Civil Procedure

Lecture Title: Special Proceedings

Diploma in Law (Malta)

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ADVOCATES

Counter-Claim or Reconvention Proceedings

(Kontro-Talba/Rikonvenzjoni)

INTRODUCTION

This term is rather clear as regards its meaning – the plaintiff is reconvened, i.e. summoned, and duly becomes a defendant.

In practical terms, this occurs when the plaintiff brings an action against the defendant and the defendant files a counter-claim against the plaintiff

WHEN COUNTER-CLAIMS CAN BE SET UP

It is not every claim that would entitle the defendant to file a counter-claim, and indeed, **Article 396** provides an exhaustive list as to when a counter-claim can be set up against the plaintiff:

1. If the claim of the defendant arises from the same fact or the same contract or title giving rise to the claim of the plaintiff;
2. If the object of the claim of the defendant is to set-off the debt claimed by the plaintiff, or to bar the action of the plaintiff, or to preclude its effects.

This is hence an active means of defence of which the defendant may avail himself, and is a demand that is directed against the plaintiff .

While reconvention could be availed of in cases that relate to the same subject matter, less rigidly, the law also accepts counter-claims that are not related to the same subject-matter.

Counter-Claim or Reconvention Proceedings

(Kontro-Talba/Rikonvenzjoni)

- **Cauchi v. Galea et (First Hall Civil Court, 2010)** involved a legal dispute in which the court clarified the procedure for counter-claims.

The court emphasised that in every case, the defendant has the right to bring a counter-claim as long as it is connected to the main action. This connection does not necessarily mean that the counter-claim must be reliant on the plaintiff's claim, but rather there must be a discernible link between the plaintiff's claim and the counter-claim.

This principle has been established in previous court cases such as:

- **Scerri v. Fenech (2003)**
- **Cutajar v. Farrugia (1987)**

Furthermore, in situations where doubts arise regarding the satisfaction of the requirements outlined in Article 396, or when these requirements are indeed not fulfilled, the defendant always has the option to initiate a separate legal action.

Counter-Claim or Reconvention Proceedings

(Kontro-Talba/Rikonvenzjoni)

• THE FIRST GROUND OF RECONVENTION

- The First Ground of Reconvention entails that a counter-claim can be raised when the defendant's claim stems from the **same fact, contract,** or **title.**
- Therefore, this ground establishes a strict criterion for reconvention proceedings.
- For instance, let's consider a scenario where Person A sues Person B for the damages caused to their car, while Person B countersues Person A for personal injuries sustained and damages to their own car. Here, both claims originate from the same fact, namely the car incident.
- Similarly, if there is a lease agreement between a landlord and a tenant, the landlord may sue the tenant for breaching an obligation, such as non- payment of rent. Simultaneously, the tenant can assert a claim against the landlord for repairs conducted on the property. In this case, the claims arise from the same contract, the lease agreement.
- Additionally, the concept of the same title can be illustrated by a situation where Person A sues Person B, asserting ownership of a particular title. In response, Person B asserts that they also possess ownership of the same title, which forms the basis of Person A's claim.
- In summary, the First Ground of Reconvention establishes that a counter-claim can be made when it arises from the same fact, contract, or title as the plaintiff's claim, providing a rigid framework for reconvention proceedings.

Counter-Claim or Reconvention Proceedings

(Kontro-Talba/Rikonvenzjoni)

THE SECOND GROUND OF RECONVENTION

The object of the second ground of reconvention is so that such grounds are broadened beyond the notions of fact, contract or title.

In the case of set-off, when claims are made by the plaintiff, the defendant's claim need not necessarily be based on facts, contracts, or titles. There are three types of set-off that may be applied:

1. Legal set-off – When the amount is certain, liquidated and due; and in such case, the amount is decreased from the amount owing by the other party *ipso jure*;
2. Conventional set-off – When the parties agree that instead of B paying A the amount he owes him, he will carry out some form of works;
3. Judicial set-off – When there are opposing claims for money by both parties and one party's claim is more easily ascertainable than that of the other party, with the party whose claim is more difficult to ascertain asking the court for such a set-off.

Counter-Claim or Reconvention Proceedings

(Kontro-Talba/Rikonvenzjoni)

- (cont'd) THE SECOND GROUND OF RECONVENTION
- When it comes to the situation of barring the plaintiff's action or preventing its consequences, the court does not possess discretionary power due to the broadness of this provision.
- However, the wording of the law in this particular case, especially the latter portion of the provision, suggests that there still needs to be a connection between the plaintiff's claim and the subject matter of the defendant's counter-claim.
- In other words, even though the court lacks discretion in dismissing the plaintiff's action, it appears that there should be a discernible link between what the plaintiff is demanding and the nature of the defendant's counter-claim.

Counter-Claim or Reconvention Proceedings

(Kontro-Talba/Rikonvenzjoni)

THE PROCEDURE RELATING TO RECONVENTION

Article 397 states that the effect of reconvention is that the original claim and the counter-claim are dealt with in one single record and both claims are disposed of in the same action.

Therefore, it can be argued that there are two actions in the same proceedings that tend to eliminate each other, with the aim of this institute being to avoid conflicting judgements.

Of course, in the case of a counter-claim being set up by the defendant, if the court is satisfied that this falls within the limits of Article 396, then both the parties' claim will be settled by the same judgement.

Counter-Claim or Reconvention Proceedings

(Kontro-Talba/Rikonvenzjoni)

(cont'd) THE PROCEDURE RELATING TO RECONVENTION

Gheiti and Sons Ltd v. Zammit (First Hall Civil Court, 2011)

The court here said that the effect of a counter-claim in a procedural sense is that both the claim and the said counter-claim together become part of one process, and are subsequently decided in one action. The defendant who wishes to set up a counter-claim shall set up his claim in the written reply to the application, whether sworn or not.

Fenech et v. Petroni (Court of Appeal (Inferior), 2011)

The court here said that it is clear, according to law, that the counter-claim must be proposed in the same judicial act in which the response, be it sworn or otherwise, is presented.

Counter-Claim or Reconvention Proceedings

(Kontro-Talba/Rikonvenzjoni)

(cont'd) THE PROCEDURE RELATING TO RECONVENTION

The counter-claim shall be set up after the defence to the original claim is made out.

With respect to the counter-claim, the defendant shall observe the rules that are duly established for the written pleading by which the proceedings were first instituted. The implication of this is that the defendant becomes a de facto plaintiff.

Where proceedings are by sworn application, the setting up of a counter-claim in a sworn reply shall be equivalent to the filing of a sworn application with respect to that claim, and shall be served on the plaintiff, who will proceed as if he were a defendant to the case. In such case, the closing of preliminary written procedures and the application of **Articles 151 and 152** shall take place with the filing of the sworn reply by the plaintiff or the expiration of the term for its filing.

The defendant may not set up a counter-claim in a capacity other than that in which he has been sued, and nor may he sue the plaintiff in a capacity other than that in which the plaintiff has claimed. This means that both parties must act in the same capacity.

Counter-Claim or Reconvention Proceedings

(Kontro-Talba/Rikonvenzjoni)

JURISDICTION AND COMPETENCE OF THE COURT

While a counter-claim extends the jurisdiction of the court as regards the case itself, it does not extend the competence of the court. Therefore, a counter-claim cannot be filed before a court which is incompetent to hear that counter-claim.

However, this does not mean that the claim of the said defendant cannot be brought before any other court which is competent to hear the claim.

- This can be seen from the combined effect of **Articles 743 and 744 COCP.**

Counter-Claim or Reconvention Proceedings

(Kontro-Talba/Rikonvenzjoni)

- FINAL GENERAL PROVISIONS
- If the defendant sets up a counter-claim and the action of the plaintiff is discontinued, the defendant may nonetheless insist on the counter-claim lawfully set up to be proceeded with.
- This is because while the actions of the parties are joined, they are nonetheless separate and independent.
- Furthermore, where the defendant in an action bring another action in respect of a claim connected with that of the plaintiff, the court may order the two actions to be heard simultaneously.

Counter-Claim or Reconvention Proceedings

(Kontro-Talba/Rikonvenzjoni)

(con'td) FINAL GENERAL PROVISIONS

Meilaq v. MV Yukon (Court of Appeal, 2001)

At first instance, the plaintiff brought an action *in rem* against the defendant, who subsequently brought a counter claim for damages, stating that the impediment of departure was abusively issued.

While the First Hall said that once the lawsuit had commenced *in rem* then a counter-claim *in personam* could not be imposed on it, since such counter-claim would the nature of the main action.

The Court of Appeal rejected this line of thought. It stated that a counter-claim is autonomous, separate and distinct from the main action, and indeed, even if a plaintiff withdraws a claim, the court is still duty-bound to continue hearing the counter-claim. The nature of the plaintiff's claim therefore would not have changed simply because of the nature of the counter-claim.

Jactitation Suits (Azzjoni ta' Jattanza)

• INTRODUCTION

- The jactitation suit is a legal remedy that aims to protect individuals whose rights have been infringed upon by another person's false or contradictory claim. It provides a means for the aggrieved party to address the situation and seek a resolution.
- In cases where someone makes a claim that undermines the rights of another person, the jactitation suit becomes a recourse for the affected individual. Rather than accepting the uncertainty and potential harm caused by the false claim, the aggrieved party can initiate legal proceedings to challenge the validity of the opposing claim.
- By instituting such legal action, the claimant (or vaunter) is required to substantiate their claim and provide evidence to support it. This process helps to establish the truth and validity of the competing claims. If the claimant fails to take appropriate legal action or provide substantial evidence, the court may impose perpetual silence upon them regarding the issue at hand. This means that the vaunter will be legally restrained from making further assertions or claims related to the matter in the future.
- The jactitation suit, therefore, serves as a mechanism to ensure that claims are not made frivolously or without proper substantiation. It promotes clarity, fairness, and resolution by compelling the claimant to validate their claim through the legal process. This reduces the element of uncertainty and protects individuals from baseless or unfounded claims that could have long-lasting effects on their rights and reputation.

Jactitation Suits (Azzjoni ta' Jattanza)

Pisani v. Grech et (First Hall Civil Court, 2011)

The court here said that the remedy of the jactitation suit is extraordinary in nature.

The court will only grant this remedy in exceptional circumstances, and definitely not for reasons such as that the plaintiff will unlawfully occupy something that does not belong to him.

Indeed, this action only applies where a person, by means of a judicial act or something placed in writing, believes that they can exercise a legal right that he has over someone else.

Furthermore, the jactitation suit must never be used in order to abuse of any forms of justice.

Where a claim is vaunted in a judicial act or in writing, the party wishing to be liberated from such claim (jactitation) may, within one year, demand, by sworn application, that a time be fixed within which the vaunter shall bring the claim for trial, with default in this regard giving rise to the remedy of perpetual silence.

Jactitation Suits (Azzjoni ta' Jattanza)

- **Chircop v. Grech (First Hall Civil Court, March 2012)**

The court provided a specific interpretation of **Article 403**, taking into account the nature and purpose of the jactitation suit. The court explained that Article 403 is given a narrow interpretation, meaning that it is understood in a limited or restricted manner.

- Now, let's break it down in simpler terms:

- The jactitation suit is a legal action taken by someone who wants to silence another person who has made a false or contradictory claim. In this case, Article 403 refers to a specific provision in the law that governs the jactitation suit.
- When the court said that Article 403 is given a narrow interpretation, it means that the court is being cautious and restrictive in its understanding of how this provision should be applied.
- The court is mindful of the purpose of the jactitation suit, which is to bring an end to the false claim and prevent the person making that claim from continuing to assert it.
- The court also mentions that the aim of the jactitation suit is to achieve perpetual silence. In other words, the goal is to permanently stop the person who made the false claim from talking about it or making similar claims in the future.
- However, there is a condition attached to this. The person who initiated the jactitation suit needs to follow up on it within a specific time frame, as stipulated by the law.

Jactitation Suits (Azzjoni ta' Jattanza)

So, in summary, the court in the Chircop v. Grech case emphasised that Article 403, which pertains to the jactitation suit, should be narrowly interpreted. The purpose of the suit is to silence the person who made the false claim, but this can only happen if the suit is pursued in a timely manner.

The time period that the vaunter has to bring such action is that of three months.

Such time shall be suspended during the pendency of an application to sue with the benefit of legal aid, provided that the application is filed by the jactitator within the first four days of the said time

Jactitation Suits (Azzjoni ta' Jattanza)

THE REQUISITES OF THE CLAIM

There are five requisites for a jactitation suit to be brought:

1. The vaunter/jactitator must have made public a pretension against the right of the holder. It must be a claim that manifestly runs counter to a right of possession or ownership that the plaintiff in the jactitation suit already has;
2. The pretension must have been made by the vaunting of a claim in writing or by means of a judicial act (Article 403), although not every claim in writing can give rise to a jactitation suit;
3. The party wishing to be liberated from jactitation must demand that a time be fixed for the vaunter to bring a suit within one year from the date of claim of the vaunter, with the vaunter eligible to bring such action within three months;
4. The claim must actually molest another person's rights, and hence the jactitation must refer to a determinate right. Article 405 states that the court shall not allow the said demand in respect of an uncertain right, contingent upon any event or condition, or of a right with regard to which no action can be taken;
5. A jactitation suit generally cannot be instituted against an absent person, or against a minor or any other person under a disability to be sued; but can be instituted against a non-resident or absent person if this is done three months from the vaunt.

Jactitation Suits (Azzjoni ta' Jattanza)

WHO CAN BRING THE ACTION AND AGAINST WHOM IT CAN BE BROUGHT

Since this is a possessory action, the action may only be brought by the holder of a right, attacked by a claim **(Atanasio v. Atanasio).** However, this is not restricted to the possessor but extends to any holder who has this right of action.

Vis-à-vis who the action can be brought, this encapsulates anyone apart from the people mentioned in **Article 415**, i.e. absent persons, minors and persons under a disability to sue or be sued.

Prime Minister v. Peralta (Commercial Court of Appeal, 1992)

This case concerned the loss of an airplane in Lockerbie. The defendants claimed that since they were absent from Malta, a jactitation suit could not entertained against them, something which the court agreed with. It said that the fact that the defendant could easily communicate with his mandators abroad did not mean that they were present in Malta, and hence rejected the plaintiff's claim for a jactitation suit.

This is the case that brought about the amendments to COCP, that incorporated the notion that persons absent from Malta cannot have a jactitation suit instituted against them.

Jactitation Suits (Azzjoni ta' Jattanza)

CONCLUSION

In summing up what a jactitation suit is, Prof. Caruana states:

- **"By means of this action a person having a right in his possession and being molested by others by contrary claims, demands that a legal term be fixed for the vaunter to bring forward his claims or pretensions before the Court"**

It has also been determined by our courts that a successive usufructary can file a jactitation suit against any person who claims a right of property on the objects forming the succession, as seen in **Cali' Corleo v. Fava,** this even though his successive right of usufruct had not yet been brought in force.

Competition of Creditors on Competing Claims

INTRODUCTION

The "Competition of Creditors on Competing Claims" refers to the procedural aspect of the rules that determine the order of priority for settling debts or claims. In simpler terms, it deals with how multiple parties with competing claims to a sum of money deposited in the court are dealt with.

Here's a breakdown in more understandable language:

- When there is a situation in the higher courts or in the Court of Magistrates (Gozo) where there is a sum of money deposited, and more than two parties are claiming that they should be given priority access to that money, the court takes certain steps to address this.
- The court, specifically through its registrar, issues a notice that is published in one or more newspapers as well as the Government Gazette.
- The purpose of this notice is to inform everyone that the money is currently held by the court and that there are multiple claims made by different parties for a preferred or priority status to access that money. The notice also calls upon all parties who have an interest in the matter to submit their respective claims within a period of one month.

Essentially, this process ensures that all relevant parties are aware of the situation and have an opportunity to assert their claims to the money within a specified timeframe. It helps create a fair and transparent mechanism for resolving competing claims in a manner that respects the rights of all parties involved.

Competition of Creditors on Competing Claims

REQUISITES AND OUTCOME

- Such claim must be done by filing an application containing the demand to be ranked on the said funds.
- The said notice shall also state the day on which all the parties interested who shall have put in a claim shall appear in court for the trial.

After the trial, the court will conclude by issuing a decree which is subject to appeal, and which determines the ranking of applicants.

The said decree shall not operate so as to bar the exercise of any right on the part of a person who failed to put in a claim. It is lawful for such person to recover, wholly or in part, from any ranked creditor the money received by him, if the claim of such person prove to be prior or equal to that of the ranked creditor.

If it can be proven that such creditor could have put in such claim within the prescribed time, his default may nonetheless be taken into account in adjudging the costs.

The court also has discretion to order the creditor withdrawing money to give security on the amount withdrawn, in the event that another creditor with a prior or same ranking at law would file an application.

Special Summary Proceedings

(Bil-Giljottina)

- INTRODUCTION

- These proceedings were introduced to facilitate and expedite cases, and they can only be instituted before the superior courts.
- They entail the plaintiff filing a sworn application demanding that the court allow his demand without going to trial.
- Special summary proceedings are thus very dangerous and draconian, since the court assesses the entire defence and comes to a decision in a single sitting.

Special Summary Proceedings

(Bil-Giljottina)

SWORN APPLICATION

- **Article 167 (1) provides that in actions within the jurisdiction of the superior courts or the Courts of Magistrates (Gozo) in its superior jurisdiction, where the demand is solely:**
  - For the recovery of a debt, certain liquidated and due, not consisting in the performance of an act; orSince the debt must be certain, liquidated, and due, these proceedings cannot be instituted when the amount must be assessed and quantified by the court (such as in proceedings on damages). It must be due in the sense that it is exigible (it is already owed, and thus it is possible to demand it now, and not simply at a future date). The debt must thus be an *obligazzione di dare* and not an *obligazzione di fare* (such as the removal of a building).
  - For the eviction of any person from any urban *(kera)* or rural *(qbiela)* tenement, with or without a claim for ground rent, rent or any other consideration due or by way of damages for any compensation, up to the date of the surrender of the tenement.

Special Summary Proceedings

(Bil-Giljottina)

- (cont'd) SWORN APPLICATION

- This second demand is rarely acceded to by the courts, because they are reluctant to evict without a trial.

- It shall be lawful for the plaintiff to request in the sworn application that the court gives judgment allowing his demand, without proceeding to trial. The sworn application must contain all the relevant facts showing that one of the aforementioned grounds is satisfied.

- It must also include a demand that the hearing be dispensed with (bid-dispensa tas-smiegh tal-kawza).

- It may be filed only before the superior courts, where proceedings are solemn (forma solenni) rather than quick (spediti). The special summary proceedings are the exception.

Special Summary Proceedings

(Bil-Giljottina)

• (cont'd) SWORN APPLICATION

- **Article 167 (1)** continues to state that this is provided that the plaintiff shall, in his declaration made in terms of **article 156 (3)** [confirming application on oath] state that in his belief there is no defence to the action. Provided further that the plaintiff may also file a sworn affidavit of any other person, containing facts relative to the claim, and confirming that such facts are within the knowledge of such a person.
- **Article 167 (2)** provides that in the cases provided for in this article, the sworn application shall be in writing according to the prescribed form and shall contain an order to the defendant to appear before the court, on an appointed day and at a stated time.
- **Article 167 (3)** states that the provisions of **article 156 (1) (a), (b), and (c), (2) and (3) and of article 159** [contents of sworn application] shall apply to the said sworn application.

Special Summary Proceedings

(Bil-Giljottina)

- SERVING

- **Article 168** states that a copy of the declaration and any affidavit and of the note of the documents produced with the sworn application shall be served upon the defendant, together with the sworn application.

- **Article 169** states that in the cases referred to in article 167, the sworn application shall be served on the defendant without delay; and he shall be ordered to appear not earlier than 15 days and not later than 30 days from the date of service. Provided that in the case of non-observance of the provisions of this article the court shall not stop proceedings by special summary proceedings but shall give such orders as it may consider appropriate so that the rights of the parties be not prejudiced.

- **Article 169A** provides that the sworn application, the declaration and any affidavit and note produced therewith, and any order referred to in articles 168 and 169 shall be served by means of any executive officer of the courts.

Special Summary Proceedings

(Bil-Giljottina)

TRIAL

- **Article 170 (1)** states that if the defendant fails to appear to the sworn application, or if he appears and does not impugn the proceedings taken by the plaintiff, on the ground of irregularity or inapplicability, or, having unsuccessfully raised such plea, does not by his own sworn evidence, or otherwise, satisfy the court that he has a *prima facie* defence, in law or in fact, to the action on the merits, or otherwise disclose such facts or issues of law as may be deemed sufficient to entitle him to defend the action or to set up a counter-claim, the court shall forthwith give judgment, allowing the plaintiff's claim.
- The defendant may make his submissions to impugn the proceedings taken by plaintiff on the ground of irregularity or inapplicability by means of a note to be filed in the registry of the court or during the hearing.
- The defendant does not file a sworn reply as in normal cases. Instead he must appear in court and he must thus either impugn the proceedings on the grounds of irregularity or inapplicability, or else satisfy the court that he has a prima facie defence, or else disclose such facts or issues of law he deems sufficient to entitle him to defend the action or set up a counter- claim.
- A possible defence is to say that the parties have been exchanging correspondence – why would they do that if the defendant has no defence?

Special Summary Proceedings

(Bil-Giljottina)

(cont'd) TRIAL

Dolores Jones v Roland Edward Merington (2008)

In this case, the parties were in a relationship that went sour.

- The plaintiff sent the defendant a number of judicial letters requesting the defendant to
- move out of her house. The defendant did not reply to any of them.
- She brought any action under **article 167** and the court acceded to her request to evict the defendant, since the latter failed to appear.

Special Summary Proceedings

(Bil-Giljottina)

(cont'd) TRIAL

- **Article 170 (2)** provides that if the defendant successfully impugns the proceedings on the ground of irregularity, or inapplicability, or if he satisfies the court that he has a prima facie defence to the action, or discloses such facts or issues of law as may be deemed sufficient to entitle him to defend the action or to set up a counter-claim, he shall be given leave to defend the action and file a statement of defence within 20 days from the date of the order referred to in subarticle (4), in which case the defendant shall comply with the provisions of **article 158 [sworn reply]** so far as applicable.

- If the defendant does prove that he has a defence, the court will grant him 20 days to file a sworn reply (the normal period to file a sworn reply). If not, the court will deliver judgment immediately or shortly after, and the only remedy would be to file an appeal.

- However one might find difficulty in conjuring reasons to support ones appeal at appeal since no evidence was brought at first instance (and no fresh evidence may be presented before the Court of Appeal). The only thing one can do is to convince the Court of Appeal that one was not given a proper hearing so that the Court of Appeal will send back the case to be heard again.

Special Summary Proceedings

(Bil-Giljottina)

- (cont'd) TRIAL

- **Article 170 (3)** provides that where leave to defend is given, the action shall be tried and determined, on the same acts, in the ordinary course as provided in this Code.

- **Article 170 (4)** states that the order giving leave to defend shall be made orally, a record thereof being kept in the proceedings.

The Judicial Review

INTERPRETATION OF THE SUBSIDIARY NATURE OF THE JUDICIAL REVIEW IN PRELIMINARY PROCEEDINGS

- The judicial review, as outlined in **Article 469A of the COCP**, is an important legal recourse that allows individuals or organisations to request the Maltese courts to examine and assess the validity of administrative actions taken by public authorities.

This provision is often used by those who feel they have been unfairly affected by an administrative decision made within the jurisdiction of Malta.

To qualify for this judicial remedy, the party seeking review must demonstrate that the contested administrative act violated the Constitution of Malta or that the public authority exceeded its legal authority and powers (also known as "ultra vires") based on specific grounds specified in the law.

In simpler terms, the judicial review is a way for people or companies to challenge and seek the nullification of administrative actions made by government bodies in Malta if they believe those actions are unconstitutional or outside the scope of the authority given to those bodies. It provides a mechanism for individuals to seek justice and ensure that government actions are lawful and fair.

The Judicial Review

(cont'd) INTERPRETATION OF THE SUBSIDIARY NATURE OF THE JUDICIAL REVIEW IN PRELIMINARY PROCEEDINGS

Joseph Gheiti u Sansone Cruises Limited v. L-Awtorita ghat-Trasport f'Malta (First Hall, Civil Court, 2021)

In this case, **it was established that parties affected by an administrative decision must exhaust all available ordinary remedies before seeking a judicial review in court.**

Facts of the case:

- Joseph Gheiti filed an application claiming that Transport Malta's decision to suspend his license to operate commercial vessels in September 2012 was illegal under Article 469(1)(b)(ii) of the COCP.
- Transport Malta argued in response that the legal action was not sustainable because the plaintiffs had not pursued all the available remedies.
- After analysing the evidence, Mr Justice Micallef found that the plaintiffs were operating a water taxi and a vessel, and their license was suspended due to non-compliance with maritime regulations.
- The plaintiffs had the opportunity to appeal the suspension but failed to do so.

The Judicial Review

(cont'd) INTERPRETATION OF THE SUBSIDIARY NATURE OF THE JUDICIAL REVIEW IN PRELIMINARY PROCEEDINGS

(cont'd) Joseph Gheiti u Sansone Cruises Limited v. L-Awtorita ghat-Trasport f'Malta (First Hall, Civil Court, 2021)

- TM confirmed the license suspension, and the plaintiffs argued that the notice of suspension was illegal as the suspension had already taken effect.
- Although the plaintiffs did give notice of appeal, they never actually filed the appeal. In September 2012, they filed a warrant of prohibitory injunction and a court action against TM, but the warrant was rejected, and the suspension remained in effect.
- The court considered whether a judicial review could proceed without the appeal being lodged. Article 469A(4) of the COCP aims to limit the jurisdiction of the ordinary court.
- Previous judgments, such as **the Banker Fuel Oil Company Limited v. Paul Gauci et** case on October 5, 2001, established that the court's jurisdiction may be limited if the plaintiff has an effective remedy to challenge the administrative action. The key here is that the remedy sought must be effective, and it should be shown that the party choosing not to use the remedy was not acting arbitrarily. If the remedy was available but not utilised, the party cannot then seek a judicial review.
- In this case, the plaintiffs were aware of their right to appeal and even filed a notice of appeal, but they did not proceed with the appeal process. Such appeals are typically heard by the Administrative Review Tribunal and later the Court of Appeal. These facts convinced the court that TM's argument was valid, and therefore, the court rejected the request for a judicial review.

The Judicial Review

(cont'd) INTERPRETATION OF THE SUBSIDIARY NATURE OF THE JUDICIAL REVIEW IN PRELIMINARY PROCEEDINGS

(cont'd) Joseph Gheiti u Sansone Cruises Limited v. L-Awtorita ghat-Trasport f'Malta (First Hall, Civil Court, 2021)

In summary, TM not only suspended the license but also provided the plaintiffs with the opportunity to appeal. Upon noticing that the appeal was not pursued, TM enforced the suspension. The court upheld TM's argument and dismissed the plaintiffs' claims.

The Judicial Review

FURTHER CASE LAW

TCV Management and Trust Services Ltd V. the EOI Penalties Committee and the Commissioner for Revenue (12 August 2020)

Facts of the case:

- the Plaintiff is an organisation that holds a local license to serve as a trustee for several trusts established in Malta, including one known as "Dama Trust".
- On March 11, 2020, the Defendants sent a default notice to the Plaintiff, acting as the trustee for Dama Trust.
- The notice accused them of a breach and imposed a fine of €5,900. The breach pertained to the submission of a report that trustees are required to provide under Article 41 of the Cooperation with Other Jurisdictions on Tax Matters Regulations.
- The Plaintiff submitted the report 34 days past the deadline set by these regulations.

The Judicial Review

FURTHER CASE LAW

(cont'd) TCV Management and Trust Services Ltd V. the EOI Penalties Committee and the Commissioner for Revenue (12 August 2020)

- The Plaintiff objected to the imposed fine, arguing that as the trustee, they had diligently undertaken all necessary steps to collect, evaluate, and submit the required report within the specified timeframe outlined in the Regulations. The Plaintiff contended that the delay in submitting the report was solely due to their reliance on the settlor, protector, and beneficiaries of Dama Trust to provide them with supplementary documents that were essential for the report. They firmly asserted that the late submission was not a result of negligence or any wrongdoing on their part.
- Consequently, the Plaintiff made an appeal to the Commissioner for Revenue, urging them to waive the penalty imposed on Dama Trust.
- However, on July 22, 2020, the Commissioner for Revenue issued a notice to the Plaintiff, rejecting their appeal and insisting that the penalty remained due.
- This prompted the Plaintiff to turn to Article 469A of the Code, initiating legal proceedings against the Defendants.
- In response, the Defendants raised a plea, contending that the Plaintiff was legally barred from resorting to Article 469A of the Code because they had failed to exhaust all available ordinary remedies before resorting to this particular legal provision, as required by sub-article (4) of the aforementioned article. The Defendants further explained that upon receiving the demand notice from the Commissioner for Revenue, which they claimed was on July 24, 2020, the Plaintiff had a fifteen-day window to challenge the notice in court. Since the Plaintiff did not contest the notice within the stipulated timeframe, the Defendants argued that they now possess an executive title, as per Article 40 of the Income Tax Management Act, Chapter 372 of the laws of Malta, allowing them to enforce the €5,900 charge.
- **In light of these arguments, the First Hall Civil Court, under the guidance of Justice Dr. Toni Abela, delivered a court order on September 16, 2021, specifically addressing the preliminary plea raised by the Defendants in relation to the ongoing legal action initiated by TCV Management and Trust Services Ltd against the EOI Penalties Committee and others.**

The Judicial Review

FURTHER CASE LAW

(cont'd) TCV Management and Trust Services Ltd V. the EOI Penalties Committee and the Commissioner for Revenue (12 August 2020)

- Within the above-mentioned court order, the Court firstly delved into the rationale behind Article 469A and its subsidiary nature.
- It explained that **the legislator's intention with Article 469A was to create a last resort remedy which persons who felt aggrieved by an administrative act and were not able to find a mode of contestation against said act, could rely on to ensure that they have access to an effective mode of appeal**.
- The Court, whilst referring to the Civil Court First Halls judgment in **Garden of Eden Garage Limited vs. Transport Authority,** emphasised that the mode of contestation which the aggrieved person must exhaust prior to resorting to article 469A must not only exist and be available, but must also provide an effective and efficient remedy that is reasonably accessible for the persons seeking appeal.
- In fact, the legislator's intentions whilst drafting sub-article (4) was to ensure that this judicial remedy does not become an option that legal or natural persons abuse by resorting to immediately without attempting to identify whether there are alternative remedies available to their specific circumstances.
- With the above in mind, the Court then proceeded to examine the penalty charged and the mode of appeal which, according to the Defendants, was available to the Plaintiff and wilfully refrained from using.

The Judicial Review

FURTHER CASE LAW

(cont'd) TCV Management and Trust Services Ltd V. the EOI Penalties Committee and the Commissioner for Revenue (12 August 2020)

- The Court initially acknowledged that the default notice issued by the Commissioner for Revenue on March 11, 2020, invoked article 44(1)(d) of the Regulations. This article stipulates that a penalty shall be imposed on a Reporting Malta Financial Institution for failing to report the required information within the specified time frame outlined in the guidelines published on the Commissioner for Revenue's website, as per article 96(2) of the Income Tax Act.
- The penalty consists of a fixed amount of €2,500 and an additional daily charge of €100 for each day of non-compliance, with a maximum cumulative penalty of €20,000.
- In light of article 96(2) of the Income Tax Act, which states that any guidelines, explanations, or instructions published by or under the authority of the Commissioner of Revenue and made available to taxpayers shall be treated as part of the rules and carry the same legal weight, the Court embarked on a meticulous examination of the various guidelines, explanations, and instructions associated with this provision.
- This thorough analysis, likened to navigating a complex legal maze, aimed to determine the existence of specific guidance pertaining to trusts and the statutory limits applicable when challenging a default or demand notice.However, after delving into this "legal labyrinth," the Court concluded that it could not find any clear guidance concerning trusts. Consequently, it became impossible to ascertain the statutory limitations for effectively contesting a default or demand notice in relation to trusts.

The Judicial Review

FURTHER CASE LAW

(cont'd) TCV Management and Trust Services Ltd V. the EOI Penalties Committee and the Commissioner for Revenue (12 August 2020)

- The Court's only timeframe of reference was the ten-day period stated in the default notice issued by the Commissioner for Revenue to the Plaintiff on March 11, 2020, as required by article 35(1) of the Regulations. Article 35(3) of the Regulations further specifies that should the penalty not be paid within this time, a demand notice is to be served on the person, advising that it can be contested in court within thirty days; otherwise it will become an executive title according to article 40(1)(d) of the Income Tax Management Act.
- Based on this sub-article, the Court concluded that the Defendants' claim that the Plaintiff had fifteen (15) days to contest the demand notice was incorrect. The law clearly allows for a thirty (30) day period for the charged person to contest the notice. Contrary to the Defendants' assertions, the witness statements gathered for this case demonstrated that the Plaintiff was notified of the demand notice on July 28, 2020, and not on July 24, 2020, as claimed by the Defendants.
- Taking all these factors into consideration, the Court affirmed that even if the applicable deadline was indeed fifteen (15) days as argued by the Defendants, the Plaintiff would have still submitted their appeal in time, as their legal action was filed on August 12, 2020.
- Given these findings, the Court determined that the Defendants' preliminary plea lacked both legal and factual basis. Therefore, the Court ordered that the Plaintiff's legal action based on Article 469A should proceed.

Civil Procedure

Lecture Title: Special Proceedings

Diploma in Law (Malta)

Lecturer: Dr Emma Portelli Bonnici

Date: 8 May 2023

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ADVOCATES