

Dr Cedric Mifsud vs L-Avukat Ġenerali¹

MICHELLE CAMILLERI

FACTS

Plaintiffs (Bezzina) were the owners of a house in Gharghur. The property was given to defendants (Azzopardi) under title of temporary emphyteusis which expired in August 1991. It was subsequently converted into a lease as per article 12(2) of Chapter 158.² Consequently, plaintiffs maintained that: 1) they were denied the right to enjoy their property, 2) the compensation provided for by law was disproportionate (the rent had to be twice as much as the ground rent) and 3) there was no effective remedy through which they could take back the property. As a result, they argued that this was a breach of their rights as set out in article 37 of the Maltese Constitution and article 1 of Protocol 1 of the European Convention.

JUDGMENT OF THE FIRST COURT

The First Court decided in favour of plaintiffs. It held that article 12(2) was inconsistent with article 1 of Protocol 1 and therefore it was deemed to be without effect. According to article 1521 Civil Code³, upon termination of the emphyteusis the property reverts back to the owners *ipso jure*, together with any improvements. However, by virtue of article 12(2) of Chapter 158, upon termination of the contract of emphyteusis entered into for a period of 30 years *prior* to 21 June 1979, the emphyteuta who is a Maltese citizen and uses the property as his ordinary residence, has a right to continue occupying the property by way of lease directly from the owner.

This situation was tackled in **Amato Gauci vs Malta**⁴ whereby the European Court of Human Rights declared that:

- i. Any restriction on the owner to terminate the lease amounts to control over the use of his property. This falls under the second paragraph of article 1.
- ii. Act XXIII of 1979 was lawful in so far as its aim was to achieve 'a legitimate social policy'.

¹ Dr Cedric Mifsud et Noe vs L-Avukat Ġenerali et, Constitutional Court, 25 October 2013

² Housing (Decontrol) Ordinance, Chapter 158 of the Laws of Malta, article 12(2)

³ Civil Code, Chapter 16 of the Laws of Malta, article 1521

⁴ Amato Gauci vs Malta, App no 47045/06 (ECHR, 15 September 2009)

- iii. The element of proportionality cannot be overlooked: "... a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights ... the requisite balance will not be struck where the person concerned bears an individual and excessive burden."⁵
- iv. The rent (Lm 120 per year) was deemed to be too low. The same could be said in relation to the maximum amount of rent payable (Lm 420).
- v. Taking into consideration a number of factors: the low rent, the uncertainty as to whether the owner would ever recover his property, the remote possibility of the tenant leaving the property out of his own free will seeing that the lease could also be inherited, the lack of procedural safeguards provided by Maltese law, and the increase in the standard of living over the years, indicated that an excessive burden had been imposed upon the owner of the property. Inevitably the Court concluded that this breached article 1 of Protocol 1 of the Convention.
- vi. The Court compensated the appellant after having observed that he was 'entitled to compensation in respect of the loss of control, use and enjoyment of his property ...'⁶
- vii. After the 1995 amendments, the effects of this law no longer applied to contracts entered into after 1995. This decision was 'reasonably and objectively justified to protect owners from restrictions impinging on their rights.'⁷ These amendments were intended to liberalize the market meaning that the Government had acknowledged the fact that the social circumstances of the country no longer required further protection. However, nothing was done to review situations similar to those of the applicant whereby owners had been deprived of their property.

Although strictly speaking the European Court's case law does not bind the local courts, the Government did not bring forward any convincing and valid argument as to why the First Court should not follow the Amato Gauci judgment. Accordingly, the Court confirmed that there was a breach of article 1 of Protocol 1.

APPEAL BEFORE THE CONSTITUTIONAL COURT

Firstly, the Attorney General argued that the First Court had failed to adequately recognize the wide margin of discretion given to the State. Moreover, article 1 of Protocol 1 did not establish the right to make a profit and similarly such right could not be contemplated in the context of social housing. The Constitutional Court disagreed and held that the First Court had justly considered the control over the use of property, in the general interest, as a legitimate exercise of discretion. The First Court had dealt with the matter in the wider context of proportionality vis-à-vis the economic and social realities of the country in general.

The First Court had rightly pointed out that Act XXIII of 1979, by virtue of which article 12 had been introduced, was lawful in so far as it aimed to achieve 'a legitimate social policy' however such a burden should not have been made to rest entirely upon the owner because the element of proportionality had to be satisfied.

⁵ Mifsud vs L-Avukat Generali Et (n1) 4

⁶ Ibid p 5

⁷ Ibid pp 5-6

Subsequently, the First Court gave a detailed explanation of the factors which led it to conclude that the element of proportionality was missing. Simply because the rent was not equivalent to the sum payable on the market this did not mean that the rent could be so low as to have no relation to the economic reality. The rent could only be increased every fifteen years, it could be renewed indefinitely and there was no remedy for the owner to get back his property – even if the owner himself required social housing – therefore, the Constitutional Court confirmed the reasoning of the First Court.

The second ground of appeal dealt with the remedy given by the First Court whereby defendants were not entitled to make use of article 12(2) to retain property belonging to plaintiffs under title of lease. The Attorney General had a general interest in the realization of social policy however for the purpose of judicial proceedings such a general interest was not sufficient if the interested party did not benefit from any advantage in the particular case. Here, defendants (Azzopardi) had not appealed which meant that in their regard the judgment had already become a *res judicata*. Therefore, they were bound by the decision of the First Court and article 12(2) could not be relied upon to keep occupying the premises in question.

Thirdly, the last ground of appeal related to the amount of compensation which the appellant had to pay for depriving plaintiffs from the use of their property. The First Court was right in deciding not to award full compensation after having taken into account the fact that plaintiff had only initiated proceedings in 2010, 19 years after the conversion of the emphyteusis into a lease. On this point, the Court referred to a number of cases: **Louis Apap Bologna vs Calcidon Ciantar et**⁸ and **Dr David Tonna et vs Kummissarju tal-Artijiet**: ‘fil-kaz fejn persuna tiddilunga milli tadixxi l-qrati ghalkemm kellha rimedji ordinarji, mhux eskruz li l-qorti tikkunsidra li tirriduci l-ammont tal-kumpens’.⁹ Moreover, the Constitutional Court felt that the damages awarded should be reduced from €30,000 to €15,000 for the breach of fundamental human rights.

⁸ Apap Bologna Louis vs Ciantar Calcidon Et [24 February 2012] Constitutional Court, Ref No. 57/2009/1

⁹ Tonna Av Dottor David Pen Et vs Kummissarju Ta' L-Artijiet [3 March 2011] Constitutional Court, Ref No. 32/2006/1