017, we had another very controversial law of expropriation which was called the Land Acquisition (Public Purposes) Ordinance, which was the then Chapter 88 of the Laws of Malta. Chapter 88 was completely repealed and replaced by the Government Lands Act. If you look at article 54 of Chapter 573, the marginal note reads "the right of compensation is an immovable right". The law says that the right to compensation

There is thus a right vested in one who suffered loss from expropriation which is considered an immovable right. The right to receive compensation from expropriation, even if it is a monetary right, is also an immovable right by reason of the object to which it refers.

54. The right to withdraw the compensation deposited in accordance with this article and to any further compensation that may be due for the purposes of this Act (hereinafter referred to as "the compensation rights") shall be deemed to be an immovable right by reason of the object to which it refers and shall be transferable accordingly. Any charge, hypothec or privilege which prior to the acquisition of the land by the authority, shall continue to attach to the compensation rights with the same ranking and priority as it attached to the land.

Division of Movables

Movables by Nature

Article 312

312. *All things, animate or inanimate, which, without any alteration of their substance, can move themselves or be moved from one place to another are movable by nature, even though such things form a collection or a stock-in-trade.*

The determining criterion for classifying an item of property as a movable by nature is the physical attribute that it can either move itself or it can be moved from one place to another. The law continues '*even though such things form a collection or a stock in trade*'.

A collection is a series of things normally with similar attributes but made up of various individual units. Therefore the law holds that each and every individual unit in that group is a movable by nature.

Stock in trade refers to the concept of a business concern (ażjenda kummerċjali). Normally, the business would include the stock, which again refers to different individual units together, the trade mark, designs, etc. This complex whole of a business presentation is what in law we refer to as the *business concern* or *going concern* or *ażjenda kummerċjali*. The law holds that the individual items which satisfy this definition, in article 312 are movables by nature even if collectively they can make up something else.

313. *Materials derived from a building which has been demolished, or gathered for erecting a new building, are movables until they are used in a construction.*

This reminds us of article 308 (f), which classifies as *immovables by nature* building and other similar materials for as long as they are permanently integrated in a building construction. Article 313 is, so to speak, the counter part of 308 (f). Before using those materials to erect a building, they are deemed movable by nature. This applies also to the materials after they are struck down from a construction.

Movables by Regulation of Law

Article 315

315. *The following things are movables by regulation of law:*

(a) shares or interests in commercial or industrial companies, even if immovable property is owned by such companies; in which latter case such shares or interests shall be deemed to be movables with respect to each shareholder and only as long as the company lasts;

(b) life or perpetual annuities, including capitals for annuities ad formam bullae and debts due for interest on capitals invested in the fund formerly existing under the name of Massa Frumentaria, provided such perpetual annuities, capitals and debts are not subject to entail;

(c) generally, all obligations, actions, even if hypothecary, and rights not considered immovable under the provisions of the last preceding sub-title.

315 (a)

Shares in a limited liability company are movable by regulation of law by 315 (a).
Interests in partnerships, commercial or civil, are movables by regulation of law by 3015 (a).

EVEN IF IMMOVABLE PROPERTY IS OWNED BY SUCH COMPANIES. The determining factor is not the *type* or *classification* of property owned by the legal person. We need to look at the shares or interest in the legal person itself. Such shares shall be deemed to be movables so long as the company lasts.

315 (b)

The second category of movables by regulation of law are ***life or perpetual annuity***. An annuity is a contractual periodical payment which is stipulated as a burden, generally on immovable property. For instance, an outright transfer of immovable property and the consideration (price) is not paid in the form of a lump sum on the deed, but there is an obligation of the buyer in favour of the transfer to pay, as stipulated, a periodical payment, for the remaining lifetime of the transferor or in perpetuity.

315(c)

Here, we have a *residual class*. The law is saying that whatever rights , obligations, or actions (remedies) which are not expressly classified as immovables are, by operation of law, classified as movables.

This is, therefore, a residual class, meaning that any other right, obligation, or action, which is not expressly classified as an immovable is, by operation of law, classified as a movable under article 315 (c).

Articles 318 and 319 are relevant in the law of succession, but apply also here.

318. *(1) The word "furniture" comprises all furnishing movables, including the pictures and statues forming part of the furniture of an apartment.*

(2) It shall not include, however, collection of books, pictures, or statues.

319. *The expression "a house with all that it contains" shall include all movable things, excepting money or documents of title to money, jewels, articles of precious metal intended for the ornamentation of the person or to be worn, things that are accidentally in the house or that belong to third parties and debts due or other rights the titles to which are in the house.*

A limita intus refers to a house with all that it contains.

Why we classify property

It is necessary to distinguish movables from immovables not only because of theory, but also because of practice.

Difference 1 - Prescriptive Acquisition

When it comes to the mode of acquisition by exercising over time, a difference arises when it comes to movables and immovables. If a person is possession a movable, he is presumed to be the owner of that movable unless there is proof to the contrary. On the other hand, a person may be deemed owner of an immovable only if he proves he was in active and continuous possession for a period ranging from 10 to 30 years (see s. 2140 and 2143 Civil Code).

Difference 2 - Formalities of Transfer

We will se that in substantive law, when it comes to immovable property, particular formalities are required for the transfer and the creation of immovable rights. In fact, in regard to immovable property, the mere delivery of control over an immovable (delivery of control, or possession, is a very important notion in property law), is not sufficient in itself, to transfer immovable property or immovable rights. The formalities of immovables are required *sine qua non* for the creation of immovable rights, the transfer of immovable property (whether by nature or by reason of the object to which they refer), etc. The formalities are not simply an *evidence of the transfer* or *creation of the right*, but rather it constitutes the transfer or creation of the right itself. When it comes to immovables, the transfer of immovables is only effective vis-a-vis third parties from the date on which it is registered in the public registry and where applicable (if the immovable falls within a compulsory registration area from the date on which it is registered in the land registry).

Formalities:

- A physical transfer of immovables is not sufficient to denote a transfer of rights, without a public deed being first prepared by a notary.
- Vis-a-vis third parties, a transfer of immovable property or the creation of a right over immovables is only effective from the date on which the transfer is registered in the public registry and, where applicable, in the land registry.

The formality of a publication of a public deed and the formality for registration for third party effect are only required for immovable property, there is no such requirement for movable property.

Difference 3 - Hypothec Subjection

Only immovable property can be subjected to hypothecs. We saw what hypothecs are, real rights of security, a very important real right of security, which can only be granted over immovable property, with one exception: ships (bastimenti). We know that ships are movable property, but by a specific provision of law in the Merchant shipping act (the law regulating vessels, chapter 234), by express provision, ships which are movables are exceptionally allowed to be subjected to hypothecs. In all other cases, only immovables can be burdened by hypothecs.

Difference 4 - Jurisdictional Regulation

When it comes to PIL (Private International Law), which is that branch of the law which regulates conflict of laws in cross-border transactions, there is the holding that when it comes to immovable property, that property is regulated by the law of the jurisdiction where that property happens to be - what we refer to as the *lex situs*. That law is the law, under PIL, that regulates immovable property. Under PIL, movable property is normally regulated by the personal law of the owner or possessor of the movable property. Very largely speaking, this different regulation of movables and immovables extends also to private international law. Therefore, the exercise of being able to distinguish between movables and immovables and to classify items of property under one category or the other is not simply academic, but it bares also practical application.

Other classifications of property

Although the classification between movables and immovables is the only classification which the civil code has adopted, Jurists and also other institutes in civil law admit of other important classifications of property - largely deriving from Roman Law.

Consumables and non-consumables

Consumables are items of property which are consumed by use, so for instance, food, fuel, etc, while non-consumables are items of property which can be used and reused at no loss, for instance, land. This is relevant, for example, when it comes to the contract of loan. Minor Contracts stipulate 2 kinds of loan; loan for use (*commodatum*), wherein only non-consumables may be issued to loan by use, and then there is loan for consumption (*mutuum*), wherein consumables may be susceptible to loan by consumption.

Fungibles and non-fungibles

Jurists still refer to the distinction between *fungibles* and *non-fungibles*. Fungibles have no particular identity (money, for instance), whereas non-fungibles are items of property which have an individual existence and cannot be replaced by exact equivalence (a plot of land, for example). The distinction between fungibles and non-fungibles becomes relevant in the area of extinction of obligations, what is known as a set-off. A set-off can only operate in regard to fungible property (I owe you 500, you owe me 400, so I just give you 100). The sale of fungibles requires the delivery of a quantity, whereas the sale of non-fungibles requires the transfer of ownership and the particular property sold.

Principal property and accessory property

Another classification is that between principle property (which have an independent existence, a house, an apartment, land, etc) and accessory property (which exist only in relation to a principle property, a tree, a river passing through land, etc).

Particular property and universality of property

There is also the distinction between particular property and a universality of property. There is a clear difference between a book and a collection of paintings. There is an important reference to universality of collectibles in article 534, which refers to the *actio manutentionis,* which is a remedy to preserve possession, available where the disturbance of possession affects either an immovable or a universality of immovables.

Divisible property and indivisible property

The distinguishing criterion is not necessarily physical but refers to the monetary valuation of the property.

Present property and future property

Present property is that which is already in existence, while future property covers those items of property which still have to come into existence. Real rights, for example, can only attach to present property, while personal rights can also exist on future property.

The Real Right of Ownership

The right of ownership is a real right, meaning it exists directly over property and over a thing. It is the widest, most complete and most extensive real right that our Civil Law tradition admits. Our law defines real ownership, found under article 320.

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

Article 320 opens Title II of Book First of the Civil Code - Of ownership. This article preserves its original drafting in the ordinances drafted by Sir Adrian Dingli, for the marginal note reflects no amendment. In fact, it follows the definition of ownership found under article 544 of the Napoleonic Code, as well as the definition in the Old Italian Civil Code as stipulated in its article 436.

Thus article 320 of our Code, article 544 of the Napoleonic Code, and Article 436 of the Old Italian Civil Code all reflect the same definition, as originally drafted in the Napoleonic code, through different translations.

The concept of Ownership was born under Roman Law. The Napoleonic Code's definition is modelled under the Roman Law concept of *dominium* - the power over a thing. Thus, under Roman Law, the right of ownership was considered to be a **power**, and not merely a **right**.

Dominium, under Roman Law, was an extremely important notion under the Roman Law of Things, for there existed 3 principle attributes which were associated with Dominium.

The 3 powers conveyed to the owner by Dominium under Roman Law were:

1) ***Usus*** - The Right to use and enjoy
2) ***Fructus*** - The Right to keep fruits produced, physical or civil (rent, interests, etc are civil fruits)
3) ***Abusus*** - The Right to destroy, transfer, and to completely change the nature of the thing.

The concept of Dominium under Roman Law and the concept of Ownership under contemporary Civil Law gives the titleholder all these advantages and powers. This proves the fact that the Right of Ownership is the strongest, widest, and most extensive right that a person can have over property.

Titleholder and the Limitations of Ownership

This phrase is repeated both in doctrine and in cases of property. *Title* is the generic term that we use to refer to any right which is held by a person over property. Most commonly, we refer to *title* when we refer to the right of ownership. If we want to refer to the person who has the right of ownership over property, we refer to that person as the titleholder.

Notwithstanding all these attributes established by Roman Law and confirmed by modern law (usus, fructus, abusus), one must note that **the real right of ownership, despite it being the strongest right one may possess, is not absolute**.

Article 320 may be split into 2:

Ownership is the right of enjoying and disposing of things in the most absolute manner

And

Provided no use thereof is made which is prohibited by law.

The definition, itself, in its second part, is the limitation to the right of ownership. The right of ownership is limited by what is otherwise provided by the law. What is interesting, apart from the restriction to the most powerful right, is that doctrine has suggested that this right is ***perpetual***, meaning that it is **not lost through the passage of time and it is not lost by non use and non enjoyment.**

The right of ownership is only lost when a new owner acquires it. A new owner may acquire the right of ownership through:

1) A formal transfer, or
2) When the owner abandons his right, with such right being exercised in such a way so as to acquire ownership by **acquisitive prescription**, through possession as governed by article 2107

Attributes to the Right of Ownership

1) The right of ownership is **absolute**
2) The right of ownership is **perpetual**
3) The right of ownership is **exclusive**

Exclusivity & The Actio Rei Vindicatoria

We have already discussed the first two attributes. The exclusivity of the right of ownership allows the titleholder to prevent third parties from taking advantage or making use in any manner of the property. This element, that of exclusivity, is protected by a very important judicial remedy, also deriving from Roman Law, which is the ***actio rei vindicatoria***. We do not have provisions in the Civil Code that regulate and establish this action, but it nonetheless plays a pivotal part in our law. The **actio rei vindicatoria** is a right of action which is vested in the owner to assert his ownership and to obtain the vacant possession of his property if a third party has infringed on exclusivity and arbitrarily taken control of his property against his will. This action protects the owner in the case where a third party has arbitrarily taken control over his property.

Consequences of the Right of Ownership

Being an absolute, perpetual, and exclusive real right, there arises a set of consequences, derived from articles 321 to 326 of the Civil Code:

Consequence 1 - right of protection from forced giving up of property

321. No person can be compelled to give up his property or to permit any other person to make use of it, except for a public purpose, and upon payment of a fair compensation.

Article 321 deals with the right of the owner not to be forced to give up his property against his will. He may not be deprived of his own property unless he permits it. This right applies in regard to all other private subjects and the state, except in the case of a **lawful expropriation**. Expropriation refers to the forced taking of private property by the Government in the public interest and for a public purpose. This action is followed up with the payment of ***fair and adequate compensation***. This is regulated by the Government Lands Act (573). Expropriation is the only admissible instance wherein a titleholder may be deprived of his property against his will. The action of expropriation is followed by compensation as stipulated by articles 37 of the Constitution and Article 1 of the European Convention of Human Rights.

Consequence 2 - actio rei vindicatoria

322. (1) Save as otherwise provided by law, the owner of a thing has the right to recover it from any possessor.

(2) A possessor who, after being notified of the judicial demand for the recovery of the thing ceases of his own act, to possess such thing, is bound, at his own expense, to regain possession of the thing for the plaintiff, or, if unable to do so, to make good its value, unless the plaintiff elects to proceed against the actual possessor.

The owner has the right to recover his property from any possessor who may be controlling it against his will. The substantive right defended by the ***actio rei vindicatoria*** is set out by article 322 (1). This article is the substantive right of the *actio rei vindicatoria*, although not expressed by name as such. The *actio rei vindicatoria* is thus the name of the remedy represented by 322 (1). This remedy will be hereunder discussed.

Consequences 3 - the presumption of vertical ownership

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

Article 323 holds that whoever has the right of ownership over land is presumed to have also the right of ownership over the airspace (l-arja) and the underlying space (sottoswol). We have this ***juris tantum*** and thus challengeable by contrary proof, that unless and until it is so rebutted, the owner of land is presumed to own also the space above and the space below without limitation. This is what we refer to as the vertical presumption of ownership.

Supermarkets Limited vs Le Crem Developments Company Co. Ltd - *vertical presumption is rebuttable*
Court of Appeal 22nd, October 2002

Illi f'dan ir-rigward l-artikolu 323 fil-Kodici Civili (Kap. 16) jistabilixxi il-principju legali li kull min ghandu l-proprjeta` ta' l-art, ghandu wkoll dik ta' l-arja ta' fuqha u ta' dak kollu li jmiss fuq jew taht wicc l-art. Din id-dispozizzjoni tal-ligi tistabilixxi prezunzjoni legali favur is-socjeta` appellata li l-arja in kwestjoni li tinsab fuq il-fond taghha, tappartjeni lilha. **Din il-presunzjoni mhijiex wahda "juris et de jure" izda wahda "juris tentum"** u ghalhekk jinkombi fuq is-socjeta` appellanti l-oneru li ggib provi sodisfacenti li jxejnu l-istess presunzjoni stabbilita mil-ligi stess. Il-pretensjoni tas-socjeta` appellanti li l-arja in kwistjoni fuq il-fond tas-socjeta` appellata tappartjeni lis-socjeta` appellanti hija kuntrarja ghal-liberta' tal-fond tas-socjeta` appellata billi din, skond il-ligi, hija prezunta li hija l-proprjetarja tal-arja sovrastanti l-fond taghha. Gie ritenut li kwalunkwe prova kuntrarja ghal-liberta` tal-proprjeta` ghandha tkun konkludenti u mhux kongetturali u ekwivoka.

Mark Schembri & Associates Limited et vs Daniel Vella et - *vertical ownership and comparison with 403*
Court of Appeal, 11th November 2011

Ghalhekk naraw li l-ilment principali tas-socjeta` rikorrenti kienet l-invazjoni tal-arja fuq il-bitha taghha u mkien ma jissemma' komunikazzjoni mad-drenagg. Huwa rikonoxxut li fid-duttrina legali adottata mill-Qrati taghna d- dritt ta' proprjeta` huwa marbut mal-principju *ad coeli et infera* li effettivament jsib l-bazi tieghu fl-Artikolu 323 tal-Kap. 16. Dan l-artikolu infatti jirrikonoxxi d-dritt ta' sid l-art ghall-proprjeta` tal-area sovrastanti u ta' dak kollu li jinsab fuq jew taht wicc l-art. Ghaldaqstant, fil-kaz konkret, il-konvenuti ma kellhom ebda dritt, jekk mhux bil-permess tas-socjeta` rikorrenti li jinvadu l-arja sovrastanti l-bitha tal-istess socjeta` u dan anke bis-semplici istallazzjoni tal- katusa. Meta l-konvenuti ghamlu hekk ikkommettew spoll kontra s-socjeta` rikorrenti li kienet gustifikata titlob li l-konvenuti jigu kundannati jnehhu l-imsemmija katusa biex b'hekk hija tigi ripristinata fil-pussess tal-arja sovrastanti l-bitha retroposta ghall-fondi msemmija fil-pjan terren. Dan naturalment japplika ghal-livell mit-tielet sular 'il fuq billi gia` kien hemm katusa li twassal ghal-livell tat-tieni sular u cioe` l-maisonette gia` proprjeta` tal-konvenuti.

Din il-Qorti tixtieq tosserva wkoll li l-Sub-Artikolu 403(1) tal-Kap. 16 ma ghandu jsib ebda applikazzjoni fil-kawza odjerna billi n-nixxijiet u twaqqieh tal-ilma hemm imsemmija huma dawk li jirrizultaw "*minghajr il-fatt tal-bniedem"* filwaqt li hawn l-intervent tal-bniedem certament jezisti.

The case of **Mark Schembri & Associates Limited** compares the vertical presumption of ownership as per article 323 with article 403, which holds that;

403. (1) Tenements at a lower level are subject in regard to tenements at a higher level to receive such waters and materials as flow or fall naturally therefrom without the agency of man.

This provision is an easement established by law for a private purpose, and contrasts with the presumption of article 323 to the extent that article 403 does **not involve** any act of man.

Carmelo Zammit et vs Paula Tabone et *(Court of Appeal, 12th February 2018)*

Dan l-Artikolu 323 johloq prezunzjoni legali li l-arja ta' fuq il-fond u taht wicc l-art huma ta' min ghandu l-proprjeta` ta' taht jew ta' fuq, liema prezunzjoni hija *juris tantum* u mhux *juris et de jure* u min jikkontesta din il-prezunzjoni jrid jipprova l-kuntrarju. Gie ritenut li kwalunkwe prova kontrarja ghal-liberta` tal-proprjeta` ghandha tkun konkludenti u mhux kongetturali u ekwivoka

The presumption of vertical ownership is still debated and relevant today.

Consequences 4 - presumption of work over or under land as being done by the owner

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

Article 324 serves corollary to the notion and presumption of vertical ownership. Article 324 is laying down a rebuttable presumption of ownership over accessories. This provision is stating that the law presumes that the owner of the land is also the owner of any improvement which exists on the land or underneath the land. This presumption is once again rebuttable (***juris tantum***). This action is especially relevant in separation cases. Imagine that one of the spouses acquired land before marriage, we call it *paraphernal property*. In this situation, one of the spouses acquires land which is, subsequently of the marriage, developed by one of the spouses. The improvements of the land have thus been carried out after the marriage. The question then arises as to who is the owner of the developed house and who is the owner of the improvements, since community of acquests holds that anything in marriage is shared equally? We know that the developments become immovable. Because of article 324, the spouse owning the land is presumed to own and to have carried out as his expense only or improvements made on the land - saving however proof to the contrary.

The **benefit of a presumption** is laid out under article **1234**.

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

Consequence 5 - the establishing of boundaries of his immovable property

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

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

Both articles preserve their original drafting. These articles vest the owner with the right to mark the boundaries of his property, as well as to enforce such confining boundaries. Article 325 uses the word "compel", meaning that one may force his neighbour to establish and permanently mark the boundaries of their adjoining tenements. **The action to enforce such marking is the *actio finium* regundorum,** which falls under the same class of actions that contains the *actio rei* vindicatoria, as stipulated by s.322. When the boundaries have not yet been established, or if there is a dispute as to where the boundary should be located on site, the owner has the right to enforce the determination of the boundaries. The *actio finium regundorum*, as is the *actio rei vindicatoria,* is an remedy of defence of title. The wall that is normally built to mark by visible and permanent means, also referred to as the boundary line or wall, is referred to also as the party-wall / ħajt tal-appoġġ / ħajt disovorju.

The *actio finium regundorum* is the action to establish and determine property boundaries and confinements. This, like the *acto rei vindicatoria*, is not expressed by name in the Civil Code, but is still an accepted and important action under our Civil Code. Both of these actions emanate and are taken from Roman Law.

Horace Fenech et vs Albert Mifsud et
Court of Appeal 14th December 2022

Ifakkru li f'azzjoni vindikatorja l-oneru tal-prova mqiegħed fuq l-attur huwa wieħed tant gravi li spiss huwa deskritt bħala li jeħtieġ prova djabolika għas-suċċess tal azzjoni.

Louis Camilleri et vs Paulina Farrugia et
Court of Appeal 31st May 2023

In ogni caso, argumentaw li l-azzjoni fil-fatt hija biss l-actio finium regundorum: jgħidu li ma jeżisti l-ebda dubju dwar it-titolu tal-proprjetà tagħhom u kien hemm biss bżonn li tiġi eliminata l-inċertezza sabiex tiġi evitata usurpazzjoni ta' parti mill-art tagħhom.

Types of Ownership Title - Original and Derivative

Original Title of Ownership

The original title is a title (proof of the right) which is not derived from another person and which has been acquired by a person in his own right through acquisitive prescription. Acquisitive prescription is the way of acquiring a right through the factual exercise of that right for the stipulated time period. The factual exercise of the right is what we call 'possession'. Possession must satisfy all the elements which are stipulated in **s 2107 of the Civil Code, which posits 5 requirements which must be met for possession to be proven:**

> **2107.** (1) Prescription is a mode of acquiring a right by a **continuous, uninterrupted, peaceable, open, and unequivocal** possession for a time specified by law.

Under our law we have **2 types of acquisitive prescription** - 10 year acquisitive prescription (**s 2104**) and the 30 year acquisitive prescription, which in the case of ecclesiastical property becomes 40 years, (**s 2143**). The main difference between the 10 year acquisitive prescription and the 30/40 year acquisitive prescription is that the former, besides possession and time, requires also **good faith and good title.** There must have thus been a deed or a particular succession (legat) which transferred the right to the possessor.

When it comes to movables, the law holds that possession has no acquisitive period, so once one has possession, then he is presumed to be owner. An actio rei vindicatoria may be instituted if it may be proven that the owner of the thing is not in possession of the thing.

An original title is not proven by merely producing an notarial deed showing that plaintiff has, for instance, purchased the reclaimed property. For original title, the plaintiff must prove that he had possession of the reclaimed property in good faith for a continuity of 10 years or morel, and his possession may be added to the possession of his predecessor title.

In our legal system, the original title is considered as the strongest title that a person can have over property. There is no legal defect associated with original title. Every time there is a transfer of the right of ownership, a defect is possible. For instance, a missing part in the description of the property of the notarial deed by which it is transferred. Or else there is a burden associated with the property which is not correctly declared in the notarial deed of transfer.

Derivative Title of Ownership

This title of ownership arises when the title of ownership is derived from another person. How can ownership be derived from another person - either ***inter vivos*** (between living individuals) or ***causa mortis*** (by cause of death & through succession).

Inter vivos may take the form of sale, donation, exchange, etc - wherever there is a wilful transfer of the right from a living person to another living person. The transfer can only be affected through a notarial deed or by court judgement. There is also the requirement of publicity for that transfer to be effective vis-a-vis third parties. That publicity requirement takes the form of the registration of the deed of transfer in the public registry and where the immovable property falls within a compulsory land registration area, that deed of transfer must also be registered in the land registry.

Causa mortis usually takes the form of succession, be it by will and testament or by intestacy. The problem with a derivative title, the problem which renders it less strong and less complete than the original title, is that when one produces a deed of sale, whereby A sold to B an immovable property, there is only the proof that there was a transfer of the right from A to B. In itself, that deed of transfer does not prove anything about the manner in which A acquired and retained his right until the transfer. In proving a derivative title, you can never bring evidence that there was absolutely no defect arising through the succession inter vivos or causa mortis of the various titles.

Restrictions to the right of ownership

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

So far we have tackled the first half of the law of ownership - that of the right to enjoy and dispose of things. We must now tackle the second half, that of the exception - *provided no use thereof is made which is prohibited by law*. There are public law rules which restrict the rights and freedoms of the owner in the general public interest (expropriation), and there are also private law rules which restrict the powers and freedoms of the owner *vis-a-vis* specific third parties. These restrictions to the right of property are understood to balance the rights of the individual with the interest of the general public.

Public Law limitations to ownership:

1) **Development Planning Law & the various subsidiary legislation enacted under Chapter 552 -** This chapter and all relevant subsidiary legislation are all examples of public law rules that are limitations to the absolute right of use and enjoyment vested in the owner. The owner of a piece of land does not have unlimited power and freedom to build whatever he likes on his land. He cannot build a 50 story building on his land without permission. These laws pose a perfect example to such limitations to the right of ownership. There are also administrative rules (the process of applying for a permit, the process of changing the use of land, etc), which are also limitations to to ownership

2) **The rules regulating trading, trading licenses, and the rules governing tenants for commercial purposes** - we have the trading licenses act (Ch 441) and subsidiary legislation enacted under this act. If an owner has obtained a development permission from the competent authority to build a commercial outlet, that owner is still unable to exercise the right of ownership carrying out such commercial activity if they did not obtain the necessary trading licenses allowing the exercising of such commercial activity.

3) **The law dealing with cultural heritage -** Those laws that regulate items of cultural heritage also designate particular zones in Malta to compulsory checks for any such findings before carrying out any such development. This is another notable restriction to the powers and effects of the owner to exercise his right of ownership.

Private Law limitations to ownership:

1) **The law of easements -** as we will see later on, the law of easements is an example of private law rules ,which can be compulsory or created by agreement, which *de facto* limit the rights of the owner to use his tenement.

2) **Other legal rules -** There are laws within the Civil Code, for instance, which restrict the behaviour of the owner within his property. The condominium act is an example of such restriction.

3) **Abuse of rights theory -** This is a French theory, the gist of which is that rights can be only legitimately exercised if, by the exercise of that right, there is no violation or infringement of a right of another subject. For instance, if there is a shop and a house adjacent to the shop, the shop cannot have a chimney that exhausts fumes into the house, as that infringes upon the rights of the house owner.

   Article 1030 is a provision in the law of obligations that serves as a legal basis that justifies adherence to the abuse of rights theory:

1030. Any person who makes use, within the proper limits, of a right competent to him, shall not be liable for any damage which may result therefrom.

The consequence is that any person who makes use of his right beyond the proper limits is liable to make good for the damages.

The earliest judgement which depicts the application of this theory by our courts is the judgement of ***Bugeja vs Washington,*** *5th May 1987*, wherein the court held that *the right of the owner to freely make use of his tenement and to carry out in it the changes which he deems convenient ends where that causes great inconvenience to the neighbour.*

Alexander Grech et vs Mamma Mia Company Limited et *- abuse of rights as a restriction to ownership*

Illi ghalhekk kif tghid il-ligi, l-uzu tal-jedd ghandu jkun fil-qies li jmiss, anke meta dan il-jedd ikun wiehed ta' proprjeta'. In-natura assoluta tal-proprjeta' ma jfissrix li s-sid jista jaghmel dak kollu li jrid. Dan il-qies ghalhekk ssir mbaghad abbuz meta s-sid anke b'mezzi li ma jidhrux jissupera dak il-limitu tad-dritt ta' proprjeta tieghu biex b'hekk jilledi d-drittijiet ta' terzi. Irwejjah, hsejjes u shanat, ukoll jistghu meta ma jkunux *"fil-qies li jmiss"* jitqiesu bhala invazjonijiet illeciti tal-proprjeta ta' terzi.

Dr Kevin Mombapao pro et noe vs Anthony Camilleri et *- abuse of rights as a limitation to ownership 30th November 2022*

F'dan il-każ ukoll, jirriżulta li din il-vettura "garaxxjata" ilha mitfugħa f'dan l-isqaq għal aktar minn għaxar snin, peress li ma tistax titressaq għall-VRT u għalhekk wisq inqas tista' tinħareġ fuq it-triq. Saħansitra, hija l-fehma ta' din il-Qorti li, din il-vettura tista' tkun ta' xkiel f'każ ta' emerġenza, peress li lanqas tista' tinstaq minn postha. Ċertament dan mhux użu normali li jsir minn vettura. Dan ma jfissirx li l-konvenuti ma jistgħux jagħmlu użu mill-istess sqaq, bħal pereżempju meta fil-passat kienet tkun qiegħda tiġi pparkjata l-vettura, minn Marica Farrugia, bint il-konvenut. Fil-fatt wieħed mill-istess appellanti, Luigi Angelini ddikjara li huwa ma kienx kontra li tiġi pparkjata vettura. Kwindi l-atturi mhumiex qegħdin jikkontestaw id-dritt tal-konvenuti li jagħmlu użu mill-isqaq. Il-problema qiegħda fil-mod ta' kif fil-fatt il-konvenuti jeżerċitaw id-drittijiet tagħhom, li din il-vettura ġiet abbandunata f'dan il-post, b'nuqqas ta' rispett totali għal min jgħix fil-proprjetajiet kontigwi, u b'inkonvenjent kbir għall-atturi appellanti, li jitqies li jeċċedi l-limitu ta' dak li hu tollerabbli għall-ġirien.

Remedies to enforce the right of Ownership

Up till now, we have spoken only on rights and title. In these situations, therefore, wherein the person enjoying the property is also vested with the right to enjoy the property in virtue of ownership. Our law of property admits and gives huge importance to another situation of enjoyment of property, which is the situation where a person has actual enjoyment without having the title. **This is the situation of possession.** Besides possession, our Civil Law tradition admits also of **detention**, referring to that situation of property where the person actually enjoying the property is doing that not in his own name or in his own interest but on behalf of someone else. For example, the tenant (kerrej) has detention (not possession) because his enjoyment of the property derives from a personal right which he has from the lessor. There is thus title, possession, and detention. Especially in regards to the difference between possession and detention, an important point to make pertains to the *causa detentionis*. This notion refers to the reason for which a thing is in one's possession. One cannot acquire by prescription something which is in his possession out of faculty or out of mere sufferance, as per article **526**. The *causa detentionis* is the reason for which one is possessing, which ultimately ascertains whether possession is useful (i.e, possession out of which one may acquire rights or extinguish obligations) or not. The remedies in defence of title, therefore the judicial actions that can be pursued in defence of title, are a category of their own with strict requirements for their successful exercise, and normally the requirement of proof, especially when it comes to title, is strict. These actions, in the English tradition, are referred to as real actions. In the Continental tradition, we refer to them as *azzjonijiet petitorji.* Possession and detention have a distinct class of remedies in their defence. These are referred to as possessory actions (*azzjonijiet possessorji*). By rule of thumb, these actions are easier to prove, and in theory, simpler and quicker to conclude when compared to real actions.

For actions defending title (i.e - azzjonijiet petitorji), one finds the following remedies:

1. **Actio rei Vindicatoria** - as governed by article 322.
2. **Actio Publiciana** - a variant of the actio rei vindicatoria, derived from Roman Law
3. **Actio Finium Regundorum** - the action to separate tenements and to created boundaries between immovable property.
4. **Actio de Communi Dividundo** - the action to terminate a state of community of property by **partition or sale**.
5. **Actio familiae eriscundi** - this is a Roman Law action endemic to the field of succession, pertaining to the liquidation and partition of inheritance.
6. **Actio confessoria servitutis** - this action relates to easements, and is use to affirm and execute the enforcement of an easement.
7. **Actio negatoria** - this action, again referring to the realm of easements, is the action used to deny and negate the existence of an easement.

Michael Fenech vs Maria Dolores Mifsud et
13th July 2023

Tassew l-appellant kellu għadd ta' rimedji ta' għamla petitorja għad-dispożizzjoni tiegħu, jekk kemm-il darba huwa kien qiegħed iħoss li l-konvenuti kienu qegħdin ixellfulu d-dritt tal-proprjetà tiegħu:

i. f'każ li huwa ġie mċaħħad mill-pussess ta' ħwejġu mill-konvenuti, huwa seta' jniedi l-*actio rei vindicatoria* biex jieħu lura l-pussess ta' ġidu (ara First Gozo Limited v. Joseph Cordina et deċiża mill-Qorti tal- Appell fis-26 ta' Jannar, 2018 u ***Ines Vella et v. John Seychell Navarro et*** mogħtija mill-Qorti tal-Appell fit-30 ta' Marzu, 2022);

ii. f'każ li bl-imġiba tagħhom il-konvenuti ħolqu xi dubju dwar it-titolu tal-appellant fuq ġid li huwa jemmen li huwa tiegħu (u dan minkejja li huwa jinsab fil-pussess fiżiku ta' dan il-ġid), huwa seta' jiftaħ kawża ta' aċċertament ta' titolu billi jitlob dikjarazzjoni mill-Qorti li l-proprjetà li dwarha hemm kontestazzjoni, hija tiegħu (ara ***Mary Borg v. Il-Kummissarju tal-Artijiet*** deċiża mill-Qorti tal-Appell fis-17 ta' Marzu,2021);

iii. filwaqt li f'każ li l-atti pubbliċi magħmula mill-konvenuti ħolqu xi dubju dwar minn fejn jibda l-ġid tal-appellant u fejn jintemm il-ġid tal- konvenut Horace Fenech, u l appellant ried iwarrab il-biżà ta' kwistjonijiet mal-istess konvenut ġar tiegħu jew ineħħi l-possibbiltà li tittieħedlu biċċa minn ħwejġu, huwa kellu jagħmel l-*actio finium* regundorum (ara Ingatius Debono et v. Pauline Debono et mogħtija mill-Qorti tal-Appell fit-28 ta' April, 2006 u ***Arthur Xuereb v. Silvio Borg et*** mogħtija mill-Qorti tal-Appell fil-25 ta' Ġunju, 2019).

Carmel Sciluna et vs Angelo Scicluna et - *possessory vs ownership actions*

L-azzjoni petitoria tingharaf mill-azzjoni possessoria mill-att tac-citazzjoni u mill-ewwel difiza li jopponi l-konvenut. Jekk id-domanda tkun pogguta fuq il-pussess bhala fatt l-azjoni hija possessorja, jekk ikollha bhala fondament taghha l-offiza tad-dritt l-azzjoni tkun petitoria

Illi l-konvenuti pero', qed jeċċepixxu preliminarjament illi fil-fatt il-partijiet jokkupaw l-egħlieqi tagħhom b'titolu ta' lokazzjoni, u allura l-attur ma jistax jeżerċita l-azzjoni msemmija li ndubbjament hija waħda petitorja.

Therefore the nature of the action filed depends on the arguments brought by the claimants. The claimant will declare what elements he intends to prove in his case, to which the defendant will file his reply. Therefore, one must apply and enforce the action which, with the evidence disposable at hand, he has the best chance of prevailing with.

Remedy 1 - Actio Rei Vindicatoria

This is the action in defence of the right of ownership. This is thus the remedy which enforces the substantive right of the owner to recover his property from an y possessor who may be controlling it against his will, the action of which is considered under **article 322** of the Civil Code.

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

We have a variant of the *actio rei vindicatoria*, which is the *actio publiciana*, both of which derive from Roman Law. They are both actions in defence of the right of ownership, but they are not one in the same action.

We said that this is the action granted to the person having the title of ownership who has been dispossessed of his property. Let's say that A is unable to exercise his right of ownership over a tenement because B has taken control of it without A's consent. A cannot just enter and regain control because a basic notion in our law is that no person can enforce his rights through his own power - this would be tantamount to *ragion fattasi*. This is to the extent that who does this, min jieħu l-liġi b'idejh, would be criminally liable. The rightful owner would obtain an order of the court to have his property vacated from defendant so that he could regain possession over his tenement. The plaintiff in an actio rei vindicatoria is the person claiming to be the rightful owner who has been factually dispossessed of his property. The defendant (konvenut) in an actio rei vindicatoria must be the person exercising control over the property at the time of filing of the actio rei vindicatoria. A basic rule in our law of procedure is the rule that whoever alleges must prove. The burden of proving a fact rests on he who alleges - **Onus propandi incumbit ei qui dicit non ei qui negat - Article 562 COCP.**

> **562.** Saving any other provision of the law, the burden of proving a fact shall, in all cases, rest on the party alleging it.

The plaintiff, in an actio rei vindicatoria, is required to prove his title of ownership and that the defendant is exercising control over the property without right. The defendant, by virtue of article 525 (1), is possessed with a comfortable presumption in the case of actions, being the actio rei vindicatoria, instituted against him. This is because in case of the plaintiff's failure to prove his ownership, the defendant is presumed to be owner of the property in question.

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

The possessor, the person exercising control over property, the defendant in the actio rei vindicatoria, enjoys the benefit of this rebuttable presumption by virtue of his possession. The actual fact of his exercising of possession gives him the benefit to be presumed *juris tantum* to be the owner. This means that if the plaintiff in the actio rei vindicatoria does not prove his title of ownership sufficiently well, the presumption of ownership in favour of the possessor will prevail. This makes the actio rei vindicatoria a very risky action.

The Actio Rei Vindicatoria is considered the principle remedy for the owner who has been dispossessed of his property to recover the thing which he owns. The Plaintiff must thus prove ownership and prove that the defendant is in control of plaintiff's property without plaintiff's consent and against plaintiff's will. If the owner completely fails to prove his title, then the defendant will retain control of the property, because the action would not succeed.

John Desira vs Maroushka Ciantar *- actio rei vindicatoria*
27th February 2024

Illi gie ritenut fil-gurisprudenza nostrana li r-rekwiziti ghall-azzjoni rivendikatorja huma tnejn, li l-attur rivendikant jipprova li ghandu d-dominju fuq il-haga li huwa jrid jirrivendika, u li kien akkwista dan id-dominju legittimament, u li l-konvenut ikun qed jippossjedi l-haga.

Mario Galea Testaferrata et vs Giuseppe Said et *- actio rei vindicatoria*

Illi qabel ma wiehed jezamina l-lanjanzi ta' l-appellanti ikun opportun li jigu ribaditi certu principji regolanti l-azzjoni odjerna, jigifieri *l-actio rei vindicatoria*, u dan peress illi l-ewwel Qorti ma kienitx ghal kollox preciza fil-principji guridici li hija enuncjat u applikat ghall-vertenza odjerna. Ghalhekk din il-Qorti tibda billi tippremetti li gej:

(1) Li l-attur f'kawza rivendikatorja jrid jipprova d-dritt tieghu ta'proprjeta` fuq il-haga rivendikata, u li tali prova trid tkun **kompleta** u **konklussiva**, b'mod li kwalunkwe dubju, anke l-icken imur favur il-possessur konvenut. Huwa veru wkoll li anke jekk il-Qorti ma tkunx ghal kollox sodisfatta mid-dritt tal-konvenut, ghandha tilliberah jekk ir-rivendikant ma jaghtix prova tad-dominju tieghu li tkun ezenti mill-anqas dubju.

(2) Gie ritenut fil-gurisprudenza illi l-imharrek **ma ghandu ghalfejn jipprova xejn**, sakemm huwa stess ma jgibx 'il quddiem l- eccezzjoni li t-titolu rivendikat jinsab **vestit fih**.

(3) Illi dan gie ampjament spjegat fis-sentenza **Jane Cassar et v. Dr Michael Grech** fejn il-Qorti irriteniet **"Min-naha l-ohra, jekk jirrizulta li l-konvenuti akkampaw ruhhom fuq l-eccezzjoni li l-proprjeta` posseduta minnhom kienet giet validament akkwistata minnhom huma jinhtiegilhom f'dak il-kaz jippruvaw l-allegazzjoni taghhom.**

(4) Fid-decizjoni in re: **Mary Rose mart Joseph Aquilina et v. Antonio Piscopo** intqal li meta l-konvenut jirreklama hu wkoll titolu ta' proprjeta` fuq l-art "gie permess, u dan anke fid-dritt Ruman, li l-ezami ma jkunx bazat fuq prova certa tat-titolu ta' l-attur, izda fuq wiehed komparattiv tat-titoli rispettivi tal-kontendenti. F'dan il-kaz, il-gudizzju ma jkunx wiehed ta' effett *erga omnes* bazat fuq prova certa tat-titolu ta' l-attur, izda *inter partes*, bazat fuq studju komparattiv tal-pretensjonijiet tal-partijiet." Fl-istess decizjoni ntqal li l-principju li min ghandu titolu ahjar jirbah il kawza, minghajr htiega li dak li jkun jipprova titolu assolut, illum jinsab assodat fid-duttrina. It-teorija tal- "prova migliore" ghandha l-bazi taghha fid-Dritt Ruman u kienet tissejjah **l-Actio Publiciana**. Dan hu rimedju li gie moghti gharfien mill-Qrati taghna, ukoll fil-qafas ta' azzjoni ta' rivendika ta' gid minn idejn haddiehor. Kwindi l-attur mhux tenut jipprova titolu originali, izda bizzejjed jipprova titolu ahjar minn dak tal-konvenut.

Stephen Sant Fournier et vs Victor Sciriha et *- actio rei vindicatoria*

Jingħad ukoll li f'kawża rivendikatorja, huwa meħtieg li l-attur iġib prova ta' titlu oriġinali u mhux derivattiv. Din il-prova tat-titlu oriġinali ssir meta l-attur jirnexxilu juri li huwa (u l-awturi fit-titlu tiegħu jekk ikun il-każ) ikun żamm il-proprjetà taħt il-ħakma tiegħu *ad usucapionem*

Alfred Copperstone vs Francesco Grech et *- defendant must have possession of the thing*
First Hall, Civil Court, 14th December, 1951

Estremi ta' l-azzjoni rivendikatorja huma: 1) Li l-attur rivendikant jipprova li għandu d-dominju fuq il-ħaġa li huwa jrid jirrivendika, u li huwa akkwista dak id-dominju leġittimament; u 2) ***li l-konvenut ikun jippossjedi dik il-ħaġa.***

Dwar l-ewwel rekwiżit, il-prova trid tkun konvinċenti; u din il-prova ma tiġix raġġunta jekk ir-rivendikant ma jurix titolu ċar u preċiż tad-dominju tiegħu.

Jekk ir-rivendikant ma jagħmilx din il-prova, il-konvenut ma għandux bżonn jipprova xejn; għax sakemm ir-rivendikant ma jagħmilx dik il-prova, il-pussessur tal-ħaġa ma għandux bżonn jiċċaqlaq; u kkwindi lanqas huwa tenut isostni l-eċċezzjonijiet li jkun ta kontra d-domanda tar-rivendikant,

This judgement establishes one of the defences which may be brought by the defendant in an ownership case. In an *actio rei vindicatoria*, the defendant **must have possession over the thing for which ownership is contested**. Thus, if the defendant is or was not in possession of the thing for which ownership is being contested, then he is not the **legitimate contradictor** (*kontradittur legittimu*) of the case, which is a plea which may shatter all proceedings immediately if proven.

Furthermore, the plea of legitimate defendant may be raised **at any point during proceedings**, including in an **appeal**, despite the plea not having been raised in the lower court decision.

Grazzju Debono et vs L-Awtorita' tat-Trasport Pubbliku *- legitimate defendant may be raised at any point*
19th April 2004

L-eċċezzjoni li parti mhix il-leġittimu kontradittur hi eċċezzjoni perentorja tal-ġudizzju u għalhekk skont il-liġi tista' tiġi sollevata anke fi stadju ta' appell

Perit Godwin A Borg et vs Salvatore sive Silvano Vella et *- legitimate defendant in actio rei vindicatoria*
12th July 2023

Għalhekk anke jekk preżentement m'għandhiex il-pussess fiżiku tal-art in kwistjoni din il-Qorti jidhrilha li l-atturi kellhom raġun meta ħarrkuha f'dawn il-proċeduri sabiex twieġeb għat-talbiet tagħhom. In kwantu għandha pretensjonijiet fuq din l-art, qajla tista' toġġezzjona li mhix il-leġittima kontradittriċi. Wara kollox fit-tifsira tal-kelma '*pussess*' fl-Artikolu 524 tal-Kodiċi Ċivili ma hemmx inkluż biss id-detenzjoni tal-ħaġa korporali imma hemm inkluż ukoll it- tgawdija ta' jedd. Padrun dirett li għandu jedd jiġbor kanoni ta' ċens minn fuq art u li jista' anke jikseb lura l-istess art jekk ma jiġux mħarsa l-kundizzjoni tal-enfitewsi għandu pussess legali fuq dik l-art u allura jista' jintlaqat bl-*actio rei vindicatoria* minn min jippretendi li huwa s-sid ta' dik l-art.

Remedy 2 - Actio Publiciana

In Roman Law, for the actio rei vindicatoria to succeed, he would need to prove original ownership. A proof of derivative ownership would not suffice. He would thus need to prove the acquisitive prescription in all its requirements. If this would not be proven, then he would have failed in the actio rei vindicatoria. The Romans, because of this problem, described this burden of proving an original title as the *probatio diabolica*.

Carmel Portelli et vs Norman Grech et *- derivative title is not sufficient to prove ownership*

Fil-każ in kwistjoni l-atturi Portelli ma ppruvawx titolu oriġinali fuq l-art in disputa li ilha okkupata mill-konvenuti sa mill-1991. Ippreżentaw biss kopja tal-kuntratt tal-akkwist tagħhom tal-1991 u tal-att korrettorju tal-2009 fejn jingħad li l-art in disputa kellha tkun inkluża fil-kuntratt tal-1991. Dan *se mai* huwa prova li għandhom titolu derivattiv fuq l-art iżda ċertament mhux prova li għandhom titolu oriġinali.

Because of the *probatio diabolica*, Roman Law had admitted a variant, the actio publiciana, as an alternative to the actio rei vindicatoria. The outcome of the actio publiciana was not as strong and powerful as a successful outcome of the actio rei vindicatoria, because under Roman Law, a successful actio rei vindicatoria was effective *erga omnes*. The actio publiciana could succeed if plaintiff proved to have a better title than defendant. Unlike the actio rei vindicatoria, the actio publiciana under Roman Law was only effective ***inter partes*****.**

The actio rei vindicatoria and the actio publiciana are still admitted by our courts to this very day. For some quite time, until 2018, our Courts considered them almost as one in the same action. Until then, if plaintiff did not manage to prove original title, then the court would proceed to determine whether the plaintiff managed to prove a better title than that of the possessor. Post 2018, our courts have moved back to the classic and rigid understanding of these 2 actions.

There is no requirement to prove original title of ownership for the actio publiciana. Even in Roman Law, for the actio publiciana, the action would succeed if the plaintiff proves derivative title of ownership. The actio publiciana would succeed even if the plaintiff proves that he had a *better* title of ownership than the defendant.

Under Maltese Law, judgements are law only between the parties to the case. The rights affected are only those of the parties to the judgement. Be it *actio rei vindicatoria* or be it *actio publiciana*, a successful outcome would affect only the parties involved, in the case of Maltese law.

Better title

We know that for the *actio publiciana*, the action succeeds if the plaintiff proves better title than the defendant. But what does *better title* mean? The French authors **Baudry-Lacantinerie** and **Wahl** give three scenarios which can arise in an *actio publiciana,* wherein the court must determine who of the parties have shown a better title. Before delving into these 3 scenarios, we must keep in mind s 525.

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

1) When the Plaintiff proves a derivative title and the defendant does not bring evidence of his title. In this case, if the plaintiff proves that he has acquired his right of ownership on a date which is earlier than on a date in which the defendant started to possess, then that title would be a better title. If the defendant's possession goes back to a date which is earlier than the date on which the plaintiff proves to have acquired his derivative title, then the plaintiff would not have managed to prove better title.

2) When both plaintiff and defendant prove a derivative title. A previous owner may have transferred the same property to different owners, there may be an error or a fraud involved, there may be a situation wherein the selling of a property happened twice, etc. In this scenario, the determining date is not the date of the deed of transfer but rather the date on which that transfer was registered in the Public Registry and (where applicable) in the Land Registry. This is reiterated in s. 996 of the Civil Code and 12(1) of the Land Registration Act. It may very much be the case that the transfer which is registered earlier happened after the other transfer. What counts is therefore the date of registration.

3) When neither the Plaintiff nor the Defendant prove a derivative title. The Burden of proof lies in he who alleged - s 562, and therefore it would be the defendant who wins the action. Additionally, by the presumption in 525, the defendant wins the title of ownership, even though he does not bring proof or evidence.

A shift in judicial interpretation:

It may be argued that there was a shift of 3 phases, wherein judgements in Malta showed different interpretations as to the distinction between the requirements of proof for both actions.

John Vella et vs Sherlock Camilleri - *the actio publiciano to establish ownership when the vindicatoria is hard to prove*

Il-Qrati taghna, konsapevoli bid-diffikulta` li ssir tali prova, u fl-interess tal-gustizzja, accettaw il-possibilta` li attur jirnexxi fil-kawza li jaghmel in forza tal-actio publiciana. Skond dan il-principju, mhux mehtieg li l-attur jipprova titolu originali fuq il-proprjeta` izda hu bizzejjed li jipprova dritt fuq l-art anterjuri (ghal) dak tal-konvenut. Ir-rizultat, ovvjament ma jkunx bhal vindicatorja li kwazi kwazi tiddeciedi t-titolu tal-attur erga omnes, imma r-rizultat ikun fil-konfront tal-konvenut, it-titolu tal-attur huwa ahjar minn dak tal-konvenut, u dan ta' l-ahhar m'ghandux jithalla fit-tgawdija tal-art a skapitu ta' min ghandu dritt aktar minnu. **This judgement fundamentally placed the two actions on the same binary, rendering them effectively interchangeable**.

Earlier judgements suggested that a stricter interpretation was applied. The *actio publiciana* was considered to be a variant of the *actio rei vindicatoria*, available only where the source of the title of the plaintiff and the defendant was the same. After a while, there were judgements that suggested that these two actions were interchangeable. Thus, ***Tabib John Cassar et vs Oliver Ruggier,*** for instance, referred to the ***John Vella*** judgement in establishing the interchangeability of the two actions. In our procedural system, when an action is filed, there is no indication as to the type of action, and so because the demands filed in both actions are the same, the courts made no distinction as to whether the action was one or the other. The Court would first see whether plaintiff proved an original title, or whether the defendant proved an original title, and in the case where no parties prove original title, the court would automatically pass on to consider whether plaintiff proved a **better** title. If it finds that the plaintiff proved a better title, then the declaration of ownership would be granted in favour of the plaintiff.

The case of **John Vella vs Sherlock Camilleri** bore the reasoning that is explained in the following way:

*7. Illi, wara li semghet it-trattazzjoni ta' dan l-appell u rat l- att processwali, din il-Qorti tibda billi tosserva li ghalkemm huwa minnu li fl-azzjoni reivendikatorja l-prova dwar it-titlu ta' proprjeta` ghandha tkun wahda netta u inekwivoka u fin-nuqqas id-dubju jirrizolvi ruhu favur il-parti konvenuta, l-appellant ftit li xejn pero` elabora dwar xi tkun il- posizzjoni ta' l-atturi appellati mill-ottika ta' l-azzjoni hekk imsejha "publiciana" (u mhux kif, x'aktarx bi zvista, tissemma' zbaljatament fis-sentenza appellata bhala "actio publicana"). Lanqas hu korrett l-appellant meta asserixxa fir-rikors t'appell li "ma gewx infatti citati sentenzi li jsostnu din it-tezi", dik igifieri li tista' tissussisti, minflok l-azzjoni reivendikatorja, l-"azzjoni publiciana". Ghall-kuntrarju, ghandu invece jirrizulta li l-ewwel Qorti addottat ir-rizultanzi peritali kemm kif espressi fl-ewwel relazzjoni u kif aktar elaborati u kkonfermati mill-periti addizzjonali, ghal-liema hemm riferenzi ripetuti fl-istess sentenza. F'dan is-sens, din il-Qorti sejra ticcita l-parti li jidhrilha li hija l-aktar wahda saljenti u pertinenti mir- relazzjoni addizzjonali u cjoe` u li fuqhom giet deciza l-vertenza: "**Ammess dan il-principju, il-Qrati taghna, konsapevoli bid-diffikulta` li ssir tali prova, u fl-interess tal-gustizzja, accettaw il-possibilta` li attur jirnexxi fil-kawza li jaghmel in forza tal-actio publiciana.***

John Vella vs Sherlock Camilleri - *continued*

Dan il-principju kien jezisti fid-Dritt Ruman, u mhux talli mhux inkompatibbli mal-Kodici Civili odjern, izda gie accettat mill-Qrati taghna bhala principju validu li ghadu jezisti fil-ligi Maltija, kif fuq intwera. Skond dan il-principju, mhux mehtieg li l-attur jipprova titolu originali fuq il- proprjeta` izda hu bizzejjed li jipprova dritt fuq l-art anterjuri (ghal) dak tal-konvenut. Ir-rizultat, ovvjament ma jkunx bhal vindicatorja li kwazi kwazi tiddeciedi t-titolu tal- attur erga omnes, imma r-rizultat ikun fil-konfront tal- konvenut, it-titolu tal-attur huwa ahjar minn dak tal- konvenut, u dan ta' l-ahhar m'ghandux jithalla fit-tgawdija tal-art a skapitu ta' min ghandu dritt aktar minnu".

In **Vella vs Camilleri**, therefore, it was established that the *actio publiciana* is rendered applicable when it is impossible to prove original ownership, thus once the actio rei vindicatoria, there must be two titles of derivative ownership that at any time was derived from the same source. The previous position, which rendered the *actio publiciana* to be applicable in the case wherein ownership was incredibly difficult, if not impossible, to prove (owing to the *probatio diabolica*), was made clear in the case ***Direttur tal-Artijiet vs Polidano Brothers Limited***, wherein it was stated that;

Direttur tal-Artijiet vs Polidano Brothers Limited *- previous position, making the publiciana an alternative to the vindicatoria*

Issa huwa veru li l-attur irid jipprova t-titolu tieghu, titolu li suppost ghandu jwassal ghall-wiehed originali, izda fid-dawl tad-diffikultà, jekk mhux impossibilità (tant li tissejjah diabolica probatio) ta' din il-prova, il-gurisprudenza u l-awturi immitigaw din il-prova li tispetta lill-attur, u l-prova rikjesta ma baqghetx mehtiega li tkun daqshekk rigida, izda ghandha tkun imqabbla ma' dik tal-konvenut possessur.

The most common judgements cited in regard to the older position are those of ***Attard vs Fenech,*** *and* ***John Vella vs Sherlock Camilleri****.*

This was all up to 2018. The **Richard England** judgement held that the *actio rei vindicatoria* and the *actio publiciana* were **not interchangeable**. This case thus went back to the previous judicial standpoint, and that which is in line with Roman Law, which asserts that the *actio rei vindicatoria* succeeds where one proves original ownership, whereas the *actio publiciana* applies only where the contestation of titles is referable, at any point, to one and the same source. This judicial statement is still being confirmed, to this day.

Richard England et vs Joseph Muscat et

Sabiex jitneħħa kull ekwivoku u ma tinħoloqx l-impressjoni illi l-azzjoni *publiciana* hija xi forma "ekonomika" tal-azzjoni *rei vindicatoria* – speci ta' *actio rei vindicatoria "lite"* li l-attur jista' liberament jagħżel bejn waħda u l-oħra – **il-qorti tosserva illi dik li llum tissejjaħ *actio publiciana* ma hijiex l-azzjoni *publiciana* tad-dritt Ruman.** L-*actio publiciana* kienet *actio utilis ficticia in rem* li l-pretur kien jagħti lil min *cum iusta causa* iżda b'mod ta' akkwist li ma jiswiex għat-trasferiment ta' res mancipi – e.g. traditio flok mancipatio jew in jure cessio – ikun kiseb *res mancipi* u jkun kisibha *a domino*, u jitlef il-pussess tal-ħaġa qabel ma jkun laħaq għadda ż-żmien biex ikun ikkonsolida t-titolu u kiseb il-proprjetà b'*usucapio*. B'finzjoni li għadda żmien biżżejjed biex seħħet *usucapio* l-pretur kien jippermetti lill-attur li jikseb lura l-pussess ukoll mingħand is-sid kwiritarju. Fid-dritt modern ma għadx hemm id-distinzjoni bejn *res mancipi* u *res nec mancipi* u għalhekk strettament ma hemmx lok għall-azzjoni *publiciana*, lanqas favur min ikun kiseb immobbli mingħajr att pubbliku. Dak l-isem iżda ngħata lill-azzjoni fejn l-attur juri titolu u kemm l-attur u kemm il-konvenut jippretendu titolu fuq il-ħaġa mingħand l-istess awtur, u f'dik is-sitwazzjoni jirbaħ min ikollu l-aħjar titolu fis-sens ta' prijorità. F'ċirkostanzi oħra – *i.e.* meta l-attur u l-konvenut ma jkunux jip-pretendu titolu mingħand l-istess awtur – ma jkunx biżżejjed għall-attur li juri "pussess anterjuri" jekk dak il-pussess ma jkunx ikkonsolida bl-użukapjoni, appuntu għax il-*publiciana* ma hijiex *rei vindicatoria* "lite".

Both these judgements make a clear distinction between the two actions. They thus stressed that in the *actio rei vindicatoria,* the defendant need not prove anything, because he has the presumption of the title of ownership (525), which will only be rebutted if the plaintiff proves original title of ownership. One must note that detention is not protected by the law of possession, but rather possession. The same applies to the actio rei vindicatoria.

Ganado vs Galea
4th March 2024

Kuntrarjament għal dak sottomess mill-konvenuti, din mhix azzjoni rivendikatorja. Fl-azzjoni rivendikatorja, l-attur jitlob lill-Qorti li ttih lura l-pussess tal-ħaġa li jgħid li hi tiegħu, u li tkun fil-pussess ta' ħaddieħor. Fil-każ preżenti, dan mhuwiex il-każ, għaliex il-pussess qiegħed f'idejn l- attur stess. Azzjoni bħal din tissejjaħ **azzjoni t'aċċertament**. Tant li t-talbiet huma kollha biex isiru dikjarazzjonijiet mill-Qorti, u xejn iżjed. L-attur fl-azzjoni t'aċċertament huwa meħlus milli jipprova t-trasferimenti tal-proprjeta` sa għeluq iż-żmien meħtieġ għall-użukapjoni, meħtieġa fl-azzjoni rivendikatorja u msejjħa l-prova dijabolika minħabba d-diffikulta` biex tiġi ppruvata. Dan għaliex l-iskop tal-azzjoni t'aċċertament mhuwiex li jitbiddel stat ta' fatt, imma biss li jitneħħa l-istat t'inċertezza dwar il-leġittimita` tas-setgħa de facto fuq il-ħaġa li tkun qiegħda diġa` fil-pussess tiegħu

Illi l-qorti rat li fin-nota ta' sottomissjonijiet tagħhom, l-atturi għamlu riferenza għal xi ġurisprudenza li, kif diġà ġie rilevat f'din is-sentenza, kienet tqis li l-attur f'azzjoni ta'21 rivendikazzjoni ma kienx tenut li jġib prova ta' titolu oriġinali imma ta' titolu aħjar minn tal-konvenut, fejn il-konvenut stess jeċċepixxi titolu. Din il-qorti diġà rrilevat li teżisti din il-ġurisprudenza, li però fi żmien riċenti ma baqgħetx tiġi segwita. Kemm hu hekk, ġjà saret riferenza f'din is-sentenza għal diversi deċiżjonijiet mogħtija mill-Qorti tal-Appell li jassodaw li l-attur fl azzjoni ta' rivendika huwa dejjem fid-dmir li jġib prova ta' titolu oriġinali. Id-deċiżjonijiet ċitati mill-atturi huma, fil-maġġor parti tagħhom, deċiżjonijiet tal-ewwel istanza li anki jippreċedu dawn ċitati minn din il-qorti. Fir-rigward tad-deċiżjoni Salvatore sive Salvinu Vella et vs. Paolina Vella et, il-qorti tirrileva li l-parti ċitata mill-atturi fin-nota tagħhom tirreferi għad-deċiżjoni tal-ewwel istanza, li però kienet ġiet revokata mill-Qorti tal- Appell.

This case also stated that the jurist **Molitor**, as applied by the courts, states that the actio publiciana alleviates the difficulty of the burden of proof in establishing the right of ownership via the probatio diabolica.

Effects of the actions (Rei Vindicatoria & Publiciana)

Effect 1 - reclamation of ownership over property

These actions are a remedy to enforce the substantive right which is stipulated in section 322 of the Civil Code which entitles the owner to recover his property from any third party who may be exercising control over that property against the owner's will.

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

This is thus the substantive right which both actions remedy. This means that the outcome in a successful exercise of any of these actions is firstly a declaration of ownership in favour of the plaintiff over the reclaimed property vis-a-vis the defendant

Effect 2 - an order of the court for the defendant to give up control and possession the reclaimed property in favour of the plaintiff

A judicial order against the defendant is thus given, in the success of the action, for him to give up the property in favour of the plaintiff. In practice, this order can have very far reaching effects; imagine that the declaration of ownership refers to *part* of a building - someone constructs over one's property, and the actio rei vindicatoria is exercised by the person who is deprived of his property by virtue of such deprivation by construction - the plaintiff may win all improvements built on and above that land.

Effect 3 - Remedy will never be pecuniary or monetary

The remedy in a successful actio rei vindicatoria or actio publiciana is **never a sum of money.** The remedy would never be for the order to be the *paying* of damages or of the purchase of the land which is not his, but rather a declaration of ownership.

Settlement by compensation is always possible, but the court will never order the sum of money paid by the defendant to the plaintiff in the case of a successful actio rei vindicatoria or publiciana. The payment by settlement for compensation may be agreed upon by the parties, but not by judicial remedy.

Time-barres

The question as to whether there is a time-barre for the action is **debatable**. There exists a general, blanket, time-barre provision in section 2143 of the Civil Code which holds as follows;

2143. All actions, whether real, personal, or mixed, are barred by the lapse of thirty years, and no opposition to the benefit of limitation may be made on the ground of the absence of title or good faith.

A literal application of this provision to the *actio rei vindicatoria* and the *actio publiciana* would mean that the 2 actions are barred by 30 years. In the case of church property, the lapse is of 40 years.

Baudry-Lacantinerie opine that real actions in defence of ownership are not subject to any prescriptive period, meaning that, according to such jurists, these real actions continue to be available to the owner irrespective of the length of time. The argument revolves around the characteristic of perpetuity, which the right of ownership is vested with. The argument is that given that ownership is a perpetual right (not limited in time), then the judicial remedy granted to the owner in defence of his substantive right should continue to be available at all times without it being subject to any extinctive prescriptive period.

Our courts agreed to this doctrinal view of the actio rei vindicatoria not being subject to any prescriptive period since the earliest of judgements. In an 1870 judgement **Maria Cassar et vs Dr G. Mamo Travison et** (*Court of Appeal, 4th December 1870*), the Court of Appeal had already taken this stand, rejecting the possibility of any time-barre for these actions. To this day, this position is still adhered to.

An opposing side to this position would hold that if the legislator wanted to express intention to exclude these acts from any prescriptive extinction, then he would have done so - ubi lex noluit tacuit and ubi lex voluit dixit. The Courts do not abide by this position - jurisprudence insists that there is no time-barre for the owner to recover his rightfully owned property.

In recent years, our Courts, following the example of the Italian Courts, have admitted of another action directed towards a declaration of title in favour of the plaintiff. This action may be referred to as an *azzjoni dikjarattorja / accertazzjoni ta' proprjeta'*. This action is available to the owner of the property who is in possession of his property but who has nothing to show for his title or the documentary proof of is defective or incomplete.

The reason for which there no time barre for these actions is that the non-use of the owner, coupled with the use of the defendant, would be tantamount to the acquisition of the right of ownership via acquisitive prescription, thus rendering the time barre inapplicable.

Actio Finium Regundorum

This action establishes the end of one tenement and the start of another. The Boundaries are those imaginary lines of land which are transported to a line on site and which mark the end of one tenement and the start of the adjacent tenement. Before the boundaries are established, there would be nothing visible on site that shows where one tenement ends and where another starts. The easiest example is a piece of land which has been split up into different plots belonging to different owners. The boundary line is referred to as the *linji tal-konfini*, and is imaginary and not visible on site. The dividing wall ("***ħajt tal-appoġġ***") is the permanent mark which makes the boundary line visible. This wall is thus built to mark the boundary line, which separates the end of one tenement from the start of another adjacent tenement. They may be a dispute as to whether the boundary line is to be marked by the dividing wall. This remedy is not referred to in our law, but it has been asserted to form part of our law by the Courts for a very long time. The Actio Finium Regundorum is available where the boundaries are either completely unknown, or else when there is a pending dispute as to where they should properly be situated. Because this action is a real action (*petitorja*), it can only be pursued by the owners of the adjoining tenements. Title of ownership on a balance of probabilities is sufficient to prove ownership for the purposes of this action. If the plaintiff contends that the location of the boundary line extends further into the defendant's tenement (which is normally the case), then the plaintiff must prove his title of ownership, on a balance of probabilities, in relation to that extension. Proof of title is made through public deeds, through registrations in the Public Registry and the Land Registry, through plans and surveys if they are attached to the deeds of title. **Here, the title of the property is not questioned or disputed.**

Arthur Xuereb vs Silvio Borg

Illi l-kawza odjerna hija l-*actio finium regundorum* li l-ghan taghha huwa d-determinazzjoni oggettiva tal fond u l-accertament ta' l- estensjoni tad-dritt, liema azzjoni ttendi li telimina l-incertezzi tad- demarkazzjoni bejn zewg fondi u taghmel is-sitwazzjoni ta' fatt kompatibbli ghal dak tad-drit

Mangion vs Aquilina
9th March 2005

Tajjeb li jigi precizat illi tali azzjoni ma titlefx in-natura rikonjittiva taghha lanqas fil-kaz li l-eliminazzjoni ta' l-incertezza ggib maghha l-obbligu tar-rilaxx ta' dik il-porzjoni indebitament posseduta. Ghalhekk talba f'dan is-4sens, kif hekk del resto inhu l-kaz hawnhekk mill-kontenut tat-tielet talba, hi proponibbli in kwantu hi l-konsegwenza ta' l-istanza tar-regolamentazzjoni tal-konfini;

Marchisa Beatrice Cremona Barbaro vs John Polidano
First Hall, Civil Court, 3rd February 2005

Illi għal dak li jirrigwarda l-kostatazzjonijiet ta' dritt li jolqtu l-każ, jibda biex jingħad li bejn il-partijiet ma jidhirx li teżisti kwestjoni dwar jekk humiex tassew sidien tal-ġid rispettivtagħhom li jmiss ma' xulxin. Il-qofol tan-nuqqas ta' qbil jirreferi għall-medda li kellu l-ħajt qabel tneħħa. Huwa għalhekk li dan in-nuqqas ta' qbil jifforma s-sinsla tal-azzjoni attriċi, li hija l-azzjoni għall-iffissar tal-konfini;

Illi l-azzjoni għall-iffissar tal-konfini hija msejsa fuq il-jedd li kull sid ta' proprjeta' għandu fil-liġi li jġiegħel lil ġar tiegħu jagħmel sinjali li jidhru u li jibqgħu biex ħwejjiġhom jingħarfu minn ta' xulxin. Din l-azzjoni tista' titressaq biss fejn żewġ proprjetajiet ta' sidien differenti jkunu jmissu ma' xulxin u fejn hemm dubju dwar fejn tibda l-waħda u tintemm l-oħra. **L-għan tal-actio finium regundorum huwa dak tad-"determinazzjoni oġġettiva tal-fond u l aċċertament ta' l-estensjoni tad-dritt ... u għalhekk ittendi li telimina l-inċertezzi tad-demarkazzjoni bejn żewġ fondi u tagħmel is-sitwazzjoni ta' fatt kompatibbli għal dak tad- dritt"**. Tali inċertezzi ġew imfissra li jistgħu jkunu kemm oġġettivi (fejn ma jkunux jeżistu sinjali apparenti li jidhru) jew kif ukoll suġġettivi (fejn min jiftaħ il-kawża jkun irid iwarrab il-biżgħa ta' kwestjonijiet mas-sid ġar tiegħu jew iwarrab il-possibilita' li titteħidlu biċċa minn ħwejġu);

Illi huwa siewi wkoll li wieħed iżomm quddiem għajnejh li f'azzjoni bħal din "i rispettivi titoli di proprieta' delle parti non sono contestati; cio' che e' incerto e l'azione tende ad accertare e' l'estensione delle proprieta' contigue, e, quindi, il confine. Non ha importanza se la zona intermedia sia posseduta da uno solo o promiscuamente da entrambi i proprietari confinanti. Questa azione ha l**a** natura di una revindica parziale (vindicatio duplex incertae partis) e presenta alcune particolarita': ciascuna delle parti e', al tempo stesso, attore e convenuto; ogni mezzo di prova e' ammesso; in mancanza di altri elementi, il giudice si attiene al confine delineato dalle mappe catastali"10. Din it-tifsira qasira imma preċiża, għalkemm imfassla fuq dak li jistabilixxi l-Kodiċi Ċivili Taljan – li għandu dispożizzjoni speċifika għall-azzjoni tal- iffissar tal-konfini11 – tgħin ħafna biex il-Qorti tista' tasal għad-deċiżjoni tagħha f'din il-kawża, mill-fatti u kostatazzjonijiet li joħorġu mill-atti;

Older judgements limited the action to circumstances where the boundaries have never been fixed. Thus the situation wherein the owners of the adjoining tenements contest the location of the boundaries was excluded from this action's applicability.

Francesca Debattista vs Antonio Grech
23rd April 1951

"Kull sid għandu dritt iġiegħel lill-ġar jagħmel, bi spejjeż komuni, sinjali li jidhru u jibqgħu, biex juru l-limiti tal-fondi tagħhom li jmissu ma' xulxin. U din l-azzjoni hija impreskrittibbli; id-dritt ta' waħda mill-partijiet, f'kawża ta' regolament ta' konfini, li tinvoka l-pussess trentennali sabiex il-limiti jitpoġġew fil-limit estern tal-art użukapita

Imma meta l-konfini jkunu ġew preċedentement stabbiliti bis-saħħa ta' konċenzjoni, b'mod li l-partijiet ikunu jafu fejn għandhom jiġu l-konfini, dik il-parti li tippretendi li s-sinjali fl-art pew spostati ma għandhiex teżerċita l-azzjoni finium regundorum. Biex tneħħi dak l-ispostament, jekk ikun tassew sar, tas-sinjali li kienu irregulaw il-konfini, hija għandha azzjonijiet oħra. Imma mhux dik li tintuża biex jiġu stabbiliti l-konfini"

"L-actio finium regundorum – li l-attrici qieghda tezercita –hija impreskrittibbli; ghaliex tikkostitwixxi ghall-proprjetarji vicini att purament fakoltativ u ghaliex id-dritt ta' dawk il-proprjetarji li jitolbu r-regoalment tal-konfini, meta dawn ikunu incerti jew promiskwi, huwa inerenti ghall-proprjeta` u kwindi ma jistax jispicca sakemm tibqa' tissussisti l-proprjeta`"

In recent judgements, although the court still refer to the older judgements, in actual fact they appear to accept that the actio finium regundorum is also available where the boundaries as marked are being disputed.

Carmelo Wismayer pro et noe et vs Carmela Dalli et
3rd February 2009

It-tielet aggravju mressaq mill-konvenuta appellanti jikkoncerna l-mertu proprju f'azzjoni *finium regundorum* billi qed jigi sottomess li l-konfini bejn il-proprjetajiet kienu hemm minn dejjem u li konsegwentement l-azzjoni attrici hija superfluwa.

Minn dan jidher car li kien hemm divergenza bejn il-kontendenti dwar il-konfini tal-artijiet minnhom akkwistati u kien ghalhekk **mehtieg li jigi stabbilit permezz ta' perizja teknika l-estensjoni ta' l-art akkwistata mill-konvenuta sabiex jigi definit dak li kien jappartjeni lill-atturi u fejn kienet il-linja li taqsam il-proprjetajiet.** Kien ghalhekk mehtieg l-intervent tal-Qorti permezz tal-azzjoni intentata mill-atturi.

Therefore despite the frequent reference done to older judgements, today, the actio finium regundorum is applicable even in cases wherein the boundaries between property were already marked.

Prescriptive Period for the Actio Finium Regundorum

The debate and application of the prescriptive period for the Actio Rei Vindicatoria and Actio Publiciana apply also to the Actio Finium Regundorum - Jurists and our courts agree that there is no prescriptive extinction with regards to these actions - there is no time barre, despite the blanket provision found in S 2143.

The case **David Vella vs Victor Mercieca** established that there is no time-barre for the actions rei vindicatoria, publiciana or finium regundorum. This was stated in quoting the case **Francesca Debattista vs Antonio Grech**, which held that

Francesca Debattista vs Antonio Grech
23rd April 1951

"L-actio finium regundorum – li l-attrici qieghda tezercita –hija ***impreskrittibbli****; ghaliex tikkostitwixxi ghall-proprjetarji vicini att purament fakoltativ u ghaliex id-dritt ta' dawk il-proprjetarji li jitolbu r-regoalment tal-konfini, meta dawn ikunu incerti jew promiskwi, huwa inerenti ghall-proprjeta` u kwindi ma jistax jispicca sakemm tibqa' tissussisti l-proprjeta`"*

The difference between the actio rei vindicatoria and the actio finium regundorum

First Gozo Limited v. John Cordina et

«42. Fil-fehma ta' din il-qorti ċ-ċirkostanzi odjerni ma jinkwadrawx taħtvl-actio rei vindicatoria. Avolja l-konvenuti jsostnu li huma fil-pussessvesklussiv tal-art in disputa… is-soċjetà attriċi qed issostni li għandhavl-pussess tal-istess art, tant li permezz ta' din il-kawża qiegħda titlobvbiss li jiġi dikjarat li l-art hija tagħha. ***L-iskop tal-kawża mhux biex l-art tiġi "restitwita" lilha, għaliex hija diġà qieghda fil-pussess tagħha…..***

43. Għalhekk irrispettivament minn kwalunkwe pussess li għandhom l-appellanti fuq l-art in disputa, ġaladarba s-soċjetà attriċi għandha wkoll il-pussess fuqha, non si tratta ta' azzjoni ta' rivendika; l-iskop ta' din il-kawża intavolata mis-soċjetà attriċi mhux ir-"restituzzjoni" tal-art in disputa, iżda dikjarazzjoni mill-qorti li hija proprjetà tagħha.

44. Isegwi għalhekk li l-prova li kellha tressaq is-soċjetà attriċi sabiex turi li l-art in disputa hija tagħha mhix dik l-imsejħa "probatio diabolica" iżda prova suffiċjenti li turi li t-titolu pretiż minnha fil-fatt jirriżulta.» (enfasi tal-Qorti)

Often times, as demonstrated in ***First Gozo Limited vs John Cordina et***, the plaintiff would file the case under the wrong action. This is because in practice, the difference between the actio rei vindicatoria and the actio finium regundorum is not always clear cut, since in both cases there is a dispute over ownership. The difference is that in the actio rei vindicatoria, the plaintiff is seeking **restitution**, and thus, the land or thing in question is **not in his possession**. On the other hand, the actio finium regundorum applies in cases wherein a land is being **possessed by two individuals,** and when one of the neighbours is requesting the court to establish where one property ends and when the other begins.

Community of Property / Komproprieta'

Sub-title I

OF THE NATURE OF THE COMMUNITY OF PROPERTY, AND OF THE RIGHTS OF THE CO-OWNERS DURING THE COMMUNITY

489. (1) Community of property exists where the ownership of one and the same thing, or of one and the same right, is vested *pro indiviso* in two or more persons.

(2) In the absence of any special agreement or provisions, the community of property shall be governed by the following rules.

Community of Property is defined under article **489** of the Civil Code. Throughout this topic we will also refer and briefly touch upon the **Condominium Act (Chapter 398)**. When considering real and personal rights, we had presumed that there is one person attributed one right. An owner has a right over a tenement. In reality, however, things differ. It is not uncommon within the sphere of rights over property (or rights concerning property, whether real or personal) to have a situation wherein more than one person enjoys, simultaneously, one and the same right over or concerning the same item of property.

Imagine there is a plot of land which belongs, at the same time, to three siblings. Together, they have the right of ownership over the whole plot of land. Individually, however, they have a fraction of the whole plot of land. Each and every one of the siblings would have 1/3 of ownership over the plot of land. Another situation may arise wherein three tenants share one and the same flat. These tenants (or lessees) do not individual have the full right of lease over the entire flat. If the shares are equal, their individual share is a third of the entirety of the flat. **These two examples (one of a real right, one of a personal right) is the subject matter for *community of property***.

Community of property is thus a situation where **2 or more persons** share, at the same time, ***pro indiviso*** (as against **pro diviso**), the same item of property.

In the law of property, we speak of **pro diviso** where one person, on his own, a complete right over or concerning property. We have a situation of **pro indiviso** when the right of *every person involved* is less than the whole. **Thus when a person has a fraction of a right over property, he is considered to have vested a right pro indiviso.**

Community of property can exist in relation to both **real rights** and **personal rights**.

The reference in **489 (1)** to the right of ownership in no way excludes community of property over any other real or personal right. Thus despite the provision's express reference to ownership, community of property may exist in regards to any right, so long as two or more persons (**physical or legal**) enjoy, at one at the same time, together and indifferently between them, the same right over the same property.

Note that **community of property does not apply to condominia. The condominium is regulated solely by the condominium act.**

Regulation of Community of Property

Section 489 (2) holds that **(2) In the absence of any special agreement or provisions, the community of property shall be governed by the ensuing rules.** This is unique because the law is expressly *relegating* the provisions of special laws underneath any agreement to the contrary. Therefore where the parties agree otherwise, the law does not apply. This relegation of the law below agreement by the parties is discussed by **Prof Caruana Galizia,** who gives 2 reasons for the disfavour which the Civil Code shows for Community of Property. If we read through the provisions, we note that there is very little focus on termination of community of property. As held by Prof Caruana Galizia, the disfavour which the law has for community of property is rooted in 2 big drawbacks on this situation of property:

1) There is a very big likelihood, in practice, of **disputes** among the persons involved in a situation of community of property. Thus in practice, community of property tends to give rise to many disputes, for the simple reason that more than one person is sharing in the enjoyment of the same right over the same property.

2) Community of Property makes the trade, business, and commercial transfer of property far more difficult. This is because in the absence of special provisions, **the same item of property or the same right can only be sold and traded with the unanimous consent of all the persons sharing the common property.**

Therefore in the absence of any agreement or any special law to the contrary, the general laws proceeding 489 applies.

In ***Maria Grima Baldacchino vs Antonia sive Tania Baldacchino et***, the court held the following:

Illi b'mod generali, il-ligi, ghalkemm tirrikonoxxi l-istat tal-komunjoni tal-proprjetá, ma tharisx lejh b'mod favorevoli, kemm ghax dan l-istat jista' jwassal ghal diversi litigji u kawzi bejn il-komproprjetarji, kif ukoll ghax jillimita l-uzu li dawn individwalment jistghu jaghmlu tal-proprjeta` taghhom.

This case further held that the law's disfavour for the situation of community of property serves as the *ratio legis* behind article 496, which holds:

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

How does Community of Property come about?

1) Inter Vivos Agreement

A plurality of individuals may decide to buy, together, one property. A deed of purchase would state that A, B, and C are purchasing, together, and undivided between themselves, in equal or unequal shares between them, one particular property.

2) Succession

This would normally entail a Will Testament of the testator who would have owned some item or items of property, and in such will there are bequests of one and the same thing or right to two or more persons. In a will, bequests can be either by universal title (with the beneficiary called the heir / eredi), or they may be by particular title (with the beneficiary called the legatee / legatu). The heir continues the personality of the deceased, whereas the legatee receives for himself. An heir only keeps what is his after the debts are settled and after the legacies are paid.

3) **By Operation of Law / Ipso Jure**

The law itself may, by express provision, create a community of property. The clearest example is the common parts in a condominium as regulated by article 5 of the Condominium Act. A condominium is defined under article 2 of the Condominium Act;

The Condominium Act - a separate sphere of Law

2. (1) Condominium is a building or group of buildings where the ownership or the use or the enjoyment of the common parts thereof is vested *pro indiviso* in two or more persons and the ownership of the various separate units in the building or group of buildings is vested *pro diviso* in the same two or more persons:

Provided that two or more tenements one or more of which overlies another and where there only exists a number of servitudes of the tenements over each other, and only the drains, or the drainage system or other piped or cabled services are owned in common, or where two or more tenements only have a common outer staircase or common outer landings, shall not be considered a condominium.

(2) For the purposes of this Act, a condominus means the owner of a separate unit and includes the emphyteuta or the usufructuary of such unit.

Therefore a condominium involves rights ***pro diviso***, with regards to separate units in a building, as well as rights ***pro indiviso***, with regards to common areas in a building. 2 (2) holds that a building with only one common staircase or one common landing is not considered to be a condominium. Any other building, which includes more than one unit, separate and distinct with its own owners and users but which includes an area which is used by the owners together is a condominium. The law of community of property **is excluded** in relation to the condominium, by virtue of article 4 of the Condominium Act.

4. The provisions of Title V of Part I of BOOK SECOND of the Civil Code shall not apply to property held pro indiviso in the common parts of the condominium.

Article 4 thus excludes the Civil Code regulation of Community of Property with regards to the common areas of Condominiums. **Article 5** of the Condominium Act provides the **exhaustive list** of common parts of the condominium:

5. Unless otherwise resulting from the title of the owners of the separate units, or unless it is otherwise agreed by the con domini by a public deed, the common parts of a condominium are the following, even if one or more of the condomini do not make use thereof:

(a) the land on which the condominium is constructed, the foundations, the external walls, including the common dividing walls with neighbouring tenements, the roofs, the shafts, the stairs, the entrance doors, the lobbies, corridors, the stairwells, the courtyards, the gardens, the airspace above the whole property and in general, all the other parts of the property which are intended for the common use;

(b) the parts used as a reception and as a common washroom and the parts used as a porter's lodge, for the central heating equipment, and for all other facilities intended for the common use; and

(c) lifts, wells, cisterns, aqueducts, sewers, drainage pipes, all installations for water, gas, electricity, heating and similar services up to where the said installations branch off to the exclusive property of each condominus, and works, installations and objects of whatever type intended for the common use or benefit.

Determining the share of pro indiviso rights

To ascertain the fraction of power allocated to the co-owners, one must refer to **Article 490** of the Civil Code:

> **490.** (1) The shares of the co-owners shall, unless the contrary is proved, be presumed to be equal.
>
> (2) Every co-owner shall participate in the advantages and burdens of the community in proportion to his share.

The Law refers to **co-owners**, which implies two or more owners in relation to the same thing. Therefore the question arises as to whether this presumption applies solely to the case wherein the right in question is of ownership. The answer is negative, for the provision also applies generally to any state of community of property which is regulated by the Civil Code irrespective of the manner in which it was created.

This provision may be rebutted, rendering it a ***juris tantum*** presumption. Thus 490 (1) lays down a rebuttable presumption that co-owners share equal proportions of rights. For **juris tantum presumptions**, we refer also to **Article 1234:**

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

When rebutting a juris tantum presumption, the onus propandi shifts, and thus the presumption is to be challenged on the basis of a **balance of probabilities**.

If there is a stipulation in the source of the Community itself, or even in matters subsequent to the community, which sets out the individual shares (which may be the same or different) of the participants in a state of community, then that stipulation will prevail over the presumption of equal proportion borne by article 490 (1), If the individual proportion is not specified, and if there is no proof of a subsequent determination of shares, then this presumption applies, to the effect that the shares of the individuals in the state of community are deemed to be equally powerful.

Our law does not look favourably on this situation of property, for the same reasons posited by Prof Caruana Galizia. Community of property is disfavoured because **the law contemplates more on the ways to terminate community of property as opposed to the regulation and containment thereof**.

Rights and Duties of the Participants in Community of Property

Presuming that a state of community is in course, and presuming that the share of the right is ascertained, what are the rights and obligations of the participants throughout the course of the state of community? **490 (2)** answers this question, together with **articles 491, 492, and 493.**

490 (2) Every co-owner shall participate in the advantages and burdens of the community in proportion to his share.

491. Each of the co-owners is entitled to make use of the common property, provided -

(a) that the use be made according to the destination of the property as established by usage;

(b) that it be not made against the interest of the community, or in such a manner as to prevent the other co-owners from making use of the common property according to their rights.

492. Each of the co-owners may compel the others to share with him the expense necessary for the preservation of the common property, saving the right of any of such other co-owners to release himself from his liability therefor by abandoning his right of co- ownership.

493. It shall not be lawful for any co-owner to effect any alteration in the common property without the consent of the other co-owners, even though he claims that such alteration is beneficial to all.

Article 490 (2) demonstrates the importance of ascertaining the shares of rights in a community of property. The splitting up of the benefits and of the obligations that ensue from a state of community is determined according to the respective, undivided shares of each and every participant in the state of community.

Article 491 then holds that the common property may be used so long as the use thereof does not hinder the enjoyment of the property by the other participants. Community of Property, in practice, creates many disputes and conflict among the members of the community. Here, we are speaking of the benefit of making use of the common property - in principle, all the participants in a state of community have **the right to share the use of the common property, provided that:**

1. Such use respects the **destination of the propert**y,
2. The use **does not run counter to the interest of the community**, and
3. The use **does not prevent the other co-owners from making use** of the common property according to their rights.

On paper, it seems simple, yet in practice, these rights give rise to many disputes. Let's say that there is a common residential tenement, such as a common apartment, which is shared among 5 siblings, in equal shares among them. How can the right of use, according to the destination of the common property, by every participant, according to his share, be translated to practice?

Paulina Stagno et vs Carmelo Bugeja et
Court of Appeal on the 6th October 2004

Dan ghaliex, kif kontemplat fl-artikolu 491 tal-Kodici Civili, kull komproprjetarju jista' jinqeda bil-haga komuni. Tajjeb pero` li anke f'dan jigi mfakkar illi dan hu hekk veru purke` dak il-komproprjetarju ma jinqediex bil-haga kontra l-interessi tal-komunjoni jew b'mod li ma jhalliex lill-koproprjetarji l-ohrajn jinqdew biha huma wkoll skond il-jeddijiet taghhom. Li jfisser ghalhekk li ma jistghax wiehed mill-komproprjetarji ta' dar jew ta' garage komuni jaqbad u jokkupa dik id-dar kontra l- kunsens tal-ko-proprjetarji l-ohra, u fl-istess hin jipprekludi lil dawn milli jaghmlu uzu huma wkoll mill-fond.

This case thus establishes that a co-owner may make use of a common area for which he has a share of ownership for, however, such use must be done with consent from the other co-owners. A co-owner cannot make use of a common property if such use prevents other co-owners from also making use thereof.

Silvia Caruana vs Mary Genovese
First Hall, 16th November 2004

"Il-konvenuta kienet marret toqgħod mal-missier, u damet hemm xi snin, iżda fl-aħħar ta' ħajtu l-missier kien riedha titlaq mit-terran fejn kien joqgħod hu. Il-konvenuta, minkejja x-xewqa ta' missierha, baqgħet toqgħod fil-fond u l-missier miet qabel ma laħaq mexxa għall-iżgumbrament tagħha. **Issa li miet il-missier, l-atturi, bħala ko-werrieta tiegħu u għalhekk komproprjetarji tal-beni tiegħu, iridu li jkollhom aċċess għall-fond.**

Il-konvenuta osservat illi d-destinazzjoni tal-fond "kif stabbilita bl-użu" hija bħala dar ta' abitazzjoni, għax Joseph Micallef kien, qabel mewtu, jinqeda bil-fond billi joqgħod fih. **Għalhekk, għalkemm kull wieħed u waħda mill-partijiet jistgħu jinqdew bil-fond komuni, għandhom jinqdew bih bħala dar ta' abitazzjoni.**

Il-qorti kienet tasal biex taqbel mal-konvenuta illi t-talba ta' l-atturi biex ikollhom ċavetta tal-fond hija ***ad æmulationem tantum*** **li kieku ma nġibitx prova illi l-konvenuta kienet qiegħda toqgħod fil-fond kontra r-rieda tal-missier u ta' lomm meta dawn weħedhom kienu s-sidien tal-proprjetà u l-partijiet kienu għadhom ma sarux komproprjetarji bil-mewt tal-missier.** Billi, iżda, t-**tgawdija tal-konvenuta kienet waħda abużiva**, u ***ex iniuria non oritur ius***, il-qorti tifhem illi **dak li qegħdin ifittxu l-atturi hu illi jħarsu l-jeddijiet tagħhom bħala komproprjetarji u ma għandhiex**, **billi tiċħad it-talbiet ta' l-atturi**, **tħalli illi l-konvenuta tieħu vantaġġ mill-għemil illeċitu tagħha**."

Maria Carmela Bezzina et vs Brian Joseph Bonello
First Hall, 30th November 2023

This recent case confirmed the position adopted by the case ***Paulina Stagno et vs Carmelo Bugeja et***, wherein it was established that a co-owner of a common property cannot make use of such property in a way which excludes the other co-owners from making a use thereof.

Acts of Alteration and of Preservation

Article 492 provides that each co-owner may compel the others to share the expenses necessary for the **preservation** of the common property, with the only way to be relieved of this expense being the forfeiture of the right of common property. This contrasts with an **act of alteration**, which is not permitted by law unless with the consent of all the co-owners participating in the community of property, by virtue of **article 493**. Therefore 492 - Act of Preservation - One may compel the others to share the expense, whereas 493 - Act of Alteration - Only permitted with unanimous consent

John Grech vs Guza Cremona
Court of Appeal, 29th March 1985

By virtue of **article 493,** a co-owner is not permitted to make any alteration to the common property without having first obtained the consent of all involved participants**. This implies that even if just one of the co-owners prove that they never gave consent for such alteration to take place, then the alteration done was not legally permitted by virtue of article 493.**

Carmelo Cuschieri et vs Margaret Smith
First Hall, 22nd May 2002

This case referred to that of **John Grech vs Guza Cremona**, in which it was established that if proof is given that **any one of the co-owners (including the plaintiff, if the case is such) did not provide consent to the alteration of common property, then such alteration was not done in accordance with article 493.**

Josephine Bedingfield pro et noe vs Mario Caruana
First Hall, 25th March 2002

This case established that a firm reading of article 493 would provide two fundamental concepts:

1) **A co-owner can never, without the consent of the other co-owners, change a thing in common to all, even where he claims that such alteration is for the benefit to all.**
2) An alteration necessarily changes the nature or form of the thing in common, and thus mere decorative amendments would not fall under the meaning of act of alteration.

The scope (raison d'etre) of this prohibition is to protect the co-owner who lacks the possession of a thing which he has a right to from having such thing altered without his consent.

494. (1) Where the co-owners fail to agree, the court shall give the necessary directions as to the management and better enjoyment of the common property, and may appoint an administrator, even from among the co-owners themselves.

(2) The court shall give effect to the opinion of the majority, regard being had to the total number of the co-owners, unless the dissentient co-owners show they will be prejudiced thereby.

This provision allows for the appointment of an administrator, who may or may not be one from among the co-owners. This is not a common provision to exercise, for there exist few judgements applying it. The administrator here is **not the same** administrator as that stipulated by the Condominium Act. This article holds that where the co-owners fail to agree, an administrator is appointed. In practice, because of the length of time that judicial proceedings take, and because of the expense involved in judicial proceedings, this remedy may be argued to be ineffective.

The Administrator

494. (1) Where the co-owners fail to agree, the court shall give the necessary directions as to the management and better enjoyment of the common property, and may appoint an administrator, even from among the co-owners themselves.

(2) The court shall give effect to the opinion of the majority, regard being had to the total number of the co-owners, unless the dissentient co-owners show they will be prejudiced thereby.

This provision provides that the participants in a state of community of property may request the court to appoint an administrator to resolve issues. The administrator in this case is **not the same** as the administrator contemplated under the Condominium Act.

In actual practice, the remedy under article 494 is not considered to be effective. Fresh disagreements arise daily, and thus it would be impractical to seek judicial recourse for every emerged conflict between the co-owners.

In ***Carmelo Cuschieri vs Margaret Smith***, the court declared that there was **no valid reason** to appoint an Administrator to resolve an issue pertaining to an **act of alteration**, considering the lack of urgency of the matter.

Foundations

The question is whether community of property exists over foundations (pedamenti) where those foundations support tenements belonging to different owners. Those tenements can constitute a condominium, but there can be situations wherein they do not constitute a condominium. The foundations are not visible in a building, but they nonetheless support the entire structure of a building. The question is whether these foundations belong to one sole owner or if they are shared between the owners of all the overlying tenements. This problem is arising nowadays because of the possibility. The problem is arising because of the possibility of excavating and forming new tenements in the space which may have never been yet developed. The deeds of the past had no purpose of stating who the owner of foundations is, for this method of excavation is a new development. This ties into the presumption of vertical ownership. This presumption holds that the owner of a tenement owns whatever lies immediately below and above his tenement. Does this mean that the owner of the lowest tenement is the owner of such foundations?

Unfortunately, the pertinent judgements which arose in this regard have not been clear and uniform in reasoning. The general line of reasoning has been to distinguish between the foundations and the space underneath the lowest lying tenement, and to stress that because the foundations are supporting the entire construction of the different tenements overlying those foundations, they are common property of all the overlying tenements and because a community of property exists, the rules on the right of use, the preservation, and the alterations, which were previously discussed apply also to the foundations. This thus excludes the application of the presumption of vertical ownership to the foundations. In contrast, they accept that the presumption of vertical ownership applies to the remaining subterranean space underlying the lowest lying tenement. What is not so clear in these judgements is that the courts do not distinguish the situation in which the building is a condominium and the situation wherein it is not a condominium. One may argue (as Phyllis does) that in the case of a condominium, in the absence of a title saying differently, that both are common parts in terms of article 5 of the Condominium act - and therefore the rules of the civil code on the community of property do not apply. Thus the argument is that where the construction overlying the foundations do not constitute a condominium, then the provisions on the community of property apply. A lacuna exists.

Estelle Azzopardi Vella vs Michael Zammit
27th July 2007

This case involved a co-owner's works made on the foundation of a building, which work resulted in the overall weakening of the building's infrastructure. This naturally prejudiced the other co-owners, who had not issued consent for such work. The court declared this to be a case of spoliation, for the co-owner who carried out the work 'dispossessed' the other co-owners of the potential to effectively develop the property for which they had a right over.

David Hillman vs G.R.A.P Limited
3rd February 2009

This case referred to **Estelle Azzopardi Vella vs Michael Zammit**, wherein it was held that the foundations (even in the case of a block of apartments) are to be considered as common property due to the fact that they serve fundamental for the integrity and structure of the building in its entirety. This court expressly held that article 323, protecting the presumption of vertical ownership, was excluded when considering the foundations of a building.

B. Tagliaferro & Sons Ltd et vs Alfred Debattista et
16th January 2014

This case again reaffirmed that the pediments of a building are to form part of the common property, and thus by virtue of article 491, one of the co-owners may not exercise the right of use over such foundation in a way which excludes other co-owners from their share over the same foundation.

Av. John Buttigieg vs Anthony Tabone
11th November 2019

The court referred to the Italian authors **Cian and Trabucchi**, who comment on the Italian Civil Code, holding that the presumption of ownership below a tenement does not apply in the case of foundations. The court also referred to **Estelle Azzopardi Vella vs Michael Muscat** in referring to Article 5 of the Condominium Act, which refers to airspace above a whole property and to *pedamenti*, which are considered to be common areas.

These judgements derive the same conclusion - that the foundations beneath a tenement, owing to their structural support and integrity to all the overlying tenements, are to be deemed common property. This was reaffirmed by **Cian and Trabucchi** in ***Av John Buttigieg vs Anthony Tabone***. However, the remaining subsoil which is not part of the foundations of a building are to be deemed the owner of the lowest tenement, owing to the presumption of vertical ownership per s. 323.

Termination of the Community of Property

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

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

(3) Any such agreement may be renewed.

No participant in a state of community, nor a testator when a state of community comes about through succession, may stipulate that a community of property lasts for longer than 5 years. The stipulation may be renewed for 5 year extensions. This is another implication of the law's disfavour of the continuance of the state of community.

A proviso to **Article 496 (1)** holds that where a community of property has been inherited, it shall not be partitioned if such partitioning was **prohibited by the testator's will**.

Article 496 is thus a public policy rule, in the sense that the law prevails over any contrary agreement or stipulation. This is the only instance in the law of property wherein the law ousts any agreement in connection to a state of property. This is therefore a restriction in time for which the community of property can exist by force.

The Remedies

Prior to Act 18 of 2004, the only remedies available to terminate community of property were those of **partitioning** and **sale by licitation**. **Act 18 of 2004** then introduced 2 additional remedies**,** which broadened the number of provisions which may be applied to terminate community of property. Such new remedies are those governed by **article 495 (3),** which covers the transferring of the final undivided share, and **495A**, which covers the sale by licitation of the common property by way of the majority's will.

Article 497 is another testament to the law's disfavour of the situation of community of property, for it holds that the law is permitted to overturn any agreement so long as **serious and urgent circumstances** prove such overriding necessary.

497. (1) Notwithstanding the prohibition or agreement referred to in the last preceding article, it shall be lawful for the court, if serious and urgent reasons so require, to order the dissolution of the community of property, and any waiver of the right to demand a partition in similar cases is null.

(2) Where any of the co-owners has, through his fault, given cause to the existence of the reasons referred to in sub-article (1), the court may, according to circumstances, in ordering the dissolution, condemn such co-owner in all damages.

Partition / Diviżjoni / Qasma

Partition is the physical splitting up of the common property into as many separate and independent portions as there are undivided shares among the co-owners while the state of community is still in course. For instance, in the case of a piece of land split between 3 siblings in equal shares, the partition would imply that every sibling would receive one separate and independent plot of land to which the sibling becomes vested **full ownership** over that land, ***pro diviso*** (undivided).

Another instance of partition would involve a sum of money that is passed, through succession, to 3 siblings in equal portions. The money would be split up, in equal portions, for each of the siblings. The former co-owners come to own their share of the sum of money exclusively.

The law does not define *partition.* Nor does it provide the situations in which it may be exercised. Nonetheless, partition is not always possible. There are circumstances wherein the physical partitioning of the common property into as many portions as corresponding to the divided shares of the co-owners is not possible. The law tells us when partition is possible and when it is not indirectly. **It provides the circumstances in which the termination of a state of community is to be carried out through a sale by licitation.**

515. (1) Where common property cannot be divided conveniently and without being injuriously affected, and compensation cannot be made with other common property of a different nature but of equal value, it shall be sold by licitation for the purpose of distributing the proceeds thereof.

(2) The same rule shall apply if, in a partition of things in community, there are some which no one of the co-partitioners is able or willing to take.

Article 515 (1) holds that where inconvenience does not permit the splitting up of common property, then it shall be sold by licitation. Therefore ***a contrario sensu***, where the common property **can be split up conveniently, then it may be partitioned**. This logic is enforceable, to the extent that any one of the co-owners, irrespective of the size of his share, can object to the sale of the common property and enforce his right to receive his share in kind, meaning that he partitions his portion and acquires ownership thereof, instead of monetary compensation for his share, as per **article 502;**

502. Each of the co-owners may claim his share of the property in kind.

Presuming that there is a dispute and that one of the co-owners filed an action to enforce his share over the property, and thus requesting a partition, the court will consider whether partition is possible (otherwise sale by licitation will prevail). But how will the court determine whether the property is conveniently divisible into as many separate and independent portions as would correspond to the undivided shares of the co-owners? This is especially relevant when the co-ownership pertains to immovables. The court would appoint a ***judicial technical referee*** (espert tekniku / perit tekniku). The court would instruct such judicial referee to visit the property (aċċess) and to make an assessment and to take into account the technical aspects of the property, such as the development potential of the common property, size, situation, servitudes, relevant planning policies and regulations, market value (including the market value of each and every undivided share), etc. Such assessment would be made in relation to the entirety of the property.

The judicial technical referee would then provide an expert opinion on:

1) Whether the common property can be divided into proportions without being injurious to any of the co-owners. If there is minimal difference in value among the portions split up (presuming that it can be split up into portions), then the referee would **quantify** the compensation to be paid by the larger portions to the smaller portions.; and

2) If the common property can not be divided into proportions without being injurious to a party. In such case, the architect would give the current market value of the whole property at which the sale by licitation can be carried out for the proceeds to be distributed among the former co owners who thereby acquire their individual share.

According to civil law of procedure, the court is not bound by the conclusion of the judicial referee, as per **COCP Article 681.**

COCP 681. The court is not bound to adopt the report of the referees against its own conviction.

If a party does not contest the conclusion of a judicial referee, he is entitled to ask the court to appoint **3 architects** (other judicial technical experts) to give their opinion. In recent years, the Court of Appeal has tended to suggest that if the parties do not avail themselves of the right to request the appointment of the additional technical experts, then they are deemed to have accepted the opinion of the first judicial technical referee. For instance, in ***George Muscat et vs Helen Xerri et,*** the Court of Appeal held that since the value suggested by the judicial referees was not contested in lower courts, then it is irrational for such contestation to be brought up in the superior courts.

George Muscat et vs Helen Xerri et *- objection against the judicial referee's opinion cannot be brought late in the proceedings*
27th February 2015

Il-ko-proprjetarji l-ohra, pero`, qatt ma infurmaw lill-attur bl-oggezzjoni taghhom, jekk kienu qed joggezzjonaw, u kien biss f'din il-kawza li formalment ipprezentaw l-oggezzjoni taghhom. Aktar importanti hu li l-konvenuti mhux qed jitolbu li x-xoghol li sar minghajr il-kunsens taghhom jitnehha. Huma jridu li dak li sar jibqa hemm u jgawdu minnu huma wkoll! Huwa f'dan il-kuntest fejn zbaljat l-ewwel Qorti. Jekk benefikati estensivi jsiru f'fond komun, u l-ko- proprjetarju li ma jkunx qed joqghod fil-fond la joggezzjona ghalihom u lanqas, aktar u aktar, ma jitlob li jitnehhew u, anzi, irid igawdi mill-valur ghola ta' dak il-fond, ma jistax jippretendi dan minghajr ma jhallas kumpens lil min ghamel dawk il-benefikati. Dak li l-attur ghamel fil-post a spejjez tieghu se jkun, meta jinbieghu l-fondi, ta' vantagg ekonomiku kbir ghall-konvenuti specjalment bil- bini ta' appartament gdid u indipendenti minn dak ezistenti.

One may take a position contrary to this line of reasoning because the law does not expressly provide for this presumption. The law provides that the court is not bound to adopt the opinion of the technical referee if it is not convinced, yet the Court of Appeal still holds by this presumption. Furthermore, technical referees are expensive, and thus it may not be feasible to appoint 3 extra referees which add significant costs to the judicial bill. The parties have **10 days t**o request these additional referees, which start running from the issuing of the first expert's findings.

Rules governing Partition

Remembering that the law gives prevalence to the agreement of the parties (in which no court may rule otherwise to any agreement), there are a number of rules which regulate the behaviour and process of co-partitioners in the case that no agreement is met. If agreement is met, then as per **article 499,** a public deed must be made in order for the partition to be usefully set up.

> **499.** (1) A partition of immovable property is null unless it is made by a public deed.
>
> (2) As to the effect of any such partition in regard to third parties, and as to the registration of the deed of partition, the provisions of article 330 shall apply.

If the parties are not in agreement either on the actual partitioning of the common property or else on the how and on the assignment of the property, then. any one of the co-participants is allowed to request the court to resolve the dispute, which in turn triggers the rules stipulated in **articles 498-514 of the Civil Code**.

In the case that one of the co-owners has been exclusively enjoying a separate portion or part of the common property in the course of the state of community, then the question arises as to whether that separate portion is to be included in the partitioning. The answer to this particular case is found through article 498, which holds that;

> **498.** Partition may be demanded even though one of the co-owners may have enjoyed separately a portion of the common property, unless there has been a partition or a possession sufficient to give rise to prescription.

Therefore such exclusive portion will be included in the partitioning, **with the only exception being in regard to previously common property which would have been acquired through acquisitive prescription by a co-owner.**

> **500.** (1) Subject to the provisions of the last preceding article, where all the co-owners are present and capable of alienating property, the partition may be made in any manner and form they may deem convenient.
>
> (2) In the absence of an agreement to the contrary, the following rules shall be observed, both in the partition of the bulk of the property as well as in any sub-division which may be necessary.

Article 500 establishes that the co-owners, when in agreement with regards to the capability of the property's partition, are free to ascertain the manner, form, and extent of the partition as they deem fit.

If the co-partitioners agree on all aspects of the partitioning, then they are free to establish the limits, considering also portions enjoyed by a co-owner exclusively. Otherwise, the following rules, referred to as *judicial partitioning* (as opposed to *contractual partitioning,* done through agreement), apply.

Article 501 - the appointment of referees to determine partitioning

If the parties dispute over whether the partitioning is possible or over how the partitioning is to take place, then the Court will appoint experts (judicial referees) to appraise the common property and to determine whether the common property can be conveniently divided in the shares of all the co-owners. If the referees agree that the property is able to be partitioned, then the referees must draft a *pjan ta' qasma*, which establishes how the portions are to be set.

501. (1) The property shall be appraised by experts chosen by the parties, or appointed by the court as provided in the Code of Organization and Civil Procedure.

(2) The experts shall state in their report, whether the property can be conveniently divided without being injuriously affected, and, in case the property can be so divided, the experts shall in the same report determine each of the portions which may be made up and the value thereof, regard being had, as far as it is practicable without considerable damage, to the provisions contained in the next following three articles.

Article 504 - the assignment of the Common Property

504. In forming and making up the shares, the dismemberment of tenements or the creation of easements shall be avoided; and it shall be sought to include in each share the same quantity of movables, immovables, rights or claims of the same nature and value.

In practice, the court will consider the opinion of the experts as well as all the circumstances of fact which are proved in the particular case and, as far as possible, avoid creating easements and splitting up immovables in an unreasonable way. 504 also holds that each portion, as far as possible, shall include the same quantity of movables, immovables, rights and claims of the same nature and value, as far as possible. **Where the court is unable to have portions respecting these rules (article 504), then the court may conclude that the property is not capable of being partitioned in kind, and will thus order the termination of the community through sale by licitation**.

Article 503 - preference to co-partitioners who own adjacent property

If a physical partition is possible, the law gives a right of preference to a co-partitioner who is the owner of a land adjacent to the common property for the assignment of that portion which includes the adjacent common property, as stipulated in **article 503**, which serves the purpose of consolidation

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

Article 510 - drawing by lot / assignment of the partitions

The separate portions which are formed by the partitioning are either drawn by lot or assigned directly for one and the same thing. The court will order the assignment if it concludes that specific portions should go to particular co-partitioners (for example, when there is a difference in the shares of the co-partitioners), as per **article 510**.

> **510.** (1) The shares shall be drawn by lot.
>
> (2) Where, however, the shares of the co-partitioners are not equal, the court shall determine whether the shares are to be drawn by lot, or whether the partition is to be carried out by assignment in whole or in part.

Article 505 - difference in value of partition and co-owners' share

If the court concludes that partitioning is possible, yet there remains a difference between the value of the individual shares and the value of the partitions, then the question arises as to the value to be assigned to the co-partitioners. This case does not render partitioning not possible - **the court is empowered by law to order the payment of a sum of money to make good for the difference.** This sum of money is referred to as *owelty* / *ekwiparazzjoni*.

> **505.** Any inequality of the shares in kind, where it cannot be conveniently avoided, shall be set off by the payment of a sum of money equal to the difference between the larger and the smaller share.

Article 513 and 946 - Effects of Partition

513. As to the effects of a partition, the provisions contained in articles 947 to 952 inclusive of this Code relating to co-heirs, shall be applicable generally to co-partitioners.

Thus once partitioning is established and once the public deed is done, then the person receiving the division becomes the sole owner of that property without any interference from the other previously co-owners, in a **retrospective manner.** It is also assumed that he ***never had any rights over the previous properties.***

946. Each co-heir is deemed to have succeeded alone and directly to all the property comprised in his share, or come to him by licitation, and never to have had the ownership of the other hereditary property.

In the same way as under the law of sale, the co-partitioners warrant, in favour of each other, the **peaceful possession** of the property which is now individually assigned. The co-partitioners have the option of agreeing to *exclude this warranty*, in the deed of partition. One must note that in this regard, the title acquired is **derivative**, and not **original**. This is unless the lapse required for *acquisitive prescription* passes.

Article 514 - Supplementary Partition

514. (1) Where in a partition, or in any other act whereby the community of property, whether movable or immovable, is terminated, even though such act be designated as a sale, an exchange or a compromise, or by any other name, the fair value of the property allotted or assigned to one of the co-partitioners is, having regard to the time of such partition or other act, less than three-fourths of the fair value of the share to which such co- partitioner was entitled, such co-partitioner shall be entitled to demand from the other co-partitioner a supplement in money.

(2) No action for a supplement under sub-article (1) of this article may be maintained where difficulties arisen between the co- partitioners have been settled by a compromise, even if no suit had been commenced in relation thereto; nor may such action be maintained in the case of a sale of the right of co-ownership made without fraud to one of the co-owners at his risk and peril by the other co-owners or any of them.

(3) The action for demanding a supplement in money under sub-article (1) of this article shall be barred by the lapse of two years from the date of the partition or other act terminating the community, and the provisions of sub-article (2) of article 1407 shall apply in respect of the running of such period of limitation.

(4) The mere omission from a partition of a thing held in community shall only give rise to a supplementary partition.

If a co-partitioner claims to have been assigned less than the correct value of his undivided share, then he is able to apply the remedy contemplated by **article 514 (1), (2), and (3)** if he satisfies the requirements for the action of a supplement. The requirement is that the real value is **less than 3/4 of the original fair value**. If this is satisfied, then the co-partitioner is able to request a sum of money to compensate such loss from other co-partitioners. This is not automatic, as it must be done through judicial recourse, with the difference being more than 1/4 of the correct value of the share of the co-partitioner. This action is barred by the lapse of 2 years from the date of partition.

Sale by Licitation / Bejgħ bil-liċitazzjoni

If the owners agree to sell by licitation, they are free to negotiate the price, find a buyer and conclude a sale (thereby terminating the state of community) without court intervention. The court intervention is necessary when there lies a dispute. If the court establishes that partition is not possible, it will declare the community to be sold by sale by licitation through judicial process, with the assistance of technical experts. The process for the sale by licitation is separate from the action directed to terminate the state of community.

Sale by licitation is governed by **articles 515 and those that ensue of the Civil Code;**

515. (1) Where common property cannot be divided conveniently and without being injuriously affected, and compensation cannot be made with other common property of a different nature but of equal value, it shall be sold by licitation for the purpose of distributing the proceeds thereof.

(2) The same rule shall apply if, in a partition of things in community, there are some which no one of the co-partitioners is able or willing to take.

516. Any of the co-owners, whatever his share of the property, may demand the sale by licitation, where competent.

Articles 305-306 of the COCP regulates sale by judicial auction, which would apply in the case wherein the property is to be sold by licitation when a buyer is not ascertained.

After a declaration for the sale to be carried out by licitation, the owners may proceed to sell without judicial intervention. At any point in time, even if there has been a judgement which orders sale by licitation, the co-owners are legally permitted to agree and proceed through a contract not under judicial authority.

The sale by licitation is open for participation (in the bidding for the sale) for co-owners, but any one of the co-owners can demand that strangers be invited to bid, as per **article 517**. This will result in the sale being publicised, thus inviting third parties to bid on the property (oblaturi barranin / external bidders).

517. It shall be lawful for each of the co-owners to demand that strangers be invited by means of an advertisement to bid at the sale by licitation, such advertisement being published in one or more newspapers, at least six dċays before that fixed for the sale.

The owners enjoy no right of preference in the sale by licitation. There is, however, in fact an important concession of the courts which gives a benefit to the bidder with the highest bid, when he is a co-owner. Although not expressed in the law, it is accepted in practice and court rulings that when the common property in a sale by licitation is awarded to a previous co-owner, he will only be required to deposit in court the proportionate price of the share or shares which he didn't own.

One must note that the rules regulating the sale by licitation apply in the case of disputes which pertain to **the manner and form** of the sale by licitation, and not to disputes regarding **whether the property should be sold by licitation or not**. In the case wherein the owners are not unanimously in agreement as to whether the property should be sold by licitation, then **article 495A** is invoked, which will be hereunder discussed.

Article 518 confirms that sale by licitation made by mutual agreement of all co-owners is done through the terms according to the co-owners, without any judicial intervention;

518. (1) A sale by licitation which takes place with the consent of all the co-owners, is not subject to any formality, and may be made by means of any person and in whatsoever manner the co-owners may agree upon; but in any such case there is no sale until the highest bid has been accepted and, if the licitation is in respect of immovable property, until a contract is made by means of a public deed.

(2) The same rule shall apply where, although the sale by licitation has been ordered by a judgment, the parties agree to carry it out in a manner other than that established for judicial sales by auction.

In a sale by licitation, the entirety and whole of the common property is sold, and not parts thereof. It is only by exception that the court allows the deposit of the price not to be the whole, but a part, to reflect that share which the co-owner did not own previously to the sale.

Another important point emerging from the rules governing sale by auction is that **the bids start from 60% of the value of the Property, as considered by the Court to be the market value**, unless the court deems otherwise.

Once the highest bidder is accepted, the buyer has **7 days** to deposit the price by means of a schedule of a deposit (*ċedola*) in the registry of the First Hall, Civil Court. The remaining proceeds are then distributed amongst the co-owners depending on their respective shares.

New remedies to terminate Community of Ownership

495 (3) - termination by untouched inheritance

These remedies were added through Act 18 of 2004, which brought these new remedies to terminate ownership, governed by article 495 and 495A of the Civil Code.

495. (1) Each co-owner has the full ownership of his share and of the profits or fruits thereof.

(2) He may freely alienate, assign, or hypothecate such share, and may also, subject to the provisions of article 912, substitute for himself another person in the enjoyment thereof, unless personal rights are concerned:

Provided that the effect of any alienation or hypothecation shall be restricted to that portion which may come to the co-owner on a partition.

For the duration of the Community of Property, each co-owner owns his share (pro indiviso), in a way which includes also any fruits arising from his share.

Articles 495 (1) and (2) existed prior to Act 18 of 2004.

495 (1) holds that a co-owner has ownership over his share, as well as the right to receive fruits of his undivided share. The ensuing sub-article holds that the owner may freely transfer or sell (alienate), assign or hypothecate such share. He may also substitute himself for another person in the enjoyment thereof, unless the right is of a personal nature.

495(2) and Article 912 are referred to as the *ritratto successorio,* thus part of the law of succession. In our law of succession, the law holds that the heir has the right to acquire back a share of the inheritance if it has been sold to third parties who are not themselves original shares. This right only applies if the entire share of the transferor in the whole inheritance is transferred. With the exception governed by **article 912**, aside, a co-owner who has a pro indiviso share in common property can freely transfer or hypothecate (burden with a debt) his undivided share in the common property, subject to a very important ensuing proviso: **the effect of that transfer or hypothecation will be restricted to the portion of the common property which is assigned to the transferor on partition.**

This proviso holds the necessary consequence that if partition is not possible, then that transfer or that hypothecation can neve takes effect. The acquirer, in such a transfer, is taking a risk, that his acquisition never takes effect if the partition doesn't take place and if the common property is sold off.

The **consequence of such a transfer or hypothecation** is limited to the portion of the common property assigned to the transferor upon partition.

Edward Borg Olivier pro et noe vs notary dr Giorgio Borg Olivier et
First Hall, Civil Court, 12th September 1957

Il-konsorti li jittrasferixxu lil konsorti ieħor is-sehem tagħhom indiviż ta' fond formanti parti minn writ li għadu mhux likwidat, ma jistgħux jallegaw li ma għandhomx interess, jekk jiġu mħarrkin f'kawża fejn il-kwistjoni tkun dwar dak il-fond, għax ittrasferew sehmhom lil dak il-konsorti l-ieħor, għax dak it-trasferiment hu ta' natura kondizzjonali, u l-effett tat-trasferiment huwa limitat għax dak it-trasferiment hu ta' natura kondizzjonali, u l-effett tat-trasferiment huwa limitat għal dak is-sehem li jmiss lilhom fil-qasma, u sa ma din issir huma jistgħu jkollhom interess.

Maria Assunta Casha et vs Joseph Mary Cutajar et
Court of Appeal, 2nd March 2018

Il-wirt tal-ġenituri tal-partijiet nfetaħ fil-15 ta' Mejju 1994 u fil-25 ta' Settembru 1995, u l-kuntratti ta' bejgħ mill-imsejħa fil-kawża lill-atturi saru bejn l-1995 u l-2002, anqas minn għaxar snin wara li nfetaħ il-wirt (u qabel l-1 ta' April 2016, meta kien għadu japplika l-perjodu ta' għaxar snin). Dan ifisser li l-werrieta kienu għadhom mhux kom-proprjetarji ta' kull ħaġa fil-wirt, u għall-beni tal-wirt kien għadu japplika l-art. 946 tal-Kodiċi Ċivili. Għalhekk il-bejgħ mill-imsejħa fil-kawża lill-atturi għadu sallum taħt kondizzjoni sospensiva, kif imfisser fuq; l-art. 495(3) ma jolqotx il-każ tallum.

Article 495 (3) was added by virtue of Act 18 of 2004, creating therefore an exception to the rule of suspension of sale as governed by 495 (1) and (2). This provision holds that;

495 (3) Where the heirs in an inheritance continue to hold in common, property deriving from the succession for more than three years and no action has been instituted before a court or other tribunal for the partition of the property within three years from the opening of the succession and the portions of the heirs in the said inheritance are the same in respect of all the assets of the inheritance, each co-owner shall be deemed to be co-owner of each and every item of property so held in common:

Provided that this sub-article shall not apply:

(*a*) when property held in common is subject to any right of habitation, use or of usufruct, for such time during which such right is in force; or

(*b*) when the property held in common consists of property which of its very kind has of necessity to be kept indivisible; or

(*c*) when persons who are holding the property deriving from the succession in common agree otherwise:

In order for article 495 (3) to be applied and invoked, the following requirements must be satisfied cumulatively;

1) The state of community must have arisen **through succession**;

2) The co-heirs must have retained the common property in co-ownership after the succession take place for at **least 3 years**;

3) **No judicial proceedings** have been instituted within those 3 years f**or the termination** of the state of community; and

4) The shares of the co-heirs in the common property must be **the same** in respect of all the common assets.

When all of these requirements are cumulatively proven and satisfied, act 18 of 2004 has added an **irrebuttable presumption that every co-heir is the owner of his undivided share in every item of common property separately and independently from any other common property included in that state of community.**

If all the 4 requirements are satisfied, the law is giving each co-heir the benefit of an irrebuttable presumption that he has a one third undivided share in each and every item of common property, without any link to the other tenements. If one reads the debates for Act 18 of 2004 on this particular provision, there is explained that the purpose of the legislator was to eliminate completely the risk of the suspended sale when these 4 requirements are satisfied. It was limited to a community of property arising from succession because normally, people tend to dispute on everything in successions, and initially (upon enactment of act 18 of 2004), the 3 year period was a 10 year period.

The exceptions to 495 (3) are given in the proviso to the sub-article, which excludes application of the juris et de jure presumption;

495 Proviso: When 495(3) does not apply:

(*a*) when property held in common is subject to any right of habitation, use or of usufruct, for such time during which such right is in force; or

(*b*) when the property held in common consists of property which of its very kind has of necessity to be kept indivisible; or

(*c*) when persons who are holding the property deriving from the succession in common agree otherwise:

The irrebuttable presumption of an undivided share in each and every item of community of property separately from the other common property will apply. Thus **any transfer and any hypothecation of one part of the community of property will be valid and effective from the moment of its conclusion**.

Remedy 2 - 495A - Sale by the will of the Majority

The second remedy brought and introduced by Act 18 of 2004 holds and provides for the sale of common property according to the will of the majority of co-owners.

> **495A.** (1) Except in cases of condominium or necessary community of property, where co-ownership has lasted for more than three years and none of the owners has instituted an action before a court or other tribunal for the partition of the property held in common, and the co-owners fail to agree with regard to the sale of any particular property, the court shall if it is satisfied that none of the dissident co-owners are seriously prejudiced thereby, authorise the sale in accordance with the wish of the majority of co- owners regard being had to the value of the shares held by each co- owner.

This remedy is applied when:

4. The state of Community must have lasted for **more than 3 years**;
5. No co-owner has **filed proceedings for terminating the state** of community;
6. The co-owners **do not unanimously agree** on the sale of the particular property, but a majority agree to sell; and
7. None of the Co-owners will be **seriously prejudiced** by the conclusion of the sale.

Where the Court is satisfied that all 4 requirements are cumulatively satisfied, the court will authorise the sale of the property according to the will of the majority. Normally, a promise of sale agreement is signed with the prospective buyer, promising to sell the entirety of the Common Property. If the court approves, the sale takes place. The court will eventually ascertain that the applicants are collectively majority co-owners (all the individual shares must be identified), and in order to determine whether the dissident co-owners will or will not be seriously prejudiced by the proposed sale, the court will appoint a technical referee to visit the tenement to be sold, to present a valuation, and to give an opinion on any other relevant condition of sale (such as permit conditions). A dissident co-owner may contest the sale ***within 20 days*** from service of the application to them, as per **495A (5)**.

The dissident co-owners always have the right to contest the proposed sale. The content of the ruling of the court is set-out in sub-article 7 of 495A:

> (7) The court shall determine the application, and where it determines that the sale is to take place, it shall determine the price or other consideration for the sale and it shall further -
>
> (*a*) determine the time, date and place, when and where the transfer is to take place;
>
> (*b*) where the sale is to be effected by a public deed, appoint a notary to publish the deed;
>
> (*c*) appoint a curator, even among the co-owners themselves, to represent any of the co-owners who fail to appear on the notarial deed or other instrument of transfer.

One must note that this remedy **does not apply in cases of condominium or necessary community of property**. The procedure is initiated by means of a submission of a declaration to the First Hall Civil Court.

> **495A** (3) The application shall be served on the co-owners who do not agree with the sale as well as on curators to be appointed by the court to represent such of the co-owners who are unknown or who cannot be traced. The registrar shall cause a copy of the application to be published in the Gazette and in one daily newspaper.

Article 495A (3) holds that in the case of a co-owner who is **unknown** or who **cannot be traced**, the Court may appoint a curator to represent such co-owner's interests. In such cases, another co-owner must declare, on oath, that the unknown or untraceable co-owner is in fact unknown or untraceable, as per **495A (4)**;

> **495A** (4) A declaration that any co-owner is not known or cannot be traced shall be confirmed on oath by one of the applicants.

495A (9) interestingly allows the Court to apply the provisions of sale by licitation, at its own discretion;

> **495A** (9) If more than one co-owner opposes the transfer or where the court rejects the application in terms of sub-article (7), the court may, notwithstanding the other provisions of this article, order the sale by licitation of the property in accordance with the provisions of articles 521 and 522.

This extraordinary procedure in 495A **cannot be used for the majority owners who try to buy out themselves the minority owners**, as per the following judgements:

> ***Busy Bee estates Limited vs Anthony Formosa et***
> *Court of Appeal, 25th November 2011*
>
> "Il-legislatur ried li titnehha l-komunjoni tal-proprjeta` billi l-Qorti "tawtorizza l-bejgh skont ma jixtieq l-akbar ghadd ta'Kopja Informali ta' komproprjetarji fil-qies tal-valur tal-ishma li kull *komproprjetarju jkollu".* Fil-kaz in ezami t-talba tas- socjeta` rikorrenti ma hijiex biex isir bejgh pur u semplici izda li hija stess tigi awtorizzata "*tixtri*" is-sehem tal- komproprjetarji minoritarji "bil-prezz u l-pattijiet murija fuq prospett mehmuz mar-rikors" . Dan imur kontra l-ispiritu tal-artikolu in kwistjoni."

> ***Anthony Attard et vs Jennifer Calleja -*** *495A cannot be used to buy out minority co-owner*
> *Court of Appeal, 18th July 2017*
>
> Madankollu hu evidenti li l-legislatur ried li l-Artikolu 495A japplika meta l-ko-propjetarji jkunu se iridu jbieghu lil terzi u mhux mezz biex jakkwistaw il-propjeta` kollha huma a skapitu tal-ko propjetarji l-ohra. Kwindi l-Qorti ghal ragunijiet kompletament differenti minn dawk indikati fis-sentenza appellata, se tichad it-talbiet attrici.

Joseph Galea et vs Mary Ellis
Court of Appeal, 14th May 2010

In-novita` fil-ligi tinsab fil-fatt li issa, anke fejn ma hemmx unanimita` fost il-komproprjetarji, assi partikolari jista' jew jistghu jinbieghu minghajr il-htiega ta' qasma tal-beni kollha jew permezz tal-procedura tal-licitazzjoni. Imma din il-Qorti tirrileva, kif *del resto* gja` gie rilevat mill-ewwel Qorti, li dan kollu huwa possibbli biss permezz ta' dak li jinsab stabbilit u provdut fl-Artikolu 459A, u mhux, kif jippretendu zbaljatament l-appellanti, jigifieri in forza tal- Artikolu 495, kif abbinat fost ohrajn mal-Artikolu 494. Tajjeb li jinghad li l-Artikolu 494, li ghalih saret riferenza mill-appellanti in sostenn tal-validita` tat-tezi proposta minnhom, jirreferi espressament ghall-ghoti mill-Qorti ta' "provvedimenti mehtiega sabiex tigi amministrata u gawduta ahjar il-haga in komun" u m'ghandha x'taqsam assolutament xejn ma' awtorizzazzjoni biex wiehed mill- komproprjetarji jigi sfurzat ibiegh is-sehem tieghu lill-komproprjetarji l-ohra, minkejja l-fatt li l-maggoranza jkun hekk jaqblilha

Ethel Muscat et vs Mary Mangion et
Court of Appeal, 23rd November 2020

Illi qabel kull ħaġa oħra, il-Qorti tibda biex tgħid li l-appellati għażlu speċifikatament li jibnu din il-kawża fuq id-dispożizzjonijiet tal-Artikolu 495A tal-Kodiċi Ċivili. Din hija dispożizzjoni li tagħti rimedju partikolari fejn ġid ikun inżamm bejn għadd ta' sidien bla ma nqasam għal żmien ta' mhux anqas minn tliet snin. L-imsemmi artikolu jirreferi għall-każ fejn dak il-ġid jew xi parti minnu jkun instab il-bejgħ jew it-trasferiment tiegħu u xi wieħed jew uħud mis-sidien komuni jkunu naqsu li jersqu għall-ftehim. F'din il-proċedura, il-Qorti tingħata s-setgħa li tawtoriżża dak il-bejgħ u trasferiment, minkejja li ma jkunx ingħata l-kunsens ta' dak jew dawk il komproprjetarji, iżda sakemm b'dak il-bejgħ jew trasferiment ma tkunx se ssir ħsara lill-interessi tal-imsemmi sid jew sidien;

The application in the case of an action by **495A** must be filed **against the dissident co-owners** or curators representing unknown co-owners, who must in turn present their pleas and exceptions against the selling of the property. If the court is satisfied that all the requirements are proven that the dissident co-owners will not suffer any serious prejudice if the sale goes through, then it will authorise the applicants to proceed to the sale and appoint curators to appear on the deed of sale on behalf of the co-owners who fail to attend for the publication of the deed.

In practice, this provision is not very easy to apply. One of the major defects underlying this procedure is that the prospective buyer is not part of the process, and thus has no say in the conditions of the deed of sale. Thus advising prospective vendors to apply this procedure involves the risk of procuring the expense of the procedure, in a manner which involves a lengthy procedure which may dishearten the prospective buyer, who may choose to cease his interest in purchasing. If the promise of sale agreement is for a term which is not long enough to cover the whole duration of the proceedings (which involve appeals), then the vendors may ultimately pursue the remedy for no realised benefit.

The Law of Easements

When discussing the right of ownership, with particular reference to s 320, we had affirmed that the right of ownership is the strongest, most complete and most extensive real right which a person can have over a thing within our Civil Law Tradition. We had also made a distinction between the owner and the possessor over a thing.

Let us envision ownership as a complete circle of rights which one may have over a thing. Easements falls under one segment of that circle - a fraction and determinant part of ownership. Thus easements, like ownership, are a real right which exists on the property itself, without including all the powers which the right of ownership contains. They will include only particular benefits/advantages, which often pertain to the subject matter of the easement.When speaking of easements, we speak of an advantage which the dominant tenement enjoys over the servient tenement, who is burdened with the corresponding obligation in favour of the dominant tenement, the content of which is the subject of matter of the particular easement.

Imagining a right of way (dritt ta' passaġġ), which sits between two adjacent tenements. Tenement A enjoys a right of way over tenement B, in addition to its whole spectrum of rights. This right of way is extraneous to the original benefits carried with ownership. The most complex aspect involved with easements is that easements are **not only a right over another tenement, but they are a right in favour of a tenement. Thus the relationship in an easement is between two** (or more) **tenements**. Thus the agent having the advantage of the easement is a tenement, the agent burdened with the easement is another tenement.

The provisions governing the law of easements tend to preserve their original drafting, as enacted by Sir Adrian Dingli's ordinances.

Article 400-488 are those governing the law of easements.

Defining Easements

400. (1) An easement is a right established for the advantage of a tenement over another tenement belonging to another person, for the purpose of making use of such other tenement or of restraining the owner from the free use thereof.

(2) The tenement subjected to the easement is called the **servient tenement;** and the tenement in favour of which the easement is created is called the **dominant tenement.**

Predial vs Personal Easements

Predial easements refer to easements **on land**. Such easements were distinguished from personal easements under Roman Law. Today, our law contemplates personal servitudes regulated as in Roman Law. For historical reasons, mainly owing to the French Revolution, the term *personal servitudes* do not appear in the Civil Code, yet the right of usufruct, use, and habitation are still regulated under the Civil Code, and despite them being traditionally classified as personal servitudes, they are not referred to as such by the Civil Code.

Predial Easements

Elements constituting Predial Easements

A fundamental rule governing predial easements is that the dominant tenement and the servient tenement must belong to different owners, and thus no person may have easements over his own tenement.

The elements constituting predial easements are:

1) Predial Easements are **real rights**;
2) The rights exist **between tenements** (between the dominant tenement and the servient tenement);
3) The tenements must belong to **different owners;**
4) The **subject matter** of the easement, which may be either to make use of the servient tenement or to restrain the owner of the servient tenement from the free use thereof.

With regards to the second type of subject matter of easements, we refer to *altius non tollendi*, which is the prohibition to raise the building in one's tenement beyond a certain height.

Creating Predial Easements

The 2 sources of predial easements are the law itself and by acts of man. Thus there are 2 classifications of predial easements: legal easements and conventional easements.

> **401.** Easements are created either by law or by act of man.

Legal Easements

The law that creates easements can be split into 2 subgroups, referring to **article 402:**

> **402.** (1) Easements created by law for purposes of public utility are established by special laws or regulations.
>
> (2) Easements are also created by law for private utility; and such are those established in the following provisions of this sub- title.

Thus legal easements may be split into easements created **for public utility**, and easements created **for private utility**.

Easements for public utility are created by instruments such as planning legislation, health legislation, and the Code of Police Laws. On the other hand, easements created for private utility are done so by the Civil Code, in **articles 403 - 453,** and are thus **exhaustively listed**.

Legal easements which are created for a **public utility** are created by virtue of Public Law, generally being an administrative act, or else which is governed by the Code of Police Laws. An easement created for a **private utility** are governed by the Civil Code.

Legal Easements made for a Public Utility

402. (1) Easements created by law for purposes of public utility are established by special laws or regulations.

(2) Easements are also created by law for private utility; and such are those established in the following provisions of this sub- title.

The Civil Code does not list or expressly list what the special laws and regulations governing such easements are. The traditional easements for public utility are generally governed by the Code of Police Laws (Chapter 10). This code originally set up the entire infrastructure of Malta, whether it be in relation to public roads, public health, construction rules, etc. In a much simpler reality and situation in Malta, all of these infrastructural and public domains were regulated by the Code of Police Laws. Today, many of the provisions enlisted in the Code of Police Laws are repealed, and several other provisions are highly outdated, especially where they were never revised. The repealed provisions were replaced in separate pieces of legislation by more detailed regulation. For instance, there is now legislation which sets up the Authority for Transport in Malta to govern regulations on public roads. There is an agency responsible for the Construction and Upkeep of the Roads (Infrastructure Malta), alongside the legislation which contains powers thereof. There is also very extensive legislation on the use of roads. Thus there is an indication as to why the original Legislation within the Code of Police Laws was repealed and transferred to other pieces of legislation. Within these vast pieces of legislation, one may find provisions which give rise to easements for public purposes.

For instance, certain Legal Easements created for Public Purpose are laid out in legislation pertaining to the Planning Act (S.L552.22 - Development Planning (Health and Sanitary) Regulations).

Where these public laws create rights and obligations between tenements, those provisions give rise and can be enforced in so far as Civil Law is concerned as legal easements for public utility.

Examples of Legal Easements for Public Utility

Looking at the Code of Police Laws, namely the provisions following article 97, one will find rules concerned with the Construction of Houses. Much of these rules are not enforced, but are still there. Article 114 provides for the obligation of a tenement to have a visible external sign containing its civic number of an outside wall. Article 117 provides for the duty of an owner of a building to keep it sewage connections in a good state of repair.

All of these servitudes are done not to benefit one tenement, but rather the surrounding tenements on a general level, thus rendering them easements serving a public utility. Under Planning Legislation (552) and the several subsidiary legislation enacted under it, one may find several legal easements, such as S.L 552.22. Another instance would be the Rubble Walls and Rural Structures (Conservation and Management) Regulations (552.01), which regulate the manner in which Rubble Walls should be constructed and preserved, again serving the general public interest. Another instance is S.L 552.15 regulating the Commercial Usage of Tenements, being Development Planning (Use Classes) Order.

Alexander Emenyan vs John Mousu pro et noe
Court of Appeal 28th February 1997

L-użu tal-fond servjenti li ma jkunx fil-parametri tal-permess mogħti jkun ukoll aġir abbużiv u illegali li jagħti lok għal rimedju lil min ikun ġie direttament preġudikat bih, basta l-abbuż ikun tali li jippreġudika notevolment is-servitu'

Michael Risiott et vs Carmel Bajada noe et
Court of Appeal 5th October 2001

Il-posizzjoni legali għalhekk jidher li hi li r-regolamenti tal- bini joholqu zewg relazzjonijiet : (a) wahda amministrattiva bejn l-awtorita' u dak li lilu jinhareg il-permess tal-bini, f'din ir-relazzjoni terzi ma jistghux jindahlu, u (b) relazzjoni civili tan-natura ta' servitu' bejn il-girien, sidien privati.

Din il-Qorti tikkondividi l-fehma tal-konvenut nomine illi s-servitujiet mahluqa mil-ligi ghall-utilita' privata huma dawk stabbiliti tassattivament bil-Kodici Civili.

Andrew Zammit et vs Joseph Pavia et - *public purpose easement must be created by law and by law only*
Court of Appeal 26th January 2018

*Lanqas ma jista' jingħad li jeżisti xi "servitu` għall- utilita` pubblika" kif jissotomettu l-atturi. Apparti l-fatt li mhux ċar x'iridu jgħidu l-atturi b'din il-fraži, ma jirriżultax minn xi Regolament jew Avviż tal-Awtorita` tal- Ippjanar li dan is-sit kellu jibqa' mhux mibni biex iservi bħala passaġġ għall-pubbliku. Żgur li servitu għall-entita` pubblika ma jistax jinħoloq b'att ta' twaqqiegħ illegali ta' fond. Ir-regoli tal-awtorita` kompetenti tal- ippjanar jistgħu forsi, iwasslu għall-ħolqien ta' servitu` (ara **Risiott v. Bajada** deċiża minn din il-Qorti fil-5 ta' Ottubru, 2001), pero`, mill-atti ma jirriżultax xi piż ossija limitazzjoni tad-dritt ta' proprjeta` imposta fuq fond servjenti a vantaġġ ta' fond dominanti.*

George Felice et vs Keith Attard Portughes et *- Development law as preserving public aesthetic*
Court of Appeal 30th September 2016

Fil-fehma tal-qorti l-ligijiet u regolamenti relatati mal-ippjanar isiru, kuntrarjament ghal dak li nsibu fil-Kodici Civili, biex jittutelaw l-interess generali biex ikun hemm fis-sehh mudell urbanistiku prestabbilit u mhux biex joholqu servitu favur il-privat.

When a development permit is issued, there is often a saving for **third party rights**. This means that in issuing the permit, and thus in upholding the application for a planning permit, the Planning Authority as a regulator has considered and applied the Administrative Law which is relevant for the purposes of that permit, and has also ensured that third party rights are not affected. Therefore the applicant would expect that once the permit is issued that there is no further objection or issues in any future cases. This is not always the case. Despite the administrative authorisation, easements may still affect property, and owners of tenements adjacent or close to the site where the development is to take place may have rights which can still be enforced against the tenement of such applicant. The developments authorised either cannot be effected or they can be effected with moderations. These "third party rights" can be privately enforced as easements.

Legal Easements for a Private Purpose

These easements are governed by the Civil Code. There are 50 provisions, stemming from article 403 to 453, and according to the ***Risiott vs Bajada*** judgement, this list of legal easements for private utility is **an exhaustive list**. The Law splits these easements into 5 groups with different subtitles:

Easements arising from the Situation of Property (403-406)

These 4 provisions create easements between neighbouring tenements (fondi li jmissu ma' xulxin) where those tenements are not situated at the same level. Thus the dominant tenement and the servient tenement are not physically situated at the same level (hemm diżlivell bejn il-fondi). There is therefore a higher tenement and a lower tenement.

Tenements at a lower level are **obliged to receive "such waters and materials as flow or fall naturally without an agency of man**".

> **403.** (1) Tenements at a lower level are subject in regard to tenements at a higher level to receive such waters and materials as flow or fall naturally therefrom without the agency of man.

The lower tenement cannot do anything to prevent such flow or fall, and the higher tenement cannot do anything to render such flow or fall more burdensome against the lower tenement. The lower tenement is considered the servient tenement, and the higher tenement is the dominant tenement.

The second easement contemplated by the law relates to a spring of water.

> **404.** Whosoever has a spring within his tenement may make use of it as he pleases, saving any right which the owner of a lower tenement may have acquired by title or by prescription.

One must note that these easements preserve their original drafting, penned by Sir Adrian Dingli.

If there is no other tenement which acquired a right on the spring through a deed or acquisitive prescription, then the tenement having the spring has full freedom to decide what to do with the water to the exclusion of all other neighbouring tenement.

Going back to tenements situated at different levels, articles 405 and 406 provide that;

405. (1) The owner of the higher tenement may cause the water which runs through the public road to be led into his own tenement, in preference to the owner of the lower tenement.

(2) In the case of owners of tenements placed on the same level, each of such owners may cause the water which runs on that half of the road, which is contiguous to his tenement, to be led into such tenement.

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

(*a*) to the person who requires the water for the use of man;

(*b*) to the person who requires it for watering animals;

(*c*) to the person who requires it for watering trees.

The higher tenement may cause water running through the public road to be led into that tenement in preference to a lower tenement. The only exception to article 405 is stipulated in article 406, depending on who needs to use the water. In article 406, we have an order of preference making exception to article 405, with such order being first where the water is required for human consumption, the second being where the water is required to be given to animals, and last where the water is necessary for watering trees.

Carmelo Wismayer noe vs Anthony Falzon noe et *- interpretation of "waters and materials flowing…"*
Court of Appeal 29th April 1996

Is-servitu' ta' stillicidju jorbot lill-fond f'liverll aktar baxx sal-punt li s-sid tal-fond superjuri ukoll, jekk ma jkunx hemm mnejn l-ilma tal-fond tieghu jmur fil-fond inferjuri, jista' dejjen jigi awtorizzat li jaghmel xi haga biex l-ilma mill-fond tieghu jaqa' wahdu naturalment fil-fond inferjuri. Mera l-awtorita' tiftah triq isir akkordju tacitu mas-sidien tal-fond latistanti li huma ma jigux disturbati fit-tgawdija tad-drittijiet taghhom bhala konsegwenza tat-tibdil. Biex ikun hemm il-kaz fortuwitu mhux bizzejjed li jkun avveniment insolitu, sproporzjonat u li jkun prodott mill-forzitan-natura, imma jehtieg li jkun inevitabbli b'mod li ma jistax jigi evitat bil-diligenza ordinarjatal-bonus pater familias.

Aldo Laferla vs Albert Mizzi noe et *- understanding "waters and materials flowing"*
Court of Appeal, 1st December 2006

illi ghalkemm kif jammetti l-attur stess huwa ma ssottomettiex il-pjanta tas-swimming pool ghall-approvazzjoni tal-periti tal-istess socjeta`, ma jirrizultax illi s-swimming pool kif kostruwita fil-fatt ostakolat in-"natural flow" stipulata mill-ligi bhala servitu reali gravanti l-fond ta' l-attur; kif gja inghad il-flow ta' ilma li rceva l-attur u li kkawzalu d-danni in kwestjoni ma kienitx in-nixxiegha naturali illi l-ligi timponi fuq l-attur illi jilqa' izda nixxiegha prokurata mill-fatt tal-bniedem – precizament b'rizultat tal- konfigurazzjoni tat-toroq krejata mill-istess socjeta` konvenuta.

Walls and ditches which separate neighbouring tenements (407-433)

In this part of the law we will speak about 1 particular wall between tenements which causes a lot of problems and gives rise to many disputes. This wall is known as the dividing wall or the party-wall (hajt divizojru).

A dividing wall is that wall which serves to separate two adjacent tenements. So the dividing wall is that wall which serves to separate two adjacent tenements. It is a dividing wall irrespective of who is the owner of that wall. Common wall is a misnomer for this wall because the party wall can either be exclusively owned by only one of the tenements which it separates, or it can be co-owned between the tenements which the wall separates. When referring to dividing wall and party wall we are being neutral and therefore not making a reference to whom the owner of that wall is. When referring to that wall as a common wall we should be meaning that the dividing wall is commonly owned between the tenements which it separates.

The easements which we have under this second group of legal easements (walls and ditches separating neighbouring tenements) by enlarge concern this dividing wall. We will thus be dealing with the rights and corresponding obligations which the law itself creates in regard to this partitioned wall in the interests of the neighbouring tenements and their owners and possessors.

The first easement we have in relation to such wall refers to its thickness;

407. A wall which serves to separate two buildings or a building from a tenement of a different nature must have a thickness of not less than thirty-eight centimetres.

This easement is **not enforced**. 38 centimetres is referred to as *il-ħajt dobblu*. The normal party wall separating a building from another building from a tenement of a different nature is a one leaf wall, being less than 38 centimetres thick. The situation is different because there is a the involvement of a legal easement for private utility, involving no public or administrative law enforcement.

The second easement in regard to the party wall is in relation to its minimum height.

408. A party-wall between two courtyards, gardens or fields, may be built of loose stones, but must be -

(*a*) three and one-half metres high, if it is between two courtyards, or between two gardens in which there are chiefly orange or lemon trees;

(*b*) two metres and forty centimetres high, if it is between two gardens in which there are chiefly trees other than those mentioned above; and

(*c*) one and one-half metres high, if it is between two fields.

This easement discusses the separation of courtyards, gardens or fields, depending on the nature of the party wall that is separating the tenements.

One must also consider the question of ownership over the party wall. We must also highlight whether and how the ownership of the party wall may be transferred as well as what are the rights and obligations of the owners of the party wall in relation to maintenance and upkeep.

Presumptions pertaining to the party wall

409. (1) In the absence of a mark or other proof to the contrary, a wall which serves to separate two buildings is **presumed to be common up to the top**, and, where such buildings have not the same height, up to one metre and eighty centimetres from the point at which the difference in height begins.

(2) The part of the wall above one metre and eighty centimetres from the height of the lower building, is presumed to belong to the owner of the higher building.

(3) Where there is a building on one side, and a courtyard, garden or field on the other side, the wall is presumed to belong entirely to the owner of the building.

Where the party wall separates two buildings of the same height, the party wall is presumed to be co-owned between the owners of the two buildings up to its top in the absence of a mark or proof to the contrary. Thus the presumption is one *juris tantum*.

The second presumption pertains to the situation wherein the party wall separates two buildings **not of the same height**. In such case, the law lays down a rebuttable presumption of co-ownership of that party wall between the tenements which it separates up to 1.8 Metres from the point where the difference in height begins.

The third presumption is that where a party wall separates a building from a tenement of a different nature (courtyard/garden/field) then that party wall is presumed to belong **entirely to the owner of the tenement,** as per **article 409 (3)**.

410. (1) A dividing wall between courtyards, gardens, or fields, shall also be presumed to be common, in the absence of a mark or other proof to the contrary.

(2) Where the wall separates courtyards, gardens or fields, placed the one at a higher level than the other, the part of the wall which, having regard to the lower tenement, exceeds the height respectively prescribed in article 408 is presumed to belong to the owner of the higher tenement.

The fourth presumption is that where a party wall separates courtyards, gardens, or fields, it is presumed to be common in the absence of proof to the contrary. Further, where such party wall is at a higher level than the other part of the wall, in a way wherein the distances as per 408 is exceeded, then that excess is presumed to belong to the owner of the higher tenement. The other part of the wall, by application of 410 (1) is presumed to be common.

Acquiring Co-Ownership over the Party Wall

If the party wall belongs to only one of the neighbouring tenements, can the other tenement acquire co-ownership rights in a pre-existing party wall, which is as yet exclusively owned by only one of the tenements which it separates? If yes then how? These questions create various disputes and problems, alongside the added difficulty that there is complete disparity between what the written law holds in response and what our courts have, for several consistent decades, held as an answer to these questions.

Looking at the law, the Civil Code answers these questions in article 418.

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

The written law replies affirmatively - the party wall can be rendered common so the adjacent tenement can force acquisition of co-ownership rights over it. The party wall can be rendered common, and the method, according to the law, for rendering a wall common is to **pay a compensation to the owner of the wall, with such compensation being computed via the formula contained in 418(1).**

The compensation is calculated as follows: 1/2 of the total value or 1/2 of the value which he wants to make common **and** 1/2 of the value of the land on which the wall is built **along** the expenses necessary to prevent damage being done.

The courts, for many decades, have completely departed from what is stipulated in article 418 (1) insofar as the method for acquiring co-ownership of the party wall is concerned, and have consistently stated that the method for rendering a party wall common is not through the payment of compensation but through **actually making use of the part wall**.

The right to receive compensation exists, but it is a completely separate and independent consequential right to the acquisition of co-ownership. It is not a real right, but a personal right, being a right of credit against who acquired co-ownership of the party wall. One may make use of the party wall, as per jurisprudential requirements, by integrating the party wall in such a manner that it becomes an integral part of the building in the neighbouring tenement. This is referred to *ingall*.

One should note that the person who wants to acquire co-ownership over the party wall **does not require consent of the neighbouring tenement who owns the party wall**. This right, per 418, is a real right which can be enforced without consent or approval from the original owner of the party wall. The is a form of **expropriation by private utility**, in the sense that it is the forced taking of ownership rights to serve not the general interest, but the particular interest of the adjacent tenement. The consideration for such forced taking is the compensation which is referred to in article 418 (1), yet this exists independently and consequently of the real right to co-own the wall.

This means that co-ownership rights in the party wall can be acquired and retained even if the compensation has not been paid and will be retained even if the right to receive compensation becomes time barred.

Busuttil vs Vella

The judgement described the right to co-own the common wall as a real right and as a *particular strain of expropriation for private utility*.

Emanuel Cauchi vs Charles Byers - *acquiring co-ownership through use of common wall*
Court of Appeal, 14th March 1995

*"*Huwa risaput li wieħed jakkomuna ħajt bil-fatt stess li jpoġġi kostruzzjoni ma' jew fuq il-ħajt u li l-kreditu favur il-proprjetarju jitwieled malli jsir l-appoġġ"

"Il-jedd tal-koproprjetarju li jgħolli l-ħajt komuni joħroġ espressament mill-artikolu 414 tal-Kodiċi ċivili basta li l-ispejjeż meħtieġa għat-tlugħ tiegħu jitħallsu minn dak li jagħmel ix-xogħol. **Pero' tali dritt ġie interpretat fis-sens li m'għandux jiġi eżerċitat u invokat sempliċement biex ikun ġie eżerċitat"**

Thus this case, as will be hereunder discussed, holds that one loses the right to acquire co-ownership over a party wall if such work done on the wall in order to acquire co-ownership is done for the simple reason of exercising such right frivolously, without deriving benefit to his property. This exception is not spoken about in the law, and is created by means of jurisprudential creation.

"***Il-Liġi għandha toħloq bilanċ mal-fatt li bl-innalzament ta' ħajt komuni tista' ssir ħsara lill-koproprjetarju ieħor"***

Mario Acquilina vs Pawlu Seychell
Court of Appeal, 20th February 1997

*"*L-appoġġ huwa wieħed mill-mezzi kontemplati mil-liġi tagħna bħala wieħed minn dawn il-forom ta' akkwisti ta' proprjieta'. Il-proprjeta' taħt is-sistema ta' dritt ċivili tagħna ma tiġix akkwistata biss permezz tal-kuntratt ta' kompro-vendita, imma hemm diversi modi oħra kif drittijiet reali jistgħu jiġu akkwistati mingħajr ma wieħed ikun jista' jitkellem fuq vendita; wieħed minn dawn il-modi huwa dak tas-servitujiet.

F'dan il-kuntest ta' min jinnota li d-dritt ta' l-appoġġ, ċjoe' li wieħed jirrendi in komun id-dritt ta' proprjeta' tan-nofs indiviż tal-ħajt diviżorju, jiffugra fil-Kodiċi Ċivili tagħna bħala wieħed mis-servitujiet maħluċ mil-liġi"

Terence Edward Cossey vs Mario Blackman
FHCC, 25th May 1965

*"*Kull wieħed mill-viċini għandu dritt assolut li jinalza l-ħajt komuni kemm irid, **basta mhux bi spirtu vessatorju**. L-għoli tal-ħajt preskritt mill-art, 445 tal-Kodiċi Ċivili mhuwiex ħlief l-altezza minima."

"Id-dritt tal-inalzament sanċit fl-Artikolu 451 tal-Kodiċi Ċivili huwa kondizzjonat biss għar-responsabilita' tal-innalzatur għal:

1) L-ispejjeż a) tal-kostruzzjoni b) tal-manutenzjoni u c) tax-xogħolijiet ta' rinforz,
2) Għar-rikostruzzjoni tal-ħajt kollu fejn il-ħajt jista' ma jkunx adatt, u
3) Għad-danni kaġunati lil viċin

"Dan id-dritt tal-inalzament tal-ħajt diviżorju ma jiddependix mill-kunsens tal-viċin l-ieħor"

Carmelo Bonnici vs Achille Spiteri
Court of Appeal, 15th October 1951

*"*Kull sid jista' jagħmel komuni, kollu jew biċċa minnu, ħajt li jmiss mal-fond tiegħu, villi jħallas lil sid il-ħajt in-nofs ta' kemm jiswa kollu, jew in-nofs ta' kemm tiswa l-biċċa li huwa jkun irid jagħmel komuni, u n-nofs ta' kemm tiswa l-art li fuqha l-ħajt ikun mibni, u jagħmel ix-xogħlijiet li jkunu meħtieġa sabiex ma ssirx ħsara lill-ġar"

"Din il-fakolta' tal- ġar li jpoġġi l-bini tiegħu mal-ħajt ta' ħadd ieħor hija mogħtija Lilu mil-liġi mingħajr il-revju kunsens tal-proprjetarju tal-ħajt, salv l-pbligu ta' l-utenti mill-fakolta' fuq l-imsemmija li jħallas lil sid il-ħajt dak il-kumpoens u li jagħmel dawk ix-xogħlijiet biex ma ssirx ħsara"

Aluminium Limited vs Earli Limited
Court of Appeal, 16th February 2004

This case made reference to **Teresa Schembri vs Joseph Delia,** wherein it was held that;

(a) Li l-gar ghandu l-fakoltà jirrendi komuni l-istess hajt u jappoggja mieghu;

(b) Illi sabiex jaghmel dan, is-socjetà konvenuta ma ghandiex bzonn il-kunsens preventiv tal-awtur tas-socjetà attrici;

(c) Illi bil-fatt stess tal-kostruzzjoni mis-socjetà konvenuta, din akkwistat il-komunjoni ta' dak il-hajt, u ghalhekk minn mindu s-socjetà konvenuta appogjat mal-hajt, inholoq favur is-socjetà attrici, jew l-awtur taghha, il-kreditu ghall- hlas ta' dak l-appogg u kontra l-appellat l-obbligu biex jissodosfa dan il-hlas;

(d) Illi ghalhekk a bazi ta' dan, fl-istess sentenza inghad illi a bazi tal-premess u konformement mal-gurisprudenza l-aktar ricenti, hija tal-fehma li d-dritt ta' sid il-hajt ghall-kumpens, li jinhareg malli l-vicin ipoggi l-bini tieghu mal- hajt, huwa dritt presenti [*recte*: personali] u ghalhekk applikat il-preskrizzjoni ta' hames (5) sninn.

Consequences of the right to compensation being classified as a personal right:

1) The action for the payment of compensation must be filed against the person who rendered the party wall common thereupon acquiring co-ownership of the party wall, even if he is no longer the owner of the adjacent tenement, unless the personal right has been validly assigned to the new owner;

2) The prescriptive period for the action for compensation is **5 years from the date of acquisition of co-ownership through the use of the wall**, with such prescription arising from article 2156 (f) of the Civil Code;

> **2156 (*f*)** actions for the payment of any other debt arising from commercial transactions or **other causes**, unless such debt is, under this or any other law, barred by the lapse of a shorter period or unless it results from a public deed;

3) The quantum is calculated at the time when the party wall was rendered common, and not when the payment was made effective;

4) There is no need for the compensation to be paid through a public deed, because it is a personal right, and not a real right; and

5) The court which is competent to decide such claim for compensation is the Court or Tribunal which, under the law of Civil Procedure, is competent ***ratione valoris,*** which refers to situations wherein the competent court is decided according to the money involved in the claim. Thus the Small Claims tribunal sees cases below 2500, the Court of Magistrates sees cases involving claims between 2500 and 15000, and the Civil Court First Hall sees cases above 15000. This is important because the judicial expenses before the different courts and tribunals vary.

Rights and obligations of the co-owners of the party wall

Every co-owner may erect beams in the common wall up to half it's thickness. Every co-owner may have his building lean against the common wall. Every co-owner may indent his own-walls into the common wall (Ingall). Every co-owner may raise the height of the common wall, provided that the co-owner who raises the common wall shall be responsible for the expense of the raising, for keeping the new part in a good state of repair, and for carrying out the works which are required to support the additional weight of the higher party wall and to secure its stability.

Where the common wall is not in a condition to sustain the additional height, the co-owner who wishes to raise its height must reconstruct it entirely at his expense and extend any additional thickness in his tenement. If damage is caused in the course of raising the height of the common wall, the co-owner carrying out such works must make good those damages. In regard to the additional height of the party wall, that too can be acquired by co-ownership by the tenement who did not raise the height, with the same rules of the Real Right of co-ownership and personal right to compensation apply the same in regards to the additional height. These rules are stipulated in articles 413-417;

413. (1) Every co-owner erecting a building may have it lean against the common wall and insert therein beams up to half the thickness of such wall.

(2) He may also indent his own wall into the common wall.

414. Every co-owner may raise the height of a common wall, but he shall be liable for the expenses necessary -

(*a*) for raising the height of the wall;

(*b*) for keeping in good repair the part raised above the height of the common wall;

(*c*) for carrying out such works as may be necessary for the support of the additional weight resulting from the raising of the wall, so that the stability of the wall will not be impaired.

415. Where the common wall is not in a condition to sustain the additional height, the person desiring to raise its height must have it entirely reconstructed at his expense, and the additional thickness must be taken on his own side.

416. In each of the cases mentioned in the last two preceding articles, the party raising the height of the wall is moreover bound to make good to his neighbour any damage which the latter may suffer in consequence of the raising of the wall or the reconstruction.

417. The neighbour who has not contributed to the raising of the height of a common wall may acquire co-ownership of the additional height by paying one-half of the cost thereof and the value of half the land used for the additional thickness, if any.

In relation to article 414, the law does not provide an exception, yet the courts tend to depart from this rule, in that they have repeatedly stated that the Real Right to raise the height of the party wall is **not absolute** insofar as if it is proved that the motivation of a co-owner of the party wall in extending it is to cause inconvenience to the other co-owner, without deriving benefit to his own tenement, then in that case the court can prohibit the exercise of this right to raise the height of the party wall.

Emanuel Cauchi vs Charles Byers *- exception to the rule that the right to raise a party wall is absolute*
Court of Appeal, 14th March 1995

Il-jedd tal-koproprjetarju li jgħolli l-ħajt komuni joħroġ espressament mill-artikolu 414 tal-Kodiċi ċivili basta li l-ispejjeż meħtieġa għat-tlugħ tiegħu jitħallsu minn dak li jagħmel ix-xogħol. **Pero' tali dritt ġie interpretat fis-sens li m'għandux jiġi eżerċitat u invokat sempliċement biex ikun ġie eżerċitat**

This is a judicial limitation to the right to raise a party wall as stipulated in article 414.

Repairing and maintaining the Party Wall

411. (1) The repairs to a common wall or its reconstruction shall be at the charge of all those who have a right thereto in proportion to the right of each.

(2) Nevertheless, every co-owner of a wall may relieve himself of the obligation of contributing to the expense of the repairs to the said wall or of its reconstruction by waiving his right of co-ownership, provided the common wall does not support a building belonging to him.

(3) Such waiver, where competent, shall not relieve the party making it of his liability for such repairs or reconstruction as may have been occasioned by him.

The expense for reconstructing or repairing the party wall shall be shared in a 50/50 ratio between the co-owners of the party wall. Article 411 (2) holds that one may be relieved of this obligation by **waiving his right of co-ownership, provided that the common wall does not support a building belonging to him**.

412. Where a common wall supports a building which the owner wishes to demolish, he may not release himself from his liability for the repairs or reconstruction of the wall by waiving his right of co-ownership, unless he carries out for the first time such repairs and works as are necessary so as to avoid causing to the neighbour any damage by the demolition of the building.

Thus the right to waive co-ownership of the party wall is not automatic and not necessarily always available, for this depends on whether the co-owner of the party wall is prepared to carry out the necessary works so that his building no longer supports or is supported by the party wall.

419. It shall not be lawful for one of the neighbours -
(*a*) to make, without the consent of the other neighbour any cavity in the body of a common wall;

(*b*) to cause any new work to be affixed to or to lean against a common wall, without the consent of the other neighbour, or, in case of his refusal, without having first determined by means of experts the necessary measures to be taken in order that the new work shall not injuriously affect the rights of the other neighbour;

(*c*) to deposit manure or other corrosive or damp substance in such a manner as to be in contact with the common wall;

(*d*) to heap earth or other matter against a common wall without taking the necessary precautions in order to prevent such heaps from causing, by pressure or otherwise, damage to the other neighbour.

Article 419 finds conflict with the Courts. The law holds that it shall not be lawful for one of the neighbours to make, without the consent of the other neighbour, any cavity (opening) in the body of a common wall. Jurisprudence adopts a radical position, wherein it is contended that co-ownership of the party wall is acquired by **actually making use of the wall**, without necessitating the consent of the original owner of the wall, and in practice, that use is made through cavities in the party wall.

Thus Article 419 builds on the method for acquiring co-ownership, as stipulated in article 418, yet the Courts adopt a totally different position, thus rendering these consequential provisions being interpreted differently in order to fit into the general interpretation of the courts in regard to the method for acquiring co-ownership of the party wall.

In fact, 419 (b) holds that it shall not be lawful for any of the co-owners to cause any new work to be affixed or to lean against a common wall without consent of the other neighbour. All of this is a *de facto* dead letter, in view of the position of the courts in regard to the manner in which co-ownership is acquired.

Article 419 posits 2 other prohibitions; the prohibition to deposit manure or corrosive or damp substances against the common wall, and the prohibition of heaping earth or other matter against a common law without taking precautions to prevent such heaps from creating pressure or damage to the other neighbour.

420. Any person may compel his neighbour to contribute to the construction or repair of walls separating courtyards, gardens, or fields, up to the height specified in article 408, regard being had to the nature and level of the tenement of the defendant.

A co-owner has the right to compel the other neighbour to contribute to the construction or repair of the party wall, with such right existing also in regard to a party wall separating courtyards, gardens, or fields. This obligation applies only up to the heights stipulated in article 408.

Where the tenements are not set at the same level, the owner of the higher tenement is bound to pay the whole expense of the construction or repair of the wall up to the level of his own tenement, and from that point upwards, up to the heights stipulated under 408, the expense shall be shared. The only way in which a co-owner may free himself from these obligations is to waive his co-ownership, as per 422.

422. Saving the provisions of article 418, where, in the cases referred to in the last two preceding articles, a neighbour is unwilling to contribute to the expense of construction or repair of the wall, he may release himself therefrom by giving up his half of the land on which the party-wall is to be built, and waiving his right of co-ownership of such wall.

Where, in a building, the different storeys in a building belong to different owners, each of the owners shall contribute for the repair or reconstruction of the party wall in proportion to the benefit which that owner derives from the part of the party wall requiring repairs or reconstruction, as per article 423;

423. Where the several storeys or other parts of a building belong to different owners, the contribution of each of the owners to the expense of the repairs or reconstruction which may be required shall be in proportion to the benefit which the respective part of the building derives from such repairs or reconstruction.

This provision **applies to buildings which are not condominia**, for such condominia are regulated by *a lex specialis* (**The Condominium Act, Article 4**, which holds that the rules of community of property in the civil law do not apply). This provision would apply for buildings where different storeys belong to different owners, which are not condominia.

What happens to pre-existing rights or easements where a common wall is removed and reconstructed afresh? This is governed by article 424;

424. Where a common wall or a house is reconstructed, any active or passive easement shall be maintained also with regard to the new wall or house, provided such easement is not rendered more burdensome, and such reconstruction is made before prescription has been acquired.

Article 424 holds that any such rights and easements shall be maintained in the newly reconstructed party wall, subject to 2 limitations: 1) that the rights and easements in the newly reconstructed wall cannot be more burdensome than the rights and easements prior to the erection, and 2) the reconstruction is made before prescription has been acquired.

427. (1) The person in whose building there are stairs leading to the roof, is bound to raise at his own expense the party-wall to the extent of one metre and eighty centimetres above the level of the roof.

(2) The portion of the wall above the level of the roof must be of the same thickness as the party-wall below such level.

(3) Where both neighbours have stairs leading to their respective roofs, each of them may compel the other to contribute half the expense necessary for raising the height of the party-wall as aforesaid.

Article 427 governs the opramorta, which is the part of the dividing wall which starts at the level of the roof upwards. In the case of adjacent tenements which are not of the same height, the opramorta starts from the level of the higher roof. The 1.8 metres, which is the minimum height of the opramorta, is largely disregarded. It can be enforce, and it is increasingly being enforced, however, being an easement for private utility, the owner of the neighbouring tenement can decide not to enforce it. If enforced, this part of the party wall must be 1.8 metres high and of the same thickness as the remaining part of the party wall.

Article 433 refers to the marking of the dividing line (boundary line) by the planting of trees, so what we have here is another way of marking the boundary line. It is a way which is usually used and makes sense to be used in rural areas.

433. The trees which are on the boundary-line between two tenements shall, in the absence of proof to the contrary, be deemed to be common; and each of the neighbours may demand that such trees be uprooted or cut if he proves that the damage they may cause to his tenement is greater than the benefit he himself may derive therefrom.

This provision is referring to a situation of property where the boundary line is not marked by a wall but is marked by trees. Therefore if one observes rural zones, this is very popular to see and sometimes there would be a rubble wall but most of the time there is no rubble wall and usually there will be trees marking the boundary lines – the boundary line that imaginary line which marks the end of one tenement and the start of the next is not permanently marked by a party wall but is marked by trees. In this case we have the presumption in article 433 that those trees are co-owned between the owners of the tenements which they are separating like all the other presumptions of ownersihp in connection to the party wall, that presumption is rebuttable.

If one may prove that the trees cause damage to his tenement is greater than the benefit which may be derived from them, he may demand the uprooting or cutting of the trees. The roots of the trees can cause serious damage, which is why the legislator sought to contemplate this remedy.

Easements of distances required in certain cases (434-444)

This group of legal easements has acquired increased importance in recent years. These easements speak of minimum legal distances which are imposed and which therefore should be respected if enforced between the neighbours. Generally, the purpose of these legal easements of distances for private utility is to **preserve and protect the safety of buildings and the privacy between neighbouring tenements**.

Carmel Zammit vs Anthony Sultana *- explanation of these easements of distance*
FHCC, 31st January 1994

"*Dan l-Istitut dwar id-distanzi f'ċerti każi hu intiż biex jirregola d-drittijiet u l-obbligi tal-viċini biss sal-punt li jassigura l-konvivenza paċifika fl-eżerċizzju tad-dritt tal-proprjeta'. Hu għalhekk li l-ġurisprudenza hi fis-sens li dawn id-distanzi għandhom jiġu osservati* ***jekk il-ġar jopponi*** *u inoltre li tali opposizzjoni ma għandhiex pero' tkun kapriċċjuża u vessatorja u bla raġuni fil-konfront tal-ġar.*"

There is no administrative enforcement of these easements. Where the owner of the tenement does not seek enforcement of these easements, then these easements are renounced and therefore not applied in practice. They are **private law rights.**

434. Every person may construct any wall or building on the boundary-line of his tenement, saving the right of the neighbour to acquire co-ownership of the wall as provided in article 418.

435. (1) Even where the construction is not made on the boundary-line, the neighbour may, if a distance of at least one and one-half metres has not been left, demand co-ownership of the wall, and may build up to, and against such wall, on paying, besides the value of half the wall, the value of the ground which he would thus occupy, unless the owner of the ground prefers to extend his building, at the same time, up to the boundary-line.

(2) If the neighbour does not wish to avail himself of such power, he must construct his wall or building in such a manner that there shall be a distance of three metres from the wall or building of the other party.

(3) The same rule shall be observed in any other case where the construction of the other party is at a distance of less than three metres from the boundary.

(4) The mere raising of the height of a house or wall already existing is deemed to be a new construction.

Thus, the party wall can be build **on the boundary line** (thus leaving no distance between the boundary line) which separates adjacent tenements. That party wall can be acquired in co-ownership by the owner of the neighbouring tenement by virtue of article 418.

Article 435 is either not applied or else not applicable in the circumstances of today's world. Article 435 provides for the situation wherein the party wall is built within 1.5 metres from the boundary line. In such case, co-ownership may still be acquired. This provision has the purpose of avoiding the creation of narrow passageways between buildings, since it allows the owner of an undeveloped tenement to extend his building into the neighbouring tenement up to the dividing wall. In such case, he would have to pay not only for half of the common wall, but also the value of the land which he would have thus acquired. If the distance between the boundary line and the party wall in the first developed tenement is 1.5 metres or more, according to this provision, a distance between the party walls of 3 metres must be left.

Articles **437 and 438** contemplate the planting of trees next to the boundary line.

437. (1) It shall not be lawful for any person to plant in his own tenement tall-stemmed trees at a distance of less than two metres and forty centimetres, or other trees at a distance of less than one metre and twenty centimetres from the boundary between his tenement and that of his neighbour.

(2) Vines, shrubs, hedges, and all other dwarfed trees not exceeding the height of two metres and ten centimetres, may be planted at a distance of not less than forty-five centimetres from the said boundary.

(3) The neighbour may, unless the period required for prescription has elapsed, demand that trees planted at a lesser distance, or which, notwithstanding the observance of the aforesaid distance, are causing him damage, be uprooted at the expense of the owner.

(4) The court, however, may grant to the owner of such trees the option either to uproot them, or to cause ditches or other works to be made at his expense sufficient to prevent all damage to the tenement of his neighbour.

(5) The provisions of this article shall not apply in cases where the adjoining tenements are separated by a wall, provided the aforesaid trees, shrubs or plants are so kept as not to exceed the height of the wall.

By virtue of article 437 (5) holds that the article does not apply in the case wherein a wall is raised, provided that the trees, shrubs, or plants planted next to the wall do not exceed the wall's height. If the boundary line between the adjoining tenements is marked by a wall and the trees do not exceed the height of that wall, then these distances do not apply.

Where the easement is deemed to apply (there is not a wall, or else there is a wall but the trees exceed its height), then the distances stipulated by law vary in height according to the height of the trees; Tall-stemmed trees must be planted 2.4 or more metres away from the wall; and Other trees must be planted 1.2 or more metres away from the wall

If the trees are planted at a distance which is lesser than the minimum distance stipulated in sub-articles (1) and (2), the owner of the adjoining tenement can demand that they be removed. If the minimum distances have been respected but the trees are causing damage to the adjoining tenement, then their uprooting, unless there is a public law preventing it, can still be demanded. The only limitation, according to sub-article 437 (3) is where their planting has conferred a right by acquisitive prescription to the owner of those trees. If the owner can prove that the trees are causing damages and there are ways, without their uprooting, in which that damage can be reduced or eliminated, the owner of the adjoining tenement would have a right of action under the general law of obligations.

Sub-article 473 (4) holds that the Court may provide the owner of such trees to uproot or to cause ditches or other works to be made in order to prevent all damage to the neighbouring tenement. This is thus a confirmation that even if some sort of right has been acquired by prescription, if it may be proved that the trees are actually causing damage to the owner of the neighbouring tenement, then that owner has a remedy directed towards eliminating the cause of the damage or at least lessening on the causing of that damage.

Article 473 is an exceptional right in the sense that the owner of the adjoining tenement who is disturbed with the extension of branches onto his tenement or with the extension of the roots of trees into his tenement is granted the right to unilaterally cut off the branches and cut off the roots. Were it not for this provision, the conduct would amount to spoliation. The reason in regard to the roots is that the roots of trees can cause severe damage.

Terence Edward Cossey et vs Rosemary Bonaci et
Court of Appeal, 25th June 2015

In kwantu ghal raba talba sabiex il-konvenuti jottemperaw ruhhom mal-artikolu 437 u 438 tal-Kap. 16, jinghad fl-ewwel lok illi l-artikolu 437(5) jeskludi l-applikazzjoni ta' tali artikolu meta l-fondi li jmissu ma' xulxin huma mifruda b'hajt. Hu minnu illi tali dispost izid li basta li s-sigar, xtieli u pjanti jinzammu f'gholi li ma jaqbzux l-gholi tal-hajt u jekk jisporgu ghal proprjeta tal-garr, il-garr jista' jitlob li jinzabru (art. 438 Kap. 16).

Norma Magri et vs Alex Zarb et
First Hall Civil Court, 13th July 2017

Il-Qorti taghraf illi l-intimati ghandhom ragun meta jghidu li fil-kaz odjern huwa applikabbli l-hames sub-inciz tal-Artikolu 437 u dan peress illi l-proprjetajiet in kwistjoni huma divizi b'hajt. Ghalhekk, sakemm is-sigar u x-xtieli in kwistjoni jkunu qed jinzammu iktar baxx mill-hajt divizorju, id-distanzi msemmija fl-ewwel u t-tieni sub-inciz tal-istess artikolu, m'humiex applikabbli fil-kaz odjern.

439. It shall not be lawful for any person to dig in his own tenement, any well, cistern or sink, or to make any other excavation for any purpose whatsoever at a distance of less than seventy-six centimetres from the party-wall.

440. (1) Notwithstanding the observance of the distance prescribed in the last preceding article, whosoever makes any excavation, shall be bound to make good any damage caused by such excavation to his neighbour's building, provided such building has been constructed according to the usages and the rules of art prevailing at the time of its construction.

(2) Nevertheless, no liability for damages is incurred, if the excavation is made at the distance which the court, upon the demand of the party wishing to make the excavation, shall have fixed, according to circumstances, or if such party has executed such works as, according to circumstances, shall have been ordered by the court so as to avoid causing any damage to the neighbour.

Article 439 speaks of digging in one's own tenement, or to make an excavation for any purpose whatsoever. This is prohibited to subsist within 76 centimetres from the party wall.

Article 440 complements 339, adding that whosoever fails to adhere by the 76 cm distance is bound to make good any damage caused by such excavation to the neighbour's building. This remedy is enforceable only by the neighbouring tenement, and not by an administrative and authoritative entity.

If damage has been caused by the excavations, then that damage must be remedied. Article 440 provides a manner which may be used to eliminate the risk of having to make good damages where one is carrying out excavations. Thus, 440 (2) provides that there will be no liability for damages only if there has been judicial involvement prior to the carrying out of the excavations and the excavations have been carried out at the distance and in the manner stipulated in a court judgement.

Eric Fenech Pace et vs Bajja Developments Limited
First Hall, 14th October 2004

Fit-tieni u t-tielet eccezzjoni taghha, is-socjeta' konvenuta qed tissottometti li hi m'ghamlitx xoghol *a tenur* tal-artikolu 439, u, f'kull kaz, ix-xoghol li qed taghmel, huwa *"essenzjali"* ghal progett li qed tezegwixxi. Din il-Qorti tibda' tghid li dan l-ahhar argument tas-socjeta' konvenuta huwa ghal kwantu superfluwu u nieqes minn kull logika guridika, ghax essenzjali kemm hu essenzjali x-xoghol, dan irid isir konformi mal-ligi u b'rispett ghad-drittijiet u l- interessi tal-ohrajn. Is-socjeta' konvenuta, tista' qed tkun tippartecipa fi progett kbir fl-interess ta' hafna persuni, *pero'*, dan ma jintitolahiex tirfes id-drittijiet ta' anqas cittadin wiehed, li bhal kulhadd ghandu dritt ghall-harsien tal-persuna u l-proprjeta' tieghu skond il-ligi.

John Busuttil et vs Tapa Limited
Court of Appeal 31st May 2013

Mhux biss jirrizulta li "fil-parti l-kbira" sar thaffir b'mod li ma thallietx id-distanzaregolamentari (76cm, ai termini tal-Artikolu 439 tal-Kodici Civili) mill-hajt divizorju, izda anke fejn thalliet din id-distanza, l-eskavazzjoni ma sarx bil-galbu u giet ikkawzata hsara fil-fond tal-attrici. Kif qalet il-Prim' Awla tal-Qorti Civili fil-kawza **Mangion v. Borg**, deciza fit-3 Frar 1983, "min jikkaguna hsara bit-thaffir li jaghmel, nonostante li jkun zamm id-distanza legali ta' zewg piedi u sitt pulzieri, jibqa dejjem responsabbli ghall-hsara li jkun ghamel".

The Avoidance of Damage to Third Party Property regulations (S.L 623.06) is a public law piece of legislation which, despite not being directly linked to this easement, is the legislation regulating development and the administrative law requirements which have been added in the law in the recent years following the fatal incidents which we had in connection with excavations next to buildings.

Windows in the Party Wall or next to the Party Wall

425. It shall not be lawful for one of the neighbours without the consent of the other to make in the party-wall any window or other opening.

443. (1) It shall not be lawful for the owner of any building to open windows at a distance of less than seventy-six centimetres from the party-wall.

(2) In the case of balconies or other similar projections, the distance prescribed under sub-article (1) of this article shall be measured from the external line of that side of the balcony or other projection, which is nearer to the party-wall, to the internal line of such wall.

Here, we are speaking of openings in the party wall itself or close to the party wall. These openings can take different forms. They can consist of a window, a door, a balcony, or a *rewwieħa* (which is a smaller window the purpose of which is for ventilation).

Since we are speaking of easements for private utility, such easements are only enforceable by the owners of the tenements. If there is no objection, then the easement would be renounced.

Where the opening is done, it cannot be done within a party wall, and it cannot be done within 76 cm of the party wall.

In practice, the 76 centimetres for openings close to the party wall has increased in importance because of the frequency of adding new storeys to existing buildings. Those existing buildings can be condominia or not condominia, and whenever a new storey is added which includes the opening of windows either in a dividing wall or the opening of windows or doors and the construction of balconies or similar projections in new levels where those openings or projections are to be constructed close to a dividing wall. Therefore, the easement of distance under 443 has become increasingly important.

Here, again, the courts have intervened beyond the written law, and added **2 exceptions to the rules which we have stipulated in Articles 425 and 443**. In particular, jurisprudence has thus created exceptions to the prohibition against openings in a party wall as per article 425. The written provision makes no exception, yet the courts have admitted otherwise, positing 2 exceptions to the rule.

Exceptions to windows in or next to a party wall - created by jurisprudence

The justification which the courts give for making these 2 exceptions is that both openings, in these 2 exceptions, do not cause an inconvenience to the owner of the neighbouring tenement. Because of the lack of inconvenience (i.e lack of burden), the opening in these 2 scenarios is deemed not to constitute an easement, and to be capable of closure when it becomes a burden.

1. The *rewwieħa* / ventilator

The ventilator is **not a window**, both in regard to its physical features as well as its function. Physically, the ventilator is **smaller** than a window, it is **not located** at a height which would allow **overlooking** through it, and the purpose is not to overlook or to view the other side, but rather to ventilate. It is differentiated from a window because of its **dimensions, purpose, and location**. Because of these 3 aspects, the courts have established that where there is a ventilator, the owner of the neighbouring tenement who has not consented to it is **not prejudiced** by its existence, and thus his tenement does not suffer a burden by its existent.

Thus, **a constituent element constituting an easement, that of advantage or disadvantage, is missing,** and therefore the ventilator does not fall within the scope of the definition of easement under Article 425.

They are referred to under Italian law as *ventiere (rewwieħa) and luci (windows)*.

The consequence of these ventilators not constituting an easement is that when they actually become a burden for the owner of the neighbouring tenement, the owner can request and enforce the closure of that opening. That point in time is referred to by the court as the *point in time when the owner of the neighbouring tenement needs to develop his tenement, and thus there requires the closure of this opening*

All of this process does not apply to a window, because a window falls within the prohibition in article 400 and constitutes an easement. Therefore, it burdens the neighbouring tenement.

Angelo Micallef vs Giuseppe Muscat - *Difference between windows and rewwieħa*
5th June 1950

L-aperturi fil-ħitan diviżorji jistgħu jkunu jew dawk li komunement jissejħu twieqi, jew dawk li colgorment jissejħu rewwieħat. Ġeneralment, is-servizz tagħhom jiddeterminahom; imma mhux dejjem faċili li jingħad jekk aperture hijiex tieqa jew rewwieħa.

Mentri t-twieqi jikkostitwixxu servitu', ir-rewwieħat ma jistgħu qatt jikkostitwixxu servitu', u jistgħu jinżammu miftuħa sakemm il-viċin ma tkunx irid jipprevali ruħu mid-dritt li tagħtih il-liġi li jappoġġa mal-ħajt fejn ikunu miftuħa sabiex jgħolli l-fond tiegħu. Mid-dispożizzjonijiet li għamel dwar il-ftuħ ta' twieqi fil-ħitan diviżorji, il-leġislatur jidher li ried jevita l-inkonvenjenzi ta' l-introspezzjoni, u fl-istess ħin rieq isalva f'ċerti limiti l-ingress tad-dawl u l-arja l-istabila konfinanti.

Emanuel Vella vs John Galea et
First Hall, 9th October 2003

Ghalkemm l-artikolu 425 tal-Kodici Civili jiddisponi li persuna ma tista' taghmel ebda fetha f'hajt divizorju, l-gurisprudenza tippermetti li ftuh ta' rewwiehat li, min- natura taghhom, ma joholqu ebda pregjudizzju lis-sid tal-fond adjacenti. It-toqob in kwistjoni ma joholqu ebda inkonvenjent lill-konvenut, u mhux mehtieg li, f'dan l- istadju, jitnehhew, pero', jigi enfasizzat li dawn it-toqob ma jistghu qatt joholqu servitu', u jekk jirrizulta li dawn, 'l quddiem, ikunu ta' inkonvenjent insopportabbli lil min ikun fil-pussess tal-fond sottostanti, jew jekk is-sid tal-fond sottostanti jkun jista' u jrid jizviluppa l-proprieta' tieghu biswit dawk it-toqob, dawn ikunu jridu jinghalqu.

2. The window overlooking undeveloped land

This exception says that a window in a party wall separating a building from undeveloped land can be opened without the consent of the owner of the undeveloped land. The reason is that for as long as the land remains undeveloped, that window will be considered not to cause any inconvenience or burden to the owner of the undeveloped land. The advantage or disadvantage as required in article 400 is missing, and therefore the window is not considered to be an easement.

However, the moment when the owner of the neighbouring tenement wants to develop his land, then that window can be closed, for it becomes an easement.

Joseph George Micallef vs Joseph Spiteri et
1st Hall Civil Court, 20th October 2005

Issa, hu veru wkoll li, skond il-gurisprudenza, hu permess li persuna tiftah rewwieha jew tieqa f'hajt divizorju, u dan minghajr ma taqa' f'dispett lejn il-ligi. Dan hu permess, *pero'*, meta it-tieqa u r-rewwieha jaghtu ghal fuq art mhux zviluppata ta' haddiehor, u dan gie koncess peress li tali aperturi li jkunu miftuha fuq art mhux zvillupata, ma jkunx ta' pregjudizzju ghas-sid ta' dik l-art u, peress li jitqiesu miftuha b'mera tolleranza, sid dik l-art ikun jista' jitlob li jinghalqu l-aperturi meta jizviluppa l-proprjeta' tieghu

Dan, *pero'*, jghodd ghal apertura miftuha fuq art vergni, jigifieri, art li ma tkunx ghadha giet zvillupata mis-sid, u ma japplikax meta l-art tal-gar tkun diga' giet minnu zvillupata ghall-uzu tieghu, *ancorche'* bhala bitha jew shaft.

Camilleri vs Curmi
Court of Appeal, 3rd July 1995

Tista' ssir eċċezzjoni għad-distanza msemmija fl-artikolu 443. Iżda biex tali modifika jew rinunzja tkun verament effettiva, hemm bżonn li din il-volonta' tirriżulta minn att pubbliku billi si tratta ta' dritt reali.

Dan l-obbligu jagħti dritt lill-viċin, li ma jħallix li twieqi jkunu aktar viċini lejn il-proprjeta' tiegħu minn dak stabbilit. Għalhekk din hija servitu'. Billi servitu' huwa dritt reali dawn ma jistgħux jiġu kkostitwiti jew mitlufa jekk mhux kif stabbilit mill-istess liġi.

Eavesdrop/stilliċidju (445)

445. Every owner shall construct the roofs of his building in such a manner that the rainwater shall not fall on the neighbouring tenement.

Article 445 refers to the counterpart to the provisions of articles 403-406, which speak of natural environments without the agency of man and the rights of water. Article 445 inversely speaks of an easement which compels the owner of a tenement to direct rainwater to fall onto his own tenement.

Under the older laws under the Code of Police Laws, every building should have a well or some other space where rainwater is collected. In such case, the roofs must be built in such a manner that rainwater falling on them does not overflow or reach the neighbouring tenement.

Necessary right of way (446-453)

This is the last group of legal easements. The necessary right of way **is a legal easement**, which arises in the **specific circumstances outlined in these provisions**. A right of way can also be **conventional**, created by the will of man, but these will be tackled later.

When we speak of the necessary right of way, we are speaking of a legal easement for private utility which is granted in the very specific circumstances mentioned in articles 446 - 453 to serve private function.

The legal easement of necessary right of way are granted in 2 circumstances, as explained in articles **446 and 447** of the Civil Code;

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

447. (1) Any owner whose tenement has no outlet to the public road, may compel the owners of the neighbouring tenements to allow him the necessary way, subject to the payment of an indemnity proportionate to the damage which such way may cause.

(2) Such right of way shall be exercised over that part where it will be least injurious to the person over whose tenement it is allowed.

The first scenario in which a legal easement for the right of way is granted is where access or way over a neighbouring tenement are required to carry out repair works over a wall or other work belonging to the neighbouring tenement or co-owned with the neighbouring tenement.

The second scenario pertains to access to a public road, when the neighbouring tenement owner may be compelled to give access to a right of way necessary to access such public road, in a manner least injurious to the person over whose tenement it is allowed. This easement is in favour of a tenement which is enclosed on all sides and which has no direct outlet onto a public.

This scenario arises most commonly in rural settings. The easement in the case of article 447 remains operative for as long as the tenement remains enclosed. This is to be exercised in the manner which causes the least damage. A question arises as to how the determination of which

tenement is to serve as the servient tenement is done. The choice of the servient tenement must **ensure the benefit of the easement for the dominant tenement** with the **least possible damage** to the servient tenements.

The direction, location, and with of the necessary way are set out by agreement or by the court in a judgement if there is contestation. The law itself does not provide for such ascertaining of width or direction of the way. These details must thus be agreed or set by the owners of the tenement in the particular circumstances. If this necessary right of way continues to be exercised for more than 30 years, it still retains its nature of a legal easement, and therefore it will still be extinguished as soon as the formerly enclosed tenement does not remain enclosed.

The way of exercising this legal easement (so the direction and width of the way over which access is exercised) can be acquired by **prescription**. This is set out in **469 (2)**

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

(2) Nevertheless, the easement of right of way for the use of a tenement may be acquired by the prescription of thirty years, if such tenement has no other outlet to the public road; and any other easement which, on the 11th February, 1870, was already acquired under previous laws, may not be impeached.

The right is dependent on the dominant tenement continuing to be enclosed on all sides, and for as long as that is the case, the legal easement will continue to exist, but the direction and width of the right of way can be acquired by prescription, so long as the legal easement is not extinguished.

With regards to indemnity, the courts have held that the quantum is either stipulated, or else determined by the court. As in the case of compensation for co-owners of the party wall, the courts have held that the right to receive the indemnity is a **personal right** which exists independently of the judgement of the easement.

John Cassar et vs Innocent Camilleri
Court of Appeal, 27th October 2017

L-appellanti konjugi Camilleri qed jipprovaw jinqdew bil-preskrizzjoni trentennali a tenur tal-Artikolu 469(2) tal-Kodici Civili, fejn wara li taht l-Artikolu 469(1) jinghad li din it-tip ta' servit ma tistax tinkiseb bi preskrizzjoni, fit-tieni subartikolu tinghata eccezzjoni ghal dik ir-regola, cio sakemm is-servit ta' moghdija ma tkunx favur fond li ma ghandux hrug iehor fuq it-triq pubblika, u hawnhekk l-appellanti konjugi Camilleri jqajjmu l-argument li l-barriera li huma akkwistaw fis-sena 1992 hija interkjuza.

No indemnity is payable if the enclosure on all sides is the consequence of a sale, exchange, or partition. The necessary right of way is extinguished once and for all with the opening of a new road or the incorporation of the enclosed tenement with a tenement which is contiguous to the public road. The distinction between the easement itself and the indemnity, as a right, is referred to clearly in article 451, wherein the law expressly states that the necessary right of way may continue to be exercised even if the action for the payment of the indemnity has become time barred.

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

Because it is a personal right, the prescriptive period is 5 years, pursuant to **article 2156 (f)**.

Edward Cauchi et vs S.O.C. & K. Company Limited
Court of Appeal, 29th April 2016

Illi din il-kawza tirrigwarda passagg minn sqaq li s-socjeta` konvenuta tghid li ghandha dritt tuza. L-atturi jghidu li dan il-passagg huwa *private alley*, izda s-socjeta` konvenuta issostni li hu sqaq pubbliku jew, fl-alternattiv, li minnu tgawdi dritt ta' servitu ta' passagg. L-ewwel Qorti cahdet l-eccezzjonijiet kollha tas-socjeta` konvenuta, iddikjarat l-isqaq wiehed privat u iddecidiet li ma giex pruvat servitu` ta' passagg minn fuq l-isqaq a favur is-socjeta` konvenuta.

Easements Created by Man

We shall explore how the owners of neighbouring tenements can create servitudes between them.

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

All easements which are not contrary to public policy, and which satisfy the requirements of the definition section in article 400, can be created by act of man. These are the only limits imposed on servitudes which can be created between the owners of neighbouring tenements: that it does not break public policy and that the requirements in article 400 are met. So long as these two conditions are fulfilled then the easement created by act of man is fine, valid, and can be enforced. In these cases, there is still a **dominant tenement, a servient tenement, a real right, and a relationship which exists between the owners of both tenements**. Within the law of obligations lies the notion of **freedom of contract**. Our law generally allows contracting parties to agree on the terms and conditions at their own free will, so long as that agreement is not in breach of some other law. The same principle applies to the creation of conventional easements. We shall first consider the classification of easements under law pursuant to articles 455 and 456. In the said articles we have six different classifications for easements created by man, which are as follows:

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

455. (1) Easements are continuous or discontinuous, apparent or non-apparent.

(2) Continuous easements are those the enjoyment of which is or may be continuous without the necessity of any actual interference by man: such as the easement of watercourse, eavesdrop, prospect and others of a like nature.

(3) Discontinuous easements are those the enjoyment of which can only be had by the actual interference of man: such as the easement of right of way, of drawing water, and others of a like nature.

(4) Apparent easements are those the existence of which appears from visible signs: such as a door, a window, or an artificial watercourse.

(5) Non-apparent easements are those which have no visible signs of their existence: such as the prohibition to build on a certain land or to build above a specified height.

456. (1) Easements are, moreover, affirmative or negative.

(2) Affirmative easements are those which consist in the right of making use of the servient tenement.

(3) Negative easements are those which consist in the right of restraining the owner of the servient tenement from the free use thereof.

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

Easements are **continuous** if their enjoyment is or may be continuous **without the necessity of any actual interference by man.** The examples which the law gives of continuous easements are the right of **watercourse**, **eavesdrop**, **prospect** (a window), and others of a like nature. These are servitudes whose advantage is continuous, and the owner of the dominant tenement needn't do anything to enjoy such an advantage. On the other hand, easements are **discontinuous** if their enjoyment can only be had by the **actual interference of man.** The examples which the law provides are **the right of way** (note that this is not the same as the necessary right of way, i.e where land is enclosed by tenements with no access to a public road), **the right of drawing water,** and others of a like nature. The distinctive feature of discontinuous easements is that the easement may only derive benefit if the owner thereof makes use of it.

An easement is **apparent** if their existence appears from **visible signs**. The law offers the **door**, the **window**, or the **artificial watercourse** as examples. An easement is **non-apparent** if they have n**o visible sign** of their existence. The examples which the law provides are the **prohibition to build on a certain land** (servitu non aedificandi) or the **prohibition to build above a certain heigh**t (altius non tollendi). These are easements which, if you look at the dominant tenement and the servient tenement, one will not see any indication of their existence. An easement is affirmative if they consist in the right to make use of the servient tenement.

An easement is **negative** if they consist in the **restraining** of the owner of the servient tenement from the free use thereof. Examples of negative easements are the altius non tollendi and the servitu non aedificandi Conversely, an **affirmative** easement is one which **permits** an owner from exercising a particular right, such as the right to make use of a benefit. These are the six headings of classification of easements which the law provides. The classification of any easement to be created by man under these headings determines the manner in which that easement can be validly created.

The Creation of Conventional Easements

The creation of conventional, easements may arise in one of three ways. **Article 457**, on the creation of continuous and apparent easements, states that:

> **457.** Continuous and apparent easements may be created -
>
> (a) by virtue of a title;
>
> (b) by prescription, if the tenement over which such easements are exercised may be acquired by prescription;
>
> (c) by the disposition of the owner of two tenements

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

> **469.** (1) Continuous non-apparent easements, and discontinuous easements, whether apparent or non-apparent, **can only be created by a title**; they **cannot be created by prescription or by the disposition of the owner of two tenements.**
>
> (2) Nevertheless, the easement of right of way for the use of a tenement may be acquired by the prescription of thirty years, if such tenement has no other outlet to the public road; and any other easement which, on the 11th February, 1870, was already acquired under previous laws, may not be impeached.

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

Otherwise (i.e if it is discontinuous or non-apparent), it can only be created by title. Taking into account article 457, it clear that there are three ways through which continuous and apparent easements may be created, which are through **virtue of a title**, **by prescription**, and by the **disposition of the owner of two tenements**.

Easements created by man arising out of title

By "title", the law means a public deed inter vivos or a public will as drawn up by a notary. In the case of a deed inter vivos the easement will only become valid and effective vis-à-vis third parties from the date of registration of the public deed in the Public Registry. If the dominant or servient tenement fall within a compulsory registration area under the Land Registration Act that public deed must also be registered in the Land Registry, and it is from that point that the easement exists in regard to third parties. There may be a specific contract for the creation of the easement, or the public deed can involve some other transaction, for example a deed of partition, creating at the same time easements burdening the land partitioned or a part thereof in favour of the remaining land. Where the servient tenement is subject to a right of usufruct the consent of the usufructuary for the creation of the easement is required if the easement effects the enjoyment of the tenement by the usufructuary, if he consents then the easement will be valid even if there is such a diminution by the easement of the usufructuary's enjoyment (pursuant to article 459). Where the servient tenement is co-owned, the valid creation of the easement requires the unanimous consent of all the co-owners.

> **461.** An easement granted by one of the co-owners over an undivided tenement, shall be deemed to be fully established as soon as the grantor becomes the sole owner of the tenement.

If the consent of all the co-owners is not forthcoming the easement will bind only the co-owner who constituted it and its existence will remain in abeyance until all of the other co-owners offer their consent to it.

> **460.** (1) An easement granted by one of the co-owners of an undivided tenement, shall not be deemed to be established until the other co-owners shall have also, jointly or separately, granted it.
>
> (2) Any grant made under any title whatsoever by one of the co-owners remains in abeyance until a like grant is made by all the others.
>
> (3) Nevertheless, any grant made by a co-owner, independently of the other co-owners, shall operate so as to restrain not only the grantor but also his successors, even if singular, or any person claiming under him, from obstructing the exercise of the right so granted.

The public deed usually contains the identifications of the dominant and servient tenements through the reference to a plan, and in the deed itself we find a description of the easement per se. It is important that these details are registered in the Public Registry and, where applicable, in the Land Registry. Any easement created by act of man, irrespective of its classification, can be created by title.

Easements created by man arising out of prescription

The second mode of creating continuous and apparent easements (which does not apply to any easement which is not continuous and apparent) is acquisitive prescription, the mode of acquiring a right through the actual exercise of that right over a period of thirty years. Actually exercising a continuous and apparent easement for more than thirty years continuously without any physical or legal interruption, openly without any contestation, and clearly and unequivocally, will create the easement validly. Take, for example, a person who opened a window in the party-wall where one did not exist before and where it should not have been. This window stood there without opposition and openly for a period of thirty years. After the lapse of thirty years this becomes an easement created by man and remains valid even if it breaches a rule of the legal easements for private utility, since the private owners lose the right to bring any action after the lapse of 30 years.

462. (1) In order to acquire an easement by prescription, possession for a period of not less than thirty years is necessary.

(2) If the servient tenement is subject to entail, or belongs to a church or any other pious institution, the prescriptive period is forty years.

(3) In the cases referred to in this article, the person pleading prescription is not bound to produce a title, and no plea on the ground of bad faith can be set up against him.

The person pleading prescription is not bound to produce a title and no plea on the ground of bad faith can be made against him. In order for an easement to be created by acquisitive prescription, all of the requirements of the thirty-year acquisitive prescription must be satisfied. There is no requirement of good faith, nor of title, but possession for the whole required time **with all the requirements stipulated in article 2107** of the Civil Code must be proved. If the servient tenement belongs to the Church, the same requirements apply but the period of prescription is ten years longer. In the case of affirmative easements (those that consist in the right to make use of the servient tenement. The possession for the purposes of acquisitive prescription starts from **the day on which the owner of the dominant tenement proves to have started making use of the servient tenement.** In the case of affirmative and negative easements, we refer to **article 463:**

463. (1) In the case of affirmative easements, possession to found prescription commences from the day on which the owner of the dominant tenement has commenced to exercise the right of easement.

(2) In the case of negative easements, possession commences from the day on which the owner of the dominant tenement, shall have, by means of a judicial letter, protest, or other judicial act, restrained the owner of the servient tenement from the free use thereof.

The burden of proving all of these requirements under articles 462 and 463 always fall on the owner of the dominant tenement who contends that an easement has been created in favour of his tenement by virtue of acquisitive prescription.

Article 469 establishes the types of easements which **cannot be acquired by prescription**;

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

(2) Nevertheless, the easement of right of way for the use of a tenement may be acquired by the prescription of thirty years, if such tenement has no other outlet to the public road; and any other easement which, on the 11th February, 1870, was already acquired under previous laws, may not be impeached.

Joseph Zammit et vs Carmelo Psalia et *- easements created by man*
1st October 2001

Id-dritt ta'passagg u d-dritt li wiehed jiehu l-ilma minn fond proprjeta' ta' terzi persuni, huma servitujiet li jnaqqsu d-dritt tal-godiment liberu tal-fond servjenti ghas-sid tal-istess fond. Dawn it-tipi ta' servitu huma minn dawk hekk maghrufa bhala *servitujiet mhux kontinwi* billi ghall ezercizzju taghhom hu mehtieg il-fatt tal-bniedem (Art. 455(3)). Skond l-artikolu 469 (1) tal-Kap 16 servitujiet mhux kontinwi, ikunu jew ma jkunux jidhru, "jistghu biss jigu stabbiliti b'sahha ta' titolu." L-istess artikolu jaghmilha cara li tali servitujiet "*ma jistghux jigu stabbiliti* bil-preskrizzjoni jew bid-destinazzjoni tas-sid ta' zewg fondi." Ghalhekk minn dan jidher li l-allegat uzu ta' dan il-passagg, liema fatt huwa kontestat, qatt ma jista' jirradika xi dritt reali favur il-konvenuti.

Francis Baldacchino et vs George Debono et
16th January 2003

L-artikolu 469 (2) jipprovdi, pero`, li "is-servitu` ta' moghdija ghall-uzu ta' fond tista tinkiteb bil-preskrizzjoni ta' tlettin sena, jekk dan il-fond ma jkollux hrug iehor fuq it-triq pubblika". Is-socjeta' konvenuta tallega li ghall-istalla fit-tieni sular m'ghandiex access iehor ghaz-zwiemel jekk mhux minn fuq ir-rampa u minn gol-arja ta' l-atturi. Il-bzonn ta' access minn fuq art ta' haddiehor trid, pero`, tirrizulta minn cirkustanzi li jkunu independenti mill-volonta` ta' min qed jirreklama dak id-dritt; proprjetarju ma jistax, hu stess, johloq sitwazzjoni fejn ikollu bzonn access minn fuq l-art tal-vicin, u mbaghad jinsisti li l-vicin jikoncedilu dak id-dritt. Fil-kawza "De Giorgio vs Zammit Tabona", deciza minn din il-Qorti fil-15 ta' Ottubru, 1982, intaql li "biex l-interkjuzura ta' fond taghti lok ghall-moghdija fuq il-fondi vicini, hemm bzonn li dik l-interjuzura tkun l-effett ta' avveniment independenti mill-volonta tal- proprjetarju ta' dak il fond: le parti non possono far subire al vicino le conseguenze di una interclusione che risulta dal loro fatto".

John Cassar et vs Innocent Camilleri
Court of Appeal, 27th October 2017

Il-ligi tiddistingwi bejn servitujiet li jinholqu mil-ligi minn dawk li jinholqu mill-fatt tal-bniedem (Artikolu 401 tal-Kap. 16 tal-Ligijiet ta' Malta). Fil-kaz ta' servitujiet imnissla mill-fatt tal-bniedem, is-servitujiet jistghu jkunu kontinwi jew mhux kontinwi, li jidhru jew li ma jidhrux. Fil-kaz tad-dritt ta' moghdija huwa specifikat mill-istess ligi bhala servit mhux kontinwu, peress li ghall-ezercizzju tieghu hu mehtieg fil-waqt il-fatt tal-bniedem (Artikolu 455(3) tal- ap. 16). Dan it-tip ta' servit jista' jigi stabbilit biss b'sahha ta' titolu u ma jistax jigi stabbilit bil-preskrizzjoni jew bid- destinazzjoni ta'sid ta' zewg fondi (Artikolu 469(1) tal-Kap. 16). B'dan illi, s-servitu` tad-dritt ta' moghdija jista' jinkiseb bil-preskrizzjoni ta' tletin sena, jekk dan il-fond ikun interkjuz u ghalhekk ma jkollux hrug iehor fuq triq pubblika. (Artikolu 469(2) tal-Kap. 16).

Easements created by man arising out of the disposition of the owner of two tenements

The law defines this phrase in article 468 which states that;

> **468.** An easement is created by "the disposition of the owner of two tenements" if it is proved that the two tenements, now divided, belonged to the same owner, and it was such owner who placed or left things in the state which gives rise to the easement.

In this case, the dominant tenement and servient tenement must have both belonged, at some point in the past, to the same owner. In order for an easement to be created by the disposition of the owner of two tenements, the following requirements must be met;

1. The dominant tenement and the servient tenement must have belonged to the same owner, meaning in the past the dominant tenement and the servient must have belonged to the same owner.

2. The common owner must have made the things in the position which now gives rise to the easement.

3. The common owner must have subsequently transferred the right of ownership of at least one of the tenements to a different owner.

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

Godwin Azzopardi vs Paul Azzopardi *- easements created by disposition of the owner*
31st January 2003

Hu pacifiku illi "is-servitu` bid-destinazzjoni ta' missier il- familja ma tohrogx mill-intenzjoni imma mill-fatt.

Jidher ghalhekk li "r-rekwizit essenzjali ta' din ix-xorta ta' servitu` hu li z-zewg fondi, dak dominanti u dak servjenti, kellhom ikunu t-tnejn proprjeta` ta' l-istess persuna fil-mument meta jinholoq dan it-tip ta' servitu'.

Herman Magro vs Mark Anthony Borg *- easements created by disposition of the owner*
23rd January 2004

Illi għar-rigward ta' servitu' maħluqa "bid-destinazzjoni ta' sid ta' żewġ fondi"[25], il-liġi trid li jintwera (naturalment, minn min jinvoka favurih tali servitu') li s-sid qiegħed jew ħalla l-ħaġa fl-istat li minnu tnissel is-servitu. Kemm hu hekk, ġie stabilit li s-servitu' bid-destinazzjoni ta' missier il-familja ma toħroġx mill-intenzjoni imma mill-fatt, għaliex is-servitujiet predjali, kif l-isem innifsu juri, huma assoġġettazzjoni tal-proprjeta' u għalhekk, bħala ħaġa "*in odiosis*", għalkemm utli għall-fond dominanti, m'għandhomx jitnisslu ħlief minn fatti univoċi u ċerti

Biex dan iseħħ iridu jintwerew erba' (4) elementi li huma: (a) li l-post serventi u dak dominanti kienu, f'xi żmien, tal-istess sid; (b) li l-imsemmi sid qiegħed jew ħalla l-affarijiet fl-istat li minnu tnisslet is-servitu', (ċ) li l-postijiet jinsabu f'idejn sidien differenti, u (d) li meta l-postijiet ikunu għaddew għand sidien differenti, ma jingħad xejn dwar is- servitu'. Minbarra dan, huwa stabilit ukoll li din is-servitu' tirrigwarda biss dawk is-servitujiet li huma kontinwi[27] u dawk li jidhru[28]. Twieqi jaqgħu sewwasew taħt dawn l-għamla ta' servitu';

The Manner in which Easements are Exercised

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

470. The creation of an easement shall be deemed to include the granting of all that is necessary for the enjoyment of such easement with the least possible damage to the servient tenement. Thus the right of drawing water carries with it the right of way, and the right to cause water to be led over another person's tenement includes the right of way along the sides of the channel in order to watch over the flow of the water, and to clean the channel and make the necessary repairs.

Article 470 provides 2 criteria which serve to **balance the rights and obligations of the dominant and servient tenement in an easement relationship**. These 2 criteria are;

- An easement is deemed to include all that is necessary for its enjoyment; and
- With the least possible damage on the servient tenement.

This principle is the central rule for interpreting easements. Making out the advantage intended by the easement and without taking anything away from that advantage the easement is interpreted in a way which causes the least possible damage to the tenement which is burdened by the easement. The right of drawing water carries with it the right of way. The right to cause water to be led over another tenement also includes the right of way for the channel to pass as well as to clean and make repairs thereto. As the examples are showing the easement is interpreted to include any accessory right which, in practice, is necessary for the dominant tenement to take the full advantage of the easement. Anything which may be required for the effective exercise of the easement and for taking the advantage intended by the said easement is included as an accessory right in the easement itself.

471. Any person to whom an easement is competent may carry out at his expense and in such manner as to cause as little inconvenience as possible to the owner of the servient tenement, the works that are necessary for the exercise and preservation of the easement.

The owner of the dominant tenement has the right and the duty to carry out at his expense any works which may be required for the exercise and preservation of the easement causing the least possible damage to the servient tenement. Where the owner of the servient tenement is required by his deed of title to bear the expense for the exercise and preservation of the easement that obligation is a real obligation and will continue to bind the servient tenement irrespective of who is its owner. The owner of the servient tenement cannot do anything to take away any part of the advantage intended by the easement in favour of the dominant tenement.

472. Where the owner of the servient tenement is bound, in the terms of the title, to bear the expense necessary for the exercise or preservation of the easement, such obligation shall remain attached to that tenement, even though it passes into other hands:

Provided that the possessor of such tenement may release himself from such obligation by abandoning, in favour of the owner of the dominant tenement, that part of the servient tenement over which the easement is exercised.

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

474. (1) The owner of the servient tenement cannot do anything which tends to diminish the exercise of the easement or to make such exercise more inconvenient. He may not alter the condition of the tenement, nor may he assign for the exercise of the easement any part of the tenement other than that over which it was originally established.

(2) Nevertheless, if the exercise of the easement in or over the part originally assigned has become more burdensome to the owner of the servient tenement, or if such owner is thereby prevented from carrying out works, repairs, or improvements in his tenement, he may offer to the owner of the dominant tenement a part equally convenient for the exercise of the easement, and the latter may not refuse it.

(3) The part of the tenement assigned for the exercise of the easement may likewise be changed upon the demand of the owner of the dominant tenement, if he proves that such change will be of considerable advantage to him, and will cause no damage whatsoever to the servient tenement.

The law places the burden on the servient tenement as small as possible without taking away any part of the advantage intended by the easement. If there is doubt as to the extent of the advantage intended by the easement, that is to say, what if the advantage of the easement were to be disputed between the dominant and the servient tenements, article 476 states that;

476. In case of doubt as to the extent of an easement, its exercise shall be restricted to what is necessary, having regard to the destination of the dominant tenement at the time the easement was created and to the convenient use of such tenement, with the least damage to the servient tenement.

This is maintaining the idea of keeping the damage to the servient tenement to a minimum without taking away any part of the advantage for which the easement was granted to the dominant tenement according to its destination and convenient use at the time when the easement was created.

Giorgio Zammit vs Francesca Borg *- extent of advantage*
24th June 1960

Billi wieħed jakkwista fond bħala li jgawdi dritt ta' passaġġ fuq fond kontigwu, ebda prova ma tidderiva favur tiegħu mill-att tal-akkwist; għaliex id-dikjarazzjoni tal-venditur fis-sens li l-fond minnu trasferit igawdi dritt ta' passaġġ fuq fond kontigwu, ma tiswa xejn bħala titolu li teżiġi l-liġi, jekk is-sid tal-fond pretiż serventi ma jkun ħa ebda parti f'dak l-att.

Louis Gauci vs Angelo Attard *- extent of advantage*
9th December 2002

Dejjem pero` ghandha tkun il-mira li filwaqt li tirrikonoxxi d-dritt tal-vantagg ghal fond dominanti, dan l-istess vantagg ma johloqx soggezzjoni zejda lil fond serventi;

Herman Magro vs Mark Anthony Borg *- extent of advantage*
23rd January 2004

tali servitu' huwa meqjus bħala eċċezzjoni għall-jedd ta' proprjeta' u għandhom jitqiesu għalhekk b'mod restrittiv, u għalhekk fejn hemm dubju dwar il-limiti ta' tali servitu', dan għandu jingħata tifsira kemm jista' jkun dejqa u żgur mhux kontra l-ġid serventi;

The Manner in which Easements are Extinguished

There are various ways in which an easement can be extinguished, and these are set out in articles 479 to 488. The simplest way in which any easement can be extinguished is through a **consensual renunciation to the easement expressed in a public deed which is registered in the Public Registry** and, where applicable, the Land Registry. This is essentially extinguishment through title, a public deed where the owner of the dominant tenement renounces to the easement and that renunciation is accepted by the owner of the servient tenement. The second way in which an easement can be extinguished is where the servient tenement is such that the easement can no longer be exercised unless it is restored to a state allowing for the exercise of the easement prior to the lapse of time required for extinctive prescription, pursuant to article 479;

479. (1) An easement is extinguished when the things subject thereto are in such a condition that it can no longer be exercised.

(2) Nevertheless, the easement will revive if the things are restored in such a manner that it can be again exercised, unless a period of time sufficient to raise a presumption of the extinguishment of the easement under article 481 shall have elapsed.

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

480. (1) An easement is extinguished where the dominant and the servient tenements become united in the ownership of one person.

(2) Where, however, a visible sign of an easement exists, and the owner disposes of one of the said tenements without there being in the contract any declaration as to the easement, such easement shall continue to be operative, actively or passively, in favour of, or over, the tenement so alienated.

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

481. (1) An easement is extinguished by non-user for the period of forty years, in the case of property belonging to the Government of Malta or to a church or other pious institution, and of thirty years, in the case of any other property.

(2) The provisions of this article shall not apply where the non-user was due to the conditions referred to in article 479 provided the owner of the dominant tenement could not, according to law, cause such conditions to cease.

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

Ester Degabriele et vs Joseph Rocco
26th February 1965

Fil-liġi tagħna, il-bażi u l-qofol tal-estinzjoni tas-servitu', hu n-non użu mill-proprietarju tal-fond dominanti u mhux neċessarju, fil-każ tas-servitu' kontinwa, illi l-att kuntrarju għall-eżeċizzju tagħha ikun ġie kompjut mill-proprietarju tal-fond serventi

The fifth way in which an easement is extinguished is when the servient tenement is acquired in full ownership by original title, pursuant to article 483;

483. In regard to a third party in possession of the servient tenement, the easement shall be extinguished by the lapse of the time required for the prescription of the ownership of the tenement itself according to the provisions relating to prescription under Title XXV of Part II of Book Second of this Code.

If the formerly servient tenement is acquired in full ownership by acquisitive prescription, therefore without any limitation of an easement, then any previously existing easement would be extinguished.

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

(2) Easements, however, imposed over the said tenements by the said persons shall be extinguished.

The Actions in the Area of Easements

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

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

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

Andrew Zammit et vs Joseph Pavia et *- actio confessoria servitutis*
26th January 2018

Minn dak appena citat jirrizulta ferm car u inekwivoku li z-zewg elementi li l-attur fl-actio confessoria servitutis irid jirnexxielu jipprova biex l-azzjoni minnu istitwita tirnexxi huma: **(a) illi hu huwa s-sid tal-**fond dominanti li jippretendi li jgawdi dritt ta' servitù fuq il-fond servjenti proprjetà tal-konvenut; u (b) li l-fond proprjetà tieghu effettivament igawdi s-servitù minnu pretiza

Illi kif jiddikjaraw l-istess atturi, in-natura tal-azzjoni tagħhom hija l-hekk imsejħa *actio confessoria*, u għalkemm forsi fid-duttrina Taljana hemm min jippermetti din l-azzjoni li ssir kontra min joħloq l-ostakolu għas-servitu` pretiż, anke jekk mhux proprjetarju, din ma hijiex il pożizzjoni ġenerali u lanqas dik lokali, li tesiġi li din l-azzjoni għandha tiġi istitwita kontra s-sid tal-fond servjenti.

Rudi Carbonaro et vs Samuel Spiteri et *- actio negatoria servitutis*
28th January 2022

Kif diġà ntqal, din tal-lum hija l-*actio negatoria*, azzjoni ta' natura petitorja fejn l-attur jitlob dikjarazzjoni li l-proprjetà tiegħu mhijiex soġġetta għal servitù favur proprjetà oħra.Sabiex tirnexxi din l-azzjoni ta' bilfors trid issir minn sid il-fond li jrid jillibera l-proprjetà tiegħu mis-servità, u kontra s-sid li jippretendi li jgawdi servitù fuq il-proprjetà tal-attur.

Carmel d'Amato et vs Baldacchino Holdings Ltd - *actio negtoria servitutis*
26th May 2021

L-'actio negatorja' hija azzjoni li s-sid jutilizza fejn jitlob lil Qorti sabiex tinnega lil-konvenut drittijiet konsistenti f'servitu' jew pizijiet ohra fuq il-proprjeta' tas-sid li l-istess konvenut ikun jivvanta

Possession

The basis of Possession is taken from Roman Law. Thus before delving into the technical aspects of possession, one must understand the role of possession in Civil Law. Possession is one of the bedrocks in Civil Law, for it is featured across various sections of the Code. It is largely based on the belief that possession is a question on control - a physical fact. The physical fact is a value which any Civilian Legal System protects.

Carbonnier has described civil law possession as conferring on the possessor *a series of blessings*. Under Civil Law, there is a clear distinction between the right of ownership and the fact of possession. ***Savigny*** further emphasises the significant distinction between **possessors** and **holders,** a distinction which is also reflected in Maltese law, as will be hereunder discussed.

Possideo quia possideo - 'I possess because I possess'. This is the basis of possession - that it is protected, in itself, through possession. Possession protects itself, through possession. Digging deeper, the Civilian Legal System has, at one of its fundamental basis, social peace - that possession must be protected within itself. It is thus linked with the principle that one cannot take the law into his own hands, which is why there exists actions protecting from arbitrary self-help.

More tangibly, possession plays the following important roles;

1) **Possessory actions** - *actio manutentionis* (action to protect) and the *actio spolii* (action to take back something dispossessed through abuse).

2) **Distinguishing between possession in good faith and possession in bad faith**. The former refers to when one genuinely believes that possession is rightfully his, whereas the latter refers to when one knows or ought to know that his possession is not lawful.

3) **Acquisitive prescription.** Possession determines ownership, depending on whether the thing is movable or immovable. This is also linked with good faith.

4) **Presumptions linked to acquisitive prescription.** For instance, if a person possesses on the basis of title, there is a rebuttable presumption that a person has possessed without interruption.

Good faith and bad faith plays an important role in the relations between a possessor and an owner. We must be aware that our Civil Code, following the structure of French tradition, is well-centred around the concept of possession. **Article 524 defines possession**.

The wider scenario of possession is the concept of ownership. Ownership is historically highly controversial, for ownership played a very significant role in history, featuring even in the French Revolution.

Defining Possession

524. (1) Possession is the detention of a corporeal thing or the enjoyment of a right, the ownership of which may be acquired, and which a person holds or exercises as his own.

(2) A person may possess by means of another who holds the thing or exercises the right in the name of such person.

(3) A person who has the detention or custody of a thing but in the name of another person, is called a holder.

Section 524 Civil Code elaborates upon possession. Its substance revolves around the detention of a thing, or the enjoyment of a right, so long as the thing or right is susceptible to ownership. 524 refers to the detention of a corporeal thing.

The detention of a thing - possessio

Generally, we know that a thing is something tangible. This thing is attributed a requirement - it must be susceptible to ownership. 'Detention', in this context, confirms the tangible nature of the thing. An element of physical power and control is thus highlighted - locking a key, the code to open a safe, etc. Possession means not only holding a thing, but also controlling it.

The enjoyment of a right - quasi possessio

Possession applies not only to corporeal things, but also to the exercising of rights. The exercise of a right is thus within the remit of possession, coined *quasi possessio*. The element of control is fundamental - possession is grounded in the materiality of physical control.

The ownership of which may be acquired

Because of the link of possession to acquisitive prescription, it is necessary that for possession to take place that there is a nexus between possession and the possibility of ownership. The thing or right possessed must be capable of acquisitive prescription. There is a link between private ownership - possession - acquisitive prescription. There must be potentiality of ownership.

Both in **Common Law** and in **Civil Law, possession is comprised of two elements -** the **material element (corpus or *factum*)** and the **intentional element (animus).** The Corpus refers to the control or detention, whereas the animus refers to the actions and behaviour that suggests ownership, the latter being also referred to as ***rem sibi habendi***. One must note that these elements, alone, do not constitute legal possession, in that each jurisdiction adopts different requisites as to what formally constitutes judicial possession. The Maltese Civil Code closely associates possession with prescription, in that our Article 2107 defines and establishes **the moment in which possession commences**.

One can possess in his name, but he may also possess in the name of another. The latter is referred to as the *detentor* (524(3). In the case of the *detentor*, the owner is possessing through someone else. In a situation of lease, you have a tenant, a detentor, and an owner. **The owner possesses through the tenant** (524(2)). Possession always has a reason. This reason is referred to as the ***causa detentionis,*** being the reason or cause of possession. We start from the assumption that there is detention. Then we must contemplate the causa detentionis - why does a tenant have control over a property? Why does he have detention over it? This is because of the title of tenancy, which is in this case the causa detentionis. A person without title has no causa detentionis and thus has no reason to remain in the tenement.

There is also another smaller difference, between technical and non-technical possession. Technical possession is ***corpus*** and ***animus***, and can have consequences for acquisitive prescription and other similar actions. Non-technical possession is wider, and refers to situations wherein someone is possessing indirectly or non-technically.

Presumption of Ownership - S 525

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

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

This is a *juris tantum* presumption. ***Possideo quia possedio*** may be therefore rebutted. Before it is rebutted, however, by virtue of article 525, **the possessor is presumed to be the owner**. If a person commences to possess in the name of another, there is a presumption that in the intervening period, the person has continued to possess in the name of another. **Thus 525 (2) establishes continuity in possession.** Article 525 (1) establishes **technical possession**, whereas 525 (2) establishes **non-technical possession**.

529. Actual possession shall not operate so as to raise a presumption of former possession unless the possessor has a title; in which case, in the absence of proof to the contrary, he shall be presumed to have possessed since the date of the title.

Article 529 holds that actual possession does not raise the presumption of possession unless there is a title. It must be read in conjunction with article 525. Possession today does not raise the presumption of continuous possession unless it is coupled with title. The moment of acquisition of possession is referred to as the ***adprehensio possessionis - the moment in which possession commences.***

Moment of Acquiring Possession

We must read all of this together with **article 2107,** which establishes the **moment in which possession commences** (i.e the *adprehensio possessionis*).

> **2107.** (1) Prescription is a mode of acquiring a right by a continuous, uninterrupted, peaceable, open, and unequivocal possession for a time specified by law.
>
> (2) Prescription is also a mode of releasing oneself from an action, when the creditor has failed to exercise his right for a time specified by law.

We must remember that the Civil Code, based on the Francophone tradition, is based on acquisitive prescription. 2107 (1) holds that prescription is a mode of acquiring a right. The term *right* here is wider and encompasses every right of property in commercio. 2107 (1) thus posits 5 requirements for prescription. These 5 requirements, together, constitute the ***possessio ad usucapionem***.

1. Possession must be **continuous**, meaning that it must be exercised on a regular basis. Continuity implies that there is no deprivation of possession, for the owner must continuously exercise such right for him to claim useful possession. When there is such loss of possession through violence or clandestinity, possession may resume lapsing upon cessation of such violence or clandestinity. The interruption of possession may be both natural and legal, with the latter referring to situations in which possession is challenged before a Court through legal acts. We will later on see in which cases possession may be *interrupted, suspended, or prevented*.

2. **Uninterrupted** possession ties into the element of continuity to the extent where if possession is interrupted, then continuity ceases. Interruption is closely related to the time required for acquisitive prescription to be triggered, yet it also pertains to the time required for an action to be filed before a court to institute an action.

3. **Peaceful** possession refers to the elements of violence and clandestinity, both of which are grounds to impugn useful possession. If one is dispossessed violently or in clandestinity, then the interruption does not reset the time requirements for acquisitive or extinctive prescription, for the lapse of time resumes following cessation of the violent act.

4. **Openness** in this regard points to the direction of clandestinity. Possession is considered to be open or public when it is not obtained through secrecy, thus when possession is done by means of visible acts. It is not necessary that such act be witnessed, so long as the owner exercises the right clearly.

5. There must be **no question** as to the possessor of a thing for such possessor to carry useful possession. A position must be taken and taken clearly, with a assertion being made that the possessor is exercising his right as if he was the owner. To this, we may refer to ***Halsbury's Laws of England***, wherein it is stated that the *corpus* is established when the possessor exercises a control over a thing in a manner which *excludes third parties*. There must be a strong and assertive control over the thing in question, in a way which satisfies unequivocal possession.

The function of these 5 elements are to ascertain when prescription begins lapsing. Once these are satisfied, then the possessor may begin the process of **acquiring ownership through prescription** (acquisitive prescription). Further, 2017 (2) posits and establishes the basis for **extinctive prescription**, in which one may be relieved of certain obligations or duties owing to a specified lapse of time, provided that a creditor has failed to exercise a right following a legally established time limit.

S 526, 527 and 2107 - Useful Possession

526. Acts which are merely facultative or of mere sufferance cannot found the acquisition of possession.

527. (1) In like manner, acts of violence or clandestine acts cannot found the acquisition of possession.

(2) Nevertheless, possession may commence when the violence or clandestinity ceases.

2107. (1) Prescription is a mode of acquiring a right by a continuous, uninterrupted, peaceable, open, and unequivocal possession for a time specified by law.

These 3 provisions, in many ways (if not in entirety) complement each other. The requirements posited in 2107 (1) are reflected in articles 526 and 527.

Time is fundamental both in determining ownership as well as in understanding the barring of the action (prescriptive extinction). Possession must be continuous and uninterrupted. These articles together found and establish the moment in which prescription commences. 526 and 527 together (**negatively**) serve as an obstacle to prescription, while 2107 defines (**positively**) at what point possession commences.

526 and 527 - what **does not constitute possession**
2107 - what **constitutes the adprehensio possessionis**.

A party cannot argue to have founded useful possession if it is founded on acts which are facultative, of mere sufferance, violence, or clandestine acts, by virtue of articles 526 and 527. Here, "facultative" refers to **acts of concession**, in that there is an element of tolerance. A facultative act is one which is surrounded by convenience and tolerance. For instance, a grown up who lives with his parents cannot expect to acquire by prescription the immovable property. This is confirmed by the reference to **acts of mere sufferance**, in that one who offers another hospitality is in no way transferring title to him, and that the latter's *causa detentionis* is not tied with intent to own, thus rendering him incapable of acquiring by possession, owing to the lack of unequivocal possession. It is often contended that **faculty** relates more to tolerance, while **sufferance** leans more towards passivity.

Per 2107, possession must be unequivocal. It must be undoubted. I may be allowed to live in your property because you tolerate me, but it does not mean that the property is yours. The ***causa detentionis*** in this case is **facultative** hospitality (526). In cases of violence and clandestinity, as per 526 (2), useful possession starts upon cessation thereof.

The underlying thinking of possession is social order, as well as the prevention of violent possession and the taking of the law in one's own hands. Thus violence does not found the ***adprehensio possessionis***. The same applies to clandestinity, which refers to secrecy.

This ties into 2107, for **violence** is reflected in **peaceable**, while **clandestinity** refers to **open**. Possession may not arise violently or clandestinely, for in such case the person deprived of such possession would be entitled to reclaim such possession by virtue of remedies such as the *actio spolii*. Further, the possessor would lose the good faith required to acquire by possession, unless 30 years have elapsed, as will be hereunder tackled. Additionally, A universal heir succeeds to the universality of rights and obligations of the deceased. That being said, upon cessation of clandestinity and violence, prescription may begin to lapse.

530. (1) Possession continues as of right in the person of a successor by universal title.

(2) A successor by a singular title, whether gratuitous or onerous, may conjoin his own possession with that of his predecessor in order to claim and enjoy the effects thereof.

Good Faith and Bad Faith

Different jurisdictions understand these terms differently. The English, for instance, make a fragmented and less-evident difference between the two. Thus we apply the Maltese tradition, adopted from the writings of Dingli. The question was whether possession was a state of mind or a state of fact. The French doctrine revolves around the state of mind - I must genuinely believe that what I possess is my own. The German School was totally different, and held that one must consider how you behave, and now what you believe. Good faith and bad faith are fundamental cornerstones underlying the Civil Code tradition. Dingli took a pragmatic middle way - article 531 (1). This article takes into considers the person's subjective belief of the ownership of his possession, as well as the circumstances surrounding that possession, which would render a person a possessor in bad faith if he could derive, from those circumstances, that the ownership belongs to someone else. Good faith is pivotal because acquisitive prescription may only be founded on good faith.

531. (1) A person who, on probable grounds, believes that the thing he possesses is his own, is a possessor in good faith.

(2) A person who knows or who ought from circumstances to presume that the thing possessed by him belongs to others, is a possessor in bad faith.

If doubts as to the ownership of the thing possessed arises after 9 years, then the prescriptive period is abolished. Good faith is not based on fantasy, but rather on **probable grounds**. These ground emanate from the circumstances surrounding the facts. Therefore this approach compromises the French belief with the German belief. One must note that Article 531 (2) holds that a person who **ought to know**, from the arising circumstances that the thing belongs to others is also deemed a possessor in bad faith,

532. Good faith is presumed, and the party alleging bad faith is bound to prove it.

Bad faith must be proven by he who alleges - ***onus propandi incumbit in ei qui dicit, non ei qui negat***. For the computation of title, there used to be a culture wherein it was assumed that 10 year possession by title was in good faith. Therefore where there was a gap, the tendency used to be that the 10 year period was a good acquisitive prescription done in good faith. This is no longer the case today, for bad faith must be proven by the alleging party. **Savigny** was fond of the argument surrounding the *subjective theory*, in that a possessor is distinguished from a holder (owner) of a thing according to the respective *causa detentionis*. One who possesses cannot acquire ownership through possession when his intention is not to own. On the other hand, **Lhering** adopts an *objective theory*, which supports the idea that the *corpus* refers to things done to a thing which an owner would do, whereas the *animus* is the mere intention to perform those ownership acts. Continental, mainly French, law tends to apply Savigny's subjective approach, purporting that the possessor must demonstrate *animus domini* in order to benefit from the legal effects of possession. It is for this reason that our Articles 526 and 527, speaking of acts of faculty, sufferance, violence, or clandestinity, are not deemed to found the basis and commencement for prescription. Such acts demonstrate an intention which steers away from the intent to acquire ownership, in turn indicating and suggesting bad faith.

Antonio Borg vs Giuseppi Zammit
28th March 1955

Il-mala fede hi n-negazzjoni tal-buona fede; hi l-istat ta' animu ta' dak li jaf, jew minhabba c-cirkostanza ghandu jahseb, illi l-haga li jipposjedi hi ta' haddiehor. Dawn is-sentenzi u l-artikoli relevanti tal-Kodici taghna **jpoggi element oggettiv u soggettiv** fl-element tal-buone fede. L-element oggettiv jikkonsisti **fil-fatt li l-akkwirent ma kienx jaf li l-oggett kien qed jigi trasferit minghand persuna li ma kienitx sidu.**

Possessory Actions

One of the important roles and functions of possession is that of the possessory actions, the point of them is that each with their own characteristics protects possession. The object of the possessory actions are to protect possession. There are a total of four, two main ones and another two which are minor. Possessory actions are those where one assumes the possession and they are a remedy given to the possessor, a remedy open to the possessor. Possessory actions are riddled with procedure, and so one must thread lightly. There is a legal distinction between **petitory actions** and **possessory** actions. The former refers to actions which establish and ascertain **ownership,** such as the actio rei vindicatoria, whereas the latter pertains to actions which reinstate or protect and enforce **possession.** In the case of possessory actions, the possessor alone is vested with the *locus standi* to trigger application of remedies, whereas in the case of petitory actions, such *locus standi* is given to the owner of the thing.

S 534 - Actio Manutentionis

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

This is an action for maintenance or protection in possession, where possession is threatened – this is why it is called the actio manutentionis, an action to be maintained in possession. Therefore this is not an action where possession has been lost (actio spolii). One must note that in order to be capable of exercising the *actio manutentionis*, one must be possessing with the **animus domini,** and not merely possessing as a holder.

Ricci held that **the actio manutentionis serves the purpose of avoiding the molestation of something in one's possession.** He also asserts that **the actio manutentionis** is a **real action** whereas the **actio spolii is a personal action.**

Molestation refers to a challenge interfering with one's ability to possess. The claimant must necessarily be a **possessor** of the thing molested, with the **intent to exercise ownership thereof**. The *animus domini* is proven through the owner's external acts which indicate the intention to be vested ownership of the thing possessed. Thus, the claimant must demonstrate intention ***animus in res habendi*** in order to succeed in an actio manutentionis claim.

The action must be brought within **one year** of the said molestation.

Giuseppa Spiteri vs Anthony Bezzina *- elements to the actio manutensionis*

L-elementi essenzjali rikjest mil-ligi ghall-*actio manutentionis a tenur* tal-artikolu 534 tal-Kodici Civili huma s-segwenti:

1. Il-pussess ta' haga mmobbli jew universalita` ta' hwejjeg mobbli;
2. l-atti li jikkostitwixxu l-molestja ghal dan il-pussess;
3. il-proponiment ta' l-azzjoni fi zmien sena mill-molestja.

The action may be instituted, as held by **Ricci**, by **any possessor**, even if the thing possessed was possessed in bad faith, or if the possessor is part of a community of property over the thing. However, jurisprudence suggests conflicting interpretation as to the extent in which *violence, clandestinity, and precariousness* render the action effective or applicable. ***Vella vs Boldarini*** also made the distinction between the actio manutentionis and the actio spolii, in that the former carries a conservative character, the latter is characterised by restoration. The case refers to Aubry and Rau, who hold that molestation, in this regard, pertains to any actions which disturb, directly or indirectly, someone else's possession. Such molestation is done with the animus contrarious, the intention to disturb the defendant's possession. In the case of possessory actions, the Courts will never delve into the question of ownership. This is what characterises and distinguishes possessory actions from petitory actions.

Carmel Sciluna et vs Angelo Scicluna et - *possessory vs ownership actions*

L-azzjoni petitoria tingharaf mill-azzjoni possessoria mill-att tac-citazzjoni u mill-ewwel difiza li jopponi l-konvenut. Jekk id-domanda tkun pogguta fuq il-pussess bhala fatt l-azjoni hija possessorja, jekk ikollha bhala fondament taghha l-offiza tad-dritt l-azzjoni tkun petitoria

Illi l-konvenuti pero', qed jeċċepixxu preliminarjament illi fil-fatt il-partijiet jokkupaw l-egħlieqi tagħhom b'titolu ta' lokazzjoni, u allura l-attur ma jistax jeżerċita l-azzjoni msemmija li ndubbjament hija waħda petitorja.

Emerenziana Bugeja vs Joseph Muscat et - *possessory actions will not question or establish ownership*

Il-qorti qalet sew meta qalet illi l-fatt li l-attriċi hija sid ma jfissirx bilfors li għandha wkoll il-pussess, għax sid jista' jiġi spussessat, għalkemm għandu jingħad illi l-proprjetà toħloq presunzjoni ta' pussess bħal ma l- pusses joħloq presunzjoni ta' proprjetà sakemm ma jintweriex mod ieħor. Il-qorti mbagħad qalet li l-attriċi hija sid mhux inkwilina sempliċement biex tgħid illi dak li ngħad fis-sentenza ta' Vella *v*. Boldarini ma jgħoddx għall- każ tallum, u mhux biex tgħid illi l-attriċi għax sid mela għandha l-pussess. Il-qorti fil-fatt qagħdet attenta li tgħid illi **ma kinitx qiegħda tiddeċiedi fuq kwistjonijiet ta' titolu,** "**għaliex mhux xogħol din il-qorti tagħmel din l-investigazzjoni f'kawża possessorja**"

This action serves as a preventative measure to safeguard and uphold possession. It is available to a possessor who asserts their status as such and faces threats or challenges to their possession, commonly referred to as molestation. The aim of this action is to counter disturbances to possession and ensure its continuity. Notably, the actio manutentionis is inapplicable once possession is lost, with the actio spolii being the appropriate recourse in such cases. The primary objective of the actio manutentionis is to maintain possession (manu tenere). These possessory actions are inherently procedural in nature, involving a petitioner seeking court intervention to halt disturbances to possession and safeguard its continuation, thus serving as a preventative measure against impending loss of possession.

"**Molestation**" in this context means any action that threatens or challenges the person's ability to keep using the property, but hasn't actually taken away their control of it. For example, if someone starts using another person's garage without permission or repeatedly sends legal letters telling them not to use something they're allowed to use, that would be considered molestation. Molestation can happen in different ways, either by physically blocking someone from using the property or through legal challenges. The legal recourse available is that within a one-year period following any instance of interference, the aggrieved party may request the maintenance of their possession, hence the invocation of the manutentionis principle. Each separate instance of interference gives rise to a distinct legal action, with the one-year timeframe commencing with each individual interference event. **Vella vs Boldarini** defined "Molestation" as the **contradictio**, whether of fact or of law, to possession of whatever nature. It manifests itself externally in an act, made against the possessor's will, accomplished with the 'animus contrarius'. The molestor acts against the possession, he hinders the possession or changes the enjoyment, without the molestor necessarily affirming for himself a contrary possession. Owing to the molestation existing, the plaintiff may demand protection over the thing being molested. In this action there is a presumption that the thing is not being taken and thus possession remains within the plaintiff. The action must happen **within one year of molestation**. Therefore, it is an action for maintenance of possession.

Exclusions to the Action

534… provided he shall not have usurped such possession from the defendant by violence or clandestinely nor obtained it from him precariously.

A proviso to the article holds that the plaintiff cannot exercise the actio manutentionis where he or she has obtained possession in the cases that the plaintiff has obtained possession either through violence or clandestinity or precariously. This exclusion is limited solely to the defendant, and not erga omnes. In other words, if A claims against B requesting protection from molestation, then A cannot exercise the action if A has obtained the possession violently or in clandestinity or precariously FROM B. The violent taking of a thing from C does not exclude A from instituting the action of a thing molested by B.

Violence or clandestinity was previously discussed. Violence refers to illegal and unregulated force, while clandestinity refers to secrecy. These are to be understood the same way in those definitions of violence and clandestinity which exclude useful possession. If these vices of violence or clandestinity relative between the plaintiff and defendant exist, then the action cannot be exercised.

With regards to **precariousness**, referring also to **Vella vs Boldarini**, we go back to Roman Law, which established the difference between Loans (Commodatum) and Precarium, with the latter meaning a loan revocable at will. Under Roman Law, a precarious holder of a thing conferred **no rights vis-a-vis the possessor, although he enjoyed the interdicts**. A commodatum has its own conditions and terms, precarium has no title and it can be called back at will of the grantor. In relation to the actio manutentionis, **Vella vs Boldarini** held that the exclusion of precariousness refers to any thing which may be recalled at will. Thus an action does not exist with regards to a thing which is molested, if such thing may be revoked at will. Courts tend to disagree with the statements of **Vella vs Boldarini.** Thus subsequent judgements adopt a different view to **Vella vs Boldarini,** stating that precariousness, in this context, refers solely to things possessed by virtue of a **precarious loan,** as governed by Article 1839 of the Civil Code, and not any thing which is *de facto* precariously given to the holder.

Following Vella vs Boldarini, precariousness was restricted to the Civil Code's understanding of the contract a precarium, which exists as distinct from a contract a commodatum and thus current meaning of precariousness is limited to the understanding of a contract a precarium. The wider interpretation adopted by Vella vs Boldarini is now abolished.

George Camilleri vs George Bonello *- exclusions to manutensionis*

Dwar l-element ta' *"pussess"*, din giet studjata mill-Onorabbli Qorti tal-Appell fil-kawza "Vella vs Boldarini", decisa fl-24 ta' Frar, 1967. F'dik il-kawza, l-Onorabbli Qorti tat interpretazzjoni wiesgha tar-rekwizit tal-pussess, u osservat li fis-sistema tal-ligi taghna, l-vizzju tal- prekarjeta, jeskludi l-azzjoni biss meta jkun fil-konfront tal-konvenut, u osservat li dan jirrizulta car mill-kliem *"minghandu"* fl-ahhar tal-artikolu. Dik l-Onorabbli Qorti qalet ukoll li dik kienet l-intenzjoni cara tal-legislatur kif jirrizulta min-noti ta' Sir Adrian Dingli dwar dan l-artikolu stess li jghamlu enfasi fuq is-sopressjoni tal-kelma *"legittimu"* li kienet tinsab fil-kodici taljan relattivament ghall-pussess manutenibbli.

Qabel ma inghatat din is-sentenza, il-gurisprudenza lokali kienet kontrarja, u kien jinghad li biex wiehed jirnexxi bl-*actio manutenionis* irid jipprova pussess ***animo domini*** fis- sens tal-artikolu 524(1) tal-Kodici Civili.

Mamo vs Camilleri - *departure from Vella vs Boldarini re precariousness*
23rd March 1962

"L-azzjoni ezercitata lanqas tista' tkun dik ta' manutenzjoni fil-pussess kontemplata fl-art. 571; ghas-semplici raguni illi l-attur hu biss kerrej tal-fond, cjoe' semplici detentur, mentri dik l-azzjoni tikkompete biss lil min hu possessor fis-sens veru tal-art. 561(1) tal-imsemmi Kodici

Recentement, il-posizzjoni regghet giet studjata minn din il-Qorti (Onor. G. Caruana Demajo) fil-kawza **"Aquilina vs Aquilina"**, decisa fit-8 ta' Frar, **1996**. Din il-Qorti ma qablitx ma l-interpretazzjoni moghti mill-Onorabbli Qorti tal-Appell fil-kawza "Vella vs Boldarini", u qalet li min m'ghandux pussess ancorche' "ta' liema xorta jkun"(ie. ukoll *in mala fede*), ma jistax jipproponi l-*actio manutentianis*. Ghalhekk, inkwilin, li ghandu biss *causa detentionis*, m'ghandux din l-azzjoni. Il-Qorti osservat li *"titolu prekarju"* fis-sistema Malti ghandha tifsira cara fl- artikolu **1839** tal-Kodici Civili, u, ghalhekk, m'ghandhiex tigi interpretata skond id-duttrina franciza (kif ghamlet l- Onorabbli Qorti tal-Appell fil-kawza "Vella vs Boldarini") fejn ghandha signifikat ta' *"ogni detenzione in nome altrui*"

Therefore the judicial shift from the interpretation applied in Vella vs Boldarini, in relation to precariousness, is that today, the Courts consider the understanding of *precariousness* to be confined to the type of contract stipulated under Article 1839 of the Civil Code, and not to any form of revocable lending, as understood in Vella vs Boldarini.

It is only a thing lent to the plaintiff by means of a *precarious loan* which precludes the applicability of the action, and not any thing lent precariously without the use of contract per 1839.

Stacy Chircop vs Maria Spiteri *- difference between actio spolii and actio manutensionis*

Jekk tqabbel l-artikolu 534 dwar l-actio manutentionis mal-art. 535 dwar l-actio spolii, tinnota li waqt li l-artikolu 534 irid"il-pussess ta' lima xorta jkun", l art.535 irid il-'pussess ta' liema xorta jkun, jew id-detenzjoni.' Huwa ovvju ghalhekk, li l-kliem "il-pussess, ta' liema xorta jkun ***ma jinkludix id-detenzjoni,*** *ghax li kien hekk, il-kliem '....jew id- detenzjoni' fl-artikolu 535 kien ikun superfluwu.*

The Courts, in distinguishing possession from ownership tend to refer to the Italian Author ***Alberto Trabucchi***, who asserts that the fundamental difference between the two notions surrounds the concept of *animus domini*. A possessor is someone who is vested with *animus domini*, a type of possession which may result in the acquiring of ownership, in which the possessor is possessing not out of tolerance, sufferance, of faculty, precariously, etc, but rather, for the sake of possessing, as validly established under article 2107.

This distinction is crucial because there have been cases wherein the Court disallowed the action to be brought by a plaintiff, simply because he was a detentor, and not a possessor. ***Mamo vs Camilleri,*** for instance, is one of such cases wherein the actio manutentionis did not succeed, since the plaintiff was a lessee over a land, and thus a detentor, not a possessor. This contrasts with the actio spolii, in which the mere holder of a thing may institute such action.

S 535 - Actio Spolii

The Actio Spolii, as opposed to the actio manutentionis, is open **both to the detentor as well as the possessor.** This action has canonical history. Spoliation, in the context of possession, is the taking of a thing not rightfully yours. The Latin translation of the term *spolium* is *to undress.* Upon reading 5 or 6 judgements that deal with the action, the principles emerge clearly. The crux of the actio spolii is the dispossession or any kind of detention which results in a loss of possession (despoiling) through **violence** or **clandestinity**. In such case, the remedy is the actio spolii, of reinstatement, the restoring of the situation prior to despoliation. The plaintiff's demand is the restoration of possession as it was before.

Possidesse spoliatum fuisse infra bimestre deduxisse - there was possession, possession was disturbed, proceedings were shortly commenced.

In the older judgements we will find the terms *spoll di ricende* and ***spoliatus ante omnia restituendum***.

The object of the actio spolii is the reinstatement of the possession of the object. The remedy is to reinstate and ensure possession is returned to the rightful possessor.

Civil Code **535.** (1) Where any person is by violence or clandestinely despoiled of the possession, of whatever kind, or of the detention of a movable or an immovable thing, he may, within two months from the spoliation, bring an action against the author thereof demanding that he be reinstated in his possession or retention, as provided in article 791 of the Code of Organization and Civil Procedure.

(2) Such reinstatement shall be ordered by the court even though the defendant be the owner of the thing of which the plaintiff has been despoiled.

Within Section 535, there is reference to Article 791 of the COCP, which discusses the procedure of spolium cases.

COCP 791. (1) The defendant in a spoliation suit brought within the period of two months from the day on which the spoliation took place may not raise any plea other than dilatory pleas, before he shall have restored the thing to its former condition and fully revested the party despoiled within the time which, according to circumstances, may have been fixed in the judgment, without prejudice to any other right appertaining to the defendant.

(2) The provisions of this article shall also apply in the case where a tenant has been dispossessed of the thing let out to him whether by the lessor or by a third party.

(3) The court shall limit its inquiry to the question of possession or detention, and to the question of spoliation.

(4) In a spoliation suit the depositions of witnesses given in criminal proceedings for an offence under article 85 of the Criminal Code for the same conduct concerned in the suit shall be admissible as evidence in the suit without prejudice to the right of the other party to cross-examination.

Article 791 COCP holds that the Court must limit its inquiry into the fact of possession / detention and the fact of spoliation and order reinstatement. The simple fact that you hold something in your hand, even if you know that it belongs to someone else, and thus without title, you may also bring the remedy of the actio spolii in the case of despoliation. It can be done with regards to a movable or an immovable, so long as the possession was disturbed by means of violence or clandestinity. The demand is reinstatement of possession, but it is barred by a 2 month time barre, as per **article 535**.

There are no exclusions to the action, unlike the case of the actio manutentionis, and thus anyone may bring an action against the author of the spolium.

Jurisprudence argued on whether the 2 months began lapsing upon the date of knowledge or the date of action, until it was finally and ultimately decided that **the 2 months begins to run upon the date of the despoliation, and not the knowledge of the victim thereof.** There is only one judgement which holds that the actio spolii begins to lapse upon the date of knowledge, but this judgement is not followed anymore.

Vin repellere legit - it is lawful and legitimate to forcefully take back something which has been forcefully taken away from you. The parameters within which this applies is not completely clear, but it must be mentioned nonetheless. This is important because the actio spolii is the forceful restoring of something which was unlawfully taken. The legal regulation thereof renders the forceful action thus lawful.

Article 535 (2) holds that the actio spolii remains available even if the thing possessed is owned by the defendant. The owner thus cannot bring the argument of title to defend the actio spolii. Furthermore, the reintegration in the action of spoliation is not in itself a barre to the exercise of any other possessory remedy. The fact that you have been reinstated does not preclude any possessory remedy to be subsequently exercised.

Alfred Cilia vs Philip Cilia et - *elements to actio spolii*

Illi mill-gurisprudenza tal-Qrati taghna jirrizultaw tlett (3) elementi rikjesti sabiex azzjoni ta' spoll privilegjat tirnexxi, u cioe':

i. **Actor docere debet possedisse** – pussess;
ii. **Spoliatum fuisse** – azzjoni spoljattiva li tkun saret bil-mohbi jew kontra l-volonta' tal-attur; u
iii. **Infra bimestre deduxisse** – azzjoni ghandha ssir fi zmien xahrejn minn meta **jkun sehh l-ispoll.**

An actio spolii may be defended by contesting the three elements, or else it may be defended by claiming procedural issues, such as Court Competence or jurisdiction or else via the defence of *legittimu kontradittur*. One must note that **the intention to despoil** is **not required**. This was emphasised in **Buhagiar vs Farrugia,** ***Azzopardi et vs Galea,*** and in ***Bonanno vs Bartolo et***,

Bonanno vs Bartolo et *- animus spoliandi not required*
5th October 1998

Fl-istess kuntest ma ghandux ragun fl-aggravju tieghu (l-appellant), rigwardanti l-allegat nuqqas ta' animus spoliandi. Fl-azzjoni de quo, cjoe` ta' spoll privileggat, l-aspett ta' animo spoliandi ma jidholx. Il-ligi taghna hija, a differenza ta' ligijiet ohra kontinentali, tali li tittutela l-pussess kontra kull spoll minghajr il-htiega tal-prova li l-ispoll ikun sar bl-intenzjoni specifika maghrufa bhala animus spoliandi.

One must note that jurisprudence has ascertained another **exception** to the *actio spolii*, being in relation to the **de minimis** rule.

D'Amato et vs Baldacchno Holdings Limited *- de minimis rule*

Fis-17 ta' Awwissu 2017 is-soċjeta` konvenuta wieġbet biex tgħid li l-elementi tal-azzjoni (l-*Actio Spolii*) ma jirrikorrux, u li bla preġudizzju għall-premess, l-azzjoni hija altament emulattiva u għalhekk għandu japplika l-prinċipju de minimis non curat praetor.

The de minimis rule holds that owing to the minimal nature of the claim, the Court should not delve into the particulars of the case, owing to the time constraints and to alleviate the workload off of the courts.

Margherita Fenech vs Pawla Zammit *- essence of the remedy to spoliation*
12 April 1958

'L-actio spolii hija radikata pjuttost fuq l-esigenzi ta' utilita' socjali milli fuq il-principju assolut ta' gustizzja hija eminentement intiza l-protezzjoni ta' kwalunkwe pussess u jigi impedut lic-cittadin privat li jiehu l-ligi f'idejh; b'mod li l-fini tagħha huwa dak li jigi restawrat l-istat tal-pussess li jkun gie skonvolt jew turbat.'

This case holds that the *raison d'etre* behind having a spoliation remedy is to **preserve social utility**, based on the principle of absolute justice which protects possession and which prohibits the arbitrary exercise of a pretended right, which would normally be tantamount to the crime of **ragion fattasi**.

Oreste Attard vs Russel Attard *- violent and abusive spoliation*
14 December 2023

Spoll vjolent u abbusiv: 'jikkonsisti fi kwalunkwe att arbitrarju li mar proprio jmur kontra l-persuna spoljata' u

'neanche e permesso in queste cause di spoglio di investigare la natura del possesso presso lo spogliato, se esso lo sia animo dominii o no perche' la legge non richiede che un possesso materiale di fatto.' Ghalhekk pussess qualunque, anki purament materjali u di fatto, anche qasir hafna u sahansitra momentanju huwa sufficjenti, basta' jkun univoku u ma jkunx bazat fuq mera tolleranza.

Philip Agius vs. Emanuel Agius *- notion of precariousness*
30th May 2014

'Innegabilment, it-tolleranza jew il-prekarju sakemm jibqgħu jezistu jiggustifikaw il-godiment fuq il-haga izda, una volta l-volonta' tal-koncedent li jtemm ir-rapport issir maghrufa, dan igib ic-cessazzjoni ta' dan l-istess dritt ta' tgawdija u mhux mistenni jew tollerat min, b'approfittar, jippretendi li jivvanta drittijiet proprji, li ma baqalux. L-uniku obbligu tieghu jibqa' dak tar-restituzzjoni lura tal-haga lill-koncedenti.

Paulina Stagno et vs. Carmelo u Frances Bugeja *- tolerance does not attribute rights*
6th October 2004

"Fil-verita' mill-assjem tal-provi din il-Qorti tara li l-konvenuti kienu qed igawdu l-garage merament b'tolleranza, kif spiss jigri fejn jezistu rapport ta' familjareta', hbiberija jew buon vicinat. Din it-tolleranza ma tattribwixxi l-ebda drittijiet mhux biss ghaliex in-natura taghha ma taqbilx mar-rabta legali li tnissel maghha n-necessita' tal-adempiment izda, wkoll, skont l-insenjament ta' Laurent

S 538 - Novis Operis Nunciasio

The remaining 2 possessory actions are available also to the possessor. The first, governed by article 538, which holds as follows;

538. (1) Where a person has reason to apprehend that in consequence of a new work undertaken by any other person either in such other person's own tenement or in the tenement of others, damage may be caused to an immovable thing possessed by him, he may bring an action demanding that such other person be restrained from continuing such new work, provided this shall not have as yet been completed and one year shall not have elapsed from the commencement thereof.

(2) The court, after summarily taking cognizance of the facts of the claim, may, according to circumstances, either restrain or allow the continuation of such new work, ordering such security as it may deem proper.

(3) Where the continuation of the work has been restrained, such security shall be in respect of the payment of any damages which may be caused by the suspension of the work, in case the opposition to the continuation thereof shall prove to be groundless.

(4) Where the continuation of the work has been allowed, such security shall be for the total or partial demolition of the work, and for the payment of the damages which the plaintiff may suffer, in case he obtains, notwithstanding that the work was allowed to be continued, a final and absolute judgment in his favour.

This action thus applies for work undertaken yet not complete. This is a procedure wherein the Court may either stop or restrict the works or else it may allow the works to be completed with an additional guarantee. The party instituting the action may also be ordered to provide a guarantee, rendering the situation non-unilateral. The defendant may be allowed to continue against a guarantee or else the work may be stopped, and in the latter case the plaintiff may be allowed to reimburse for damages. This action is, in some ways, similar to a mandate in Civil Procedure referred to as the warrant of prohibitory injunction, which is a precautionary court order whereby a party is ordered not to do something.

S 539 - Actio de damno infecto

539. Where any person has reasonable cause to apprehend any serious and impending damage to a tenement or other thing possessed by him, from any building, tree or other thing, he may bring an action demanding, according to circumstances, either that the necessary steps be taken to obviate the danger, or that the neighbour be ordered to give security for any damage the plaintiff may suffer therefrom.

This final possessory action looks at a situation where a pending or apprehended damage is caused not as a result of new works but rather which comes from a tree or any building. This is a possessory action because it is open to any person who is suffering from a tenement. In Italian it is referred to as the *azione de damno tenuto*.

Relations between Owner and Possessor

The collecting of income, fruits and interests

Sub-title III

OF THE RIGHTS AND OBLIGATIONS AS BETWEEN THE POSSESSOR AND THE OWNER

540. A possessor in good faith acquires the fruits of the thing possessed, even though such thing be an inheritance; and he is not bound to restore except such fruits as he shall have collected, or, by the exercise of the diligence of a *bonus paterfamilias*, could have collected, after a judicial demand:

Provided that he shall not be bound to restore the price of unplucked or uncut fruits, received by him before the judicial demand, even though, at the time of such demand, the fruits may be as yet unplucked from the trees or uncut from the ground.

541. A possessor in bad faith is bound to restore all the fruits which he has collected, or, by the exercise of the diligence of a *bonus paterfamilias*, could have collected from the day of his unlawful occupation.

The relations between the owner and the possessor often surround the income and fruits which are owed from one to the other. A clear distinction is made between possession in good faith and possession in bad faith, for the former retains all income and interests collected or could have been collected, while the latter does not.

In the case of possession of good faith; during the period of good faith and until the good faith stops, the possessor retains all income, interests and fruit whether collected or could have been collected through due diligence. Note that the highest form of diligence which may be expected is *quam suis.*

On the other hand, the possessor in bad faith is bound to account for and restore all income, interests and fruits which were and could have been collected through the diligence of the bonus paterfamilias.

Expenses Derived from Possession

545. (1) Necessary expenses are those without which the thing would have perished or deteriorated.

(2) Useful expenses are those which ameliorate the thing by making it more convenient, or capable of yielding more fruit, but the omission of which is not prejudicial to the thing.

(3) Decorative expenses are those which serve only to adorn the thing, without rendering it more convenient or capable of yielding more fruit, and which if omitted would not cause the thing to deteriorate.

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

Article 545 distinguishes between **necessary** expenses, **useful** expenses and **decorative** expenses (*de pense necessarie, de pense utilis and de pense voluptuose*).

A **necessary** expense is vital for the **property's preservation**, or else for preventing the deterioration thereof. Without such expenses, the property will perish or degrade significantly. A **useful** expense serves the purpose of **enhancing the property's convenience or productivity.** The failure to make a useful expense will not negatively harm the property, but the making thereof will enhance it. A **decorative** expense serves **no functional utility**, and does not contribute to the convenience or productivity of the property.

545 (2) caters for the useful expenses, which add to the convenience of the thing or else which improve the object's ability to generate income. This is distinguished from decorative goods, catered for by **545 (2),** which relate to expenses which serve the purpose of decorating a thing without making it more convenient or capable of yielding more fruit. **545 (5)** holds that a decorative expense may be useful if done to improve the condition of the object.

542. (1) A possessor in good faith may demand from the owner the reimbursement of the necessary expenses whether their effect continues or not.

(2) As regards useful expenses, the owner is bound either to refund to the possessor the cost of the work or, at his option, to pay to him a sum corresponding to the enhanced value of the thing.

(3) The court may, according to circumstances, direct that the refund of the expenses made on an immovable, be effected by the owner by means of a rent-charge secured by the hypothecation of the immovable, or in any other manner as to fully satisfy the debt and which is at the same time less onerous to the debtor.

Article 542 makes a distinction between useful and necessary expenses when it comes to reimbursements. Necessary expenses will always reimburse the possessor, while useful expenses may or may not be reimbursed, depending on the owner.

Possession in Bad Faith

543. (1) In relation to a possessor in bad faith, the owner has, in respect of necessary expenses, and of useful expenses for meliorations which cannot be removed, the same obligations as an owner has in relation to a possessor in good faith, provided possession of the thing shall not have been obtained by theft or some other offence which does not fall under the class of contraventions.

(2) As regards useful expenses for meliorations which can be removed, the owner may elect either to retain such meliorations or to compel the possessor to remove them.

(3) If the owner demands the removal of such meliorations, the possessor shall remove them at his expense without any right to indemnity, and he shall be bound to make good to the owner any damage which the latter may have suffered.

(4) If the owner elects to retain the meliorations, he shall, at his option, either refund to the possessor the cost thereof or pay to him a sum corresponding to the enhanced value of the thing.

In the case of necessary and useful expenses which cannot be removed, the obligation to reimburse remains the same.

There is, however, a very important exclusion - ***provided that possession in bad faith had not been obtained by theft or by an offence***, in which case there is no right to compensation. This is enshrined further in article 546.

546. Any person who shall have obtained possession of the thing by theft or any other offence, not being a mere contravention, shall not be entitled to any indemnity for any kind of expenses, or to remove any meliorations made on the thing; and he may be compelled by the owner to remove at his expense, and without any right to indemnity, such objects as may be removed, and also to make good any damage which the owner may have suffered.

Decorative expenses are catered for, whether in good or in bad faith, by **Article 544:**

544. With regard to decorative expenses the possessor, whether in good or bad faith, shall only be entitled to take back the adornments in kind, provided this be advantageous to the possessor and not injurious to the thing, unless the owner desires to retain such adornments, and pay to the possessor a sum corresponding to the profit that the latter might make by taking them away.

With regards to decorative expenses, irrelevant of whether done to a thing possessed in good or in bad faith, the owner may either retain such adornments and thus issue compensation, or else he may order the possessor to remove the adornments. There are situations wherein set-offs are acknowledged. In the case of a possessor in bad faith, who has the obligation to account for and refund interests and profit, there can be a set-off against any compensation owing to the possessor. The right of retention of the possessor applies until compensation is paid.

Obligations and Responsibility of the Possessor vis a vis the Owner

The question relates to the possessor who lost or sold the item in question. The areas in question are the **return of the object, what happens if it is not returned, and damage or loss of the object**.ħ

§ II. OF THE OBLIGATIONS OF THE POSSESSOR WITH REGARD TO THE RESTORATION OF THE THING

551. A possessor in good faith is bound to make good such damage as, by his own act or otherwise, even before the judicial demand of the owner, may have been caused to the thing, but only to the extent of the benefit which he has derived from such damage.

A key term which emerges is the ***deriving of a benefit***, as referred to in **s 553**;

553. For the purposes of the provisions of the last two preceding articles, the possessor is deemed to have derived a benefit from the said damage or alienation in each of the following cases only:

(*a*) if the subject of the benefit so derived is found, at the time of the judicial demand, to exist separately from the things belonging to the possessor;

(*b*) if, where the subject of such benefit has been intermixed with things belonging to the possessor, his estate is found, at the time of such demand, to have been enhanced thereby;

(*c*) if, where the subject of such benefit has been consumed by the possessor, such possessor has in consequence saved his own things, and such saving still exists:

Provided that it shall be lawful for the possessor in any of the foregoing cases to retain the subject of such benefit on paying to the plaintiff the value of the things at the time he shall have disposed thereof or their value at the time of the demand, whichever is the greater.

In these provisions, the difference between possessors in good faith and in bad faith emerges very clearly. As per **Article 554**, the possessor in good faith is not bound to restore the value of a thing given lost or destroyed without any produced profits.

554. A possessor in good faith is not, even in the case of possession of an inheritance, bound to restore the value of things given, lost or destroyed without profit.

The same applies in the case of possession of an inheritance. Therefore where the possessor in good faith made profit, there is an obligation to make due any damages caused (only to the extent of the profit), and in the case where no profit was made, there is no obligation to compensate. Thus the obligation only arises if profit is made from the possessed thing.

Thus in the case of possession with good faith, the possessor is only obliged to make good of the benefit derived from the damage of the thing possessed. Per article 554, no one is bound to restore the value of a thing given, lost or destroyed, when no profit was made and when held in good faith.

The Obligation of a possessor in bad faith to restore

556. (1) A possessor in bad faith shall in all cases be bound to restore all the things which he has wrongfully occupied.

(2) Where such possessor has, whether voluntarily or through his own fault, ceased to possess any of such things, he shall be bound to restore to the plaintiff any profit which he may have derived therefrom or, at the option of the plaintiff, to pay to him the value of the thing at the time of the cesser of possession or the value thereof at the time of the demand, whichever is the greater, notwithstanding that, in such case, he shall not have derived any profit therefrom.

557. A possessor in bad faith shall also be liable for all damage which may have been occasioned by his own act as well as for that occasioned by a fortuitous event unless, whatever the manner in which he may have obtained possession of the thing, he shows that the thing would have equally perished or deteriorated if it had been in the possession of the owner.

Where the possessor has ceased to possess, the possessor is also liable for profits which could have been derived in the period of possession in bad faith. Finally, he is also responsible to the owner for damages, even if the damages are caused by a third party. An act of god, a fortuitous event, would also render the possessor liable to damages, **unless he can prove that the damage would have happened even if the thing was not in his possession.**

558. (1) In the case of movables by nature, or securities to bearer, possession shall produce in favour of third parties in good faith the same effects as the title, saving, in regard to vessels, the provisions of any other law.

(2) The provisions of this article shall not apply in the case of a *universitas* of movables.

This provision thus holds that in the case of movables by nature, wherein it is difficult to ascertain the registration documents which prove ownership, good faith is presumed to he who possesses. This is because in the case of company shares, for instance, ownership is presumed to be of the possessor, and thus such possessor is able to produce the same effects with third parties as if he was the proper owner, without such third parties contesting the ownership over the thing.

559. (1) It shall, nevertheless, be lawful for any person who has lost a thing, or has been robbed thereof, to recover it on indemnifying the possessor.

(2) Such person may even recover the thing without any obligation to indemnify the possessor if the latter has not obtained the thing in good faith, under an onerous title, from a party who was presumably the owner thereof or a person charged by the owner to dispose of it.

Article 559 holds that if a movable by nature is stolen, the previous possessor is given the right to recover it with indemnification to the person against whom such recovery is made. Such indemnification is not obligatory, as per **559 (2)** in the case that the previous possessor had not obtained the thing in good faith from a party who was presumably the owner thereof.

With regards to the possessor in bad faith, he will never be deemed to be capable of acquiring through prescription, notwithstanding any lapse of time, as per **article 2154**. This is considered to be a **cause which prevents prescription**, and admits to **no exceptions**.

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

Therefore a thief or a fraudster can never acquire through prescription, no matter how long the thing remained in his possession.

With regards to a thing lost or stolen, when received by a third party **in good faith**, there is a two year lapse within which an action can be filed for the restitution of the thing so lost or stolen.

> **2155.** (1) The action for the recovery from a third party of a movable thing which has been lost or stolen, where such action is competent under article 559, is barred by the lapse of two years, if the third party received the thing in good faith.
>
> (2) If he received it in bad faith the provisions of sub-article (2) of the last preceding article shall apply.

Therefore by virtue of **article 2155,** an owner loses the right to recover a thing stolen or found by a third party **in good faith** after 2 years of such deprivation. **After these 2 years, the third party is able to acquire its ownership through prescription.** In the case wherein possession was obtained through theft or fraudulently, then he cannot acquire through prescription.

Prescription

Types of Prescription

Under the French tradition, **prescription is placed at the centre of Civil Law**. There is a very close relationship between possession and prescription, to the extent where the provisions of possession are placed under the same title as prescription in the Napoleonic Code, unlike the Maltese Code. Prescription may be **acquisitive** or it may be **extinctive**. Our Civil Code follows upon the Napoleonic Code tradition, in terms of distinguishing between the two types. We have already referred to **article 2107**, which holds as follows;

> **2107.** (1) Prescription is a mode of acquiring a right by a continuous, uninterrupted, peaceable, open, and unequivocal possession for a time specified by law.
>
> (2) Prescription is also a mode of releasing oneself from an action, when the creditor has failed to exercise his right for a time specified by law.

This provision thus separates acquisitive prescription from extinctive prescription. Acquisitive prescription under our Civil Code, as is with most francophone countries, plays a fundamental role in both acquiring rights as well as transferring ownership. Our law contemplates 3 modes of acquiring ownership, those being *sale, inheritance, and acquisitive prescription*.

Acquisitive prescription requires useful possession, as defined under article **2107** and which must satisfy the negative obligations set out under **Articles 526 and 527**. This provision does not make reference to good faith, and thus a party possessing in bad faith yet who satisfies the conditions of *continuous, uninterrupted, peaceful, open and unequivocal* possession is still able to acquire ownership, owing to the thirty year acquisitive prescriptive period, which does not hold a requirement of good faith. Our law follows the **French Models** when it comes to the acquiring of ownership by prescription. Thus, there is the reinforcement of the Civil Code's philosophy rooted within the Roman traditions of Private Ownership. Acquisitive prescription is often coined the term ***possessio ad usucapionem***.

Extinctive prescription, on the other hand, refers to the releasing of oneself from an action, owing to a certain lapse of time. Actions are normally governed by certain *time-barres*, which would terminate the applicability of said action after a specified amount of time passes from an act. Such extinctive prescription depends on the inactivity of the debtor for a specified period of time.

Renunciation of Prescription

2109. (1) Renunciation of prescription is express or tacit.

(2) Tacit renunciation is inferred from a fact which implies the abandonment of the right acquired.

The law allows for prescription to be renounced either **expressly or tacitly**, with the latter being inferred from facts and circumstances which suggest abandonment. Tacit renunciation is determined by the Court, after having made all relevant considerations. It is thus undefined what is tantamount to tacit renunciation, rendering the area rather grey and unclear. The following article states that a person under a disability to alienate is not able to renounce an already acquired prescription.

2110. A person who is under disability to alienate cannot renounce a prescriptive right already acquired.

One must note that the renunciation is only in relation to an already acquired right, and thus it cannot occur for prescription which has not yet elapsed.

Applicability of Prescription

Acquisitive Prescription may only operate with respect to things *in commercio,* and not with things in *extra commercio*. This ties into what we understand by possession, as the exercising of a right over a thing, the ownership of which may be acquired, as per **2114**. There is thus a link, the ownership of which may be acquired, and acquisitive prescription being only possible in the case of things *in commercio*.

2114. Prescription does not take place in regard to things which are *extra commercium*.

This is as far as acquisitive prescription goes. It is also relevant to note that by virtue of article **2115**, which must be placed in its historical perspective, prescription also applies to rights and actions vested in any person indiscriminately.

Article 2115 extends the applicability of prescription, whether acquisitive or prescriptive, to entities, corporations, institutions, etc.

2115. (1) Prescription applies to rights and actions vested in any person, institution, or body corporate, indiscriminately, as well as to property subject to entail.

(2) Nevertheless, prescription may not be set up against any right or action of the Government of Malta, except in the cases mentioned in articles 2149, 2153, 2154, 2155 and 2156.

We will shortly see that the Church and the Nobility were given preferential treatment, thus providing a significant light to the term *indiscriminately*. This is the same as the case of property subject to entail. Entail is what is referred to as ***fidei commissum.*** At the time of the 19th century, the concept of private property was not a market based asset available to everyone. In the past, the mentality was very different to the position of today. Property was argued to be retained indefinitely, generation after generation, within the family, leaving no availability in the market. The context was that most of private property were in the hands of a few dozen families who owned 80% of the land. The census of the early 18th Century indicated this situation. In this context, it is the ***fidei commissum*** which brought change - for it served as a perpetual usufruct from one generation to another. Entail thus meant that it was possible for someone to create a bundle of assets (a fund) to be enjoyed by the *bocatus* to be transferred from one to another. In this case, it was the first born person who was entitled to the fidei commissum. This reflected the culture and mentality of keeping property within the family. Thus **article 2115's use of the word indiscriminately is extremely relevant, since it includes also entails**.

2115 (2) holds that prescription may not be set up against the Government of Malta, except in 2 year or 5 year **extinctive** (not acquisitive) prescriptions. For prescription to be activated, it must be raised by the parties. Prescription must be set up and pleaded by the parties, it cannot be instituted as a plea ***ex officio***. Therefore, prescription must be formally pleaded in defence statements. It is not sufficient if prescription is mentioned during the exchange of submissions. This is because civil proceedings have a particular structure (claim is filed, respondent may defend or it may exceed, defence pleas are raised, and submissions are filed). Prescription must be raised in the defence pleas, and thus may not be raised after having heard the evidence.

There are certain pleas which may be raised by the court on its own motion, and prescription isn't one of them. Prescription may be raised at any point of the proceedings, including appeal, so long as it must be formally pleaded in the defence pleas. It is not a plea which must be raised *in limine litis* (at the beginning of a proceeding).

2111. The court cannot of its own motion give effect to prescription, where the plea of prescription has not been set up by the party concerned.

2112. Prescription may be set up at any stage of the proceedings, even on appeal.

Article 2111 confirms that **prescription may only be instituted inter partes, and never ex officio**. The following article furthers, holding that prescription may be brought at any stage of the proceedings, even on appeal.

Causes which prevent Prescription: 2118-2121

These causes stop the defence of prescription all together. In such cases, prescription does not begin to run *a priori*.

2118. Persons who hold a thing in the name of others or the heirs of such persons, cannot prescribe in their own favour: such are tenants, depositaries, usufructuaries, and, generally, persons who hold the thing not as their own.

2119. The persons mentioned in the last preceding article may, nevertheless, prescribe, if their title is changed by a cause flowing from a third party, or by the opposition which they may have made to the right of the owner.

2120. Any person to whom a tenant, depositary, or other mere holder has transferred the thing under a title capable of transferring ownership, may prescribe.

2121. (1) No one can prescribe against his own title, in the sense that no one can change, in regard to himself, the cause for which he holds the thing.

(2) Nevertheless, a person may prescribe against his own title, in the sense that he may by prescription obtain his discharge from an obligation.

Article 2118 mentions tenants, depositaries, usufructuaries, and persons who hold a thing not for his own purpose. This fits perfectly with the opening articles of possession, which discuss the corpus, animus, and the rem sibi habendi (the behaviour and acts which suggest ownership). Once a person possesses in someone else's name, the lapse of possession can never begin to lapse.

In order for possession to be considered **useful** (i.e - through which one may acquire ownership), he must possess with the **intent to own - animus domini.** There can be circumstances where due to a change, a person may challenge the situation, and start possessing. By means of these articles, the **detentor** or **holder of a thing in the name of another** is given the right to acquire by ownership in certain cases. This process, of changing the ***causa detentionis*** from one of holding to one of possessing with **animus domini** is referred to as the ***interversio possessionis***. The *interversio possessionis* is the notion governed by **article 2119**, and holds that a **detentor** is capable of **acquiring ownership through prescription only if the causa detentionis is altered by means of an external and third party act, or by the opposition which they have made to the right of the owner**.

Stellini vs Stellini
31st May 2013

Ghalhekk il-kuncett tal-interversjoni tal-pussess huwa inapplikabbli ghall-kaz odjern, stante li, ghalkemm l-art ghaddiet ghand Anna Xuereb minghajr kuntratt, izda verbalment minghand missierha, din bdiet mill-bidu nett tippossediha *animo domini* tant li bniet dar fuqha. Kif jiddisponi l-Artikolu 525 tal-Kodici Civili: "Il-prezunzjoni hija dejjem li kull persuna tippossjedi ghaliha nnifisha, u b'titolu ta' proprjeta`, meta ma jigix ipprovat li hija bdiet tippossjedi f'isem ta' persuna ohra."

Sciberras vs Sciberras
7th July 2006

Li "huwa principju tal-ligi li meta wiehed ikun qabel jippossjedi prekarjament, jibqa' jippossjedi hekk, *ammenoche`* ma jippruvax interverzjoni tat-titolu tieghu, ghaliex 'nemini sibi ipse licet causam possessionis *mutare*'." Biex ikun hemm interverzjoni tat-titolu tal-pussess, u wiehed jibda jippossjedi *animo domini*, mhux bizzejjed l-affermazzjoni tad-drittijiet tieghu ta' proprjetarju, imma hemm bzonn li din tkun rikonoxxuta mill-interessati.

Curmi vs Farrugia
3rd December 2007

"Anke jekk Ignazia Cauchi kienet ko-inkwilina tal-fond (dak li ma jirrizultax), bhala persuna li tkun qed izomm il-haga f'isem il-haddiehor (bhal ma hu l-kerrej: ara artikolu 2118 tal-Kodici Civili), ma tistax tippreskrivi favur taghha infisha. Dan, l-inkwilini jkunu jistghu jaghmluh jekk "it-titolu taghhom jitbiddel minhabba raguni li tkun gejja minn terza persuna jew bis-sahha tal-oppozizzjoni li huma jaghmlu ghall-jedd tas-sid". Dan l-ahhar principju, li jsehh meta jkun hemm "interversio possessions", jehtieg att pozittiv ta' oppozizzjoni, li in forza tieghu s-sid jitpogga fuq avviz li l-inkwilin m'ghadux jirrikonoxxi t-titolu tieghu. In nuqqas ta' hlas ta' kera mhux att pozittiv li jindika b'mod car li linkwilin m'ghadux iqies ruhu inkwilin, ghax in-nuqqas ta' hlas ta' kera tista' tkun konsegwenza ta' hafna ragunijiet, u bhala att ambigwu ma jservix biex jinverti l-pussess"

Azzopardi vs Cauchi
14th October 2004

Anke jekk Ignazia Cauchi kienet ko-inkwilina tal-fond (dak li ma jirrizultax), bhala persuna li tkun qed izomm il-haga f'isem il-haddiehor (bhal ma hu l-kerrej: ara artikolu 2118 tal-Kodici Civili), ma tistax tippreskrivi favur taghha infisha. Dan, l-inkwilini jkunu jistghu jaghmluh jekk *"it-titolu* taghhom jitbiddel minhabba raguni li tkun gejja minn terza persuna jew bis-sahha ta' l-oppozizzjoni li huma jaghmlu *ghall-jedd tas-sid"*. Dan l-ahhar principju, li jsehh meta jkun hemm "interversio possessions", jehtieg att pozittiv ta' oppozizzjoni, li in forza tieghu s-sid jitpogga fuq avviz li l-inkwilin m'ghadux jirrikonoxxi t-titolu tieghu. In-nuqqas ta' hlas ta' kera mhux att pozittiv li jindika b'mod car li l-inkwilin m'ghadux iqies ruhu inkwilin, ghax in-nuqqas ta' hlas ta' kera tista' tkun konsegwenza ta' hafna ragunijiet, u bhala att ambigwu ma jservix biex jinverti l-pussess. Fuq kollox, l-artikolu 2121(1) tal-Kodici Civili jghid li *"hadd* ma jista' jippreskrivi kontra t-titolu tieghu nnifsu, fis-sens li hadd ma jista' jbiddel ghalih innifsu r-raguni li ghaliha jkun izomm il-haga".

Situations of interversio possessionis occur in cases of co-owners, or otherwise familial situations, wherein things remain undivided for generations until the moment such possession is challenged. Therefore, there must be an active opposition and challenge against the holder. There is thus a change of the *causa detentionis,* from holding in the name of others to holding and possessing (animo domini) as if it were one's own. The change in behaviour has to be such that the challenge must leave no doubt that one is purporting to possess as if it is one's own.

Article 2120 lays to rest the doubt in the case wherein something is bought from a tenant, depository, or someone holding in another's name, the acquirer who has acquired under a title capable of transferring ownership from such depository may prescribe.

2120. Any person to whom a tenant, depositary, or other mere holder has transferred the thing under a title capable of transferring ownership, may prescribe.

Furthermore, **article 2021** holds that no one may prescribe against his own title. One cannot change the cause for which he holds the thing. This is consistent with the reasoning which was previously mentioned, relating to the *causa detentionis*. The rule here is that failing or absent a public challenge to the owner, no one can change unilaterally the *causa detentionis*.

2121. (1) No one can prescribe against his own title, in the sense that no one can change, in regard to himself, the cause for which he holds the thing.

(2) Nevertheless, a person may prescribe against his own title, in the sense that he may by prescription obtain his discharge from an obligation.

If one publicly challenges the title of the owner, then prescription may happen. It is only unilaterally which this rule is excluded. Another qualification is found under 2121 (2), which states that one may prescribe against his own title in the case of discharge from an obligation (which is extinctive prescription).

Causes which suspend Prescription: 2122-2126

These causes pause the process of prescription, with no affect to the lapse of time. In such cases, the lapse of time continues to run upon cessation of suspension. The provisions governing suspended prescription apply both to acquisitive and prescriptive prescription alike. If prescription has not yet began to lapse, then the point of suspended prescription applies solely to an extent, which will be further discussed hereunder.

When prescription is suspended, two main consequences emerge immediately;

1) Prescription ceases to lapse, and recommences when the cause of suspension ceases; and
2) The original time lapsed before the intervening suspension is not forgotten or lost, but merely suspended. Following cessation of suspension, the lapse does not being *ex nuovo*, but rather it continues to lapse. The lapse of time following cessation of suspension is thus added to the amount of time lapsed prior to the suspension.

2122. Prescription runs against -

(*a*) an absentee;
(*b*) a vacant inheritance even though a curator has not been appointed thereto;
(*c*) the heir during the time for making up the inventory or for deliberating; and
(*d*) generally, any other person not included in the exceptions laid down in the following articles.

Article 2122 clarifies and establishes, non-exhaustively, when prescription can run. An *absentee*, as referred to in 2122 (a) refers to someone not within the jurisdiction of Malta, or who are considered missing. Thus the law provides for the running of prescription against people of unknown whereabouts, without the ability to bring, as a defence, their absence.

"A vacant inheritance", as per 2122 (b) refers to inheritances which have not been accepted by the heirs. Vacant inheritance has often been attributed with *quasi-personality*, for it does not have personality in totality, but is rather a collection of assets of liabilities in a way nearly similar to a natural person. A person may thus run prescription against such inheritances, even if a curator had not been appointed to represent such inheritance.

The general rule, as stipulated in **2122 (d)** is that prescription can run against anyone, except for in the cases stipulated by the ensuing provisions. These provisions and this concept, of *pigeon holing* the relevant provision which suspends prescription, must be read alongside **article 2137;**

2137. Subject to any other provisions of the law, the prescription of an action commences to run from the day on which such action can be exercised, irrespective of the state or condition of the person to whom the action is competent.

This article holds that there could be further provisions of law which override the applicability of suspended prescription. This article holds that prescription *commences* on the day in which the action may be exercised. This is ambiguously explained, as some questions arise when placed next to the generality contained in **article 2122 (d),** as previously stated, holding that *generally, prescription can run against anyone not included in the following exceptions*.

2137 thus holds that prescription may only begin to run upon applicability of the action. This is in line with the Latin maxim ***contra non valentem agere non currit prescriptio,*** which holds that **prescription does not run against who is legally unable to act**.

Therefore **article 2137** may be brought as a defence for the person who found out of the identity of the person who crashed into their vehicle 5 years ago, since it permits the prescription to begin running upon discovery of such identity. **Article 2123** conversely tackles and establishes when **prescription does not run.**

2123. Prescription does not run -

(*a*) as between spouses;
(*b*) as between the parent and the child subject to parental authority
(c) as between the person under tutorship or curatorship and his tutor or curator until the tutorship or curatorship ceases, and the accounts are definitely rendered and approved;
(d) as between the heir and the inheritance entered upon inventory.

Prescription therefore cannot commence between spouses, or between a parent and his child, or between a person under tutorship and his tutor, or between the heir and the inheritance entered upon. The reason being is that there is a certain element of vulnerability which warrants a suspension in prescription.

2124. (1) Save as otherwise provided by law, prescription does not run against minors and persons interdicted.

(2) Nor does it run, during the continuance of marriage, against any one of the spouses, in any case in which the action competent to such spouse, if exercised, would vest the defendant with a right of relief against the other spouse.

(3) Where damages arise from a criminal offence committed against a minor, prescription shall run from the day on which the victim attains the age of majority.

2125. Prescription is likewise suspended -

(*a*) in regard to conditional rights, until the condition is fulfilled;

(*b*) in regard to actions for breach of warranty, until eviction takes place;

(*c*) in regard to any other action the exercise of which is suspended by a time, until such time expires;

(*d*) in regard to an action for damages, during the time before the commencement of the cause when negotiations are taking place between all or any of the parties or their insurers having opposing interests in the claim;

(*e*) where a consumer who has a dispute with a trader, has recourse to an ADR procedure in accordance with the Consumer Affairs Act, the outcome of which procedure is not binding on either party, until such time when the ADR procedure is brought to a conclusion:

Provided that the provisions of article 2 of the Consumer Affairs Act shall apply in relation to this paragraph.

The essence of suspended prescription is captured in **article 2126**, which holds that prescription shall continue to run as soon as there is cessation of suspension.

> **2126.** Prescription commenced and suspended shall continue to run as soon as the cause of suspension shall cease.

Article 2126 thus captures the fundamental underlying essence of suspended prescription. When prescription is suspended by virtue of one of the exceptions posited under articles 2122-2126, **the lapse of time is not considered to be failed, but rather paused**. When the cause which gave rise to such suspension is resolved or ceases to exist, the prescription shall continue to lapse, adding to the period of time accrued prior to the suspension.

Causes which interrupt Prescription: 2127-2136

These causes are those which reset the lapse of prescription, thus restarting the run of time. In cases of interruption, both acquisitive and extinctive prescription start lapsing from zero. If a party has possessed something for 29 years, and that prescription is interrupted, then he cannot acquire the ownership of the property the next year, notwithstanding the 30 years of possession. The essence of interrupted prescription is captured by **Article 2136**:

2136. (1) Where prescription is interrupted, the portion of the prescriptive period already elapsed shall not be reckoned for the purpose of prescribing.

(2) Prescription, however, may commence anew.

There is a distinction, at law, between **prescription** and **forfeiture**. A prescriptive period (perjodu ta' preskrissjoni) is one wherein the time limit may be extended and interrupted through the reasons provided under articles 2127 and 2136. A period of **forfeiture** (often coined the peremptory period, perjodu ta' dekadenza) **cannot be interrupted or extended**. For instance, a 5 year term within which one must act on a bill of exchange is considered to be a **peremptory period**, and not a **prescriptive period.** These provisions of law will cover when prescription is interrupted, and not forfeited.

2127. Prescription is interrupted when the possessor is deprived, for more than one year, of the enjoyment of the thing, whether by the owner or by a third party.

Article 2127 pertains to situations where a possessor loses possession or enjoyment of the property for more than a year, either due to the owner's intervention or that of a third party, resulting in an interruption. If a possessor, who is engaged in the act of possession or exercising a right over property, loses possession for a duration significantly exceeding one year due to the owner's actions or those of a third party, this constitutes a **natural interruption of possession**. This article thus holds that prescription is interrupted when an owner is deprived of a thing possessed by himself for more than a year, whether by the owner himself or by a third party.

2128. Prescription is also interrupted by any judicial act filed in the name of the owner or of the creditor, served on the party against whom it is sought to prevent the running of prescription, showing clearly that the owner or creditor intends to preserve his right.

Article 2128 speaks of the interruption of prescription **by a judicial act**. This is a common means adopted to interrupt one's possession, and occurs when a creditor serves to the debtor a judicial letter stating that the former intends to preserve his right. This therefore interrupts the **extinctive period** through which the debtor might have been relieved of his obligation. In the case of an owner, the owner might serve a judicial letter against a person who is possessing in his name, declaring that he has no intention of parting ways with the ownership of that thing. This would thus prevent the possessor from acquiring through prescription.

2129. The interruption shall be operative even though the demand, protest, or other judicial act is null owing to a defect in its form, or is filed before a court which is not the competent court.

Article 2129 saves the interruption from failing in the case wherein the judicial letter previously mentioned is erroneously submitted before the wrong court or by incorrect form.

2130. (1) No interruption takes place if the act is not served before the expiration of one month to be reckoned from the last day of the period of prescription.

(2) Nevertheless, if the party to be served is absent from Malta, service shall be deemed to be effected by the publication of a notice in the Government Gazette, within a month to be reckoned from the last day of the aforesaid period, on the demand of the party filing the act, as provided in the Code of Organization and Civil Procedure.

(3) The said notice shall contain a summary of the act of interruption, and shall be signed by the registrar of the court before which the act has been filed.

Article 2130 caters for the practical discrepancy between the date of filing the case and the date on which the court serves the action against the defendant. This is a procedural provision which declares that the interruption is deemed to be effective on the day of filing, and not the day of service, in the case that the act is filed within 30 days from the last day of prescription.

2131. Prescription is interrupted by a judicial demand, even though such demand has not been notified to the defendant on account of his absence or for any other lawful cause, provided the plaintiff has continued the proceedings against a curator appointed by the court according to the provisions of the Code of Organization and Civil Procedure, and has obtained a judgment on such demand.

Article 2131 follows on the interruption by **judicial demand**. This interruption is effective even if the defendant is not yet notified, owing to absence or any other lawful cause, in which case the plaintiff must file the action against a **curator** representing the absent defendant.

2132. (1) The interruption of prescription made by means of a judicial demand shall be deemed inoperative if the plaintiff withdraws the action or if the action is deserted, or dismissed.

(2) With regard to the withdrawal or the dismissal of an action, the provisions of this article shall not apply in cases where the plaintiff can, according to law, re-institute the action, provided such action is so re-instituted before the same or another court within one month from the day of its previous withdrawal or dismissal, and service thereof is effected in the manner and within the times established in the two preceding articles, as the case may be.

Article 2132 asserts that if the plaintiff withdraws the action, or if he does not follow up on the action, then the interruption is to be deemed **inoperative**.

Two additional ways in which prescription may be interrupted are demonstrated through **articles 2133 and 2134,** which hold;

> **2133.** Prescription is interrupted if the debtor or possessor acknowledges the right of the party against whom such prescription had commenced.
>
> **2134.** Prescription is also interrupted by a payment on account of the debt, made by the debtor himself or by a person acting in his behalf.

The first article purports that prescription, may be interrupted by **acknowledgement of the right of the plaintiff party**. In this article, two situations are demonstrated; where the possessor acknowledges the right of the alleged owner, in which case the possessor would not be able to claim or plea **acquisitive prescription**, and in the case where a debtor acknowledges the right of the creditor, in which case the debtor is not able to claim **extinctive prescription** of the obligation.

The second provision states that prescription may also be interrupted by a **payment on account of the debt,** made by the debtor himself or by a person acting on his behalf.

Time Frames required for the Effects of Prescription

> **2137.** Subject to any other provisions of the law, the prescription of an action commences to run from the day on which such action can be exercised, irrespective of the state or condition of the person to whom the action is competent.
>
> **2138.** (1) Prescription is reckoned by whole days, and not by hours.
>
> (2) The days are running days: the months are reckoned according to the calendar.
>
> **2139.** (1) Prescription is completed immediately upon the expiration of the last day of the prescriptive period.
>
> (2) Nevertheless, if the last day is a Saturday or a public holiday, prescription shall be completed upon the expiration of the next following day, not being a Saturday or a public holiday.

Article 2137 pivotally states that the prescription of an action begins lapsing **from the day on which such action can be exercised**. This is, however, **subject to any other provision of the law**. We will hereunder consider the various time frames established by law through which one may **acquire ownership** or **extinguish an obligation.**

Article 2139 states that prescription is deemed complete upon the last day of the prescriptive period, provided that the last day does not fall on a Saturday or a Public Holiday, in which cases the prescriptive period shall be deemed complete upon expiration of the next following day not being a Saturday or a Public Holiday.

10 year acquisitive prescription for immovables

2140. (1) Any person who **in good faith** and **under a title capable of transferring ownership** possesses an immovable thing for a period of **ten years** acquires ownership thereof.

(2) If the title derives from an act which, according to law, must be registered in the Public Registry, the prescriptive period does not commence to run except from the day of the registration of such act.

2141. Good faith must not only exist at the time of acquisition, but must continue during the whole prescriptive period.

2142. (1) The bad faith of a previous possessor does not prejudice his successor, whether universal or singular.

(2) Nevertheless, in any such case the successor may not, for the purposes of prescription, conjoin his possession with that of his predecessor.

The rule is that useful possession in good faith and under a title capable of transferring ownership for 10 years is a basis of acquisitive prescription. It is therefore a matter of loss and acquisition of title. The first requirement for such prescription is *useful possession,* as governed by article 2107.

Another requirement is that of good faith, which is more difficult to define and identify. Generally, it is that period or moment of subjective belief based on objective and probable grounds which indicates the start of good faith. Good and bad faith are governed under article 531 (1);

531. (1) A person who, on probable grounds, believes that the thing he possesses is his own, is a possessor in good faith.

(2) A person who knows or who ought from circumstances to presume that the thing possessed by him belongs to others, is a possessor in bad faith.

The 10 year prescription has also the validation of those situations after which the situation can no longer be challenged. This is thus the significance of the term *under the title capable of transferring ownership*. Such titles are purchase, exchange, donation, inheritance, and *datio in solutum*. It is not only the possession of 10 years which transfer ownership, but also possession of **a title which is capable of transferring ownership**, which is set as a requisite to activate acquisitive prescription. The provisions provide that *where the title is one which requires a registration* (2140 (2), *the 10 year term commences to run from the date of registration*. Thus if the notary was late in registering within the public registry, it is then when the time begins to lapse. Good faith must exist for the entire period. ***Mala fides superveniebs non nocit***. Therefore if bad faith arises after 9 years, then the requirement of good faith cannot be invoked and the 10 year prescription cannot be applicable. Furthermore, it is possible to conjoin a possession, in both cases of singular and universal title. Thus inheritance transfers the time lapsed, with the good faith of the predecessor being conjoined by the good faith of the successor. If there is transition by singular title (sale, donation, exchange), then it is also possible to conjoin the periods of good faith to make up the 10 years.

30 year acquisitive prescription for immovables

2143. All actions, whether real, personal, or mixed, are barred by the lapse of thirty years, and no opposition to the benefit of limitation may be made on the ground of the absence of title or good faith.

This is interestingly arrived at indirectly. The code does not state that there is a 30 year prescription in the same manner as it says there is a 10 year acquisitive prescription. Rather, it states indirectly that there is finality of actions.

Real actions are distinguished from real rights. We know the catalogue of real rights (ownership, usufruct, servitudes, guarantees). We also know certain actions which are considered real (rei vindicatoria, confessoria, negatoria). One may argue that these actions are to fall under the same category, since the dominant theme today is that in civil procedure, an action is different from a right. The procedure to enforce an action is not the same as the enforcement of a right. Real actions generally derive from the exercise and protection of real rights.

Personal actions are claims against another party for the performance of an obligation. Personal actions derive from personal rights of a party against another, where there is a personal obligation of one against another.

Mixed actions are not as straight forward. You can sue for the payment of ground rent. You can sue for the dissolution of the emphyteusis on the basis of non payment of ground rent. This is a typical example of a mixed action. There are not many instances wherein the term mixed action is featured in both the Civil Code and the COCP, yet this concept is something acknowledged by jurists and cases alike.

From **article 2143**, one may deduce that there exists a 30 year acquisitive and extinctive prescription. In the 30 year prescription provided that there is useful prescription for the 30 years is sufficient. Good faith is irrelevant, so long as there is useful possession.

There is a very specific 40 year acquisitive prescription, applicable to the case of Churches.

2144. (1) The prescriptive period referred to in articles 2140 and 2143 shall not apply in the case of immovables subject to entail, or of immovables or actions belonging or competent to churches or other pious institutions.

(2) In the cases referred to in the said articles, prescription as regards property or actions mentioned in sub-article (1) of this article is only completed by the lapse of forty years, provided that no opposition to the benefit of limitation may be made on the ground of the absence of title or good faith.

The association with the nobility is through the link of entail and the *fidei commissum*, which is a particular binding of property. This was something associated with the nobility, because the concept of property at the time was that it belonged to the nobility.

Particular Prescriptions: 2147-2160

These are considered particular because they are generally deemed extinctive prescriptions. They are known to be relatively shorter when compared with other forms of prescription. They are 1 year, 18 months, 2 year and 5 year prescriptions.

2147. The following actions are barred by the lapse of **one year**:

(*a*) actions of masters and teachers of sciences or arts, for lessons given by the day or by the month;

(*b*) actions of keepers of inns, taverns or lodging-houses for lodging and board furnished by them;

(*c*) actions of domestic servants or other persons paid by the month, of artificers or day-labourers for the payment of their wages, salaries or the supplies due to them;

(*d*) actions of carriers by land or water referred to in articles 1628 to 1631 for the payment of their hire or wages.

2148. The following actions are barred by the lapse of **eighteen months:**

(*a*) actions of tailors, shoemakers, carpenters, masons, whitewashers, locksmiths, goldsmiths, watch-makers, and other persons exercising any trade or mechanical art, for the price of their work or labour or the materials supplied by them;

(*b*) actions of creditors for the price of merchandise, goods or other movable things, sold by retail;

(*c*) actions of persons who keep educational or instructional establishments of any kind, for the payment of the fees due to them;

(*d*) actions of persons for the payment of their salary;

(*e*) actions of brokers for brokerage fees;

(*f*) actions of any person for the hire of movable things.

2148 (a) sometimes causes overlap and confusion when read alongside **2149 (a)**, which discusses **2 year** prescriptions.

2149. The following actions are barred by the lapse of two years:

(*a*) actions of builders of ships or other vessels, and of contractors in respect of constructions or other works made of wood, stone or other material, for the works carried out by them or for the materials supplied by them;

(*b*) actions of physicians, surgeons, obstetricians and apothecaries for their visits or operations or for medicines supplied by them;

(*c*) actions of advocates, legal procurators, notaries, architects and civil engineers, and other persons exercising any other profession or liberal art, for their fees and disbursements;

(*d*) actions of procurators *ad litem* or other attorneys or mandataries, for their remuneration, the expenses incurred by them, indemnities due to them for losses sustained, and for the reimbursement of advances made by them.

Generally held, the difference between **2148 (a)** and **2149 (a)** is found in the term ***trade or mechanical art***. One identifies the applicable period of prescription from the kind of action being exercised. In other words, very often, the question arises as to whether the prescription in question is of 2 years or of 5 years. The applicable period of prescription is determined by the action. Jurisprudence holds that in **2148 (a)**, the determination relies on the term *trade or mechanical art*. The thinking has generally been that where there is an intellectual input (sculpting, for instance), renders the prescription of 18 months (2148). One may argue this distinction to be artificial and arbitrary, in the sense that the work of a builder is also considered to be skilful.

It is important to be aware of **2148 (b)**, which tackles the time barre for the action of sale by retail. For sale by wholesale, the prescriptive period is of 5 years, whereas sale by retail actions are barred by 2 years. This ties into the previous discussion, that the time barre is established by the type of action raised. Time periods for the actions by advocates or legal procurators are barred by 2 years which begin to lapse from the date advice is given.

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

(2) For the purposes of this article, any act which, although not forming part of the proceedings of the suit, is, nevertheless, connected therewith, shall be deemed to be part of such proceedings.

(3) In regard to fees for advice and to fees or expenses for judicial letters, protests, warrants, applications or other acts or services not connected with a suit pending or commenced within two years from the day on which the advice, act or service has been given or has taken place, the prescriptive period shall commence to run from that day.

2151. (1) In the cases referred to in the last four preceding articles, prescription takes place, even though there may have been a continuation of supplies, deliveries on credit, labour, services or other work.

(2) Nevertheless, in such case, where the claim in respect of such supplies, deliveries, labour, services, or other work is evidenced by an approved account or other written declaration of the debtor, the action shall not be barred except by the lapse of five years to be reckoned from the date of such account or declaration.

There is a popular misconception surrounding article 2151, which is that if there is a continuation of a delivery of goods or services, then prescription is suspended. This is not true. This often happens or used to happen in the past, particularly where there were questions on the allocation of payments. Prescription runs even though there has been a continuation of supplies, services, etc. It is, however, interrupted if there is some written acknowledgement. If there is a written acknowledgement, then prescription starts to run afresh. Thus notwithstanding that there has been a continuation of supplies, goods, services, etc, prescription still continues to lapse. One may stretch the argument holding that an email acknowledgement is sufficient to interrupt prescription.

2152. (1) Advocates and legal procurators are released from any obligation to account for papers relating to lawsuits or advice on the expiration of one year from the day when such lawsuits have been decided or otherwise disposed of, or such advice given.

(2) They are likewise released from any obligation to account for any papers which may have been delivered to them for the purpose of commencing a lawsuit, on the expiration of two years from such delivery, if within such time the lawsuit has not been commenced.

(3) They may, however, be called upon to declare on oath whether they are in possession of such papers, or whether they know where such papers are to be found.

Thus lawyers are released from any obligations relating to lawsuits after 1 year from which the decision was taken or when advice was given. 2152(1) refers to papers relating to lawsuits or advice following a decided decision or to advice given. After a year, the lawyer is freed from any obligation arising from such papers. 2152(2) says that the lawyer is freed from an obligation relating to papers used and filed to initiate a lawsuit following 2 years from the delivery thereof.

The Law of Damages

We must distinguish between damages *ex delicto* and damages *ex contractu.* Damages *ex delicto* are those which originate from an unlawful act or omission and are based on the old Roman principle of *neminem ladere*, whereas damages *ex contractu* are those which assume the pre-existence of a contractual relationship.

2153. Actions for damages not arising from a criminal offence are barred by the lapse of two years. (Damages *ex delicto*)

2154. (1) With regard to the prescription of civil actions for damages arising from criminal offences, the rules laid down in the Criminal Code relating to the prescription of criminal actions shall be observed.

(2) Nevertheless, any person who has stolen a thing, or who has become the possessor thereof by means of an offence of fraud, or who has received or bought such thing, knowing it to have been stolen or fraudulently acquired, cannot prescribe for it, notwithstanding any lapse of time.

In the case of damages *ex delicto,* where these are not flowing from a criminal offence, the term of prescription is of 2 years, whereas damages flowing from criminal offence are prescribed within the criminal code. Thus one must try to pigeon-hole a specific set of circumstances under a potential offence under the criminal code. If the criminal code provides that these facts may constitute an offence, then it is the prescriptive term in the criminal code which applies. **Damages *ex contractu*** assumes a pre-existing contractual relationship. Where there is a public deed, the prescriptive term is held to be 30 years. Where there is a public deed, there is the rule that the prescriptive term is 30 years. Therefore, for damages *ex contractu*, where there is a private writing which is not entered into by public deed, the term is jurisprudentially held to be **5 years**. This is what the readings and constant jurisprudence have established. Where a contractual obligation arises out of a public deed on the other hand, the period is of 30 years. This interpretation is taken from a reading of article 2156 (which establishes 5 year actions) and 2153 (which provides the 30 year barre for all actions).

2156 (f): actions for the payment of any other debt arising from commercial transactions or other causes, unless such debt is, under this or any other law, barred by the lapse of a shorter period or unless it results from a public deed;

Thus 2156 (f) holds that actions for damages arising from a contractual obligation is barred by 5 years **except if it is taken from a public deed**. Thus by implication, action for damages from public deeds are governed by 2153, which provides for 30 year extinctions. There also exists the situation of *cumul*, in which damages arise both *ex delicto* and *ex contractu*. For instance, I approach an investor, he makes a terrible decision, and subsequently fails to satisfy a contractual obligation.

2155 provides for the recovery of a thing stolen from a third party.

2155. (1) The action for the recovery from a third party of a movable thing which has been lost or stolen, where such action is competent under article 559, is barred by the lapse of two years, if the third party received the thing in good faith.

(2) If he received it in bad faith the provisions of sub-article (2) of the last preceding article shall apply.

5 year Prescriptions

Article 2156, as we have previously mentioned, is a very important provision of prescription, owing to the various issues that emerge.

2156. The following actions are barred by the lapse of five years:

(*a*) actions for payment of yearly ground-rent, perpetual or life annuities, interest on annuities ad formam bullae created before the 14th August, 1862 and for the payment of fines due upon a sale or other alienation of emphyteutical tenements;

(*b*) actions for payment of maintenance allowances;

(*c*) actions for payment of rent of urban or rural property;

(*d*) actions for payment of interest on sums taken on loan or for any other cause, and, generally, of any other thing payable yearly or at other shorter periodical terms;

(*e*) actions for the return of money given on loan, if the loan does not result from a public deed;

(*f*) actions for the payment of any other debt arising from commercial transactions or other causes, unless such debt is, under this or any other law, barred by the lapse of a shorter period or unless it results from a public deed;

(*g*) except as provided for in any special law, actions of the Government of Malta for the payment of judicial fees, customs or other dues:

Provided that actions referred to in paragraphs (*a*) and (*c*), where such payments are due to the Government of Malta, shall be barred by prescription by the lapse of ten years.

Note that prescription begins to run from the day the obligation becomes due. Annuities were a way in which the knights of St John used to raise capital. Today, the concept evolved into Government Bonds, wherein people would invest in the Government.

Maintenance allowances are barred after 5 years.

2156 (d) (e) and (f) are very important. They pertain to actions for the payment of interest, whether on loans or *on any other cause,* are barred by 5 years lapse. Today, one may say that interest is payable for the use of money. The way the law is written encompasses what is referred today as *financial transactions*, such as bank overdrafts. Further, actions for the return of money given on loan, so long as they don't arise from public deeds, are also barred after 5 years. As are actions for the payment of debt arising from commercial transactions or other causes, unless such debt is barred by a shorter period or unless the payment arises from a public deed.

2156 (f) contains 2 important default presumptions. The first is that commercial transactions are barred after 5 years *or any other causes*. There are situations in the Commercial Code, for instance in relation to insurance or bills of exchange, where the term is of 5 years. However, in general, the terms of prescription under the Commercial Code are preemptory, whereas terms in the Civil Code are capable of being interrupted or extended. In the case wherein an action is barred by a shorter prescriptive term, or in the case wherein the action pertains to an action for damages in relation to a public deed, the action is not barred by 5 years for the purposes of article 2156 (f).

2156 (g) creates a 5 year prescription for actions of the Government of Malta for the payment of judicial fees, customs, or other dues, unless another special law holds the contrary or a different period.

Action of Rendering Accounts

2157. An action for the rendering of accounts against any tutor, curator, mandatary, or other administrator, is barred by the lapse of five years from the day of the cessation of the management, or by the lapse of one year from the death of the tutor, curator, mandatary, or other administrator.

2159. Such prescriptions run against minors and persons interdicted, saving their right to relief against the tutor or curator.

These provisions cater for the actions by a tutor, administrator, mandatary, etc, who must account for the moneys they receive and the money they spent. These actions are also barred after 5 years from the termination of the administration, tutorship, or mandatary. This action is referred to as the *actio res acconti*. Further, if the tutor, administrator, or mandatary dies, then the action is barred after 1 year after death.

In the COCP, there is an action called the action for the rendering of accounts. A party whose affairs were administered, in this case the tutor, administrator, curator, mandatary, etc, would file a writ in court, demanding the court to condemn the administrator to prepare a statement of accounts within a period to be established by the courts, failing which the claimant is entitled to prepare a statement of affairs itself and to confirm it on oath. If the administrator fails to file accounts after having been ordered to do so by the court, then the claimant is entitled to prepare an account as he thinks the accounts should be, which would be subsequently confirmed on oath and which would be binding between the administrator and the claimant.

Article 2159 holds that prescription runs against minors, unless the law provides otherwise. Generally, the short prescriptions (2147-2157) run against minors and interdicted persons.

Giuramento Decisorio

2160. (1) The prescriptions established in articles 2147, 2148, 2149, 2156 and 2157 shall not be effectual if the parties pleading them, do not of their own accord declare on oath, during the cause, that they are not debtors, or that they do not remember whether the thing has been paid.

(2) If the oath is deferred to the heirs of the person whom the plaintiff alleges to have been the debtor, or to parties claiming under such person, the said prescriptions shall not be effectual if such heirs or parties do not declare that they do not know that the thing is due.

(3) In proceedings for the collection of debts referred to in the proviso to article 2156, where a party to the proceedings declares on oath that he or she is not a debtor, such party shall be required to give reasons why he or she considers himself or herself not to be a debtor.

In 2017, there was a negative change in relation to the guramento decisorio. Going back to what was previously mentioned, it is the correct and constant procedure that when a plea of prescription is pleaded, on the point of prescription, the burden is thrown on the claimant to show that prescription has not elapsed. This can be done in a number of ways, showing that there has been interruption, showing that there has been acknowledgement, showing payment of account, showing that the prescriptive term is not applicable to the action, etc. Therefore if A owes money to B, and A holds that the action is time barred, then the burden of proof is thrown onto B to disprove this plea. The Guramento Decisorio, prior to 2017, allowed the creditor to compel the debtor under oath, and if the debtor holds that he is not a debtor, or that he does not remember if the sum had been paid, then the pleas of prescription may be raised, and the action could be time barred, on sufficient proof by the debtor. One must note that prescription can be pleaded at any stage of the proceedings. Once it is pleaded, then the burden is on the other party to prove that prescription has not lapsed or that it is inapplicable. Once pleaded, it must be done so formally, referring to the article applicable and the time barre involved.

The Law, today, article 2160, holds that the period of prescription under Article 2156 **will fail unless the debtor, out of his or her own initiative, declares that he or she is not a debtor or does not remember whether he or she was paid.** Thus the element of compelling is lost under today's law.

F.X Borg Furniture Limited vs Sandro Galea *- guramento decisorio pre 2017*
Court of Appeal 7th April 1998

"Fix-xhieda tiegħu, il-konvenut għamilha ċara li ma kellu jagħti xejn lid-ditta attriċi, u għakhekk din iċ-ċaħda abbinata mal-perkors taż-żmien statutorju jagħmlu l-azzjoni attriċi preskritta"

P&S Limited et vs Noel Zammit et *- guramento decisorio post 2017*
First Hall Civil Court 16th February 2018

Qabel l-introduzzjoni ta' dawn l-emendi l-posizzjoni kienet li "Jekk l-attur jaghzel il-mezz tal-gurament, u l-konvenut ikun halef skond il-ligi, l-attur ma jkunx jista` jaghzel mezz iehor, billi meta l-kreditur jitlob li jinghata lid-debitur il-gurament, dan ifisser li hu qieghed jirritjieni bhala ammissibbli l-preskrizzjoni eccepita u li ma kienx hemm sospensjoni jew interruzzjoni taghha, u li jrid jipprova l-mezz estrem tad-dilazzjoni tal-gurament. B` dan il-mezz huwa jkun qieghed jirrimetti ruhu fil-kuxjenza tad-debitur.

The case ***Bottega del Marmista Ltd vs Paul & Carmen Mifsud*** delves into the different legal positions pertaining to the *ġurament deċiżorju* prior to and following the amendments.

Bottega del Marmista Ltd vs Paul & Carmen Mifsud - *guramento decisorio pre and post amendments*
Court of Appeal Inferior 26th January 2018

Imbaghad fis-seduta tal-25 ta' Jannar, 2017 il-konvenuti xehedu li m'ghandhomx jaghtu lis-socjeta attrici. Pero' dan ma kienx kaz fejn il-konvenuti nghataw il-gurament decizorju izda fejn huma **xehedu minn jeddhom**. Ghalhekk ma jistghux jigu applikati l-principji tal-gurament decizorju. Il-qorti zzid li bl-Att 1 tal-2017, li dahal fis-sehh fit-13 ta' Jannar, 2017, saret emenda kardinali fl-Artikolu 2160 tal-Kodici Civili. Qabel dakinhar id-disposizzjoni kienet tikkontempla l-possibilta lill-attur li jaghti l-gurament decizorju lill-konvenut:

"Il-preskrizzjonijiet imsemmija fl-artikoli 2147, 2148, 2149, 2156 u 2157 m'ghandhomx effett jekk il-partijiet li jeccepuhom, **meta jinghata lilhom il-gurament**, ma jistqarrux li mhumiex debituri, jew li ma jiftakarx jekk il-haga gietx imhallsa".

Bl-emenda li saret bl-Att 1 tal-2017 il-legislatur impona fuq il-konvenut l- obbligu li jiehu l-gurament u fin-nuqqas il-konvenut ma jkunx jista' jiehu beneficcju mill-preskrizzjonijiet qosra. Ovvjament, l-konsegwenzi legali li zviluppaw mill-gurisprudenza dwar il-gurament decizorju li ssemmew mill- ewwel qorti f'pagni 19 u 20 tas-sentenza, kienu japplikaw f'xenarju partikolari cjoe' meta l-attur jaghti l-gurament lill-konvenut. Fil-kaz in ezami l-konvenuti xehedu minn jeddhom. 'Il fatt li hi l-ligi li timponi fuq il-konvenut li jixhed biex ikun jista' jinvoka l-preskrizzjonijiet qosra, ma jbiddel xejn.

Ghaldaqstant, illum irrispettivament x'jixhed il-konvenut **minn jeddu meta jiehu l-gurament** kontemplat fl-artikolu 2160 tal-Kodici Civili, l-attur ghandu kull dritt li jaghti prova li kien hemm interruzzjoni jew rinunzja ghall-preskrizzjoni. Din kienet wara kollox ukoll il-posizzjoni qabel l-emenda tal-artikolu 2160 tal-Kodici Civili meta l-konvenut kien jaghzel li jixhed minn jeddu.

Ballut Blocks Services Limited vs Bonnici Bros. Construction Limited et - *guramento decisorio*
First Hall Civil Court 17th January 2019

Illi l-artiklu 2160 tal-Kodiċi Ċivili kien jifforma parti mill-Kodiċi kif oriġinarjament ippromulgat, u baqa' bla mittiefes għal 150 sena, sakemm fis-sena 2017 f'temp ta' xahar sofra bdil kardinali permezz ta' emenda u emenda għall-emenda. Xhieda ta' leġislazzjoni mgħaġġla mgħoddija għal kontinġenzi partikolari li fis kellha tiġi mibdula mill-ġdid u li iżda xorta waħda kkanċellat l- istitut venerabbli tal-ġurament deċiżjorju. Fl-istat verġni tiegħu l-artiklu imsemmi kien jgħid li l-preskrizzjonijiet qosra msemmija fl-istess artiklu "m'għandhomx effett jekk il-partijiet li jeċċepuhom, **meta jingħata lilhom il-ġurament**, ma jistqarrux li **mhumiex debituri**, jew li ma **jiftakrux jekk il-ħaġa ġietx imħallsa**". Meta l-konvenuti jkunu l-werrieta tal-pretiż debitur, inkella b'mod ieħor ikollhom il-jeddijiet tagħhom ġejjin mingħandu l-istess preskrizzjonijiet "ma jkollhomx effett jekk huma ma jistqarrux li **ma jafux li l-ħaġa għandha tingħata**";

Therefore, prior to 2017, the law's position was that if the debtor states that an action to pay due money is time barred, then the creditor was given the right to force the debtor to go under oath and declare whether he was a debtor or not. If the latter declared that he did not owe any money or that he did not remember whether the sum was paid or not, then the defence of prescription is applicable.

The amendments did away with the right to compel, and thus today, the law holds a presumption that the defence of prescription **cannot be raised unless the debtor, out of his own free will, testifies on oath that he is not a debtor or that he forgot whether the sum has been paid**. If this is done, then he may plea prescription. Thus today, the debtor who pleas prescription must take the oath voluntarily and declare that it is either not a debtor or does not remember whether the thing was paid.

By virtue of Article 2160 (3), if the debtor under oath holds that he is not a debtor, he must give reasons as to why not.

Usufruct

328. Usufruct is the real right to enjoy things of which another has the ownership, subject to the obligation of preserving their substance with regard both to matter and to form.

Under older generations of law, property was transferred infinitely, from family to family to family, with no form of acquiring different titles. This familial succession of property is referred to as the notion of ***entails,*** sometimes also coined the ***fidei commissum***. Following the French Revolution, a legal paradigm shift took place, asserting, for the first time, that **property may be tied to usufruct**. From this paradigm shift, we retained two fundamental notions pertinent to the law of usufruct, namely that **usufruct terminates upon death** and that **usufruct cannot be held indefinitely**. Under the law of succession, the notion of substitution exists, holding that you may leave inheritance to children, and if the children choose not to accept inheritance, it may be transferred to a substitute. Usufruct terminates with the death of the usufructuary, and thus substitution cannot apply for usufruct like it does for inheritance.

Usufruct is a real right and a **personal servitude.** It is a real right because it is a right over things or land belonging to another, and is a personal servitude because it serves as an advantage from one person to another. It is the right to enjoy things belonging to another, under an obligation to preserve. The right of usufruct is thus protected by the doctrine of *salva rerum substantia,* meaning to preserve its substance.

Diacono pro et noe vs Degorgio Lowe - *salva rerum substantia*

the Court deemed a change in the use of the premises from residential to a commercial one to be a violation of the *salva rerum substantia*. When the usufruct related to fungibles and the object is consumed by use, and equivalent in the same amount or value is returned.

The question arises as to the liability of the usufructuary at the end of the usufruct.

329. If the usufruct includes things which cannot be used without being consumed, such as money, grain, or liquids, the usufructuary has the right to make use of them subject to the obligation of paying the value thereof according to the valuation made at the commencement of the usufruct; in the absence of such valuation, he has the option either to return things in like quantity and of like quality, or to pay their value at the current price at the end of the usufruct.

Article 329 discusses the responsibility of the usufructuary at the end of the usufruct, in relation to **fungible assets** (Roman Law: res fungibiles). If the evaluation has been done at the commencement of the usufruct, then it is that initial value which must be returned. If no evaluation is made, it must be returned either in a like quantity and of a like quality, or else returned at the market price at the end of the usufruct.

Usufruct implies the obligation to maintain and preserve the utility of the property, provided that natural wear and tear owing to legitimate use is not a liability to be incurred by the usufructuary. Courts often consider the nature of the property, the duration of the usufruct, and the manner in which it was used, in order to ascertain the damages due by the usufructuary to the owner. These considerations are relevant to determine whether the wear and tear emanating from negligence or misuse exceeds the boundaries of ordinary diligence in ordinary use. This is governed by Article 338, as will be hereunder discussed.

Creation of Usufruct

Usufruct may either be created *ipso jure* or else by the will of man (contract or testament).

330. (1) Usufruct may be constituted either by law or by the will of man; in the latter case, if the usufruct refers to immovable property, it may not be constituted except by a public deed, and, if constituted by a deed *inter vivos*, it shall not be operative with regard to third parties except from the time when the deed is registered in the Public Registry upon the demand of any of the interested parties or of the notary before whom the deed was executed.

(2) The note for the registration of the deed shall contain the designation of the parties as specified therein, the date and nature of the deed, and an indication of the thing to which the deed refers in accordance with the provisions of the Public Registry Act, and it shall be signed by the notary before whom the deed was executed.

A usufruct created by law may take the form of usufruct to a surviving spouse, the use of a marital home until the other spouse completes a second marriage, etc.

Where it is created by the will of man, it must be registered as a **public deed** according to the provisions of the Public Registry Act. Such arrangements are deemed to be contracts, thus carrying a **legal binding force**.

331. (1) Usufruct may be constituted even conditionally or for a specified period.

(2) It may be constituted in favour of one or more particular persons.

(3) Where the usufruct is granted to several persons to be enjoyed by them successively, it shall be operative only in favour of those persons who are alive at the time when the usufruct devolves upon the first usufructuary.

Usufruct may be subject to a condition, be it **resolutive** (one which extinguishes the obligation *ex tunc* if fulfilled) or **suspensive** (one which delays the obligation's effect until the condition is fulfilled).

Article 331 (1) confirms the **duration of the usufruct**, stating that it may be constituted either **conditionally** or else for a **specified period of time**. A usufruct **cannot be granted indefinitely**.

Article 331 (2) confirms the duration of usufruct, stating that usufruct can be **joint** (in favour of one person) **and successive** (in favour of a plurality of persons).

Article 331 (3) holds that where it is granted severally, it operates only in favour of those born and alive during the vesting of the first usufructuary. Those born later will not be included in the arrangement, establishing a clear cut-off point for determining and ascertaining usufructuary validity.

The Rights of the Usufructuary

The Code is structured in a manner that first we find the rights and then the obligations of the usufructuary. Upon careful reading one asks oneself whether these rights are conditioned. The usufructuary has the right to take all kinds of fruits, with such fruits being classified as **industrial** (that which requires cultivation), **natural** (that which grows spontaneously), or **civil** (pertaining to rents and interests). These classifications of fruits owe themselves to the agricultural context in which the Roman Law provisions were drafted.

Today, usufruct operates almost exclusively within the contexts of interests and return on investment (industrial and financial contexts), be they returns on financial assets, property, profits from a business, proceeds from the cashing of an insurance, rents, ground rents, annuities, pensions, dividends, etc. Usufruct has another important benefit which is the role of transmission of wealth from one generation to the other retaining control by the party transmitting by way of usufruct. With regard to residences, it may be tax efficient to transfer bare ownership to children whilst parents retain the rights of use and habitation to live till, they day in the donated property. With regard to shares, parents donate shares but retain usufructs to be entitled to dividends, vote in general meetings, appoint directors, etc. without owning the shares. Note the role of usufruct in the transmission of wealth from one generation to another. This is often done for tax purposes. With regard to emphyteusis we will see that there is the right of the dominus to get a laudemium, an entitlement of the usufructuary. Primarily, the usufructuary has **the right to all fruits**, whether natural, industrial, or civil, which the thing subject to usufruct is capable of producing. This is located under Article 332.

322. ’The usufructuary has the right to take all kinds of fruits, whether natural, industrial or civil, which the thing subject to his usufruct is capable of producing.’’

The ensuing article further establishes and contextualises the understanding of **natural, industrial,** and **civil fruits**.

333. (1) Natural fruits are those which are the spontaneous produce of the soil. The produce and increase of animals and the produce of stone-quarries or of mines are also natural fruits.

(2) Industrial fruits of a tenement are those which are obtained by cultivation.

(3) Civil fruits are the rents of property let, emphyteutical ground-rents, interest on capitals and annuities.

Article 334 holds that natural or industrial fruits hanging from branches or standing upon roots at the time when the usufruct begins, shall belong to the usufructuary, without prejudice to any portion which may be due to the tenant under a meatier lease. Moreover, such fruits that are hanging when the usufruct terminates shall belong to the owner, without prejudice to that which may be due to any portion due to tenant or to compensation due to the usufructuary for his cultivation.

334. (1) Natural or industrial fruits hanging from branches or standing upon roots at the time when the usufruct begins, shall belong to the usufructuary, without prejudice to any portion which may be due to the tenant under a metayer lease.

(2) Such fruits as are hanging from branches or standing upon roots at the time when the usufruct terminates, shall belong to the owner, without prejudice to any portion which may be due to the tenant under a metayer lease, and to any compensation which may be due to the usufructuary or his heirs for their cultivation.

Article 335 holds that civil fruits shall be deemed to be earned day by day and shall belong to the usufructuary in proportion to the duration of his usufruct. **Civil fruits** represent the income derived from the use of that property, and are shared with the usufructuary proportionately to the duration of the usufruct.

335. Civil fruits shall be deemed to be earned day by day and shall belong to the usufructuary in proportion to the duration of his usufruct.’

Alienation fines in emphyteutical grants (laudemia) shall also belong to the usufructary. This is stipulated in **Article 336.**

> **336.** The alienation fines in emphyteutical grants shall belong to the usufructuary.

In emphyteutical grants, the fines associated with alienation are known as ***laudemium,*** and are entitled to the usufructuary. Traditionally, *laudemium* is paid to the owner in case of such alienation, for it serves as acknowledgement of the new emphyteuta. However, when there is a concurrent usufruct over and aboce the emphyteusis, the laudemium is liable towards the usufructuary instead of the owner.

Another right of the usufructuary is the entitlement to receive the payments which fall due from day to day during his usufruct. He is, however, bound to restore any surplus which he may have received in advance. This is stipulated in Article 337.

> **337.** The usufructuary of a life annuity is entitled to receive the payments which fall due from day to day during his usufruct; but he is bound to restore any surplus which he may have received in advance.

This provision states that any interests on capital which don't amount to life annuity, must be paid by taking from the invested capital. The provision makes it clear that both capital and the interests appertain to the usufructuary, thus suggesting that interest cannot accumulate separately but must be consumed alongside the capital.

The usufructuary further has the right to make use of things which deteriorate gradually, via **wear and tear**, and which are not consumed at once. **The usufruct of things which deteriorate gradually by use** is dealt with in **Article 338**. The law holds that the usufructuary **is not responsible for wear and tear**, as long as:

a) The thing was used in **a proper manner**, and
b) The deterioration was not brought about by the usufructuary's **negligence or malice.**

> **338.** If the usufruct includes things which, without being consumed at once, are subject to gradual deterioration by use, the usufructuary has the right to make use of them for the purpose for which they are intended, and he is only bound to restore them, at the end of the usufruct, in the condition in which they may be, provided they have not been damaged through his malice or negligence.

Here we find a situation where things deteriorate through **normal use.** The hypothesis is that things, through normal use, deteriorate over time. If the usufructuary uses them properly, and for the purpose intended, and as **bonus paterfamilias**, it is lawful and legitimate that these are returned in the condition of deterioration through normal and proper use, provided there has been no malice or negligence. The three key points here are that 1) the thing in question must not be consumed upon usage, and that there must be an element of wear and tear, 2) there is a necessity for proper and ordinary usage, and 3) the user was not acting maliciously or negligently. The test for negligence surrounds the test of the ***bonus paterfamilias***. If these three points are proven, then the usufructuary will **not be liable** to repair or restore the thing so used.

This article creates a distinction from **Article 329,** which contemplates the **usufruct of fungibles**. Here we are contemplating a usufruct of things which are not consumed at once but are subject to gradual deterioration by use. The obligation is to restore these things which without being used at once are subject to deterioration in the condition at the termination of the usufruct.

Usufruct is not inherited. However, bare ownership can be inherited. The same cannot be said for the damages or responsibilities arising from usufruct - the **responsibility in damages of the usufructuary is inherited.** Thus in usufruct, the rights are not inherited, but the duties are.

Article 339 holds that fruit trees that die, and those that are uprooted or broken by accident belong to the usufructuary, subject to his obligation **of replacing them by others.**

> **339.** Fruit trees that die, and those that are uprooted or broken by accident, belong to the usufructuary, subject to his obligation of replacing them by others.

The usufructuary also has **the right to assign the enjoyment of the right to any person,** with the inherent enjoyment of the thing, as stipulated in Article 340. This may be done **gratuitously** or by **valuable consideration**.

> **340.** A usufructuary may assign the enjoyment of his right whether gratuitously or for valuable consideration.

The usufructuary is entitled to assign its enjoyment whether this is gratuitously or for value. Clearly, the usufructuary can only transfer what it has meaning and implying that if theoretically, the usufructuary dies after 3 months, the usufruct will be terminated after 3 months. We do not have the creation of a new usufruct linked to a new usufructuary but rather the transfer of the usufruct linked to the original usufructuary.

The **usufructuary** is entitled **to lease any property of which he had the usufruct. Article 341** explains that the lease shall still be operative after the termination of the usufruct, provided that it shall have been made:

a. On fair conditions.
b. For a period not exceeding 8 years in the case of **rural property**.
c. For a period not exceeding 4 years in the case of **urban property**.

> **341.** A lease of the property shall continue to be operative even after the termination of the usufruct, provided such lease shall have been made on fair conditions and for a period not exceeding eight years, in the case of rural property, or four years, in the case of urban property, or an ordinary period according to usage, in the case of movable property, or any period shorter than any of the said periods respectively in the case of property the letting of which for a period exceeding such shorter period is prohibited.

This title is in most cases favour the bare owner. There are instances where this has been criticised and deemed unfair on the usufructuary, but we must now forget that usufruct is by essence and definition **a limited finite and temporal right.** It is not something which is perpetual and is something which terminates with the death of the usufructuary. There are limitations to this right.

This article contemplates the hypothesis where the usufruct leases out the property held in usufruct. It is allowed but subject to important safeguards in favour of the bare owner. There is also an important qualification that subject to the two requirements to be spoken, the lease created by the usufructuary subject to the two following qualifications, continue to be operative and remains in force even after the termination howsoever it is terminated of the usufruct.

There are two requirements:

- A time requirement (a very special type of lease).
- Fair conditions

This provision is considered to be a **special law** governing the law of lease, for it is not contemplated within the provisions traditionally governing lease.

Fair conditions is the term which has evolved and has seen the most significant turn about starting from the 1980s. There was the temptation prior to the early 80's to link fair conditions with the old rent laws. When one studies rent one will go into the history of rent and see that an important part of the local and international is the history of freezing of rents partly because of the way where rents could not be increased and there was also a control in the market negotiations to rent out. This is the historical context. The sitting tenant cannot be thrown on the street and a cap in the rent. Prior to 1980s the meaning of fair conditions here which is the second requirement in this article.

Post 1980, with growing awareness of human rights, this changed and **fair conditions now means** open market value conditions. In other words what would be the conditions of a willing lessor and lessee of the specific immoveable in an open market scenario is negotiation at arm's length (with no undue constraints) what the market would have given you. So it remains a but **subjective of what the market gives you.** If the owner were to challenge a lease made by the usufructuary on the basis that it is not fair current market conditions there is this unavoidable element of subjectivity.

Over time the meaning of fair conditions has evolved in meaning, where in the past fair conditions were linked to the old rent laws which froze rent and condition at very unfavourable conditions to the landlord, however in the 1980s we saw a change where **fair conditions meant market conditions, meaning willing lessor, willing lessee, operating at arm's length in an open market condition without undue constraints.**

342. The usufructuary may also sell the fruits that are pending; and in such case, if the usufruct terminates before the fruits are gathered, the sale shall continue to be operative, and the owner is entitled to receive the price of such fruits as have not yet been gathered:

Provided that the owner shall have no action against the buyer who may have paid the price of such fruits to the usufructuary before the termination of the usufruct.

Article 342 holds that the usufructuary, or the person entitled to use and enjoyment of the property and its fruits, **can sell the pending fruits of the property.** If the usufruct ends before all the fruits are collected, the sale is still valid, provided that the owner is entitled to receive the price of such fruits not yet gathered.

The usufructuary has the right to enjoy, in the same manner as the owner, **any right of easement** attached to the tenement and generally all the rights which the owner might enjoy, according to Article 343.

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

343. The usufructuary is entitled to enjoy, in the same manner as the owner himself, any right of easement attached to the tenement subject to his usufruct, and generally all the rights which the owner might enjoy.

Article 344 holds that the usufructuary is also entitled to the enjoyment of any stone-quarry which is already opened and being worked at the time the right to the usufruct vests in him; he may not, however, open new quarries.

344. The usufructuary is also entitled to the enjoyment of any stone-quarry which is already opened and being worked at the time the right to the usufruct vests in him; he may not, however, open new quarries.

Since usufruct is a **real right**, the usufructuary **may bring any real action** competent by law to the owner as stipulated in Article 348.

> **348.** It shall be competent to the usufructuary to bring any real action competent by law to the owner.

This brings to the fore the distinction which is assumed and not defined in the law. There is no legal distinction between real rights and real actions. **Article 2143** states that all actions are prescribed by the lapse of 30 years. The point here to note is that the usufructuary is entitled to the enjoyment of real rights **as well as** the procedural actions to protect the real right. The respondent would not be able to defend and say that the usufructuary lacks **locus standi** to bring forward a legal case.

The Obligations of the Usufructuary

The owner has no positive obligations towards the usufructuary. He is under the obligation to abstain from any act which would hinder the enjoyment of the usufruct as laid down in **Article 346** and under a passive obligation to tolerate the enjoyment of the usufruct.

> **346.** The owner may not by his own act or in any other manner whatsoever prejudice the rights of the usufructuary.

> **347.** (1) The usufructuary cannot, at the termination of the usufruct, claim any compensation for the improvements of any kind which he may have executed, even though the value of the thing may have been considerably increased thereby.
>
> (2) Any such improvements, however, may be taken into consideration in the assessment of any damages for which the usufructuary may be liable.
>
> (3) Where no set-off arises under sub-article (2) the usufructuary may take away those improvements which may be removed with profit to himself, and without damage to the tenement, unless the owner prefers to retain them, on payment to the usufructuary of a sum corresponding to the profit which the latter might obtain by removing them from the tenement.

Article 347 has been criticised as unfair on the usufructuary, but it underlines the fact that the law is ultimately on the side of the property owner. This is due to the fact that **article 347(1**) clearly states that at the end of the usufruct **the usufructuary is not entitled to any compensation for improvements carried out on the property,** and any investments made, even though the value of the property may have increased significantly as a result thereof. **The usufructuary knew or should have known that he or she was not there forever and that he enjoyed the property improvements whilst enjoying the usufruct.** The only right which the usufructuary has where there is no case of set-off against damages is to remove those improvements which are useful to the usufructuary at the cost of the usufructuary unless the owner opts to keep them and pay their value at the time of their removal. The notion of set-off may be taken into account. As seen in **Article 347 (2)** says that *may* be taken into consideration which indicates that he is not even entitled. Permanent improvements re normally impossible to take off but if it is possible to take off without damage unless the owner decided to keep the improvements and pay the usufructuary. The term *profit* is found in the relation between possessor and owner.

The point here surrounds the entitlement of any of the usufructuaries to compensation for improvements. Here the code has been criticised as being unfair on the usufructuary. This code is coming from a context where the rights of ownership where exceedingly harsher than what was truly needed. This by today's eyes is a very wise and balanced exercise and it is evident that Dingli reflected in depth and tried to balance when drafting the law. Until today, the usufructuary has **no right to any compensation for improvements.**

The Obligation of Security

350. The usufructuary may not commence to exercise his rights over the things subject to the usufruct before he has made up an inventory of such things, containing a description of the movables together with the value thereof, and of the state of the immovables, unless such inventory is dispensed with in the act creating the usufruct.

The most fundamental obligations of the usufructuary pertain to **inventory and guarantee.** Inventory pertains to the documentation of the contents of the usufruct and is tied to the other obligations in the usufructuary, including the responsibility to return the property in accordance with the legal standards or replacing it if damaged negligently or maliciously.

The obligations, when attached with the duty to **publicise** are often exercised via the Court of Voluntary Jurisdiction. The Usufructuary is often burdened with the recording of the **state, condition, nature** and **value** of the property. Without these recordings, the usufruct may not be commenced.

352. (1) It shall likewise be unlawful for the usufructuary, unless he has been exempted by the act creating the usufruct, to commence to exercise his rights over the things subject to the usufruct before he has given security that he will enjoy the things so subject as a *bonus paterfamilias*, that he will restore the movables, refund the values of the things mentioned in article 329, and make good any damage that might happen through his negligence whether to the movables or to the immovables.

(2) The sum of the security, for the purposes of the hypothecary registration, shall be regulated by the amount of the capitals that are to be delivered to the usufructuary or that may be restored to him during the usufruct, by the value of the movables, and by the cost of such repairs in the immovables as may probably be required during a period of five years and as are, according to law, at the charge of the usufructuary.

(3) It shall be lawful for the court, according to circumstances, to fix a lesser sum; and in such case, should the sum of the security be spent or become insufficient before the termination of the usufruct, the usufructuary shall be bound to give a further security, and, in default, the provisions of article 355 shall apply.

Article 352 discusses the formalities which establish the commencement of the usufruct. The usufructuary, unless he has been exempted from the act creating the usufruct, must **give a security that he will enjoy the things subject as a bonus paterfamilias, and that he will make all due restorations owing to negligence or malice and refund of the values of fungibles consumed, as per article 329**.

Without the provision of this security, the usufruct cannot commence. The security ensures that the usufructuary acts diligently and safely. The sum of the security is determined based on several factors, including the sum of capital to be delivered to the usufructuary, the value of movables, and the anticipated cost of repairs done to an immovable over a 5 year period. As per **article 352 (3),** the court has the power to adjust the required sum of security based on specific circumstances. This guarantee or security, is referred to as a **hypothec**.

The law, via **article 353** provides 3 **exceptions to article 352**, in that these exceptions exempt the enlisted persons from issuing the security or guarantee for the benefiting of usufruct rights.

353. The following persons, however, are not bound to give security:

(*a*) those whose usufruct derives from the law;

(*b*) the vendor or the donor who has retained the usufruct for himself;

(*c*) the usufructuary of things which are, or are to be, administered by others.

Thus where the usufruct is created *ipso jure*, or where the vendor or donor has retained the usufruct for himself, or where the usufructuary of things are to be administered by others, then there is **no duty to issue security before commencing the usufruct. Article 354** describes the process to be followed in the case of the non-payment of the security;

354. The owner may demand the security, where required, either before or within one year after the usufructuary shall have commenced to exercise his rights over the things subject to the usufruct; after the expiration of the said year, it shall not be lawful for the owner to demand the security unless he proves that the condition or the conduct of the usufructuary has so changed that the fulfilment of his obligations is thereby endangered.

Therefore, where security is not paid, the **owner** may **demand the security within one year after the usufructuary has commenced**. After the expiration of the said year, it is not lawful for the owner to demand the security unless **he proves that the condition or conduct of the usufructuary has changed enough to warrant concern over the fulfilment of his obligations**.

355. If the usufructuary fails to give security, where required, within the time fixed by the court, the court shall, upon the demand of the owner, appoint a competent person to administer the things subject to the usufruct, in the interest of both the owner and the usufructuary.

If the usufructuary fails to give security, where so required (i.e where not exempted by article 353 or where excluded from the act which creates the usufructuary relationship), then the Court shall appoint a competent person to administer the things subject to the usufruct in the mutual interest of the owner and the usufructuary. This administrator is empowered to sell the movables subject to the usufruct, if necessary.

356. The administrator shall sell the movables, investing at interest the proceeds thereof; he shall likewise invest any other sum of money included in the estate or which may be derived from the return of capitals during the usufruct.

362. Delay in giving security shall in no case deprive the usufructuary of the fruits to which he may be entitled: such fruits are due to him from the time of the vesting of the right to the usufruct.

Article 362 importantly states that a delay in payment of the security does not deprive the usufructuary of the fruits entitled to him.

The Obligation of Repairs

364. The repairs to walls and vaults, the replacing of beams, and the entire renewal of the roof, staircase, or pavement of any part of a building, are extraordinary repairs.

The responsibilities of the usufructuary are delineated in the law, but these provisions often leave room for interpretation, owing to certain ambiguities. Essentially, the usufructuary is responsible for **ordinary repairs**, which entail maintenance expenses typically required in the ordinary course of events. In the case of **extraordinary expenses,** however, it is the **owner** who bears the burden.

Extraordinary repairs as per article 364 pertain to **structural integrity** of a property.

Let us consider an example wherein the premises in the usufruct requires **extraordinary repairs**. The usufructuary **cannot compel** the owner to carry out extraordinary repairs. The only remedy available when the owner is unwilling to carry out the repairs is to carry out the repairs at the cost of the usufructuary. There is a process whereby the costs must be notified by the usufructuary to the owner, and if the owner does not challenge the costs, he is assumed to approve of them. This process is governed by article 365.

365. (1) No action shall lie in favour of the usufructuary to compel the owner to carry out the repairs which are at his charge; but, if the owner refuses to carry out such repairs, it shall be lawful for the usufructuary to demand that he be authorized by the court to effect such repairs, and to recover from the owner, at the termination of the usufruct, the amount of the expenses incurred, without interest, provided the utility of the repairs subsists at the time of the termination of the usufruct:

Provided the usufructuary shall be entitled to recover only the value of such repairs as determined by means of a valuation, regard being had to the time of the demand, if he fails to give to the owner an account of the expenses incurred by him together with the respective vouchers within six months from the day on which the repairs shall have been completed.

(2) The account shall be considered as accepted by the owner, if he shall not, within two months, declare his intention to contest it.

Thus if the owner refuses to carry out the repairs, and if the court orders the usufructuary to make such repairs nonetheless, the usufructuary would be entitled to recover the damages for expenses incurred for the repairs. If, however, the owner approves of the extraordinary repairs, the usufructuary is obliged to pay, during the usufruct, interest on what was actually spent.

Article 365 (2) holds that the usufructuary is expected to render an **account of the expenses incurred by him** within 6 months of the making of the repairs. When this account is presented to the owner, he has 2 months to declare whether he wishes to accept the expenses, and hence for the usufructuary to hear all expenses for himself, or to refuse the expenses, in which case the usufructuary is given the remedy to ask the court to recover the expenses from the owner at the termination of the usufruct. If the 2 months elapse without any reply from the owner, then it is presumed that he accepted the expenses.

One may argue this provision to be **severely against the usufructuary**, since the owner enjoys the benefit of protection from compelling to pay for expenses due to the subject matter.

The payment of specific liabilities and obligations

370. The usufructuary is bound to pay the ground-rent and all other annual charges upon the tenement.

371. The usufructuary of one or more particular tenements is not bound to pay the debts for which any of such tenements may be hypothecated, nor is he bound to pay any annuity with which such tenements stand charged; and if he is compelled to pay, he may claim relief against the owner.

372. (1) The usufructuary of an entire estate, or of a portion of an estate, is bound to pay, in proportion to his enjoyment, and without any right of recovery, any maintenance allowances, any perpetual or life annuity, and any interest on debts to which the estate may be liable.

(2) Where any capital has to be paid, if the usufructuary is willing to advance the amount, such amount shall be returned to him by the owner, without any interest, at the end of the usufruct.

(3) If the usufructuary is not willing to make such advance, the owner may effect the payment either with his own money, in which case the usufructuary shall pay to him interest thereon during the continuance of the usufruct, or by causing a portion of the property subject to the usufruct to be sold, to the extent of the sum due.

One must distinguish between article 371 and 372; a distinction which is founded on the treatment of the burdens of liabilities which may or may not be on the principles of usufruct. Article 371 holds that the usufructuary is not bound to pay debts for tenements which may be hypothecated. If there are hypothecary debts (debts secured by the tenements subject to usufruct) or annuities burdening the immovable, these are not the responsibility of the usufructuary. If the usufructuary pays or is made to pay such costs, he has a right of relief and regress against the owner.

Article 372 refers to the scenario of usufructuary of an entire estate. This could refer to inheritance, which is the normal case, but it could also refer to an universality of rights, assets and obligations. An estate is generally accepted to have quasi-personality, whereas a universality can have personality. In the case of liabilities burdening an estate or part of an estate, this is at the charge of the usufructuary without any right of regress against the owner. Strangely, if there are capital payments to be remade, the usufructuary is not bound to make such capital payments.

373. (1) The costs of lawsuits relating to the usufruct exclusively shall be borne by the usufructuary.

(2) The costs of lawsuits relating to the ownership exclusively are at the charge of the owner.

(3) The costs of lawsuits concerning both the usufruct and the ownership shall be borne by the owner; but the usufructuary shall pay to the owner the interest thereon during the usufruct.

The usufructuary pays the usufructuary costs, the owner pays the owner costs, and in actions which are mixed which involve both the usufructuary and the owner, strangely but consistently, the owner has to pay the litigation costs and the usufructuary pays the interest costs.

Extinguishing of Usufructs

378. Usufruct terminates -

(*a*) by the death of the usufructuary;

(*b*) by the expiration of the time for which it was constituted;

(*c*) by the merger or reunion in one and the same person of the two capacities of usufructuary and owner;

(*d*) by non-user of the right during thirty years;

(*e*) by the total loss of the subject of the usufruct.

Termination 1: Death of the Usufructuary, not the Owner

Death of the usufructuary terminates the usufruct, but death of the bare owner does not. It is clear that Dingli did not wish to allow the succession of usufruct, which is why the death of the usufructuary brings about a termination of the usufruct.

Termination 2: The Lapse of Time

We know that article 331 (1) holds that usufruct may be conditional or else for a specified period. If such specified period elapses, then the usufruct is terminated, as per **378 (b)**. Article 381 holds and caters for conditional usufruct in conjunction with a specified time lapse. Let us imagine that A grants a usufruct to B until C reaches 50. If C dies before reaching 50, the usufruct will continue until the date C, had he lived, would have attained the age of 50. This principle is enshrined in **article 381**.

381. Where the usufruct is granted until a third party shall attain a given age, it shall last for all that time, even if the third party dies before attaining that age.

Termination 3: The Merger of the Usufructuary and the Owner

Article 378 (c) provides for the **merger or union** of usufructuaries. Thus, if an owner inherits the usufructuary, there is a perception of union and capacity, when in reality, it constitutes a consolidation of real rights rather than a merger or union. It is thus terminated because there is an amalgamation of the individual results of consolidation.

Termination 4: The non-use of the Usufruct

Article 378 (d) holds that if the usufructuary does not exercise its rights for 30 years, then there is an implied abandonment.

Termination 5: The total loss of the Usufruct subject matter

378 (e) holds that a total loss of the subject of the usufruct would terminate the contract of usufruct.

The rights of Use and Habitation

Use and habitation are minor real rights that allow individuals to make use of or reside in property belonging to another. While some may question their utility, they remain relevant, especially in scenarios involving the transmission of wealth from one generation to another, where the creator of the usufruct retains the right of use and habitation. The rights of use and habitation share the same requirements of commencement and termination as those of usufruct, per **389**.

389. The rights of use and habitation are acquired and lost in the same manner as the right of usufruct.

The rights are defined under **articles 392 and 393;**

392. (1) Use is the real right of a person of making use of a thing belonging to another, or of taking the fruits thereof, but only to the extent of his own needs and those of his family.

(2) The right of use of a house is the same as the right of habitation.

(3) The right of use of things which are consumed by use is considered as usufruct.

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

The distinction between use and habitation is subtle, with both referring to the right to utilise a property according to family needs. Essentially, habitation is specifically tied to the right to reside in a dwelling house, while use encompasses a broader range of uses for other types of property.

The creation and termination of rights of use and habitation follow the same procedures as usufruct, typically requiring a public deed for immovable property.

Art. 394 extends the definition of "family" to include children born after the commencement of the right of use or habitation, as well as acknowledged illegitimate children, adopted children, and servants.

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

Art. 395 outlines the obligations of the grantee of a right of use or habitation, including the requirement to create an inventory and provide security, similar to the obligations of a usufructuary. However, the court may exempt the grantee from providing security based on the circumstances. Nevertheless, the obligation to use the property as a bonus paterfamilias, or a good family head, remains.

395. (1) The grantee of a right of use or habitation shall make up an inventory and give security as provided in the case of usufruct.

(2) The court may, according to circumstances, exempt the grantee from giving security.

Emphyteusis

Emphyteusis is a legal arrangement whereby the ***dominus directus*** (i.e the property owner) **maintains ownership title while granting certain usage rights to an emphyteuta who pays ground rent as acknowledgement**. As the emphyteuta possesses only a ***jus in re aliena*** (i.e a right over someone else's property), the property automatically revets back to the ***dominus directus*** once the contract expires. Through the transfer of rights to the emphyteuta, the *dominus directus* retains only **residual rights over the property**.

Emphyteusis is a form of **land lease** which was especially relevant during feudal eras, wherein the landowner would grant rights to utilise and cultivate land to lessees. The lessee, in return, commits to paying an annual rent and to enhancing the land's condition.

These leases typically extend over lengthy periods, sometimes even up to 99 years. While emphyteusis is not widely practiced in modern western legal systems owing to feudal origins, it persists in certain regions, such as Malta. In Malta, where the legal tradition owes itself to the 1865 Italian Code, terms such as ***cens*** and ***kanone*** represent the ground rent featured in emphyteutical arrangements.

1494. (1) Emphyteusis is a contract whereby one of the contracting parties grants to the other, in perpetuity or for a time, a tenement for a stated yearly rent or ground-rent which the latter binds himself to pay to the former, either in money or in kind, as an acknowledgment of the tenure.

(2) The provisions of this Title shall apply to any emphyteusis whatsoever, even where the amount of the ground-rent shall have been fixed with reference to the value of the fruits of the tenement.

Article 1494 defines emphyteusis as a contractual arrangement wherein one party grants another the privilege to utilise their land for a specified duration in exchange for an annual payment, termed the **ground rent**. This compensation, whether in monetary form or goods, serves as **acknowledgement of tenure** of the lessee's acceptance of the contract's conditions and terms.

Emphyteusis strictly pertains to land and necessitates a predetermined duration, either **indefinitely** or for a **specified period of time**. However, the **payment of ground rent** does not confer **ownership rights upon the lessee** - rather, it acknowledges the superior title of the landowner. Historically, emphyteusis gained popularity for its role in rendering land transfers more enduring, yet its usage has been influenced by its feudal connotations.

The party receiving the ground rent, and who is vested the real right of ownership over the property, is referred to as the ***directarius, or direttarju.*** This party is vested dual rights - the receipt of the ground rent and a vested interest in ensuring compliance with the emphyteusis conditions. The party paying the ground rent, and thus the party who is receiving the rights over the land is referred to as the ***emphyteuta*** or the ***utilista***, and enjoys what is termed the ***utile dominium***, granting them the **real right** to utilise and derive benefit from the property.

The primary distinction between a lease and an emphyteusis lies in the nature of the rights they confer. A lease constitutes a **personal right**, while emphyteusis **a real right**. Emphyteusis is inherently tied to **immovable property,** and not to the person holding the emphyteutical rights. In contrast, a lessee lacks the right to modify the property's form or structure.

Over time, established businesses and legal experts have influenced the evolution of the emphyteusis contract. Originally, emphyteusis took the form of a group of feudal agreements. Today, emphyteusis has transformed into a strong commercial tool owing to the enduring real rights embedded in an emphyteutical concession. These rights persist regardless of changes in property ownership, rendering emphyteusis a valuable and adaptable instrument in the modern commercial and legal sphere.

Nullity of Emphyteusis

1497. Emphyteusis is null -

(*a*) if not made by a public deed; or

(*b*) if the grant is otherwise than in perpetuity or for a stated time to be reckoned from any certain day; or

(*c*) if the amount of the ground-rent is not expressly stated in the contract.

Article 1497 discusses and contemplates the nullity of emphyteusis. It holds that an emphyteutical relationship **not created by a public deed** is invalid *a priori*. Further, if the contract is created perpetually, with no specified duration, the contract is null. The emphyteutical contract must also **specify the ground-rent** to be paid by the emphyteuta.

1498. (1) Where a tenement is granted for a time exceeding sixteen years or in such manner that the grant may by the grantee be made to last for more than sixteen years, and, in either case, under conditions which are in accordance with the provisions of the following article of this Title rather than with those relating to contracts of letting and hiring, the grant shall be deemed to be an emphyteutical grant, although the parties shall have termed it a contract of letting and hiring; and any such grant is null if made otherwise than by a public deed.

(2) On the contrary, where a tenement is granted under a title of emphyteusis, the grant shall be deemed to be an emphyteutical grant, notwithstanding the shortness of the period for which it is made and the nature of the stipulations attached thereto.

Article 1498 stipulates that when two parties engage in discussions regarding a lease exceedin 16 years, they are obligated to formalise it within a **public document**. Moreover, if the terms and conditions of the agreement resemble those of an emphyteusis contract, characterised by its long-term nature, it must also be document publicly, regardless of whether the parties refer to it as a lease. However, if the agreement unequivocally represents an emphyteusis contract and is documented publicly, the duration of the lease becomes inconsequential.

Fr David Cortis vs Ogygia Ltd.

The *dominus'* interest extends beyond receiving ground-rent payments, for it encompasses enforcing conditions such as servitudes, exemplified by the principle of ***Altius non tollendi***. This grants the *dominus* a robust entitlement, as seen in instances where the emphyteuta is constrained from constructing beyond the height of the Church due to imposed conditions.

1499. (1) The rules contained in the foregoing articles and in articles 1501,1502, 1512, 1513 and 1519, shall be observed in all cases and any agreement contrary thereto shall be without effect.

(2) Save as provided in sub-article (1), it shall be lawful for the contracting parties to make in a contract of emphyteusis any stipulation which they may deem proper, provided there be nothing contrary to law.

(3) Without prejudice to the provisions of sub-article (1), in the absence of any special agreement, the rules contained in the following articles shall be observed.

Article 1499 outlines the terms and conditions governing emphyteusis contracts. The terms mandated by law and which emanate from the Civil Code are referred to as **mandatory terms**, and feature in every emphyteutical contract, irrespective of the parties. The **mandatory terms** are laid out by **1499 (1),** and are those rules governed in **articles 1501, 1502, 1512, 1513, and 1519**. These can never be altered or amended. The parties may, however, opt to create and abide by ***ad-hoc*** provisions, created by their united wills. This represents a ***flexibility in agreement***, and go beyond the obligatory terms. The parties possess the liberty to negotiate and agree upon any additional conditions, provided that they do not exceed legal boundaries. In the absence of these *flexible conditions*, the **default rules and conditions** as stipulated in the Civil Code are applied.

Redemption of Emphyteusis

When speaking of the redemption of emphyteusis, one refers to the **extinguishing of the obligation via the paying of a fee**. Essentially, this allows the emphyteuta to permanently acquire rights over the property, as opposed to the temporal real rights which exist so long as the emphyteuta is paying the ground rent. The background which sets the theme for article 1501 is partly a measure to remove certain useless burdens over property. This article was introduced in 1981, and the idea was to give parties the possibilities to redeem these small ground rents which were not worth the troubles. It was always possible to redeem by deed the ground rent, but the 1981 amendments created the possibility to redeem a *perpetual* ground rent. Art. 1501(2) outlines the process for redeeming perpetual ground rent through a court deposit, which involves multiplying the current ground rent by 20, a method known as capitalisation at a 5% rate. This rate was chosen in light of high interest rates prevalent in the 1970s and 1980s, effectively tying the purchase of ground rent to a fixed deposit rate of 5% in 1981. The lower the capitalisation rate, the higher the cost. For instance, if capitalised at 3%, the rent is multiplied by 33. One must note that **redemption only does away with the financial obligations of the contract**, the other impositions remain untouched.

1501. (1) Where a grant in emphyteusis is made in perpetuity, the emphyteuta, even though the ground-rent may be revised at stated intervals of time, shall have the option to redeem the ground-rent as provided in the following sub-articles of this article, unless the contract itself, being a contract entered into before the 15th August, 1981, provides for a different manner in which the redemption may be effected.

(2) Such redemption of the ground-rent shall be made by the payment of a sum equivalent to the amount of the ground-rent capitalised at the rate of five per cent:

Provided that where the contract provides that the ground-rent may be revised at a specified time or on the happening of a specified condition, the redemption may be opted for by the emphyteuta within the first year of the date of any such revision, or the happening of such condition, and the sum payable for the redemption of the ground-rent shall, in such case, be equivalent to the amount of ground-rent so revised capitalised at the average rate of interests payable by a commercial bank on deposits of a fixed nature at the time of the redemption.

Baruni Salvino Testaferrata Morani Viani et vs Hubert Mifsud *- perpetual emphyteusis*
22nd November 1995

Wara li jsir fidi ta' ċens perpetwu, l-ex ċenswalist isir proprjetarju. Hemm għalhekk il-konsolidazzjoni jew konfużjoni tad-diretto dominium ma' dak utili, u dak li kien qabel utilista isir proprjetarju assolut.

Il-kunċett tal-proprjeta' kif ikkontenuta fil-liġi tagħna hija kunċett assolut. B'dana kollu, dan il-kunċett assolut ta' proprjeta' ġie mxellef b'diversi liġijiet, fosthom dawk li jipprovdu fuqu s-servitujiet predjali.

F'dan il-każ, l-impożizzjoni ta' kundizzjoni fil-kuntratt ta' ċens kien bil-ftehim bejn il-partijiet u din il-kundizzjoni (ta' limitazzjoni fuq il-bini) kienet waħda li setgħat tiġi legalment imposta. Il-Qorti ta' l-Appell waaslet biex tikklassifika din il-kundizzjoni bħala imposizzjoni ta' servitu' kontra l-akkwirent favur mhux biss tal-kontendenti pero' ukoll tat-terzi li kienu jabitaw fl-istess akkwati.

Philip Fenech vs A&R Mercierca Ltd *- perpetual emphyteusis*

It-tieni ilment hu wkoll infondat. Bil-fatt tal-fidi tas-subcens impost fuq il-kuntratt kostitwenti s-servitu`, jispiccaw l-obbligazzjonijiet marbuta mal-hlas tac-cens, izda mhux ukoll dawk id-drittijiet reali li nholqu bl-istess kuntratt ta' enfitewsi. Kif qalet din il-Qorti fil-kawza "**Coliero v.Cremona**": "*ghalkemm isir il-fidi tac-cens fil-bejgh, il-koncedent li jkun irrizerva favur tieghu drittijiet li ghandhom fihom elementi ta' proprejta`, dawn id-drittijiet jibqghu veljanti nonostante l-fidi tac-cens*". L-istess principju gie enuncjat fil-kawza "**Testaferrata Moroni Viani et v. Mifsud"**, fejn intqal li mal-fidi tac-cens drittijiet reali riservati favur il-garanti jew terzi persuni fil-kuntratt originali tal-koncessjoni enfitewtika jibqghu mhux affettwati

Is-servitu` in kwistjoni tolqot drittijiet inerenti mal-fond u fid-dawl tal-principji enuncjati bhala tali jibqghu mhux affettwati bil-fidi li ghamel Michael Spiteri. Dawk id-drittijiet ma nholqux favur persuna jew persuni partikolari, izda favur proprjetajiet partikolari, u, ghalhekk, jibqghu jaggravaw il-proprjeta` dominanti, minkejja kull fidi li jsir tac-cens/subcens impost fuq il-fond servjenti.

Division of the Ground Rent

1502. (1) The ground-rent cannot be divided without the consent of the *dominus*; but where the tenement is transferred or otherwise belongs to two or more persons separately, the *dominus* may not refuse his consent for the division of the ground-rent if such division is made substantially in proportion to the separate parts held by the persons requiring the consent.

(2) The consent given by the *dominus* for the transfer of one or more separate parts of the tenement to different persons, or the receipt by him of one or more portions of the ground-rent, from one or more of such persons, shall have the same effect as an express consent given by the *dominus* for the division of the groundrent.

Article 1502 contemplates the **divisibility of the ground rent**. A major amendment was made to this provision in 1976. This amendment made it so that each emphyteuta is entitled to demand that it pays its proportionate share of the ground rent. Historically, prior to 1976, there existed joint and several liability of various emphyteuta. For instance, in the case of a large plot of land, wherein a number of developments were carried out. On this land, there was an entire ground rent imposed which was not divided. Technically, each of the co-emphyteuta was responsible for the entire amount **in solidum** with the others. The ***dominus*** would go after the emphyteuta most capable of settling the dues, rather than chasing each co-emphyteuta for the relative pro-rata share.

In 1976, the article was re-written, to give the right of each co-emphyteuta to demand division. This thus allows for the divisibility of ground rent. One of the pre-requisite conditions for such division is that the co-emphyteuta must seek the **consent of the dominus**. Without such consent, the ground rent cannot be divided. This amendment retained the right of the dominus, whilst imposing on him the obligation to recognise divisibility of the ground rent. The dominus cannot refuse a ground rent where the division sought by the co-emphyteuta corresponds in substance to the **physical division of the property**.

1503. (1) A co-possessor who has paid the entire ground-rent, obtains reimbursement from the other co-possessors *pro rata* having regard to the portion of the tenement held by each, notwithstanding any assignment of rights.

(2) He contributes, in the same proportion, with the other co- possessors in respect of the shares of such of the co-possessors as are insolvent.

Article 1503 protects the co-emphyteuta who pays for the entire ground rent, by giving him a right to collect the pro-rata shared from the other co-emphyteuta.

Powers of the Emphyteuta

Articles **1504 - 1508** create and establish the wide powers of the emphyteuta over the property held in emphyteutis.

1504. (1) The emphyteuta may alter the surface of the tenement, provided he does not thereby cause any deterioration thereof.

(2) He is entitled to any profit which the tenement may yield and has the right to recover the tenement from any holder, even if such holder is the *dominus*.

(3) He is also entitled to the treasure trove found in the tenement, saving such portion thereof as according to law is due to the person who has found it.

1505. The emphyteuta shall keep, and in due time restore the tenement in a good state.

1506. (1) All improvements made by the emphyteuta appertain to him during the continuance of the emphyteusis.

(2) He may alter the form of such improvements; but he may not destroy them without the express consent of the *dominus*.

1507. The emphyteuta is bound to carry out any obligation imposed by law on the owners of buildings or lands:

Provided that if for the carrying out of any such obligation a considerable expense is required, and the emphyteusis is for a time, the court may, upon the demand of the emphyteuta, compel the *dominus* to contribute a portion of such expense, regard being had to the covenants of the emphyteusis, to the remaining period of the grant, to the sum of the ground-rent and to other circumstances of the case.

1508. (1) The emphyteuta may, without giving notice to the *dominus* or requiring his consent, dispose of the emphyteutical tenement and of the improvements, either by an act *inter vivos* or by any testamentary disposition.

(2) Any alienation, however, made otherwise than by a public deed, is null.

The emphyteuta has various powers pertaining to **demolishment, development,** and **alteration** of the form and substance of the immovable property. One must note that despite these powers, the conditions agreed upon in the emphyteutical contract must nonetheless be respected. The same applies event the case that the emphyteutis is **redeemed** by the emphyteuta. This is because redemption does away only with the financial obligation, and not with the other agreements and conditions imposed by the emphyteutical contract.

One may ascertain 3 interests pertaining to the **directarius**, being 1) the entitlement to receive ground rent, 2) the. Entitlement to insist that the conditions of the emphyteuta are observed, and 3) the right to demand the dissolution of the ground rent if the ground rent is not paid, if the conditions are not respected, or if the immovable is left to ruin.

The **emphyteuta**, by virtue of **article 1508** is given the **power** to dispose of the **emphyteutical tenement**, without giving notice to the dominus or without seeking his consent, provided that such disposal is done by an act *inter vivos* or by any testamentary disposition.

Joseph Fenech v. Domenic Agius - *principles of emphyteutis*

As established here, the following principles apply:

a) The ***dominus directum*** retains the authority to prohibit the emphyteuta from transferring the ***utile dominium*** to third parties, thereby prohibiting sub-emphyteusis, through an explicit provision in the deed of emphyteusis. This prevails despite the rights of the emphyteuta as outlined in Art. 1508 and Art. 1510, where the *dominus directum* may not refuse an alienee unless their incompetence is proven.

b) Any sub-emphyteusis established must NOT prejudice the ***dominus directum***.

c) All sub-emphyteusis transactions must be conducted in good faith.

1509. (1) Where the emphyteuta makes any such disposal without the consent of the *dominus*, he shall not be released from his obligations towards the *dominus* himself unless the latter acknowledges the alienee.

(2) The alienee, however, although not acknowledged by the *dominus*, is personally bound towards him for the payment of the whole amount of ground-rents which fall due during his tenure, and for the repair of all damages which take place during such tenure; but he is not liable for the ground-rent which fell due, or for the damages which took place previously to such tenure; saving always, even in respect of such ground-rent and damages, the rights of the *dominus* on the emphyteutical tenement, on the fruits and on the value of all things which serve for the furnishing or stocking or for the cultivation of the tenement, to whomsoever such things may appertain:

Provided that such rights shall not be available to the proprietor in respect of the said things if the same belong to or are held by or on behalf of any department of the Government of Malta in any case in which such department is not itself liable for the payment of the debt.

1510. The *dominus* may not refuse to acknowledge, in lieu of the emphyteuta, the alienee under any title, of the emphyteusis, if the alienee is a competent person to carry out the obligations arising from the emphyteutical grant.

1511. An alienee, under any title, of an emphyteusis, in possession of the tenement, whom the *dominus* has acknowledged or has offered to acknowledge, may not refuse to acknowledge expressly the *dominus* or to bind himself personally towards him for the carrying out of the obligations arising from the emphyteutical grant.

1512. (1) Any of the acknowledgements mentioned in the last two preceding articles may be either express or implied; and the payment or receipt of ground-rent or of a fine by or from the alienee shall operate as an implied acknowledgement, unless an express reservation is made by a judicial act.

(2) Both the *dominus* and the alienee may require the acknowledgement to be made by a public deed or a private instrument; and in any such case the expenses shall be borne by the party requiring the written form.

Articles 1509 to 1512 contemplate the **acknowledgement** of the new emphyteuta by the dominus and vice versa. **Article 1509** states that even though the emphyteuta may have transferred the emphyteutis or disposed of the tenement, the obligations towards the owner are not extinguished, unless the dominus (owner) acknowledges the new emphyteuta. Nevertheless, the new emphyteuta is also bound with the former emphyteuta for all events and damage following the acquisition, and thus the dominus has a right of action for post transfer, both against the former and the new emphyteuta. This situation continues until the release of the former emphyteuta.

Article 1510 holds that the dominus may not refuse acknowledgement to the new emphyteuta if such new emphyteuta is a competent person. This has been interpreted to mean that the burden of proof is on the dominus to show that the new emphyteuta is not a competent person, with the competence often being attributed to financial incompetence or insufficiency. In 1961, this provision was amended to abolish the **right of first refusal**, which was vested in the owner prior to such amendments. Prior to the 1961 amendments, the owner had the right to refuse to buy the *utile dominium*, on the same conditions.

Article 1511 postulates that the new emphyetuta may not refuse to acknowledge a dominus if the dominus has acknowledged the new emphyteuta. By implication, this raises the question as to what would happen if the dominus does not offer to acknowledge the emphyteuta. If the dominus refuses to acknowledge the emphyteuta, the said emphyteuta may refuse to acknowledge the dominus.

Article 1512 is a relatively modern provision, and carries various practical benefits. It states that the acknowledgement may be **either express or implied**. Acknowledgement may thus be derived from implicit and overt acts which suggest concession.

Testaferrata et vs Mifsud
22nd November 1995

"Wara li jsir fidi ta' ċens perpetwu, l-ex ċenswalist isir proprjetarju. Hemm għalhekk il-konsolidazzjoni jew konfużjoni tad-diretto dominium ma' dak utili, u dak li kien qabel utilista isir proprjetarju assolut.
Il-kunċett tal-proprjeta' kif ikkontenuta fil-liġi tagħna hija kunċett assolut. B'dana kollu, dan il-kunċett assolut ta' proprjeta' ġie mxellef b'diversi liġijiet, fosthom dawk li jipprovdu fuqu s-servitujiet predjali.

F'dan il-każ, l-impożizzjoni ta' kundizzjoni fil-kuntratt ta' ċens kien bil-ftehim bejn il-partijiet u din il-kundizzjoni (ta' limitazzjoni fuq il-bini) kienet waħda li setgħet tiġi legalment imposta. Il-Qorti tal-Appell waslet Biex tikklassifika din il-kundizzjoni bħala imposizzjoni ta' servitu' kontra l-akkwirent favur mhux biss tal-kontendenti pero' ukoll tat-terzi li kienu jabitaw fl-istess akkwati"

Coleiro Bros Ltd vs Maria Felicita Cremona
14th October 1987

... illi ghalkemm isir il-fidi tac-cens fil-bejgh l-koncedent li jkun irrizerva favur tieghu drittijiet li ghandhom fihom elementi ta' proprjeta` dawn id-drittijiet jibqghu veljanti nonostante l-fidi tac-cens. Jinkombi ghalhekk lill-Qorti li tezamina l-kuntratt "de quo" sabiex tistabbilixxi jekk il-koncedent ghamilx tali rizervi fil-kuntratt.

Laudemium - the Alieation Fee

Laudemium is governed by **article 1513**, and is the right of the dominus to be paid a sum, generally from the new emphyteuta, being less one year's ground rent, referred to as the *alienation fee*. The law refers to such fee as *any sum by way of fine, by wahtever name called*.

1513. The *dominus* shall not be entitled to exact any sum by way of fine, by whatever name called, upon any sale or other alienation made after the 1st July, 1976, of the *dominium utile* or of the improvements unless -

(*a*) the emphyteutical grant contains an express agreement providing for such payment, and

(*b*) the emphyteutical grant is one which is made for a period exceeding twenty years;

and where any sum due in accordance with the foregoing provisions of this article exceeds the amount of the ground-rent for one year due to that *dominus* in respect of the tenement or part of the tenement sold or alienated, such *dominus* shall not be entitled to any such excess.

The current law on emphyteusis states that, firstly, that *laudemium* has to be **expressly agreed upon**, and, secondly, that the concession has to **exceed a period of 20 years.** Therefore the right to receive and compel for the payment of *laudemium* is applicable only if these 2 conditions are **cumulatively satisfied.**

The final paragraph to article 1513 states that ***if the sum agreed upon for the laudemium exceeds one year's worth of ground rent, then the owner cannot compel for the payment of that laudemium***. It must necessarily be a sum less than one year's worth of that ground yet in order for the owner to demand the payment thereof.

The Dissolution of Emphyteusis

The emphyteuta is obliged to enjoy, *as a bonus paterfamilias*, the concession, even if it is in perpetuity, because although the emphyteuta has wide rights in may ways similar to those of the owner of a property, the *dominus* has residual rights as has been seen above. Note that a 1976 amendment rendered the rules of promise of emphyteusis the same as those of a promise of sale.

1515. (1) An emphyteusis is dissolved *ipso jure* if the tenement perishes in whole by a fortuitous event.

(2) If the tenement perishes in part, and the remaining part is not capable of yielding a rent equivalent to the ground-rent, the emphyteuta may not claim a reduction of the ground-rent, but he may demand the dissolution of the emphyteusis, restoring to the *dominus* the tenement with the improvements even if the remaining part of the tenement consists chiefly of such improvements.

1516. It is incumbent on the emphyteuta to prove that the tenement has perished, wholly or in part, by a fortuitous event, and without any fault on his part or on the part of his family, or of his servants, guests or tenants or of the sub-emphyteutae not acknowledged by the *dominus*.

Articles 1515 and 1516 contemplate the dissolution of emphyteutis. 1515 holds that an emphyteusis is **dissolved ipso jure if the tenement perishes in whole by a fortuitous event**. Thus if an act of god results in the destruction or perishing of a tenement, then the emphyteutical contract ceases ipso jure. In the case that such act perishes only part of a tenement, and where the remaining part is not capable of yielding a rent equivalent to the ground-rent, **the emphyteuta cannot request for the ground rent to be reduced**. However, in such case, the emphyteuta is given the **option to dissolve the emphyteutis, restoring to the dominus the tenement with the improvements done**.

Article 1516 holds that the burden of proof lies on the emphyteuta to prove that the tenement was perished, wholly or in part, by a fortuitous event, **and without any fault on his part or on the part of the family**. Thus, there is an element of **negligence** involved in this article, which extends to the emphyteuta's family, servants, guests, tenants, or to other sub-emphyteutae not acknowledged by the dominus.

One must note that there were special laws relating to the protection of dwellings in the case of temporary or perpetual emphyteusis, wherein the legislator has intervened to protect the sitting emphyteuta, generally either by giving a right to convert into a lease or giving a lease to convert from a temporary to a perpetual emphyteusis. These rules are generally governed by **Chapter 158** of the laws of Malta, the **Housing (Decontrol) Ordinance**. There have also been many Constitutional Court jdugements wherein the first Article of the First Protocol of the ECHR, alongside Article 39 of the Constitution of Malta, have been invoked to protect the right for peaceful possession of property, with intent to enforce the **emphyteuta's right to convert the contract into one of lease, or to convert the emphyteutis from definitely established to perpetually enforceable,** upon the expiration of the emphyteutical grant.

The two streams of trends are as follows; on one hand, a violation of a human right may only be in relation to the State, who is to respond, whilst on the other hand, it is not always clear and one may argue that such rights are also enforceable against individuals. Some judgements tend to suggest that the dominus would be entitled to act before the competent court, and not the ECHR or Constitutional Court, to have the occupier evicted, in turn leaving such occupier without title. Conversely, the occupier may argue that if there is responsibility, it is not his to bear, because he acted with a legitimate expectation and thus should not be made to suffer.

1517. It shall be lawful for the *dominus* to demand the dissolution of the emphyteusis and the reversion in his favour of the tenement together with the improvements if the emphyteuta owes by way of ground-rent a sum equal in amount to three yearly payments.

1518. (1) It shall also be lawful for the *dominus* to demand the dissolution of the emphyteusis and the reversion in his favour of the tenement together with the improvements, in addition to the repair of any damage, if the tenement has considerably deteriorated, and the emphyteuta fails to show that such deterioration has taken place without any fault on his part or on the part of the persons mentioned in article 1516.

(2) The same shall apply where the deterioration has taken place in the improvements executed on the tenement.

Articles 1517 and 1518 grant the dominus the right to **demand the dissolution of the emphyteutis and the reversion in his favour**, in certain events;

1) **Article 1517**: in the case that the emphyteuta owes by way of ground-rent a sum equal in amount to **three yearly payments**.
2) **Article 1518**: in the case that the tenement has been considerably deteriorated, and the emphyteuta **faisl to show that such deterioration has taken place without any fault on his part**.

Again, the notion of negligence is introduced, with the test of the bonus paterfamilias featuring.

1519. (1) In the cases mentioned in the last two preceding articles, it shall be competent to the *dominus* to demand the dissolution of the emphyteusis and the payment of the arrears of the ground-rent, concurrently.

(2) Nevertheless, the court may, in each of the cases aforesaid, grant to the defendant a reasonable time, according to circumstances, for the payment of the arrears or for the execution of the repairs, and such time may, for a just cause, be extended once to a further reasonable time.

(3) The provisions of the foregoing sub-articles shall apply also in any case in which the dissolution of the contract has been expressly agreed upon for any reason, and shall so apply even if the agreement excludes the grant of any time.

(4) Nothing in this article shall be construed as requiring the payment of any ground-rent or other sum that is not due, whether because the demand therefor is barred by prescription or for any other reason.

Article 1519 is the last mandatary article, and was amended by the 1976 amendments. IT clarifies as to whether, in the same proceedings, the dominus was allowed to demand both dissolution and payment of the arrears concurrently. The reasoning waas that in the past there was a problem wherein one would offer the choice between the arrears of ground rent, whilst keeping the emphyteutis in force or the dissolution of the said emphyteusis.

Article 1519 thus holds that the **dominus** is allowed to demand such facts concurrently. 1519 (2) holds that **the court shall grant to the defendant a reasonable time for the payment of the arrears or repairs**. The reasonable time may also be extended once to a further reasonable time.

1519 (3) follows, stating that this power of the court applies even where a resolutive condition has been **expressly agreed upon**. Such condition would hold that in the event that a condition is or is not met, the emphyteusis will be dissolved.

The case may arise where a creditor third party has interest against the dissolution of the emphyteusis. For instance, a creditor may have a security interest over the property. **Article 1520** provides such standing to the third party creditor;

1520. (1) Any creditor of the emphyteuta, or any other person interested may intervene in the suit and make the demand for the time aforesaid; and he may also within such time, even though granted with his intervention on the demand of the emphyteuta, prevent the dissolution of the emphyteusis by paying the arrears or by executing the repairs required.

(2) In such case, the creditor or other person interested shall, for the reimbursement of the arrears paid or of the expense incurred in the execution of the repairs, be vested with the rights of the *dominus* as against any other creditor of the emphyteuta, excepting, however, the *dominus* himself.

The creditor may thus intervene to demand for the time referred to in article 1519, for the defendant emphyteuta to make due all the arrears and repairs.

1521. (1) A temporary emphyteusis ceases on the expiration of the time expressly agreed upon, and the reversion, in favour of the *dominus*, of the tenement together with the improvements takes place, *ipso jure*.

(2) Any action for the renewal of the emphyteusis for any cause whatsoever, except by virtue of an express covenant in the emphyteutical grant or in any other public deed, is abolished, in regard to any kind of property whatsoever.

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.

Article 1521 and the following articles make provisions for the reversion of a temporary emphyteusis. Article 1521 takes a clear stance which asserts that a temporary emphyteusis seizes on the expiration of the time agreed upon. In such case, the property returns to the full ownership of the dominus. One must bear in mind that here we are not looking at a dissolution of the emphyteusis owing to deterioration or violation of conditions, but rather by the lapse of time. The rule is that there is **no entitlement to renew the emphyteusis except by virtue of an express provision in the deed of emphyteusis or by another public deed**.

Article 1522 follows with the effects of **reversion**. It holds htat all hypothecs, burdens, easements, etc, created during the emphyteusis **shall be dissolved both in regard to the tenement and to the improvements**. The tenement together with the improvements then return to the dominus.

1523. (1) Upon reversion, the emphyteuta shall not be entitled to any compensation in respect of the improvements, whatever their nature or value, unless reversion takes place for any of the causes mentioned in articles 1517 and 1518.

(2) In the cases mentioned in the said two articles, the *dominus* is bound to pay to the emphyteuta the price of the improvements, regard being had to their value at the time of the reversion, up to the amount by which the value of the tenement is found to have increased in consequence of such improvements at the time of the reversion, as well as to the remaining period of the emphyteusis.

Art. 1523 addresses whether an emphyteuta is eligible for compensation for improvements made if the emphyteusis concludes either through natural expiration or due to rent non- payment or neglect of property maintenance. If the emphyteusis ends because the agreed- upon time has lapsed, the individual is NOT entitled to compensation for improvements made.

However, if the emphyteusis ends due to rent non-payment or neglect, the individual may be eligible for compensation for improvement costs, considering the remaining emphyteusis duration and the property's value increase due to the improvements. The court weighs these factors to determine the appropriate compensation amount.

1524. The provisions of this Title shall apply to all contracts of emphyteusis whether made before or after the lst July, 1976, other than those emphyteuses which had terminated before the said date or which, before that date, were determined or dissolved by agreement, or by a judgment which had become *res judicata*, or by operation of law; in respect of such latter emphyteuses the law dissolution shall, in so far as necessary, continue to apply.

The last article found within the law of emphyteusis refers to the 1976 amendments, and holds that **the provisions under the title shall apply to all contracts of emphyteusis, whether made prior to or subsequent to the amendments**. The only emphyteutical contracts not subject to the new laws of emphyteusis are those which expired before the 1st July of 1976, or which were determined or dissolved by agreement before that date, or by judgements which are *res judicata*.

Introduction to Expropriation

We have seen that the elements of the right of ownership are the following;

1) the right to use, dispose, and enjoy the fruits of one's property;
2) To act freely within the limits of the law;
3) Absolute ownership;
4) Exclusivity; and
5) Perpetuity.

Expropriation is the exception to the rule that ownership is absolute. In order to understand the present law (ch 573, enacted April 2017), we must understand the law prior to 2017. Before this the concept was regulated by Chapter 88, which created various problems mainly of a constitutional nature. The foundation of expropriation is **public purpose**, which will be tackled hereunder. Without public purpose, expropriation is unlawful, and so we must refer to jurisprudence and relevant legal provisions in order to understand what public purpose is all about. We will also see how expropriation is dealt with after April 2017, and how modern expropriation is exercised.

There are various pigeon hole solutions which are intended to cater for specific problems, arising out of the complex process of expropriation, such as article 63, which will be discussed later. Another pigeon hole solution is the occupying of land illegally, without any form of declaration, which is catered for by another specific remedy. These will be explained in proper detail below.

The General rule

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

The elements to the right of ownership are **the right to use, dispose and enjoy the fruits, within the time limits of the law, in an absolute, exclusive manner, in perpetuity.**

Ownership implies absoluteness. If it wasn't for the law, you could do whatever you like with your property. You can build it, you can destroy it, you can abandon it, with no distinction between agriculture and building sites. Without the law, it was only nature that provided value. Thus the first limitation to the right of ownership is the operation of the law. Legal limitations to the use of land mainly surround the area of planning law. Before 1868 and before the enactment of the Code of Police Laws, there was no legislation which regulated building and planning. The Code of Police laws introduced laws on how, where, and what you can build. A definition for building site was given. Since then, our legislation evolved. This part of the Police Laws was abolished and substituted by the introduction of the Development and Planning Act in 1992, with a lot of changes and additions being featured. At the moment, our definition of *building site* and how to control the use of land is defined by **2 systems which run together**:

1) The plans / maps defining the building zone; and
2) The policies which dictate how the plans are to be interpreted.

321. No person can be compelled to give up his property or to permit any other person to make use of it, except for a public purpose, and upon payment of a fair compensation.

Article 321, which has been included in our law since 1868 (under different provisions) is a provision which protects the owner's right. Thus **if property is taken without public purpose, or without payment of fair compensation, then the expropriation can be challenged.**

What is expropriation?

Expropriation is a decision taken by the state which involves a forced transfer of immovable property or the use thereof. Normally, property is purchased, which involves various decisions to be taken by the owner and the purchaser alike. Expropriation is totally different, for the property is taken without any say from the owner, at a price which is set by the government. It is not the owner's choice in any way whether the property is transferred or at which price it is transferred. This is how expropriation is different to normal sale. The power to negotiate is stripped from the owner, with all power being transferred to the government. The only remedies available to the owner are those of contestation.

When dealing with expropriation it is important to note the development thereof.

Chapter 88 remained in force until 2017. There was also chapter 268, which dealt with the law on how the government could dispose of land expropriated. Chapter 169 then discussed the powers of the Commissioner of Land. These chapters (88, 169, 268) were the laws which governed expropriation. They are now all repealed and replaced by Chapters 573 and 562.

Prior to **Lowell vs Caruana**, an act done by the state in its sovereignty could not be challenged by any act, owing to the Iure Imperii doctrine. Thus public purpose could not be contested in older expropriation cases, unlike today. The Court had no power to challenge the declaration of public purpose.

Amendments to expropriation were often made at key moments, when the situations required amending. Chapter 573 builds on what was Chapter 88, in attempt to resolve unsolved lacunae. The question is whether Chapter 573 achieves it's aims or whether pre-1935 laws where sufficient.

Briefly, the main provisions governing expropriation were processed and governed by the following pieces of legislation;

Ordinance VII of 1868

Under this Ordinance, the absolute right to ownership was first introduced. It's article 14 represents what we have today under Article 320 of the Civil Code. The ensuing provisions were those which governed expropriation for the first time under Maltese Law. The law provided for the expropriation of property, or part thereof, for a public purpose and upon payment of fair compensation. The law also provided for the indemnification for the depreciation of the rest of the property, when only a part thereof was expropriated. The defendant was not entitled to proof for a public purpose beyond the declaration by the **Head of State**. This ordinance was then amended in order to transfer the provisions governing expropriation to the newly enacted and pivotal **Chapter 88 of 1935**.

Chapter 88 of 1935

This Chapter contained 36 articles which regulated expropriation, and remained in force until 2017, when the Act was repealed and Substituted by the Government Lands Act, which is in force and which regulates expropriation today. One must note that after 1981, property prices began to increase exponentially, all increased during pending expropriation cases. Thus the question arose as to how the compensation was to be calculated, and this alongside the complications of the Lands Department, who could not cope with all the previous cases. The numerous amendments brought against Chapter 88 gave rise to several Constitutional Issues, until the Chapter was stretched to its breaking point, wherein it was consequently substituted by the current Chapter 573.

Chapter 573 of 2017

Chapter 573 is the Act of Parliament which regulates expropriation today. Coined the Government Lands Act, it builds upon Chapter 88, taking heed of various judgements by the Constitutional Court and the ECtHR. This Act is designed to cater for a modern, efficient, fair, and sufficient process of expropriation, in a manner that regulates both pending expropriations as well as post-2017 expropriations.

Indirect Methods of Expropriation

Chapter 158, the Housing Decontrol Ordinance, was a law which produced an effect similar to expropriation, but without a formal expropriation taking place. Two main problems which arose from this law were;

1) The requisition of Property and
2) Perpetual leases following temporary emphyteusis.

The first case often gave rise to abuse, often political. In the 1970s, there was a very blatant abuse of this law wherein the Government would issue requisition orders to certain vacant houses in order to allocate them to friends of friends. This gave rise to many constitutional cases, owing to abuse towards the owner.

In the case of temporary emphyteusis, the situation was that upon expiration, it was turned into rent. So instead of the owner regaining his property back, the property was given to a lessee, and the owner became a tenant. This law has been amended, and remedies are available, with such changes made in 2021.

A further indirect method of expropriation could be found under Chapters 504 (the Environment and Development Planning Act) and 549 (the Environment Protection Act). This may be argued to contain indirect expropriation, for the law controls the use of property. If land is valued as agricultural land, and if the Government builds on it, you have no right to complain. This takes us back to article 320, which states that you have an absolute right to own your property. The limitation by law is an exception, and what the government does is that it takes advantage of the limitation, it removes that limitation to its own advantage, and makes beneficial use thereof. Is this limitation which is being removed a just action?

Additionally, rent laws, until 2021, created all sorts of problems. It perpetuated rents which commenced before June 1995. Another law which provides for indirect expropriation was the Mortmain Law, which was repealed in the 1980s. The Church had huge areas of land, and with ownership of land came power. If a farmer wanted land to till, he went to the Parish Priest, and the Priest gave him land. The church used its private ownership to entice people to remain loyal to the church. The British did not like the status quo, as it wanted the church to be restricted solely to religious purposes. Thus the British wanted to pass a law which held that if the Church inherited the land, then it must be used for pastoral purposes. If it was not used pastorally within one year, then the land became state property. The persons running Malta at the time put a lot of pressure on the Churches to accept this law. The Maltese Church then answered to Palermo Bishops, who defended us and refused the accepting of this British Law. The British went to Rome, and offered the Pope army services in exchange to order the Bishops of Malta to accept this legislation. This is how the Mortmain Act was formed, remaining until 1987.

There are various Constitutional issues which arise in relation to expropriation. There are infringes on the rights of personal possession, as well as the right to a fair hearing and an effective remedy of adequate compensation, both under the Constitution and under the ECHR.

The Procedure of Expropriation

When discussing expropriation, it is important to understand the difference between the old procedure (governed by Chapter 88) and the procedure that regulates expropriation today. We must understand the ordinary procedure of selling land. You must first establish the price, what you want to sell, but ultimately, how you are going to sell and place it on the market. Selling a house is different to selling a field. 2 major decisions are made; the first that you have decided to sell, and second - the conditions (selling price, the thing to be sold, etc). Once an agreement has been reached, and a promise of sale is made, then the notary must delve into the formalities (defects, ownership, the state thereof, etc). The process lasts around 6 months until a contract is signed, wherein ownership is transferred. Expropriation abolishes all of this procedure.

With expropriation, the result is the same - transfer of ownership and payment of price. The difference is in the *way* in which ownership is transferred and *how* the price is set. If the government wants to expropriate land, it is difficult to ascertain who the owner is or at what price it shall be expropriated. With expropriation, the seller's point of view is different, for he has little to no say in the matter. From the buyer's (government's) end, the law provides for the way in which the buyer may access and acquire the land. There is an administrative process which will lead to a transfer without even communicating with the owner.

When dealing with expropriation, we must understand that the government can expropriate any land, so long as there is **public purpose**. The public purpose encompasses the scope of expropriation, and thus - why it exists. The government may be left with **no choice but to expropriate**. If there is public interest in a project, the government has the **obligation** to expropriate, in order to do what is **necessary** for the population. This involves the widening of road, the building of hospitals and even the creating of playgrounds.

Here we are speaking of **land**. If we look at the definition of land in Chapter 88 and in 573, the definition is extensive.

Chapter 88 - Land Acquisition (public purpose) Act (repealed)

> "land" includes any building, tree or anything fixed in the land and any portion of the shore, and any easement in or over land and other rights of user and any right of interference;

Chapter 573 - Government Lands Act (current)

> "land" includes any property which is immovable either by its nature or by reason of the object to which it refers to it in articles 308, 309, 310 and 311 of the Civil Code and it also includes any land which has been formed following land reclamation and also the sea and the sea bed. Any reference to 'government land', or 'government building' includes reference to land and building administered by the Government or Government agency;

The law distinguishes between agricultural land and other land. It defines agricultural or rural land as;

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

Agricultural land is often valued higher than normal, owing to its generative earnings.

Chapter 88 used to distinguish between wasteland, rural land, and a building site, before deriving the compensation owed to the owner. This distinction remains even today, placing a pivotal role on the definitions provided by law in relation to these terms.

"**Building Site**" is defined under Article 50 of the Government Lands Act as;

> **50.** (1) Land shall be deemed to be a building site for the purposes of this Act if it falls within the limits of a building scheme or as indicated and approved for development in a Spatial Strategy for Environment and Development or subsidiary plan which has been adopted for the time being in force under any law relating to planning.

Our rent laws are spread across different Acts, such as the Law of Lease, Chapter 158 (Consequences of Emphyteusis), Chapter 199 (Agricultural Leases), and the Civil Code. One must note that under Chapter 573, the definition of Agricultural Land is **wider** than the definition found under Chapter 199, thus allowing for a wider scope of application for expropriation when compared with the law which regulates lease of agricultural land.

This is important because when dealing with compensation, the law distinguishes between waste land, building sites and agricultural land. Usually, a building site awards more compensation than agricultural land, which in turn awards more compensation than expropriated waste land. The owner will always value his land higher than the Government, in order to receive maximum compensation. Thus the definition between the three is crucial, since an owner must first ascertain what type of land he owns. The Government will classify the land for you, and if the owner would like to contest such classification in court, he will undoubtedly look at the legal definitions.

Difference in procedure over time (1868-2017)

We have ascertained three different time periods in which expropriation was governed; Ordinance VII of 1868, Chapter 88 of 1935, and Chapter 573 of 2017.

Upon amendments, the person tasked with the issuing of the expropriation request changed over time.

1868 - 1935 (Chapter 88's enactment)

Originally, the law did not provide for any definition for the declaration issued. It was, however, issued by the **head of state**, and contained within it the government's need to take possession or ownership over the land.

Prior to Chapter 88, the declaration took the form of a notice the Government Gazette, with no legal stipulation in relation to the contents thereof, leaving such notice as useful as a blank sheet of paper.

With regards to the effects of the declaration prior to 1935, the declaration merely represented an intention and indication of the commencement of the process. The government could not enter the land at this point, and ownership was not transferred with the declaration.

Chapter 88 of 1935 - 2009 amendments

Under Chapter 88, the declaration was issued by the Governor-General, until 1974, wherein the office of the Head of State was substituted with that of the President of the Republic of Malta. All of the duties and responsibilities of the Governor-General were transferred to the President, including the issuing of the declaration. The declaration was deemed to be an act of state, and up until ***Lowell vs Caruana***, it was subject to the *iuri imperii* doctrine, which holds that no act done within the State's sovereign capacity could be subject to impugnment.

This declaration under Chapter 88 was vague and contained no significant details as regards to the facts of the expropriation. It took the form of a simple notice placed within the Government Gazette, with no form of identification as to the particular land which was going to be expropriated. It was subsequently published in 2 local Newspapers, one in English and the other in Maltese. Sometimes, where an owner may be identifiable, the notice would be passed to him directly, yet this happened infrequently. Under Chapter 88, the declaration, in relation to its effects, went through a significant change. The declaration would freeze the nature of the property, for the purposes of its classification and valuation, irrespective of what happens to the land after the declaration. Furthermore, within 14 days, the State may authorise individuals to take possession of the land in order to seek occupation. Prior to the 2002 amendments, **ownership used to transfer upon the signing of the public deed, when the contract was signed**.

2002 Amendments to Chapter 88

In 2002, a significant amendment was made which allowed for **full transfer of ownership upon the issuing of the declaration**. Thus when a declaration is issued, the competent authority was to register the land under the Land Registry in favour of the Government within 3 months. Further, the compensation became classified as a real right, thus, an immovable. Within 14 days the Government becomes full owner and takes full possession over the property in relation to which the declaration is issued. The Kummissarju tal-Artijiet then registers the title of ownership in the Land Registry. This amendment brought several impacts, such as the obligation to pay the compensation offered on the state.

2009 Amendments to Chapter 88

Chapter 88 was amended in 2009 to cater for a **notice fixed on site**. It remained published in 2 newspapers, one in English and one in Maltese, and it was again sometimes issued to known persons who might have legal interest in the order.

Additionally, for the first time the owner was granted the **right to contest the public purpose before the Lands Arbitration Board** within **21 days** from the Publication. Then, title passes in favour of the state.

Chapter 573 of 2017

Upon enactment of Chapter 573, the role of issuing the declaration was transferred to the Lands Authority, who issues such a declaration which is signed by the **Chairman of the Board of Governors** of the Lands Authority, as established by Article 38. Under Chapter 573, the requirements which constituted a correctly construed declaration were clearly laid out. The formalities with regards to the publication of the notice were that it must be published in the Government Gazette, it must be published in 2 Daily or Sunday Papers (in English and in Maltese), and it must also be posted on Notice Boards at the police station and local council pertaining to the land taken.

Under Chapter 573, it must also be served by a judicial act to occupants of the land, in a way which did not confer entitlement of ownership onto such occupants. Further, a notice must be affixed on or next to the site to be expropriated. The following contents, today, must be included in each expropriation declaration;

1) A statement declaring the land is required and going to be acquired for a public purpose;
2) It must be signed by the Chairman of the Board of Governors of the Lands Authority;
3) The Public Purpose must be explicitly defined and laid out;
4) The amount of compensation;
5) An attached architect evaluation; and
6) A site plan, normally taking the form of a Land Registry Plan.

The case ***Bugeja vs Kummissarju tal-Artijiet*** is a decision often referred to in order to contextualise the understanding of ***public purpose***.

Bugeja et vs Kummissarju tal-Artijiet - *Public Purpose*

L-interess pubbliku hu immirat lejn il-generalita` u marbut mal-finalita` ahharija li ghaliha l-proprjeta` qed tintuza**, u dan indipendentement minn jekk dik l-attivita` tkunx maghmula minn awtorita` pubblika. **Jinghad ukoll li skop pubbliku ma jista' qatt jirreferi ghall-interess essenzjalment privat, u l-interess huwa dejjem privat meta m' ghandux applikazzjoni ghal generalita' tac-cittadin, ta' l- universalita' tal-pubbliku fl-Istat. Mill-banda l-ohra pero' il-fatt li terz privat, individwu, jibbenefika wkoll mill-esproprju jew ikun involut b' xi mod fit- thaddim anke jekk bi profitt ghalih, ta' progett li jkun fl-interess pubbliku u li jkun jirrikjedi esproprijazzjoni ta' art jew possediment iehor, ma jfissirx necessarjament li dik l-esproprijazzjoni ma tkunx saret fl-interess pubbliku. **L-interess pubbliku jinkludi kull aspett tal-hajja socjali tal- pajjiz**. Dan l-iskop socjali jolqot firxa differenti ta' nies, anke jekk ikun hemm persuni li ma jinteressawx ruhhom f'attivitajiet in dizamina.[21] Jinghad ukoll li mhux eskluz li proprjeta' tigi esproprijata fl-interess pubbliku ghax kien hekk mehtieg biex tigi assigurata l-attwazzjoni kompleta ta' progett ta' utilita` partikolari fil-kuntest tal-izvilupp partikolari taz-zona.

Moment of transfer of title

With regards to the effects of the declaration under Chapter 573, we refer to article 53;

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

There has been a transition, from Chapter 88 to the law today, in regards to the **moment in which full transfer of property** is deemed to take place. Today, the title transfers **upon full payment of the deposit**. The deposit must be equal to the sum of compensation stipulated by the declaration, as per **article 52**. The time in which the compensation must be paid depends on whether the owner contests to the declaration or not, with such contestation being elaborated upon in **article 41**;

Prior to 2002 amendments, ownership would transfer upon the completion of the contract and upon the signing of the public deed.

Under Chapter 88, following the 2002 amendments, the ownership would transfer **upon the issuing of the declaration**, and the competent Authority had to register the land expropriated in the Lands Registry within 3 months.

Post-2017, ownership and title would transfer **upon the full payment of the deposit, a sum equal to the compensation agreed or stated by the Court following contestation, or promised by the government which remained uncontested**.

41. (1) Any person who has an interest in the land, in respect of which a Declaration by the Chairperson of the Board of Governors of the Lands Authority as is referred to in article 38 (1) is made, may contest the public purpose of the said Declaration and demand for its cancellation before the Arbitration Board by means of an application to be filed in the registry of the said Board within fifty days from the publication of the said Declaration.

(2) The application filed in accordance to sub-article (1) shall be served to the authority, who has a right to submit a reply within twenty days.

(3) The Arbitration Board shall set down the application for hearing without delay, and after listening to the witnesses and the submissions of the parties, it shall pass judgement within the shortest time possible but not any later than two months from the closing date within which the authority had to file its reply.

52. (1) The authority shall deposit in an interest bearing bank account which will guarantee a minimum of interest *per annum* as the Minister may by regulation under this sub-article prescribe, a sum equal to the aamount of compensation offered in the Declaration drawn up by the chairperson of the Board of Governors of the Lands Authority.

(2) If there is no contestation as referred to in article 41, the deposit referred to in sub-article (1) shall be made within a period of fifteen days running from when the time for contesting the Declaration has elapsed. If there is a contestation which is then dismissed, the fifteen day period starts running from when the decision of the Arbitration Board or the Court of Appeal (Superior Jurisdiction) has become res judicata.

Therefore, if the Owner has **to contest the public purpose of the declaration to the Arbitration Board**. If such contestation is made, then the payment of the deposit occurs **15 days after the decision of the Arbitration Board, or else the appeal to the Court of Appeal, becomes *res judicata***.

If the owner decides not to contest, then the 15 days within which the deposit must be paid begins to lapse when the time within which a contestation must be made passes. Thus the deposit must be paid within 15 days after the 50 days after the declaration, as stipulated under Article 41, passes.

When the deposit is paid, ownership transfers.

The person who signed the declaration had no say in the expropriation process apart from signing. Today, the Chairperson is vested with more power and has a better control over the process. The older declarations provided little to no detail, leaving no information as to the location or state of the land to be expropriated. The owner would not even know that his land was going to be expropriated. This naturally gave rise to problems. Amendments were made, and each time the contents of the declaration were improved, to the point where today, a detailed notice is issued which contains information on the location, boundaries, purpose, etc. The compensation is included in the declaration, as opposed to declarations prior to 2001. The declaration includes also a side plan, indicating the land boundaries. Today, if the owner is identifiable, the Department informs the owner.

The Lands Authority

The administrative process is done formally by the **Lands Authority**. All requests to expropriate must be done to the Lands Authority. An individual may request expropriation of land for a public purpose, in cases such as a field road which has not yet been opened.

The powers of the Lands Authority are defined under Chapters 563 and 573, which have replaced Chapter 169. Such powers include the drawing up of plans, the valuation of property, the collecting of funds from the person requesting, the signing of contracts, and the ultimate payment of compensation to the owner. The Lands Authority must also be satisfied that the request is coupled with a public purpose, after which a proper surveyed plan is made. The Lands Authority has its own draftsman, who will identify and establish that the request is complete. Architects are then appointed to set a value. The person who makes the request must then send the payment of the land valued. If an individual makes a request, then he must make the payment before the expropriation may be commenced. The declaration is then drafted and signed, and then published.

Upon publishing of the declaration, the Government may enter into the property. The owner of the expropriated land may contest the value of the land, or he may accept it and get paid.

The Lands Authority is established by the Lands Authority Act (Chapter 563), and is burdened with the duties to;

- Allow the owner to scrutinise the public purpose;
- To draw up the plans arising from technical expertise in relation to land to be expropriated;
- To evaluate property and determine compensation due;
- To collect funds of compensation from the person making the request;
- To draw up the Declaration to be signed by the Chairperson of the Board of Directors;
- To Publish the declaration in the Government Gazette and local newspapers;
- To deposit the compensation;
- To Register the Title of Property following the contestation period and upon the payment of the deposit in the Lands Registry, together with the plans;

Procedure of Expropriation Under Chapter 88

Under Chapter 88, the procedure for expropriation was far different to what we have today. This period of time may be split into 2 parts; 1935-2002, and 2002-2017, owing to the 2002 amendments.

1935-2002 - original 4 step procedure under Chapter 88

Between 1935 and 2002, a 4 step procedure was in force.

1) The declaration was published vaguely, and after 14 days the Government may enter into the land. In the meantime, the Lands Authority would attempt to find and contact the owner, in order to issue the notice to treat.
2) A **notice to treat** was issued, in order for the owner to accept the offer. If the owner does not reply to the treat, then he is presumed to have accepted it. The owner had **21 days** to contest the declaration, by means of a letter to the Commissioner for Lands. In his contestation, the owner **was not required to issue a requested price**.
3) If the owner contested, then the Lawsuit is filed by the Commissioner for Lands against the owner, and once the case is closed, a public deed is issued.
4) If the owner does not contest, the public deed is issued after 21 days.

One must note that **if the owner contests, the 14 days within which the Government may take possession of the property is not suspended**.

The **notice to treat** was a letter served via the Lands Arbitration Board which was sent to the owner/s of the property. It would contain the details of the land and the compensation offered.

2002-2017 - the Revised procedure under Chapter 88 following amendments

Chapter 88 revised the procedure, reducing it down to 3 steps;

1) The declaration, as published in the Government Gazette and in the local newspapers.
2) The judicial intimation (the same notice to treat, under a different title) to the owner.
3) The acceptance or non acceptance of the intimation. If the owner accepts, then the contract is signed and the public deed is issued. If the owner does not accept, then he had 20 days to file the lawsuit before the Lands Arbitration Board. Thus, following these amendments, the owner became the plaintiff in such cases. **This time, if the owner contested the notice to treat, then he must indicate the price requested**.

Note that after the 2002 amendments, ownership would transfer upon the issuing of the declaration.
At this point, the Lands Arbitration Board, upon presiding over the proceedings, may decide to order the compensation **over and above that requested by the owner,** in the case of contestation. This was eventually changed to what is the current procedure, that the **Lands Arbitration Board is confined to order compensation within the limits of the initial proposed compensation and up to the amount requested by the owner in his contestation**. Therefore pre-2002, the owner did not have to state his price. Post-2002 he must attach a price to his contestation.

2004 Capping Amendments

In 2004, the law was again amended to introduce minimum and maximum limits as to the price of the expropriation, with the minimum being that offered by the Government and with the maximum being that requested by the owner who contested. If the owner requested a price **lower** than that valued by the architects who were appointed by Government, then a legal lacuna resulted in the pricing to be restricted solely to the owner's price, thus giving rise to various appeals and constitutional cases.

There were some pending lawsuits, owing to the constitutional question following the amendment of the law in 2004, which set the minimum and maximum prices. These cases include ***KTA vs Frank Calleja*** (6/9/2010) and **KTA vs Deguara Caruana Gatto** (6/9/2010). Eventually, the Courts arrived at one conclusion - was there a legitimate expectation that the owner would have been awarded a higher value had the law not been changed? In these cases the owners brought the argument that despite the change in law which restricted the compensation to that proposed by the owner, there was a breach of the Constitution's protection of the right to **adequate** compensation, as protected by article 37. In the case of **Frank Calleja**, the court ruled that the amended law which limited the compensation to that requested by the owner did not apply in retrospect, and that for the parties to the case it was the older law which applied.

KTA vs Frank Calleja - *contesting the capping - legitimate expectations*

In this case, the concept and doctrine of legitimate expectations was applied in relation to the ECHR's Article 1 of Protocol 1, protecting the right to property and peaceful possessions. The Court in turn referred to ***Maurice vs France***, which explained the extent to which legitimate expectations may apply insofar as they fall under protection by the ECHR;

Il-kuncett ta' *legitimate expectation* ma jissemma' *mkien fl-Artikolu 1 tal-Ewwell Protokoll, izda gie introdott mill-gurisprudenza. Fis-sentenza* ***Maurice v. France*** *deciza fis-6 ta' Ottubru 2005, il-Qorti Ewropea qalet hekk: "The Court reiterates that, according to its case-law, an applicant can allege a violation of Article 1 Protocol 1 only in so far as the impugned decisions relate to his "possessions" within the meaning of that provision. "Possessions" can be "existing possessions" or assets, including in certain well-defined situations, claims. For a claim to be capable of being considered an "asset" falling within the scope of Article 1 of Protocol 1, the claimant must establish that it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it. Where that has been done, the concept of "legitimate expectations" can come into play."*

The court ultimately ruled that the defendant carried the legitimate expectation that the Lands Arbitration Board was going to offer the amount of compensation higher than that requested by the defendants, especially after considering that the Board unanimously agreed upon such compensation. Thus, despite the law being amended retrospective in setting the capping, the Court ruled that they satisfied the requisites required to prove legitimate expectations in relation to the compensation, and that the sum owed to them should not be changed due to a retrospective amendment.

Types of Expropriation

Under Chapter 88, Expropriation existed under 5 different forms;

1) Absolute Purchase

The land could be acquired via full ownership, thus vesting the Government with the most absolute right of ownership over the land expropriated. There would be no restrictions on the site, in a way which avoids all problems related to personal rights, hypothecs, servitudes, etc.

2) Possession and use

The concepts of possession and use under Chapter 88 are not identical to the Civil Law rights of possession and use. The Government would often seek possession and use over the absolute purchase thereof, since it would be less costly and is burdened with less procedural strictness. If the Government opts to take possession and use over the property, instead of purchasing it, the owner had the right, after 10 years, to apply to the Lands Arbitration Board to order either the absolute purchase of his property, or else for the acquisition by public tenure, or else for the Government to vacant the land within one year.

3) Public Tenure

The concept of public tenure is similar to that of perpetual emphyteusis, which is a real right wherein the direct owner receives ground rent as a token which represents the emphyteutar's direct ownership. Public tenure is a real right, which was discontinued as a form of expropriation under the new Chapter 573.

4) Preliminary Investigations

A preliminary investigation was governed by Article 8 under Chapter 88, which provided for the following;

8. (1) Whenever the President of Malta considers it desirable that any land should be examined with a view to its possible acquisition for any public purpose, he may make a declaration signed by him to that effect, and thereafter it shall be lawful for any person either generally or specially authorised by the competent authority in that behalf, and for his assistants and workmen to do all or any of the following things:

a) to enter upon and survey and take levels of any such

b) to dig or bore under the subsoil;

c) to do all other acts necessary to ascertain whether the land is adapted for such purpose;

d) to clear, set out and mark the boundaries of the land proposed to be taken and the intended line of work proposed to be made thereon:

Provided that no person shall enter into any building or upon any court or garden attached to any dwelling-house except with the consent of the occupier thereof, without previously giving such occupier at least seven days notice of his intention to do so.

(2) As soon as conveniently may be after any entry made under subarticle (1), the competent authority shall pay for all damage done, and in case of dispute as to the amount to be paid, either the competent authority or the person claiming compensation may refer such dispute to the Board, whose decision shall be final.

Thus the preliminary investigation procedure pertained to the Government's investigation on one's property, in order to examine whether such property is sufficient to serve as a public purpose.

5) Sub-soil rights

Sub-soil rights was defined under Chapter 88 as;

> "subsoil rights" means the subjection of any land to the restrictive conditions regarding underground works and excavations referred to in article 29.

When a land was subject to Government sub-soil rights, no one was permitted from carrying out underground works on such land without prior permission. Further, as per Article 29 (3), no owner was granted the right to compensation in relation to land which is subject to sub-soil rights by reason only of such rights. The Government retained the right of possession over any underground work or excavation constructed by virtue of sub-soil rights, as well as the right to maintain, extend, and further develop such underground work erected by virtue of such rights

Under **Chapter 573**, expropriation was restricted to the following forms;

1) Absolute Purchase
2) Possession and Use
3) Preliminary Investigations
4) Sub-soil rights.

The form of expropriation by public tenure was thus eliminated and was not transitioned to the new law. The Government may thus either purchase a property, or else it may acquire certain rights (such as possession, use, and sub-soil) over it.

The Law of Expropriation post 2017

Until 2001, ownership would pass when the contract was done. Thus the public deed completed the process. In 2002, this was changed and it was held that ownership was passed **upon the publishing of the declaration**. Thus publication in the gazette gave the government the right to enter the land after 14 days as well as the right to ownership over the property expropriated. Because of this, the **right to receive the adequate compensation was deemed to be a real right, and not a personal right**. It is only paid by public deed. This procedure remained as such until 2017, wherein the law was amended to the situation of today; **ownership will only pass when the government deposits the amount in an interest-baring account.** At the moment, the declaration contains various facts such as the evaluation, the public purpose, the price, etc. There is a 50 day limit within which to contest public purpose. When this period lapses (or if there is contestation and the contestation process is completed), the government is bound to deposit the price in an interest baring account. Thus the obligation to deposit arises either after 50 days or when the contestation process is completed. Today, the deposit completes the expropriation. Various problems arose under Chap 88;

Article 1077 of the Civil Code gave the Commissioner of Lands a time limit to complete the deposit, as discussed in **Albert Mizzi vs Kummissarju tal-Artijiet.**

1077. Where no time has been fixed for the performance of an obligation, it shall be carried into effect forthwith, unless the nature of the obligation, or the manner in which it is to be carried into effect, or the place agreed upon for its execution, implies the necessity of a time to be, if necessary, fixed by the court.

Albert Mizzi vs Kummissarju tal-Artijiet *- Government must make use of expropriated land*

2007 case - pre 2017 Chapter 573

Il-ligi pprovdiet mezz facli ta' kif it-toroq isiru proprjeta` tal- Gvern. **Ma hux aktar mehtieg li jigi ppubblikat il-kuntratt ta' trasferiment** (ara "**Sciberras v. Micallef**", **izda l- proprjeta` tghaddi f'idejn il-Gvern bl-operat tal-ligi malli tigi ppubblikata fil-Gazzetta tal-Gvern ordni f'dan is-sens tal-President ta' Malta.** (Note: 2007 case, PRE CHAP 573) Kif inghad m'hemmx terminu li fih ghandha tinhareg din l-Ordni wara t-triq tkun giet asfaltata, kif ma kienx hemm terminu qabel meta l-ligi kienet tesigi l- pubblikazzjoni ta' kuntratt notarili, **pero` hu principju generali tad-dritt li fejn il-ligi jew il-partijiet ma jiddeterminawx zmien li fih ghandha tigi esegwita obbligazzjoni, il-Qrati ordinarji ghandhom is-setgha li jiffissaw terminu skond ic-cirkustanzi tal-kaz** (ara Artikolu 1077 tal-Kodici Civili, u applikazzjoni tal-principju fil-kawza "Tabone v. Kummissarju ta' l-Artijiet".

L-artikolu in kwistjoni huwa tassattiv fil-propozizzjoni tieghu li t-toroq li ma jkunux tal-Gvern "ghandhom" isiru proprjeta` tal-Gvern meta jitlesta l-kisi taghhom bl-asfalt jew xort'ohra, u malli tigi ppubblikata l-ordni fil-Gazzetta tal-Gvern, u darba li t-toroq jigu asfaltati, il-gvern ma jistax joqghod jitrattjeni milli johrog l-ordni sabiex jevita li jassumi responsabbilita` ghall-istess toroq.

Triq privata ma ssirx pubblika sempliciment ghax tkun ilha zmien twil miftuha ghall-uzu tal-pubbliku (ara "**Sammut v. Micallef**"), izda, skond il-ligi kif giet issa emendata, wara ordni tal- President ippubblikata fil-Gazzetta tal-Gvern. Il-Gvern pero`, hu obbligat jassumi r-responsabbilita` ta' toroq asfaltati accessibbli ghall-pubbliku u li jkunu fi skema jew fi pjan lokali, u dawn il-Qrati jistghu u ghandhom is-setgha jimponu fuq l-awtorita` kompetenti terminu biex titpogga fis-sehh dik l-obbligazzjoni.

Under Chapter 88, there was no Time Limit as to when the Government must deposit the compensation into the interest-bearing account, yet the Courts retained the power to scrutinise the non-payment of the deposit following the contestation period via application of Article 1077, which allows the Court to fix a time to carry into effect an obligation which is not fixed by a time.
Various problems arose in the cases of the Government's possession of land prior to the declaration signed by the President / Chairman of the Board of Governors of the Lands Authority was issued.

One of the remedies was to sue the government for damages, as per **Andrew Agius et vs Direttur Dipartiment tat-toroq.** In this case, the plaintiffs were awarded the liquidation of damages arising from the Government's illegal occupation and possession of the Land **before** the expropriation order was issued, and before the formalities were met.

Andrew Agius et vs Direttur Dipartiment tat-Toroq - *damages from occupation prior to expropriation 2021 case dealing with Chapter 88 expropriation*

Darba li ma kienx hemm proċeduri ta' esproprjazzjoni, huma l-qrati ordinarji li jridu jiddeterminaw il-kumpens. Il-kawża hija waħda purament għad-danni konsegwenza tal-agir illegali u abbużiv tal-awtoritajiet. L-atturi għandhom kull dritt jitolbu li jiġu kumpensati għad-danni ta' okkupazzjoni minn dakinhar li parti mill-art ġiet okkupata sa dakinhar tal-esproprju (ċioe`, sas-7 ta' Mejju, 2011), u fir-rigward ta' biċċiet oħra tal-art sa dakinhar li jsir l-esproprju

Another type of case was the *actio spolii*, as per **535,** instituted owing to the failure to adhere to the correct expropriation procedures. As in the ***Andrew Agius*** judgement, the case involved the possession of property prior to the expropriation order being issued.

Inez Calleja vs Awtorita tat-Trasport - *actio spolii on illegally expropriated land*

lli kif jidher ċar mir-rikors promotur din hija kawża ta' spoll. L-attriċi qed issostni li l-awtorita' konvenuta daħlet fi proprjeta' tagħha li għaliha għamlet referenza fl-istess rikors u li bidlet ħajt tas-sejjiegħ b'ħajt ieħor f'post differenti minn qabel. Kif hu magħruf huma tlieta l- elementi rikjesti biex azzjoni ta' spoll tirnexxi, u ċjoe':

1. il-pussess - ***possedisse;***
2. l-azzjoni spolljattiva li tkun saret bil-moħbi jew kontra l-volonta tal-attur – ***spoliatum fuisse;*** u
3. li l-azzjoni ssir fi żmien xahrejn minn meta jkun se l- ispoll – infra bimestre deduxisse.

Various obstacles under the expropriation procedures served as the pediment for the overhaul done in 2017 with regards to expropriation law, such as;

1) Land occupied - no declaration
2) Declaration - not occupied
3) Declaration - land occupied, no notice to treat
4) Declaration - land occupied, notice to treat, contested but no lawsuit from KTA
5) Declaration - land occupied, but no judicial intimation

The Owner's Right to Contest Compensation under Chapter 573

Then, section 55 kicks in, which holds and deals with new expropriations;

> **55.** (1) When an owner feels that the amount of compensation offered to him by means of a Declaration is not appropriate, such person may apply to the Arbitration Board for the determination of the compensation in accordance with the provisions of this Act.
>
> (2) Such application shall, on pain of nullity, state the compensation, that in the opinion of the applicant is due and it shall be served to the authority who shall have twenty days to file a reply.
>
> (3) The application shall be filed by not later than five years from when the Declaration by the chairperson of the Board of Governors of the Lands Authority has been published as referred to in article 39(1) and (2), provided that if such an application is not filed, the owner shall only have the right over the deposited sums and the interests mentioned in article 52.
>
> (4) The Arbitration Board shall determine such compensation and shall give all necessary orders and directives in accordance with this Act, if it is satisfied that the applicant has proved that he has a valid title on that land

A notary may be contacted to confirm all the processes, as well as to do a due diligence test to determine issues related to money laundering. A property ownership form is then issued, giving details on the owner and how they came to acquire such property. A notary will then draft a contract to be sent to the Land Arbitration board, for the owner to receive the funds, in the case that the declaration is agreed to. The price is a real right by operation of law, and for the transfer of a real right, you need a public deed **except when the government is acquiring ownership through expropriation**. In such case, the transfer of money transfers ownership *ipso jure*. The law also expressly states that the compensation is a real right and for the owner to be paid it must be done through a public deed. If this declaration is not accepted, the owner may file an application before the Lands Arbitration Board to contest the price. The owner is the plaintiff and the Lands Authority is the defendant, with no need to notify the state advocate. This is not a procedure under article 469A, but is a standalone procedure governed by law under chapter 573. You don't sue the person requesting the expropriation, but the Lands Authority.

One must note that the 5 year application to contest the compensation is to be differentiated from the 50 day time limit to contest the ***public purpose***, as stipulated in Article 41.

> **41.** (1) Any person who has an interest in the land, in respect of which a Declaration by the Chairperson of the Board of Governors of the Lands Authority as is referred to in article 38 (1) is made, **may contest the public purpose** of the said Declaration and demand for its cancellation before the Arbitration Board by means of an application to be filed in the registry of the said Board **within fifty days from the publication of the said Declaration.**
>
> **55.** (3) The application (**to contest the amount of compensation per 55 (1)**) shall be filed by not later than **five years** from when the Declaration by the chairperson of the Board of Governors of the Lands Authority has been published as referred to in article 39(1) and (2), provided that if such an application is not filed, the owner shall only have the right over the deposited sums and the interests mentioned in article 52.

When the owner files the expropriation, he contains the information relating to the land, the price issued, and the price requested. If the owner fails to state the price, the application is null and void. The procedure established by article 63 is split into 2: the ordering of the declaration and the fixing of the price. There is a case wherein the owner requested an amount less than that ordered by the board. The board stated that by law, there is a minimum and a maximum between which the price has to be established, and since the government set a price which is higher than that requested by the owner, it is that price which is the maximum, and not of the owner. Under article 55, the price has already been set and published, so in the application it is advisable to request an amount higher than that established by the Lands Authority.

One thing that must be noted is that there is a 5 year limitation, and so the suit must be filed in 5 years. This is not a prescriptive period, but a peremptory period. A prescriptive period is one which may be extended, while a peremptory period can not. Even if you admit to the claim, the time period doesn't begin to run in the case of prescriptive periods. For peremptory periods, there is no discretion in the court to extend such time frames, and so if you go beyond the period, even the court may raise the argument *ex officio*.

The rate of inflation is fixed according to the rise in inflation, not the index of property value, usually at a very low rate of 1% or 1.5%. The index of inflation does not reflect the index upon which properties are fixed. Why use the index of inflation and not the index of property rise. The reason why the state has chosen the index of inflation and not of that of property rise is that ownership passes through the deed, therefore the index used is that of purchasing power according to the depreciation of currency.

During the court case, the Board has to be happy with your title to the property. In practice, the property ownership form is sent to the lands authority and there is a change of internal correspondence between the lawyer and the lands authority. The court does not have the time and resources to enter into title. In the case that the Court is not convinced of the ownership, the Plaintiff must prove his title as if he was instituting an actio rei vindicatoria. He must also bring evidence for the price he is asking for. The Lands Authority will also bring its own valuation. The Board must then decide which price is the most accurate, and so they will appoint architects to determine the value. Normally, when an architect or other professional person is appointed by the court to do a report, the more questions are asked, the stronger will he defend his report. Thus the questions must be selected to pick on mistakes which will help your case. Eventually, the board will ask the lawyers to argue the case. When the case is decided, either party may appeal within 20 days. In the ordinary courts, the time limit is 30 days, but for expropriation the appeal is 20 days, rendering it a *lex specialis*.

From 1935 to 2006, Chapter 88 (prev 136), Law was classified under 3 headings: building site, rural land or waste site. The type of land was determined by the date of declaration. The price was issued with the notice to treat.

Pigeon hole remedies

Various issues arise in instituting and effecting expropriations, which are often resolved by specific provisions of law, designed to cater for particular complications, often coined pigeon hole remedies. Under chapter 573, the following pigeon hole remedies may be identified;

1) Article 63 - The revocation of a Declaration Under Chapter 88 when Land has not been used;
2) Article 64 - Declaration issued without a Notice to Treat Under Chapter 88;
3) Article 65 - Declaration issued along a Notice to Treat;
4) Article 67 - Land Occupied without a Declaration being Issued;
5) Article 68 - Land held on Title of Public Tenure; and
6) Article 69 - Land held on Title of Possession and use.

Note that all remedies are barred by 30 years lapsing from the date the declaration was issued.

Article 63 - Revocation of a Declaration issued Under Chapter 88 and prior to 2002 when Land was not used

63. (1) If land which is subject to a Declaration issued before the entry into force of this Act remains unacquired in terms of one of the manners referred to in this Act and such land has not been used for public purposes for a period of more than ten years from the issue of the Declaration, whosoever proves to the satisfaction of the Arbitration Board that he is the owner of the land by valid title may ask for the revocation of the Declaration and for the relinquishment of the land.

(2) This action shall be made by means of an application filed in the Registry of the Arbitration Board that shall be addressed against the Lands Authority who shall have the right of reply within twenty days from the day it has been served with the application.

(3) Together with the requests for revocation of the Declaration and the return of the land, one can make a request so that the Arbitration Board liquidates and orders the authority to pay for material damages and moral damages that have been suffered by the owner for all the years that the land has been kept by the Government without anything being done on it.

(4) In order for an application to be heard and decided by the Board, all the persons who are known to have a right of title on such land have to be present during proceedings.

(5) The Arbitration Board shall dismiss the application for revocation of the Declaration if the authority gives valid reasons why the land remained unused for all these years or if it proves to the satisfaction of the Board that there is still public interest in the acquisition of that land.

(6) Everyone shall forfeit his right of action in accordance with this article if he fails to proceed within thirty years from when the Declaration has been issued, provided that if upon the entry into force of this Act, a period of twenty five years already had elapsed from the date of issue of the Declaration, the action shall be filed by not later than five years from the entry into force of this Act. Such periods are peremptory and cannot be renewed.

Under Article 63, the term *unacquired* refers to the land not being used for a public purpose as stipulated in the Declaration issued. In such cases, the owner may apply to the Arbitration Board after 10 years of such non-use, so long as he may prove to be the owner of the land (applying the requisites as if the action was an *actio rei vindicatoria*), requesting for the **revocation of the declaration and for the relinquishment of the Land**.

One must refer back to the amendments done in 2002 which altered the ***moment of acquisition*** during an expropriation order. Prior to 2002, transfer of title was complete **upon the signing of the public deed**. Post 2002, **title was transferred upon declaration being issued**. Therefore, this remedy implies application solely to pre-2002 declarations, when these remained unacquired, since declarations issued post 2002 automatically transferred title to the Government.

The remedy provided for by Article 63 contains the following requirements;

1) The a Declaration is Issued;
2) That the Declaration is Issued prior to 2002
3) That no transfer of title or possession was made and that the land remained unacquired;
4) That the land has not been used for a public purpose for more than 10 years; and
5) That the application filed by the Owner includes his requisite to prove title over the land.

The action must be done after 10 years of non-use for public purpose, with it being directed against the Lands Authority, who has the right to reply within 20 days. This remedy, as per 63 (3) provides the applicant with the remedy to liquidate **material and moral damages** suffered by the owner for all the years that the land has been kept by the Government with no use being done thereof. Article 63 (5) provides that the Lands Arbitration Board may refuse the application on the grounds that ***there are valid reasons as to why the land remained unused for all the years*** or if it is proven that **there is still public interest in the acquisition of the land**.

Camilla Scerri vs Lands Authority - *first case issued under this remedy + the considerations taken 16th April 2021*

Sabiex jiddetermina l-kwantum tad-danni morali, dan il-Bord qiegħed jieħu in konsiderazzjoni s-segwenti fatturi:
a. l-estensjoni u l-lokazzjoni tas-sit in kwistjoni li mir-rapport tal-membri tekniċi, jirriżulta li l-art tinsab eżatt taħt il-bini tal-iskola sekondarja tan-Naxxar;
b. il-periodu ta' żmien minn mindu nħarġet id-dikjarazzjoni presidenzjali;
ċ. il-perijodu ta' żmien minn meta r-rikorrenti ġew imċaħħda mit-tgawdija ta' din il-proprjetà taġħhom;
d. il-fatt li r-rikorrenti talbu diversi drabi sabiex din l-art tiġi rilaxxata lilhom;
e. il-fatt li kien biss fl-aħħar stadju ta' din il-kawża, li l-intimata ordnat ir-rilaxx ta' din l-art;
f. l-fatt li kien mis-sena 2015 'il quddiem, li wħud mis-sidien bdew jikkorrispondu mal-Kummissarju tal-Artijiet dwar ir-rilaxx ommeno, ta' din l-art;
ġ. il-fatt li kien biss f'Jannar 2019 (fol 64), u sussegwentement f'Ġunju 2019 (fol 66), li l-Awtorità tal-Artijiet kitbet lill-entità li kienet talbet it-teħid ta' din l-art sabiex tara jekk kienx għad hemm interess pubbliku fl-akkwist ta' din l-art;
h. il-fatt li skont ir-rapport tal-membri tekniċi ta' dan il-Bord, fuq din l-art ma rriżultax bini, u l-art ma tidhirx li qed tintuża, iżda tidher li hija abbandunata;
u
i. l-fatt li fil-21 ta' Novembru 2019, intbagħtet korrispondenza uffiċjali mill-Works and Infrastructure Department lill-Awtorità tal-Artijiet, fis-sens li din l-art għandha tiġi rilaxxata (fok 81).

The right of action is barred after 30 years from the issuing of the declaration.
This is the only remedy catering for pre-2002 expropriation orders.

Article 64 - Declaration issued with no Notice to Treat or with no indicated compensation

Article 64 is considered to be a pigeon hole remedy, tackling the situation wherein a declaration was issued without any follow up by the Lands Authority.

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

(2) This action shall be done by means of an application filed before the Registry of the Arbitration Board that shall be addressed against the authority who shall have a right of reply within twenty days from when it has been served with the application.

(3) The compensation that shall be paid for the acquisition of the land shall be the value that the land has within the period of publication of the Declaration as updated during the years in accordance to the index of inflation published in the schedule of the Housing (Decontrol) Ordinance.

(4) Apart from the compensation for the acquisition of the land as established in this article, the owner can also make a request to the Arbitration Board to liquidate and order the authority to pay him for material damages and moral damages due to the excessive delay for such acquisition.

(5) The peremptory period referred to in article 63(6) for filing such action shall apply *mutatis mutandis* to the action under this article.

Post 2002, the transfer of ownership was complete upon the declaration, as opposed to the transfer taking place upon the signing of the contract and the deed of sale. In this scenario, a notice of agreement is not issued.

Article 64 applies only when a declaration has been submitted through the Government Gazette, made before April 2017. In this provision, Government is in possession of land, and one must ascertain what possession means. Chapter 573 does not describe what type of possession is being considered by this article, but in other chapters of law we find that the Lands Authority handles land occupied or administered by the Government. Thus the term *possession* refers to any land that has been physically occupied or administered by the Government. The issues which have arisen emanated from the lack of a notice to treat or to a lack of indication of compensation. The notice to treat was the invitation to accept the price, by means of a judicial letter sent to court. In 2002, the notice to treat was done away with, yet the law remained unchanged. The question is then whether article 64 applies solely to cases of expropriation initiate pre-2002, or whether they still apply to declarations issued pre-2017 and not followed upon.

The remedy provides the applicant to order the acquisition of the land occupied by absolute purchase. Further, the provision holds that the applicant is also entitled to moral and material damages following excessive non-use.

The courts have ruled that Article 64 certainly applies to declarations issued **before 2002** and which were **not followed up by a notice to treat,** *as held in* ***Rita Borg vs Lands Authority, Strickland vs Lands Authority, and Testaferrata Moroni Viani vs Lands Authority***.

David Abela vs Lands Authority

Understanding the remedy - ratio legis

Camilla Scerri et vs l-Awtorita' tal-Artijiet *- ratio legis behind remedy s 64 and compared to 63*

Il-Bord iqis li l-intenzjoni tal-leġislatur wara dan l-artikolu (63) kien, **li jforni rimedju ordinarju lil individwu li sofra, jew li għadu qed isofri leżjoni tad-dritt ta' proprjetà tiegħu, u/jew tad-dritt li jkollu rimedju xieraq.** L-Artikolu 63(3) tal-Kap 573 tal- Liġijiet ta' Malta huwa ċar, fis-sens li d-danni morali huma proprju dawk id-danni morali "**li ġew imġarrba mis-sid għas-snin kollha li l-art kienet miżmuma mill-Gvern *mingħajr ma sar xejn fuqha*" (test bil-Malti meħud mill-Artikolu 63(3) tal-Kap 573)** jew "moral damages that have been suffered by the owner for all the years that the land has been kept by the Government without anything being done on it". (Test bl- Ingliż meħuda mill-Artikolu 63(3) tal-Kap 573).12

Il-Bord sejjer iqabbel dan l-artikolu ma' partijiet oħra fl-istess Kap 573 tal-Liġijiet ta' Malta fejn jissemmew danni morali. **Per eżempju, fl-Artikolu 64 tal-Kap 573 li jirrigwarda art li tkun soġġetta għal dikjarazzjoni minġħajr avviż tal-ftehim, jissemmew "danni materjali u danni morali minħabba d-dewmien biex sar l-akkwist." Fl-Artikolu 65 tal-Kap 573 li jirrigwarda art li tkun soġġetta għal dikjarazzjoni u avviż għal ftehim, iżda li ma tkunx ġiet akkwistata, jissemmew "*danni materjali kif* ukoll danni morali minħabba d-dewmien biex sar l-akkwist**". Fl-Artikolu 67 tal-Kap 573 li jirrigwarda art okkupata minn awtorità kompetenti mingħajr dikjarazzjoni, jissemmew "danni materjali u d-danni morali li ġew imġarrba mis-sid għas-snin kollha li l-art kienet qed tiġi okkupata mingħajr ma nħarġet id-dikjarazzjoni." **Minn dawn il-frażijiet kollha, jirriżulta li l-leġislatur kien ċar li d-danni morali huma proprju dawk relatati mas-snin kollha li l-art kienet miżmuma mill-Gvern mingħajr ma sar xejn fuqha fil-każ tal-Artikolu 63 tal-Kap 573, jew mingħajr ma nħarġet id- dikjarazzjoni fil-każ tal-Artikolu 67 tal-Kap 573, u huma proprju dawk relatati minħabba d-dewmien biex sar l-akkwist fil-każ tal-Artikoli 64 u 65 tal-Kap 573 tal- Liġijiet ta' Malta.** F'għajnejn il-Bord, l-intenzjoni tal-leġislatur wara l-kunċett ta' danni morali, kien proprju li jiġu likwidati danni morali, in vista tad-dewmien li jseħħ f'dan it-tip ta' kwistjonijiet.

Strickland vs l-Awtorita tal-Artijiet *- Danni morali as contextualised under s 64*

Fil-fehema tal-Bord id-danni morali prospettati fl-Artikolu 64 jemanu proprju mill-fatt innifsu **tad-dewmien biex sar l-akkwist.** Hawnhekk il-Bord jirreferi ghan-nota ta' osservazzjonijiet tal-Awtorita intimata fejn targumenta li ebda danni morali m'huma dovuti billi l-Gvern ghamel uzu mill-art immedjatament kif okkupaha u tghid li kien ikun ghal kollox differenti kieku l-art kienet mizmuma mill-Gvern minghajr ma ghamel xejn fuqha. Izda dan l-argument m'ghandux mis-sewwa.

Harsa lejn l-artikoli relattivi tal-Kap. 573 turi illi d-danni morali dovuti bhala konsegwenza ta' non uso tal-art huma dawk ravvizati fl-artikolu 63(3) li hija azzjoni ghal kollox differenti minn dik odjerna. **Filwaqt li azzjoni taht l-artikolu 63 tal-Kap 573 hija azzjoni biex tiġi mħassra dikjarazzjoni f'sitwazzjoni fejn art għadha ma ġietx akkwistata, azzjoni taht l-artikolu 64 – bhal dik odjerna – hija azzjoni intiza sabiex art li tkun soġġetta għal dikjarazzjoni qabel id-dħul fis-seħħ tal-Kap 573 u li l-Gvern ikun ħa l- pussess tagħha iżda ma jkun qatt inħareġ avviż tal-ftehim jew ikun ġie indikat il- kumpens għall-akkwist ta' dik l-art**, is-sid jitlob li dik l-art tiġi akkwistata b'xiri assolut mill awtorità u jigi ffissat il-kumpens. F'din l-azzjoni apparti l-kumpens u imghax is-sid ghandu dritt ukoll jitlob lill-Bord sabiex jillikwida u jordna lill-awtorità tħallsu danni materjali u danni morali minħabba d-dewmien biex sar l-akkwist.

The difficulty arises in the latter half, holding that the article applies also to notices that do not indicate the amount of compensation. The Court held that this part does not apply to declarations issued post 2002, because in the post-2002 declarations there was always indication of the price (and thus section 55 was to be applied). The court also held that post-2002 declarations that do not indicate any price or compensation find themselves **in a lacuna.** See ***David Abela vs Lands Authority, Michael Spiteri vs Lands Authority, Emily Spiteri vs Lands Authority.***

David Abela vs Lands Authority - *elements required to activate the remedy contained in s 64*

Għalhekk sabiex l-azzjoni tinkwadra ruhha f'dan l-artikolu iridu jissussitu erba' elementi:-

1. Id-dikjarazzjoni trid tkun inħarġet qabel id-dħul fis-seħħ tal-Kap. 573;
2. Il-Gvern ikun ħa l-pussess tal-art;
3. Ma jkun qatt inħareġ avviż tal-ftehim jew ġie indikat il-kumpens għall-akkwist ta' dik l-art; u
4. Is-sid irid jipprova li għandu titolu validu ta' proprjetà fuq l-art.

Ghalhekk fil-fehema tal-Bord il-fatt li fid-dikjarazzjoni odjerna kien hemm indikat valur ghall-akkwist m'ghandux ikun ta' ostakolu ghall-applikazzjoni tal-Artikolu 64 tal-Kap 573 ghaliex il-linja ta' demarkazzjoni bejn iz-zewg artikoli jemergi li hija l-hruġ o meno tal-Avviz ghal Ftehim.

In ***David Abela***, the elements for Article 64 to be invoked were laid out. Furthermore, this case asserted that the difference between Article 64 and 65 surrounds the question on whether the notice to treat was issued or not. With reference to ***Andrew Agius***, the Court held that the value of the house listed on the declaration should not serve as an obstacle for the invoking of Article 64, to the extent that if a notice to treat (or judicial intimation) was not issued, the remedy may still be invoked.

The plaintiff must prove that he is the owner of the land. The problem is that for article 64 to be instituted, a notice was **not issued**, and therefore the owners were not indicated. The owners filing the claim for article 64 therefore must prove ownership. Once ownership is proven, the case progresses.

The claimant is given one possible demand attached to the activating of this remedy; that he ***may demand that the competent authority acquires the land by absolute purchase.*** In ***David Abela***, the court held that where there is ownership by absolute purchase, the transfer of ownership must pass and the price must be paid. Once the price fails to be paid, the acquisition is not complete, and therefore the Courts have held that if the owner has not been paid, then the acquisition was not complete, and thus article 64 applies.

The price is calculated according to the nature and the value **at the date of the declaration**. They determine whether the land was a waste site, rural land, etc, and ascertain a price. Under chapter 88, the scenario was different, as it held that the price should be determined according to the date of the judicial intimation (notice to treat). The claimant may also file for damages, as per **64 (4)**, which holds as follows;

(4) Apart from the compensation for the acquisition of the land as established in this article, the owner can also make a request to the Arbitration Board to liquidate and order the authority to pay him for material damages and moral damages due to the excessive delay for such acquisition.

One of the problems with this remedy is that it is not clear as to whether post 2002 declarations are subject to it. This is because nearly all post 2002 declarations had attached a price offered for compensation. Thus it seems that the only cases governed by such remedies are pre-2002 declarations which were not followed up by a notice to treat, and this because post 2002 judicial intimations were all coupled with a price.

Article 65 - Declaration followed by a Notice to Treat when payment is not effected

65. (1) Whoseover proves that he is an owner by valid title of land in respect of which a Declaration and notice to treat had been issued in terms of the Land Acquisition (Public Purposes) Ordinance, may proceed before the Arbitration Board to receive compensation if the competent authority failed to effect the payment.

(2) This action shall be made by means of an application filed in the Registry of the Arbitration Board that shall be addressed against the Lands Authority who shall have the right of reply within twenty days from the day it has been served with the application.

(3) The authority shall indicate in its reply whether the Government is still interested in the purchase of that land.

(4) If upon the issue of the notice to treat, the owner decided not to contest the price offered in the notice by means of a judicial act, the compensation due by the authority shall be that indicated in the notice to treat, as updated during the years in accordance to the index of inflation published in the schedule of the Housing (Decontrol) Ordinance

(5) If upon the issue of the notice to treat, the owner chose to refuse the price offered in the notice by means of a judicial act, the compensation due by the authority shall be that established by the Arbitration Board, which compensation shall be calculated in accordance with the value of the land at the time when the Declaration had been issued, as updated during the years in accordance to the index of inflation published in the schedule of the Housing (Decontrol) Ordinance.

(6) The compensation established by the Arbitration Board shall not be higher than the amount indicated by the owner or lower than the amount indicated in the notice to treat.

(7) Apart from the compensation for the acquisition of the land as established in this article, the owner can also make a request to the Arbitration Board to liquidate and order the authority to pay him for material damages and moral damages due to the excessive delay for such acquisition.

(8) The peremptory period referred to in article 63(6) for filing such action shall apply *mutatis mutandis* to the action under this article.

Article 65 thus again requires the plaintiff to prove ownership, only in this case both the declaration and the notice to treat were effected property. The issue in this scenario is that **the compensation was not effected**, despite the declaration being issued and the land being occupied. The plaintiff may also file for material and moral damages, owing to excessive delay. Again, Article 65 Applies solely to pre-2002 declarations, since the Notice to Treat was replaced in 2002 with the Judicial Intimation, which always contained a compensation value.

Prior to the enactment of Chapter 573, the price was valued as at the date of the notice to treat, and not the date of the declaration. The classification of the land would not change, but the price. Under Chapter 573, both the price and the nature are **as at the date of declaration**, with the difference of price being calculated according to the Cost of Living Index.

One should contrast the Cost of Living Index with the Property Index. There were years in the late 1970s and 1980s wherein the value of property doubled every year. There is a difference between the value of land increased because of the Cost of Living Index and the value of land increasing owing to the Value of Property Index. For instance, in 1994, a plot to build a terraced land in 1994 was the equivalent of 30,000. Today, the same plot of land is worth about 800,000. According to the index of inflation, the 30,000 would have increased to around 90,000, yet owing to the Property Value Index, the price of such property ought to have increased to 800,000. Therefore Article 65 does not consider the correct incremental value, for it applies the Cost of Living Index and not the Value of Property Index.

Apart from this increase according to the COLI, the owner is entitled to material and moral damages owing to delays and failure to adhere to correct procedures. Over and above these payments is the **right to interest**, as set out by Article 66.

Material damages are calculated according to the presumed fictitious value of the land from the date of the declaration to the date of the case. The strength of these material damages is that the value is updated periodically, not according to the COLI, but according to the real value of property. The rental value is thus a **real** rental value.

The law does not provide for how material damages are calculated, and thus the method for calculating such damages have evolved over time. With expropriation cases, it is difficult to value such damages, and so the Court has adopted a system surrounding the **rental value of the land**, which is equivalent of the damages suffered by the owner, as applied in the ***Michael Spiteri*** judgement.

Camilla Scerri et vs Lands Authority - *moral damages*

Inkwantu għad-danni morali akkordati mill-Bord, huwa ċar li l-għan li ddaħħal bis-saħħa tal-Kap. 573, huwa li individwu li jkun sofra ksur tad-drittijiet tal-proprjetà, kawża tad-dewmien fil-konklużjoni tal-proċeduri tal-esproprju, sabiex jingħata l-kumpens dovut għall-art li tkun ittieħditlu, huwa li jingħata rimedju ordinarju li jista' jiġi adottat mill-Bord, mingħajr il-ħtieġa li jsiru proċeduri ulterjuri. Bla dubju t-trapass ta' tletin sena sabiex jiġi konkluż proċess ta' esproprju huwa wieħed esaġerat, li ndubbjament wassal lill-Bord jakkorda d-danni morali. Madankollu d-danni morali, bħal fil-proċeduri kostituzzjonali, ma jingħatawx fl-għama, iżda wara li tingħata konsiderazzjoni ta' diversi fatturi

If the compensation stipulated in the Notice to Treat was **not contested**, then the compensation he is entitled to is that stipulated by the Notice to Treat. If the price was contested, then the minimum possible compensation is that stipulated by the Notice to Treat, and the maximum possible compensation being that requested by the Owner, with the ultimate decision left in the Court.

At the moment, owing to the Time Barre, the only declarations subject to this remedy are those issued after April 1994, for **article 65 (8)** holds that all owners lose a right of action following 30 years from the issuing of the declaration. This leaves a legal lacuna - if the owner chooses not to activate this remedy, the law does not state what happens to the land, namely whether it returns to the owner or whether it belongs to the Government. There are no cases which resolve this query. There is the ***Belvedere Land in Senglea case***, wherein the Italian owners lost the right to challenge the public purpose owing to a 20 day time barre. They, however, had filed a case alleging that the law provided that they could contest within 20 days of them finding out, and not within 20 days of the declaration. They won on appeal, thus having a granted remedy, with the reason being that since the owners were in Italy, they could not have possibly known of the declaration.

In ***John Bezzina et vs Lands Authority***, the Court asserted the distinction between **material and moral damages** for the purposes of Article 65.

John Bezzina et vs Lands Authority *- material vs moral damages re 65*

Fl-Artikolu 65 tal-Att dwar Artijiet tal-Gvern, li jirrigwarda art li tkun soġġetta għal dikjarazzjoni u avviż għall-ftehim, iżda li ma tkunx ġiet akkwistata, jissemmew "danni materjali kif ukoll danni morali minħabba d-dewmien biex sar l-akkwist." Fil-fehma ta' din il-Qorti, huwa meħtieġ li ż-żewg kategoriji ta' danni jinżammu distinti, fis-sens li f'tal-ewwel, l-iskop huwa dak li minn sofra ħsara materjali jiġi kkumpensat b'danni bbażati fuq it-telf materjali jew effettiv mġarrab minnu, filwaqt li f'każ ta' danni morali dawn għandhom jingħataw għat-tbatija u inċertezza ta' persuna li tkun għaddiet minnu minħabba l-aġir u d-dewmien tal-entità pubblika. Kif ukoll, il-fatt li jingħataw id-danni materjali ma jeskludix li jingħataw dawk morali. Jistgħu jingħataw it-tnejn, kif wara kollox jirriżulta mill-provvediment tal-liġi

David Abela pro et noe vs Lands Authority - *article 64 vs 65*

Mill-provi prodotti ma hemmx kontestazzjoni li d-dikjarazzjoni li nħarġet fl-2006, inħarġet qabel id-dħul fis-seħħ tal-Kap. 573 li daħal fis-seħħ f'April tal-2017. Inoltre mhuwiex ikkontestat lanqas li l-Gvern ħa l-pussess tal-fond - dan hu konfermat mill-Awtorità stess. Lanqas huwa kontestat it-titolu tar-rikorrenti fil-fond in meritu ... Jifdal għalhekk biss it-tielet element x'jiġi eżaminat fejn is-sid irid jipprova li fir-rigward tal-fond in meritu ma jkun qatt inħareġ avviż tal-ftehim jew ġie indikat il-kumpens għall-akkwist ta' dik l-art. Fil-każ preżenti jirriżulta li ma nħareġ qatt avviż għal ftehim iżda fid-dikjarazzjoni numru 982 tat-22 ta' Novembru 2006 hemm indikat il-prezz offrut mill-Awtorità għax-xiri assolut tal-fond in meritu bil-prezz indikat ikun dak ta' Lm4,400. Għalhekk iqum il-kweżit jekk japplikax l-Artikolu 64 billi fid-dikjarazzjoni hemm indikat il-prezz. Fin-nota ta' sottomissjonijiet tagħhom ir-rikorrenti jargumentaw illi in primis il-Kap. 573 ġie promulgat proprju biex jiġu eliminati l-problemi li kienu jeżistu taħt ir-regime legali tal-Kap. 88 u dan wara li l-Gvern kien ħa kont ta' numru ta' deċiżjonijiet tal-Qrati nostrani inkluż dawk ta' natura Kostituzzjonali u kif ukoll qrati esteri. Iżidu illi l-artikolu 64 jitkellem fuq sitwazzjoni meta għandek art soġġetta għal dikjarazzjoni qabel id-dħul fis-seħħ ta' dan l-Att u l-Gvern ikun ħa l-pussess tagħha iżda ma jkun qatt inħareġ avviż tal-ftehim JEW ikun ġie indikat il- kumpens għall-akkwist ta' dik l-art u jargumentaw illi bl-użu tal-konġuntiv 'jew' il-leġislatur ried illi fl-eventwalità li waħda biss mis-sitwazzjonijiet hemm kontemplati tkun soddisfatta, ossia jew ma jkunx inħareġ avviż ta' ftehim jew ma jkunx ġie indikat il-prezz, il-vot tal-Liġi jkun soddisfatt u purché jkunu jissussitu l-elementi l-oħra fuq deskritti għandu jsib applikazzjoni l-Artikolu 64.

Mid-dibattiti parlamentari jemerġi ċar li d-distinzjoni netta li tiddefinixxi jekk azzjoni ta' sid milqut b'dikjarazzjoni antika u li qed jitlob kumpens għat-teħid għandiex tkun waħda taħt l-Artikolu 64 jew 65 hija l-kwistjoni ta' jekk ikunx inħareġ jew le Avviż għall-Ftehim. Dan jidher ukoll ċar mill-marginal note tal-artikoli rispettivi li fil-każ ta' Art. 64 jgħid: Art li tkun soġġetta għal dikjarazzjoni mingħajr avviż tal-ftehim u fil-każ ta' Art 65A jgħid: Art li tkun soġġetta għal dikjarazzjoni u avviż għal ftehim iżda li ma tkunx ġiet akkwistata.

Il-Bord josserva li l-fatti tal-każ prezenti ma jinkwadraw ruħhom taħt l-ebda artikolu ieħor għajr għall-Art. 64 tal-Kap 573. L-art hija milquta bid-Dikjarazzjoni Presidenzjali tad-29 ta' April 2014 ippublikata b'avviz numru 552 tal-11 ta' Ġunju 2014 liema dikjarazzjoni nħarġet qabel id-dħul fis-seħħ tal-Kap. 573 li dahal fis-seħħ fil-25 ta' April 2017 u qatt ma nħareġ avviż ta' ftehim. Fid-dawl tal-insenjamenti ċitati, il-kunsiderazzjonijiet suddetti u l-fattispeċji ta' dan il-każ il-Bord iqis li l-artikolu applikabbli f'dan il-każ huwa l-Art. 64 tal-Kap. 573 tal-Ligijiet ta'Malta.

Dwar il-kumpens għall-akkwist tal-art li għandu jitħallas, l-Art. 64(3) jipprovdi li dan"għandu jkun skont il-valur tal-art fiż-żmien li nħarġet id-dikjarazzjoni, liema kumpens għandu jiġi aġġornat mas-snin skont l-indiċi tal-inflazzjoni ppubblikat fl-Iskeda tal-Ordinanza li Tneħħi l-Kontroll tad-Djar".

Articles 64 and 65: the right to interests via article 66

66. (1) In the cases referred to in articles 64 and 65, the owner also has the right to receive interest with the simple rate of eight per cent on the compensation that has been established by the Arbitration Board as updated during the years in accordance to the index of inflation published in the schedule of the Housing (Decontrol) Ordinance and this interest shall start accruing from the date when the Declaration has been published.

(2) If there is a contestation between the owner and the Lands Authority regarding the interest that shall be paid, the owner shall file an application so that the issue would be resolved by the Arbitration Board. This application shall be filed till not later than six months from when the contract of transferring the land has been paid by the parties or from when the decision of the Board become res judicata.

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

In the cases of remedies by Articles 64 and 65, the Plaintiff has the right to receive interest at the rate of 8% on the compensation yearly, according to the Housing (Decontrol) Ordinance, with such interest accruing from the date when the Declaration was published.

This position is contrasted with that of Chapter 88, wherein a declaration would totally freeze the nature of the land, with all surrounding compensation and interest being in relation to the time of declaration. Further, no material or moral damages were available under Chapter 88.

Article 67 - Occupation of Land without an issued Declaration

This is a situation previously discussed, pertaining to illegal possession of land, which may result in the action for damages or the *actio spolii*, as demonstrated in ***Andrew Agius*** (damages) and ***Inez Calleja*** (spolii). Article 1077 played a significant role in such proceedings, for it allowed the Court to place a time limit on the payment of compensation or of the issuing of a declaration, or any surrounding obligations. In such a situation, the Court may ***force the government to expropriate within a restricted time***, or else the government may surrender the land and forfeit the expropriation.

67. (1) When land not subject to a Declaration is occupied or administered by a competent authority, anyone who proves to the satisfaction of the Arbitration Board that he is owner of the land by valid title may either request that the land be acquired by absolute purchase by the Lands Authority or else that the land be relinquished free and unencumbered from any occupation.

(2) This action shall be done by means of an application filed in the Registry of the Arbitration Board which shall be addressed against the authority who shall have a right of reply within 20 days from when it has been served with the application.

(3) The authority shall indicate in its reply whether the Government wants to acquire the land with absolute purchase or else return the land to the owner.

(4) Should the authority indicate in its reply that it wants to acquire the land by absolute purchase it shall prove to the satisfaction of the Board that the land is required for public purposes.

(5) Should the Arbitration Board be satisfied that the land is required for public purpose, it shall fix a period of time within which the owner and the authority have to declare the amount of compensation which should be paid for the transfer of the land.

(6) If the parties disagree on the compensation to be paid, it shall be for the Arbitration Board to determine the fair compensation for the transfer of the land, provided that the compensation cannot be higher than the amount indicated by the owner or lower than the amount indicated by the authority.

(7) The value of the land shall be taken to be the amount which the land if sold by a willing seller might be expected to realize and shall be calculated on the value of the land at the time when the application was filed in terms of this article.

(8) In combination with the demands for purchase or relinquishment of the land, one can make a request so that the Arbitration Board liquidates and orders the authority to pay for material damages and moral damages that have been suffered by the owner for all the years that the land has been occupied without any issuance of the Declaration.

(9) Everyone shall forfeit his right of action in accordance with this article if he fails to proceed within five years from the entry into force of this Act. This period is peremptory and cannot be renewed.

For this remedy to apply;

1) No declaration was issued, or else land was occupied prior to a declaration being issued;
2) The Land was occupied without a declaration issued;
3) The occupation or administration is done by the Lands Authority or any other entrusted individual or entity empowered by law to administer Government land;
4) A valid title is produced before the LAB showing the Applicant to have ownership over the occupied land.

The applicant can filed the application within 5 years of the enactment of the act, and the Lands Authority would have 20 days to reply. The Lands Authority may declare that there is still public purpose in the land, in order to maintain occupants therefor. Further, the applicant may request the absolute purchase of the land, or else he may opt to demand the return of the property to the owner.

In order for the Lands Authority to acquire the land by absolute purchase after the proceedings have been instituted by the owner, it must prove that the land is required for a public purpose. If the Arbitration Board is satisfied with the proof of public purpose, it will fix a period of time within which the owner and the authority should determine the fair compensation for the transfer of the land, subject to the condition that the compensation cannot be higher than the amount of compensation requested by the owner or lower than the amount indicated by the authority.

The judgement this case would be split into 2; the first being the partial judgement of the Arbitration Board determining whether public purpose is satisfied and that the land shall be acquired by the Authority by Absolute Purchase, and the second being the determination of the fair compensation.

The owner may also request for material and moral damages, something previously not considered under Chapter 88, wherein the Constitutional Court would evaluate the rental value of the land and consider the value equivalent to the damages suffered.

Article 68 - Land held on Title of Public Tenure

68. (1) All those lands which upon the entry into force of this Act are held by a competent authority by title of public tenure shall either be acquired by absolute purchase or by title of use or possession or else they should be returned to the owner.

(2) This decision by the authority must be taken within ten years from when this Act comes into force, provided that if the authority fails to take any decision such default shall be deemed that the authority renounced to every right over that land and that the owner shall have the right to take it back.

(3) In the case that the land is required for purchase the chairperson of the Board of Governors of the Lands Authority shall issue a Declaration in accordance with article 38 and the provisions of articles 52, 53, 54 and 55 shall apply.

(4) The value of the land shall be taken to be the amount which the land if sold by a willing seller might be expected to realize at the time when the Declaration has been issued as provided in sub- article (3):

Provided that in the value, no regard shall be had to any building, erection or other improvement erected or made on the land after the date upon the possession thereof was taken by the competent authority.

Public tenure is similar but not identical to emphyteusis, in that there is a perpetual tenure for which compensation is offered (often referred to as recognition rent). Public tenure is not full ownership, nor is it a Civil Law Concept, being an English Law doctrine. A public tenure is naturally perpetual, and it refers to the owner's right as *residual ownership*. The compensation is unchangeable, with it being classified as a **real right**. Further, there is no restriction on use, meaning that construction and demolishing are permitted, within the natural remits of the law. The subject is also permitted to take fruits from the land occupied, and the title shall also prevail in the case of destruction of property.

Today, under Chapter 573, the occupation of land via public tenure is not possible, and thus Article 68 serves to extinguish those lands occupied by public tenure prior to the enactment of the present law. It holds that such land shall be acquired by absolute purchase or by title of use or possession, or otherwise it shall return to the owner.

The authority has 10 years to decide on the use of such occupied land, which began to lapse in 2017 upon the enactment of the Act. The failure to decide on use results in the owners' acquisition of all rights over such land, as stipulated under article 68 (2).

If the Authority seeks to acquire by absolute purchase, and if public interest is sufficiently proven, then a declaration must be issued by the Chairperson of the Board of Governors, with the value of the land being evaluated upon the date of the declaration's issue, subject to a very important proviso; **that no value should be considered in relation to any building, erection, or improvement benefitted from the land after being possessed by the Authority**.

If the land was deemed to be acquired by purchase, and if a declaration was issued, but is still pending, then such land is also subject to the pigeon-hole remedies aforementioned.

Article 69 - Land Held by title of Possession and Use

69. (1) When land has been acquired by a competent authority for use and possession during such time as the exigencies of the public purpose shall require, the owner may, after the lapse of ten years from the date when possession was taken by the competent authority, apply to the Board for an order that the land be purchased or acquired by the authority with absolute purchase in same manner as defined in article 68(3) and (4) or else be vacated within a year from the date of the order.

(2) When land which has been in the possession and use of a competent authority is vacated, the competent authority may remove all buildings, erections, or other improvements erected or made thereon during the period of occupation, making such compensation to the owner of the land for the damage which may have been caused by the erection of such buildings or otherwise, as may be agreed between the Authority and the owner or as, in default of agreement, shall be assessed by the Arbitration Board.

Prior to Chapter 88, title and possession were regulated by Section 15 of the Civil Code, holding that *no person can be compelled to give up his property or to permit any other person to make use of it, except for a public purpose, and upon payment of a fair compensation*. The form of expropriation for possession and was often abused of, for it was often applied in relation to land which was damaged during the second world war. The owners did not have funds to reconstruct their buildings, nor did the government have the money to purchase that property. As far as the costs of reconstruction was concerned, the state of Malta received compensation as part of the spoils of war, to help rebuild Malta. This compensation was not, however, enough to purchase the property. This system of expropriation is derived from English Law, applying English mechanisms. The notion of possession under English Law is quite strong when compared to local law, to the extent wherein **good faith is not a requisite for possession to be proven under English Law**. Thus when Chapter 88 was introduced, the notion of possession contemplated by this form of expropriation was not the same notion of possession as understood by Maltese Law (Article 2107 of the Civil Code and Article 524). **Under Chapter 88, the government could acquire land for any public purpose *for the possession and use thereof for a stated time, or during such time as the exigencies of the public purpose shall acquire.*** This was not considered to be a real right, but a personal one. The closest one may be to having title of possession is through rent. At the time, rent was confined to 1939 prices in the case of existing houses. Those built after 1939 would be subject to 3% of the cost of land in addition to 3.25% of the capital outlay to build. In either case, the rent was far less than the market value, and no provision for increases were made to reflect market changes. There was no mechanism to revise the amount paid, giving rise to various legal problems.

Under Chapter 573, there exists a remedy for older cases of possession and use. Currently, Article 36 governs and permits the expropriation of land for possession and use;

36. (1) The authority may acquire any land required for any public purpose, either:

(*a*) by the absolute purchase thereof; or
(*b*) for the possession and use thereof for not more than ten years.

(2) The authority can acquire part of a land by absolute purchase and part of it by possession and use.

(3) Where the land is to be acquired on behalf and for the use of a third party for a purpose connected with or ancillary to the public interest or utility, the acquisition shall, in every case, be by the absolute purchase of the land.

(4) No land shall be acquired any more by public tenure and all those lands which are held by public tenure shall be acquired by absolute purchase or by possession and use as laid down in the Act or else be relinquished to the owner.

In regards to the declaration issued by the Chairperson of the Board of Governors of the Lands Authority, article 39 (3) holds the following;

> **39 (3)** In the case of acquisition of land for possession and use, the Declaration shall indicate the number of years during which the land shall be kept by the authority, as long as that period of time does not exceed ten years, and it shall specify the whole amount of compensation that the authority is willing to pay as an acquisition rent for all the years that the land is going to be kept.

Thus the declaration must indicate the duration of such possession or use, provided that the duration **does not exceed 10 years**. It must also specify the whole amount of compensation that the authority is willing to pay as an acquisition rent for all the years it will be kept.

Going back to Article 69(2), the law holds that the authority possessing the land may remove all buildings, erections, or other improvements made throughout the duration of the possession or use, in turn making such compensation to the owner of the land for damage sustained by the erection of such buildings. This right is not enforceable, as the discretion as to whether such improvements are to be removed or not remains within the authority's discretion.

Article 69 seems to resolve all issues pertaining to expropriation by use and possession prior to the enactment of Chapter 573, since it caters for a time limit, for the right to compensation, and it also provides the owner with the remedy of converting the title or to request absolute purchase thereof, in the case that the authority fails to take a decision within 10 years from when possession was taken from the owner. If the Arbitration Board is satisfied that public purpose exists, it may order absolute purchase, issuing a declaration. If the Arbitration Board orders the land to be given back to the owner, then compensation must be issued to indemnify any damages suffered.

The 10 year begins to lapse upon the date of the issuing of the first declaration. If the land is acquired by absolute purchase, the Lands Authority must deposit the compensation in an interest bearing account. The owner must then prove ownership, and he will receive the compensation. The effects of the deposit are that ownership passes in favour of the state.

> **69…** *the owner may, after the lapse of ten years from the date when possession was taken by the competent authority, apply to the Board for an order that the land be purchased or acquired by the authority with absolute purchase in same manner as defined in article 68(3) and (4) or else be vacated within a year from the date of the order.*

Thus in order for the owner to effect the request to acquire by purchase or to vacate the land, 10 years must elapse from the date possession and use commenced.

> ***Maria Paris vs Lands Authority*** *- 2nd declaration issued before 2017, rendering articles 64 and 68 inapplicable*
> *12th October 2022*
>
> In aġġiunta, jingħad li dan il-Bord ma jaqbilx li f'dawn il-fattispecie, ir-rikorrenti, ġialadarba daħal fis-seħħ il-Kap 573 tal-Liġijiet ta' Malta, għandhom xi dritt li jeżiġu li terġa' tinħareġ xi dikjarazzjoni oħra ai termini tal-Artikolu 69, u in linea ma' dak stipulat fl-Artikolu 68(3) u (4) tal-Kap 573 tal-Liġijiet ta' Malta. Huwa minnu li din l-azzjoni saret abbażi tal-Kap 573 tal-Liġijiet ta' Malta, mentri d-dikjarazzjoni Presidenzjali kienet inħarġet ai termini tal-Kap 88 tal-Liġijiet ta' Malta, iżda dawn iċ-ċirkostanzi, bl-ebda mod ma jintitolaw lir-rikorrenti li jeżiġu li tinħareġ dikjarazzjoni oħra, din id-darba miċ-Chairperson tal-Bord tal-Gvernaturi tal Awtorità tal-Artijiet, u terġa' tinbeda l-proċedura ai termini tal-Artikolu 68(3) u (4), l-Artikolu 38 u d- dispożizzjonijiet tal-Artikoli 52, 53, 54 u 55 tal-Kap 573. Dana iktar u iktar qed jinghadd meta din id-dikjarazzjoni kienet ilha li nħarġet fis-sena 2012, u ċioe' snin wara li r-rikorrenti pproċedew b' din il-kawża.

Expropriation of Part of a Property

Prior to the enactment of Chapter 88, and thus under Ordinance VII of 1858, the general rule under its Article 16 was that;

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

Provided that if consequent to the said expropriation the remaining portion increases in value, in establishing the said indemnity regard shall be had to such incremental value and if such incremental value exceeds the indemnity, the latter shall not be payable.

Under the 1858 law, the owner, in certain cases, was given the right to compel the authority to purchase the entirety of the property. Furthermore, no one was able to be compelled into giving up a portion of their land exceeding 3/4 of the entire area of the land, when the owner does not own adjacent tenements.

Under Chapter 88, the issue was regulated by its Article 14, wherein a distinction was made between houses and land.

Chapter 573 contains this procedure under article 46 47 and 48, which state that;

46. An owner shall not be required to sell or convey to the authority a part only of any house or other building, if such owner is willing and able to sell and convey the whole thereof.

47. (1) An owner shall not be required to sell or convey to the authority a portion only of a building site, if the remaining portion measures less than two hundred and twenty square metres, or if, in the opinion of the Arbitration Board, the remaining portion, owing to its conformation and extension, will cease to be adaptable for building purposes under the laws and regulations relating to building.

(2) In any such case the authority shall acquire the whole site: Provided that if the owner owns adjacent land, the Arbitration Board may declare that the foregoing provisions of this article do not apply to the land to be acquired.

48. An owner shall not be required to transfer a portion only of any land if such portion exceeds three quarters of the area of the whole and the remaining portion measures less than one thousand one hundred and twenty-four square metres and that owner does not own any adjacent land.

Thus in relation to a *house or other building*, the authority has no right to compel the owner to sell part of the house when the owner is willing to sell it entirely.

Article 47 discusses the part expropriation of a **building site**. If the remaining portion measures less than 220 sqm, or **if in the opinion of the Arbitration Board, the Arbitration Board, owing to its conformation and extension will be rendered incapable for building purposes**, then the owner thereof shall not be compelled to sell part of the building site. There is thus an element of discretion vested in the Arbitration Board in regards to the part selling of a building site. Further, by virtue of Article 48, the same prohibition of forced part expropriation exists as under Chapter 88, in the case wherein the **remaining portion measures less than 1024 sqm**, provided that the owner does not own the adjacent land.

Contesting Public Purpose

Prior to 2002, owing to the *iuri imperii* doctrine, the public purpose could not be contested so long as a declaration was issued. The doctrine of *iuri imperii* was done away with in ***Lowell vs Caruana***. In 2009, for the first time, the right to contest public purpose was introduced within Chapter 88, within 21 days from the issuing of the declaration. Despite ***Lowell vs Caruana***, under Chapter 88 and until 2009, the *iuri imperii* doctrine was still in place, for there was no form of remedy to challenge a declaration issued under Chapter 88. There was an exemption within the law from existing legislation from scrutiny. Chapter 88 could not be challenged, and therefore it was only when Malta was granted the right of individual petition that the Maltese Courts were empowered to challenged public purpose. Around the time the right was adopted, the European Convention was also transposed into Maltese law, bringing us into the realm of Public International Law (Treaty Law), bringing about the question as to whether a treaty has direct effect in Malta. The enactment of the European Convention Act, with the effective transposition of the ECHR into Maltese law was pivotal for the crucial reason that the Constitution's right to property **precluded action against any law enacted before 1962**. Thus the declarations, which were issued under an Act promulgated in 1935 (Chapter 88), were not subject to unconstitutionality. The ECHR thus widened the protection available to citizens in the forefront of human rights, by introducing the right to individual petition. Between 1868 and 1935 (promulgation of Chapter 88), there was **no definition for public purpose**. Furthermore, the owner was **not entitled to proof of public purpose** beyond that stipulated by the issued declaration.

Nobbli Gioacchino Attard Montalto vs Onor Dr Edgar Cuschieri - *iure imperii and public purpose*

In this case, the Courts asserted that public purpose, being a concept determined and established by the State, was not contestable owing to the *iure imperii* doctrine.

"*L-esproprijazzjoni ta' art għal utilita' publiak tikkostitwixxi att li jiġi magħmul mill-awtorita' iure imperii. Kif id-dritt tal-awtorita', li tesproprija art għal skop publiku, mhux sindikabbli mill-Qrati sakemm jiġi eżerċitat mill-awtorita' kompetenti u fil-forma preskritta mil-liġi; hekk ukoll hija insidikabbli l-eżekuzzjoni ta' dak id-dritt, li hija parti u haġa waħda mal-istess dritt"*

Pawlu Cachia vs AG & il-Kummissarju tal-Artijiet - *right to contest*

Wiehed ghandu jifhem li meta kienet originarjament promulgata l-Ordinanza dwar it-tehid ta' l-art ghal skop pubbliku tramite il-procedura ta' esproprijazzjoni, il-legislatur kien mhux biss haseb ghat-tehid immedjat tal-pussess u d-disponibilita' tal-proprjeta' biex tigi utilizzata ghall-iskop li ghalih tkun giet esproprijata, imma wkoll ghall-process spedit ta' likwidazzjoni ta' kumpens dovut anke bit-twaqqif ta' Tribunal kwazi gudizzjarju b'kompetenza teknika in materja. Zgur li l-Ordinanza qatt ma kienet mahsuba biex tigi mehuda art meta l-iskop pubbliku ma jkunx jirrizulta stabbilit, u wisq anqas kien mahsub illi l-Gvern jiehu l-art, jutilizzaha ghal ghexieren ta' snin (fil-kaz taht ezami lanqas biss utilizzaha ghax il-pussess materjali baqa' f'idejn l-appellat) u xi darba ihallas il-kumpens. Jidher li anke fiz-zmien li fih giet promulgata l-Ordinanza, meta kien ghadu jirrenja l-kuncett tal-"iure imperii" u meta l-istharrig gudizzjarju ta' l-ghemil amministrattiv kien ghadu pratikament rudimentali, jidher li l-Istat kellu forsi aktar konsiderazzjoni ghall-veru sinifikat tal-jedd fondamentali ta' l-individwu ghat-tgawdija tal-possedimenti tieghu minn amministrazzjonjiet li gew wara fi zminijiet aktar imdawwla.

Gvern ghal skop pubbliku, imma fejn il-kumpens ghal dak it-tehid, nonostante li jkunu ghaddew ghexieren ta' snin, jibqa', ghal xi raguni jew ohra, mhux imhallas, u allura il-process ta' esproprijazzjoni ma jkunx gie finalizzat. Il-fattispeci tal-kaz prezenti mbaghad ukoll hu tipiku ta' kazijiet ohra fejn l-Istat ikun hareg id-dikjarazzjoni ta' l-esproprju u ghal decenni jkun ghadu ma hallasx il-kumpens dovut avolja ma jkunx qieghed jaghmel uzu mill-proprjeta' ghall-iskop pubbliku li ghalih ikun fl-ewwel lok ittiehed il-pussess taghha. Ikun sahansitra irritjena tali pussess, nonostante li l-iskop pubbliku li ghalih tkun saret id- dikjarazzjoni ta' l-esproprju, ma jibqax validu jew ghax l-Istat ikun abbanduna l-progett, jew ghax jirrizulta li l-progett ma jkunx jestendi ghal fuq l-art de quo, jew ghal xi raguni ohra. D

Dawn kienu sitwazzjonijiet li kien jehtigilhom jigu nvestigati mill-organi gudizzjarji, meta mitluba bl-applikazzjoni tal-ligi vigenti, interpretata mhux f'termini ta' editti iure imperii jew ordinanzi kolonjali, imma bl-applikazzjoni tal-principji kostituzzjonali u konvenzjonali li jirrikonoxxu t-tgawdija tal-possedimenti ta' l-individwu bhala jedd fondamentali u lill-Gvern id-dritt li jiehu pussess tal-proprjeta' ta' l-individwu ghal skop pubbliku. L-interpretazzjoni tal-ligijiet in materja kellha allura ttendi biex tistabilixxi dak il-bilanc essenzjali f'socjeta' demokratika bejn il-jedd ta' l- individwu u l-bzonnijiet tal-kollettivita' fid-dawl tal-principji tal- proporzjonalita' aktar 'il fuq enuncjati u mhux bl-invokazzjoni ta' xi difizi ta' l-insindikabilita' ta' atti ta' l-Istat mill-organi gjudizzarji ormai felicement sorpassati

Therefore prior to the 2009 amendments, the only way to contest public purpose was through the Constitutional Court. Today, the owner has 50 days to contest public purpose, with a difference being made between the contesting of public purpose and the contesting of the price, as previously mentioned.

As previously mentioned, in 2009, the Land Acquisition (Public Purposes) Ordinance introduced the right to contest the public purpose **within 21 days from the issuing of the declaration,** as per the then Article 6(2) of Chapter 88, which held as follows;

6. (1) Without prejudice to the provisions of subarticle (2), no person shall require any proof of the public purpose referred to in articles 3 and 4 and in article 8(1) other than the declaration of the President of Malta.

(2) Any person who has an interest in land, in respect of which a declaration of the President as is referred to in subarticle (1) is made, may contest the public purpose of the said declaration before the Land Arbitration Board by means of an application to be filed in the registry of the said Board within twenty-one days from the publication of the said declaration and the provisions of the Code of Organization and Civil Procedure applicable to the hearing of causes before the Civil Court, First Hall, including the provisions regarding appeals from such decisions, shall, *mutatis mutandis*, apply to the determination of the said application:

Provided that the filing of an application in terms of this subarticle shall not hinder the continuance of the expropriation proceedings or the doing of anything that may be done in respect of the land as provided in this Ordinance during the time when the application is still not determined, without prejudice to the right of the applicant to seek compensation in the event that the declaration of the President is found to be without public purpose.

Buxom Pultry Limited vs Kumissarju tal-Artijiet et - *Board's power to decide public purpose*

Fil-fehma ta' din il-Qorti r-rimedju pprovdut mill-Artikolu 21(2A) tal-Kap. 199 huwa rimedju effettiv u effikaci, billi l-Bord tal-Arbitragg jista' jiddeciedi jekk l-iskop huwiex pubbliku jew le. Fil-kaz li l-Bord jiddeciedi li l-iskop ma huwiex pubbliku, allura s-socjeta` rikorrenti jkollha rimedju tajjeb billi d-Dikjarazzjoni tal-President tigi dikjarata nulla, minghajr htiega allura li ssir din il-kawza kostituzzjonali abbazi taz-zewg artikolu tal-ligi msemmija minnha. Jekk is-socjeta` rikorrenti xorta wahda tibqa' ssostni li qed tbati lezjoni tad-drittijiet fondamentali taghha, ma hemm xejn xi jzommha milli terga' tipprocedi b'rikors iehor kostituzzjonali. Izda fil-fehma ta' din il-Qorti,il-procedura ordinarja quddiem il-Bord tista', f'dan il-kaz, tindirizza pjenament l-ilment tas-socjeta` appellanti.

Under Public International Law, there exists the positivist and the dualist approach, with the former referring to direct applicability within signing and with the latter referring to direct effect only after further implementation. The Maltese system applies a dualist approach.

41. (1) Any person who has an interest in the land, in respect of which a Declaration by the Chairperson of the Board of Governors of the Lands Authority as is referred to in article 38 (1) is made, **may contest the public purpose** of the said Declaration and demand for its cancellation before the Arbitration Board by means of an application to be filed in the registry of the said Board **within fifty days from the publication of the said Declaration.**

55. (3) The application (**to contest the amount of compensation per 55 (1)**) shall be filed by not later than **five years** from when the Declaration by the chairperson of the Board of Governors of the Lands Authority has been published as referred to in article 39(1) and (2), provided that if such an application is not filed, the owner shall only have the right over the deposited sums and the interests mentioned in article 52.

Under the current law, the 21 day contestation period was extended to 50 days, with the Government, in practice, not allowed to make use of the property until such period elapses. The deposit (compensation) is paid according to the provisions of Article 52;

52. (1) The authority shall deposit in an interest bearing bank account which will guarantee a minimum of interest *per annum* as the Minister may by regulation under this sub-article prescribe, a sum equal to the amount of compensation offered in theDeclaration drawn up by the chairperson of the Board of Governors of the Lands Authority.

(2) If there is no contestation as referred to in article 41, the deposit referred to in sub-article (1) shall be made within a period of fifteen days running from when the time for contesting the Declaration has elapsed. If there is a contestation which is then dismissed, the fifteen day period starts running from when the decision of the Arbitration Board or the Court of Appeal (Superior Jurisdiction) has become res judicata.

(3) Whosoever satisfies the Arbitration Board that he is an owner of that land by virtue of a valid title may request for the Board's authorization to withdraw the deposited sum as referred to in this article, together with the interest accrued thereon.

(4) This action shall be done by means of an application filed in the registry of the Arbitration Board which shall be addressed against the authority who shall have a right of reply within twenty days from when it has been served with the application.

(5) The amount deposited as provided in this article together with any interests accruing thereon may be withdrawn whether or not the sum deposited as compensation has been accepted as the amount of compensation due, and the withdrawal of such deposit interests shall not prejudice the right competent to any person to take action according to this Act for the purpose of determining any further compensation that may be payable to him in accordance with this Act.

Referring back to ***Bugeja vs Kummissarju tal-Artijiet***, the difference between Public Purpose and Private Purpose remains pivotal;

Bugeja et vs Kummissarju tal-Artijiet - *Public Purpose*

L-interess pubbliku hu immirat lejn il-generalita` u marbut mal-finalita` ahharija li ghaliha l-proprjeta` qed tintuza**, u dan indipendentement minn jekk dik l-attivita` tkunx maghmula minn awtorita` pubblika. **Jinghad ukoll li skop pubbliku ma jista' qatt jirreferi ghall-interess essenzjalment privat, u l-interess huwa dejjem privat meta m' ghandux applikazzjoni ghal generalita' tac-cittadin, ta' l- universalita' tal-pubbliku fl-Istat. Mill-banda l-ohra pero' il-fatt li terz privat, individwu, jibbenefika wkoll mill-esproprju jew ikun involut b' xi mod fit- thaddim anke jekk bi profitt ghalih, ta' progett li jkun fl-interess pubbliku u li jkun jirrikjedi esproprijazzjoni ta' art jew possediment iehor, ma jfissirx necessarjament li dik l-esproprijazzjoni ma tkunx saret fl-interess pubbliku. **L-interess pubbliku jinkludi kull aspett tal-hajja socjali tal- pajjiz**. Dan l-iskop socjali jolqot firxa differenti ta' nies, anke jekk ikun hemm persuni li ma jinteressawx ruhhom f'attivitajiet in dizamina.[21] Jinghad ukoll li mhux eskluz li proprjeta' tigi esproprijata fl-interess pubbliku ghax kien hekk mehtieg biex tigi assigurata l-attwazzjoni kompleta ta' progett ta' utilita` partikolari fil-kuntest tal-izvilupp partikolari taz-zona.

The public purpose must be proven by the State, who is alleging that the property must necessarily be taken in order to satisfy the needs of the general public. Chapter 88 used to provide for a definition of public purpose, being;

Chapter 88: "public purpose" means any purpose connected with exclusive government use or general public use, or connected with or ancillary to the public interest or utility (whether the land is for use by the Government or otherwise) or with or to town-planning or reconstruction or the generation of employment, the furtherance of tourism, the promotion of culture, the preservation of the national or historical identity, or the economic well being of the State or any purpose connected with the defence of Malta or connected with or ancillary to naval, military or air operations; and includes any other purpose specified as public by any enactment; and for the purposes of this definition, where the purpose for the exercise of any right under this Ordinance is connected with the utilisation of any land or any right in connection or in relation therewith for any purpose connected with the supply, storage or distribution of fuels or other sources of energy, or in connection with the provision of any utility or municipal services or infrastructural project shall be deemed to be connected with or ancillary to the public interest or utility

Today, Chapter 573 provides the following definition;

Chapter 573: "public purpose" means any purpose connected with exclusive government use or general public use, or connected with or ancillary to the public interest or utility (whether the land is for use by the Government or otherwise) or with or to town-planning or reconstruction or the generation of employment, the furtherance of tourism, the promotion of culture, the preservation of the national or historic identity, or the economic well being of the State or any purpose connected with the defence of Malta or connected with or ancillary to naval, military, or air operations; and includes any other purpose specified as public by any enactment; and for the purposes of this definition, where the purpose for the exercise of any right under this Act is connected with the utilization of any land or any right in connection or in relation therewith for any purpose connected with the supply, storage or distribution of fuels or other sources of energy, or in connection with the provision of any utility or municipal services or infrastructural project shall be deemed to be connected with or ancillary to the public interest or utility

Thus, in summary;

Pre 1987:

Prior to the enactment of the European Convention Act, there was no possible remedy to contest public purpose in relation to expropriation under Chapter 88. Not even Article 37 of the Constitution, governing the right to property, was able to be invoked in challenging the public purpose.

Post 1987 (ratification of ECHR)

The constitution still was not invokable in order to challenge public purpose. However, upon the ratification of the ECHR, with the right of individual petition, one was able to contest public purpose, albeit within the Constitutional Court.

Post 2009 Amendments

Under the 2009 amendments, Chapter 88 introduced the right to contest public purpose under the Lands Arbitration Board within 21 days from the issuing of the declaration, thus alleviating the load off the Constitutional Courts.

Chapter 573 of 2017

Today, public purpose may be contested by virtue of Article 41, which will be replicated hereunder for convenience purposes.

In summation, the requisites and procedures to be adhered to when contesting public purpose today are the following;

- It may be done by anyone who has an interest in the land
- A declaration by the Chairperson must be made
- The plaintiff may demand for its cancellation before the Arbitration Board
- **Within 50 days of the declaration**,
- The Lands Authority has 20 days to reply,
- The Arbitration Board shall ascertain whether there is public purpose or not within 2 months after the 20 days within which the Authority has the right to reply,

41. (1) Any person who has an interest in the land, in respect of which a Declaration by the Chairperson of the Board of Governors of the Lands Authority as is referred to in article 38 (1) is made, may contest the public purpose of the said Declaration and demand for its cancellation before the Arbitration Board by means of an application to be filed in the registry of the said Board within fifty days from the publication of the said Declaration.

(2) The application filed in accordance to sub-article (1) shall be served to the authority, who has a right to submit a reply within twenty days.

(3) The Arbitration Board shall set down the application for hearing without delay, and after listening to the witnesses and the submissions of the parties, it shall pass judgement within the shortest time possible but not any later than two months from the closing date within which the authority had to file its reply.