



**CIVIL COURT
FIRST HALL
THE HON. MADAM JUSTICE ANNA FELICE**

Today 28th April, 2021

Sworn Application No: 979/2019 AF

Timothy Marshall Clark and his wife Laura Clark

VS

**Salem I.S. Alhenshiri in his capacity of Counsellor
attached to the Libyan Embassy duly authorised by the
said Libyan Embassy, in the name, in the interest and in
representation of the State of Libya, diplomatic identity
card #01720**

The Court,

Having seen the sworn application filed by the plaintiffs in the Maltese language which reads as follows:

L-esponenti akkwistaw permezz ta' Att tan-Nutar Jean Paul Farrugia tat-tnax (12) ta' Awwissu tas-sena elfejn u tlethax (2013), u dan mill-poter ta' Samuel u Emmy Gauci, il-fond ossia il-porzjon diviz ta' art tal-kejl superficjali ta' tlett elef mija u hamsin metru kwadru (3150 m.k.), maghrufa bhala 'Tas-Sellum', fil-vicinanze maghrufa bhala 'Tas-Salib', fil-Limiti tar-Rabat, Malta, u li hija accessibli minn passagg bir-rigel u bil-vettura u li jizbokka fi Triq is-Salib gewwa l-limiti tar-Rabat, Malta. (Dok. TMC 1).

L-esponenti, permezz ta' Att iehor tan-Nutar Jean Paul Farrugia, tas-sittax (16) ta' Lulju tas-sena elfejn u erbatax (2014) akkwistaw mill-poter ta' Carmelo u Catherine Fenech, il-fond ossia porzjon ohra diviza ta' art u li hija wkoll formanti parti mill-artijiet maghrufa 'Tas-Salib', fil-limiti tar-Rabat, tal-kejl superficjali ta' tlett mija u sebgha u sittin punt ghaxra metri kwadri (367.10 m.k.), accessibli mill-passagg suindikat. (Dok. TMC 2).

Sa minn meta l-esponenti akkwistaw l-imsemmija fondi, huma dejjem accedew ghall-imsemmija porzjonijiet ta' artijiet, mill-imsemmi passagg.

Madwar sentejn (2) ilu, il-konvenut arbitrarjament, abuzivament, u llegalment qabad u ghalaq l-imsemmi passagg, billi bena hajt adjacenti ghal mat-triq, fil-bokka ta' l-imsemmi passagg ghal mat-triq, kif ukoll, pogga fl-imsemmi passagg, blokk tal-konkos, u terrapien, u dan sabiex l-esponenti, u sidien ohra li ghandhom il-proprjeta' fl-inhawi, jigu mcahhda milli jaccedu ghall-proprjeta' taghhom mill-imsemmi passagg. (ritratti esebiti u mmarkati Dok. TMC 3).

Recentement u cioè nhar l-4 ta' Settembru tas-sena elfejn u tmintax (2018) l-esponenti qabad u fetah l-access ghall-imsemmi passagg, billi nehha l-hajt, u wahhal xatba u nehha it-terrapien, u l-blokki tal-konkos, bil-konsegwenza illi l-konvenut

ha passi kontra l-attur permezz ta' kawza ipprezentata fl-ismijiet 'Salem I.S. Alhenshiri vs Timothy Marshall Clark', (Rikors Guramentat numru 1098/2018 LSO), u li tinsab pendenti quddiem il-Prim'Awla tal-Qorti Civili, u differita ghad-29 ta' Ottubru, 2019. (Dok. TMC 4).

Permezz ta' ittra gudizzjarja datata is-7 ta' Jannar, 2019, l-esponenti kienu irrizervaw id-dritt taghhom kontra l-konvenuti, ghar-rigward il-passagg li tgawdi il-proprjeta' taghhom. (Dok. TMC 5).

Hija l-pretensjoni tal-esponenti illi l-proprjeta' taghhom suindikata, tgawdi minn dritt ta' passagg u access kif indikat.

Ghalhekk kellha ssir din il-kawza.

Intalbet din il-Qorti sabiex:

1. Tiddikjara u tiddeciedi illi l-fond ossia iz-zewg (2) porzjonijiet ta' artijiet suindikati, wahda tal-kejl superficjali ta' tlett elef mija u hamsin metru kwadru (3150 m.k.), maghrufa bhala 'Tas-Sellum', fil-vicinanze maghrufa bhala 'Tas-Salib', fil-Limiti tar-Rabat, Malta, u l-ohra tal-kejl superficjali ta' tlett mija u sebgha u sittin punt ghaxra metri kwadri (367.10 m.k.), maghrufa bhala 'Tas-Sellum', fil-vicinanze maghrufa bhala 'Tas-Salib', fil-limiti tar-Rabat, Malta, it-tnejn proprjeta' tal-esponenti, jgawdu servitu ta' passagg bir-rigel u bil-vettura, kif ukoll ta' access, mill-imsemmi passagg, indikat bl-ahmar, u mmarkati ittri 'A' u 'B' fuq l-annessa Pjanta mmarkata Dok. TMC 6, liema passagg jizbokka fi Triq is-Salib gewwa l-limiti tar-Rabat, Malta.
2. Tiddikjara illi bl-agir tieghu, l-intimat cahhad lill-esponenti mit-tgawdija ta' dan il-passagg, hekk kif indikat.
3. Konsegwentement tordna lill-intimat jirripristina, dan is-servitu, jekk ikun mehtieg, bil-hatra ta' perit nominat mill-Qorti.

4. Fin-nuqqas, tordna illi dawn ix-xogholijiet jigu esegwiti mir-rikorrenti ghas-spejjez ta' l-intimat.

Bl-ispejjez, inkluzi dawk tal-ittra gudizzjarja datata s-7 ta' Jannar, 2019, (Numru 59/2019), kontra l-intimat, minn issa ngunt ghas-subizzjoni.

Having seen the documents annexed to the sworn application.

Having seen the sworn reply filed by the defendant nomine in the Maltese language which reads as follows:

L-esponent nomine jiddikjara għall-finijiet u effetti kollha tal-Ligi li qed jintervieni f'dawn il-proceduri gudizzjarji esklussivament u limitatament biex jinvoka l-immunitajiet aktar 'l isfel riferiti stante li la hu u lanqas l-Istat Libjan m'huma ser jirrinunzjaw għal tali mmunitajiet u għalhekk mhumiex ser jissottomettu għall-gurisdizzjoni ta' din l-Onorabbli Qorti b'mod li f'dan ir-rigward l-esponent nomine, in vista tal-improponibilità tal-azzjoni odjerna qed jissollewa s-segwenti eccezzjonijiet prettament ta' natura interlokutorju lkoll relatati mat-tema tal-immunità u konsegwentement jeccepixxi bir-rispett.

Fl-ewwel lok, l-immunità tiegħu fil-kwalità diplomatika premissa mill-gurisdizzjoni civili ta' din l-Onorabbli Qorti u dan skond in-normi perentorji tad-Dritt Internazzjonali konswetudinarju li in effetti għandhom l-istatus gerarkiku ta' normi ta' Jus Cogens kif ukoll u senjatament ai termini tal-Artikolu 31 tal-Konvenzjoni ta' Vienna dwar ir-Relazzjonijiet Diplomatici rez applikabbli fil-gurisdizzjoni Maltija permezz tad-disposizzjonijiet rilevanti tal-Att dwar l-Immunitajiet u Privileggi Diplomatici (Kapitolu 191 tal-Ligijiet ta' Malta), tenut kont li ebda wahda mill-eccezzjonijiet previsti mid-disposizzjoni riferita m'huma applikabbli għall-kaz odjern b'mod li l-esponent għandu jigi liberat mill-osservanza tal-gudizzju.

Fit-tieni lok u minghajr pregudizzju għall-ewwel eccezzjoni, minnu sollevata, in kwantu li l-azzjoni odjerna hi diretta lejn l-Istat Libjan qed tigi eccepita l-immunità gurisdizzjonali tal-Istat Libjan minn din l-Onorabbli Qorti u dan ai termini tal-Artikolu 8 tal-konvenzjoni tal-Gnus Magħquda dwar l-Immunitajiet

Gurisdizzjonali tal-iStati u tal-Proprietà Tagħhom (2004) kif ukoll fuq l-iskorta tan-normi perentorji tad-Dritt Internazzjonali konswetudinarju li effettivament għandhom l-istatus gerarkiku ta' normi ta' Jus Cogens inkluz il-gurisprudenza kostanti ta' fora evoluti u d-duttrina stabbilita u konsegwentement l-iStat Libjan għandu jigi liberat mill-osservanza tal-gudizzju.

Mingħajr pregudizzju għall-eccezzjonijiet precedenti, stante li l-pussess u z-zamma tal-Ambaxxata Libjana f'Malta mill-iStat Libjan ut sic jikkostitwixxi "acta jure imperii" ossija att sovrani ta' natura statali intiz biex ikattar l-interessi ta' tali stat sovrani fit-territorju Malta bi skop purament ta' natura pubblika ma jista' jsir xejn gudizzjalment li b'xi mod jinvolvi lill-Ambaxxata Libjana la de proprio u lanqas fl-interess ta' terzi inkluz l-iStat Libjan molto più meta jitqiesu d-disposizzjonijiet tal-Artikolu 3 (1)a tal-Konvenzjoni surriferita tal-Gnus Magħquda li jirreferi għall-privileggi u l-immunitajiet li tgawdi inter alia Ambaxxata, f'dan il-kaz l-Ambaxxata Libjana. Dan jimplika li dawn l-privileggi u l-immunitajiet ma jistghu bl-ebda mod jigu disturbati. Il-fatt li r-rikorrenti ccitaw fil-gudizzju lill-Ambaxxata Libjana tramite l-esponent nomine, anke jekk dan sar in rappresentanza tal-iStat Libjanm l-integrità tal-gudizzju safa ivvizzat fis-sens li gew intralcjati l-privileggi u l-immunitajiet li tgawdi l-Ambaxxata Libjana oggettivament bi ksur tal-Konvenzjoni aktar 'il fuq imsemmija u tan-normi tad-Dritt Internazzjonali konswetudinarju. Għalhekk l-iStat Libjan għandu jigi liberat mill-osservanza tal-gudizzju.

Salv eccezzjonijiet ulterjuri jekk ikun il-kaz, wara li jigu indirizzati l-eccezzjonijiet ta' natura interlokutorju aktar 'il fuq sollevati.

Having seen that during the sitting of the 3rd March 2020, the Court ordered that the proceedings were to be conducted in the English language.

Having seen the note of submissions filed by the plaintiffs relating to the preliminary pleas raised by the defendant nomine.

Having seen that the case was adjourned for judgment for today on the preliminary pleas raised by the defendant nomine.

Having seen the acts of the proceedings.

Having Considered:

This action is known as the *actio confessoria servitutis* whereby the plaintiffs are demanding a declaration affirming the existence of a servitude, in this case a right of passage, in favour of their property.

The defendant nomine raised only three preliminary pleas and no pleas as to the merits of the case. By virtue of his first plea, the defendant nomine is invoking diplomatic immunity and by virtue of his second and third plea, which the Court shall consider as one, he is invoking state immunity.

Diplomatic Immunity

By means of his first plea, defendant noe pleads immunity in accordance with the '*peremptory norms of customary International Law*'. More specifically, in accordance with article 31 of the Vienna Convention on Diplomatic Relations.

The articles of this Convention have the force of law in Malta by virtue of the Diplomatic Immunities and Privileges Act, Chapter 191 of the Laws of Malta.

Article 31 of the Vienna Convention reads as follows:

1. *A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:*
 - a. *a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;*

- b. an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;*
 - c. an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.*
- 2. A diplomatic agent is not obliged to give evidence as a witness.*
- 3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.*
- 4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.*

The Court considers the defendant noe's first plea to be unfounded. Article 31 of the Vienna Convention concerns those instances whereby a diplomatic agent enjoys immunity from the jurisdiction of the receiving State and where the diplomatic agent is sued in his personal capacity and not in connection with his official duties.

In the present case, the defendant is not being sued in his personal capacity but in his capacity as Counsellor attached to the Libyan Embassy, on behalf and in the interest and in representation of the State of Libya.

A distinction must be made between diplomatic immunity and state immunity. As explained by the Civil Court First Hall in the case of Joseph Cassar et vs L-Avukat Muhammed El Ghirani noe, delivered on the 9th June 2014:

"L-Artikolu 31 tal-Konvenzjoni qiegħed jikkontempla għal dawk il-kazijiet fejn l-agent diplomatiku jista' jigi mharrek personalment. Kazijiet li m'humix konnessi mad-dmirijiet ufficjali tal-agent diplomatiku, u ta' natura privata. L-immunità diplomatika li jgawdi agent diplomatiku hi milli jigi mharrek personalment, salv għall-eccezzjonijiet li jissemmew fl-Artikolu 31. Mill-okkju tar-rikors guramentat hu evidenti li fil-kaz in ezami l-agent diplomatiku ma giex imharrek personalment izda biss bhala rapprezentant tal-Gvern Libjan. Din l-eccezzjoni m'hijiex titratta l-immunità ta' Stat milli jigi mharrek, imma ta' ufficjal diplomatiku. Eccezzjoni li għad trid tigi trattata kontestwalment mat-tieni eccezzjoni. Hemm distinzjoni bejn l-immunità diplomatika u l-immunità ta' Stat:-

"Diplomatic immunity and State (or sovereign) immunity are often confused. State immunity is the immunity of a State, and its officials and agents, from the jurisdiction of another State. Diplomatic immunity is accorded to the members of a diplomatic mission, and in the case of diplomatic agents amounts to almost total immunity from jurisdiction.

*Take a simple case: an ambassador contracts with a local decorator for the repainting of the embassy. The ambassador disputes the bill, but the decorator will not reduce it. How is this typical dispute to be resolved? Because the ambassador would in any event have diplomatic immunity, one might think that all the decorator can do is to urge his foreign ministry to put pressure on the ambassador or his government to pay or to negotiate a settlement. But in this case the ambassador would have signed the contract as part of his official functions, and therefore on behalf of his State. It is the sending State that is the party to the contract, not the ambassador.....So can the decorator sue the State? **Whether a State can be sued in a foreign court will depend on whether under the law of the receiving State a foreign State can claim immunity in the particular circumstances and, if so, whether that immunity is waived....** (enfazi mizjuda).*

*When considering legal proceedings in a matter in which a diplomat has been directly involved, it is crucial to analyse the situation or transaction to see if he is acting on behalf of his State or personally. Issuing legal proceedings against a diplomat when they should be against his State is pointless and will only cause delay and expense. To help to avoid confusion, when a member of a diplomatic mission signs a contract, lease or suchlike as part of his official functions, he should do so expressly on behalf of his State, and only the State should be named as the party” (**Handbook of International Law**, Anthony Aust, Cambridge University Press [2010] pagina 127)."*

Consequently, this plea is being dismissed.

State Immunity

The defendant noe also pleads state immunity in accordance with article 8 of the United Nations Convention on the Jurisdictional Immunities of States and their Property (2004) and on the strength of the peremptory norms of customary International Law. By virtue of his third and final plea, the defendant noe pleads that the possession and holding of the Libyan Embassy in Malta by the Libyan State constitutes an act *jure imperii* and that therefore the defendant noe cannot be sued in the Maltese Courts. In this regard, the defendant noe makes specific reference to article 3(1)(a) of the aforementioned United Nations Convention.

On the matter of the jurisdiction of the Maltese Civil Courts, article 742(1) of the Code of Organization and Civil Procedure, Chapter 12 of the Laws of Malta, stipulates that:

"Save as otherwise expressly provided by law, the civil courts of Malta shall have jurisdiction to try and determine all actions, without any distinction or privilege, concerning the persons hereinafter mentioned

...

(c) any person, in matters relating to property situate or existing in Malta;”

Nevertheless, state immunity is one of the basic principles of customary international law. Malta has not enacted state immunity legislation and it has neither signed nor ratified the 1972 European Convention on State Immunity or the United Nations Convention on the Jurisdictional Immunities of States and their Property (hereinafter referred to as the 'United Nations Convention'). In fact, the United Nations Convention has not yet been brought into force because it has not yet been ratified by the requisite number of countries. Therefore, state or sovereign immunity remains applicable in Malta as a principle of customary international law. However, the above mentioned international instruments remain useful tools for courts to address pleas of state immunity in that these instruments reflect in some respects customary international law.

The question of immunity is and always was a question of jurisdiction. In his book **Principles of Public International Law**, (Oxford University Press, 6th Edition, 2003) author Ian Brownlie begins his chapter on Privileges and Immunities of Foreign States by defining State immunity as follows:

“By licence the agents of one state may enter the territory of another and there act in their official capacity. The acts may include the disposition and even the use in the field of military forces and the exercise of jurisdiction in the specific sense of setting up courts and using power to enforce the findings of such courts. The privilege of the entrant in such cases stands against the exclusive power of the territorial sovereign to regulate, and to enforce decisions of its organs respecting, the territory and its population. A concomitant of the privilege to enter and remain is normally the existence of an immunity from the jurisdiction of the local courts and the local agencies of law enforcement. However, as a general principle this immunity is delimited by a right on the part of the receiving state to use reasonable force to prevent or

terminate activities which are in excess of the licences conferred or are otherwise in breach of international law.”¹

The same author explains that as regards the rationale behind jurisdictional immunity, the most commonly quoted statement on the principle is the judgment of the United States Supreme Court in *The Schooner Exchange v. McFaddon*, delivered by Chief Justice John Marshall in 1812, who referred to the jurisdiction of a state within its own territory as being ‘*necessarily exclusive and absolute*’. Chief Justice Marshall goes on to say:

“This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its object. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express licence, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest compelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.”

In this case, Chief Justice Marshall upheld immunity as claimed by the French Emperor, however, he also observed that sovereign immunity should be subject to certain exceptions, particularly where the sovereign acts in his personal capacity:

¹ Page 319

“Bynkershoek, a jurist of great reputation, has indeed maintained that the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual, and has quoted several cases in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant.

Without indicating any opinion on this question, it may safely be affirmed that there is a manifest distinction between the private property of the person who happens to be a prince and that military force which supports the sovereign power and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince and assuming the character of a private individual, but this he cannot be presumed to do with respect to any portion of that armed force which upholds his Crown and the nation he is entrusted to govern.”

Over the years, the doctrine of absolute immunity has been set aside. In her article *State Immunity and Employment Relationships* before the European Court of Human Rights, that appeared in the *Journal of European Law (ERA Forum)*, Issue 4, Volume 19, of April 2019, author Dr Lisa Rodgers explains that:

“Public international law allows the possibility for states to claim immunity from jurisdiction in relation to claims brought in foreign courts. It was felt that this immunity was necessary in order to respect state sovereignty and to promote good international relations and comity between states. At the outset, these rules were absolute, in the sense that there existed a customary rule that no state could be brought before the courts of another state for any matter. However, following the Second World War, the idea appeared in European jurisprudence particularly that where the state acted as a private party, it was no longer appropriate for that state to take advantage of the rules on immunity under public international law. As a matter of justice, the interests of the private parties interacting with states in this instance had to be considered. As a result,

there developed the idea of 'restrictive immunity', under which a state could not claim immunity for matters which involved the exercise of private functions."

One way of applying the principle of restrictive immunity is by referring to the *jure imperii* and *jure gestionis* distinction. In fact, this is the basis of one of the defendant's pleas. However, and in addition to the fact that the defendant did not produce a shred of evidence in support of his argument, classifying an act on the basis of the *jure imperii* and *jure gestionis* divide is no longer considered appropriate or favoured by the international instruments but rather the focus has shifted towards the subject matter of the issue brought before the courts.

In fact, with the conclusion of the 2004 United Nations Convention, the focus shifted more than ever before towards the nature of the conduct. Generally speaking, today's state immunity instruments, be it national or international, provide for a general principle of state immunity limited by a list of specific exceptions. These exceptions are usually based on commercial activity, contracts of employment, personal injury or damage to property, and waivers of immunity.

Author James Crawford in his book *Brownlie's Principles of International Law* (Oxford University Press, 8th Edition, 2012) explains that:

"The exercise of local jurisdiction in such cases is an assertion of the forum's right, acknowledged by international law, to deal with the consequences of unlawful acts on its territory."

In fact, relevant to the present case is article 13(a) of the United Nations Convention which states that:

"Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the determination of:

(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum;”

Similarly, article 9 the 1972 European Convention on State Immunity, 1972 states that:

“A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to:

- a. its rights or interests in, or its use or possession of, immovable property; or*
- b. its obligations arising out of its rights or interests in, or use or possession of, immovable property*

and the property is situated in the territory of the State of the forum.”

Turning to national legislation, it is essential that the Court refers to the UK State Immunity Act, 1978, as will be elaborated on further on in this judgment. Article 6 of this law reads as follows:

Ownership, possession and use of property.

- 1) A State is not immune as respects proceedings relating to—*
 - a) any interest of the State in, or its possession or use of, immovable property in the United Kingdom; or*
 - b) any obligation of the State arising out of its interest in, or its possession or use of, any such property.*
- 2) A State is not immune as respects proceedings relating to any interest of the State in movable or immovable property, being an interest arising by way of succession, gift or bona vacantia.*

- 3) *The fact that a State has or claims an interest in any property shall not preclude any court from exercising in respect of it any jurisdiction relating to the estates of deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts.*
- 4) *A court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property—*
 - a) *which is in the possession or control of a State; or in which a State claims an interest, if the State would not have been immune had the proceedings been brought against it or, in a case within paragraph*
 - b) *above, if the claim is neither admitted nor supported by prima facie evidence.*

The Court refers also to The United States Foreign States Immunity Act which in section 1605 provides for an exception to the jurisdictional immunity of a foreign state in any case *'in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue.'*

In the current case the plaintiffs are claiming an infringement of their right over immovable property situate in Malta and therefore, in terms of the above-mentioned legal instruments, the defendant now cannot invoke immunity from the jurisdiction of the Maltese courts.

On a final note, the Court refers to the case of AWT Handels Gesellschaft mbH vs Il-Bastiment M/V Dimitriy Polujan which remains the only Maltese judgment where reference was made to the subject of how state immunity is to be applied in Malta. In this case the Civil Court First Hall raised the issue of state immunity *ex officio*. By means of a decree dated 10th December 1997, the Court acceded to the plaintiff's request for the state of Ukraine, as the owner of the vessel which was the subject of those proceedings, to be called into the action as co defendant.

The Court accepted the plaintiff's argument that when it comes to Maltese public law, in the absence of an express provision, Maltese civil courts should look towards the practices of English courts for guidance. Maltese courts have in fact repeatedly affirmed the principle of applying English rules of common law whenever there is a lacuna in the Maltese system in public law. The Court referred to the case of *Callus vs Paris noe*, decided by the Court of Appeal on the 28th February 1969:

"Safejn il-prinċipji anterjorment aċċettati u applikati mill-Qrati tagħna fuq il-bażi tad-Dritt Pubbliku Inġliż ma ġewx spustati mill-Kostituzzjoni u huma kompatibbli magħha jew ma' xi liġi oħra ta' Malta, ma għandhomx bla raġuni jiġu mwarrba."

The Court in the *AWT Handels Gesellschaft* case went on to consider that in such cases, the English courts would consider the *jure imperii* and *jure gestionis* divide. The Court found that without any doubt, the activity conducted by Ukraine through its maritime fleet was commercial in nature, and the vessel in question formed part of that fleet. Therefore, the Court confirmed that jurisdiction on the State of Ukraine could be exercised as defendant in that case.

Therefore, this Court considers that in any case, if it were to apply the above mentioned principles to the present case, and apply the provisions of the UK State Immunity Act 1978, the defendant noe cannot invoke state immunity in the present case (i) due to the clear exception laid down in article 6 of that Act and (ii) in light of the complete lack of evidence to sustain the defendant noe's claim that by building a wall to prevent the plaintiffs from gaining access to the passage in question, he was carrying out an act *jure imperii*.

Consequently, this Court considers that the plea of state immunity is unfounded and therefore being dismissed.

For these reasons the Court is hereby dismissing the defendant nomine's preliminary pleas and orders the continuation of hearing of the cause.

The costs of the proceedings determined by this partial judgment are to be borne by the defendant.

JUDGE

DEP/REG