



THE FIRST HALL OF THE CIVIL COURT

**MADAME JUSTICE
HON DR. DOREEN CLARKE LL.D**

Sworn Application Number 1335/2023DC

*Anthony Dervan, and
Michelle Dervan*

vs

*Mark W Critchley, and
Marie Louise Critchley*

Today, the 16th day of April 2024

The Court

Having seen the Sworn Application of filed by the plaintiffs on the 22nd November, 2023 whereby they premised:-

- 1. That the plaintiffs are owners of the property number 34, Portu Salvu Street, Senglea, whilst the defendants own the adjacent property number 32, Portu Salvu Street, Senglea.*
- 2. That the property of the defendants is located at a level which is slightly higher than that of the plaintiffs' and both properties are separated by a dividing wall between the roof, or rather the terrace of the defendants and that of the*

plaintiffs, as results from the picture herewith annexed and marked as Document A.

- 3. That in 2018 the defendants sought to build a new room on the roof with a large window overlooking the Grand Harbour. They also sought to demolish part of the said dividing wall, which would have granted them a better view of the Grand Harbour.*
- 4. That, notwithstanding that the defendants had the intention of demolishing part of the dividing wall, the plaintiffs never gave them their consent to do this, and in fact, they always cautioned them that the dividing wall had to conform with the law, and hence it had to be one meter and eighty centimeters in height (1.8m), because the same defendants have stairs leading to their roof.*
- 5. That, this notwithstanding, the defendants abusively and illegally demolished a big part of the dividing wall (in the sense of reducing its height), as results from the photo herewith annexed and marked as Document B, with the consequence that they can now overlook onto the plaintiffs' property, and this in breach privacy, in breach of the civil law, and in breach of public order. This lowering of the dividing wall took place when the applicants were abroad in Australia between the 5th of June 2021 and the 30th of December 2022.*
- 6. That, following the defendants' abusive alterations, the current level of the dividing wall is that of approximately one (1) metre and this in flagrant breach of Article 427(1) of the Civil Code (Cap. 16 of the Laws of Malta), which states that "The person in whose building there are stairs leading to the roof, is bound to raise, at his own expense, the party-wall to the extent of one metre and eighty centimetres above the level of the roof."*
- 7. That, the photos of the roof which are annexed to the Condition report clearly show the dividing wall in its original state, (copy of the Condition report is being herewith attached and marked as Document C).*
- 8. That, although the plaintiffs called upon the defendants various times, including by a judicial protest dated 13th April, 2023, to rebuild the dividing*

wall to its original height, with the minimum of one metre and eighty centimetres according to the said Article 427(1), the defendants remained in default, (legal copy of the judicial protest is here annexed and marked as Document D).

9. *That therefore, this court case had to be instituted.*

Having premised this the plaintiffs requested that this Court:-

- i) Declares that the current level of the dividing wall which divides the defendants' property 32, Portu Salvu Street, Senglea, and the property of the plaintiffs 34, Portu Salvu Street, Senglea, is not that established by law, specifically Article 427(1) of Chapt. 16 of the Laws of Malta, and this, as the case may be, with the assistance of appointed experts.*
- ii) Declares that the defendants are solely responsible for the breach of Article 427(1) of Chapt. 16 of the Laws of Malta, and this, after they demolished part of the dividing wall between their property and the plaintiffs' property in an abusive and illegal manner, without the consent of the plaintiffs, reducing the height of the dividing wall to below the minimum height established by law.*
- iii) Condemns the defendants to once again raise the level of the dividing wall to the level established by law, within a short and peremptory period established by this Honourable Court, and under the supervision of an Architect who is nominated by this Honourable Court.*
- iv) Authorises the plaintiffs to carry out the abovementioned remedial works themselves in case of the defendants' default in conforming themselves and in carrying out the necessary works to once again raise the dividing wall to the stipulated legal levels, and if necessary with the involvement of appointed architects, at the expense of the defendants.*

Having seen the Sworn Reply filed by the defendants on the 19th February, 2024 whereby the following pleas were raised:

- 1. That, preliminarily, the plaintiffs are not ordinarily resident in the Maltese islands and they therefore need to regulate themselves with***

regards to their representation in these proceedings, and this prior to the continuation of this lawsuit;

2. *That, as for the merits, the defendants confirm that they are the owners of property 32, Portu Salvu Street, Sengle, which they bought in 2009;*
3. *That, besides this fact, the rest of the plaintiffs' sworn application is full of inaccuracies and false allegations intended to put the defendants in a bad light;*
4. *That Triq Portu Salvu slopes downwards, in a way that the properties in that road are built on a gradient. The plaintiffs' property is the last property at the bottom of this road, while the defendant's property is the one immediately adjacent, and is located at a slightly higher level than that of the plaintiffs. Although it is true that the defendants have a staircase in their premises, this staircase does not lead to the roof, but to the inside of their property;*
5. *That, therefore, Article 427 of the Civil Code is not applicable to the present case. In addition, and as will be explained, there is no introspection from the defendants' property into the plaintiffs' property, and therefore in any case there is no need for the raising of the dividing wall (which belongs exclusively to the defendants);*
6. *That, contrary to the impression that is being given in the plaintiffs' application, the dividing wall that separates the properties of the two parties was never one meter and eighty centimeters high. Such height not only goes against the streetscape approved by the Planning Authority, and not only completely obstructs the view that the respondents have (and always had) of the Grand Harbour, but blocks or obstructs also the view of all the properties located in the same street;*
7. *That, as will result in more detail in the course of these proceedings, in the course of the development of their property, the respondents lowered the full level of their property, in the sense that nowadays, the roof of the ground floor is at a lower level than it was before the defendants carried out works in their property;*
8. *That, therefore, the demolition of part of the dividing wall was done in this context, and did not prejudice the plaintiffs in any way, provided that, as*

previously stated, the defendants lowered the level of all their property, and not just the dividing wall. Therefore the position of their property vis-à-vis the plaintiffs' property remained presso poco identical to what it was;

- 9. That, multo magis, as will be amply demonstrated in these proceedings, the plaintiffs have not suffered any reduction in their privacy, as their privacy has increased in the way the defendants have carried out the development, wherein the latter even made a voluntary set back so that they would not be able to reach the dividing wall, and would thus not be able to look into the plaintiffs' property (and this despite the fact that, as explained, this was possible before they carried out the works in their property);*
- 10. That again, contrary to the impression that is being given in the sworn application, the defendants have always acted in an open and transparent manner, and have followed all the procedures imposed by the Planning Authority, including the affixation of the relative site notice. Moreover, they had even verbally and cordially informed the plaintiffs about the development. However, even though they were aware of the development planned by the defendants, the plaintiffs did not register any objection with the Planning Authority;*
- 11. That the claim of the plaintiffs is being made in a purely emulatory spirit, and is motivated solely by rivalry against the defendants, so much so that the plaintiffs do not stand to gain any benefit from the raising of the dividing wall. It should also be emphasized that the plaintiffs are rarely in their property, since they reside abroad;*
- 12. That the plaintiffs' claims are therefore unfounded in fact and in law, and should be rejected in toto, and this for the reasons explained herein.*

Having seen the submissions filed by both parties regarding the first plea raised by the defendants.

Having seen that in the sitting held on the 14th March 2024 the case was adjourned for a preliminary judgement regarding this plea.

Having seen the acts of the proceedings.

Having considered

From the acts of the proceedings it appears the plaintiff Anthony Dervan was present in Malta when the sworn application was filed and it was he who confirmed the application on oath. He was also physically present in Malta on the days of the two hearings held so far in these proceedings, he in fact attended both of these sittings. However it also appears that the plaintiffs, whilst holding a residence in Malta, are currently living in Ireland where they seem to be now habitually resident.¹

Defendants contend that the physical presence in Malta, of the plaintiffs, is necessary and that in default of their presence they have to be properly represented. Defendants claim that this is not only a legal requirement but also a practical one since in the absence of the plaintiffs or a lawfully appointed representative, it will be impossible to effect service, on plaintiffs, with any official court documents.

Plaintiffs on the other hand insist that their constant physical presence in Malta is not required by any provision of law. In the course of the submissions made on plaintiffs' behalf it was also said that European Union regulations facilitate the service of judicial documents from one member state to another and that in any case service of court documents can be effected on their lawyer. There is no official minute in the acts of the proceedings in this sense, neither is there any official document which attests to this.

In the notes filed on their behalf each of the parties referred to caselaw supporting their views on the matter; neither of the parties referred to any provision of law in their submissions.

Having also considered

The matter of a plaintiff's continued physical presence in Malta during the course of judicial proceedings has long been debated in our courts and the reality is that there are some conflicting judgements on the matter. A review of these jurisprudence was carried out in the judgement given on the 17th November 2020 in the lawsuit **ESA Asset Management S.R.L. vs Solutions & Infrastructure Services Limited**².

L-uniċi żewġ sentenzi li ppronunzjaw in-nullita` tal-atti huma Perit Delia u Commonwealth. F'dawn iż-żewġ kawżi, l-atturi kienu assenti minn Malta fil-mument tal-preżentata tal-att promotur. Il-Qorti, f'Delia,

¹ It was submitted that they are living in Ireland until their claims against defendants are settled since they feel that until that happens they cannot live in the property they hold in Malta, which property is the subject of this present lawsuit.

² By the First Hall of the Civil Court.

iddikjarat li kienet qiegħda tippronunzja n-nullita` minħabba li l-preżenza tal-attur jew ta' prokuratur tiegħu kienet espressament meħtieġa a tenur tal-Artiklu 180(1)(a) tal-Kap 12.

Il-kwistjoni fil-bqija tal-kawżi ma kinitx dwar jekk l-attur kellux ikun preżenti fil-mument tal-preżentata tal-att promotur, imma dwar jekk kellux ikun preżenti fil-mori tas-smiegħ tal-kawża; forsi bl-eċċezzjoni ta' Miller li fiha l-prokuratur legali tal-atturi, assenti minn Malta, ippreżenta rikors tal-appell minn digriet tal-ewwel Qorti li ordnat li xorta waħda jinżammu s-seduti minkejja li l-atturi kienu msifrin. Dan jekk wiehed iqis ir-rikors tal-appell bħala att promotur. F'Miller, il-Qorti tal-Appell ċaħdet l-eċċezzjoni tan-nullita` tar-rikors tal-appell.

F'Commonwealth (ir-ritrattazzjoni) l-Qorti tal-Appell (Inferjuri) rriteniet li l-Qorti bħal speċi għalqu għajn waħda biss fejn l-att promotur ġie ppreżentat validament mill-attur jew prokuratur tiegħu preżenti f'Malta imbagħad l-attur jassentixxi ruħu temporanjament waqt is-smiegħ u jiġu ppreżentati atti oħrajn waqt l-assenza tiegħu.

Il-Qorti tal-Appell fi Blacker, f'Castelli u iktar tard il-Prim'Awla f'Zealand iddikjaraw il-ħtieġa tal-preżenza fiżika waqt is-smiegħ tal-kawżi.

L-Onorabbli Qorti tal-Appell (kolleġjalment komposta) f'Castelli iddikjarat li r-Regolamenti Ewropeja jitrattaw kif għandhom jiġu servuti l-atti ta' kawża miftuha f'pajjiż ieħor, iżda mhux il-metodoloġija ta' kif issir il-kawża nnifisha. U l-Prim'Awla f'Zealand, l-attur ma kienx residenti fl-Unjoni Ewropeja, u l-Prim'Awla (per Onor. Mark Chetchuti, illum is-S.T.O. Prim Imħallef) il-Qorti ma daħlitx fil-kweżit jekk residenti fl-Unjoni Ewropeja kellux ikun preżenti waqt is-smiegħ tal-kawża, għalkemm għamlet aċċenn għal dan il-punt. Fil-każ sussegwenti ta' Harris, l-atturi kienu Nglizi. Il-Qorti, ippreseduta mill-istess Onor. Imħallef, din id-darba ppronunzjat ruħha definittivament fis-sens li r-Regolamenti Ewropej bl-ebda mod ma rrestringew is-saħħa tal-liġi proċedurali Maltija.

Blacker iddeċidiet li l-prokuratur legali kien rappreżentant legittimu biex jirrappreżenta lill-attur assenti in forza tal-mandat professjonali, li ma jiġix sospiż bis-safar tal-mandant. Tal-istess fehma kienet Sarti. Mhux tal-istess fehma kienet Chadborn.

Mediterranea, Sarti, u Costruzioni ħadu pożizzjoni iktar radikali billi rrimarkaw li l-liġi proċedurali imkien ma ssemmi l-ħtieġa li l-partijiet

ikunu preżenti waqt is-smieġh tal-kawża; u għalhekk m'hemm l-ebda hteġa tal-preżenza tagħhom u lanqas il-preżenza ta' prokuratur jew il-hatra ta' kuratur. Dan indipendentement mill-konsegwenzi o meno tar-Regolamenti tal-Unjoni Ewropeja; għalkemm bl-applikazzjoni diretta tagħhom fil-liġi Maltija, dan huwa iktar u iktar il-każ. Skont Sarti, (li ċċitat lil Delia) il-hteġa tal-preżenza fiżika mhix għajr prassi bbażata fuq aspetti prattiċi u ekwi. Prattiċi li, skont Mediterranea, mhumix iktar meħtieġa f'kawżi bejn Malta u pajjiżi oħrajn fl-Unjoni Ewropeja, anke billi wiehed jista' faċilment ifittex għall-ispejjeż tal-kawża f'dawn il-pajjiżi ukoll.

Minkejja d-diverġenza tal-varji pronunzjamenti, l-ebda waħda mis-sentenzi msemmija ma ppronunzjat in-nullita` tal-atti, minhabba l-assenza tal-attur waqt is-smieġh tal-kawża. F'Castelli, Zealand, Harris u Chadborn il-Qorti ordnat lill-atturi biex jirregolaraw ruħhom.

After making this analysis the Court in that judgement concluded that since the law did not expressly require the plaintiff's physical presence during the course of the proceedings then neither would it impose such a requirement.

This Court however believes that the correct position is that taken by the Court in **Zealand Holdings Inc vs Il-Bank Esteru Amsterdam Trade Bank N.V**³ when it said that:

Il-Qrati tagħna kienu konsistenti dwar il-bzonn li parti jekk mhux preżenti f'Malta trid tkun rappreżentata minn persuna f'Malta u tidher għaliha (ara Lovers Transportainment BV vs George Smith pro et noe, (PA 25/01/2011; u Avukat Carmelo Castelli pro et noe vs Focal Maritime Services Limited, App Civ 03/02/2012).

Dan ma jfissirx pero illi jekk parti tinsab sprovista minn rappreżentanza f'Malta, allura dan iwassal immedjatement għal nullita tal-proceduri. Din in-nullita mhix imposta u anqas tirrizulta mill-ligi. B'daqshekk ma jfissirx pero illi sitwazzjoni simili tista' tithalla jew tigi permessa u l-kawża tkompli miexja. Li kieku l-kwistjoni tar-rappreżentanza tirrigwarda l-konvenut, il-ligi tagħti indikazzjonijiet cari dwar x'jista jsir biex il-proceduri jitkomplew għax wara kollox hu primarjament fl-interess ta' attur li l-proceduri jitkomplew fil-konfront tal-persuna li kontra tieghu tkun saret il-pretensjoni. Il-ligi tagħti l-fakolta tan-nomina ta' kuraturi biex jirrapreżentaw lill-assenti. Fil-kaz invers pero, meta l-attur nnifsu hu assenti, hu fl-interess tieghu sabiex

³ Decided on the 29th April 2014 by the First Hall of the Civil Court.

juri l-interess guridiku tieghu li jehtieg li l-atti jigu proceduralment korretti biex jigi sodisfatt l-interess reali tal-istess attur fl-azzjoni u jigi assigurat fost affarijiet ohra illi f'Malta hawn rapprezentant li jista' jipprezenta atti fil-Qorti jew jircievi jew jigi notifikat bl-atti u ordnijiet jew digrieti tal-Qorti u jigu salvagwardati spejjez gudizjarji⁴ skond l-artikolu 1005 tal-Kap. 12 (ara f'dan is-sens Commonwealth Educational Society vs Camilleri, App Inf 2/06/2003).

Il-kaz sub iudice mhux wiehed fejn l-attur hu citaddin u enti li tiffirma parti minn pajjiz parti mill-Unjoni Ewropea, fejn jistghu jitqajmu argument dwar in-necessita tal-prezenza fizika o meno tal-parti jew rapprezentant taghha, peress li f'dan il-kaz is-socjeta attrici u d-direttur li halef ir-rikors guramentat huma minn barra l-Unjoni Ewropea.

Il-Qorti tqis li l-prezenza f'forma ta' mandatarju hi necessarja ghal prosegwiment tal-kawza biex l-atti jkunu korretti u d-drittijiet u obbligi tal-partijiet jigu salvagwardati pero l-Qorti ma taqbilx li f'dan l-istadju wara li l-kawza giet prezentata kif trid il-ligi, in-nuqqas ta' mandatarju li jirraprezenta s-socjeta attrici jista' jwassal per se ghan-nullita tal-proceduri, ghalkemm jista' xorta jaghti lok ghal provvedimenti ohra mill-Qorti biex il-pozizzjoni tigi regolarizzata jew determinata fin-nuqqas.

The same views were expressed by in a slightly later judgement: **Hannah Harris vs Anthony Spiteri et**⁵. The Court in that case, after referring to some judgements which held opposing views, and after referring to jurisprudence which established the principle that the need for plaintiff's continued presence in Malta can be inferred from various provisions of the COCP, concluded that despite Regulations providing for direct service of judicial documents within the European Union, and despite Regulations simplifying crossborder execution of judgements within the European Union, parties to litigation in Malta should nonetheless be represented by a mandatory⁶.

Kif intqal fis-sentenza Commonwealth Educational Society Limited vs Adriana Camilleri (App Inf 02/06/2003):

“Izda kif jista' jigi argumentat minn xi normi procedurali stabbiliti fil-Kodici ta' Organizazzjoni u Proceduri Civili,

⁴ The emphasis is of this Court.

⁵ Decided on the 7th October 2014.

⁶ The plaintiff and his representative in the Harris case resided in the United Kingdom, which in 2014 was a member state of the European Union.

“esistono varie disposizioni delle quali si deve dedurre che nello spirito di quelle leggi chiunque e` parte in una causa deve essere presente in queste isole per tutto il corso del giudizio, e qualora se ne assente deve farvisi rappresentare da un procuratore: tali sono ad esempio le disposizioni per cui viene ordinata la notificazione di taluni atti alla parte stessa, o si indicano le persone che possono presentare scritture o trattano della comparizione o non comparizione delle parti alla trattazione della causa (articoli 171, 201, 207 inciso primo, 208, 214, 221, 225 e 234 delle dette leggi – illum Art 152, 174, 180, 182, 187, 195, 199 u 209 tal-Kap 12)” – “Emilia Miller Blacker –vs- Maria Costantina Howard Mills Mattei”, Appell Civili, 16 ta’ Dicembru 1921.

Huwa desumibbli minn dan dedott illi min jipprezenta att gudizzjarju jrid ikun prezenti fil-gurisdizzjoni Maltija fil-mument tal-prezentazzjoni ta’ l-att u jekk ma jkunx, allura l-att ghandu jigi prezentat permezz ta’ mandatarju jew prokuratur. Jekk dan ma jsirx dak l-att jigi ritenut null. Il-Qrati taghna kienu jakkordaw biss certa liberalita` ta’ gudizzju fejn wara l-prezentata valida ta’ l-att promotur, dak li jkun jassentixxi ruhu temporanjament fil-kors tal-proceduri u fl-intervall jigu ntavolati atti ohra f’ismu. F’kazijiet analogi, kif bosta drabi ritenut, il-mandat ta’ l-avukat jew prokuratur legali ma jispiccax u lanqas jigi sospiz bis-safar talmandanti. U allura dawn, in forza tal-Art. 180, jistghu jipprezentaw skritturi ghallmandanti taghhom. A propozitu jghoddu d-decizjonijiet fl-ismijiet “Neg. Antonio G. Agius –vs- Samuel Lebet Hazan”, Appell Civili, 28 ta’ Novembru 1883, “Tabib Dr. Joseph Ellul –vs- Jos. G. Coleiro”, Appell Civili, 24 ta’ Jannar 1964, “Avukat Dr. Francis Portanier –vs- Dr. Frank Chetcuti et noe”, Appell Civili, 13 ta’ Novembru 1967 u “Adrian Richard Margot –vs- Alfred Galea et”, Appell Civili, 31 ta’ Lulju 1979.”

Fil-fatt il-Qorti tqis li d-decizjoni fuq il-mandat implicitu tal-avukat kif argumentata mill-istess Qorti fil-kawza Carmelo Farrugia vs Grezzju Farrugia et (App Inf 16/03/2005) ghandha tigi miftehma f’dan is-sens limitat biss.

Il-kwistjoni quddiem din il-Qorti mhix ir-rapprezentanza tal-prokuratur fil-mument li nfethet ilkawza peress illi l-prokuratur kien f’Malta meta saret il-kawza izda n-nuqqas tal-mandant u mandatarju li juri li huma persuni li ghandhom prezenza abitwali u regolari f’Malta. Hu indiskuss illi l-mandant u l-mandatarju f’dan il-kaz huma residenti

abitwalment fl-Ingilterra u ghalhekk ma hemmx il-prezenza taghhom f'Malta waqt il-kawza. Dan imur kontra dak li jistabilixxu d-decizjonijiet imsemmija aktar il-fuq.

Il-Qorti hi konsapevoli ta' decizjonijiet ricenti ta' din il-Qorti diversament preseduta fl-ismijiet Gian Domenico Sarti vs Palazzo Events Limited (PA 06.03/2014) u Mediterranea Distribuzione Srl vs Dr. Richard Galea Debono noe (PA 16/07/2012). Dawn id-decizjonijiet imorru kontra d-decizjonijiet imsemmija aktar il-fuq. Ir-ragunijiet fil-qosor huma l-kuncett ta' moviment hieles ghal cittadini tal-Unjoni Ewropea u aktar minn hekk il-facilita li tinnotifika atti gudizjarji fl-Unjoni Ewropea bir-regolament 1393/2007 u proceduri ta' rikonoxximent u esekuzzjoni ta' sentenzi fi stati membri tal-Unjoni Ewropea bir-regolament 44/2001.

Din il-Qorti ma taqbilx li dawn ir-regolamenti b'xi mod irristringew jew naqsu s-sahha tal-ligi procedurali Maltija fil-varji artikoli taghha kif imsemmija fil-kawza Commonwealth Educational Society Limited vs Adriana Camilleri. Hu minnu illi r-regolamenti Ewropej iffacilitaw u uniformizzaw proceduri ta' notifika u esekuzzjoni ta' sentenzi pero bl-ebda mod ma abrogaw jew issubordinaw l-effetti tal-ligijiet procedurali tal-varji Stati Membri. Ghalhekk dak li kien applikabbli fil-bidu tas-seklu ghoxrin ghadu applikabbli bl-istess mod illum billi filvarji artikoli tal-ligi tal-procedura hu indikattiv il-bzonn tal-prezenza regolari tal-atturi jew irrapprezentant tieghu f'Malta biex il-proceduri jkunu kompleti u jigi evitati kwistjonijiet ta' integrita ta' gudizzju. Basta li din il-Qorti issemmi biss l-artikolu 199 tal-Kap. 12 fejn fin-nuqqas tal-prezenza tal-attur u d-difensur tieghu ghal kawza, il-Qorti tista' tikkancella l-istess kawza. Dan l-artikolu ma jistax jitqies inapplikabbli semplicement ghax ir-regolament 1393/2007 jiffacilita proceduri ta' notifika.*

B'daqshekk ma jfissirx, kif qed jitlob ir-rikorrent illi n-nuqqas ta' rapprezentanza idonea fil-prosegwiment tal-kawza jwassal ghall-annullament jew kancellament tal-proceduri. Dan mhux impost u anqas jirrizulta mill-ligi. Pero b'daqshekk il-Qorti ma tistax tippermetti li proceduri jitkomplew fl-istat li qeghdin.

In accordance with these principles, with which this Court fully concurs, it is necessary for the plaintiffs in these present proceedings to be properly represented by a mandatory.

Wherefore, the Court is upholding the first plea of the defendants and is consequently directing the plaintiffs to regularise their position within a month. The judicial costs of the proceedings determined by this partial judgement are to be borne by the plaintiffs.

**HON MADAM JUSTICE
DR. DOREEN CLARKE**

**DEPUTY REGISTRAR
MARVIC PSAILA**