

The Hospitals Saga: Some Questions – A Few Answers

Judge Anthony Borg Barthet

In this article, **Judge Anthony Borg Barthet** explores some issues raised in the case instituted by the Hon. Dr. Adrian Delia regarding the concessions of the state hospitals to private investors and the case instituted by Dr. Bernard Grech against the State Advocate in connection with the same. These judgments raise issues of constitutional and administrative law as well as issues of Civil law and procedure which in the opinion of the author require further scientific study and education.

TAGS: Article 91A of the Constitution, Government Lands Act, Civil Code, Code of Organization and Civil Procedure.

Judge Borg Barthet was Attorney General between 1989 and 2004 and Judge at the Courts of Justice of the European Union between 2004 and 2018.

The judgments in the Delia/Hospitals Case¹ and the Bernard Grech/State Advocate case² raised a number of issues of a constitutional law nature, as well as issues concerning the Code of Organization and Civil Procedure and the Civil Code. They also were an opportunity to clarify the provisions of articles 31 and 33 of Cap 573 of the Laws of Malta.

In this paper, I will try to explore these various issues, the questions raised and the answers, if any, given by the Courts. This analysis does not purport to be the final round, but it is hoped that it will rouse further interest and encourage further study on some of the questions raised.

The central constitutional question raised in the Bernard Grech/State Advocate case was the extent of the State Advocate's autonomy and independence of actions under Article 91A of the Constitution and The State Advocate Act, Cap 603 introduced by Act XXV of 2019³. The claim, in the Bernard Grech/ State Advocate case was that under article 91A of the Constitution, the State Advocate had the power and the legal duty to act independently of the Government to take legal action to recover funds illegally appropriated by third parties and to take action against persons holding high office in the Government who may have colluded with third parties in order to defraud the government of assets belonging to it. The Courts, at both levels, decided against this claim, in full at first instance and nuanced at appeal in the sense that while deciding that the State Advocate did not have such power and duty under Article 91A of the Constitution, he had, under Article 33 (2) of Cap 573, the power, but not an obligation, to take action to bring about the *restitutio in integrum* between the parties following the declaration of nullity of the contracts of the concessions of the three hospitals made by the Government to private entities in 2016.

The nuance introduced by the Court of Appeal in no way embraces the original basis of the case instituted by the plaintiffs. The theory, as exposed by Bernard Grech and Adrian Delia, was rejected in its entirety by the Courts which clearly endorsed the State Advocate's argument that the latter's right of action arises only when the law so specifically provides. This was the position taken by the State Advocate in the case, including in his own

¹ 133/18, *Onor Kap tal-Oppożizzjoni Avukat Adrian Delia vs Onor. Prim Ministru ta' Malta et*, Civil Court First Hall 24 February 2023, Court of Appeal 23 October 2023.

² 1398/23 *Onor Kap tal-Oppożizzjoni u Kap tal-Partit Nazzjonalista l-avukat Dottor Bernard Grech et vs Avukat tal-Istat et* Civil Court First Hall 11 July 2024, Court of Appeal 2 December 2024.

³ Vide "Opinion by Judge A. Borg Barthet on the Powers of the State Advocate" Online Journal Ghsl DATE where the relationship between art. 91A of the Constitution and Cap. 603 of the Laws of Malta is discussed. The reader may also wish to see Prof. Tonio Borg's paper "The Office of the State Advocate and the Bernard Grech case" online Journal Ghsl 08.02.2025- Prof. Borg quotes the some parts, but not the whole opinion and gives a reading of it which differs from that of the author.

testimony. It must be noted that the claim in the plaintiff's protests and subsequent judicial action to the effect that the State Advocate not only had the general right to take action *motu proprio* but was bound to do so, and was personally liable for not doing so, was rejected. I am pleased to note that the Courts ultimately endorsed the position taken by the State Advocate, this being a legally correct position which I comfortably shared by means of my legal opinion which the State Advocate submitted, in his own deposition, as documentary evidence in Court.

At points 45 and 46 of the judgment of the Court of Appeal in the Bernard Grech/ State Advocate case, after having stated at point 44 that the State Advocate has the power under *ad hoc* legislation⁴ to take action as aforesaid: the Court declared:

45. However, the fact that the State Advocate has the power, does not mean that he has the duty to take action. Both Article 91A of the Constitution and Article 2 of Cap. 603 state that the State Advocate "shall not be subject to the direction or control of any other person or authority".

The decision whether the State Advocate institutes an action or not is [to be] taken by the State Advocate alone in his judgment and no authority may interfere in that decision.

46. In his reply to the appeal the State Advocate brought forward reasons that show that in his opinion it would not be judicious⁵ to take such action, or at least that such action is to be taken now, reasons that would make it judicious for whoever like him, under article 33 of Cap 573,⁶ has the power to take action for the restitutio in integrum, after the rescission of the Contract relating to the Hospitals, to take into consideration.

In the judgment of the Civil Court First Hall in this case, Judge Toni Abela, examined the implications of article 124 (10) of the Constitution on the autonomy of the State Advocate under article 91A of the Constitution and article 2 of Cap. 603.⁷

Article 124(10) reads as follows:

(10) No provision of this Constitution that any person or authority, shall not be subject to the direction or control of any other person or authority in exercising any functions under

⁴ Art 33(2) Cap 573 read in conjunction with Articles 541 and 543 Civil Code Cap. 16.

⁵ "ghaqli" in the original Maltese text, all translations of the judgements from Maltese to English are by the author.

⁶ All sitting members of the House of Representatives among others

⁷ Points 35 to 40 of the First Hall Civil Court Judgement in the Bernard Grech/ State Advocate case.

*this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law.*⁸

There is, on just a superficial sight, two ways of reading this provision, the first is that the Court has jurisdiction to enquire whether “the person or authority” has exercised his functions “within the limits of the law”. An alternative (but perhaps incorrect) reading would be that the Court has jurisdiction to go into the matter as to whether that person or authority has or has not exercised his functions (in accordance with his duty to do so in accordance with the Constitution). The First Hall of the Civil Court quoting a long list of judgments reads it as a jurisdiction to enquire whether the authority acted *intra vires*⁹ or within the limits of ordinary as well as constitutional law.¹⁰

Prof. Tonio Borg,¹¹ however, concludes that “the references by the Court of Appeal to the autonomy of the State Advocate to preclude a Court of law from ordering the State Advocate to do something, if he breaches his constitutional duties, is strange and bizarre.” With all due respect, I think this statement is incorrect. Firstly, the case law quoted by Borg in support of his conclusion dealt with the power of the Courts to enquire whether the “person or authority” concerned acted within the limits of its powers that is not *ultra vires*; secondly because article 124 (10) talks of the Courts power to enquire whether “in the exercise of its functions” the authority has acted “in accordance with the law”, not whether it has exercised its functions at all; and finally such a reading of article 124 (10) would result in the mere substitution of the exercise of the discretion by the person or authority indicated by the Constitution, by that of the Court, rendering the setting up of the specialised authorities purposely established by the Constitution to perform certain tasks, superfluous. On the other hand, it is important and necessary that the persons and authorities enjoying such discretion do not exercise such discretion beyond the limits and confines established by the law.

The State Advocate had all along never excluded that under ad hoc legislation he had the power to take civil action *motu proprio* without being

⁸ “tkunx qdiet daw k il-funzjonijiet skond din il-kostituzzjoni jew xi li ġi oħra.” in the Maltese Text, a rather rare occasion where the English and Maltese text are a perfect rendering of each other; both texts being equally ambiguous.

⁹ Point 36.

¹⁰ Point 37

¹¹ Tonio Borg, ‘The Office of the State Advocate and the Bernard Grech Case’ (Online Law Journal, 8 February 2025) < <https://www.ghsl.org/lawjournal/the-office-of-state-advocate-and-the-bernard-grech-case/> > accessed 21 March 2025

tasked¹² so to do by the Government. The plaintiffs in the Bernard Grech/State Advocate case based their judicial action on Article 91A of the Constitution, article 1051A of the Civil Code, and on the basis of the judgment of the Court of Appeal in the Delia/ Hospitals case. Nowhere were the provisions of Art. 33 and 31 of Cap 573 invoked as a basis for their claim.

In the original protests filed by the plaintiffs in the Bernard Grech/State Advocate Case,¹³ the plaintiffs held that the State Advocate, personally responsible, for not taking action under article 91A of the Constitution, the sworn application instituting the action and the subsequent appeal were never based on the powers of the State Advocate under Chapter 573, a power the State Advocate never denied. The Court of Appeal may have been misled into basing its judgment on Article 33(2)(3) of Chapter 573, because of the strong rhetorical and imprecise language used in the written pleadings in both the Delia/Hospitals case and the Bernard Grech/State Advocate case which may have obfuscated the issues. A stricter adherence to article 156 and other provisions of the Code of Organization and Civil Procedure would give rise to clearer reasoning and judgments by our courts.

Article 33 of Chapter 573 reads as follows:

33. (1) Any disposal¹⁴ of land, to which article 31 applies, which was disposed of differently from the provisions of that article, shall be null and void.

(2) The nullity of a disposal made in contravention of the article aforesaid may be demanded by the parties involved in the disposal and also by the State Advocate or by any person who is a member of the House of Representatives at the time of the demand before the Civil Court, First Hall.

(3) The effects and consequences referred to in articles 541 and 543 of the Civil Code shall apply to whosoever acquires land in violation of article 31 of this Act.

It should be immediately underlined what the said article provides for is the nullity of the disposal made in contravention of the provisions of the Act.

¹² “tasked” not “tusked” vide “A toothless State Advocate?” Prof. Tonio Borg, Times of Malta, January 28, 2025, where the author claims, notwithstanding the judgements in the Bernard Grech/State Advocate cases, that article 91A of the Constitution, empowers and obliges the State Advocate to take action as an advocate without being instructed to do so by his client, that is, the state, acting through the appropriate organs exercising executive powers as established in the Constitution; Vide also “Landmark appeal decision confirms State Advocate’s independence to sue perpetrators in the Malta Hospitals Concession” <https://fenechlaw.com/news- events/landmark-appeal-decision-confirms-state-advocates-independence-to-sue-perpetrators-in-the-malta- hospitals-concession/>.

¹³ Vide: Protest filed by Dr. Bernard Grech and Adrian Delia against the State Advocate on the 1st November 2023 (Protest Gudizzjarju 503/2023, the counter protest by the State Advocate of the 8th November 2023 and the rejoinder filed on the 10th November 2023.

¹⁴ “disposal” is defined very widely in article 2 of Cap 573 and includes the transfer of any land under any title whatsoever including any real or personal right in or over any land.

The right given to the State Advocate (formerly the Attorney General) and members of the House is an exception to the rules of the Constitution which provide for the manner in which the executive powers of the State are exercised by the Cabinet and the Heads of Department to which the management of the various functions of the state are assigned. Exceptions, as a rule of interpretation, unless otherwise indicated in their language, are to be given a strict interpretation and should not be read in a manner that makes them more extensive than provided by the legislator.

The first question that article 33 poses is; does its provisions cover cases where, after a disposal is validly made in accordance with article 31, the conditions attached to the disposal are not adhered to?¹⁵ A strict reading of article 33(1) and (2) of Cap 573, should exclude such a possibility. The management of the contractual or quasi contractual relations that the disposal (or its annulment give rise to lies in the responsibility of the Heads of Department or the Public Administration under which the matter falls, and is not by virtue of sub-article (2) extended to the State Advocate or the sitting members of the House. However, the basis of the action and the direction of the evidence brought in the Delia/Hospital Case, was in the sense that the concessionaires did not fulfil their contractual obligations arising out of the deed of emphyteuses and the related agreements.¹⁶ Both in first instance and at appeal judgments in the Delia/Hospitals case the Courts did not elaborate this point but the reasoning of the Court at first instance and that of the Court of Appeal, seems to indicate that the evidence of the unfulfillment of the conditions of the deed of emphyteuses and of the related agreement were proof of the fraudulent intention of the concessionaires (first instance) and of collusion between the concessionaires and high standing government officials (appeal) which evinced that the disposal was a *mise en scene* to defraud the State and consequently null.

The Hon. Bernard Grech and the Hon. Adrian Delia could take action under article 33(2) of Cap 573 because they were members of the House of Representatives, the fact that they were at any point leaders of the Opposition or Heads (Kap) of Partit Nazzjonalista, does not impinge on or increase their authority to act under Cap. 573. This remark may seem specious, but it would seem correct that parties to a case refrain from describing themselves as having qualities and offices which are irrelevant to their *locus standi* in the case. The present practice though not strictly illegal, may give rise in some cases to doubts as to the manner in which a person may be a judgment debtor or creditor, and should not be encouraged.

Could they, as members of the House of Representatives take action

¹⁵ To give an extreme example, in a lease made for a number of years, it results that the payment of ground rent has at some point been effected a number of days after it was due;

¹⁶ Which the Courts deemed it to be an integral part of the disposal or emphyteuses, at least for the purposes of Cap 573.

against the State Advocate under Article 33(2) to take action which they themselves could take? The question seems circular and indeed it is, can the State Advocate (or any other MP) take action against any Member of the House of Representatives including the Hon. Bernard Grech and the Hon. Adrian Delia asking the Court to order them to take action under Art. 33(2) for the *restitutio in integrum* as envisaged by the Court of Appeal at points 41, 42 and particularly 43 of the Judgment in the Bernard Grech/State Advocate case? In short, could the State Advocate or a sitting MP take action under Art. 33(2) against another sitting MP to take action under article 33(2)?

The Court of Appeal held at point 42 and 43 of its judgment in the Bernard Grech/State Advocate case that:

42. Therefore article 33(3) of Cap 573 states that the recession¹⁷ under that article produces the effects of Art 541 and 543 of the Civil Code so that the restitutio in integrum which is a consequence of its recession is achieved. Consequently, whoever has the right to proceed with an action under article 33(3)¹⁸ also has the right to make the consequential claims, either in the same case or in a separate case, because they are part of the remedy.

43. Therefore the State Advocate, as he is one among others, like the plaintiffs as long as they remain members of the House of Representatives, who have the right to take action under article 33 of Cap 573, also has the right to take action for the restitutio in integrum for that which may be due under articles 541 and 543 of the Civil Code as a consequence of the recession.

With all due respect there are a number of points that these paragraphs seem to fail to take into consideration. Firstly, Art. 33(2) empowers the State Advocate and others to ask for a declaration of nullity and not to seek the *restitutio in integrum*, secondly, the provisions of article 33(3) simply state what is the state of play between the State and the person who had acquired land in violation of article 31 of Cap 573, after the declaration of nullity, and defines the reciprocal rights of the person to whom the land reverts and the person who had previously acquired the land in violation of article 31. There is little or nothing in the judgment that seems to justify such an extensive interpretation of the article by the Court. Thirdly, Article 543 of the Civil Code implies choices to be made by the owner to whom the land reverts after the declaration of nullity. Such choices cannot be left to the State Advocate and all sitting MPs collectively, because it would be practically impossible to

¹⁷ Are a recession and a declaration of nullity the same thing? Art. 33(3) of Cap 573 merely states that “The effects and consequences referred to in articles 541 and 543 of the Civil Code shall apply to whosoever acquires land in violation of article 31 of this Act” It is a consequence of the nullity brought about by art. 33 (1) and does not empower anybody to do anything;

¹⁸ The judgment says 33(3) but obviously the references should be 33(2).

arrive at an agreement between them. They can neither be left to who acts first to the exclusion of others who come later, because there is nothing in the law that says so. Finally, whoever has the direction and management of the land is best placed whether to keep improvements to the land made by the possessor in bad faith. Art. 543 (1) Civil Code speaks of sums owing to the possessor in bad faith- are these to be paid by the State Advocate or the sitting MP making the claim? The decision of the Court of Appeal would have been more comprehensible had it gone into the intricacies of the consequences referred to in Art 33(3) Cap 573.¹⁹

The Court neither entered into the merits of what constitutes the fruits of the thing possessed referred to in article 541, Civil Code, which the possessor in bad faith had or could have collected. Do those fruits cover damages for unfulfilled obligations under the deed of emphyteusis or the related instruments, or indeed damages that may have been caused by negligent management of the property? Articles 541 and 543 should be read in the context of Sub-title III “of the Rights and Obligations as between the Possessor and the owner”, of Title VI of Possession of Book II of the Civil Code.

This title deals with the relationship between the owner and the possessor after the thing has been restored and not of damages in general. To my mind what article 33(3) Cap 573 states is that the person acquiring land in violation of article 31 of that law, is to be treated as a possessor in bad faith with regards to the restitution of fruits and the compensation for improvements, and does not justify the purported extension of the rights of the State Advocate and members of the House of Representatives under Art. 33(2).

The fact is that Article 33 of Cap 573, was not an issue between the parties. The state Advocate, from day one, stated that Art. 33 (2) gave him the right to act *motu proprio*, and the action of the plaintiff was never based on that article. Had the dispute involved this matter, the parties would have discussed and given their input on the matter.

This author does not claim that the Courts have in either the Delia/Hospitals Case or the Bernard Grech/State Advocate Case decided *extra* or *ultra petita*. As the First Hall of the Civil Court stated at point 350 of its judgment:

“it is true that formalism is an essential part of judicial proceedings, since, in their [sic] absence, the Courts will be faced with complex and unwarranted situations that may lead the Court not to function efficiently and render it unable to deliver justice²⁰ as expected of it”

¹⁹ The Court did not have the benefit of the views of the parties to the case in Bernard Grech/State Advocate case, as the matter was not debated by the parties and only arose in the last six points of the Judgement in appeal.

²⁰ “gustizzja u haqq” in the Maltese Text

and went on to warn against excessive and asphyxiating formalism.

However, a stricter enforcement of the provisions of article 156 of the Code of Organization and Civil Procedure, would have in both cases helped the Court to clearly identify the points in dispute, limit the debate and evidence to those points, after affording the parties the opportunity to give their input therein.

The Courts should, perhaps, be less reluctant to rule in favour of the *exceptio obscuri libelli*, when the provisions of Art. 156 Cap. 12 are not strictly observed, not only because in my view that article is one of public order, and is meant to safeguard the defendant's right to establish and prepare its defences, but also because it enables the Courts to clearly identify the reasons and motives of the claims and their full extent, in such a manner that the parties, the pleadings, the evidence and the judgments are from the start clearly focused on the real points at issue,²¹ In these cases, the Courts did not always enjoy the benefit of having pleadings which helped elucidate and identify the points in dispute.

Finally, it should be noted that it is a basic rule of interpretation that exceptions are to be interpreted restrictively, and not extended in scope by a wider interpretation. Article 33(2) of Cap 573 is an exception to the rules set out in article 181 B (1) of the Cap. 12 as well as to the general rule in Chapter VII of the Constitution. As such its scope should not be widened by interpretation.

At the beginning of the paper, I stated that I would try to explore the various issues and questions that the judgments in the Delia/Hospital Case and Bernard Grech/State Advocate Case raise. I have pointed out some points which have been adequately answered in the judgments, others where the Court have not deemed it necessary for the purposes of the cases before it to explore more deeply. At some points I have stated my opinion, which is not meant to be final - the aim has been to whet the appetite of present and future jurists to delve more deeply into the matters raised, and to explore them in a scientific manner, clear of political or other bias. It is hoped that where by such study the law is shown to be ambivalent or ambiguous, the legislature will find the time and energy to clarify.

²¹ It would also expedite Court proceedings, because less time would be wasted hearing unnecessary evidence or dealing with arguments which are not central to the point of issue.



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