Court Of Appeal

Judges

THE HON. CHIEF JUSTICE MARK CHETCUTI
THE HON. MR JUSTICE JOSEPH R. MICALLEF
THE HON. MR JUSTICE TONIO MALLIA

Sitting of Wednesday, 25th January, 2023.

Number: 32

Application Number: 551/2017/2 TA

Marco Parolini and Markus Kick

v.

Farrugia Investments Limited (C-25921) and by virtue of a decree dated 10th July 2018 joinders to the suit Robert Farrugia and his wife Alexandra Farrugia

The Court:

1. This judgement concerns both an appeal which has been filed by the defendants and a cross-appeal which has been filed by the plaintiffs from a judgement of the First Hall of the Civil Court (the First Court) which was delivered on the 19th of May 2022;

2. By means of a sworn application which was filed on the 20th of June 2017, the plaintiffs declared that they are the owners of the property bearing address 20, at St. Frederick Street, in Valletta. The plaintiffs held that the defendant company applied to develop the adjacent property next to their house, bearing address 21, at St. Frederick Street, Valletta. The plaintiffs complained that the defendant company had carried out illegal works at the site adjacent to their house, and this to the detriment of their property rights and to the prejudice of soundness of the structure of their property. The plaintiffs further complained that during the course of works, the defendants have built structures in breach of article 407 of the Civil Code and this because they omitted to construct a dividing wall of a thickness of not less than 38 centimetres. According to the plaintiffs, this fact is preventing them from enjoying their property and is causing them actual damages which are not limited to excessive noise, odours, and humidity. The plaintiffs further accused the defendants of abusively and illegally carrying out works on the dividing wall which separates the two properties, to the extent that the defendants have built a wall on the diving wall which belongs exclusively to them and this in contravention of article 409(3) of the Civil Code. The plaintiffs also complained that the works which have been carried out by the defendants were without their consent and have caused several structural damages to their property. The plaintiffs further explained that they have requested the issue of a warrant of prohibitory injunction (Warrant No. 735/2017) to stop the defendants

from carrying out further construction, and this case was being filed in furtherance to such precautionary warrant. To this end the plaintiffs requested to Court to:

> *"1. Tiddikjara li s-soċjeta konvenuta hi obbligata li tibni ħitan diviżorji ġodda bejn il-fondi rispettivi fi ħxuna ta' mhux anqas minn tmienja u tletin ċentimetru (38cm) skont ma jipprovdi l-Artikolu 407 tal-Kapitolu 16 tal-Liġijiet ta' Malta;*
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> *2. Tiddikjara illi l-istess soċjeta konvenuta b'mod abbusiv u illegali għamlet diversi xogħolijiet fil-ħitan li jifirdu iż-żewġ propjetajiet, meta dawn il-ħitan jappartjenu lil-atturi u dana bi ksur ta' dak li jipprovdi l-Artikolu 409 (3) tal-Kapitolu 16 tal-Liġijiet ta' Malta;*
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> *3. Tiddikjara li x-xogħolijiet li ġew effetwati fil-ħitan tal-atturi huma illegali u abbusivi;*
>
> *4. Tiddikjara lis-soċjeta konvenuta kienet unikament responsabbli għal tali xogħolijiet illegali u abbusivi;*
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> *5. Tiddikjara li s-soċjeta konvenuta hi reponsabbli għad-danni subiti mill-atturi fil-proprjeta tagħhom;*
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> *6. Tordna lis-soċjeta konvenuta sabiex tagħmel dawk ix-xogħolijiet kollha neċessarji u rimedjali fl-istess ħitan, okkorrendo permezz ta' periti nominandi u dan fi żmien qasir u perentorju li tiffissa dina l- Qorti;*
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> *7. Tawtoriżża lill-atturi sabiex jagħmlu huma stess ix-xogħolijiet kollha neċessarji u rimedjali kif jiġi hekk ordnat mill-Qorti bl-assistenza okkorrendo ta' periti nominandi fil-każ tan-nuqqas tas-soċjeta konvenuta fiż-żmien lilha ordnat minn dina l-istess Qorti u dan a spejjeż tal-istess soċjeta konvenuta;*
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> *Salv u impreġudikat kull dritt ieħor tal-atturi skont il-liġi.*
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> *Bl-ispejjeż kontra l-istess soċjeta konvenuta li minn issa hija nġunta biex tidher għas- subizzjoni"*

3. The defendant company Farrugia Investments Limited contested the claims of the plaintiffs and this by means of a sworn reply which was

filed on the 18th of August 2017. The pleas which were filed by the defendant company against the demands of the plaintiffs were as follows:

> *"1. Illi preliminarjament, it-talbiet hekk kif dedotti m' humiex sostenibbli fil-konfront ta' l-intimata stante illi hija propjetarja ta' parti diviża mill-fond mertu tal-vertenza odjerna, u ċioe 21, St. Frederick Street, Valletta, filwaqt illi Robert Farruġia u Alexandra Farruġia huma is-sidien ta' parti oħra diviża ta' l-istess fond u dan skont kif jirriżulta mill-anness kuntratt (Dok A);*
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> *2. Illi mingħajr preġudizzju għas-suespost, daqstant ieħor it-talbiet attriċi huma infondati fil-fatt u fid-dritt u dan stante illi il-proprjetajiet rispettivi tal-kontendenti dejjem kienu mibnija ma ġemb xulxin u l-ħajt diviżorju bejn il-proprjetajiet huwa dak li hu u li minn dejjem kien, u ħadd mill-kontendenti jew mill-aventi kawża tagħhom ma esiġew li l-ħajt diviżorju jkun ta' xi ħxuna partikolari u għaldaqstant jeżistu l-elementi tal-preskrizzjoni estintiva ta' l-azzjoni skont l-artikolu 2143 tal- Kap. 16 tal-Liġijiet ta' Malta.*
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> *3. Illi f'kull każ, jekk il-ħajt diviżorju għandu jkun tal-ħxuna ta' tmienja u tletin centimetre (38cm) din il-ħxuna trid tinqasam fuq iż-żewġ fondi adjaċenti ta' xulxin, u ċioe dik tal-intimata u dik tar-rikorrenti, u ċertament li ma tistax tintlaqa talba illi l-ħxuna addizzjonali jeħtieġ ibgħatiha sid ta' proprjeta waħda, u għaldaqstant l-ewwel talba attriċi għandha wkoll tiġi miċħuda.*
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> *4. Illi l-ħajt eżistenti huwa ħajt diviżorju illi huwa komuni u japplika l-artikolu 409(1) tal-Kap. 16 u mhux l-artikolu 409(3) stante li hawn si tratta ta' żewġ binjiet b'għoli differenti u mhux binja adjaċenti għal bitħa, għalqa jew ġnien. Oltre dan skont l-artikolu 413 u l-artikolu 414 kull sid għandu d-dritt li juża u saħansitra jgħolli l-ħajt ta' l-appoġġ bejn il-proprjeta.*
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> *5. IIli konsegwentement l-intimata ma għamlet l-ebda xogħol illegali jew abbusiv u qatt ma tista tiddikjara li għamlet xi xogħol illegali jew abbusiv.*
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> *6. Illi t-talba rigward il-ħsarat fil-fond tar-rikorrenti hija frivola u vessatorja stante illi is-socjeta intimata qatt ma irrifjutat li tħallas għal dawk il-ħsarat li kienu responsabiltà tagħha. Hija dejjem ottemprat ruħha ma dak stipulat fl-AL. 72 tas-sena 2013 u kull ħsara, dejjem jekk hija attribwibbli lill-intimata, ser tiġi rimedjata mill-intimata. Ċertament illi ma kien hemm l-ebda ħtieġa li jintalab l-intervent ta' dina l-Onorabbli Qorti sabiex l-intimata tiġi kkundannata tagħmel dawn it-tiswijiet.*
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> *7. Salv eċċezzjonijiet ulterjuri"*

4. Further to the above pleas, the defendant company also filed a counter-claim against the plaintiffs by means of which it has asked the Court to:

> *"1. Tiddikjara illi d-deċiżjoni ta' dina l-Onorabbli Qorti tat-2 ta' Gunju 2017 mir-rikors numru 725/17 fl-Atti tal-Mandat ta' Inibizzjoni fl-ismijiet Marco Parolini et vs. Farruġia Investment Limited hija żbaljata stante li dak li inibit lis-soċjeta Farruġia Investments Limited milli tagħmel jew tkompli kien jirrelata għall-xogħolijiet ta' kostruzzjoni li kienu diġa saru u tlestew qabel il-preżentata u n-notifika ta' l-istess mandat lis-soċjeta Farruġia Investments Limited;*
>
> *2. Konsegwentement tannulla, tirrevoka u tħassar l-istess deċiżjoni;*
>
> *3. Tiddikjara illi stante li jeżistu l-elementi stipulat fl-artikolu 427 tal-Kap. 16 tal Liġijiet a' Malta, r-rikorrenti huma obbligati li jgħollu l-opramorta, u ċioe il-ħajt diviżorju, b' għoli ta' mija u tmenin ċentimetru (180cm) mill-livell tal-bejt tagħhom;*
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> *4. Tordna li l-istess rikorrenti jgħollu l-istess opramorta, ossia il-ħajt diviżorju, sa mija u tmenin ċentimetru mill-livell tal-bejt tagħhom, okkorrendo permezz ta' periti nominandi u dan fi żmien qasir u perentorju li diga tiffissa dina l-Onorabbli Qorti;*
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> *5. Tawtorizza lill-intimata rikonvenjenti sabiex tagħmel dawn ix-xogħolijiet hija stess okkorendo permezz ta' periti nominandi fil-każ ta' l-inadempjenza da parti tar-rikorrenti milli jagħmlu dawn ix-xogħolijiet ordnati, u dan a spejjeż ta' l-istess rikorrenti;"*

5. The plaintiffs rebutted the demands as put forward by the defendant company in its counter-claim, and this by means of a sworn reply which was filed on the 14th of September 2017 by which the plaintiffs raised the following pleas:

> ***"1.** Illi l-ewwel u t-tieni talba għandha tiġi miċħudha u dana stante li d-deċiżjoni tal-ewwel Qorti kienet motivata u ntlaqgħet skont il-liġi;*
>
> ***2.** Dwar it-tielet talba u r-raba talba sabiex titla l-opramorta u ċioe l-ħajt diviżorju, jiġi eċċepit li:*
> *(i) din l-istanza saret mingħajr ebda interpellazzjoni fis-sens illi l-atturi rikonvenzjonati qatt ma kienu nterpellati sabiex jgħollu l-opramorta;*

(ii)wisq inqas ma kienu f'pożizzjoni li jtellgħu l-opramorta u dana peress li x-xogħolijiet minn naħa tal-konvenuti rikonvenzjonati kienu għadhom qas tlestew u dan kif ser jiġi ppruvat waqt it-trattazzjoni tal-kawża;

***3.** Illi in oltre dwar it-tielet talba u r-raba talba sa ftit jiem qabel ma kien appuntat għas-smiegħ il-mandat ta' inibizzjoni 725/17 il-konvenuti rikonvenzjonati (1) kienu applikaw għall-emenda fil-permess tagħhom u l-atturi rikonvenzjonati kienu għadhom qas jafu x'ser isir mill-fond adjaċenti nkwantu tlugħ u bini ta' ħitan; (ii) ma setgħux qas li kieku riedu jtellgħu ebda ħitan għax kien hemm xogħolijiet għadejjin fil-fond adjaċenti kontinwi u kontestazzjoni fuq diversi ħitan u strutturi kif jirriżulta mill-kawża li ntavolaw l-atturi rikonvenzjonati;*

***4.** Illi oltre hekk l-atturi rikonvenzjonati sofrew diversi ħsarat fil-bejt tagħhom meta l-konvenuti rikonvenzjonati kienu qabdu u aċċedew fuq il-bejt tagħhom u taqqluh b'materjal mingħajr il-kunsens tagħhom u dan kif ser jiġi ppruvat waqt it-trattazzjoni tal-kawża u kien minħabba x-xogħolijiet kontinwi u d-danni li kienu qiegħdin isofru u għadhom isofru l-atturi rikonvenzjonati li ma saru ebda xogħolijiet oħrajn fil-fond tal-atturi;"*

6. By means of an application filed on the 15th of June 2018, the plaintiffs requested the Court to order the joinder of Robert Farrugia and Alexandra Farrugia, and this because the latter co-owned the adjacent property to their house together with the defendant company. Having considered the no objection by the defendant company; by means of a decree which was delivered in open court during the sitting held on the 10th of July 2018, the first Court acceded to the request of the plaintiffs and ordered the joinder of Robert Farrugia and Alexandra Farrugia as defendants to the case. The latter were notified in open court during the same sitting and declared that they were contesting the demands of the plaintiffs by adopting the same pleas as raised by the defendant company in its sworn reply at page 36 of the Court file;

7. On the 19th of May 2022, the First Court, on the basis of all the considerations put forward in its judgment, decided the demands of the plaintiffs and the demands of the defendant company in the following manner:

> *"Denies the first, second, third and fourth demands of the plaintiffs.*
>
> *Acceeds to the fifth demand of the plaintiffs and declares that the Defendants are liable for the damages sustained by the plaintiffs in their property.*
>
> *Acceeds to the sixth demand of the plaintiffs and orders the Defendants to undertake and execute those remedial works as described in Doc A fol 121 within peremptory period of three (3) months from the date of this judgment, with the assistance and under the supervision of the expert appointed by this Court, architect Godwin Abela.*
>
> *Acceeds to the seventh demand and declares, that if the defendants fail to perform all such remedial works as prescribed in the said Doc A a fol 121 within the peremptory time above mentioned, the plaintiffs are being authorised to carry out and undertake these works, with the assistance and under the supervision of Architect Godwin Abela and this at the expense of the defendants.*
>
> *Denies the first two demands in the counter-claim.*
>
> *Declares the remaining demands in the counter-claim exhausted.*
>
> *Two-fifths (2/5) of the expenses of these procedures, including those of the warrant of prohibitory injunction, shall be borne by the plaintiffs and the remainder three-fifths (3/5) by the Defendants."*

8. The defendants felt aggrieved by the above cited decision and by means of an appeal application which has been filed on the 17th June 2022, they have asked this Court to:

> "*vary the decision of the Court of First Instance of the 19th May 2022 as follows:*

1. The judgement should be confirmed in so far as the Court rejected the first, the second, third and fourth demands of the plaintiffs;
2. The judgment should be confirmed in so far as the Court acceded to the fifth demand of the plaintiffs;
3. The judgement should be varied in that part where the Court acceded to the sixth and seventh demand of the plaintiffs in that the Defendants should be ordered to pay plaintiffs the amount of nine thousand two hundred and seventy seven Euro and forty six cents (€9,277.46) as liquidated by the Judicial referee;
4. The Judgement should be varied in that part where the Court declared the remaining demands in the counter-claim as exhausted in that the third, fourth and fifth demand of the defendants as contained in the counter-claim should be acceded to;
5. As a consequence vary the part of the decision wherein the Court apportioned the costs of the proceedings as to 2/5th on the plaintiffs and 3/5th on defendants in accordance with the upholding of the demands aforesaid."

9. The plaintiffs also felt aggrieved by the judgement of the First Court, and apart from replying to the appeal of the defendants, the plaintiffs also filed a cross-appeal, by means of which they demanded this Court to:

"vary the decision of the Court of first Instance of the 19th May 2022 as follows:

1. The judgement should be confirmed in so far as the court acceded to the fifth demand of plaintiffs; with the exception that it should also provide for the damages which ensued after the architect report;
2. The judgement should be confirmed in so far as the court acceded to the sixth demand of the plaintiffs;
3. The judgement should be confirmed in so far as the court acceded to the seventh demand of the plaintiffs;
4. The judgement should be varied in that part where the Court rejected the first, second, third and fourth demands of the plaintiff and proceed to accede to them;
5. The court should vary the part of the decision wherein the Court apportioned the costs of the proceedings as to 2/5th on Plaintiffs and 3/5th on defendants in accordance with the upholding of the demands as aforesaid;"

10. Having seen all the acts of the case together with the acts of the warrant of prohibitory injunction No.735/17SM, and also after taking into consideration that the written pleadings have been closed and there is no reason at law to set a sitting for hearing this appeal, this Court is consequently proceeding to deliver judgement in terms of **Article 152(2) of Chapter 12 of the Laws of Malta.**

Considerations

11. Having taken cognizance of both the grounds of appeal as put forward in the appeal of the defendants, and those as put forward in the cross-appeal of the plaintiffs; this Court considers it expedient to start by considering the first ground of appeal of the defendants and the second ground of appeal of the plaintiffs, which are both in connection with the decision of the first Court in relation of the fifth, sixth and seventh demand of the plaintiffs. The Court would then proceed by considering the remaining grounds of appeal as put forward in the cross-appeal of the plaintiffs and in the appeal of the defendants respectively;

12. In the first ground of appeal the defendants are complaining that the plaintiffs have never requested the defendants to remedy any damage that may have been caused and simply proceeded to file the Court case. The defendants further submit that they have never claimed that they were not responsible for any damage that they may have caused

and the first time they were presented with an actual list and quantified bill of remedial works was through the report of the judicial referee. The defendants state that they have *'readily accepted to pay and actually suggested that the works are executed by plaintiffs through their own workmen and contractors so as to avoid unnecessary disputes'.* The defendants further argue that since the bill of quantities as established by the judicial referee was not contested, then the First Court should have ordered the defendants to pay the amounts therein established rather than ordering the defendants to execute the work themselves;

13. On the other hand, in the second ground of their cross-appeal, the plaintiffs are stating that they are aggrieved by the fact that the First Court proceeded to accede to the their fifth demand and ordered the defendants to carry out the reparatory works without considering all the damages which could have accrued till date of judgement and beyond if the works were not remedied according to law under the direction of the court appointed expert. The plaintiffs further argue that in acceding to the fifth demand, the Court should have also considered or rather provided a remedy for all the works required and not restricted itself to the works as reported in the architect's report. The plaintiffs are also claiming that in the course of time, the damages went beyond those recorded by the judicial referee in his report;

14. Having reviewed all the acts of the case, this Court finds both the first ground of appeal of the defendants and the second ground of appeal of the plaintiffs as manifestly unfounded and extremely frivolous;

15. As regards to the first ground of appeal of the defendants, this Court notes that their grievance is essentially that the First Court should have ordered the defendants to pay the amounts established in the technical report of the judicial referee rather than ordering the defendants to execute the work themselves. This argument was however not raised by the defendants at the proceedings before the First Court - neither as a formal plea, nor in the final written note of submissions. In this respect the arguments of the defendants are therefore tantamount to *noviter deductus* and on this basis alone, the first ground of appeal of the defendants is being rejected. *(See amongst others the judgements in the names of* ***Asset Investments Limited v. Awtorità tad-Djar****, decided by this Court on the 13th of October 2022;*[1] ***Michael Buttigieg v. Kummissarju tal-Pulizija et.*** *Decided by this Court on the 4th of May 2022;*[2] ***Charm Developments Limited v. Kummissarju tat-Taxxi Interni****, decided by this Court on the 23rd of February 2022;*[3] *and* ***Fracht Malta Limited v. Mohamed Madkour,*** *decided by this Court on the 26th of January 2022)*;[4]

[1] App. Civ. No. 213/11/1.
[2] App. Civ. No. 1263/10/1.
[3] App. Civ. No. 278/11/1.
[4] App. Civ. No. 320/17/1.

16. The second ground of appeal of the plaintiffs is then even more so perplexing. Firstly, this Court finds that the arguments of the plaintiffs are incompatible with the final demands which the same plaintiffs have put forward in their cross-appeal. This is being said because whilst the plaintiffs are asking this Court to confirm the decision of the first Court in relation to their sixth and seventh demands; it was actually in that part of the decision relating to those demands wherein the First Court had ordered the defendants to undertake and *'execute those remedial works as described in Doc A fol 121'*, and thus which is the subject matter of their grievance as put forward in their second ground of appeal. On the other hand, whilst the plaintiffs are asking this Court to vary the decision of the First Court in relation to their fifth demand; in deciding the fifth demand the First Court had actually acceded to their fifth demand word for word as put forward in their sworn application. Whilst on this basis, this Court has sufficient reasons to proceed by rejecting the second ground of appeal of the plaintiffs; this Court however considers it expedient to add that, in any case, the First Court could only decide on the acts and evidence which has been laid by the parties before it. Whilst it is true that some time had elapsed between the date of filing of the report by the judicial referee and the date of judgement; should it have been the case that with the course of time the damages affecting the plaintiffs' property went beyond the ones documented in the expert's report, the plaintiffs should have raised this issue before the First Court

and substantiated this claim by cogent evidence. The plaintiffs clearly failed to act at the opportune time and they cannot expect this Court to order any remedial works which are not supported by any evidence in the acts of the case. As concisely but precisely summed up by the Latin maxim: - *'quod non est in actis non est in mundo'*! For these reasons, the second ground of appeal is being dismissed;

17. Having considered the grievances in relation to the issue of damages, this Court is now going to delve into the first ground of appeal of the plaintiffs which concerns that part of the decision of the First Court whereby their first, second, third, and fourth demands were dismissed. The plaintiffs state that they had presented to the First Court their argument that the walls upon which the defendants laid the new works, did not belong to the defendants and therefore they could not have been built upon in the manner as constructed. The plaintiffs submit that they are basing their argument on the fact that adjacent to the wall in issue, there is a yard, and consequently by application of the provisions found in **article 409(3) of the Civil Code**, the wall is deemed to belong to them. The plaintiffs also make reference to **articles 409, 418, 419, and 407 of the Civil Code**, and further argue that even if for the sake of argument, the wall was co-owned, the defendants could not extend the wall without the consent of the plaintiffs and this on the basis of **article 493 of the Civil Code**;

18. After taking note of all the submissions of the plaintiffs, the reply of the defendants, and all the relevant evidence which concerns the first four demands of the plaintiffs, this Court considers that in circumstances of this case, the first four demands cannot be acceded to and the First Court was correct to reject them;

19. As a point of departure, this Court does not agree with the plaintiffs that the presumption in **article 409(3) of the Civil Code** is applicable to this specific case. From the acts of the case, including the deed of purchase which was submitted by the defendants,[5] and also from the plans which have been submitted by the representative of the Planning Authority during the sitting which was held before the judicial referee on the 9th March of 2018,[6] it is quite clear that the property of the defendants which is adjacent to the property of the plaintiffs is not a 'yard' in terms of article 409(3) of the Civil Code, but is an urban tenement. The presumption that the wall in issue belongs to the plaintiffs does not therefore apply and since the plaintiffs are insisting that the wall is theirs, the plaintiffs were bound to produce evidence to substantiate their claims. In the view of this Court, the plaintiffs failed to submit such evidence, and instead they have based their arguments quite 'blindly' on the provisions of article 409(3), which as stated is inapplicable. Also, although the plaintiffs relied heavily on the reports and testimony of their appointed

[5] 'Document A' attached with the sworn reply, fol. 42 et.seq.
[6] 'Document OM1', fol. 264 – 273.

architect, the Court notes that when that architect was asked to express her opinion as to whether the wall dividing the properties in issue was a common wall or otherwise, that architect refused to provide an opinion and stated that she had referred her clients to their lawyer as she considers this to be a legal matter.[7] Furthermore, although in his report, the Court-appointed judicial referee failed to provide any conclusions in relation to the first four demands of the plaintiffs and this notwithstanding that such judicial referee was directed by the Court to *"accede on the place of dispute and to report about the respective claims of parties to the case",*[8] the plaintiffs neither challenged the judicial referee on what were his views on the matter in issue; nor asked the Court to order the judicial referee to report on such an issue, as the defendants had done in connection with their demands in their counter-claim;[9]

20. Further to the above considerations, this Court also notes that the evidence in the acts of the case is incongruous with the plaintiffs' assertion that the dividing wall is their own exclusive property and not a common wall which is owned jointly between the contending parties. On this point, the Court refers to the contents of the affidavit which has been submitted by Sebastian Mangion who is the general manager of the defendant company and in which he declared that the defendants'

[7] See cross-examination of Perit Katia Vella held before the Court appointed Judicial referee on the 22nd March 2018, fol. 279.
[8] See Court *verbal* dated 6th October 2017.
[9] See application which has been submitted by the defendants on the 9th November 2019, fol. 423.

property *"had beams and ceilings affixed into the said party wall even to the commencement of any works".*[10] Also, whilst being cross-examined, Mr. Mangion, reiterated that: *"I am being referred to paragraph one on page three of my affidavit where I mentioned that there were beams and stone slab ceilings supported by the party wall and am being asked whether this was the party wall dividing the two properties and I confirm that this was the case."*[11] Mr. Mangion's version is also corroborated by the version of the architect in charge of the defendant's works who during the sitting held on the 17th of May 2018 testified that: *"The common party wall was already supporting existing ceilings and roofs in defendant's property, in fact it was one of the four walls of the rooms of defendant's property. The common wall was a straight vertical wall throughout the building".*[12] In the Court's view, such evidence, which is not contradicted by any other evidence, is not consistent with the plaintiffs' claim that the dividing wall belongs exclusively to them but is rather co-owned by the contending parties. Also, from such evidence this Court can also deduce on a balance of probabilities that when the tenements of the contending parties were originally being constructed, the previous owners had agreed that the thickness of the common wall would be as it is in the present state, and not thicker;

[10] Fol. 352.
[11] Fol. 412.
[12] Fol. 347.

21. Having said this, from the same testimony of Perit Paul Camilleri, it is also quite evident that the adjoining tenements were not of the same height and consequently in terms of **article 409(1) of the Civil Code**, the part of the dividing wall over one metre and eighty centimetres from the original height of the property of the defendants, was legally presumed to belong exclusively to the defendants. The fact that this part of the wall belonged exclusively to the defendants was clearly admitted by Perit Camilleri who during the sitting held on the 17th May 2018 held that: *"During the course of works, it was decided to make use of the party wall and not construct a separate wall. Defendants offered to compensate plaintiffs for the use of the party wall where construction over and above the current structure was carried out and this to render that part which was not yet common to be made common"*;[13]

22. In the Court's view, the state of facts as discussed in the above paragraph do not however render the arguments of the plaintiffs as correct, neither do they mean that the First Court was wrong not to uphold their first four demands. The fact alone that from a certain height onwards, the dividing wall belonged exclusively to the plaintiffs does not mean that when the height of the dividing wall was extended by the defendants, such wall was not a common wall. On this point the Court refers to **article 418 of the Civil Code** by means of which the defendants

[13] Fol. 347.

were entitled to render that part of the dividing wall which belonged exclusively to the plaintiffs, as a common wall. As has been stated by this Court numerous times, as soon as the owner of the adjacent property constructs his building in a manner which leans against the dividing wall, such dividing wall is automatically and without any additional formalities rendered as a common wall. (See on this point the decree in the names of ***Nicholas Cassar et. V. P&S Limited et.*** decided by this the First Hall of the Civil Court on the 6th February 2013,[14] and the judgement in the names of ***Neil Bianco v. A. Bonello Limited***, decided by this Court on the 30th November 2012, and all the other quoted judgements and references to the opinion of eminent jurists on the subject[15]);

23. Considering the testimony of Perit Camilleri, in light of the above observations; it is quite clear that in this case, the vertical extension to the tenement of the defendants was constructed in a manner which leans against the dividing wall which belonged to the plaintiffs, and hence this fact alone rendered that part of the dividing wall which was exclusively owned by the plaintiffs, as a common wall owned jointly by the contending parties;

24. Given that the dividing wall was rendered as a common wall in the manner as described above, this Court is of the view that the defendants, as co-owners of the common wall were entitled by law to extend the

[14] Warrant No. 86/2013/1MCH.
[15] App. Civ. No. 557/2007/1.

common wall vertically, and this by works of the same thickness. As has been reiterated by this Court in various judgements, by virtue of **article 414 of the Civil Code**, a co-owner has the right to vertically extend the common wall, so long as: such extension is not carried out for vexatious motives; he forks out the related expenses in connection with such extension; and such extension would not prejudice the soundness of the common wall. For example, in the case of ***Carolyn King v. Noel Galea et.*** which was decided on the 9th of January 2010, apart from affirming the above stated principles, this Court also made it clear that, the exercise of such right was absolute in the sense that it did not depend on the consent and agreement of the owner of the adjacent tenement. Such principles were again reiterated in other judgements such as those in the names of: ***Fortunato Farrugia et. v. Adelina Cini****,* decided by this Court on the 29th of April 2016; and ***Joseph Grima et. v. Brian German***, decided by this Court on the 24th of September 2004). As regards the thickness of the vertical extension to the common wall, in the case of ***Michael Debono et. v. Joseph Zammit et.***, decided by this Court on the 28th of March 2014, the Court had held that a co-owner of the common wall had the right to build on the dividing wall with a wall of the same thickness. The Court further added that the dividing wall shall be left in a situation in which another wall of same thickness can be built upon it;

25. Considering the above legal principles in light of all the evidence brought forward in this case, this Court notes that, the plaintiffs did not

bring any evidence to show that the defendants had carried out the vertical extension to the dividing wall for purely vexatious motives. Neither did the plaintiffs bring forward evidence to show that they were asked by the defendants to fork out the money in connection with the extension of such wall. Furthermore, the plaintiffs did not provide any tangible evidence which shows that the extension was prejudicial to the soundness of the common wall. In addition, the plaintiffs did not ever mention nor produced any evidence that they enjoyed a servitude of '*altius non tollendi'.* Also the plaintiffs did not bring any evidence that the vertical extension to the common wall was constructed in a manner which reduced the original thickness of the dividing wall. The evidence in the acts of the case actually points to the contrary. For instance, as regards to the soundness of the dividing wall following the extension, Perit Camilleri confirmed that the dividing wall was strong enough to support the additional load of the vertical extension.[16] Moreover, the court-appointed judicial referee in his report noted that the damage caused to the property of the plaintiffs *"were confined mainly to hairline cracks in the walls and a cracked lintol but nothing major that would compromise the integrity of the plaintiff's property."*[17] The judicial referee also added that: *[t]he undersigned also noted that the defendants had constructed two floors on the existing premises and from the relatively minor damages*

[16] Fol. 414.
[17] Fol. 116.

caused to plaintiffs, it results that the preventive measures taken by defendants had been effective";[18]

26. In light of all the above considerations, this Court does not consider the first ground of appeal of the plaintiffs' cross-appeal as justified, and in this respect this Court is confirming the decision of the First Court in so far it rejected the first four demands of the plaintiffs as put forward in the sworn application;

27. In their final demand of their appeal application, the plaintiffs have also requested this Court to *"vary the part of the decision wherein the Court apportioned the costs of the proceedings as to 2/5th on Plaintiffs and 3/5th on defendants in accordance with upholding of the demands as aforesaid".* Given that this Court has rejected both grievances of plaintiffs' cross-appeal this Court does not see any reason on the basis of which it shall accede to the plaintiff's final grievance. It must be further pointed out that the plaintiffs also fell short of coming up with a specific ground of appeal to substantiate their final demand in relation to the apportionment of costs by the First Court. In light of these reasons, this Court is also rejecting the final demand of the plaintiffs as put forward in the appeal application, and is therefore rejecting the plaintiffs' cross-appeal in its entirety;

[18] Id.

28. Another ground of appeal which ought to be considered by this Court is then the second ground of appeal of the defendants. Whilst making reference to the conclusions of the court-appointed judicial referee, the defendants state that during an on-site inspection by the presiding judge on the 23rd March 2022, the Court was shown the areas on the different levels of the roof of the plaintiffs' property where the *opramorta* had to be raised, and therefore it was not the case that they had raised the party wall on their own initiative and at their own expense. Also, the defendants submitted that there were still parts of the *opramorta* that needed to be raised, *"some of which were not even part of the development permit application of the defendants".* The defendants add that whilst they have executed most of the works covered by their permit; yet, since the various areas of the roof of the plaintiffs' property are at a higher level than those of the defendants, then the obligation to raise the *opramorta* of those levels lay with the plaintiffs. The defendants also admit that in reality they were and are still willing to raise the *opramorta*; yet due to this litigation, they are of the view that it would be more appropriate to request a court order than just executing the works which in reality are the obligation of the plaintiffs;

29. Having also noted all the arguments which have been brought forward by the plaintiffs against this ground of appeal, this Court considers it expedient to start by pointing out that in principle the height of the *opramorta* is a legal servitude which through the course of time has

been considered as of public order and which creates a duty imposed by law (see amongst others the case in the names of ***J. Axiaq v. F. Galea et,*** decided on the 11th of December 1965).[19] In the case of ***Michael Mifsud et v. Philip Mifsud et.*** which has been decided by the First Hall of the Civil Court on the 7th February 2002,[20] the Court considered that article 427 of the Civil Code, which concerns the *opramorta*, establishes five elements which need to be satisfied. These are: *"(a) li s-sid ikollu bejt (inkluż setaħ); (b) li jitla' jew jista' għalih b'taraġ, jew, kif ingħad f'għadd ta' sentenzi, b'modi oħra ta' aċċes li jirrendu t-tlugħ fuq dak il-bejt jew setaħ mhux wieħed diffiċli jew skabruż; (ċ) li l-ħajt għandu jitgħolla sa metru u tmenin ċentimetru 'l fuq minn wiċċ il-bejt jew setaħ tal-post l-iżjed għoli; (d) li l-ħajt li jittella' għandu jkun tal-istess ħxuna tal-ħajt li fuqu jittella' (Art. 427(2) tal-Kap 16); u (e) li dan jittella' bi spejjeż tas-sid tal-post l-iżjed għoli, sakemm is-sidien taż-żewġ postijiet ma jkollhomx bejt jew setaħ li t-tnejn jitilgħu għalih b'taraġ jew mezz ieħor ta' access kif ingħad u li jkunu, bejn wieħed u ieħor fl-istess livell (Art. 427(2) moqri flimkien mal-artikolu 421 tal-Kap 16), f'liema każ l-ispejjeż għat-titligħ tal-ħajt jinqasmu bejniethom;"*;

30. Considering the above principles in light of the facts of this case, and after having seen the various photos which are found in the acts of the case, this Court notes that the plaintiffs do actually enjoy access to

[19] Vol: XLIX.ii..1075.
[20] Cit. No. 2450/00JRM

their roof by means of a stairs.[21] On the other hand, from the plan outlining the roof-level of the defendants, this Court notes that the defendants in contrast do not seem to have access to their highest roof which is meant for services, such as water tanks and air-conditioning compressors.[22] Of relevance is also the addendum made to the technical report wherein, the court-appointed judicial referee; who has inspected the site twice, on the 4th December 2017 and on the 16th October 2019; noted that in the course of the on-site inspection it was noted the roof level parapet wall dividing the roof terraces of the two properties in question was at a low level and that in accordance with the provisions of Article 427(1), (2) and (3) of the Civil Code, the roof parapet wall dividing the two properties in question must be raised to a height of 1.80 metres above the roof terrace level.[23] With reference to the issues raised in paragraphs 3, 4 and 5 of the counter-claim, the judicial referee then concluded that: *"it is the undersigned opinion that plaintiff company's request for the raising of the dividing roof parapet should be acceded to"*;[24]

31. Taking the above findings into consideration, this Court finds no justified reasons why it should depart from the findings of the judicial referee, even more so when considering that the plaintiffs neither

[21] Fol. 315, amongst many other photos.
[22] Fol. 272.
[23] Fol. 429.
[24] Id.

demanded the appointment of additional referees, nor challenged the findings of the judicial referee by cross-examining him. Also, the plaintiffs did not submit any evidence which contradicts the findings of the judicial referee in its addendum to the technical report dated 26th January 2021. (See on this point the judgements in the names of: ***Paradise Bay Maritime Limited et. v. Direttur Generali (Dwana),*** decided by this Court on the 12th May 2022;[25] ***Louis Baldacchino v. Perit AIC Stephen Farrugia,*** decided by the First Hall of the Civil Court on the 15th July 2022,[26] ***Paul Lungaro v. Salvino Lungaro***, decided by this Court on the 29th October 2021,[27] and all the jurisprudence therein cited);

32. In light of the above considerations and the defendants' submissions that as of today there are still parts of the *opramorta* which need to be raised, this Court is going to accede to the defendants' second ground of appeal and would therefore be varying the judgement of the First Court in relation to the third, fourth and fifth demands of the defendant company's counter-claim and this in the manner provided in the operative part of this judgement;

33. The final ground of appeal of the defendants then relates to the decision of the first Court concerning the apportionment of judicial costs. In its judgement the First Court apportioned the judicial costs in the

[25] App. Civ. No. 307/11/1MCH.
[26] Rik. Gur. No. 41/2016CFS.
[27] App. Civ. No. 1322/1994/2LM.

following manner: *"[t]wo-fifths (2/5) of the expenses of these procedures, including those of the warrant of prohibitory injunction, shall be borne by the plaintiffs and the remainder three-fifths (3/5) by the defendants"*;

34. Having acceded to the defendant's second ground of appeal which is going to lead to the accession of the third, fourth and fifth demands of the counterclaim; and considering that either of the parties have been cast at some points in issue, then on the basis of **article 223(3) of Chapter 12 of the Laws of Malta,** this Court is of the view that all the judicial costs connected with the procedures before the first Court, and those in relation to the warrant of prohibitory injunction shall be borne by the parties incurring them. This Court is therefore acceding also to the defendant's third ground of appeal and would be varying the apportionment of costs in relation to procedures before the First Court, and those in relation to the warrant of prohibitory injunction accordingly;

Decision

For these reasons, the Court rejects the cross-appeal of the plaintiffs, whilst accedes in part to the principal appeal of the defendants; and on this basis this Court is varying the judgement of the First Court of the 19th of May 2022 and this by acceding to the third, fourth, and fifth demands of the defendant company's counterclaim, and this by declaring that:

(i) Since the elements of article 427 of Chapter 16 of the Laws of Malta are satisfied, the plaintiffs are obliged to raise the *opramorta,* and thus the dividing wall, at a height of one metre and eighty centimetres above the level of their roof;

(ii) Orders the plaintiffs to raise the same *opramorta,* that is the dividing wall, to the extent of one metre and eighty centimetres above the level of their roof, and this within the peremptory term of three (3) months from the date of this judgement, and with the assistance and under the supervision of the judicial referee appointed by the First Court, architect Godwin Abela;

(iii) In case the plaintiffs fail to carry out the said works, the defendant company Farrugia Investments Limited is authorised to carry out the said works at the expense of the plaintiffs, and with the assistance and under the supervision of the judicial referee appointed by the First Court, architect Godwin Abela;

Furthermore, this Court is also varying the apportionment of judicial costs as decided by the First Court in the manner that judicial costs connected with the procedures before the first Court, and those in relation to the warrant of prohibitory injunction shall be borne by the parties incurring them. As to the remainder, the decision of the First Court as provided in the judgement of the 19th May 2022 is being confirmed. For the purpose

of clarity, any peremptory times referred to in the judgement of the first Court shall commence to run from the date of this judgement.

Any costs connected with the plaintiffs' cross-appeal shall be borne exclusively by the plaintiffs, whilst any costs connected with the defendants' principal appeal shall be apportioned in the manner as to one-third ($^1/_3$) to the paid by the defendants and the remainder two-thirds ($^2/_3$) to the paid by the plaintiffs.

Mark Chetcuti Chief Justice	Joseph R Micallef Judge	Tonio Mallia Judge

Deputy Registrar
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