



**QORTI TAL-MAGISTRATI  
(GHAWDEX) GURISDIZZJONI SUPERJURI**

**MAGISTRAT DR.  
JOSETTE DEMICOLI**

Seduta tad-9 ta' Ottubru, 2012

Citazzjoni Numru. 82/2010

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

**Vs**

**Noel Scerri  
Pauline Scerri**

The Court,

By means of the sworn application, plaintiff is requesting this Court to declare and decide that defendants only enjoy a right of way over his drive-way and consequently the affixing of a door opening outwards and with window panes contained therein constitutes an aggravation of the

right of way enjoyed by them and should thus be removed and replaced by a metal or wooden solid door opening inwards with no apertures contained therein as the door was prior to the changes affected by the defendants.

In his reply defendants state that this Court should totally reject plaintiff's claims with costs.

Having seen the joint note filed on the 28th of September 2012.

Having seen all the acts of the case.

Having seen that the case has been deferred for judgement for today.

#### Facts of the Case

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

▪ Defendants are the owners of 'Villa Kortoll' in Kortoll Street, Xaghra, Gozo which they acquired from Ian and Janet Jackson by virtue of a deed in the records of Notary Dr Michael Refalo of the 28th February 2003. Defendants bought *'the semi-detached villa without number but named 'Kortoll Villa' in Kortoll Street, Xaghra, Gozo in part*

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

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

## Kopja Informali ta' Sentenza

- Thus Gozo Consolidated Building Contractors Company Limited imposed a servitude due to the fact that it was the owner of both the servient and dominant tenement.
- The door in question was originally fixed by Ian and Janet Jackson as a garage door made out of solid metal and opening inwards.
- Few years after defendants acquired the villa from the Jackson's they changed this door into a door that opens outwards and consisting of eight glass panes.

### Considerations

By means of this case, plaintiff is arguing that when defendants changed the garage door made out of solid metal and opening inwards into a door that opens outwards and having eight glass panes, similar to windows that are also transparent, they have aggravated the easement burdening the land belonging to him.

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

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

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

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

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<sup>1</sup> At fol. 65 of the acts of this case

<sup>2</sup> At fol 69 of the acts of this case

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

In the case in the names of **S.M.W. Cortis vs Lewis Press Limited**<sup>3</sup> the Court of Appeal held that:

*In mertu ta' din il-kwistjoni din il-Qorti tixtieq tissenjala dawk il-principji legali li ghandhom relevanza ghas-soluzzjoni ta' tali vertenza kif inkorporati fid-diversi artikoli tal-Kodici Civili. Fl-ewwel lok huwa stabbilit li kuntratt huwa konvenzjoni jew ftehim bejn tnejn minn nies jew izjed, illi bih tigi maghmula, regolata, jew mahlula obligazzjoni (Art. 960). Kull kuntratt maghmul skond il-ligi ghandu s-sahha ta' ligi ghal dawk li jkunu ghamluh (Art 992). Il-kuntratti ghandhom jigu ezegwiti bil-bona fidi, u jobbligaw mhux biss ghal dak li jinghad fihom, izda wkoll ghall-konsegwenzi kollha li ggib maghha l-obbligazzjoni skont ix-xorta taghha, bl-ekwita`, bl-uzu jew bil-ligi (Art.993). Meta l-kliem ta' konvenzjoni, mehud fis-sens li ghandu skont l-uzu fiz-zmien tal-kuntratt, hu car, ma hemmx lok ghall-interpretazzjoni (Art. 1002). Fid-dubbju, il-konvenzjoni tigi mfissra kontra dak li favur tieghu saret l-obbligazzjoni u favur dak li ntrabat bl-obbligazzjoni.*

*Servitu` li tinholq kemm b'ligi kif ukoll mill-fatt tal-bniedem, huwa jedd stabbilit ghall-vantagg ta' fond fuq fond ta' haddiehor, sabiex isir uzu minn dan il-fond ta' haddiehor jew sabiex ma jithalliex li sidu juza minnu kif irid. Is-servitu` ta' moghdija, in kwantu servitu` mhux kontinwa, tehtieg l-att pubbliku biex tohloq titolu (Art. 458). Kull min ghandu jedd ta' servitu` ghandu jinqeda b'dan il-jedd skond it-titolu tieghu, u ma jista' jaghmel la fil-fond serventi u lanqas fil-fond dominanti ebda tibdil li jista' jtaqqal izjed il-piz tal-fond serventi (Art. 475). Meta tigi stabbilita` servitu`, jitqies li maghha gie moghti dak kollu li hu mehtieg ghat-tgawdija ta' dik is-servitu` bl-anqas hsara li jista' jkun tal-fond serventi. (Art. 470). Finalment meta jkun hemm dubbju dwar l-estensjoni tas-servitu`, wiehed ghandu jinqeda biha fil-limiti ta' dak li hu mehtieg billi*

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<sup>3</sup> Civil Appeal No: 235/2000 decided on the 31<sup>st</sup> January, 2011

*jittiehdu b'qies id-destinazzjoni li l-fond dominanti kellu fiz-zmien li giet stabbilita` s-servitu` u l-uzu konvenjenti ta' dak il-fond, bl-anqas hsara tal-fond serventi (Art. 476).*

*Din il-Qorti ghamlet rassenja tad-diversi artikoli tal-Kodici Civili hawn fuq riportati billi thoss li l-ligi taghna hija provvida u la hemm htiega li wiehed jiccita awturi esteri u lanqas gurisprudenza estera jew nostrana hlief fejn jkunu mehtiega xi kjarifiki. Il-kliem tal-ligi huma cari, u daqstant hija cara l-klawsola li permezz taghha nghatat din is-servitu`. Konsegwentement kif jinghad fl-Artikolu 1002 meta l-kliem huma cari ma hemmx htiega ta' interpretazzjoni billi b'dak il-mod tista' tigi sostitwita l-intenzjoni tal-kontraenti b'dik tal-gudikant.*

*X'inhu dritt ta' moghdija? Dan huwa dritt li jippermetti sid ta' art li ma jkolliex access ghat-triq pubblika li jinghata dan l-access mit-triq pubblika ghall-art tieghu u vice versa. Dan x'jfisser? Ifisser illi minn jirreklama dan id-dritt ikollu d-dritt li jghaddi minn fuq il-fond serventi biex jaccedi ghal proprjeta` tieghu. Dan id-dritt ma jaghti ebda drittijiet ohra lis-sid tal-fond dominanti sakemm ma jirrizultax mit-titolu li permezz tieghu inholqot din is-servitu`.*

In the case **Louis Gauci vs Angela Attard**<sup>4</sup> the Court held:

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

*Dejjem in tema tad-disposizzjonijiet tal-ligi in subjecta materia dwar x'inhu permissibbli jew ipprojbit, lanqas ma jista' it-titolari ta' servitu jippretendi estensjoni tas-servitu (Artikolu 476) fuq il-motiv li l-ezercizzju taghha skond it-titolu jkun sar insufficcjenti minhabba tibdiliet. Il-kliem "dak kollu li hu mehtieg" fit-test ta' dan l-artikolu ghandu jigi interpretat b'referenza ghaz-zmien tal-kostituzzjoni tas-servitu u mhux in referenza ghall-izvilupp li jkun ghamel*

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<sup>4</sup> Writ of Summons No: 19/1992PS decided on 9<sup>th</sup> December, 2002

wara dak iz-zmien sid il-fond dominanti ("**Dr. Galea Naudi -vs- Mifsud**", Qorti ta' l-Appell, 27 ta' Mejju 1927; "**Fortunato Farrugia et -vs- Vincenzo Galea**", Prim' Awla, 19 ta' April, 1947;

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

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

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

In the same judgement, the Court stated that '*Il-ligi ma taghtina l-ebda definizzjoni jew tifsira ta' x'jikkostitwixxi stat oneruz jew gravuz f'kazijiet bhal dan izda tillimita ruhha biex tghid illi ma jista' jsir fil-fondi, kemm dak dominanti u dak serventi, "ebda tibdil li jista' itaqqal izjed il-piz tal-fond serventi" (Artikolu 475). Dan b'applikazzjoni tal-principju dettat mill-Artikolu 1031 tal-Kodici Civili fejn jiddisponi illi "kull wiehed iwiegeb ghall-hsara li tigrigi bi htija tieghu."* The Court proceeded by quoting from another judgement reported in Vol IX page 589 which latter judgement observed that "*La legge, vietando di far cosa, che rende piu` grave la servitu` del fondo inferiore, volle necessariamente intendere che il risultato dell' atto del proprietario superiore arrecchi un pregiudizio reale, non verificandosi il quale, l'atto dev'essere mantenuto. Il-pregudizio adunque sara` ognora la norma, che dovranno osservare il tribunale nel pronunciare. Non giustificando il proprietario del fondo inferiore un reale pregiudizio, le*



*opere nuove, che si facessero dal superiore, devono esser conservate.*"<sup>5</sup>

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

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

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

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

It is an established principle that the contracts must be executed and interpreted in good faith. There is no mentioning in the three contracts exhibited in the acts of this case as to the kind of door which had to be installed. However, it has emerged that the space in question was originally intended to be a garage as confirmed by the director of Gozo Consolidated Buildings Limited. The contracts unequivocally provide for a right of way in favour of Villa Kortoll. The fact that this right of way should remain *unobstructed at all times and in all manners* does not necessarily mean that the owners of the dominant tenement can do whatever they want because the space in front of this garage must remain unobstructed at all times. As has already been explained a servitude burdening a tenement is a limitation to the right to property and thus must be considered restrictively.

It is evident from the second paragraph of defendants' sworn reply that they admit that there has been an aggravation of the servitude but not in an appreciable manner. Now, the Court does not believe that there was a serious prejudice suffered by plaintiff just because the door originally opened inwards and now it opens outwards. In fact this space in front of the garage must remain unobstructed at all times. However, the same cannot be said of the glass panes. Defendants argue that no prejudice is being suffered by the servient tenement simply because the door includes glass panes as the defendants have every right to leave the doorway uncovered all day if they so wish. Although it is true that hypothetically defendants can leave the door open at all times however this is stretching the argument to the limit. In actual fact it has not transpired that defendants have left the door open at all times and it is hardly unlikely and illogical to do so. The space in question was always intended as a garage so much so that a normal garage door was installed. The right of way over plaintiff's land

was created in favour of the dominant tenement so that the owners could access their property because they had no access from the public road at the time and the buyers were not given any other right to open windows or apertures overlooking this land which belongs to plaintiff. Thus by changing a solid metal door into a door with glass panes the defendants constitutes an aggravation of the servitude.

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

1. Declares that in terms of the constitutive contract in the acts of Notary Michael Refalo dated 21<sup>st</sup> March 1988, the dominant tenement belonging to defendants enjoys the unobstructed right of way at all times and in all manners over the land in front of the adjacent villa and which is marked with the colour yellow on the plan attached with the mentioned contract.
2. Declares that the affixing of a door with window panes contained therein constitutes an aggravation of the servitude enjoyed by defendants' property over the plaintiff's property.
3. Consequently condemns defendants to substitute the present door with a metal or wooden door without any kind of aperture within two (2) months from today.
4. In case defendants fail to substitute the said mentioned door within the period stipulated, then plaintiff is authorized to substitute the present door as established by this Court at defendants' expense and under the direction and supervision of Vincent Ciliberti.

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

Kopja Informali ta' Sentenza

**< Sentenza Finali >**

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