



**Courts of Magistrates (Gozo)
Superior Jurisdiction
General Section**

**Magistrate Dottor Brigitte Sultana LL.D., LL.M (Cardiff) Adv. Trib.
Eccl. Melit.**

Sitting of Friday, 26th November 2021

Sworn application number:- 74/2016BS

Michael Debrincat and Miriam Debrincat

Vs

Peter Martha Constant Cabus and Liesbeth Liekens

The Court;

Having seen the sworn application of the plaintiffs Michael Debrincat and Miriam Debrincat where Michael Debrincat confirms on oath:

- (1) That the plaintiffs are the owners of the unnumbered house named 'Ta Lavinja' including various portions of land known as "Ta' Mondu" sive "Tat-Trux" in Gharb, Gozo bordered on the west with Trux Street in part, and in part with property of spouses Cabus and Liekens, on the south with property of spouses Peter and Charmaine Donath and on the north by property of spouses Cabus and Liekens in part and in part by family Cauchi and others, which lands were acquired by them by virtue of three deeds, one in the records of Notary Enzo Dimech of the fifteenth (15th) September one thousand nine hundred and

ninety seven (1997), another one in the records of Notary Silvio Hili of the fourteenth (14th) January two thousand (2000) and another one in the records of Notary Paul George Pisani of the sixteenth (16th) January two thousand and four (2004);

- (2) That Cabus and Liekens are the owners of a plot of land known as "Ta' Mondu" sive "Tat-Trux" in Gharb, Gozo adjacent to the unnumbered house named 'Villa Lucis', measuring about seven hundred and seventy three square metres (773sq.m.) and bordered on the east by a private passageway, property of spouses Debrincat, west by property of the Curmi family and on the south by other property of spouses Cabus and Liekens hereunder described, acquired by them by virtue of a deed in the records of Notary Paul George Pisani of the first (1st) December two thousand and fifteen (2015) - hereinafter referred to as "the dominant tenement";
- (3) That the property of spouses Cabus and Liekens abovementioned, has heretofore enjoyed the right of necessary right of way over the private passageway property of spouses Debrincat as allowed by law since such tenement had no outlet to the public road, which passageway is shown on the plan herewith annexed and marked document "A";
- (4) That the fact that this right of passage is only a 'necessary' one in terms of law had been recognised by the defendants' predecessors in title, both in respect of the land and in respect of the house, by virtue of a deed in the records of Notary Enzo Dimech of the 23rd March 2000.
- (5) That by virtue of the deed in the records of Notary Paul George Pisani abovementioned, spouses Cabus and Liekens had also acquired the property known as "Villa Lucis", in Triq Trux, Gharb, Gozo, built on the land known as "Ta' Mundu" sive "tat-Trux" bordered on the south and east by a private passageway, property of spouses Debrincat, north by property of the same spouses Cabus and Liekens and west by the street;
- (6) That in effect the fact that the right of passageway is only a necessary one in terms of law had been recognised by the

predecessors in title of defendants by virtue of a deed in the records of Notary Enzo Dimech of the 23rd March 2000;

- (7) That the plaintiffs Debrincat claim that since the dominant tenement has now been incorporated with the said house "Villa Lucis" which is contiguous to the public road, in exercise of the provisions of section four hundred and forty nine (449) of the Civil Code, Chapter sixteen (16) of the Laws of Malta, they are entitled to demand the discontinuance of the passive servitude to which their property is subject since it is no longer necessary;
- (8) That although they have been judicially called upon to terminate the right of way heretofore enjoyed by the dominant tenement for the reasons above set out; and to appear on a public deed whereby the right of passageway has effectively been terminated, the defendants have been remiss in both respects;

You are therefore requested to show good reason as to why this Court should not:

- (1) Declare that the right of way heretofore enjoyed by the dominant tenement is a necessary right of way in terms of law; and that, due to the joinder of the dominant tenement with another tenement having access to a public road, this right of passageway is no longer necessary;
- (2) Consequently orders the discontinuance of this right of way in terms of section 449 of the Civil Code;
- (3) Furthermore, consequently also prohibits you from using this right of way in any way and under any circumstances, and orders you to permanently and irrevocably close any apertures that allow you to use this right of way, and this within a peremptory period to be fixed by the Court;
- (4) In the eventuality that you fail to comply with this order within the time limit set down by the Court, authorises the plaintiffs to carry out the necessary works at your expense and under the

supervision of an architect to be appointed for this purpose by the Court;

- (5) Finally orders the publication of the relative public deed confirming this termination, by a Notary Public and with the intervention of a curator to be appointed by the Court to represent those parties who fail to appear on the public deed.

With all costs against you.

Having seen the Sworn reply of the respondents Peter Cabus and Liesbeth Liekens whom Liesbeth Liekens declares under oath:

1. That plaintiff's claims are unfounded in fact and at law and they should be dismissed;
2. That first and foremost the plaintiffs have to prove their title regarding the passageway namely the alleyway subject of this lawsuit and the sort of servitude which supposedly is burthening the property of plaintiffs;
3. That not all the elements at law are present in order that the provision of the law be applied regarding the termination of the servitude in terms of article 449 of Chapter 16.

Whereas in terms of article 158 of Chapter 12 of the Laws of Malta:

- a) The first premise is being contested in that it is not well specified as to the extension of the land that plaintiffs are claiming that it is theirs;
- b) The second premise is not being contested in that it refers to the deeds of acquisition of the property of defendants;
- c) That all the other premises are being contested.

Saving other pleas both factually and at law.

With costs against the plaintiffs.

Having seen that during the sitting of the 3rd November 2016 the Court ordered that proceedings were to be conducted in the English language.

Having seen that during the sitting of the 16th November 2018 Court acceded to the request for the acts of the prohibitory injunction number 40/2018 in the names **Dr Angele Formosa noe et vs Michael Debrincat et** to be attached to these proceedings.

Having seen the acts of the prohibitory injunction number 40/2018 in the names **Dr Angele Formosa noe et vs Michael Debrincat et**.

Having seen that the Court held an onsite inquiry on the 10th June 2021 whereby the Court noted that the field can be accessed from the kitchen through the pool and likewise from the street level up a flight of twelve (12) steps.

Having seen the documents submitted and the acts of the proceedings.

Having seen the final note of submissions filed by plaintiffs.

Having also seen that defendants have not filed their note of submissions.

Having seen that the case was adjourned for judgment for today.

Considers

The action being advanced by plaintiffs is for the termination of the right of necessary passageway being exercised over their property.

As a preliminary plea, by virtue of the second plea, defendants are requesting plaintiffs to prove their title over the passageway. As to the merits of the case, defendants are pleading that the elements for the termination of the servitude in terms of Article 449 of the Civil Code do not subsist.

Proof

Plaintiffs acquired the entire extent of their property in virtue of various deeds as follows:

- i. In virtue of a deed dated 15th September 1997 in the acts of Notary Dr Enzo Dimech, plaintiffs purchased and acquired from Peter Howitt as represented on the deed by Eugenio Camilleri: *the farmhouse numbered forty three (43) and named "Dar ta' Pietru", in Trux Street, Charb, Gozo, which house has also been referred to as being numbered forty two (42), together with the shed (maqjel) without number annexed to the said house, the house and shed bounded west by the said street, north by the land described hereunder and south and east by property of Carmela Piscopo, and the adjacent land known as "ta' Mondu" in the same Gharb, Gozo, this land measuring approximately five hundred and sixty two square metres (562sq.m), and this land bounded north by property of Michaelangelo Grima, west by Trux Street and south by the said house. The whole property is better illustrated on the plan attached hereto and marked document "C".*¹

Vendor also declared that *"on the extreme northern side of the land adjoining the said house there exists a foothpath in favour of third parties."*

- ii. In virtue of a deed dated 14th January 2000 in the acts of Notary Dr Silvio Hili, plaintiffs purchased and acquired: *the plot of land in Gharb, Gozo, known as "Ta' Mondu", situated in the territory known as "Ta' Trux" measuring about two thousand two hundred and ninety square metres (2,290m²), bounded on the south in part by property of the purchasers, and in part by property of the family Grima, on the north east by property of Emanuel Galea and on the west by property of Joseph Agius, or more correct boundaries, ... which plot of land is better indicated as delineated in red on the plan and site plan hereby attached and marked as document "C".*²

In virtue of a deed dated the 23rd March 2000 in the acts of Notary Dr Enzo Dimech, Advocate Dr Victor Bugeja who appeared in the name and on

¹ 'Dok. B' a fol. 10 et seq.

² 'Dok. C' a fol. 17 et seq.

behalf of “Irving and Company Limited”, Joseph and Mary Jane spouses Agius, and plaintiff Michael Debrincat there appeared and declared that:

Bis-sahha ta’ dan l-att il-partijiet jiddikjaraw illi:

Il-komparenti konjugi Debrincat huma l-proprjetarji ta’ diversi porzjonijiet raba’ adjacenti maghrufa bhala “ta’ Mondu fil-kontrada “ta’ Trux”, limiti Gharb Ghawdex, li jmissu punent in parti ma’ Triq Trux, in parti ma’ beni tal-kumpanija u in parti ma’ beni tal-komparenti konjugi Agius, nofsinhar in parti ma’ beni tal-kumpanija “Tanti Limited” u in parti ma’ beni tal-familja Grima. Dawn il-porzjonijiet akkwistati permezz ta’ zewg kuntratti, wiehed fl-atti tieghi stess tal-hmistax (15 ta’ Settembru elf disa’ mija sebgha u disghin (1997), u l-iehor fl-atti tan-Nutar Dottor Silvio Hili tal-erbatax (14) ta’ Jannar tas-sena korrenti;

il-kumpanija “Irving and Company Limited” hija l-proprjetarja ta’ porzjoni art iehor fl-istess inhawi, tal-kejl ta’ cirka mitjen u sitta u erbghin metri kwadri (246 m.k.), imiss punent mat-Triq Trux, tramuntana ma’ beni tal-komparenti konjugi Agius, lvant u nofsinhar ma’ beni tal-komparenti Michael u Miriam konjugi Debrincat. Liema art giet mixtrija b’att tan-Nutar Dottor Paul George Pisani tal-ghaxra (10) ta’ Lulju elf disa’ mija tmienja u disghin (1998);

il-komparenti Joseph u Mary Jane Agius huma l-proprjetarji ta’ porzjon art iehor fl-istess inhawi tal-kejl ta’ cirka seba’ mija digha u erbghin metri kwadri (749m.k.), imiss punent ma’ beni tal-Ufficcju Kongunt, nofsinhar ma’ beni tal-kumpanija “Irving and Company Limited” u lvant ma’ beni tal-komparenti Michael u Miriam konjugi Debrincat. Liema art giet mixtrija b’att tan-Nutar Dottor Joseph Spiteri tat-tnejn (2) ta’ Novembru elf disa’ mija u disghin (1990);

l-art tal-komparenti konjugi Agius tgawdi dritt ta’ access bir-rigel bhala access necessarju moghti bil-ligi, minn passagg minn Triq Trux li jghaddi mill-estremita’ tat-tramuntana tal-proprjeta’ tal-komparenti konjugi Debrincat u jkompli tul l-estremita’ ta’ lvant tal-proprjeta’ tal-kumpanija “Irving and Company Limited”.

Il-partijiet ftehm u bejniethom illi jispostaw il-passagg imsemmi sabiex dan jigi fit-tul kollu tal-proprjeta’ tal-komparenti konjugi Debrincat.

Ghalhekk bis-sahha ta’ dan l-att il-partijiet qeghdin jiftehm kif gej:

- (1) B’effett immedjat l-access ghal proprjeta’ tal-konjugi Agius ghandu jkun minn passagg li jigi iffurmat fuq l-estremitajiet tat-tramuntana u l-punent*

tal-proprjeta' tal-komparenti konjugi Debrincat, kif indikat bil-lewn ahmar fuq il-pjanta hawn annessa bhala document "A";

- (2) *Dan l-access ghandu jkollu wisgha (vojt) ta' erba' (4) piedi pari ghal metu wiehed u tnejn u ghoxrin centimetri (1.22m), u jkun ghal finijiet u effetti kollha tal-ligi meqjus bhala access necessarju moghti bil-ligi stante li fil-prezent l-art tal-komparentni Agius ma tintlehaqx mit-triq, u ghandu jsir bl-ahjar mod possibbli. Dan il-passagg bil-kejl ta' cirka erbgħa u tmenin metri kwadri (84m.k.), jmiss punent in parti ma' triq Trux, in parti ma' beni tal-kumpanija u in parti ma' beni tal-konjugi Agius, u lvant u nofsinhar ma' beni tal-konjugi Debrincat;*
- (3) *Il-komparenti konju Agius jiddikjaraw li konsegwentii ghal dan l-arrangement huma ma jivvantaw ebda jedd fuq l-art tal-kumpanija "Irving and Company Limited" u l-inqas fuq proprjeta' tal-komparenti konjui Debrincat salv għall-access fuq stabbilit;*
- (4) *Il-komparenti Dottor Victor Bajada u Joseph Cassar nomine jiddikjaraw li l-proprjeta' tal-kumpanija "Irving and Company Limited" fuq deskritta, ma tgawdi ebda jedd ta' kwalsijasi natura fuq il-proprjeta' tal-komparenti konjugi Debrincat. Filwaqt li l-komparenti konjugi Debrincat vicendevolement jiddikjaraw li l-proprjeta' tagħhom ma tgawdi l-ebda dritt fuq il-proprjeta' tal-kumpanija "Irving and Company Limited".³*

In virtue of a deed dated 16th January 2004 in the acts of Notary Dr Paul George Pisani, plaintiffs purchased and acquired: *porzjon art imsejha Ta Mondu, fil-limiti ta' l-Gharb, Ghawdex, tal-kejl ta' cirka hames mija u tnejn u sittin metri kwadri (562m.k.) u tmiss min-nofsinhar ma' beni tal-familja Galea, punent ma' beni tal-kompraturi u ohrajn u lvant ma' beni tal-Katidral ta' Ghawdex, jew awenti kawza ... kif ahjar murija fuq il-pjanta u site-plan hawn annessa u mmarkata document "A".⁴*

As for defendants, in virtue of a deed dated 1st December 2015 in the acts of Notary Dr Paul George Pisani, Terence Ernest Shaw, Joseph and Mary Jane spouses Agius, sold to defendants *the house without number named Villa Lucis in Triq tat-Trux, Gharb, Gozo, built on the land known as 'Ta' Mundu' sive 'Tat-Trux' and bounded on the east by property of the heirs of Joseph Portelli, north by property of Carmelo Mercieca, west by the street, and south by*

³ 'Dok. F' a fol. 48 et seq.

⁴ 'Dok. D' a fol. 27 et seq.

a private passageway, ... better shown on the annexed plan and site-plan forming part of an official Land Registry Search Form, marked enclosure 'B' and large scale plans herewith annexed and marked enclosures 'C', 'D' and 'E'.⁵

By a judicial letter of the 9th August 2010 plaintiffs Debrincat requested Paul Frederick Barnes and Terence Shaw, then owners of Villa Lucis, to stop making use of the right of passage over plaintiffs` property given that the right of passage in their favour was no longer necessary once the dominant tenement had been adjoined to another property which had direct access to the public road⁶. Under the instructions given by plaintiffs, on the 9th August 2010 Notary Dr Enzo Dimech registered said letter in the Public Registry.

In his affidavit plaintiff **Michael Debrincat** stated that in all of the deeds by which plaintiffs acquired their property, the property is described as bounded by other private property and nowhere is there mentioned that the property is bounded by a private passageway. He added that this is solid proof of the fact that the passageway in question forms an integral part of the property acquired by plaintiffs. He also stated that this is further confirmed by the agreement reached in virtue of the deed of the 23rd March 2000 between the owners of adjacent tenements whereby they regulated the right of passage.

Plaintiff added on saying that the passageway in question underlies the property acquired by the plaintiffs to the extent that part of the passageway has been roofed above the 11th course from street level. Additionally, at ground floor level there are a window and a door leading from the garage directly onto the passageway and the first and second floor levels of the house extend over the roofed area of the passageway up to the dividing wall that separates the property of the plaintiffs from that of defendants.

In his affidavit plaintiff also referred to an incident which took place in 2008 where the Street Naming Committee was instructed to name all the alleys in Triq Trux, Gharb. As part of this exercise the Street Naming Committee included also the passageway forming the merits of this case. However, when plaintiff drew attention to the fact that the 'alley' was not

⁵ 'Dok. E' a fol. 30 et seq.

⁶ 'Dok. B' a fol. 72 et seq.

an alley but a private passageway, the Local Council, the Street Naming Committee and the Ministry of Gozo gave clearance for the passageway in question to no longer be deemed an alley.

Plaintiff also filed an additional affidavit wherein he stated that on the 30th May 2017 defendants obtained the necessary permits to carry out works on their property. On completion of the works the land annexed to the property will be incorporated as part of the property. The swimming pool and deck area will be relocated to the land with the remaining land being used as garden all directly accessible from the northern side of the house by opening up doors and widening the present opening from the house to the land.

In his additional affidavit plaintiff also made reference to the fact that out of the blues and without any warning defendants had sealed off the opening that led from their land onto the passageway and they had even removed a small iron gate which was previously installed at the opening. It so happened that a week later, between the 18th and the 25th September 2017 defendant opened another access to the passage way by dismantling part of the rubble wall that divides the respective properties. The iron gate was installed at the new opening. This led plaintiffs to report the incident to the police as defendants did not obtain plaintiff's permission to carry out said works. In cross-examination plaintiff confirmed that following the initiation of spoliation proceedings, defendants restored the opening in the dividing wall to its' previous state and proceedings were stopped.

In cross-examination plaintiff confirmed that no searches were made ahead of signing the agreement dated 23rd March 2000. He added that all three appearers on the act presented the deeds by which they bought their respective properties and Notary Enzo Dimech established root of title on the basis of the information obtained from those acts. Plaintiff confirmed that the passageway is still being made use of by farmers whose right of passage is necessary.

The claim being advanced by plaintiffs is only in respect of defendant. Plaintiff confirmed that the back of defendants house is located at a higher level and is accessible through a flight of stairs. However, he reiterated that given that defendants have access to the entire extent of their property from the street through their house and into the land at the back,

then the right of passage ceased to be necessary and can therefore be terminated. He explained that both from what he can see directly from his own house and also from the drawings submitted for construction permits, it is evident that there is an opening which leads from the backyard of the house to the land. The opening in question had been made by Terence Shaw and Paul Barnes, previous owners of Villa Lucis, in 2010 when they started hiring the adjacent field from Joseph Agius. Plaintiff explained that defendants obtained necessary permits to develop their property and as a result they removed the dividing wall between the backyard and the field at the back and they also opened up a door which leads from the kitchen to the field creating full access from the house directly to the field.

Plaintiff explained that the wall that separates his property from the adjacent property which previously belonged to Irving & Company Limited, was built by Joseph Cassar way back when Irving & Company Limited was building its own property. Eventually plaintiffs applied for permits to build their own property and the construction was made to rest against the dividing wall built by Joseph Cassar. Given the right of passage that exists in favour of third parties, during construction phase plaintiffs made sure that the passage would be reconstructed as was. Hence, plaintiffs did not built the passage way but over it thereby leaving the passageway free for transit.

Plaintiff added on saying that originally the passage passed over the property belonging to plaintiffs and over that which originally belonged to Irving & Company Limited. Following the agreement of the 23rd March 2000 between Joseph Cassar and plaintiff, the said passage was shifted slightly so that from point 'C' as marked on 'Dok. 2008' at fol. 267, it was moved to point 'D' as marked on the same document. In virtue of this agreement the passage was shifted entirely onto plaintiff's property. Letter 'R' on the said document refers to the part of the passageway that was levelled down to street level making access more comfortable. The dividing wall at 'R' had originally been made by Peter Howitt and was made of franka stone. The wall at 'D' was made of sejjiegh until the time it was dismantled and reconstructed by Joseph Cassar. Plaintiff added on saying that the original passage was widened by Peter Howitt to around 8 feet wide so that he could get better access to his field. Presently the field has been narrowed down to about four feet wide.

Plaintiff **Miriam Debrincat** explained that prior to the filing of this court case plaintiffs installed a metal gate which closes with a simple lock but is never locked. The gate was installed for security reasons.

Joseph Cassar, shareholder and director of Irving & Company Limited testified that before selling the property to Terence Shaw, Irving and Company Limited had reached an agreement with plaintiffs whereby the said company would construct a thirty eight centimetre (38cm) thick boundary wall on the dividing line with nine inch (9") thick course built on the said company's property and another nine inch (9") thick course on the property already owned by plaintiffs. Cassar further declared that the nine inch (9") wall immediately adjacent to the passageway that leads to fields at the back of the said passageway, is wholly owned by plaintiffs. This wall that is made of franka stone is marked with letter 'A' on the plan at fol. 16.

Cassar also made reference to the agreement dated 23rd March 2000 in the acts of Notary Dr Enzo Dimech whereby plaintiffs, Cassar and Joseph Agius all agreed that the right of passage in favour of Joseph Agius would be enjoyed over the property of plaintiffs. In cross-examination Joe Cassar explained that the right of passage in favour of Joseph Agius was originally over the property belonging to Irving & Company Limited but eventually, owing to differences in ground level, plaintiffs, Joseph Agius and Joseph Cassar for the said company agreed to shift the passage from over the property belonging to plaintiffs. He added on saying that in actual fact there are other people making use of this passageway to access fields that are further in. Even Irving & Co still makes use of this passageway to access agricultural property that is situated further in along the passageway.

Cassar explained that the agreement was drawn up on the insistence of plaintiffs. In virtue of what was agreed upon, plaintiffs were entitled to rest their own property against the dividing wall which separated the property belonging to plaintiffs from that of Irving & Company Limited. He added on saying that he is personally very familiar with the area in question and he knows for a fact that the passageway in question belongs to plaintiffs. He added on saying that Irving & Company Limited is the owner of other land in the area which land is accessible from the passageway property of plaintiffs. Irving & Company Limited made legal searches on the root of title of the property that it had acquired so all

relevant information about the property was obtained from the searches. He explained that the passage was already formed and in use. Irving & Company Limited did not run any searches on the passageway.

In his testimony **Notary Dr Enzo Dimech** made particular reference to the deed dated 15th September 1997 in the acts of said Notary whereby vendor declared that on the extreme north side of the land adjoining the house sold to plaintiffs there existed a right of passage in favour of third parties. The said Notary confirmed that this declaration in itself confirms that the passageway sits of the northern part of the property purchased by plaintiffs in virtue of the said deed.

Notary Dr George Paul Pisani who drew up the deed dated 1st December 2015 in virtue of which defendants acquired their property, confirmed that ahead of publishing the said deed he carried out searches and came across the deed dated 23rd March 2000 in the acts of Notary Dr Enzo Dimech and the enrolment of the judicial letter dated 9th August 2010. He also confirmed that from the plans attached to the deed of the 1st December 2015 it appeared that the land and the house acquired by defendants were adjoined.

Dr Joseph Galea testified that at present there exists a right of passage over the property belonging to plaintiffs. He explained that the passageway consists of *“a small alley way, that goes round the house and then goes into another path and the path goes round and then at the end there is our field”*⁷. He explained further that on accessing the passage from the right the passage goes straight up then there is a wall and the passage turns left and continues leading up to a ramp that leads to fields that are enclosed and have no access except for that through the passageway in question. The floor of the passageway is made of concrete and part is roofed over. Dr. Galea explained that this passage was moved around twice owing to development in the area. The passage now passes over the property belonging to plaintiffs.

Joseph Agius explained that he sold his property consisting of a field to defendants. He stated that he used to access the field through a passageway which passed over property that belonged to the Bajada and Cassar families. At a certain point in time Michael Debrincat approached

⁷ Fol. 116

Joseph Agius and requested his permission to shift the passage and so they entered an agreement to this effect thus declaring the new passage to be entirely over property belonging to plaintiffs. He further explained that the field which belonged to him had no access to the public road so the right of passage was a necessary one. Joseph Agius continued to explain that defendants bought a villa from an English national, the same person who used to hire the field from Joseph Agius. He explained that before he started renting out the field, the field and the house were separated by a high wall.

Defendant **Liesbeth Liekens** testified that the right of passage remains necessary to date in order for defendants to access the field situated at the back of their house. She explained that immediately upon entering the house one is faced with a staircase which turns at a right angle every ten steps and leads to the upper floor. She added that the entrance to the house is at a lower level compared to the back of the house where the field is located. For this reason defendants cannot get big trees or agricultural machinery into the field by passing through the house. The only way that machinery and big trees can get to the field is by passing through the passageway in question.

Faced with plaintiffs' request to terminate the right of passageway, Liesbeth Liekens conducted a research to establish ownership of the passageway. It resulted to her that the agreement entered into between plaintiffs, Cassar and Bajada on behalf of Irving & Company Limited relative to the displacement of the passageway, did not confirm that the passageway was in fact privately owned by plaintiffs, nor did the agreement specify how the passageway came to belong to Debrincat or why the new passageway created was actually narrower than the original passageway. She also stated that the contract in virtue of which plaintiffs acquired their property in 1997 did not make reference to the property being subject to a right of passage in favour of third parties and reference to contracts relative to plaintiff's predecessor in title show that the acquisition did not include the passageway. Liekens also made reference to the passageway as being officially named and marked as a public one. She explained that the name was then removed following a request made by plaintiffs but this was followed by the filing of a judicial protest as the Local Council had no right to arbitrarily accede to the request lodged by plaintiff⁸. Defendant also filed aerial photos dated 1994 and 1998 where

⁸ 'Dok. E' a fol. 162 et seq.

the passageway in question is clearly visible. Liekens believes that the passageway has been defined for a very long time and that from the aerial photos it is evident that the passageway is distinct from the land acquired by plaintiffs.

In her additional affidavit, Liesbeth Liekens stated that in virtue of a deed of purchase dated 29th April 2017 in the acts of Notary Doctor Paul George Pisani, Submerge Productions, a company belonging to defendants, has acquired a plot of land situated to the north of plaintiffs' property and this property enjoys a right of passage over the passageway in question given that this is the only access to that land.

Liekens exhibited a copy of the deed of purchase dated 4th March 1969 in the acts of Notary Doctor Antonio Galea in virtue of which Peter Howitt acquired *"the house in Gharb Gozo, in Trux Street, formerly Strada San Demetrio including the shed (maqjel) annexed to the said house bearing number 43 (forty-three) and the said shed (maqjel) has no number, which buildings sold by this deed formerly were marked by numbers 6 (six) and 7 (seven) and the whole is bounded on the west by said street, on the north by an alley, on the south and on the east by property of Carmela Piscopo ..."*⁹ Liekens remarked that according to what is stated in this deed the house acquired by Peter Howitt is indeed bounded by an alley situated to the north, however, in virtue of what is stated in the said contract it does not appear that the alley was included in the sale. Hence, Liekens is of the opinion that the alley was never part of the property acquired by Howitt.

Defendant also exhibited a contract of sale dated 19th June 1985 in the acts of Notary Doctor Michael Refalo in virtue of which Peter James Howitt acquired *"the plot of land known as "ta' Mondu" in the limits of Gharb, Gozo, measuring about five hundred and sixty two square metres (562sq.m.) and bounded North by Property of Michalangelo Grima, West by Truq Street unencumbered with all its rights and appurtunances and better shown on the herewith annexed plan marked "D""*¹⁰

With respect to this deed plaintiff drew attention to the fact that the deed filed by defendants had a missing part to the paragraph just quoted. Plaintiff explained that he obtained a certified true copy of the said deed from the office of Notary Dr Michael Refalo from where it transpires that

⁹ 'Dok. C' a fol. 439 et seq.

¹⁰ 'Dok. D' a fol. 446 et seq.

the exact and complete wording reads as follows “the plot of land known as “ta’ Mondu” in the limits of Gharb, Gozo, measuring about five hundred and sixty two square metres (562sq.m.) and bounded North by Property of Michalangelo Grima, West by Truq Street, South by property of purchaser nominee free and unencumbered with all its rights and appurtenances and better shown on the herewith annexed plan marked “D””¹¹ (emphasis added by this Court)

In cross-examination Liekens confirmed that on completion of the structural works being carried out in the house the field will be directly accessible through the house by taking a flight of around 20 stairs. She explained that this access is not adequate if passing through with agricultural machinery and heavy or bulky objects.

The deed in virtue of which defendants bought their own property refers to Villa Lucis as being bound on the south by a private passageway. Liekens confirmed that this is the same passageway in question. Reference was also made to the part of the deed where it is stated that the field acquired by defendants is bounded on the east by a private alley. Liekens confirmed that this too is indeed the same passageway because it is a continuation of the passageway situated to the south of the house. She went on to acknowledge that the passageway forming the merits of this case is indeed a private one. Liekens added on saying that when she conducted further research into the root of title over the passageway she starting doubting the rights claimed by plaintiffs over the said passageway. This being said, Liekens confirmed that she does not know how to read in Maltese so she needed to get most documents translated to her.

David Apap Agius, Major of Gharb since 1997 explained that following the request filed by plaintiffs to have the alley name removed on the basis that they enjoy ownership of the said passageway, Gharb local council passed the request onto the Street naming committee for them to vet the allegation made by plaintiffs and to decide accordingly. The street naming committee decided on removing the street name and the decision was published in the Government Gazette on the 25th September 2015.

¹¹ ‘Dok. MD2’ a fol. 486 et seq.

Dr Renata Farrugia, a member on the street naming committee explained that in actual fact the said committee does not engage into investigating the root of title. It simply rests on the request which the local council makes for a street name to be removed. The Gharb Local Council sent the street naming committee a letter dated 30th January 2015 attaching also the minutes of the local council meeting during which it was unanimously agreed that the alley name be removed.

Architect Joseph Publius Dimech testified that in 1998 he was engaged by plaintiffs to supervise the reconstruction of the dividing wall which separated the property of plaintiffs from that of defendants. Architect Dimech established the median line between the two properties and marked the area accordingly. Architect Dimech was also requested to establish the measurements of the entire mass purchased by plaintiffs and in the course of such exercise, basing himself also on the measurements of land as indicated in the contracts of sale, he established that the entirety of land acquired by plaintiffs includes the passageway that forms the merits of this case. He added that *“huwa fatt li l-punti estremi tan-naha tan-nofsinhar u tat-tramuntana fuq in-naha l-ohra jaqblu mal-pjanta annessa mal-kuntratt, u definittivament jinkludu l-passagg li jghaddi min-naha tat-tramuntana tal-proprjeta’ ta’ Debrincat.”*¹²

Terence Shaw testified by means of an affidavit wherein he stated that when they initially moved into the house they had no interest in the passage way as the house was directly accessible from the public road. Shaw eventually started to rent out the field which belonged to Joseph Agius and which field is located at the back of Villa Lucis. At that point Shaw started making use of the passageway as there was no other route through which to get agricultural machinery and trees into the field. He also carried out works on the rubble wall which separated the field from the passage way and installed a gate. Shaw added that the installation of a gate was suggested by plaintiff himself. Shaw went on to explain that by time it was evident that plaintiffs did not want the owners of Villa Lucis to make use of the passageway. Tensions rose between these two neighbours and as Shaw was carrying out reparation works on the wall which separates his house from the passage way, there was an altercation between plaintiff Miriam Debrincat and the workers contracted by Shaw. Debrincat proceeded to install a gate at the road end of the passageway

¹² A tergo fol. 272

putting up a notice that unauthorised access was forbidden. These tensions made Shaw stop all works and cease any contacts with plaintiffs.

Carmel Mifsud, testified that the passageway has long been there, originally part of Peter Howitt's property. The original passageway was narrow and only accessible on foot carrying a plougher. At some stage a new passageway was formed and a ramp was formed giving access to the fields. This new passageway was wider thus allowing access with trucks and heavier agricultural machinery. Abutting onto the old passageway one could find a balcony and a window which belonged to Howitt's property. He added on saying that plaintiffs eventually bought their property from Howitt and they narrowed the passageway down without consulting with the farmers who enjoy right of passage and they also built over the passageway. Today plaintiffs property has a door and a window that abut onto the passageway. Like the old passageway, the new passageway is accessible on foot carrying a plougher.

Architect Alex Bigeni confirmed that Villa Lucis and the garage belonging to defendants have direct access on Trux Street, Gharb, Gozo. The field however, does not as this is located on a different level than the street with at least a 10 course height difference between the entrance to the house at street level and the field. He explained that the only direct access to the field is through the passageway. The only access from the house is through a terrace and a kitchen door both situated on the first floor level. He explained that the staircase leading from ground floor to first floor has around 19 steps and a few 180 degrees turns. On reaching the first floor one would have to cross the living area to reach the kitchen or the terrace and then go down a few steps to reach the field. This makes it impracticable to carry out maintenance works or to pass with machinery through the house to reach the field. Architect Bigeni explained that although a second staircase is being built, this will still involve taking around 15 stairs making it still impracticable to pass through the house with machinery.

In cross-examination Architect Bigeni explained that as the current layout of Villia Lucis stands, the owners of the house can access the field through the house by going up a flight of stairs. He added that even to access the kitchen one needs to go to first floor as the kitchen is located on this floor and beyond the kitchen lies the field where today there is a pool.

After being referred to the contract of 1985 and after being shown the plans attached to the said deed, Architect Bigeni confirmed that Peter Howitt's house lies to the south of the passageway.

Considers

By means of the second plea defendants are demanding proof of title over the passageway. Defendant Liesbeth Liekens testified at length during the course of these proceedings. In cross-examination she confirmed that indeed the passageway is private but that doubts were cast as she researched further into the matter. She explained that she does not know how to read in Maltese hence she needed someone to translate to her the contents of the various deeds she vetted. She also went through various plans that were attached to the deeds of acquisition by which plaintiffs acquired various parcels of land and property. Basing herself on the information she retrieved, Liekens stood firm on her idea that plaintiffs do not have any title over the passageway in question and that indeed the passageway is government property.

It is worth noting that from the documentation submitted by plaintiffs it has emerged that pending proceedings defendants sold their property to third parties who are not part of these proceedings.

That being said, the first matter that needs to be addressed is whether or not plaintiffs have title over the passageway in question as if it results that they do not enjoy the title claimed, then they would not have any legal standing to push forth these proceedings.

The best proof of title lies in the deeds of acquisition. Court points out at the very outset that the deeds which have been exhibited are very clear in the wording and descriptions used leaving no room for interpretation or confusion over the real state of affairs.

For the sake of clarity and in order to establish facts as they stand, it is better to have a look at the descriptions of the property sold as these emerge from the respective deeds. The following can be noted:

- i. In virtue of a deed of purchase dated 4th March 1969 in the acts of Notary Doctor Antonio Galea, Peter Howitt acquired:

*“the house in Gharb Gozo, in Trux Street, formerly Strada San Demetrio including the shed (maqjel) annexed to the said house bearing number 43 (forty-three) and the said shed (maqjel) has no number, which buildings sold by this deed formerly were marked by numbers 6 (six) and 7 (seven) and the whole is bounded on the west by said street, **on the north by an alley**, on the south and on the east by property of Carmela Piscopo ...”* (emphasis added by this Court)

From this deed it appears that the house acquired by Peter Howitt back in 1969 was bounded on the north by an alley.

- ii. In virtue of a deed dated 19th June 1985 in the acts of Notary Doctor Michael Refalo Peter James Howitt acquired:

*“the plot of land known as “ta’ Mondu” in the limits of Gharb, Gozo, measuring about five hundred and sixty two square metres (562sq.m.) and bounded North by Property of Michalangelo Grima, West by Truq Street, **South by property of purchaser nominee free and unencumbered with all its rights and appurtenances and better shown on the herewith annexed plan marked “D”**”* (emphasis added by this Court)

Reading through the deed of 1985 in conjunction with that of 1969 it is clear that the property acquired by Peter Howitt in 1985 included the passageway as part of that property. This is evident from the fact that whilst in the deed of 1969 the property is described as bounded on the north by an alley, in the deed of 1985 it is said that the property is bounded on the south by property belonging to Peter Howitt. This means that there were no gaps between the property acquired in 1969 and that acquired in 1985. Hence, Peter Howitt had acquired the passageway as part of the entire extent of his property.

It emerges that Peter Howitt is the successor in title of plaintiffs.

The deed which is more significant to the matter under discussion is the deed of the 15th September 1997 in the acts of Notary Dr Enzo Dimech, by virtue of which plaintiffs purchased and acquired from Peter Howitt as represented on the deed by Eugenio Camilleri:

the farmhouse numbered forty three (43) and named "Dar ta' Pietru", in Trux Street, Charb, Gozo, which house has also been referred to as being numbered forty two (42), together with the shed (maqjel) without number annexed to the said house, the house and shed bounded west by the said street, north by the land described hereunder and south and east by property of Carmela Piscopo, and the adjacent land known as "ta' Mondu" in the same Gharb, Gozo, this land measuring approximately five hundred and sixty two square metres (562sq.m), and this land bounded north by property of Michaelangelo Grima, west by Trux Street and south by the said house. The whole property is better illustrated on the plan attached hereto and marked document "C".

On the said deed, Peter Howitt as vendor of the property also declared that "on the extreme northern side of the land adjoining the said house there exists a footpath in favour of third parties." (emphasis added by this Court)

It is evident that Peter Howitt sold to plaintiffs the entire extent of the property he had previously bought. The details in the deeds of 1969 and 1985 tally with those entered into the deed of 1997. This means that plaintiffs bought from Peter Howitt the house and the adjoining land including the passageway forming the merits of the case.

Although in virtue of the deed dated the 23rd March 2000 in the acts of Notary Dr Enzo Dimech, the plaintiffs along with the representatives of Irving & Company Limited and spouses Joseph and Mary Jane Agius, agreed to shift the passageway from its original location to a different one, plaintiffs still retained the ownership thereof. By shifting the passage way the parties merely agreed to making the passage way more comfortable and more in line with the development that the area was undergoing. By agreeing to shift the passageway plaintiffs never gave up their rights over the said passageway and indeed the shifting still burdened the property of plaintiffs.

From the very outset defendants were aware of the fact that the passageway in question was a private one as this was even mentioned in the deed by which defendants acquired Villa Lucis and the adjoining land. The deed dated 1st December 2015 in the acts of Notary Dr Paul George Pisani provides that:

the house without number named Villa Lucis in Triq tat-Trux, Gharb, Gozo, built on the land known as 'Ta' Mundu' sive 'Tat-Trux' and bounded on the east by

property of the heirs of Joseph Portelli, north by property of Carmelo Mercieca, west by the street, and south by a private passageway, ... better shown on the annexed plan and site-plan forming part of an official Land Registry Search Form, marked enclosure 'B' and large scale plans herewith annexed and marked enclosures 'C', 'D' and 'E'.

It is clear that defendants grappled with questioning the title held by plaintiffs over the passageway. Faced with plaintiffs repeated and vehement request for defendants to stop making any transit over the passageway, defendants were put with their back against the wall and they tried to fight the request off by casting doubt over the title held by plaintiffs. Defendant should have known better that at the end of the day what matters is not how she personally interprets the wording in the various deeds. Indeed, defendants went to great lengths in their quest to discredit the root of title held by plaintiffs and in so doing they even filed an act that missed out on a very important part. This is being said with reference to the 1985 contract of sale in virtue of which Peter Howitt acquired his property. Court hardly believes that it was a question of coincidence that incidentally the part of the deed that is mostly significant to this particular case was left out. It appears to this court that this omission was deliberately and deviously perpetrated by defendants in a last attack launched against plaintiffs' title over the passageway.

Court deems that the information resulting from these deeds is clear and casts no doubt whatsoever on the fact that indeed plaintiffs are the owners of the passageway forming the merits of this case.

Moving on to the merits of the case. Court notes that during the onsite visit held on the 10th June 2021 defendants declared that the house and the field can be accessed through the house but reserved her pleas with regards to ease of accessibility to the field by passing through the house.

It has been established that originally Villa Lucis and the field at the back of said villa were separated by a dividing wall owing to the fact that the two properties belonged to different owners. When Terence Shaw, previous owner of Villa Lucis, started renting out the adjacent field, he formed an opening in the dividing wall thereby interconnecting the field with the house. The villa and the field were eventually sold to defendants and as it turns out, defendants have done extensive works as a part of which they created access to the field directly through the house.

Now, as has been confirmed by Court during the onsite visit, whilst the entrance to the house is located at ground floor level, the field in question lies higher up, roughly in the level of the first floor. As it emerges from the proof submitted and as could be confirmed by Court during the onsite visit, the first floor is accessible internally through the house by taking a flight of 12 steps up. On getting to the first floor one proceeds through the living area and into the kitchen where a door has been opened onto a terrace that leads to the field by going down about four steps. Defendants have confirmed that the works carried out in their property reflect their liking.

Defendants accept the fact that the field now converted into a pool area is indeed accessible through the house but they question the ease of accessibility. They claim that given that access is through a flight of stairs it is inconvenient to get through with heavy or bulky objects.

In terms of Article 447 of the Civil Code, a tenement that is enclosed on all sides enjoys a right of passage over third party property in order to reach a public road. In terms of Article 449 of the Civil Code the right of passage granted in terms of Article 448 is discontinued "*in consequence of the opening of a new road, or of the incorporation of the tenement with another tenement contiguous to the public road*".

In **Giovanna Caruana vs Lucy Davies et** decided by the Court of Appeal on the 30 th January 1956 it was stated that:-

"Is-servitu ta` passagg hi servitu` diskontinwa, li tista` biss tigi stabbilita` bis-sahha ta` titolu u mhux ta` preskrizzjoni, hliet meta l-fond ikun interkjuz, jigifieri ma jkollux hrug iehor fuq it-triq pubblika, fliema kaz, l-istess servitu` tkun tista` tigi akkwistata bil-preskrizzjoni ta` tletin sena. Ghall-interkjuzura tal-fond hu ekwiparat il-kaz meta, ghalkemm il-fond ikollu passagg ghal fuq it-triq pubblika, dan il-passagg joffri diffikulta` jew ikun perikoluz. Imma l-kumdata` ma taghtix lok ghad-dritt ta` passagg necessarju. Rekwizit essenzjali tad-dritt ta` passagg necessarju huwa l-interkjuzura assoluta, jew almenu dik relattiva tal-fond u ghalhekk jekk il-fond ghandu passagg ghat-triq pubblika li, ghalkemm mhux komdu, lanqas ma hu eccessiv ghal min jghaddi minnu bir-rigel, ma jistax jinghad li dak il-fond huwa interkjuz u li ghandu dritt ta` passagg necessarju fuq ir-raba` ta` hadd iehor."

In Wilfred Camilleri et vs Carmelo sive Charles Muscat noe, decided by this Court on the 20th March 2009, Court made the following observations:

“Fin-nota ta` sottomissionijiet il-konvenut ghamel riferenza ghall-Artikolu 447(1) tal-Kodici Civili: “Is-sid li l-fond tieghu m`ghandux hrug fuq it-triq pubblika, jista` jgieghel lis-sidien tal-fondi ta` ma genbu li jaghtuh il-moghdija mehtiega, bi hlas ta` kumpens proporzjonat ghall-hsara li ggib dik il-moghdija.”. Argument li jista` jitqies li jidhol fl-eccezzjoni numru sebgha (7), u f`kull kaz fl-ghoti tas-sentenza l-qorti trid tqies it-talbiet li jkun ghamel l-attur fl-ottika tal-provvedimenti tal-ligi skond il-provi li jkunu tressqu.

Ghalkemm hu veru li l-konvenut ghandu mezz ta` dhul bir-rigel ghall-proprjeta` tieghu, pero` mhux l-istess jista` jinghad ghal dhul ta` vetturi. Ghandu jigi apprezzat li hu dmir tal-qorti li tapplika l-ligi skond l-esigenzi tal-hajja li jkunu jezistu fiz-zmien li l-ligi tkun qeghda tigi applikata. Proprjetarju ghandu jedd li mill-proprjeta` tieghu jiehu l-utilita` kollha li din tista` tippermetti, ghalkemm wiehed irid japprezza wkoll li dan m`ghandux isir a diskapitu ta` proprjetarju iehor. Il-konvenut applika u nghata permess sabiex fuq l-art jizviluppa dar, u l-izvilupp kien jinkludi drive in u garaxx. Ir-raguni tghidlek li f`dik l-akkwata, minhabba l-wisa` ta` l-isqaq, min jibni dar ikollu jipprovidi ghal garaxx. Il-qorti temmen li l-argument tal-konvenut iregi, fis-sens li fil-prezent mill-proprjeta` tieghu m`ghandux hrug ghal fuq it-triq pubblika (Sqaq Dun Karm) permezz ta` vettura, jekk mhux billi jghaddi minn parti mill-art li l-konvenut irid jifred bil-bini ta` hajt divizorju.

Jidher li fil-gurisprudenza lokali gie accettat li l-interkjuzura m`hemmx ghalfejn tkun wahda assoluta, u interkjuzura relattiva taghti lok ghal servitu ta` passagg necessarju (ara f`dan il-kuntest sentenza Giovanna Caruana vs Lucy Davies et deciza mill-Qorti ta` l-Appell fit-30 ta` Jannar 1956 , li saret riferenza ghaliha mill-istess qorti fil-kawza Anthony Camilleri vs Pawlu Farrugia et deciza fil-31 ta` Ottubru 2008. Hekk per ezempju giet kunsidrata bhala interkjuzura relattiva fejn passagg ghal fuq it-triq pubblika gie meqjus perikoluz jew li joffri diffikulta (Vol. XXI.ii.453). Fil-fehma tal-qorti l-fatt li l-proprjeta` tal-konvenut m`ghandix hrug fuq it-triq pubblika permezz ta` vettura, tikkwalifika wkoll bhala interkjuzura relattiva. Il-hrug ezistenti ghal fuq it-triq hu insufficjenti ghal bzonnijiet tal-fond.”

It has resulted that originally the field that belonged to spouses Agius was enclosed and hence gained the right of passage in discussion. When Terence Shaw started renting out the field from spouses Agius he interconnected the two properties for ease of access directly from the

house that has a frontage on the public road. On acquiring the property from Shaw, defendants developed the property even further creating a bigger access to the field directly from the house. Now, it is true that access is through a flight of stairs but the argument that this access is not practical or adequate does not really hold. It emerged that the kitchen in defendants house lies on the first floor. No doubt that a kitchen is amongst the spaces that are mostly used within every house. It is also known that kitchens offer space for the storage of food and food supplies. Thus, on entering the house with the shopping, even if the shopping is cumbersome, heavy or bulky, defendants would still have to take a flight of stairs to reach the kitchen with the shopping. If this is indeed possible and doable, Court does not see why the same cannot be done to reach the field. It is worth noting that the field in question has been converted to a recreational pool area. Since the field is no longer being used for agricultural purposes, the incidence of the need to bring in heavy machinery has been drastically reduced. Court understands that going up and down a flight of stairs might not always be the best option. That being said, Court needs to assess whether the right of passage claimed stems from the fact that the property is enclosed and enjoys no access from the road. In this case, it has been clearly established that the house has direct access from the road and on entering the house one can continue through to the back. Court deems that the right of passage ceased to be necessary in terms of law the moment that access was gained directly through the house. Court reminds that servitudes are burdensome in nature and courts have always applied and interpreted servitudes in the most restrictive manner so as not to burden the servient tenement unnecessarily. In this case Court deems that if it were to retain the right of passage in favor of defendants, it would be burdening the servient tenement not only unnecessarily but also unjustly. Hence, by application of Article 449 of the Civil Code, Court accedes to the demand raised by plaintiffs and terminates the right of passage in favor of defendants.

Decide

For the above-mentioned reasons, this Court decides this case in that whilst rejecting all pleas raised by defendants, accedes to plaintiff's requests and hence:

1. Declares that the right of passageway in favour of defendants is no longer necessary.
2. By application of Article 449 of the Civil Code orders the discontinuance of the right of way enjoyed by defendants.
3. Consequently and with immediate effect, whilst forbidding defendants from making any use of the passageway, condemns and orders them to permanently close any openings that give defendants access from their property onto the passageway, within one month from today.
4. In case defendants fail to close off the aforementioned openings that lead onto the passageway within the stipulated period, then plaintiffs are hereby being authorised to seal off said openings at defendants' expense and under the direction and supervision of Architect Alexei Pace who is hereby being nominated for the purpose.
5. Accedes to the fifth plea and nominates Notary Public Dr. Valerie Said to publish a deed of termination of the right of passage and appoints Dr. Jonathan Mintoff to act as curator in default of appearance of the parties.

Orders defendants to pay the costs of these proceedings.

Dr Brigitte Sultana
Magistrate

Dorianne Cordina
D/Registrar