QORTI ĊIVILI PRIM'AWLA

ONOR. IMĦALLEF TONI ABELA LL.D.

Seduta ta' nhar il-Hamis, 19 ta' Mejju, 2022

Numru

Sworn Application Number: 551/2017 TA

Marco Parolini (holder of Swiss ID card number C 7085049) and Markus Kick (holder of Swiss ID card number C7091410)

vs.

Farruġia Investments Limited (C-25921) and by virtue of a decree dated 10th July 2018 joinders to the suit Robert Farruġia holder of ID card number 6588182M and his wife Alexandra Farruġia holder of ID card number 197285M.

The Court:

Having seen the sworn application of Marco Parolini and Markus Kick (the plaintiffs) filed on the 20th of June 2017 by which they premised and demanded the following :-

1. Illi l-esponenti huma s-sidien tal-fond ossia dar li ġġib in-numru għoxrin (20) u qiegħda ġewwa St. Frederick Street gewwa l-Belt Valletta; u dan kif ser jirriżulta waqt it-trattazzjoni tal-kawża;

2. Illi s-soċjeta intimata applikat sabiex tiżvilluppa l-proprjeta adjaċenti għall dik tal-esponenti; u ċioe l-fond li jġib in-numru wieħed u għoxrin (21) ġewwa St. Frederick Street, Il-Belt Valletta;

3. Illi s-soċjeta intimata, għamlet diversi kostruzzjonijiet fil-proprjeta adjaċenti għall dik tal-esponenti u dana b'detriment u dannu għal-esponenti u dana peress li:

i Saru diversi binjiet illegali u mingħajr permess;
ii Saru binjiet li għamlu danni nġenti fl-istruttura tal-esponenti;
iii Sar bini li kien ta' detriment u jilledi d-drittijiet ta' tgawdija tal-esponenti,
iv Kien hemm aċċess għall fuq il-proprjeta tal-esponenti mingħajr il-permess tagħhom;

4. Illi oltre nbnew diversi strutturi mingħajr ma ġie segwit dak li jeżiġi l-**Artikolu 407 tal-Kapitolu 16 tal-Liġijiet taʳ Malta** u dana peress li ma nbena l-ebda ħajt diviżorju ġdid bejn il-fondi rispettivi fi ħxuna ta' mhux anqas minn tmienja u tletin ċentimetru (38cm) meta s-soċjeta konvenuta ġiet biex tagħmel il-binja tagħha peress li qed jinbena biss ħajt taʾ ħxuna singlu u dan bi ksur tal-artikolu 407 tal-Kodiċi Civili Kapitolu 16 tal-Liġijiet ta' Malta;

5. Illi minħabba li s-soċjeta intimata bniet mingħajr ma kkostruwiet qoxra oħra adjaċenti għall dik tal-esponenti, l-esponenti qiegħdin ibgħatu danni nġenti liema danni jinkludu iżda mhux limitatament, ħsejjes eċċessivi li jinstemgħu mill-proprejta tal-esponenti, rwejjaħ u umdita fil-ħitan tal-atturi b'dana li l-atturi mhux qiegħdin jgawdu l-proprjeta tagħhom kif għandhom dritt jagħmlu; u dan kif ser jiġi ppruvat waqt it-trattazzjoni tal-Kawża;

6. Illi l-istess soċjeta konvenuta b'mod abbusiv u illegali għamlet diversi xogħolijiet fil-ħajt li jifred iż-żewġ proprjetajiet rispettivi tal-kontendenti, tant li anki tellat bosta filati fost kostruzzjonijiet oħra fuq dawn il-ħitan, meta dawn il-ħitan jappartjenu lil esponenti u dana peress li huwa ħajt li jifred il-bini tal-esponenti u l-bitħa tas-soċjeta konvenuta u dana bi ksur ta' dak li jipprovdi l-Artikolu 409 (3) tal-Kapitolu 16 tal-Liġijiet ta' Malta, u dana fost xogħolijiet illegali oħrajn kif ser jiġi ppruvat waqt it-trattazzjoni tal-kawża;

7. Illi dawn ix-xogħolijiet huma elenkati fl-anness rapport maħruġ mill-perit tal-esponenti; mill-liema rapport jirriżulta ukoll uħud mid-danni sofferti mill-atturi; hawn anness u mmarkat bħala 'Dokument MK2' u 'Dokument MK3'; liema rapporti juru ukoll l-mod kif dil binja ġiet

mibnija, bl-irregolaritajiet tagħha kollha, Iil hinn minn dak kontenut fil-permess kif ser jiġi ppruvat aħjar waqt it-trattazzjoni tal-kawża;

8. Illi l-esponenti kienu tramite l-Perit tagħhom anki kkomunikaw mal-perit inkarigat mill-proġett sabiex ma jibqax isir xogħol u kostruzzjonijiet illegali u kien hemm ftehim li dan ix-xoghol kellhu jieqaf u dan kif ser jiġi ppruvat waqt it-trattazzjoni tal-kawża;

9. Illi l-esponenti jgħixu barra, u meta waslu lura ndunaw li x-xogħolijiet tkomplew b'detriment kbir għalihom u għal proprjeta tagħhom minħabba ħsarat sofferti fl-istruttura u minħabba l-fatt li telaw diversi ħitan li ppreġudikaw il-propjeta tal-esponenti u nvadew id-drittijiet tagħhom ta' tgawdija tal-proprjeta tagħhom; minħabba l-mod illegali u bla grazzja kif ittella l-bini, u dan kif jirriżulta mir-ritratti esebiti fil-conditional report fuq imsemmi u kif ser jirriżulta aħjar fit-trattazzjoni tal-kawża;

10. Illi l-esponenti talbu u ottjenew il-ħruġ ta' mandat ta' inibizzjoni kontra s-soċjeta intimata sabiex iżommuha milli tkompli bix-xogħol ta' bini tagħha sakemm ma tottemporax ruħha mad-dispożizzjonijiet leġiżlattivi rilevanti — Mandat Numru 735/ 2017 fl-ismijiet "Marco Parolini et vs. Farruġia Investments LIMITED (C-25921)" u għalhekk din il-kawża qiegħda ssir ukoll in sostenn ta' dak il-mandat, kopja annessa u mmarkata bħala 'Dokument MK3';

11. Illi s-soċjeta konvenuta għalkemm intrabat verbalment sabiex jirrimedja l-istess nuqqasijiet da parti tagħha u anki vverbalizzat dan waqt is-smiegħ tal-Mandat ta' Inibizzjoni llum kkonfermat permezz tal-provvediment tat-tnejn(2) ta' Gunju tas-sena elfejn u sbatax (2017) hija baqgħet inadempjenti sa issa;

Għaldaqstant tgħid is-soċjeta intimata l-għaliex ma għandiex din l-wisq Onorabbli Qorti:

1. Tiddikjara li s-soċjeta konvenuta hi obbligata li tibni ħitan diviżorji ġodda bejn il-fondi rispettivi fi ħxuna ta' mhux anqas minn tmienja u tletin ċentimetru (38cm) skont ma jipprovdi l-Artikolu 407 tal-Kapitolu 16 tal-Liġijiet ta' Malta;
2. Tiddikjara illi l-istess soċjeta konvenuta b'mod abbusiv u illegali għamlet diversi xogħolijiet fil-ħitan li jifirdu iż-żewġ propjetajiet, meta dawn il-ħitan jappartjenu lil-atturi u dana bi ksur ta' dak li jipprovdi l-Artikolu 409 (3) tal-Kapitolu 16 tal-Liġijiet ta' Malta;
3. Tiddikjara li x-xogħolijiet li ġew effetwati fil-ħitan tal-atturi huma illegali u abbusivi;
4. Tiddikjara lis-soċjeta konvenuta kienet unikament responsabbli għal tali xogħolijiet illegali u abbusivi;

5. Tiddikjara li s-soċjeta konvenuta hi reponsabbli għad-danni subiti mill-atturi fil-proprjeta tagħhom;
6. Tordna lis-soċjeta konvenuta sabiex tagħmel dawk ix-xogħolijiet kollha neċessarji u rimedjali fl-istess ħitan, okkorrendo permezz ta' periti nominandi u dan fi żmien qasir u perentorju li tiffissa dina l- Qorti;
7. Tawtoriżża lill-atturi sabiex jagħmlu huma stess ix-xogħolijiet kollha neċessarji u rimedjali kif jiġi hekk ordnat mill-Qorti bl-assistenza okkorrendo ta' periti nominandi fil-każ tan-nuqqas tas-soċjeta konvenuta fiż-żmien lilha ordnat minn dina I-istess Qorti u dan a spejjeż tal-istess soċjeta konvenuta;

Salv u impreġudikat kull dritt ieħor tal-atturi skont il-liġi.

Bl-ispejjeż kontra I-istess soċjeta konvenuta li minn issa hija nġunta biex tidher għas- subizzjoni.

Having seen the sworn reply of the Defendant company Farruġia Investments (the Company) filed on the 18th of August 2017 by which the pleaded the following:-

1. Illi preliminarjament, it-talbiet hekk kif dedotti m' humiex sostenibbli fil-konfront ta' l-intimata stante illi hija proprjetarja ta' parti diviża mill-fond mertu tal-vertenza odjerna, u ċioe 21, St. Frederick Street, Valletta, filwaqt illi Robert Farruġia u Alexandra Farruġia huma is-sidien ta' parti oħra diviża ta' l-istess fond u dan skont kif jirriżulta mill-anness kuntratt (Dok A);

2. Illi mingħajr preġudizzju għas-suespost, daqstant ieħor it-talbiet attriċi huma infondati fil-fatt u fid-dritt u dan stante illi il-proprjetajiet rispettivi tal-kontendenti dejjem kienu mibnijja ma ġemb xulxin u l-ħajt diviżorju bejn il-proprjetajiet huwa dak li hu u li minn dejjem kien, u ħadd mill-kontendenti jew mill-aventi kawża tagħhom ma esiġew li l-ħajt diviżorju jkun ta' xi ħxuna partikolari u għaldaqstant jeżistu l-elementi tal-preskrizzjoni estintiva ta' l-azzjoni skont l-artikolu 2143 tal- Kap. 16 tal-Liġijiet ta' Malta.

3. Illi f'kull każ, jekk il-ħajt diviżorju għandu jkun tal-ħxuna ta' tmienja u tletin centimetre (38cm) din il-ħxuna trid tinqasam fuq iż-żewġ fondi adjaċenti ta' xulxin, u ċioe dik tal-intimata u dik tar-rikorrenti, u ċertament li ma tistax tintlaqa talba illi l-ħxuna addizzjonali jeħtieġ ibgħatiha sid ta' proprjeta waħda, u għaldaqstant l-ewwel talba attriċi għandha wkoll tiġi miċħuda.

4. Illi l-ħajt eżistenti huwa ħajt diviżorju illi huwa komuni u japplika l-artikolu 409(1) tal-Kap. 16 u mhux l-artikolu 409(3) stante li hawn si tratta ta' żewġ binjiet b'għoli differenti u mhux binja adjaċenti għal bitħa, għalqa jew ġnien. Oltre dan skont l-artikolu 413 u l-artikolu 414 kull sid għandu d-dritt li juża u saħansitra jgħolli l-ħajt ta' l-appoġġ bejn il-proprjeta.

5. Illi konsegwentement l-intimata ma għamlet l-ebda xogħol illegali jew abbusiv u qatt ma tista tiddikjara li għamlet xi xogħol illegali jew abbusiv.

6. Illi t-talba rigward il-ħsarat fil-fond tar-rikorrenti hija frivola u vessatorja stante illi is-socjeta intimata qatt ma irrifjutat li tħallas għal dawk il-ħsarat li kienu risponsabilita tagħha. Hija dejjem ottemprat ruħha ma dak stipulat fl-AL. 72 tas-sena 2013 u kull ħsara, dejjem jekk hija attribwibbli lill-intimata, ser tiġi rimedjata mill-intimata. Ċertament illi ma kien hemm l-ebda ħtieġa li jintalab l-intervent ta' dina l-Onorabbli Qorti sabiex l-intimata tiġi kkundannata tagħmel dawn it-tiswijiet.

7. Salv eċċezzjonijiet ulterjuri.

Having seen the sworn counter-claim filed by the Defendant company together with the sworn reply by which they premised and demanded the following:-

1. Illi hija sid ta' parti diviża mill-fond wieħed u għoxrin (21), St, Frederick Street, Valletta. Illi is-sid tal-parti diviża l-oħra ta' l-istess fond huma Robert u Alexandra konjuġi Farruġia;

2. Illi hija għamlet xogħolijiet ta' kostruzzjoni u xogħolijiet oħra fl-istess fond;

3. Illi x-xogħolijiet kollha ta' kostruzzjoni kienu tlestew qabel it-tnax (12) ta' Mejju 2017, u dan kif jista jiġi ikkonfermat fil-mori ta' din il-kawża;

4. Illi r-rikorrenti kienu talbu u ottjenew mandat ta' inibizzjoni fil-konfront tas-soċjeta intimata rikonvenjenti sabiex dina ma tkomplix bix-xogħolijiet ta' kostruzzjoni fil-fond 21, St, Frederick Street, Valletta, u dan tramite deċiżjoni ta' dina l-Onorabbli Qorti diversament ippreseduta tat-2 ta' Gunju 2017 (rikors 735/17);

5. Illi ċertament li qatt ma seta jintlaqa mandat ta' inibizzjoni sabiex jitwaqqfu milli jsiru xogħolijiet li kienu diġa saru;

6. Illi oltre dan, r-rikorrenti bħala sidien tal-fond numru għoxrin (20) St. Frederick Street, Valletta, għandhom l-obbligu li jgħollu il-ħajt diviżorju ta' bejn il-proprjeta tagħhom u dik tas-soċjeta intimata rikonvenjenti b' għoli ta' mija u tmenin ċentimetru (180cm) mill-art tal-bejt tagħhom, u dan skont dak provdut fl-artikolu 427 tal-Kap. 16 tal-Liġijiet ta' Malta;

Għaldaqstant, l-esponenti umilment jitolbu li dina l-Onorabbli Qorti jogħġobha:

1. Tiddikjara illi d-deċiżjoni ta' dina l-Onorabbl Qorti tat-2 ta' Gunju 2017 mir rikors numru 725/17 fl-Atti tal-Mandat ta' Inibizzjoni fl-ismijiet Marco Parolini et vs. Farruġia Investment Limited hija żbaljata stante li dak li inibit lis-soċjeta Farruġia Investments Limited milli tagħmel jew tkompli kien jirrelata għall-xogħolijiet ta' kostruzzjoni li kienu diġa saru

u tlestew qabel il-preżentata u n-notifika ta' l-istess mandat lis-soċjeta Farruġia Investments Limited;

2. Konsegwentement tannulla, tirrevoka u tħassar l-istess deċiżjoni;

3. Tiddikjara illi stante li jeżistu l-elementi stipulat fl-artikolu 427 tal-Kap. 16 tal Liġijiet a' Malta, r-rikorrenti huma obbligati li jgħollu l-opramorta, u ċioe il-ħajt diviżorju, b' għoli ta' mija u tmenin ċentimetru (180cm) mill-livell tal-bejt tagħhom;

4. Tordna li l-istess rikorrenti jogħllu l-istess opramorta, ossia il-ħajt diviżorju, sa mija u tmenin ċentimetru mill-livell tal-bejt tagħhom, okkorrendo permezz ta' periti nominandi u dan fi żmien qasir u perentorju li diga tiffissa dina l-Onorabbli Qorti;

5. Tawtorizza lill-intimata rikonvenjenti sabiex tagħmel dawn ix-xogħolijiet hija stess okkorendo permezz ta' periti nominandi fil-każ ta' l-inadempjenza da parti tar-rikorrenti milli jagħmlu dawn ix-xogħolijiet ordnati, u dan a spejjeż ta' l-istess rikorrenti;

Having seen the Plaintiffs' sworn reply to the counter-claim filed on the 14th of September 2017, wherein they pleaded the following:-

1. Illi l-ewwel u t-tieni talba għandha tiġi miċħudha u dana stante li d-deċiżjoni tal-ewwel Qorti kienet motivata u nlaqgħet skont il-liġi;

2. Dwar it-tielet talba u r-raba talba sabiex titla l-opramorta u ċioe l-ħajt diviżorju, jiġi eċċepit li:

(i) din l-istanza saret mingħajr ebda interpellazzjoni fis-sens illi l-atturi rikonvenzjonati qatt ma kienu nterpellati sabiex jgħollu l-opramorta;

(ii)wisq inqas ma kienu f'posizzjoni li jtellgħu l-opramorta u dana peress li x-xogħolijiet minn naħa tal-konvenuti rikonvenzjonati kienu għadhom qas tlestew u dan kif ser jiġi ppruvat waqt it-trattazzjoni tal-kawża;

3. Illi in oltre dwar it-tielet talba u r-raba talba sa ftit jiem qabel ma kien appuntat għas-smiegħ il-mandat ta' inibizzjoni 725/17 il-konvenuti rikonvenzjonati (1) kienu applikaw għall-emmenda fil-permess tagħhom u l-atturi rikonvenzjonati kienu għadhom qas jafu x'ser isir mill-fond adjaċenti nkwantu tlugħ u bini ta' ħitan; (ii) ma setgħux qas li kieku riedu jtellgħu ebda ħitan għax kien hemm xogħolijiet għadejjin fil-fond adjaċenti kontinwi u kontestazzjoni fuq diversi ħitan u strutturi kif jirriżulta mill-kawża li ntavolaw l-atturi rikonvenzjonati;

4. Illi oltre hekk l-atturi rikonvenzjonati sofrew diversi ħsarat fil-bejt tagħhom meta l-konvenuti rikonvenzjonati kienu qabdu u aċċeddew fuq il-bejt tagħhom u taqqluh b'materjal mingħajr il-kunsens tagħhom u dan kif ser jiġi ppruvat waqt it-trattazzjoni tal-kawża u kien minħabba x-xogħolijiet kontinwi u d-danni li kienu qiegħdin isofru u għadhom isofru l-atturi rikonvenzjonati li ma saru ebda xogħolijiet oħrajn fil-fond tal-atturi;

> **5.** Illi għalhekk l-atturi rikonvenzjonati ma għandhomx ibgħatu l-ispejjeż ta' din il-kawża peress li saret b'mod frivolu u vessatorju;

Having seen that spouses Robert and Alexandra Farruġia (spoused Farruġia) where joined to the suit by virtue of the decree dated 10th July 2018. In that same sitting the spouses Farruġia made their own, the pleas of the defendant company and consequently as well as the counter-claim.

Having seen the judicial proceedings of the warrant of prohibitory injunction number 735/2017, included in these proceedings by virtue of a decree given in the court verbal of the hearing of the 6th of February 2018.

Having seen all the documents produced during the course of the proceedings by all parties;

Having seen all the evidence produced and adduced by the parties during the course of these proceedings;

Having seen all the records of the case;

Having seen that the case has been adjourned for today for the delivery of judgment;

Now therefore:

Points of facts:

The plaintiffs are the owners of property number 20, St. Frederick Street, Valletta. They acquired this property by virtue of a public deed dated 6th June 2006 (fol 10 in the acts of warrant number 735/2017). On the other part the

defendants are in their own right, owners of the adjacent property number 21, St. Frederick Street, Valletta, acquired by virtue of a public deed dated 24th June 2016 (a' fol 42). The defendents commenced developing their property in September of that same year (affidavit plaintiff Markus Arnold Kick fol 147, affidavit defendant Robert Farruġia a' fol 409).

This plaintiffs' action is stands on the premise that during the course of developing their property, the defendants did not observe what is laid down by article 407 of the Civil Code. The plaintiffs contend this caused serious damage to their poperty number 20, St. Frederick Street, Valletta (see premises 4 and 5). The plaintiffs further premise, that the work undertaken by the defendants, as regards the party wall, were carried out in violation of article 409(3) of the Civil Code. They insist that according the said article, the party walls appartain to the plaintiff qua owners of property 20, St. Frederick Street, Valletta (see premises 6 and 7).

Prior to introduction of this suit, the plaintiffs filed an application before the appropriate Court to obtain a prohibitory injunction for the following reason:

"*sabiex jogħġobha, tinibixxi anki proviżorjament lis-soċjetá intimata milli:*

i. Tkompli fil-bini tal-proprjetá li ġġib in-numru wieħed u għoxrin (21), St. Frederick Street, Il-Belt Valletta; ii. Tagħmel xogħolijiet ta' kostruzzjoni fl-imsemmi fond u ċioe mill-fond wieħed u għoxrin (21), St. Fredrick Street, il-Belt Valletta; (iii) Ittella u tibni ħitan mingħajr permess fil-fond wieħed u għoxrin (21),

St. Frederick Street, Il-Belt Valletta; (iv) Taċċedi fuq il-proprjetá tal-esponenti li għandha n-numru għoxrin (20), ġo St. Frederick Street, Valletta."

By virtue of a decree pronounced on the 2nd of June 2017, the Court acceded to their request and proceeded to grant their requests definitively and a warrant of prohibitory injunction was issued against defendant Company.

Points of Law:

Plaintiffs are demanding that the defendants be declared by the Court, that they are to be held liable for the damages sustained by them in their property because of the following reasons:

i. the defendants failed to erect new party walls of a thickness of not less that thirty-eight centimeters (38cm) in accordance with Article 407 of the Civil Code;

ii. the defendants acted in violation of Article 409(3) of the Civil Code when they abusively and illegally carried out various works to and on the party walls, keeping in mind that these walls belong to the plaintiffs qua owners of property number 20, St. Frederick Street, Valletta.

It has been established that "*Id-drittijiet u obbligi ta' sidien tal-proprjetajiet adjacenti meta jkun hemm hitan u fossijiet li jifirdu fond minn iehor huma regolati bl-Artikolu 407 et sequitur tal-Kodici Civili. Dawn ir-regoli ta' bon vicinat huma ntizi sabiex ma ssirx hsara fil-hitan divizorji li jifirdu proprjetajiet adjacenti, u ghalhekk mhux biss ma jippermettux il-gar li jigma materjal li jista' jaghmel hsara ma' l-imsemmi hajt izda jimponu obbligu fuq il-gar li jiehu azzjonijiet preventivi*

sabiex jevita kull possibilita` ta' hsara." (**Lay Lay Company Limited et vs Michael Seychell et, Qorti tal-Appell, 16 ta' Diċembru 2003**).

On the otherhand by means of their counter-claim, the defendants are requesting this court, in the first place, revokes the above referred warrant of prohibitory injunction, and in the second place, to order the plaintiffs to raise the party-wall to the extent of one metre and eighty centimetres above the level of the roof, in terms of article 427 of the Civil Code.

Considerations:

The defendants plead *ad limine* that the action of the Plaintiffs is unsustainable at law "*stante illi hija proprjetarja ta' parti diviża mill-fond mertu tal-vertenza odjerna, u ċioè 21, St. Frederick Street, Valletta, filwaqt illi Robert Farruġia u Alexandra Farruġia huma s-sidien ta' parti oħra diviża ta' l-istess fond u dan skont kif jirriżulta mill-anness kuntratt (Dok A)*"

This plea was resolved by the decree of the court dated 10th July 2018 by virtue of which Robert and Alexandra Farruġia were joined to the suit (vide fol 94).

Another preliminary plea of the defendants is to the effect that the action has been time barred and therefore extinguished following the lapse of the thirty-year prescription period stipulated in article 2143 of the Civil Code. This "*stante illi l-proprjetajiet rispettivi tal-kontendenti dejjem kienu mibnija ma ġenb xulxin u l-ħajt diviżorju bejn il-proprjetajiet huwa dak li hu u li minn dejjem kien, u ħadd mill-kontendenti jew mill-aventi kawża tagħhom ma esiġew li l-ħajt diviżorju jkun ta' xi ħxuna partikolari*".

It has been held that obligations and prohibitions expressed in the law, since they are also founded on public interest, are not extinguishable by prescription. As already observed by this Court in **Joseph Aquilina et vs Espedito Sammut et delivered on the 16th of November 2017**, "*L-artiklu 2143 tal-Kodici Civili, li fuqu qieghed jistrieh il-konvenut biex jikkumbatti t-talbiet attrici, jitkellem dwar il-preskrizzjoni estintiva. Il-konvenut ma hux jeccepixxi li akkwista xi dritt rejali ta' servitu` bhal ma huwa fil-kaz tal-artikolu 462 tal-Kodici Civili. Li qieghed jghid il-konvenut hu, li l-attur tilef id-dritt li jesperita l-azzjoni taht artikolu 443 bit-trapass ta' 30 sena.*

Izda anke jekk wiehed ihares lejn dak li jghid dan l-artikolu, it-test tieghu huwa car: "Is-sid ta' bini ma jistax jiftaħ twieqi f'bogħod ta' anqas minn sitta u sebgħin ċentimetru mill-ħajt diviżorju." Galadarba b'mod imperattiv hemm din il-projbizzjoni tal-ligi u fid-dawl tal-element ta' ordni pubbliku kif fuq inghad, il-Qorti tirribadixxi d-dubbji taghha ta' kemm l-azzjoni taht l-artikolu inkwistjoni hija effettivament soggetta ghall-preskrizzjoni estintiva. Fejn jidhlu distanzi domandati b'mod imperattiv mil-ligi u dwar l-impreskrittivibilta` taghhom issir referenza ghas-segwenti sentenzi u cioe` Sentenza fl-ismjiet ***Salvatore Grixti et -vs- Giuseppe Cutajar et*** *tal-Prim Awla Qorti Civili per Imhallef J. Montanaro Gauci tat-12 ta' Lulju 1946 u* ***Tagliaferro-vs-Axiaq*** *Kollezz Xll.p.458.*"

It is also worth noting, for the better appreciation of the legal issues under consideration, that articles 407 to 418 of Civil Code regulate the behaviour and rights of co-owners. In this legal context, the same principles of co-ownership therefore apply, since the grant to every co-owner exercise his rights are not

subject to prescription in so far that the matter concerns their internal relationship. These articles contrast starkly with the provisions of articles 419 to 428 of the same Civil Code. The latter, regulate the conduct in the exercise of rights and obligations, between neighbours and non-co-owners to which prescription is applicable.

Therefore, since Article 407 imperatively imposes an obligation that "*A wall which serves to separate two buildings or a building from a tenement of a different nature must have a thickness of not less than thirty-eight centimetres*", an action under this article is not subject to extinctive prescription. In other words, the action of a co-owner to exercise his rights under this article cannot be time-barred. The Court will therefore be rejecting this plea.

Article 407 of the Civil Code does not impose an obligation to build a party wall but only provides for it's thickness, should it be built, that is thirty-eight centimeters. It is uncontested that during the course of developing property of 21 St. Frederick Street Valletta, the Defendants did not erect any party wall but only raised the existing one (see premises 4 and 6 in fol 2, affidavit of plaintiff Markus Kick fol 147 paras 17 to 26 together with photos MK5/1 and MK5/2 fol 171 and 172, MK8 to MK15 fol 188 to 195, testimony of Architect Katia Vella fol 278, affidavit of Plaintiff Marco Parolini fol 282 para 9(e) to (m) together with photos Doc MPE fol 315 to Doc MPG fol 328, additional affidavit of Plaintiff Markus Arnold Kick fol 343 para 1, testimony of Architect Paul Camilleri fol 347 and 413, affidavit and counter-examination of Sebastian Mangion, General

Manager Farruġia Investment Ltd fol 352 and 412 and affidavit Robert Farruġia fol 409 front 2).

It follows then, that article 407 of the Civil Code finds no application in this case. In order to raise the common wall, the defendants had to build on it a wall equivalent to the existing thickness. This is required by article 427(2)of the Civil Code. Therefore it logically and legally follows, that the defendants cannot be held at fault because strictly speaking they are not in breach of the law (vide **Judgment in the names of Eunice Cassar et -vs- Tancred Borg, Civil Court First Hall, 9th May 2018**).

Moreover, our Courts expound on this matter by further explaining that before a party wall is raised to the height required by law, its present condition is to be assessed and taken into account. This in order to avoid and prevent unnecessary damage to the wall itself (Vide **Judgment of the First Hall Civil Court decided on the 8th of January 1936 in the names of Tanti -vs- Tanti Kollez. [Vol: XXIX.ii.885]**). From a close examination of the report of the court appointed expert, it transpires, that the party wall did not suffer any extensive damage. The damages were only minimal (see fol 106 till 429).

The Court will therefore be rejecting the plaintiffs' first request since it is legally unsustainable.

As to the Plaintiffs' second claim, this Court agrees with the teachings of the **Court of Appeal in the Judgment of Neil Bianco -vs- A. Bonello Limited dated 30th November 2012**. In this Judgement the court reiterated the right

conferred to every owner by article 418 of the Civil Code to make and render common a wall contiguous to his tenement by raising or rebuilding it. This Court feels that it is worth citing this Judgment *in exte*nso because of the clarity and comprehensive exposition of the guridical elements involved in the matter being considered in this suit.

"*b'sentenza moghtija fil-15 ta' Ottubru 1951, fil-kawza fl-ismijiet* ***Bonnici vs Spiteri****, din il-Qorti kienet studjat il-kwistjoni u ddecidiet favur l-akkwist tal-komproprjeta` ta' hajt divizorju bis-semplici uzu tieghu mill-gar. Din il-Qorti kienet analizzat il-kwistjoni f'dawn it-termini (l-artikolu tal-Ligi rilevanti kien dak iz-zmien enumerat Artikolu 455 [illum dan huwa l-artikolu 418]): "Analizzata n-natura guridika tad-dritt tal-appogg fid-dawl tad-disposizzjoni tal-ligi fuq riportata, wiehed ghandu jasal ghall-konkluzjoni li dak id-dritt mhux haga ohra hlief esproprijazzjoni forzuza; u jikkonsisti fic-cessjoni ta' bilfors li l-proprjetarju eskluziv ta' hajt ta' konfini huwa obligat jaghti lil vicin tieghu ta' nofs l-istess hajt li mieghu l-istess vicin ipoggi l-bini tieghu. Il-fakolta` moghtija bl-imsemmi Art. 455 hija moghtija minghajr il-bzonn tal-prevju kunsens tal-proprjetarju tal-hajt, salv l-obligu tal-utenti minn dik il-fakolta` li jhallas lil dak il-proprjetarju nofs il-valur tal-hajt li ghamel komuni, u li jhallas l-ispejjez li jkun hemm bzonn biex ma ssirx hsara lill-imsemmi proprjetarju. Dak il-hlas li jsir lill-proprjetarju tal-hajt ma jistax jissejjah proprjament prezz billi wiehed ma jistax jirritjeni li kien hemm bejgh tal-hajt jew ta' bicca minnu, ghaliex jonqos il-kuntratt konsenswali. Ghalhekk, kif sostniet il-Prim' Awla tal-Qorti Civili fil-11 ta' Frar 1931 in re "Busuttil vs Vella" (Vollez. Vol. XXVIII, P. II. Pag. 35), dak l-hlas jirrapprezenta*

“un compenso, un equivalente, o una indennita` per la cosa tolta al proprietario della stessa”; “Dwar l-imsemmija fakolta` stabbilita mill-Art. 455 tal-Kodici Civili (sostanzjalment identiku ghall-Art. 556 tal-Kodici Civili Taljan) ir-Ricci (Corso Teorico-Pratico di Diritto Civile, Vol. II, par. 396 tergo pag 512-513), jghid hekk: “Quando il muro e` contiguo al fondo altrui, il proprietario di esso non puo` in alcun modo opporsi a che il vicino ne ottenga la comunione, essendo la legge stessa quella che lo espropria di parte del suo dominio per trasferirlo nel proprietario vicino. Ora a quale scopo ‘chiedere’ quello che non puo` essere ricusato?” U izjed ’il quddiem jghid li “la domanda non e` adunque necessaria per ottienere la comunione di un muro contiguo; basta quindi che chi vuole consguirla ne dimostri la volonta`, perche` ‘ope legis’ se ne trasferisca in esso la comproprieta`”. L-istess awtur (loc. cit. pag. 515, para. 398) isostni li “La comunione del muro non e` sottoposta al previo pagamento della somma dovuta dall’acquirente ai termini dell articolo 556; onde il proprietario del muro non puo` recusarsi a renderlo comune per il motivo che non siasi ancora pagato il dovuto compenso”; u jiccita favur din il-konkluzjoni tieghu sentenza tal-Qorti tal-Appell ta’ Firenze tat-3 ta’ Marzu 1876, ohra tal-Kassazzjoni ta’ Palermo tal-10 ta’ Awwissu 1897, ohra tal-Kassazzjoni ta’ Napli tat-23 ta’ Dicembru 1899, u ohra tal-Qorti tal-Appell ta’ Venezia tat-2 ta’ Mejju 1899. “Il Pacifici Mazzoni (Istituzioni, Vol. III, p. 1, pag. 310) jghid li “in ogni caso la comunione e` facoltativa del proprietario del fondo contiguo a quello dove esiste il muro”; u fin-noti aggunti (op. cit. pag. 490), taht l-inciz (d), jissokta jghid hekk:- “Non e` necessaria una forma speciale per la domanda di comunione. La Cassazione

di Roma, 20 marzo 1894, Legge, 1894, I, 649, decise che a rendere perfetto il diritto di comunione stabilito dall'articolo 566 basta il semplice fatto che il vicino abbia appoggiato la sua costruzione al muro, quando da tale fatto si possa desumere la sua intenzione di acquistarne la comunione";

"Ikkunsidrat;

"Illi, stabbiliti l-principji fuq migjubin, li ghandhom jigu applikati fil-kaz in ezami, jitnisslu dawn il-konsegwenzi:- "(1) li l-appellant kellu skont il-ligi, il-fakolta` li jirrendi komuni u li jpoggi l-bini tieghu mal-hajt imsemmi fic-citazzjoni, ta' proprjeta` tal-attur; (2) li biex jaghmel hekk l-appellant ma kellux bzonn il-kunsens preventiv tal-attur; u (c) li bil-fatt stess tal-kostruzzjonijiet mill-appellant maghmula fis-sena 1941 u fis-sena 1948 huwa akkwista l-komunjoni ta' dak il-hajt. Minn din l-ahhar konkluzjoni titnissel ohra wisq importanti ghas-soluzzjoni ta' dan l-appell, jigifieri li la darba l-appellant akkwista l-komunjoni tal-hajt minn mindu huwa pogga mieghu, minn dak iz-zmien inholoq favur l-attur il-kreditu ghall-hlas ta' dak l-appogg, u kontra l-appellant l-obligu tieghu biex jissodisfa dak il-hlas. U billi din il-Qorti taqbel ma' dik tal-ewwel istanza li dan il-hlas ghandu jkun regolat fuq il-valur fl-epoka li jkun sar l-akkwist, tirrizulta fondata l-pretensjoni tal-appellant li l-kumpens minnu dovut ghandu jigi stabbilit fuq il-valur tal-hajt fiz-zmien li gew minnu pratikati l-appoggi in kwistjoni." (Sottolinear ta' din il-Qorti)

Minn dak iz-zmien 'l hawn, hekk baqa' jigi nterpretat l-artikolu in ezami, u din il-Qorti ma tarax li gurisprudenza ta' aktar min-nofs seklu ghandha titwarrab

leggerment. Dan mhux kaz ta' bidla fl-interpretazzjoni minn "gurisprudenza aktar recenti" (kif osservat il-Prim' Awla tal-Qorti Civili fil-kawza Camilleri vs Cutajar, deciza fis-7 ta' Dicembru 2001), imma, kif inghad, huwa principju bbazat fuq gurisprudenza antikissima, gurisprudenza li baqghet tigi segwita tul is-snin minn dak iz-zmien 'l hawn. Hekk, per ezempju, din il-Qorti, fil-kawza ***Refalo vs Rapa et****, deciza fl-20 ta' Marzu 1995, ghamlet is-segwenti osservazzjonijiet:*

"Fil-petizzjoni tal-Appell, l-appellanti ghamlu riferenza ghal sentenza moghtija mill-Onorabbli Prim' Awla tal-Qorti Civili in re ***Sacerdot Carmelo Gauci vs Michele Zerafa****, (Vol. XXIV-II-451), fejn intqal dan li gej: "nel fatto il convenuto ha elevato il detto muro divisorio comune senza il consenso e malgrado il rifiuto dell'attore: ma anche` qui, per le stesse ragioni sopra espresse, il convenuto non ha con cio` commesso spoglio in modo da intitolare l'attore a chiedere la demolizione del sovralzarnento poiche` gli stessi diritti che l'attore aveva per la comunione del muro sono rimasti illesi, e la legge gli concede il diritto tanto di risarcimento dei danni che nel fatto dell'inalzamento egli venisse a sofrire, come pure quello di acquistare la comunione della porzione sovra elevata";*

"Din il-Qorti jidhrilha li din ic-citazzjoni minn din is-sentenza appena msemmija tikkristallizza proprju l-pozizzjoni legali. Il-ligi ma tirrikjedix procedura partikolari biex hajt li jkun diga` mibni u li huwa possibbli li jigi rez in komun, jigi effettivament rez komuni. Hija forsi l-kortesija, il-kostumi salutari ta' bwon vicinat u ragunijiet ohra li jaghmluha rakkommandabbli li qabel ma persuna tirrendi hajt in komun tinforma lill-proprjetarju b'din l-intenzjoni, pero`, dana m'huwiex rikjest

ad hoc mil-ligi, li anqas, s'intendi, ghalhekk, ma tirrikjedi xi formalita` partikolari jew illi qabel ghandu jigi ottenut il-permess jew il-kunsens tas-sid. Ir-raguni ghal dan hija ovvja, u cioe` li meta persuna tibni hajt li minnu nnifsu jista' jigi rez in komun eventwalment, dan huwa stat ta' fatt illi dak li jkun jidhol fih konsapevolment. Isegwi wkoll ghalhekk illi l-proprjetarju tal-art adjacenti li jkun irid jirrendi dak il-hajt in komuni u li ghandu dritt jirrendih in komuni, kull ma ghandu jaghmel huwa proprju jaghmel dak l-att fiziku illi permezz tieghu jirrendih in komun. Ma jkun qieghed inehhi xejn mill-pussess – ghaliex hawnhekk qeghdin in materja ta' pussess wara kollox – tal-proprjetarju ta' dak li kien sa dak iz-zmien proprjetarju assolut u uniku tal-imsemmi hajt, ghaliex il-pussess hemm kien u hemm jibqa', hlief li issa se jkun hemm ko-pussessur. Pero`, certament m'hemmx dak l-ispossessament li jikkaratterizza cirkostanzi li jwasslu biex tkun tista' ssir l-actio spolli. Il-pozizzjoni ghalhekk kif taraha din il-Qorti hija wahda semplici, u cioe`, illi l-fatt li persuna minghajr ma tkun avzat lill-proprjetarju ta' hajt, izda li jkollha dritt legali li tirrendi dak il-hajt komuni, taqbad u jew tappoggja jew tibni fuq dak il-hajt biex tirrendih komuni, ma jwassal qatt ghall-konsegwenzi ta' spoll kif qed jippretendi l-attur izda semmai jista' jaghti biss drittijiet lil dak li jkun li jittutela dak li ghandu dritt ghalih bhalma gie osservat fil-bran citat mis-sentenza msemmija u li jizgura li ma jkunx hemm hsara. Pero` din il-Qorti ma tarax li jista' jikkonfigura l-ispossessament li hu r-rekwizit principali fil-kazijiet ta' spoll." (Sottolinear ta' din il-Qorti)

*Fil-kawza **Debono vs Sammut**, deciza mill-Qorti tal-Kummerc fil-25 ta' Novembru 1987, intqal hekk a propozitu: "Illi ghalhekk, l-unika indagini mehtiega*

hija dwar jekk il-vicin kellu l-intenzjoni li jakkwista l-komunjoni tal-hajt; ghaliex kif innota Ricci, "basta che chi vuol conseguirla ne dimostri la volonta` 'ope legis', se ne trasferisca in esso la proprieta`" (Diritto Civile, 396 ter). Issa, kif jirrizulta mill-perizja gudizzjarju u mill-provi l-ohra, il-konvenut isserva bil-hajt tal-attur tant ghall-bini abittattiv, kemm anki ghall-bitha; parti mill-bitha tal-konvenut bajjadha bil-gir isfar biex taqbel mal-hitan l-ohra tieghu, wahhal musmar fil-hajt inkwistjoni ghas-servizz tieghu, u fl-ahhar tal-bitha l-konvenut bena hajt trasversali biex isahhah il-hajt tieghu; imbaghad, ghal estensjoni ta' 16'4'' il-konvenut qieghed juzaha ghall-annimali – haga li ma kienx jista' jaghmel kieku ma kienx hemm il-hajt inkwistjoni, li bih qieghed jisserva biex "seta' jaghlaq il-fond tieghu". Dawn ic-cirkostanzi juru fil-konvenut l-intenzjoni li jakkwista l-komunjoni tal-hajt kollu; u specjalment, rigward il-bitha, ghandu jigi osservat li ma kienx jista' jbajjadha jekk mhux bhala konsorti fil-hajt. Difatti, De Luca jenumera d-drittijiet tal-konsorti f'hajt divizorju, u jghid li "parietem comunem unus ex sociis potuerit etiam altero invito dealbare ac dipingere et similia super eo facere" "De Servitutibus, Cap. LXXI, §2, pag. 200);

"Similment, fil-kawza fl-ismijiet ***Mifsud vs Abela****, deciza mill-istess Qorti fit-2 ta' Settembru 1986 intqal hekk: "Malli pero` l-konvenut ghamel uzu mill-hajt billi wahhal imsiemer, tella' dilja mieghu, u qabbad hajt mieghu, huwa rrenda l-hajt kollu komuni."*

Fl-istess sens huma l-kawzi ***Mercieca et vs Depasquale et****, deciza minn din il-Qorti Sede Inferjuri, fis-27 ta' Novembru 2009,* ***Abela vs Cassar****, deciza minn din il-Qorti fl-14 ta' Jannar 2002, fejn intqal li l-perjodu preskrittiv (ghall-hlas ta'*

*appogg) jibda jiddekorri minn meta jigi ezercitat l-appogg fis-sens rejali "li jirrendi l-hajt divizorju komuni", **Cauchi vs Byers**, deciza minn din il-Qorti fl-20 ta' Marzu 1995, **Dimech vs Mercieca**, deciza minn din il-Qorti, Sede Inferjuri, fil-5 ta' Mejju 2011, fejn intqal li "d-dritt ta' hlas ta' appogg huwa dovut mid-data meta jsir effettivament l-appogg", **Sultana vs Zahra**, deciza mill-Prim' Awla tal-Qorti Civili fit-30 ta' Gunju 2005, u **Bonnici vs Galea**, deciza mill-Prim' Awla tal-Qorti Civili fit-8 ta' Marzu 1983, fejn intqal li "l-appogg ghandu jitqies li gie prattikat u l-kumpens tieghu stabbilit meta x-xoghol li bih il-vicin appogga l-bini tieghu mal-hajt divizorju jkun tlesta ghal kollox", fost diversi ohra.*

*F'sentenza tat-12 ta' Ottubru 1989, il-Qorti tal-Kummerc, fil-kawza **Muscat vs Camilleri**, kienet regghet fethet il-kwistjoni meta ddecidiet illi l-hajt ta' appogg isir komuni malli jsir il-hlas lill-parti l-ohra, pero`, din il-Qorti, fis-sentenza taghha tat-28 ta' Mejju 1993, skartat din l-interpretazzjoni, u qalet hekk dwar din il-kwistjoni:*

"Minn dan isegwi, fil-fehma kkunsidrata ta' din il-Qorti, illi malli ssir din l-esproprjazzjoni jitwieled id-dritt tal-esproprijat li jithallas, cioe`, dak kollu li tistipula l-ligi fl-Artikolu 418 tal-Kapitolu 16. Din il-konkluzjoni hija l-unika wahda legittima;

*"Bir-rispett lejn il-Qorti tal-Kummerc, li targumenta illi l-hajt isir komuni malli jsir il-hlas huwa argument li ma johrogx minn interpretazzjoni korretta tal-artikolu inkwistjoni. Il-kuntest li fih l-istess intqal mill-Qorti tal-Appell fil-kawza **Schembri vs Delia** kien wiehed differenti;*

“Di fatti, biex wiehed jorbot mal-kawza Schembri vs Delia, li kieku d-dritt tal-appogg jitwieled malli jsir il-hlas, ma tibda tiddekkorri qatt il-preskrizzjoni, billi min ibati l-appogg ikun soggett ghall-konvenjenza tal-gar (jew tal-aventi kawza ta’ min jakkwista minghand il-gar) u ma jkunx jista’ jirreklama l-hlas;

“Izda l-ligi kjarament ma timplikax dan. Il-ligi taghti d-dritt lill-gar li jappoggja, basta jhallas. Din hi l-unika interpretazzjoni legali u logika li wiehed jista’ jigbed…….

…….“Ghalhekk din il-Qorti tara li l-interpretazzjoni korretta tal-artikoli rilevanti hija dik illi d-dritt ta’ min jappoggja jgib mieghu l-obbligu tal-hlas. Min jappoggja jaf li ghandu jhallas tal-appogg kif tghid il-ligi. Jekk min jappoggja jittrasferixxi l-fond qabel ma jhallas tal-appogg, jaf li l-obbligu tal-hlas ghadu hemm;

“Dan igib il-konsegwenza illi s-sid tal-hajt komuni ghandu d-dritt ghall-hlas primarjament minghand min ezercita l-appogg u in difett ta’ hlas, ghandu d-dritt li jirreklama l-pagament minghand l-aventi kawza tal-istess. Fi kliem il-konvenut appellanti stess, f’wahda min-noti tal-osservazzjonijiet tieghu, “id-dritt tal-appogg huwa dritt reali immobiljari, cioe` huwa jus in re konsistenti f’poter dirett u immedjat, fuq il-haga stess u ghalhekk huwa dritt assolut u impersonali u jezisti fil-konfront ta’ kulhadd. L-azzjoni relattiva hi ezercibbli kontra kull possessur tal-haga soggetta ghal dak id-dritt”;

“Veru li hu hekk, fil-fehma ta’ din il-Qorti. U d-distinzjoni bejn in-natura tad-dritt, cioe` jekk hux dritt reali jew personali mhix tant importanti ghas-soluzzjoni tal-vertenza puntwalizzata f’din il-kawza. Il-punt importanti hu li ma jigix interpretat

hazin l-artikolu rilevanti tal-Kapitolu 16 u li ma tinghatax enfasi skorretta fuq l-ideja li huwa l-hlas li jirradika l-appogg. Bhalma ntqal fuq, il-hlas hu dovut malli jsir l-appogg. Il-kwistjoni tal-preskrizzjoni li tiddekorri kontra sid il-hajt hija kwistjoni ohra u kienet din il-kwistjoni biss li giet investita mill-Qorti fis-sentenza Schembri vs Delia. Jigi nnutat ukoll illi dik is-sentenza qalet testwalment hekk:

"Il-fakolta` moghtija bl-imsemmi artikolu hija moghtija minghajr il-bzonn tal-prevju kunsens tal-proprjetarju tal-hajt salv l-obbligu tal-utenti minn dik il-fakolta` li jhallas lil dak il-proprjetarju nofs il-valur…";

"Mela anki hawn hemm ir-rikonoxximent tal-fatt illi l-obbligu tal-hlas jitwieled immedjatament li jsir l-uzu mill-appogg;

"Issa jekk l-utent originali ma jhallasx, min jibqa' jgawdi l-uzu tal-hajt wara l-utent originali, bhala eventi kawza minnu ghandu certament l-obbligu li jhallas, salv ir-relazzjonijiet interni bejnu u bejn l-awtur tieghu."

Din l-interpretazzjoni giet accettata mill-periti u l-kuntratturi lokali u qed tigi segwita fil-prattika fil-kostruzzjoni. Din l-interpretazzjoni ma jidhirx li holqot problema la legali u lanqas fil-prattika, u fuq kollox, hi interpretazzjoni logika u prattika. Interpretazzjoni mod iehor ikun ifisser li min irid jizviluppa s-sit tieghu jkun irid joqghod ghar-rikatt tas-sid tal-hajt divizorju li jkun jista' ma jaghtix il-permess tieghu qabel ma jithallas kemm jitlob: il-gar ikun irid jew jibni qoxra hu (haga li l-ligi trid tevita minhabba li l-art hi limitata) jew jidhol il-Qorti ma' sid il-hajt, bir-rizultat li l-izvilupp ikollu jieqaf sakemm il-kawza tigi deciza. Ikun ukoll

difficli li jigi kkalkolat il-kumpens dovut qabel ma jkun stabbilit kemm mill-hajt divizorju gie res komuni.

Darba li jsir uzu tal-hajt, jiskatta d-dritt ta' hlas ghall-appogg favur is-sid precedenti tal-hajt. B'hekk, meta s-socjeta` konvenuta ghamlet uzu mill-hajt tal-attur, hija ma kienet qed taghmel xejn hlief tezercita d-dritt taghha li trendi in komun parti mill-hajt divizorju, u meta sar hekk skatta favur l-attur id-dritt personali (ara ***Micallef vs Pisani****, deciza minn din il-Qorti fis-7 ta' Ottubru 1997) li jitlob kumpens ghal:*

"…cessjoni ta' bilfors li l-proprjetarju esklussiv ta' hajt ta' konfini huwa obbligat jaghmel lill-vicin ta' nofs l-istess hajt li mieghu l-istess vicin ipoggi l-bini tieghu."

Il-hajt, pero`, sar komuni mal-uzu tieghu, u l-komproprjetarju jista' jgholli l-hajt u jkompli jaghmel uzu minnu fit-termini tal-Artikoli 413 u 414 tal-Kodici Civili. Kwindi, ma jistax jinghad li s-socjeta` konvenuta ghamlet jew qed taghmel uzu hazin mill-hajt inkwistjoni, u t-talbiet tal-attur ma jistghux jintlaqghu. Salv id-dritt tal-attur, allura, li jitlob hlas ghal appogg si et quatenus, hu ma jistax iwaqqaf lis-socjeta` konvenuta milli tinqeda mill-hajt divizorju."

Needless to say, this Court fully endorses the legal considerations expounded in the above Judgement. Applying this clear and comprehensive exposition of the legal points to the matter here dealt with, it cannot be said that the raising by the Defendants of the party walls amounts to an abusive and illegal behaviour or is otherwise in breach of the law. It is manifestly clear that our law

does not require the consent of the Plaintiffs, as owners of the party wall, in order for the defendants to carry out the works, subject of this suit.

On the contrary, the law by virtue of article 418 (1) of the Civil Code grants the Defendants the possibility to unilaterally make a party wall common. This by reimbursing its owner, that is Plaintiffs, one-half of the value of the wall itself and one-half of the value of the land on which it is built as well as by carrying out such necessary works to avoid causing damage to the Plaintiffs' property.

It is therefore also clear, that the acquisition of half the wall is not concomittant with the payment to the other party as compensation. Though the action to render a dividing wall common is *in rem*, the payment for rendering it common is an action *in personam* so much so that it is prescribable. The law sanctions it on the basis of private utility, as expressed in article 402(2) of the Civil Code (vide **Judgment in the names of Francis Theuma pro et noe -vs- Simon Camilleri noe, Civil Court First Hall, 22nd June 2000**).

The act of rendering a party wall common cannot be opposed by the plaintiffs because this right is given to the defendants by the law, save to get paid in the manner explained so clearly in the above mentioned Judgement. As regards damages sustained by the plaintiffs, the court appointed expert found that the costs for remedial works amount to €9,277.46 (see fol 120 and Doc A fol 121).

Therefore, in view of the above, the Court, while rejecting the second, third and fourth demands will be acceeding to the fifth, sixth and seventh demands. The Court is convinced that the works carried out by the defedants were the direct

cause of the damage sustained by the plaintiffs in their property. There are no justifiable reasons why this Court should depart from the conclusions reached by the court appointed expert. This means that the Defendants are liable for the damage suffered by the Plaintiffs in their property. Consequently the defendants will be ordered to perform all such necessary remedial works as decribed in Doc A of the technical report a' fol 121.

By virtue of the second demand in the counter-claim, the Court is being requested to declare that the Court's decision to issue the warrant of prohibitory injunction number 725/17 against the same defendants, was wrong.

It has first to be noted, that this demand is to be examined not on the evidence gathered during these proceedings, but in the light of the evidence that was submitted before the Court that acceded to the request to issue the injunction in question.

Just as that Court could not consider those proceedings ad funditus but merely on the face of them prima facie, in a likewise manner this Court must restict itself to the same constraints as set out by article 873 of Chapter 12 of the Laws of Malta. From an examination of the evidence submitted before that Court in the acts of the warrant in question, this Court has come to the conclusion, that Court was right in upholding the request, given that all the elements of the law for this purpose were present before it.

This being established, the Court considers, that it should not accede to this demand. In any case, Chapter 12 of the Laws of Malta provides for the apposite

procedure to obtain a revocation of that warrant, by means of a counter-warrant under article 836. In case that this judgment gives rise to the exigency to revoke this warrant, common sense dictates, that the party who requested should volontarily see to it and be removed. Failure to do so may give rise to heavy damages.

In such case, the defendants can always proceed in accordance with the said article, on any of the grounds therein stated.This is, however, for the parties to decide after this judgement becomes final.

This particular request will therefore be rejected without prejudice to any rights the rights of the parties under the law.

The court considers that the third, fourth and fifth demands in the counter-claim, are to be declared as exhausted due to the fact that the defendants themselves raised the party wall on their own initiative and at their own expense.

As to the fees of these proceedings, the Court considers it unfair to these are not borne solely by the defendants spouses Farruġia. The defendants have always shown a willingness to make good for the damage sustained by the plaintiffs and to reimburse them in accordance with article 418 of the Civil Code.

The defendants also made some alterations to the party wall on the suggestion of the Plaintiffs' own architect. This was done to avoid obstructing their view (see testimonies of Architect Katia Vella fol 278, testimony and cross-examination of Architect Paul Camilleri fol 346 and 413, cross-examination Plaintiff Marcus Kick fal 349, affidavit and cross-examination Sebastian

Mangion fol 351 and 412, cross examination Plaintiff Marco Parolini fol 407, affidavit and cross examination Defendant Robert Farruġia fol 409 front 2, and 410 till 412). Moreover, the primary demand,of the Plaintiffs, have been rejected.

Finally, it was a good thing that spouses Farruġia were joined to the suit considering that both of them had a direct interest in the property. However, since all the defendants have an obvious interest in the development that was undertaken, they are both to answer to the demands of the plaintiffs.

Decision:

Now therefore, in view of the above reasons and considerations, the Court hereby:

Denies the first, second, third and fourth demands of the plaintiffs.

Acceeds to the fifth demand of the plaintiffs and declares that the Defendants are liable for the damages sustained by the plaintiffs in their property.

Acceeds to the sixth demand of the plaintiffs and orders the Defendants to undertake and execute those remedial works as described in Doc A fol 121 within peremptory period of three (3) months from the date of this judgment, with the assistance and under the supervision of the expert appointed by this Court, architect Godwin Abela.

Acceeds to the seventh demand and declares, that if the defendants fail to perform all such remedial works as prescribed in the said Doc A a' fol 121 within the peremptory time above mentioned, the plaintiffs are being authorised to carry out and undertake these works, with the assistance and under the supervision of Architect Godwin Abela and this at the expense of the defendants.

Denies the first two demands in the counter-claim.

Declares the remaining demands in the counter-claim exhausted.

Two-fifths (2/5) of the expenses of these procedures, including those of the warrant of prohibitory injunction, shall be borne by the plaintiffs and the remainder three-fifths (3/5) by the Defendants.

Judge Toni Abela

Deputy Registrar