Court Of Appeal

Judges

THE HON. CHIEF JUSTICE SILVIO CAMILLERI
THE HON. MR. JUSTICE GIANNINO CARUANA DEMAJO
THE HON. MR. JUSTICE NOEL CUSCHIERI

Sitting of Friday 28th April 2017

Number: 14

Application Number: 82/10 JD

Roger Elliott and by means of a note dated 11th November 2010 Dr Carmelo Galea assumed the acts of the case instead of plaintiff since he is abroad, and by a note filed on the 28th of September 2012 plaintiff is assuming the acts of the case since he is currently present in Malta

v.

Noel Scerri u Pauline Scerri

Preliminary

1. Defendants Noel and Pauline Scerri filed an appeal from the judgment given by the Court of Magistrates (Gozo), Superior Jurisdiction, General Section, on the 9th of October 2012, whereby they requested this court to revoke the said judgment and instead to allow their pleas and consequently reject the demands of the plaintiff in their entirety, with costs of both instances to be borne by the plaintiff (now the respondent).

2. For a better understanding of this appeal, the judgment of the court of first instance is being reproduced in its entirety:

> "The Court,
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> "By means of the sworn application, plaintiff is requesting this Court to declare and decide that defendants only enjoy a right of way over his drive-way and consequently the affixing of a door opening outwards and with window panes contained therein constitutes an aggravation of the right of way enjoyed by them and should thus be removed and replaced by a metal or wooden solid door opening inwards with no apertures contained therein as the door was prior to the changes affected by the defendants.
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> "In his reply defendants state that this Court should totally reject plaintiff's claims with costs.
>
> "Having seen the joint note filed on the 28th of September 2012.
>
> "Having seen all the acts of the case.
>
> "Having seen that the case has been deferred for judgment for today.
>
> "Facts of the Case

- "Plaintiff Roger Elliott acquired from Gozo Consolidated Buildings Contractors Company Limited by virtue of a public deed dated 15th April 1988 in the acts of Notary Michael Refalo *'the villa in Kortoll Street, Xaghra, Gozo in part overlying another villa property of Ian and Janet Jackson and the whole bounded on the North by a lane off Kortoll Street on the south by another villa property of Ian and Janet Jackson, and on the west by property of Ursola Portelli, free and unencumbered but subject to the right of passage in favour of Ian and Janet Jackson as hatched in yellow on the aforesaid plan and as stipulated in the deed herein mentioned with all its rights and appurtenances, and in shell form and better shown on the plan attached to a deed in my records of the twenty first (21st) day of March of the current year where it is hatched in green'.*

- "Defendants are the owners of 'Villa Kortoll' in Kortoll Street, Xaghra, Gozo which they acquired from Ian and Janet Jackson by virtue of a deed in the records of Notary Dr Michael Refalo of the 28th February 2003. Defendants bought *'the semi-detached villa without number but named 'Kortoll Villa' in Kortoll Street, Xaghra, Gozo in part overlying [recte: underlying] another semi-detached villa and enjoying the unobstructed right of way at all times and in all manners*

over the land infront of the adjacent villa the whole being bound on the north by property of the successors in title of Gozo Consolidated Building Contractors Limited, West by property of the successors in title of Ursula Portelli and south by property of Eucharist Sultana as subject to one hundred Maltese Lira (Lm100) annual and perpetual ground rent otherwise free and unencumbered with all its rights and appurtenences and which property includes also the plot of land known as Tal-Moxa in Kortoll Street, Xaghra, Gozo measuring approximately ninety nine point seven square metres (99.7sq.m) that is the properties acquired by the vendors by two deeds in my records of the twenty first (21st) day of March one thousand nine hundred and eighty eight (1988) and the twenty sixth (26th) day of July one thousand nine hundred and eighty nine (1989) free and unencumbered, with vacant possession, with all its rights and appurtenances'.

- "Ian and Janet Jackson had acquired this property by virtue of a deed in the records of Notary Dr Michael Refalo of the 21st March 1988 from Gozo Consolidated Building Contractors Company Limited. This property was described as *'the semi-detached villa 'the semi-detached villa as yet unnamed and unnumbered with land annexed thereto and bordered in red on the attached plan and marked also 'A' in part overlying [recte: underlying] the other semi-detached villa and enjoying the unobstructed right of way at all times and in all manners over the land infront of the adjacent villa and which is marked with the colour yellow on the same plan abovementioned and the whole being bound on the north by another villa property of vendor company, west by property of Ursula Portelli and east by property of Eucharist Sultana free and unencumbered with all its rights and appurtenances and accessible from an alley which leads to Kortoll Street, Xaghra, Gozo'.*

- "Thus Gozo Consolidated Building Contractors Company Limited imposed a servitude due to the fact that it was the owner of both the servient and dominant tenement.

- "The door in question was originally fixed by Ian and Janet Jackson as a garage door made out of solid metal and opening inwards.

- "Few years after defendants acquired the villa from the Jackson's they changed this door into a door that opens outwards and consisting of eight glass panes.

"<u>Considerations</u>

"By means of this case, plaintiff is arguing that when defendants changed the garage door made out of solid metal and opening inwards into a door that opens outwards and having eight glass

panes, similar to windows that are also transparent, they have aggravated the easement burdening the land belonging to him.

"The defendants argue that the deed of the 15th April 1988 whereby plaintiff acquired Villa Barumbara only mentions that plaintiff was acquiring a villa and nowhere mentions that Gozo Consolidated Building Contractors Company Limited was also selling him a piece of land adjacent to the villa. Thus they maintain that plaintiff has not adequately proved his title over the portion of land which is acting as the servient tenement.

"First and foremost it must be stated that defendants did not raise this plea in their sworn reply but only raised it in their note of submissions. It is an established principle that the Court should not take any cognizance of any plea which is only raised in a note of submissions and which has not been formally recognized in the sworn reply.

"Having said this, *dato ma non concesso* that defendants raised this plea in the sworn reply, the Court considers that there is no doubt that this piece of land which is acting as the servient tenement belongs to plaintiff. First of all, the plan attached to the deed of acquisition clearly indicates that this piece of land was included in the sale. Moreover, Angelo Cefai, director of Gozo Consolidated Building Contractors Limited[1], explained that when the company built the villas it did not own the land that gives on to Kortoll street. This land was bought later on by the buyers themselves. Thus at the time Villa Kortoll and Villa Barumbara were sold, the entrance to the villas was through a private alley that was constructed infront of both villas. Villa Barumbara (that is, plaintiff's villa) had another entrance from a public lane off Kortoll Street since it sits on a corner block. However, Villa Kortoll (defendants' villa) only had one entrance from the private alley that gives onto the valley, bounded then by property of Ursola Portelli. In his affidavit he also stated that in retrospect there was a mistake done in the contract with the first villa sold as the contract says that Villa Kortoll was *'in part overlying the other semi detached villa',* whereas it should have read as underlying the other villa. According to him this explains why the land infront of the garage in question was given to Mr Elliott. Under cross-examination Angelo Cefai[2] once again confirmed that this piece of land was bought by Roger Elliott.

"Now, as has already been stated when the Jackson's bought Villa Kortoll (the dominant tenement) by virtue of the contract dated 21st March 1988 a right of way over the plaintiff's land was created – the semi-detached villa in question was described as *enjoying the unobstructed right of way at all times and in all manners over the*

[1] At fol. 65 of the acts of this case
[2] At fol 69 of the acts of this case

land infront of the adjacent villa. When the defendants bought Villa Kortoll the same terminology was used in the contract of sale.

"Thus the starting point is to identify the relevant articles in the Civil code which regulate the matter in question and to refer to various cases which have dealt with servitudes.

"In the case in the names of **S.M.W. Cortis vs Lewis Press Limited**[3] the Court of Appeal held that:

> *"In mertu ta' din il-kwistjoni din il-Qorti tixtieq tissenjala dawk il-principji legali li ghandhom relevanza ghas-soluzzjoni ta' tali vertenza kif inkorporati fid-diversi artikoli tal-Kodici Civili. Fl-ewwel lok huwa stabbilit li kuntratt huwa konvenzjoni jew ftehim bejn tnejn minn nies jew izjed, illi bih tigi maghmula, regolata, jew mahlula obbligazzjoni (Art. 960). Kull kuntratt maghmul skond il-ligi ghandu s-sahha ta' ligi ghal dawk li jkunu ghamluh (Art 992). Il-kuntratti ghandhom jigu ezegwiti bil-bona fidi, u jobbligaw mhux biss ghal dak li jinghad fihom, izda wkoll ghall-konsegwenzi kollha li ggib maghha l-obbligazzjoni skont ix-xorta taghha, bl-ekwita`, bl-uzu jew bil-ligi (Art.993). Meta l-kliem ta' konvenzjoni, mehud fis-sens li ghandu skont l-uzu fiz-zmien tal-kuntratt, hu car, ma hemmx lok ghall-interpretazzjoni (Art. 1002). Fid-dubbju, il-konvenzjoni tigi mfissra kontra dak li favur tieghu saret l-obbligazzjoni u favur dak li ntrabat bl-obbligazzjoni.*
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> *"Servitu` li tinholoq kemm b'ligi kif ukoll mill-fatt tal-bniedem, huwa jedd stabbilit ghall-vantagg ta' fond fuq fond ta' haddiehor, sabiex isir uzu minn dan il-fond ta' haddiehor jew sabiex ma jithalliex li sidu juza minnu kif irid. Is-servitu` ta' moghdija, in kwantu servitu` mhux kontinwa, tehtieg l-att pubbliku biex tohloq titolu (Art. 458). Kull min ghandu jedd ta' servitu` ghandu jinqeda b'dan il-jedd skond it-titolu tieghu, u ma jista' jaghmel la fil-fond serventi u lanqas fil-fond dominanti ebda tibdil li jista' jtaqqal izjed il-piz tal-fond serventi (Art. 475). Meta tigi stabbilita` servitu`, jitqies li maghha gie moghti dak kollu li hu mehtieg ghat-tgawdija ta' dik is-servitu` bl-anqas hsara li jista' jkun tal-fond serventi. (Art. 470). Finalment meta jkun hemm dubbju dwar l-estensjoni tas-servitu`, wiehed ghandu jinqeda biha fil-limiti ta' dak li hu mehtieg billi jittiehdu b'qies id-destinazzjoni li l-fond dominanti kellu fiz-zmien li giet stabbilita` s-servitu` u l-uzu konvenjenti ta' dak il-fond, bl-anqas hsara tal-fond serventi (Art. 476).*
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> *"Din il-Qorti ghamlet rassenja tad-diversi artikoli tal-Kodici Civili hawn fuq riportati billi thoss li l-ligi taghna hija provvida u la hemm htiega li wiehed jiccita awturi esteri u lanqas gurisprudenza estera jew nostrana hlief fejn jkunu mehtiega xi kjarifiki. Il-kliem tal-ligi huma cari, u daqstant hija cara l-klawsola li permezz taghha nghatat din is-servitu`. Konsegwentement kif jinghad fl-Artikolu 1002 meta l-kliem huma cari ma hemmx htiega ta' interpretazzjoni billi b'dak il-mod tista' tigi sostitwita l-intenzjoni tal-kontraenti b'dik tal-gudikant.*
>
> *"X'inhu dritt ta' moghdija? Dan huwa dritt li jippermetti sid ta' art li ma jkolliex access ghat-triq pubblika li jinghata dan l-access mit-triq*

[3] Civil Appeal No: 235/2000 decided on the 31st January, 2011

pubblika ghall-art tieghu u vice versa. Dan x'jfisser? Ifisser illi minn jirreklama dan id-dritt ikollu d-dritt li jghaddi minn fuq il-fond serventi biex jaccedi ghal proprjeta` tieghu. Dan id-dritt ma jaghti ebda drittijiet ohra lis-sid tal-fond dominanti sakemm ma jirrizultax mit-titolu li permezz tieghu inholqot din is-servitu`."

"In the case **Louis Gauci vs Angela Attard**[4] the Court held:

"F'dan il-kuntest l-Artikolu 475 tal-Kodici Civili jippreciza illi "kull min ghandu jedd ta' servitu ghandu jinqeda b'dan il-jedd skond it-titolu tieghu, u ma jista' jaghmel la fil-fond servjenti u lanqas fil-fond dominanti ebda tibdil li jista' jtaqqal izjed il-piz tal-fond servjenti.";

*"Dejjem in tema tad-disposizzjonijiet tal-ligi in subjecta materia dwar x'inhu permissibbli jew ipprojbit, lanqas ma jista' it-titolari ta' servitu jippretendi estensjoni tas-servitu (Artikolu 476) fuq il-motiv li l-ezercizzju taghha skond it-titolu jkun sar insufficcjenti minhabba tibdiliet. Il-kliem "dak kollu li hu mehtieg" fit-test ta' dan l-artikolu ghandu jigi interpretat b'referenza ghaz-zmien tal-kostituzzjoni tas-servitu u mhux in referenza ghall-izvilupp li jkun ghamel wara dak iz-zmien sid il-fond dominanti ("**Dr. Galea Naudi -vs- Mifsud**", Qorti ta' l-Appeill, 27 ta' Mejju 1927; "**Fortunato Farrugia et -vs- Vincenzo Galea**", Prim' Awla, 19 ta' April, 1947;*

"Dejjem in tema ta' servitujiet m'ghandux jonqos li jigu senjalati ukoll dawn l-aspetti ta' interess, hekk dottrinalment u gurisprudenzjalment affermati:-

"(a) Is-servitujiet huma 'di stretto diritto' u kull limitazzjoni ghad-dritt li wiehed jisserva liberament bi hwejjgu ghandha tircievi interpretazzjoni rigoruza anke ghaliex is-servitu hi eccezzjoni ghar-regola tal-massimu u liberu godiment ta' fond;

*"(b) Tant dan hu hekk illi jinsorgi l-principju l-iehor li fejn ikun hemm dubbji dwar l-estensjoni ta' servitu`, 'quod minimum est sequimur' ("**Maria Azzopardi -vs- Giuseppe Sciberras**, Appell Civili, 18 ta' Ottubru 1963; Vol. XXX P I p 139). Li jfisser li "si deve interpretare in senso restrittivo e qualunque dubbio circa la detta materia si deve risolversi in vantaggio del possessore del fondo serviente...", (**Vol. XVIII P II p 325; Vol. XXVI P I p 759**);*

"In the same judgment, the Court stated that '*Il-ligi ma taghtina l-ebda definizzjoni jew tifsira ta' x'jikkostitwixxi stat oneruz jew gravuz f'kazijiet bhal dan izda tillimita ruhha biex tghid illi ma jista' jsir fil-fondi, kemm dak dominanti u dak serventi, "ebda tibdil li jista' itaqqal izjed il-piz tal-fond serventi" (Artikolu 475). Dan b'applikazzjoni tal-principju dettat mill-Artikolu 1031 tal-Kodici Civili fejn jiddisponi illi "kull wiehed iwiegeb ghall-hsara li tigri bi htija tieghu."* The Court proceeded by quoting from another judgment reported in Vol IX page 589 which latter judgment observed that "*La legge, vietando di far cosa, che rende piu` grave la servitu` del fondo inferiore, volle*

[4] Writ of Summons No: 19/1992PS decided on 9th December, 2002

necessariamente intendere che il risultato dell' atto del proprietario superiore arrecchi un pregudizio reale, non verificandosi il quale, l'atto dev'essere mantenuto. Il-pregudizio adunque sara` ognora la norma, che dovranno osservare il tribunale nel pronunziare. Non giustificando il proprietario del fondo inferiore un reale pregudizio, le opere nuove, che si facessero dal superiore, devono esser conservate."[5]

"Having referred to the law and to the principles established by case-law, the Court must necessarily refer to the moment when the servitude in question was created. As has already been pointed out the right of way was created by means of a public deed on the 21st March, 1988 when Ian and Janet Jackson bought Villa Kortoll. At the time the entrance to this villa was only through this alley. Eventually, the defendants refurbished their villa and their entrance has been reverted onto a street. In the contract it is clearly specified that this villa enjoys the *unobstructed right of way at all times and in all manners over the land in front of the adjacent villa.* When the Jacksons bought their villa there was no door affixed. Hence, there was just an aperture. The Jacksons installed a garage door made of solid metal and opening inwards. Plaintiff seems to argue that such door was installed in such manner as a consequence of an agreement reached between the Jacksons and himself (he bought his villa just few weeks after the Jacksons). Such agreement has not been proven.

"Defendants on the other hand argue that since when the Jacksons bought the villa there was just an aperture and since there is no mentioning of what kind of door should be installed in the contract then defendants can fix any kind of door they want. They argue that the even if the door were to open inwards the owner of the servient tenement would not be able to encumber the right of way in the space utilized at present for the door to swing outwards so that there is truly no added prejudice being suffered by the owner of the servient tenement. As for the diminished privacy they argue that the space onto which the door in question opens is an open-air space and not a living space.

"Defendant Noel Scerri in cross-examination admitted that when his wife and himself bought the villa the door installed was made of solid metal and opened inwards. Some years later they decided to change it.

"It is an established principle that the contracts must be executed and interpreted in good faith. There is no mentioning in the three contracts exhibited in the acts of this case as to the kind of door

[5] **Nobile Orade Testaferrata Viani -vs- Lorenzo Farrugia Bugeja**", 24th November, 1881, confirmed by the Court of Appeal on the 30th June, 1883 (Vol. X pag. 176).

which had to be installed. However, it has emerged that the space in question was originally intended to be a garage as confirmed by the director of Gozo Consolidated Buildings Limited. The contracts inequivocably provide for a right of way in favour of Villa Kortoll. The fact that this right of way should remain *unobstructed at all times and in all manners* does not necessarily mean that the owners of the dominant tenement can do whatever they want because the space in front of this garage must remain unobstructed at all times. As has already been explained a servitude burdening a tenement is a limitation to the right to property and thus must be considered restrictively.

"It is evident from the second paragraph of defendants' sworn reply that they admit that there has been an aggravation of the servitude but not in an appreciable manner. Now, the Court does not believe that there was a serious prejudice suffered by plaintiff just because the door originally opened inwards and now it opens outwards. In fact this space in front of the garage must remain unobstructed at all times. However, the same cannot be said of the glass panes. Defendants argue that no prejudice is being suffered by the servient tenement simply because the door includes glass panes as the defendants have every right to leave the doorway uncovered all day if they so wish. Although it is true that hypothetically defendants can leave the door open at all times however this is stretching the argument to the limit. In actual fact it has not transpired that defendants have left the door open at all times and it is hardly unlikely and illogical to do so. The space in question was always intended as a garage so much so that a normal garage door was installed. The right of way over plaintiff's land was created in favour of the dominant tenement so that the owners could access their property because they had no access from the public road at the time and the buyers were not given any other right to open windows or apertures overlooking this land which belongs to plaintiff. Thus by changing a solid metal door into a door with glass panes the defendants constitutes an aggravation of the servitude.

"Consequently, for the above-mentioned reasons, the Court decides this case in that whilst rejecting defendants' pleas where this does not contrast with what have been above-stated, accedes limitedly to plaintiff's requests in that:

"1. Declares that in terms of the constitutive contract in the acts of Notary Michael Refalo dated 21st March 1988, the dominant tenement belonging to defendants enjoys the unobstructed right of way at all times and in all manners over the land in front of the adjacent villa and which is marked with the colour yellow on the plan attached with the mentioned contract.

"2. Declares that the affixing of a door with window panes contained therein constitutes an aggravation of the servitude enjoyed by defendants' property over the plaintiff's property.

"3. Consequently condemns defendants to substitute the present door with a metal or wooden door without any kind of aperture within two (2) months from today.

"4. In case defendants fail to substitute the said mentioned door within the period stipulated, then plaintiff is authorized to substitute the present door as established by this Court at defendants' expense and under the direction and supervision of Vincent Ciliberti.

"Costs are to be borne as to one-half by plaintiff and the other half by defendants."

Appeal application filed by defendants Noel and Pauline Scerri (29.10.2012)

3. Defendants Noel and Pauline Scerri felt aggrieved by the judgment given by the court of first instance, and consequently lodged this appeal in which they put forward the following five (5) grievances.

The 1st grievance

4. Appellants highlight the fact that the plaintiff brought the action to assert his alleged rights over a portion of land (the servient tenement). They argue that as such, he was obliged to prove his title over the said portion. Although they acknowledge the fact that they did not raise a specific plea in this regard, they argue that this does not exonerate plaintiff from producing the necessary proof to meet the parameters of this action. Appellants feel aggrieved by the fact that the first court *obiter* stated that there is no doubt that the piece of land which is acting

as the servient tenement in fact "*belongs to the plaintiff*"; they insist that on the contrary no clear and incontrovertible proof of such ownership was brought produced.

The 2nd grievance

5. Without prejudice to the above, appellants claim that the judgment of the first court is wrong in fact and at law. While agreeing with the court's view that there was no serious prejudice suffered by respondent as a result of the fact that the new door now opens outwardly, they disagree with the first court's conclusion that the substitution of the solid metal door with a door containing glass panes amounts to an aggravation of the servitude.

6. They highlight the fact that as owners of the dominant tenement they enjoy a right of way at all times and in all manners over the servient tenement, and explain that it so happens that they have a doorway which gives onto the passage over which they enjoy the right of way. They argue that the fact that this doorway exists overrides any consideration of the form the door should take. They make reference to the first court's consideration that "…*were not given any other right to open windows or apertures overlooking this land which belongs to the plaintiff*", and argue that they did not in fact open any windows or

openings. They emphasise the fact that when the servitude was created the doorway was completely open and that hence whatever door is affixed is of no concern to the plaintiff: the opening is still the original opening.

The 3rd grievance

7. Appellants underline the fact that after quoting existing case-law, the court of first instance stated in its considerations that in order to determine whether there was an aggravation of the servitude it needed to refer to the moment when the servitude was created. They comment that had the court indeed followed its own reasoning and looked at the moment when the servitude was created it would have realized that at such time there was simply a doorway – a large opening – with no door affixed. Appellants argue that there is no point in comparing the original solid door (which was in place when they acquired the property) with the present glass door (affixed by themselves), but that rather, any comparison should be made between the present door and the original doorway. They stress the fact that no condition was imposed on the Jacksons (the former owners of the property) to affix a door at all, let alone a particular kind of door.

The 4th grievance

8. Appellants also maintain that the first court misread the nature of their pleas. They refer to that part of the judgment where the court stated: *"…is evident from the second paragraph of defendants' sworn reply that they admit that there has been an aggravation of the servitude but not in an appreciable manner*". They clarify that in their sworn reply they first and foremost insisted that there was no aggravation whatsoever since the doorway itself is an opening, and that it was only secondarily that they had submitted that any aggravation would be so small and insignificant that it would be unfit for courts to take cognizance of it.

The 5th grievance

9. Finally, appellants argue, that once the title deeds do not mention a particular type of material for the door which may be affixed to the doorway, the court could not restrict them to a metal or wooden door. They maintain that the judgment forces them as owners of the dominant tenement to affix a door when in reality they may just as well have an open opening with no door affixed whatsoever.

Reply of plaintiff (now respondent) Roger Elliott to the appeal application (02.12.2012)

10. Respondent Roger Elliott respectfully submits that the judgment in question was just in fact and at law and as such merits to be confirmed by this court. In reply to appellants' five (5) grievances he submits the following:

(i) Firstly appellants never raised the plea in their sworn reply that he had to prove his title over the strip of land over which they enjoy a right of way. Secondly, as owner of the servient tenement he is not asserting any right; he was not obliged to bring forward proof of his ownership of the portion of land in question. Thirdly, and contrarily to that alleged by appellants, there does exist clear and incontrovertible proof of his ownership of such land.

(ii) The only servitude that was granted to the appellants over his property was that of a right of way. Appellants (and their predecessors) were never given the right to open windows or openings overlooking the land in question.

(iii) The first court did in fact refer to the moment when the servitude was created, and in fact correctly pointed out that at such time, the room in which the disputed door lies was a garage and was always intended to be a garage, and was sold as a garage, and this clearly results from the plans which were attached to the contracts of 1988 (by virtue of

which plaintiff bought his property, and the Jacksons – the predecessors of defendants – bought theirs).

(iv) The first court did not misread the nature of the appellants' pleas: appellants did in fact state "*Illi fl-ewwel lok l-esponenti jeċċepixxi l-bidla fil-bieb ma aggravatx il-passaġġ b' mod apprezzabbli*."

(v) It was always the intention of the parties that the space in question should be a garage and in fact a solid metal door was affixed there, and hence the first court had every right to order that the material to be used should be solid metal or wood.

Facts of the case:

11. On the 21st of March 1988[6] Gozo Consolidated Building Contractors Company Ltd sold to Ian and Janet Jackson a semi-detached villa in Xagħra, Gozo, shown bordered in red on the plan[7] attached to the deed of sale. It was stipulated in the deed of sale that said villa enjoys an "*unobstructed right of way at all times and in all manners over the land in front of the adjacent villa*", marked in yellow on the same plan.

[6] Deed of sale, 21.03.1988, folio 6-8
[7] Plan of semi-detached villa transferred by deed of sale of 21.03.1988, folio 14

12. On the 15th April 1988[8], Gozo Consolidated Building Contractors Company Ltd sold to Roger and Doris Elliott a semi-detached villa[9] adjacent to the villa which they had transferred three weeks before to the Jacksons. It was stipulated in the deed of transfer that said villa was being transferred "*free and unencumbered but subject to the right of passage in favour of Ian and Janet Jackson*" as hatched in yellow.

13. Photos of the adjacent semi-detached villas[10] show the position of one vis-à-vis the other.

14. The respective plans (among other things) show:

(i) that part of the villa acquired by the Jacksons (indicated as "*garage"*) underlies the "*master bedroom*" of the villa acquired by the Elliots; and

(ii) that said "*garage*" has an opening (doorway) that gives onto the land over which the Jacksons have a right of way.

15. On acquiring their villa the Jacksons affixed a solid metal door (which opens inwards) to said doorway[11]. In his affidavit[12] plaintiff explains that the Jacksons used the garage for storage.

[8] Deed of sale, 15.04.1988, folio 9-13
[9] Plan of semi-detached villa transferred by deed of sale of 15.04.1988, folio 15
[10] Folio 48, 68
[11] Vide photos of solid metal door, folio 46
[12] Affidavit of Roger Elliott, folio 54-55

16. On the 28th of February 2003[13], Ian and Janet Jackson sold their villa (by then named "Villa Kortoll") to Noel and Pauline Scerri. It was stipulated in the deed that said property enjoys an "*unobstructed right of way at all times and in all manners over the land in front of the adjacent villa*".

17. A few years after acquiring their villa, the Scerris (defendants) converted the abovementioned garage underlying the "*master bedroom*" of the Elliotts into a living area and replaced the original solid metal door (which opened inwards) with a door with glass panes and which opens outwards[14].

18. In his affidavit plaintiff describes the new door as "*fully glazed from top to bottom in the manner of French windows*". He complains that "*By just walking on this part of my property, I am standing directly in front of their new French windows. This severely restricts our privacy and enjoyment of that part of my property and adversely affects the saleability and value of my property*."

Considerations of this court

19. This court, after having thoroughly examined the acts of the case

[13] Deed of sale, 28.02.2003, folio 30-34
[14] Vide photos of said door with glass panes, folio 47, 49

which were compiled during the proceedings before the court of first instance, after having seen the judgment of the court of first instance, and after having duly analysed the grievances of the defendants (now appellants) and the relative reply of the plaintiff (now respondent), makes the following considerations:

(i) The semi-detached villas of appellants and defendant, which are adjacent to each other, were developed by Gozo Consolidated Building Contractors Ltd and sold to the first owners in 1988.

(ii) Subsequent to the sales, the appellants' property (originally acquired by the Jacksons) was named Villa Kortoll, whereas the defendant's property was named Villa Barumbara. (For ease of reference this court will refer to the said properties by their respective names.)

(iii) Villa Kortoll enjoys the servitude of an "*unobstructed right of way at all times and in all manners*" over the stretch of land situated in front of the façade of Villa Barumbara. This servitude in favour of Villa Kortoll is mentioned in both the deed of title of the 21st March 1988 (by which the Jacksons, had acquired Villa Kortoll) and the deed of title of the 14th April 1988 (by which the Elliotts acquired Villa Barumbara).

(iv) The contract of 21st March 1988 specifies that the said right of

way is "*over the land **in front of**[15] the adjacent villa".* Such choice of wording seems to suggest that the land over which Villa Kortoll has a right of way does not actually form part of Villa Barumbara. The contract of the 14th April 1988 however removes all doubt, as it specifies that Villa Barumbara was being sold "*free and unencumbered **but subject to**[16] the right of passage*" in favour of the owners of Villa Kortoll. The respective plan attached to said contract also indicates that the land in front of the façade of Villa Barumbara does indeed form part of Villa Barumbara, as the first court pointed out. Thus Villa Barumbara is the subservient tenement and Villa Kortoll the dominant one.

(v) The right of way in favour of Villa Kortoll over this piece of land ends at the dividing line between the properties (as is clearly indicated in the top photo in folio 45). Today the dividing line is more apparent in that Villa Kortoll is a step more elevated than Villa Barumbara (as can be seen in the photos in folio 49).

(vi) Villa Kortoll has an opening (doorway) leading to the same land over which it enjoys a right of way. This, as explained above, is because that area on the ground level (indicated on the plans as "*garage*") underlying the "*master bedroom*" of Villa Barumbara is actually part of Villa Kortoll and not part of Villa Barumbara. In his affidavit, plaintiff in fact refers to his property as the "*smaller villa*" of the

[15] emphasis made by this court
[16] emphasis made by this court

two with the "*anomaly*" of having this "*garage*" of Villa Kortoll situated under his master bedroom, "*occupying what would otherwise have been part of our lower floor*."

(vii) Hence this court, from the evidence produced in this case, identifies two separate servitudes which Villa Kortoll (the dominant tenement) enjoys over Villa Barumbara (the servient tenement):

(a) that of an unencumbered right of way over the stretch of land in front of Villa Barumbara's façade, also part of Villa Barumbara, (as specifically created in the 1988 contracts),

and

(b) that of having an opening (consisting of a doorway) leading to the said stretch of land**.**

(viii) The existence of this second servitude, of the apparent and continuous type, results amply clear from the physical features of the two properties. There evidently exists a servitude in favour of Villa Kortoll (the dominant tenement) and burdening Villa Barumbara (the servient one) with regards to the said opening.

(ix) Article 457 of the Civil Code states that

> "*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.*"

(x) Although this servitude was never specifically mentioned in the 1988 contracts, it does emerge from the relative plans. In any case, considering the circumstances, this court considers it would qualify as a servitude that was "*created by the disposition of the owner of two tenements"* (Art 457(c)). The First Hall of the Civil Court in the case "Rosario Schembri et vs Joseph Demanuele", decided on the 27th May 2004, in this regard asserted the following:

> *"…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*[17]*. Biex dan iseħħ iridu jintwerew erba' (4) elementi li huma: (a) li l-post servienti 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 kienu għaddew għand sidien differenti ma jingħad xejn dwar is-servitu`. Minbarra dan huwa stabbilit ukoll li din is-servitu` tirrigwarda biss dawk is-servitujiet li huma kontinwi u dawk li jidhru."*

(xi) Now respondent based his action on the allegation that the replacement of the solid metal door opening inwards (originally affixed by the Jacksons) with a new door with (a) glass panes and (b) opening outwards, has increased the burden on his servient tenement with specific reference to Villa Kortoll's servitude of right of way over Villa Barumbara.

(xii) With regards to (b) the way in which the new door opens, (i.e. outwardly) the first court was of the opinion that no serious prejudice is

[17] App. Civili, 24.03.1975. fil-kawża fl-ismijiet Francis Apap vs Michael Galea (mhux pubblikata)

suffered by plaintiff. In fact it did not uphold plaintiff's demand that defendants be ordered to substitute the present door with one that opens inwardly. No appeal in this respect was lodged by the plaintiff, and hence this issue is excluded from the appeal in question.

(xiii) With regards to (a), the actual material of the door, the first court held that by replacing the original solid metal door with the current door containing glass panes, defendants actually aggravated the servitude of the right of way imposed on Villa Barumbara (this in violation of Article 475 of the Civil Code).

(xiv) Article 475 of the Civil Code in fact provides that:

> *"Any person having a right of easement shall exercise such right in the terms of his title, and it shall not be lawful for such person to make either in the servient or in the dominant tenement, any alteration which may increase the burden on the servient tenement."*

(xv) Respondent maintains that the first court was right in considering that way back in 1988 it was clear for both the Jacksons and the Elliotts that the space under the Elliots' "*master bedroom"* was intended as a "*garage"*. He emphasises that the understanding back then was that a solid metal door typical of garages would be installed, so much so that after the Jacksons purchased their property, they installed such a door in the opening in question.

(xvi) This court, however, does not see how the replacement of a solid metal door with a door having glass panes aggravates in any manner

the servitude of the right of way imposed on Villa Barumbara in favour of Villa Kortoll in violation of the above-cited Article 475.

(xvii) Moreover it is a moot point whether the replacement of the solid metal door with a new door with glass panes would have increased the burden on the servient tenement **with specific reference to Villa Kortoll's servitude of having an opening which gives onto Villa Barumbara.**

(xviii) Firstly the dimensions of the opening (doorway) remained completely unchanged.

(xix) Secondly no limitation whatsoever was ever imposed on the original owners of Villa Kortoll as to what material should be used when affixing a door in the opening in question (at the time of sale in 1988 actually had no door whatsoever in the opening in question). Therefore whether the owners of Villa Kortoll use such part of their property to actually garage their car, whether they use it simply for storage purposes (as seems to have been the case when the Jacksons were owners) or whether they use it as a living area (as is currently the case now that the Scerris are owners) it appears that they are at liberty to affix a door made of whichever type of material they choose.

(xx) Thirdly, on plaintiff's own admission, the fact that Villa Kortoll's "*garage*" is situated underneath his own property indeed constitutes an

"*anomalous"* situation. In addition to that, having the "*garage*"'s doorway actually leading to his own property renders the situation even more "*anomalous*", and as this court explained above, actually constitutes a servitude in itself.

(xxi) In his affidavit plaintiff complains that by just walking on that part of his property where defendants' doorway is positioned, he would end up standing directly in front of defendant's door with glass panes, implying that he would feel somewhat uncomfortable to see through the glass into their living area (assuming, of course, defendants never install any curtains!). However this court believes that he would feel equally awkward if he positioned himself directly in front of a solid wooden or metal door that is left open while the owners of Villa Kortoll are sorting boxes in their garage or washing their car, or doing whatever it is they choose to do at any given time.

(xxii) One must bear in mind that because of the particular features of these two properties and their position vis-à-vis each other, the privacy of <u>both</u> owners of respective villas is, to some extent, necessarily compromised. This however, was totally foreseeable by plaintiff when he decided to purchase his property, which he purchased anyway.

<u>Decide</u>

20. For the above mentioned reasons, this court:

(i) confirms that part of the judgment of the first court in so far as it declared that in terms of the constitutive contract in the acts of Notary Michael Refalo dated 21st March 1988 the dominant tenement belonging to defendants enjoys the unobstructed right of way at all times and in all manners over the land in front of the adjacent villa and which is marked with the colour yellow on the plan attached with the mentioned contract;

(ii) revokes the rest of the judgment and rejects the plaintiff's demands.

Costs of both instances are to be borne by plaintiff (respondent) Roger Elliott.

Silvio Camilleri Chief Justice	Giannino Caruana Demajo Judge	Noel Cuschieri Judge

Deputy Registrar
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