



CIVIL COURT, FIRST HALL

The Hon Mr Justice Henri Mizzi

17 September 2024

No: 9

Sworn Application No. 151/2020

Pierre Ellul and Anika Psaila Savona

v

Lorna Borg

and

Peter Benson

Introduction¹

1. The parties to this case each own a tenement within a block in Valletta. Pierre Ellul and Anika Psaila Savona (the “claimants”) are the owners of the tenement at ground-floor level. The entrance to this tenement is at 43, Battery Street (“No. 43”). Lorna Borg owned apartment number 2 (“apartment 2”) within the block, which she eventually sold to Peter

¹ This judgment is being delivered in the English language pursuant to the court’s order, set out in the minutes of the hearing held on 1 July 2022, that the proceedings should continue in English.

Benson. Shortly after selling apartment 2, she acquired apartment number 3 (“apartment 3”). Both these apartments, as well as the other apartment above them, have an entrance from St Ursula Street.

2. While she still owned apartment 2 and later when she bought apartment 3, Lorna Borg commissioned the construction of what can be called passages. These passages serve to internally interconnect apartment 2 and apartment 3 respectively. Each has been constructed over part of the yard which forms part of No. 43, and each has a large window overlooking the said yard. It should be noted that the term ‘passage’ is not entirely precise. The structure in question functions as a passage, a bridge and even as a balcony. The court will use the term ‘passages’ for convenience.
3. The claimants assert that passages were built without entitlement over what is now their property, and they seek to have them removed. Lorna Borg and Peter Benson disagree. This judgment will decide who has the better case.

The claimants’ case

4. The claimants advanced the following demands:
 1. Tiddikjara li l-konvenuti, jew min minnhom, ma kellhomx dritt li jibnu jew ikollhom, il-passagg li jinsab fuq l-arja tal-bitha tal-atturi fil-fond taghhom 43, Triq il-Batterija, Il-Belt.
 2. Tordna lill-konvenuti sabiex, fi zmien qasir u perentorju, inehhu il-kostruzzjoni li ghamlu, jew ippermettew, fuq l-arja tal-bitha tal-atturi fil-fond taghhom 43, Triq il-Batterija, Il-Belt.
 3. Tawtorizza lill-atturi sabiex, jekk il-konvenuti jonqsu li jnehhu l-istess fiz-zmien lilhom koncess, l-istess atturi, okkorrendo b’periti appuntati mill-Qorti jnehhu l-istess a spejjez tal-konvenuti.

Bl-ispejjez inkluzi dawk tal-ittra ufficjali tal-21 ta’ Gunju 2016 u tal-5 ta’ Lulju 2018 kontra l-konvenuti li jibqghu minn issa ngunti ghas-subizzjoni.

5. The demands were advanced on the basis of the following premises:

Illi l-atturi huma propjetarji tal-fond 43, Triq il-Batterija l-Belt, liema fond jikkonsisti f’dar b’bitha interna, liema dar hija sottoposta ghal erba’ apartamenti, l-access ghal dawn l-apartamenti huwa min-numru 264, Triq Sant’Ursola, Il-Belt Valletta.

Illi fis-sena 2003 Lorna Borg, li kienet is-sid ta’ apartment Numru 2, 264 Triq Sant’ Ursula, l-Belt, kienet abbuzivament u illegalment qabdet u bniet passagg fl-arja tal-istess bitha tal-atturi, u b’hekk gongiet kmamar differenti fuq l-istess sular u kkrejat apartment, bil-

konsegwenza li ghalqet l-arja u d-dawl tal-istess atturi, u ledietilhom id-drittijiet patrimonjali taghhom.

Illi fit-3 ta' Settembru 2009 l-istess Lorna Borg bieghet l-apartament Numru 2, 264 Triq Sant' Ursula, l-Belt, lill-konvenut Peter Benson.

Illi sussegwentement fil-15 ta' Jannar 2010 l-istess Lorna Borg xtrat apartament numru 3, 264 Triq Sant' Ursula, l-Belt, u ghamlet l-istess haga li ghamlet fl-apartament numru 2, cioe abuzivament u illegalment bniet passagg iehor fl-arja tal-istess bitha tal-atturi, u b'hekk gongiet kmamar differenti fuq l-istess sular u kkrejat appartament, bil-konsegwenza li komplet taghlaq l-arja u d-dawl tal-atturi, u tledilhom id-drittijiet patrimonjali taghhom.

Illi l-konvenuti gew interpellati diversi drabi, anke ufficjalment sabiex jersqu ghal diskussjonijiet, jew sabiex inehhu l-kostruzzjoni li ghamlu, u intalbu izda dawn baqghu inadempjenti.

Lorna Borg's defence

6. Lorna Borg's defences are as follows:

1. Illi preliminarjament u in primis l-atturi iridu jippruvaw li huma sidien tal-bitha interna u l-arja sovrapposta u ghaldaqstant li l-istess mhumix partijiet komuni ai termini tal-Att Dwar il-*Condominia*, Kap 398 tal-Ligijiet ta' Malta;
2. Illi filwaqt li m'hemmx kontestazzjoni li l-esponenti applikat ghal permessi ta' zvilupp sabiex jinbnew il-pontijiet mertu tal-proceduri odjerni li jinsabu fil-livell tal-appartamenti numru 2 u numru 3 ta' 264, Triq Sant' Ursula, l-Belt, l-istess pontijiet saru bil-kunsens tal-kondomini prezenti fis-sena 2003 u 2010 ai termini tal-Att Dwar il-*Condominia*, Kap 398 tal-Ligijiet ta' Malta u dan minghajr ebda htiega ta' att pubbliku;
3. Illi minghajr preġudizzju ghas-sueċċepit meta l-atturi xtraw il-fond nru 43, Triq il-Batterija, il-Belt fis-sena 2012 huma kienu ben konsapevoli tal-pontijiet mibnija u prezenti u ma gabu ebda kontestazzjoni dwar l-istess jew rizervaw drittijiet ta' azzjoni fl-att ta' akkwist u dan b'acċettazzjoni ċara tal-istat tal-propjeta u pontijiet prezenti;
4. Illi minghajr preġudizzju ghas-sueċċepit jirrizulta li l-appartament numru 4, 264, Triq Sant' Ursula, l-Belt ukoll ghandu pont li huwa sovrappost ghal pontijiet mertu tal-proceduri odjerni u liema pont kien gja prezenti meta inbnew il-pontijiet fis-sular tal-appartament numru 2 u 3;
5. Illi minghajr preġudizzju ghas-sueċċepit l-atturi ma sofrew ebda limitazzjoni tad-drittijiet taghhom bil-kostruzzjoni tal-pontijiet mertu tal-proceduri odjerni;

7. She supplemented her defences with the following factual assertions:

1. Illi fis-sena 2003 jiena applikajt ghal permess nru 2950/2003 sabiex nibni pont fis-sular tal-appartament numru 2, 264, Triq Sant' Ursula, l-Belt wara li ksibt il-permess tal-kondomini kollha u speċifikament tal-familja Bonnici li jigu is-sidien preċedenti tal-fond nru 43, Triq il-Batterija, il-Belt;
2. Illi meta applikajt ghal tali permess kien hemm gja pont simili fis-sular tal-appartament nru 4, 264, Triq Sant' Ursula, l-Belt;
3. Illi fis-sena 2010 wara li bieghajt l-appartament numru 2, 264, Triq Sant' Ursula, l-Belt u xtrajt l-appartament numru 3, 264, Triq Sant' Ursula, il-Belt applikajt ghal permess numru

3367/2010 sabiex nibni pont ukoll fis-sular tal-appartament numru 3 u dan wara li kont ergajt ksibt il-permess tal-kondomini kollha u speċifikament tal-familja Bonnici;

4. Illi jiena qatt ma kelli problemi mall-familja Bonnici jew ma kondomini ohra fuq l-ezistenza tal-pontijiet mertu tal-proċeduri odjerni sakemm ma xtraw il-fond numru 43, il-Batterija l-Belt l-atturi;
5. Illi ngħid ukoll li l-kontestazzjoni qamet biss wara li jiena saqsejt lill-atturi jekk kienux disposti jiffirmaw att pubbliku u dan biss sabiex jiġu evitati proċeduri kontenzjużi bħal dawk odjerni fil-futur;
6. Illi kien wara li jiena kkomunikajt mall-atturi li huma bdew jitolbu rizarċiment mingħand. Qabel dik id-data qatt ma wrew li kienu qed joġġezzjonaw għall-imsemmija pontijiet, u ma jidhirx mill-kuntratti tal-akkwist tagħhom li rriservaw xi drittijiet dwar dawk il-pontijiet meta xtraw il-fond fis-sena 2012;

Peter Benson's defence

8. Peter Benson's defences were set out as follows:

1. That preliminarily, the defendant has no juridical relationship with the plaintiffs given that he did not build the passageway himself; however when he acquired apartment number 2, in number 264, St. Ursula Street, Valletta, the passageway was already there;
2. That also preliminarily and without prejudice to the aforesaid, it was not the defendant that build the passageway, however it was the other defendant in this case Lorna Borg. Therefore the defendant is non-suited in this case and must therefore be freed from the effects and observance of the judgment.
3. That also preliminarily and without prejudice to the aforesaid, it was not the defendant that build the passageway; but it was the other defendant in this case Lorna Borg and therefore the defendant should not, in any case, be condemned to pay any expenses or for any demolition works or for any other works that could be ordered to be done by this Honourable Court;
4. That preliminarily and alternatively to the aforesaid, the plaintiffs must bring proof that they are the owners of the internal shaft and the overlying airspace meaning that the said internal shaft and overlying airspace are not common parts according to the Condominium Act, Chapter 398 of the Laws of Malta;
5. That alternatively and on the merits of the case, the works carried out by the other co-defendant Lorna Borg were not illegal and were not carried out abusively, this taking account and consideration of the fact that the relative works to the apartment of the defendant (number 2, in number 264, St. Ursula Street), were (and still are) covered with the necessary permits for their construction as well as with the consensus of the condomini of the years 2002 and 2010 according to the Condominium Act, Chapter 398 of the Laws of Malta and this without any need for a public deed, therefore there was nothing illegal and abusive in the construction of said passageway;
6. That without any prejudice to the aforesaid, when the plaintiffs acquired property number 43, Triq il-Batterija, Valletta in the year 2012, all the passages about which the plaintiffs are now making this case were already built and were visible, therefore the plaintiffs were well aware about the presence of the said passages at the moment of acquiring their apartment. They did not make any contestation about same, neither did they reserve any litigious rights and this with clear acceptance of the state of the property and the passages;

7. That without any prejudice to the aforesaid, the plaintiffs did not suffer any limitation to their rights as a consequence of the construction of the passageway in the exponent's apartment which is the subject matter of these proceedings;
 8. That without any prejudice to the aforesaid, the plaintiffs did not suffer any limitation to their rights as a consequence of the construction of the passageway in the exponent's apartment which is the subject matter of these proceedings;
 9. That alternatively and without prejudice to the aforesaid, the remedy prayed for – that is the demolition of the passages – is excessive taking into account the physical and structural aspects of the whole condominium and is absolutely not proportional to the damages that the plaintiffs allegedly claim to have suffered by way of any loss of light and air.
9. Mr Benson supplemented his defences with the following factual assertions:
1. I declare that I bought the apartment number 2, in number 264, St. Ursula Street, Valletta, as one which already had the passage at time of purchase. This will result through the proof that I am to produce. I bought my apartment in the year 2009.
 2. Nobody told me that the passage was illegal or abusive and the first time I heard about this allegation was many years after I bought the apartment, definitely more than six or seven years after I bought the apartment.
 3. From the time I bought the apartment till now nothing has changed in the internal yard, and it is in the exact same way as when I bought the apartment. This internal space is still being used (as it always was) as a service shaft. It contains many pipes and other services. In fact, this space isn't an internal yard which could be used for recreational purposes.
 4. That in any case, the passage about which this case is about is not obstructing any air or light.

The facts

10. There is not much that separates the parties in so far as the relevant facts are concerned. There is agreement on the following:
- a. Lorna Borg owned apartment 2. Originally this consisted, so to speak, of two sections. There were rooms on the St Ursula Street side of the block; and rooms on the Battery Street side. All the rooms were on the same floor, but they were not internally interconnected. To traverse from one set of rooms to the other, one had to use a landing forming part of the common parts of the block. In or around 2003, Lorna Borg built a passage over part of the yard of No. 43 thereby interconnecting the two sections of apartment 2.²
 - b. She sold apartment 2 to Peter Benson in 2009.

² This can be seen on the (then 'proposed') plan at page 221.

- c. After selling apartment 2, Lorna Borg bought apartment 3 in 2010. The apartment had the same issue as did apartment 2, in that it was not internally interconnected. After having bought the apartment, she built a passage like the one she had built interconnecting apartment 2.³
- d. Each passage overlooks the yard that belongs to the claimants through a large window.⁴
- e. The claimants bought No. 43 in October of 2012. At the time of this purchase, the passage interconnecting apartment 2 had already been built.
- f. In or around 2014, Lorna Borg wanted to sell apartment 3. The notary who had been tasked with the transaction asked for evidence, in the form of a public deed, that she was entitled to build the passage that served to interconnect apartment 3. Lorna Borg had no such deed. She therefore contacted the claimants and asked them to sign a deed to such effect. Lorna Borg did not expect to have to pay any compensation to the claimants. The claimants, who learned that the passages had been built by Lorna Borg from the discussions that ensued, expected compensation. Although a level of compensation was eventually agreed in principle, no deed was signed, as the claimants and Ms Borg failed to come to terms on an issue regarding a warranty.

11. There is a measure of disagreement as regards the following points:

- a. Lorna Borg contends that before she built the passage interconnecting apartment 2, there was already a similar passage in the apartment above apartment 3.

In his closing submissions, counsel to the claimants contended that there is no evidence to this effect. This is not quite so. Lorna Borg testified to this effect, and she was not challenged on this point in cross-examination.⁵ Furthermore, there is evidence to corroborate her statement. Perit John Demicoli, who was commissioned

³ This can be seen on the plan at page 239 (figure 08).

⁴ See the cross-examination of Perit John Demicoli on 21 May 2024.

⁵ Affidavit, para. 13 at page 198; cross-examination on 21 May 2024

by Lorna Borg and Peter Benson to prepare an *ex parte* report, testified that although he could not gain access that would have allowed him to see the passage himself, he saw documents that indicate it exists. He did not indicate what those documents were. There is one document in the file which, the court surmises, Perit Demicoli might have been referring to. This is Document L3, which is a copy of the planning permit that Ms Borg had obtained to build the passage in apartment 2 in or around 2002. The plan of the (then) existing second floor shows what is said to be a ‘Closed Balcony Above’,⁶ which could well have been the passage at the level above apartment 3.⁷ There is also what appears to be a copy of a statement which Lorna Borg says she procured from members of the Bonnici family, prior owners of the block (including No. 43).⁸ The claimants did not request that this statement be expunged. As it remained in the record, and as its content was not challenged factually by the claimants, it must be considered, even if it cannot be considered to be as weighty as it might otherwise have been.

All considered, the court finds it likely that there is a passage at the level of the apartment above apartment 3 and that that passage was built before the one built by Lorna Borg in or around 2003.

- b. In his closing submissions, counsel to the claimants made the point that the evidence as to when the passage at apartment 3 was built is nebulous. His point, presumably, was that there is no clear evidence that it was built before his clients’ acquisition of their apartment in 2012.

It is true that the evidence in this regard is not the best. But to the extent that it is relevant and necessary to do so, the court must come to a view based on the evidence before it.

⁶ See page 221

⁷ It certainly could not have been the passage at apartment 3, as we know that that was built after Lorna Borg bought that apartment in 2010.

⁸ Page 210

Lorna Borg sought planning permission for the passage in question in 2010 (PA3367/10), the same year in which she acquired apartment 3. A copy of the permit is in the record, but it is undated.⁹ Lorna Borg testified to the effect that the passage was built soon after she acquired apartment 3.¹⁰ This evidence was not challenged in cross-examination.¹¹

Finally, the claimants made no suggestion, in their evidence, that the passage was built after they acquired No. 43. One would have expected that, had the passage been built after October 2012, then the claimants would have noticed or would have been alerted to it.

Based on the evidence at hand, the court concludes that the passage interconnecting apartment 3 was likely to have been built before the claimants acquired No. 43.

- c. The claimants contend that the passages have a significant impact on their enjoyment of their yard.

As will be seen, the court considers this point to be inconsequential, and so it need not make a factual finding in this regard.

- d. Lorna Borg maintains that when she built the passage at apartment 2, she had obtained the consent of the Bonnici family as well as that of the other owners of apartments within the block.¹² She further says that when she built the passage at apartment 3, there was no need to obtain consent, because at the time it was sufficient to have a notice affixed to the façade.¹³

Lorna Borg could have produced better corroboration, in the form of testimony by then then owners. She failed to do so, for whatever reason. Still, she testified to this

⁹ Pages 206 - 209

¹⁰ Affidavit, para. 8, page 200

¹¹ Cross-examination on 21 May 2024

¹² Affidavit, para. 4, page 199

¹³ *Ibid*, paras. 6 and 7

effect herself, and her testimony went unchallenged on cross-examination. Furthermore: (i) there is evidence that the other owners of apartments within the block were formally advised of Lorna Borg's plans as part of the planning process and do not appear to have objected (even if the notice was for planning, not civil, purposes);¹⁴ (ii) there is a copy of a statement by the Bonnici siblings confirming that they had no objection;¹⁵ (iii) there are the facts on the ground, namely that she built the passages without apparent opposition; and (iv) there is the sale to the claimants, which contains the clauses to which reference will be made below.

The court finds, as a matter of fact, that the passages were built without objection from then then owners of No. 43 and the other apartments within the block.

Claimants' title

12. In her first defence, Lorna Borg maintains that it is for the claimants to prove that they own the internal yard and its overlying airspace and, therefore, that both are not common parts.¹⁶ Peter Benson echoes this in his fourth defence.¹⁷

13. In his submissions on these defences, counsel to the claimants referred the court to paragraph 12 of his clients' deed of acquisition. This clause reads as follows:

“The yard which is being sold together with the property is subject to the servitude of the passage of drains and overlooking windows of the properties overlying the property being sold.”

14. This appears to confirm that the yard is the claimants' property. Although they did not formally withdraw their first and fourth defences respectively in so far as they concern the ownership of the yard, Lorna Borg and Peter Benson did not present any evidence to counter that presented by the claimants. Indeed, they did not press the point in relation to the yard itself in the closing arguments advanced by counsel on their behalf. This should quell any doubts. Had there been any, the fact that the yard is part of No. 43 and not a common part of the block is further confirmed in fact by the existence of a door from the

¹⁴ See Document L3, at pages 223 - 229

¹⁵ Document L2, at page 201

¹⁶ Page 128

¹⁷ Page 141

claimants' property directly onto it; and by the absence of access to it from the common parts of the block.

15. However, this is not the end of the matter in so far as the airspace over the yard is concerned.
16. It is of course trite law that ownership of property is up to the heavens, or at least as close thereto as one can get before reaching planning limits, flying machines, and other obstacles.
17. But ownership can also be limited by what one has purchased, in that one can purchase property that is limited vertically, or in terms of height. Indeed, this is the case here, as the property acquired by the claimants is described in their deed of acquisition as (*inter alia*):

“ .. underl[y]ing third party property ...”¹⁸

18. It was suggested in closing arguments by counsel to Mr Benson that this means that the airspace over part of the yard acquired by the claimants was up to the passage at apartment 2.
19. Now claimants may very well argue - though they did not do so explicitly - that the words cited at paragraph 17 above were intended as a reference to the apartments above No. 43 but excluding the passages in question. This is because the passages are not ‘third party property’ on account of the fact, as they argue, that Lorna Borg usurped that part of the airspace of the yard in which the passages were built.
20. But this would give a most unnatural meaning to the phrase in question as agreed at the relevant time; and would require one to read into it a qualification (‘unless the property is not owned by such third party’ or words to such effect) which does not appear to have been considered, let alone intended. At the time they contracted - in 2012 - the passages were, as a matter of fact, part of apartment 2 and (as determined above) of apartment 3. It follows that the phrase, as it would have been understood at the time by the parties to the claimants’

¹⁸ Description in the claimants’ deed of acquisition, at page 16

deed of acquisition, would have been a reference to the apartments above No. 43 as built, included the passages. It must be borne in mind that the parties to that deed were here concerned with defining the property being sold, and they did so in the customary way in such circumstances, that is by reference to the existing physical boundaries expressed in the generic phrase ‘third party property’. The clause was not dealing with the title of third parties to their property; the reference was, in effect, a proxy for the boundaries of No. 43.

21. Although less important, the court would add that, from the circumstances, it would appear to have been assumed, at that time, that the passages were owned by the defendants both by the Bonnicis and by the claimants. Indeed, it is probable, if not certain, that the claimants were not even aware that they were passages. To them, had they even noticed them,¹⁹ they were simply integral parts of the apartments above. The fact that the Bonnicis (for as long as they owned No. 43) as well as the claimants (between 2012 and 2015 or thereabouts) never claimed otherwise, corroborates this. Clause 12 of the contract buttresses this by assuming not only that the passages were to be taken as they existed in terms of structure, but also as having windows overlooking the claimants’ yard.
22. In other words, the only meaning that can properly be ascribed to the phrase in question is that the Bonnicis were selling, and the claimants were buying, No. 43 up to the level of the apartments above which, to their knowledge or belief at the time, included the passages. This must mean that the airspace over the yard which was sold and bought was up to the level of the passage forming part of apartment 2.
23. In short, the claimants never acquired title to that part of the airspace in which Lorna Borg built the two passages. The court therefore finds Lorna Borg’s first and Peter Benson’s fourth defences hold, but only to the extent that the claimants’ title to the airspace from the bottom of the passage in apartment 2 upwards has not been proved.

¹⁹ In her cross-examination, Anika Psaila Savona describes the speed with which No. 43 was acquired.

For the above reasons, the court dismisses the claims advanced by the claimants, with costs to be borne by them.

The Hon Mr Justice Henri Mizzi

Tristan Duca
Deputy Registrar