



MALTA

**CIVIL COURT**

**FIRST HALL**

**THE HON. MR. JUSTICE**

**JOSEPH R. MICALLEF**

Sitting of the 13 th November, 2014

Citation Number. 311/2012

John **BUĠEJA** u martu Lucy Buġeja

VS

Monica **LISELOTT STENUDD** u b'Nota tal-20 ta' Settembru, 2012, l-Avukat Dottor Peter Borġ Costanzi assumu l-atti tal-kawża f'isem l-imsemmija Monica Liselott Stenudd stante li hij assenti minn Malta; u b'degriet tat-2 ta' Ottubru, 2012, ġew imsejġha fil-kawża Gaetano u Edwarda Maria miżżewġin Bondin

## The Court:

Having taken cognizance of the Sworn Application filed by spouses Buġeja on the 26th of March, 2012, by virtue of which and for the reasons therein mentioned, they requested that this Court (a) declare that the creation of no easement is permissible in the common parts of the tenement containing their respective properties without the plaintiffs' consent; (b) declare that the assignment of no undivided share nor of a portion of such undivided share of the common property can be made without the plaintiffs' consent; (c) annul and rescind that part of the public deed dated March 3<sup>rd</sup> 2011 in the records of Notary Andre' Farrugia whereby defendant acquired the penthouse overlying premises number one-hundred and eighteen (118) Triq I-Għerien, Mellieħa, and specifically those parts of said deed which prescribe that "*The Penthouse includes an undivided share of the ownership of the common entrance at street level, the stairs giving access to the Penthouse from the said street, the internal shaft and the drains and drainage system*" and further on "*The Penthouse is subject and enjoys all those servitudes resulting from its physical position*" or those parts of the deed which affect plaintiffs; (d) annul and rescind that part of the public deed dated November 16<sup>th</sup> 2011 which purports to correct the notarial deed of March 3<sup>rd</sup> 2011, and specifically that part whereby it is declared that when vendors had assigned to defendant amongst others their one-half undivided share, this consisted of "*a) an undivided share in the undivided one-half ( $\frac{1}{2}$ ) share owned by spouses Bondin in the common entrance at street level and the stairs leading to the first landing and the landing thereof and the internal shaft, drains, and drainage system and b) an undivided share in the stairs from the said landing up to the level of the penthouse*"; (e) declare that defendant enjoys no legal title on the common parts which, from street level, give access to the common

staircase leading to the first floor where plaintiffs' property is to be found; and (f) ordain that the necessary changes be made in the public deed whereby defendant acquired her property in conformity with their requests, and by establishing the time, place and date when such public deed is to be drawn up, by appointing a Notary Public to publish the required deed and curators to represent any party who fails to appear on said deed. Plaintiffs also requested costs and reserved the right to any action for damages against defendant;

Having seen its interlocutory decree of the 30<sup>th</sup> of March, 2012, whereby it ordered service of the Application on the defendant and gave orders to the plaintiffs as to the production of evidence on their part;

Having ordered service to be made on defendant in terms of Council Regulation 1393/2007;

Having taken cognizance of the Sworn Reply filed by defendant Monica Liselott Stenudd on September 20<sup>th</sup>, 2012, whereby, by way of preliminary plea, she requested the joinder into the suit of Gaetano and Edwarda Maria spouses Bondin, the persons from whom she had acquired her property. Defendant then proceeded to raise pleas on the merits by rebutting plaintiff's requests to the effect that she categorically denied that any new servitudes had been created or that existing servitudes had been rendered more burdensome. She claimed that spouses Bondin were the owners of the premises underlying the penthouse that she acquired from them and that they were the rightful owners of the airspace above their property within which they built that penthouse. She further pleaded that before she acquired the penthouse, that property had been occupied for some time by others and plaintiffs had not raised any claims against those previous occupiers. As to the claims about the common parts, defendant pleaded that plaintiffs ought to mention the provisions of law upon which they purport to make those claims, and reiterated that her vendors were fully entitled to transfer all the rights and appurtenances to her without the

prior consent of plaintiffs: thus, both public deeds were valid and binding and were not liable to rescission. Defendant pleaded also the right of necessary access to the road and use of the existing shafts for drainage and other services necessary to her property. She denied that the rights granted to her diminished in any manner the value of plaintiffs' property nor prejudiced them in any manner, and thus pleaded lack of interest in plaintiffs to file their suit. Finally, she pleaded that, as regards the drains and drainage systems, the servient tenement is not the plaintiffs' property but the property of the owners of the underlying tenement;

Having ordered by decree dated October 2<sup>nd</sup> 2012 the joinder into the suit of Gaetano and Edwarda Maria spouses Bondin;

Having seen its decree of the eighth of November 2012 whereby it upheld plaintiff's request made during that sitting to the effect that proceedings be heard in English;

Having taken cognizance of the Sworn Reply filed by parties joined into the suit on November 8<sup>th</sup>, 2012<sup>1</sup>, whereby the rebut all the plaintiffs' requests as being motivated purely by pique and as being a source of particular aggravation to them, given the precarious state of health of Gaetano Bondin. To this effect, they relate a series of episodes and events where plaintiffs continually challenged any improvement which they proposed from time to time in their own property. They argue that plaintiffs' action is unfounded both in fact and at law. They strongly deny having sold to defendant any property over which they did not have proper title or that they have in the process in any way prejudiced any of plaintiffs' rights over their own property. In particular, they strongly deny having created any new easements which in any manner burden plaintiffs' property, nor did they sell or transfer to defendant any undivided share of any property held by plaintiffs. Finally, they deny having caused any damages to plaintiffs and argue that all plaintiffs' requests ought to be dismissed with costs;

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<sup>1</sup> This was substituted by common agreement between the parties by a revised version on February 19<sup>th</sup> 2013, pp.264 – 6 of the case bundle

Having seen the Note filed jointly by the parties regarding some aspects of the documentary evidence presented by them;

Having heard the testimony produced by the parties;

Having heard declarations by counsel at the hearing of May 14<sup>th</sup>, 2013<sup>2</sup>, that they have no further evidence to produce, and its decree of that date whereby it ordered an on-site examination and granted parties time to file their respective written submissions;

Having held an on-site inspection in the presence of parties and counsel<sup>3</sup>;

Having taken note of the Note of Submissions filed by plaintiffs on October 18<sup>th</sup> 2013<sup>4</sup>;

Having taken note of the Note of Submissions simultaneously filed by respondent and by parties joined into the suit on November 18<sup>th</sup> 2013<sup>5</sup> in reply to that filed by plaintiffs;

Having heard further oral submissions by counsel to the parties;

Having examined all the relevant documents and evidence in the records of the case;

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<sup>2</sup> Pg. 295 of the case bundle

<sup>3</sup> Pp. 299 – 302 of the case bundle

<sup>4</sup> Pp. 310 – 320 of the case bundle

<sup>5</sup> Pp. 323B – 339 of the case bundle

Having put off the case for judgment at the hearing of November 26<sup>th</sup>, 2013;

***Having Considered:***

This is principally an action of disavowal of easements on the plaintiff's property ("*actio negatoria servitutis*"), with an accessory claim to rescind parts of a public deed whereby such servitude was constituted without the plaintiff's consent. Plaintiffs (hereinafter referred to as "Bugeja"), in their capacity as owners of an urban tenement, are challenging the creation in favour of respondent (hereinafter referred to as "Stenudd") of what they consider to be a legal easement constituted by public deed when Stenudd purchased another urban tenement forming part of the same building from the owners (hereinafter referred to as "Bondin") of another tenement overlying plaintiffs' own property;

That respondent Stenudd rejects plaintiffs' claims as being unfounded at law. In particular, by way of preliminary plea, she requested the joinder into the suit of Gaetano and Edwarda Maria spouses Bondin, the persons from whom she had acquired her property. Defendant then proceeded to raise pleas on the merits by rebutting plaintiff's requests to the effect that she categorically denied that any new easements had been created or that existing servitudes had been rendered more burdensome. She claimed that spouses Bondin were the owners of the premises underlying the penthouse that she acquired from them and that they were the rightful owners of the airspace above their property within which they built that penthouse. She further pleaded that before she acquired the penthouse, that property had been occupied for some time by others and plaintiffs had not raised any claims against those previous occupiers. As to the claims about the common parts, defendant pleaded that plaintiffs ought to mention the provisions of law upon which they

purport to make those claims, and reiterated that her vendors were fully entitled to transfer all the rights and appurtenances to her without the prior consent of plaintiffs: thus, both public deeds were valid and binding and were not liable to rescission. Defendant pleaded also the right of necessary access to the road and use of the existing shafts for drainage and other services necessary to her property. She denied that the rights granted to her diminished in any manner the value of plaintiffs' property nor prejudiced them in any manner, and thus pleaded lack of interest in plaintiffs to file their suit. Finally, she pleaded that, as regards the drains and drainage systems, the servient tenement is not the plaintiffs' property but the property of the owners of the underlying tenement;

That respondent's preliminary plea was acceded to and Bondin were joined into the suit as co-respondents;

That Bondin too reject plaintiffs' claims and rebut all the plaintiffs' requests as being motivated purely by pique and as being a source of particular aggravation to them, given the precarious state of health of Gaetano Bondin. To this effect, they relate a series of episodes and events where plaintiffs continually challenged any improvement which they proposed from time to time in their own property. They argue that plaintiffs' action is unfounded both in fact and at law. They strongly deny having sold to defendant any property over which they did not have proper title or that they have in the process in any way prejudiced any of plaintiffs' rights over their own property. In particular, they deny having created any new easements which in any manner burden plaintiffs' property, nor did they sell or transfer to defendant any undivided share of any property held by plaintiffs. Finally, they deny having caused any damages to plaintiffs and argue that all plaintiffs' requests ought to be dismissed with costs;

That the salient facts which emerge from the evidence tendered and the acts of the case show that the development known as "*Lyness Flats*"<sup>6</sup> in

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<sup>6</sup> Some of the deeds exhibited refer to the development as "*Lyress Flats*"

Triq I-Għerien, at Mellieħa, consists of three (3) overlying tenements with two (2) garages at street level at number one-hundred and sixteen (116). The garage numbered one hundred and eighteen (118) on the right-hand side when facing the building from the street belongs to Bondin, whereas the garage next to it on the left, numbered one-hundred and seventeen (117) belongs to Buġeja. The apartment immediately overlying the said garages is plaintiffs' Buġeja's property whereas the apartment overlying the said apartment is Bondin's property. Respondent Stenudd's penthouse overlies Bondin's apartment. Bondin hold title to another property in a separate tenement situated at the back of "*Lyness Flats*" which is accessible from a different street<sup>7</sup>;

That access to the apartments and penthouse is through a passageway (consisting of stairwell, landing and staircase) which from street level leads to their respective separate entrances. Plaintiffs claim that whereas the stairwell and the steps from street level are common property, the landing fronting the entrance to their apartment is exclusively theirs. They concede that they hold no title over the staircase which, from very close to their apartment entrance, rises to the overlying properties of Bondin and Stenudd respectively. Whereas Buġeja have leased out their apartment<sup>8</sup>, Bondin use their apartment as their ordinary residence;

That plaintiffs Buġeja acquired their apartment and garage by virtue of a public deed in the records of Notary Doctor John Debono of the 4<sup>th</sup> June, 1991<sup>9</sup>. The apartment is internally marked as number four (4) in the development denoted as "*Lyness Flats*" and is described as "*having a separate entrance from a staircase leading to the road*";

That Bondin acquired their garage, apartment and its overlying airspace by virtue of a public deed in the records of Notary Doctor Marco Farruġia

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<sup>7</sup> Affidavit of Edwarda Maria Mifsud Bondin at p. 249 of the case bundle

<sup>8</sup> Plaintiff John Buġeja's testimony 5.2.2013, at p. 259C of the case bundle

<sup>9</sup> Doc "A" at pp. 5 – 13 of the case bundle

dated September 16<sup>th</sup>, 1985<sup>10</sup>. Their apartment is internally marked number three (3). The deed stipulates that the properties sold to purchasers “*are being sold with the community of all parts common with the other flats of the same block*” and that they “*have no right whatsoever to the yards at the side and back of the building abovedescribed*” though they have “*the full and absolute ownership of the roofs. But the owner of the underlying flat shall have the right to fix a television aerial on the purchaser’s roof of such dimensions and height to enable him to get a good picture of the local station*”;

That Bondin developed the air-space overlying their apartment into a penthouse;

That respondent Stenudd acquired her penthouse from Bondin by virtue of a public deed in the records of Notary Doctor Andre’ Farrugia dated March 3<sup>rd</sup>, 2011<sup>11</sup>. The contract stipulates that the roof and airspace of the penthouse are subject (i) to the right in favour of Buđeja’s apartment to install a television antenna as well as the installation of a water tank; and (ii) to the right in favour of Bondin’s apartment to install a television antenna (which the respondent is entitled to make use of), a water tank and one (1) air-conditioning compressor, together with a right of access to repair any of the said installations subject to a twenty-four hours’ notice given to Stenudd. The contract also stipulates amongst other things that “*The penthouse also includes an undivided share of the ownership of the common entrance at street level, the stairs giving access to the Penthouse from the said street, the internal shaft and the drains and drainage system*”; that it “*does not enjoy any right over the yards on the side and on the back of the building which it forms part of*”; and that it “*is subject to and enjoys all those servitudes resulting from its physical position*”;

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<sup>10</sup> Doc “E” at pp. 143 – 6 of the case bundle

<sup>11</sup> Doc “B” at pp. 14 – 9 of the case bundle

That by virtue of a public deed dated 16<sup>th</sup>, November 2011<sup>12</sup>, in the records of Notary Doctor Andre' Farrugia, Bondin and Stenudd "clarified" that, with respect to the transfer to Stenudd of the undivided share, Bondin had transferred to Stenudd an undivided share of what they themselves had already acquired when they purchased their own apartment. Thus, in the said declaratory deed, they stated that the undivided share of ownership transferred to Stenudd consisted of "*a) an undivided share in the undivided one-half (1/2) share owned by the Spouses Bondin in the common entrance at street level and the stairs leading to the first landing and the landing thereof and the internal shaft, drains and drainage system, and b) an undivided share in the stairs from said landing up to the level of the Penthouse*";

That on September 28<sup>th</sup> 2011<sup>13</sup>, Bugeja filed an official letter against Stenudd requesting her to refrain from passing along the landing abutting their apartment in order to gain access to her penthouse. Since the respondent did not comply with the request, they proceeded to file the lawsuit on March 26<sup>th</sup> 2012;

That insofar as the legal considerations regarding the present suit go, it ought to be pointed out that Bugeja raise two major objections: the first is that they consider that in transferring the penthouse to Stenudd, Bondin gave rise to new burdens (that is, easements) in favour of the penthouse and to the detriment of Bugeja's property; and secondly, that Bondin transferred to Stenudd rights to common property without their consent;

That one has to appraise the disputed issues involved within the context of a rather protracted saga of judicial and extra-judicial episodes between Bugeja and Bondin of which the present law-suit is, perhaps, the culmination. In all of this Stenudd has become the unwitting character to be embroiled into the unfolding story which, the Court

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<sup>12</sup> Doc "C" at pp 20 – 1 of the case bundle

<sup>13</sup> Doc "JB" at pp. 191 – 2 of the case bundle

strongly believes, could and ought to have been resolved civilly by all concerned;

That plaintiffs argue that their lawsuit is founded on the *actio negatoria servitutis*, including those provisions of the Civil Code which relate to property held conjointly and the creation or aggravation of easements. They explain that once they have not given their consent to respondent to acquire any rights over the common property, she has no right to make use of such common property. The same applies to Bondin who, plaintiffs believe, were not empowered to transfer or assign to Stenudd any their rights to the common property without their prior approval, let alone any transfer or assignment of property over which Bondin do not hold title;

That the type of action adopted by Buġeja is one where the sole aim is to obtain a judicial declaration that the property of the plaintiff is not subjected to any easement in favour of the defendant's property, and to put aside all that which can diminish the full enjoyment of one's own property as easements inevitably do. A judicial declaration in the *actio negatoria* to the effect that a particular tenement was never is not subject to an easement can be made both where that tenement is declared to have been always free from any easement as well as when such declaration applies to easements which have formerly burdened such tenements but no longer do so owing to any one of the reasons recognized at law for the lapse of such easements. The action stands on the presumption that an immovable tenement is unfettered<sup>14</sup>. It is, thus, a non-possessory action<sup>15</sup> and can only be availed of by whosoever is the lawful owner of such tenement against any other owner of an adjacent property who claims to exercise any right which renders plaintiff's property a servient tenement, in so far as such action concerns real rights<sup>16</sup>;

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<sup>14</sup> P.A. 9.1.1877 in the case *Desain vs Piscopo Macedonia* (Kollez. Vol: VIII.21)

<sup>15</sup> Civ. App.19.2.1951 in the case *Farrugia et vs Cassar* (Kollez. Vol: XXXV.i.10)

<sup>16</sup> P.A. 3.4.1995 in the case *Baldacchino vs Grima et* (Kollez. Vol: LXXIX.iii.1219)

That normally, in an *actio negatoria* the burden of proof that an easement exists against plaintiff's property lies on the defendant<sup>17</sup>, notwithstanding that defendant might actually be in "possession" of the pretended right of easement<sup>18</sup>. Therefore, the plaintiff need only prove that he is the rightful owner of the property on which the defendant claims the existence of an easement and that a claim or a particular deed has been made by someone else on his property which somehow diminishes his rights thereon<sup>19</sup>. On the other hand, the respondent or defendant in such an action has to prove the actual existence of an easement on the plaintiff's property<sup>20</sup>;

That to this effect all of plaintiffs' submissions as to the nature and portent of their present action<sup>21</sup> are fully subscribed by this Court. It is now opportune to examine whether, in this particular case, there have indeed arisen the circumstances which justify plaintiffs' action;

That **as regards Buġeja's claim as to the creation of easements** in favour of respondent's penthouse, is based on the assumption that when Bondin transferred the penthouse to Stenudd, such transfer constituted a violation of law. Buġeja claim that Bondin had no right to grant Stenudd the rights of easement arising from the position of the property, as such assignment was tantamount to the creation of new easements on their own property in view of the fact that it made use of the communication system of water and drainage services which already existed prior to the development of the airspace into a new building<sup>22</sup>;

That the Court observes that Buġeja lay great emphasis on the fact that they had purchased their apartment well before Stenudd purchased hew penthouse. However this is only part of the picture. It is also uncontested that Bondin had purchased their apartment years before Buġeja purchased their own, and that the access into their apartment as well as the layout of the drain works and the drainage system was already in place when Buġeja obtained title to their property. In spite of the robust opposition which Buġeja apparently attempted to offer when Bondin undertook to develop the airspace above their apartment (where

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<sup>17</sup> Civ. App. 28.1.1957 in the case *Vella et vs Magro* (Kollez. Vol: XLI.69)

<sup>18</sup> P.A. PS 18.2.2004 in the case *Nazzareno Schembri vs Leonilda Farrugia*

<sup>19</sup> Mag. Sup. (Gh) A.E. 13.11.2007 in the case *John Attard et vs Carmel Azzopardi et*

<sup>20</sup> P.A. PS 31.1.2003 in the case *Joan Cachia vs Marianna Schembri*

<sup>21</sup> *Vide* pp. 315 – 6 of the case bundle

<sup>22</sup> Art. 475 of Chap. 16

Stenudd's penthouse was eventually erected) it is undeniable that Bondin were the sole owners of that airspace and were entitled to develop it. The question which arises is whether in so doing, they subjected Buġeja's property to new easements or burdened existing ones;

That plaintiffs' action in this regard relates both to (i) issues of access as well as to (ii) use of services in the property. It is not contested that access to Stenudd's and Bondin's respective properties is through one and the same staircase, stairwell and landing. The present case does not relate to the right of access by Bondin into their property, but only in regard to Stenudd's access into hers. Were it not for such access, Stenudd's property would not have alternative access to and from the street and would be otherwise completely segregated;

That as regards the **right of way** one has to point out that the law provides<sup>23</sup> that an owner whose tenement has no outlet to the public road may compel the owners of the neighbouring tenements to allow him the necessary right of way, subject to the payment of an indemnity proportionate to the damage which such a right of way may cause and such right is to be had over that part of the servient property which causes the least inconvenience. Furthermore, the law states that no such indemnity is owed to the servient tenement where the tenement has become enclosed on all sides in consequence of a sale, exchange or partition, in which case the vendors shall be bound to grant access<sup>24</sup>. Such necessary right of way ceases when alternative access is obtained to the street, in which case the servient tenement's owner may demand the cancellation of the necessary right of way<sup>25</sup>;

That such rules apply where the easement is created by virtue of the law. One would do well to keep in mind that the right of way is a non continuous easement<sup>26</sup>, and cannot be created except by proper title<sup>27</sup>, bar the specific instances where the tenement becomes completely enclosed by surrounding tenements by action of the owner himself. It is

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<sup>23</sup> Art. 447 of Chap. 16

<sup>24</sup> Art. 448 of Chap. 16

<sup>25</sup> Art. 449 of Chap. 16

<sup>26</sup> Art. 455(3) of Chap. 16

<sup>27</sup> Civ. App. **24.6.1960** in the case *Żammit vs Borg* (Kollez. Vol: XLIV.i.178)

generally held that the proper title should be in the form of a public deed<sup>28</sup> and cannot be acquired by prescription nor by the destination of the owner of two tenements<sup>29</sup>. Should any doubt arise as to whether an easement arises from a proper title, such easement ought to be considered as non-existent<sup>30</sup>;

That in the present case it is undoubted that Stenudd's right of way has been recognized by public deed. Indeed such deed (as well as the declaratory one) are the main focus of plaintiffs' action. It is a right of way which Bondin themselves enjoyed and which right also arises from a proper title preceding that of Buġeja. It is the Court's considered view that when Bondin sold the penthouse and its appurtenances to Stenudd, they were applying the title they already had and assigning it to the purchaser;

That to this extent, the Court cannot find any fault, flaw or abuse by Bondin; nor is there any perceptible fault, flaw or abuse by respondent Stenudd in accepting that the right of access to her penthouse is through that part of the building which both plaintiffs Buġeja and vendors Bondin avail themselves of;

That regarding the burdening or the creation of new easements through the construction of the penthouse, it must be pointed out that well before Bondin developed their airspace, Buġeja's property had been connected to the same service system and through the same internal shafts as that to which Bondin's property was connected. This means that at no time was Buġeja's property free from easements in this regard. Bondin's and Stenudd's argument that the development of the airspace into the penthouse was approved by the competent development authorities is not in itself a valid argument to preclude this Court from examining whether such development did cause prejudice or harm any of Buġeja's rights over their property. It goes without saying that any development permit is issued subject to third party rights, and this is not being considered by the Court in a merely perfunctory attitude nor taken in a tongue-in-cheek manner;

That the effects of the development on Buġeja's rights have to be seen from the perspective of the evidence produced and the existing facts surrounding the case. From the detailed examination of the premises which the Court had the opportunity to conduct first-hand during the on-

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<sup>28</sup> P.A. 12.2.1959 in the case *Sant vs Buġeja et* (Kollez. Vol: XLIII.ii.627)

<sup>29</sup> Art. 469(1) of Chap.16

<sup>30</sup> Civ. App. 20.7.1970 in the case *Carmelo Galea et vs Ġużeppe Aquilina* (unpublished)

site inspection, it emerges that with the construction of the penthouse, Buġeja's apartment has not been subjected to any perceptible inconveniences which were not in place prior to the construction of the penthouse. This applies also to the issue of introspection. Any alterations to which the Court's attention was drawn seem to have been made by Bondin in their property, but not by Stenudd. In such case, those alterations are beyond this Court's remit as plaintiffs' claims refer only to the deeds of title by which Stenudd acquired her penthouse and no specific claims were made against Bondin who were only joined into the suit at a subsequent stage. The Court believes that the erection of the penthouse and the services attached to it have not burdened Buġeja's property more than what it had already been subjected to when the only overlying property was that of Bondin. If at all, the property which has had to bear the added burden of such services is the garage owned by Bondin at street level, into which converge all the services including those serving Buġeja's apartment;

That the Court, in view of these considerations of fact and law, arrives at the conclusion that Buġeja have not shown valid reasons to found their claims in regard to the aspect of easements and therefore the Court has to dismiss their claims in that regard;

That **in respect of Buġeja's claim as to the transfer by Bondin in favour of respondent Stenudd of rights to the common parts** without their consent, plaintiffs argue that as co-owners of the common parts, nothing should have been made without their express consent and that in so far as they enjoy rights of co-ownership in some areas of the tenement, Bondin ought not to have made any assignments to third parties (the respondent) without such consent<sup>31</sup>. Furthermore, they argue that a co-owner can only alienate or assign the full ownership of his respective share and not an undivided portion thereof, as Bondin have purported to do on the occasion of the sale of the penthouse to Stenudd;

That it has to be pointed out that Buġeja accept that the stairwell immediately found behind the common entrance at street level and granting access to their property is common property with that of Bondin, however they deny that the same applies to the landing fronting their

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<sup>31</sup> Artt. 493 and 495 of Chap. 16

apartment's entrance<sup>32</sup>. They base this claim on public documents referring to root of title to their own property and state that this issue has been settled by judgment handed down in another lawsuit between them on a related matter. However, Buġeja do not seem to lay any claim to title to any part of the staircase which proceeds from the said landing upwards towards Bondin's and Stenudd's respective property<sup>33</sup>;

That therefore, Buġeja aver that Bondin had no right to transfer to Stenudd any rights of ownership relating to the said landing, since they hold that Bondin had no right thereto. Having no right thereto, they could therefore transfer no such right to Stenudd ("*nemo dat quod non habet*");

That the Court feels duty bound to point out that Buġeja's assertion that their own purchase contract defines the question of the co-ownership and the exclusive ownership of the stairs and the landing is not borne out by a reading of that same contract. The assertion made both in the Sworn Application at the first recital and in the Note of Submissions (first paragraph of the part entitled "Facts of the Case"<sup>34</sup>) is certainly not reflected in the public deed by which they acquired their apartment, which contract contains only the laconic phrase "*having a separate entrance from a staircase leading to the road*". That phrase alone, in the Court's considered opinion, sheds no light on the question of whether the staircase (and, for that matter, the landing fronting plaintiffs' apartment) is the exclusive property of anybody. There are no other clauses in that contract which deal with the matter. The same applies to other contracts from which Buġeja's title derives and the question seems to be decipherable only from a comparison of the plans attached to some of those deeds, particularly the public deed dated 10<sup>th</sup> July, 1968, in the records of Notary Doctor Maurice Gambin<sup>35</sup>;

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<sup>32</sup> Plaintiff's affidavit at pp. 62 – 3 of the case bundle

<sup>33</sup> *Ibid* at p. 64

<sup>34</sup> Pg. 311 of the case bundle

<sup>35</sup> Doc "D" at pp. 134 – 5 of the case bundle

That it is also true that when Bondin purchased their apartment, garage and overlying airspace, some six (6) years prior to Buđeja acquiring their own property there, it was clearly stated that the apartment, airspace and garage “*are being sold with the community of all parts common with the other flats of the same block*”. When Stenudd acquired her property from Bondin in 2011, it was stated that her penthouse “*... also includes an undivided share of the ownership of the common entrance at street level, the stairs giving access to the Penthouse from the said street, the internal shaft and the drains and drainage system*”; that it “*does not enjoy any right over the yards on the side and on the back of the building which it forms part of*”; and that it “*is subject to and enjoys all those servitudes resulting from its physical position*”;

That the issue of the power of disposal by a co-owner of his share in the co-owned property is regulated, as stated above, by the provisions of the law which refer to community of property and not to the law of easements. This means that in such circumstances the *actio negatoria* proposed by Buđeja has no application, since that action, by definition, applies only where the plaintiff’s tenement is owned exclusively by him and not where the property in question is held or enjoyed by different owners who are alleged as being those who are vaunting an easement on such property. Secondly, in terms of law<sup>36</sup> the rights arising from a state of community of ownership allow each and every co-owner the right to make use of the common property provided that (i) such use is made according to the use for which such property is destined by usage, and (ii) such use is not made against the interest of the community or to such an extent that any of the other co-owners is precluded from making use of the common property according to their respective rights. Such use by a co-owner does not seem to require nor depend upon the consent of the other co-owners;

That plaintiffs combine the rules contained in article 493 of the Civil Code with that of article 491 to sustain their position. The former article refers to “alterations” in the common property. It is doubtful whether the

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<sup>36</sup> Cfr. Art. 491 of Chap. 16

granting or assigning of a right of access over common property is tantamount to an “alteration” of that common property for the purposes of that article. Nevertheless, even if such an assignment were to be so considered, not every alteration falls within the category requiring the prior consent of all the co-owners. It has been established that “*Kollox jiddependi jekk bix-xogħolijiet li jkunu saru jew ser isiru, ikunx sar tibdil fil-konsistenza, l-istat jew forma tal-ħaġa komuni. Jekk it-twegiba hi fl-affermattiv, mela jkun hemm bżonn il-kunsens tal-komproprietarju l-ieħor. Din hi l-interpretazzjoni li ngħatat mill-parti l-kbira tal-ġurisprudenza*”<sup>37</sup>;

That in the present case, Bondin granted Stenudd a right of access to the penthouse they sold her over the stairwell and landing which they held at least a right of co-ownership with Buġeja. To that extent, the Court believes that the assignment made by Bondin to Stenudd that Bondin did not exceed the rights vested in them since a time prior to Buġeja’s own acquisition of title. Besides, such assignment did not in any manner change the nature of or radically alter the common parts. Furthermore, it has not been shown that by granting Stenudd such right of access, Buġeja have been in any manner deprived of the right they too enjoy. The records of the case show that, for some three years before Stenudd purchased her penthouse and appurtenances, use thereof had been made by others (persons to whom the penthouse had been leased) without any opposition from plaintiffs Buġeja;

That the Court is unwilling to subscribe to Buġeja’s argument that a co-owner cannot but assign or dispose of all of the rights of co-ownership he may hold in a commonly-held property, but is precluded from assigning or transferring a share thereof. This assertion is not borne by the provisions of the law and, it seems, neither by a proper interpretation thereof;

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<sup>37</sup> Mag. Sup. (Gh) AE 27.10.2009 in the case *Margaret Saliba et vs Carmelo Cortis et*

That in the light of these considerations, the Court is unable to accept plaintiffs' arguments and cannot perceive any diminution of their rights on the co-owned property. It will therefore not uphold plaintiffs' claims on these grounds. As a logical consequence to this and the preceding conclusions, there remain no valid reasons to consider the other claims regarding the rescission of those parts of the public deeds to which plaintiffs have taken exception;

That among the so-called "**additional pleas**" raised by Stenudd one related to whether Buđeja have a legal interest in pursuing their claims. There should be no doubt whatsoever that Buđeja have legal standing in defining their rights over their property and to resist incursions they believe they have suffered in regard thereto. The fact that Bondin think that Buđeja have suffered no financial or economic prejudice to their property does not support their plea, especially when one considers that the main thrust of plaintiffs' action is one based on easements and extension of property rights and not one based on damages;

That this circumstance alone amply demonstrates, in the Court's opinion, that Buđeja have an actual, direct and legal interest to pursue their lawsuit. The Court does not see any purpose in delving into the finer disquisitions regarding the doctrinal aspects of the question of legal standing, as the respondent herself did not seem to dwell on her own plea when she made her written final submissions;

That, for these reasons, the Court will not uphold the said plea;

For the above-mentioned reasons, the Court decides and rules that:

**It rejects the first of the additional preliminary pleas** of the parties joined into the suit and holds that plaintiffs Buđeja had an actual, direct and legal interest to file this case;

It **upholds the pleas on the merits** of both the defendant and of the parties joined into the suit as being founded at law and in fact;

It **dismisses plaintiffs' claims** as being unfounded at law and in fact; and

**Orders** that the **costs of the case** be borne by plaintiffs, except those costs relating to the additional plea, which costs are to be borne by the parties joined into the suit.

**< Final Judgement >**

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