

The Amendments to the Lease provisions of band clubs in the Civil Code – a critical assessment

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ABSTRACT

The objective of this dissertation is to shed light on the amendments to the Civil Code specifically relating to lease agreements pertaining to band clubs. Due to the recent amendments by virtue of Act XXVII of 2018, it addresses the constitutionality of such legislation and the previous laws which led up to such amendments. It places significant importance on salient case law which led up to the need for legislation in the area such as *Sean Bradshaw et vs L-Avukat Generali et* which critically analyses the definition of a club and the stringent laws under Chapter 69 of the Laws of Malta. Moreover, the stance taken by the European Court of Human Rights shall be discussed, highlighting the wording found within the law and discussing whether such amendments follow the fundamental principles enshrined within the European Court. The principle of proportionality shall be delved into along with a critical analysis regarding such amendments and alternative solutions which may have been introduced.

Furthermore, a specific focus is placed on the landmark judgement of *Lanzon Carmen Mary et v. Boffa Joseph* due to it being the first court judgement to be overturned by an amendment to the law, placing an obligatory lease agreement on the landlords irrelevant of what the Court decided. It shall address the implications that this judgement shall have on future cases as well as the repercussions of the new amendments, specifically with regards to the rule of law.

Keywords: Band Clubs – Rule of Law – Principle of Proportionality – Lease Agreements – Constitutionality.

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INTRODUCTION

Band Clubs were introduced into the Maltese scenario in the nineteenth century and have become an integral part of Maltese culture. Initially, such clubs were a meeting point where the villagers could socialize, however, over time the musical aspect was incorporated, rendering clubs as a place where individuals could gain education and culture through musical instruments.¹ Although the bands were introduced to create a lively ambience at the village feasts, the idea was to imitate “*the marching bands of the British military*”.² Such clubs strive to create an element of unity between the members and in the village it is situated, although rivalry is common between different clubs. Such clubs also hold a large responsibility as the club is deemed to be a reflection of the village itself. Such was noted by Boissevain where he stated that “... *a band club is more than just a social centre... the men who run the club make decisions which affect all the inhabitants.*”³

There are currently 90 band clubs found across Malta and Gozo, with almost every village having a club. Data collected in 2018 by the National Statistics Office proved how up until 2017, there were 27,326 members registered with different band clubs nationwide.⁴ Furthermore, a study conducted by Dr. Vincent Marmara proved how 51.6% of the population perceive band clubs very highly and believe that such clubs “*act as a source of*

¹ Joseph Mario Farrugia, ‘The King’s Own’ – A Pioneering Maltese Band Club 1874-1927’, B.A (Hons) History, 2013

² Marie-Claire Grima, ‘A Local traditions rooted in the past: the Maltese Band Club’ (*GuideMeMalta*, NA) <<https://www.guidememalta.com/en/a-local-tradition-rooted-in-the-past-the-maltese-band-club>> accessed 3 March 2019

³ Jeremy Boissevain, *Saints and Fireworks*, Page 47

⁴ European Statistical System, *Band Clubs: 2017* (News Release 137/2018)

*cultural identity.*⁵This appreciation for band clubs and the importance of maintaining this cultural element is not only exerted by club members and officials, but has also been demonstrated by the government and included in legislation throughout the years. This appreciation was witnessed as recent as January 2019, where the government gave a sum of €150,000 to thirty band clubs in order to aid in the preservation of certain items found within the clubs, such as antiques and musical pieces, as well as to strengthen the projects being worked on by such clubs.⁶

This need for preservation has also extended to lease agreements. Upon analyzing the vast legal history pertaining to band clubs, it is evident that the cultural significance has been paramount when legislators promulgated new laws. Considering the protection afforded to leases entered into prior to the 1st June 1995, club lessors have been facing dire consequences in order to regain possession of their properties. The first Chapter of this dissertation shall discuss the legal definition of a band club and critically analyze how it has evolved from Act XXIII of 1929 up until the recent amendments of Act XXVII of 2018. It shall delve into the legal implications of such definitions and discuss the conundrum faced by the courts regarding the protection of band clubs prior to Chapter 69 of the Laws of Malta.⁷ It shall then delve into Act X of 2009, providing a detailed explanation of the articles and portraying how such legislation was incorporated into prominent judgements.

⁵ Denise Grech, 'Band Clubs seen as source of cultural identity' (*Times of Malta*, 16 November 2017) <<https://www.timesofmalta.com/articles/view/20171114/local/band-clubs-seen-as-source-of-cultural-identity.663036>> accessed 3 March 2019

⁶ Nigel Mifsud, 'Government distributes €150,000 among 30 band clubs' (*Times of Malta*, 26 January 2019) <<https://www.tvn.com.mt/en/news/government-distributes-e150000-among-30-band-clubs/>> accessed 3 March 2019

⁷ Re-Letting of Urban Property (Regulation) Ordinance, Chapter 69 of the Laws of Malta

Chapter 2 shall delve into Article 1 of the First Protocol of the European Court of Human Rights. The notion of general interest shall be discussed; studying the merits which must be followed in order to fall under such category. Prominent judgements which also focused on such relevant articles shall be analysed such as the judgement of Avukat Leslie F Grech Et v. Nicolo' Isouard Band Club Et.

Finally, Chapter 3 shall then introduce Act XXVII of 2018, explaining the new amendments in detail, whilst placing a specific focus on the landmark judgement of Lanzon Carmen Mary Et v. Boffa Joseph Et due to the fact that it is the first judgement to be overturned by an amendment in legislation after having been decided by the Court. An analysis shall then be provided to the relevant articles as well as a number of alternative solutions which may have been considered prior to enacting such laws.

LITERATURE REVIEW

The subject matter of this dissertation is a complex area compared with other units of property law. In order to shed light on the subject and fulfil the aims of this legal paper, prominent judgements, articles, legislation and parliamentary debates were utilized.

Case law played a crucial role in the development of this dissertation. An in depth analysis of various prominent court judgements is provided, delving into cases such as Sean Bradshaw et v. L-Avukat Generali and Evelyn Montebello v. L-Avukat Generali with regards to where the landlords portrayed their frustration at the lack of repossession of their property after Act X of 2009. It also places a large focus on Lanzon Carmen Mary et v. L-Avukat Generali, focusing mainly on the aspect that it was the first court judgement to be reversed through an amendment in the Civil Code. This judgement then allows one to delve into the juridical implications resulting from this judgement, analysing cases from the European Court of Human Rights such as Anthony Aquiliana v. Malta as well as Hutten-Czapska v. Poland.

Although there are no complete theses specifically available on the subject, certain short chapters from two theses provided a clearer understanding on certain areas of the law. One such thesis is entitled ‘An Assessment of Act X of 2009 Reforming the Rent Law in the Light of the Property Rights Protected by the European Convention on Human Rights’ by Sandra Sant Fournier. The second chapter of this dissertation proved highly beneficial in gaining a clear understanding of the amendments incorporated into Maltese law through Act X of 2009. Furthermore, an important source of literature was a thesis by Luigi Farrugia entitled ‘To what extent has Act X of 2009, as subsequently amended, achieved its

Objectives? An Assessment of the Rationale for Introducing the Amendments and their Application by the Courts.’ This thesis proved essential in acquiring a well-rounded understanding of the definition of a club under Maltese law and the conundrum with regards to the term ‘shop’ under Chapter 69 of the Laws of Malta.

Lastly, legislation on each definition and area of the topic posed to be the most useful. A critical analysis of the lease provisions relating to band clubs was delved into as well as the definitions available; starting from Act XXIII of 1929 leading all the way up to the present amendments of Act XXVII of 2018. The articles under the Constitution of Malta with regards to the right to peaceful possession are also analyzed, in conjunction with Article 1 of the First Protocol of the ECHR. Parliamentary debates were also examined, to provide a deeper understanding of the topic and the outcome of the court.

METHODOLOGY

This section gives a concise explanation regarding the branch of methodology used to obtain current information and scholarly research for this dissertation. It shall start off with the research methods used and the merits to such a form of methodology. It shall then move on to discuss the limitations encountered within this area, as well as any form of hindrance experienced in order to collect such data when there was a lack of sources.

i. Data Collection Methods

Black-Letter Methodology

This dissertation shall follow a branch which is arguably the most suitable form for a legal paper; Black Letter Methodology. The latter is more commonly referred to as doctrinal analysis; this form of methodology is known to be the more traditional kind due to fact that it does not leave much room for interpretation or intuitive thinking. Such form of research entails delving into judgements, legal sources, text-books as well as treatises and statutes.⁸ The effects of the law or the way in which the law has been applied through judgements is not taken into consideration; as the most imperative aspect is critically analysing the law available through existing legal sources.⁹

Due to the area of law chosen for this dissertation, although various academics may have a different viewpoint on the matter, it is a well-known opinion that black letter methodology is the most applicable for a number of reasons. Due to the fact that such methodology

⁸ Coralieneavecoleshaw, 'Research Methods: Doctrinal Methodology' (*ASC LLM Support – UWE*, 18 January 2017) <https://uweascllmsupport.wordpress.com/2017/01/18/research-methods-doctrinal-methodology/> accessed 14 April 2019

⁹ Ibid.

delves into the law available, analysing how it has evolved up until this day and age and how it continues to evolve is essential when critically assessing lease agreements. Without a prior understanding of the old regulations under Maltese law, it would be quite complex to understand the current scenario and the problematic situation landlords are faced with.

The main sources used throughout this dissertation were the law; looking into past legislation and analysing how it evolved up to the recent amendments. Furthermore, court judgements have been essential to understand certain definitions as well as to gain a better understanding of the time-frames under Maltese lease agreements. Such judgements of a recent nature were found online and judgements pre-dating 1995 were found through the special collection available at Melitensia.

ii. Black Letter Methodology Limitations

There have been a number of academics that criticize this form of methodology due to its restrictive nature, stating that it does not allow the user to question certain principles or laws but must accept them without interpretation. Furthermore, it has also received criticism as it is quite a complex form of methodology to follow, and unless one has a basis of legal knowledge, it is quite problematic to understand.¹⁰ Most academic researchers follow the Latin maxim of “*ubi societas, ibi jus*” which directly translates to “where there is society, there is law”.¹¹ Therefore, due to the belief that society is an integral part of the foundation of law, some believe it should include a more interdisciplinary approach, combining other areas of study or statistics to give a more well-rounded argument.

¹⁰ Terry Hutchinson, ‘The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law’ https://www.elevenjournals.com/tijdschrift/ELR/2015/3/ELR-D-15-003_006.pdf accessed 1 April 2019

¹¹ Frances Camilleri-Cassar et. Al, ‘Legal Research Methods’ (*Times of Malta*, 13 March 2017) <https://www.timesofmalta.com/articles/view/20170313/opinion/Legal-research-methods.642262> accessed 1 April 2019

However, quantitative statistical results as well as questionnaires for qualitative purposes are out of the scope of this field and would not enrich the study in any manner. Whilst it is true that the law is a product of the society in which it is formed, numerical values and opinions of certain individuals do not provide a better understanding of the lease provisions.

Whilst this is an excellent area to delve into due to the fact that, as of yet, no thesis regarding such topic is in existence, this proved to be highly challenging. Up until the date of this writing, there was no encounter of any books relating to lease agreements specifically relating to band clubs and online articles and journals were few and far in-between. Therefore, although black letter is arguably the preferred methodology when conducting a legal paper, with regards to this topic, this proved to be a highly complex task due to the lack of resources available.

CHAPTER 1 – LEGAL HISTORY ON BAND CLUBS

1.1 Definition of a club

Band clubs have been around for decades and throughout the course of time, their legal definition has been altered by various legislators to ensure that such encompasses the many aspects of a club. In order to understand the definition which is currently available, it is essential to step back into the past and witness how this term evolved. The first definition of a club was included in the Registration of Clubs Regulations of 1939 under Article 2(a), this subsidiary legislation defined a club as:

“Only any building or part of a building used by an association of persons for their common resort.”¹²

It is immediately noticeable how this definition of what makes a band club is ambiguous and leaves plenty to be desired from a legal point of view, therefore further amendments were necessary. As time progressed, all laws regulating leases of urban property were regulated by the Re-letting of Urban Property (Regulation) Ordinance. This is known as the “special law” and lease agreements entered into prior to the 1st June 1995 were regulated by this law. Such held a new definition of a club under Article 2 as:

“Any club registered as such at the Office of the Commissioner of Police under the appropriate provisions of law.”¹³

This statement is still very vague and does not fully describe a club and the characteristics it possesses. After Chapter 69 was amended by Act X of 2009 and the Civil Code was

¹² Registration of Clubs Regulations of 1939 – Article 2(a)

¹³ Re-Letting of Urban Property (Regulation) Ordinance, Chapter 69 of the Laws of Malta, Article 2

inaugurated to be the only legislative instrument regulating lease agreements, the new definition of a club now fell under Article 1525(3) of the Civil Code.¹⁴ However, such definition was deemed to be disappointing due to the fact that the wording from the previous law was upheld and the definition had very little changes; still leaving room for loopholes and failing to describe the intricacies of a band club.

Prior to Act X of 2009, the courts were faced with a conundrum due to the definition of a “shop” under Chapter 69. The law stated that the term “shop” entails a property which may be used as a club. This caused a great deal of confusion due to the fact that clubs are generally perceived to be philanthropic organisations distinct from shops. A prominent judgement where this notion was discussed is *Giuseppe Zammit vs Giuseppe Attard Ne Et*¹⁵, where the court confirmed that a club is distinct from a commercial shop. This was also concluded in the Court of Appeal where the judge stated that although clubs may cater for the villagers during the week where the feast ensues, and in turn makes a substantial amount of profit, this does not mean that the earnings obtained alters the clubs definition into that of a shop.¹⁶

Another similar judgement in which the lack of definition to the term ‘club’ was deemed to be problematic was that of *Paul Camilleri et. v. Joseph Glanville pro. Et. noe.*¹⁷ This case dealt with a lease agreement entered into between the parties; the landlord argued that the band club had breached the conditions of the contract as they believed the tenants were

¹⁴ Civil Code, Chapter 16 of the Laws of Malta, Article 1525(3)

¹⁵ Giuseppe Zammit vs. Giuseppe Attard Ne. Et, *Kollezzjoni ta’ Decizjonijiet tal-Qrati Superjuri ta’ Malta*, Volume 33B (1949)

¹⁶ Luigi Farrugia, ‘To what Extent has Act X of 2009, as Subsequently Amended, Achieved its Objectives? An Assessment of the Rationale for Introducing the Amendments and their Application by the Courts’ (LL.D, 2016)

¹⁷ Paul Camilleri et. vs. Joseph Glanville pro. et noe, FHCC, 28th April 2003

using the club for purposes other than those agreed upon in the contract.¹⁸ The court came to the conclusion that in this case the alleged breach is groundless by stating that:

“...huwa daqstant ovvju mill-qari tal-iskrittura illi din ma tikkontjieni l-ebda rizervi jew restrizzjonijiet konċernanti l-attivitajiet li kellhom jigu gestiti mill-club, u allura fil-fond mikri.”¹⁹

However, although this judgement appeared to settle the matter, there are still opposing views relating to whether protection has always been available to band clubs, or if such protection only commenced upon the emergence of Chapter 69. This notion was discussed in the recent judgement of *Anna Galea v. L-Avukat Generali u St. Julians Band Club*.²⁰ This case delved into the definition provided under Chapter 69 wherein it was stated that a band club falls under the definition of a shop.²¹ The argument in this case was that Article 2 provided under Chapter 69 was included due to the protection afforded under Act V of 1955, however, it was stated that prior to such act, band clubs were not given any form of protection. The plaintiff’s provided a number of instances which proved this notion such as *Clementina Galea v. Giovanni Galea*.²² It stated that Act V of 1955 introduced security of tenure with regards to band clubs and acknowledged the stance taken in the parliamentary debate relating to such act which confirmed that:

¹⁸ Rosette Cassar, ‘Act X of 2009: To What Extent is the Lessor Better Off?’ (LL.D 2010)

¹⁹ Ibid 17. Translation: “... it is apparent upon reading the text that this does not contain any reservation or restriction concerning the activities that had to be gestured by the club, therefore in the premises under lease.

²⁰ *Anna Galea vs L-Avukat Generali u St. Julians Band Club*, FHCC 8th February 2019

²¹ *Reletting of Urban Property (Regulation) Ordinance*, Chapter 69 of the Laws of Malta, Article 2

²² *Clementina Galea vs. Giovanni Galea*, FHCC, 8th January 1965

“Bl-emenda ta’ illum il-clubs sejrjn jiġu kkunsidrati bħala shops u ma jkunux jistgħu jiġu aktar rinfaccati bil-fatt li jekk ma jaċċettawx il-keras esagerata ikunu jistgħu jsibu ruħhom barra wara li jkunu ilhom jokkupaw ħamsin jew sittin sena...”²³

However, the Attorney General disagreed with such notion stating that although Act V of 1955 gave birth to the protection afforded under Chapter 69, protection was already being afforded to band clubs prior to such Act. It was discussed that such protection was already provided under Act XXIII of 1929 where the landlord was already prohibited from increasing rent or refusing to renew the lease without sufficient authorization from the Board. It was also acknowledged how although such Act was temporary in nature, Ordinance XXI of 1931 also provided sufficient protection.²⁴

Later down the line this misconception was dealt with in Act X of 2009 where legislators confirmed that *“a tenement leased to a society or leased to a musical, philanthropic, social, sporting or political entity, that is used as a club, shall not be considered as a commercial tenement even if part of it is used for the purpose of generating profit”*.²⁵

1.2 Act X of 2009

With the new amendments being added with regards to lease agreements one may note the stepping stone between the limitations imposed by pre-1995 Laws and the free market post-1995. The former is due to the fact that in regards to any property, whether a dwelling house or a commercial lease, if such lease was entered into prior to the 1st of June 1995, the

²³ Parliamentary Debate

Translation: With today’s amendments, clubs are going to be considered as shops as can no longer be reinforced with the fact that if they do not accept the exaggerated rent, they may find themselves evicted after having occupied the premises for fifty to sixty years.”

²⁴ Ibid 18.

²⁵ Civil Code, Chapter 16 of the laws of Malta as amended by Act X of 2009, Article 2(3)

tenant was given the ultimate protection. Such protection included a fixed rent which is estimated to be well below market value, and conditions regulating such lease may not be altered by the landlord under any circumstances. Whilst new amendments were introduced to level the playing field between landlord and tenant and to give landlords the opportunity to gain repossession of their property with regards to residential and commercial leases, it is evident that this novelty was not extended to club owners. It is evident that the legislator was giving more importance to the cultural implications which would be suffered by phasing out band clubs, rather than giving club landlords the opportunity to regain their rights with regards to their own property. In order to provide a form of solution to this situation, on the 19th June 2009, Act X of 2009 was promulgated and introduced article 1531J.²⁶ The latter stipulates that a club leased and made use of prior to the 1st June 1995 which has been leased for a certain period, and as of the 1st January 2010 such lease is still within its original period “di fermo” or “di rispetto” and such lease has not been extended, then the initial date stated in the contract is to apply.²⁷ Article 1531J continues by stating that the Minister is given the permission to make regulations as he deems fit in order to cater for the needs of both the landlord and the tenant simultaneously.

The Minister soon after exercised his right and the Conditions Regulating the Leases of Clubs Regulations was drafted and this regulation entered into force on the 1st January 2014.²⁸ The first amendment is found under Article 2 which states that with regards to leases entered into prior to the 1st June 1995, unless there has been an agreement made in writing before the latter date or after the 1st January 2014, leases still in their original period

²⁶ Civil Code, Chapter 16 of the laws of Malta as amended by Act X of 2009, Article 1531J.

²⁷ Ibid.

²⁸ Conditions Regulating the Leases of Clubs Regulations, Subsidiary Legislation 16.13, Legal Notice 195 of 2014

on the 1st January 2014 shall have an increase in due rent as from the first payment which is due after the latter date.²⁹ Such amount shall be increased by 10% over the last sum of rent paid and shall continue to increase by a fixed rate of 10% over the previous years' amount until 2016. Article 2(2) goes on to state that the first rent which is due after the 1st January 2017 shall also be increased at a rate of 5% over the previous years' rent and shall continue to increase at this fixed rate annually until the 31st December 2023. After the stipulated date, such rent shall increase according to the market value.³⁰

Another initiative introduced is that where such club generates a form of economic activity, from the 1st January 2015 all band clubs must also give an additional 5% of the annual income accumulated through the club. Such amount shall be additional to the rent due and may not derive from income generated from philanthropic or fund raising activities.

Furthermore, the income which the club generates must be regulated by financial statements and it is within the tenant's duty to hire an accountant to take care of their finances by audited financial statements if the club generates an income exceeding €200,000 per annum. If such amount is not reached, such statements must still be signed by a certified accountant.³¹

It is evident that the Minister aimed to introduce productive and fair amendments through this regulation by placing financial pressure on the tenants. Not only would the tenant be paying a fair amount of rent along with other expenses but would also need to ensure that an accountant is taking care of the necessary finances; which is also another cost to bear. However, although the above elements were introduced, landlords were still highly

²⁹ Civil Code, Chapter 16 of the laws of Malta as amended by Act X of 2009, Article 1531J (2)

³⁰ Ibid.

³¹ Ibid.

dissatisfied that the law was favouring the tenant and this resulted in a number of prominent judgements.

1.3. Sean Bradshaw Et. v. L-Avukat Generali

A landmark judgement concerning this matter is that of *Sean Bradshaw Et v. L-Avukat Generali Et.*³² This judgement deals with the King's Own Band Club situated in Republic Street, Valletta. The argument in this judgement reflected the frustration that multiple club landlords were dealing with; due to the fact that the club's market value was initially calculated in the 1940's, the market value at the time was substantially lower therefore a rent of £500 at the time was sufficient. However, this market value increased but due to the protection afforded to the tenant since the lease was entered into prior to 1st June 1995, the landlord was unable to increase such rent. This was expressly stated in the judgement;

*"Huwa evidenti li, tenut kont tal-valur arkitettoniku, kulturali u storiku, tal-pozizzjoni strategika u ta' importanza kummerċjali fil-qalba tal-Belt Valletta, u tal-introjtu originat mill-fond proprjeta' tar-rikorrenti in solidum, il-kera li qieghda tigi offruta mill-Kings Own Band Club lir-rikorrenti ghall-kontinwat pussess u uzu tal-fond imsemmi hija ta' ammont irrizorju u li bl-ebda mod ma jirrifletti korrisspettiv xieraq fid-dawl tal-valur reali tal-istess fond."*³³

It was also argued that landlords are being discriminated against as article 1531J is only putting such heavy restrictions on club owners. Apart from the discrimination faced by

³² Sean Bradshaw Et vs. L-Avukat Generali Et, FHCC (Constitutional Jurisdiction), 8th October 2013

³³ Ibid. Pg. 2 Translation: "It is evident that, according to the architectural, cultural and historical value, and the strategic position having commercial importance in the heart of Valletta, and for the revenue originating from the premises of the landlords in solidum, the rent being offered to the King's Own Band Club to the landlords for the continued possession and use of the premises is a miserable amount and in no way reflects correspondingly in light of the actual value of the same premises."

article 1531J of the Civil Code, the parties also argued that the rent laws under Maltese law violated Article 1 of the First Protocol to the ECHR which states that:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions.”³⁴

They also stated that this contradicts Article 37 of the Constitution of Malta.³⁵ Therefore, the lessors sought for the court to uphold this breach in legislation and also to provide a sufficient amount of compensation.

In order to determine if the rent payable was up to the current market value, the FHCC followed the stance taken in *Gera de Petri Testaferrata Bonnici Ghaxaq v. Malta*³⁶ and *Amato Gauci v. Malta*³⁷ and applied the proportionality test. The court established that the value of the property, when taking into account the central area in which it is situated, was significantly lower than the acceptable amount. Therefore, the FHCC held that Article 1531J of the Civil Code breaches lessors rights and ordered the club to pay €300,000 as a form of compensation.³⁸ This judgement was subsequently appealed by both the Attorney General as well as the band club, stating that they had not breached any laws and that such compensation should be paid by the state. The Constitutional Court in turn reversed the previous judgement declaring that there had been no violation of human rights. The court noted that the applicants had entered into such agreement with a complete understanding of the fact that the lease agreement could not be changed, and that the rent due would be at a fixed annual sum. Therefore, the court declared that such parties may not argue that this is a

³⁴ Article 1 of the First Protocol to the European Court of Human Rights

³⁵ Constitution of Malta, Article 37

³⁶ *Agnes Gera de Petri Testaferrata Bonnici Ghaxaq v. Malta* App no 26771/07 (ECHR, 5 July 2011)

³⁷ *Amato Gauci vs. Malta* App no 47045/06 (ECHR, 15 December 2009)

³⁸ *Ibid* 32.

violation of their right to peaceful possession as they entered into the agreement willingly.³⁹

Due to this outcome, the applicants filed for a retrial on the 6th May 2015 pleading that the court had interpreted the law incorrectly and such reasoning contained an “error of fact”.

However, such retrial was rejected and the judgement was later on brought before the ECHR.

The applications raised a significant aspect during such submission; stating that not only does the legislation hinder their right to peaceful possession of their property, but also that such club does not serve a public purpose although it is a band club. This is due to the fact that the ground floor was transformed into a bar and restaurant, therefore such interest was purely commercial. This was noted wherein stated that:

“This economic activity was disguised under the name of a ‘band club’ which was not used solely for the benefit of its members.”⁴⁰

The applicants also pointed out that whilst band clubs carry a highly important and cultural role, such club need not occupy such a prominent building in the centre of the capital.

Moreover, although there were amendments to the law to potentially raise the rent due to club owners, such amount still did not reflect the market value.

The applicants further alleged that the restrictions imposed on them with regards to their own property also violated article 14 of the European Convention which states that:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political

³⁹ Bradshaw and Others vs Malta App no. 37121/15 (ECHR, 23 October 2018)

⁴⁰ Ibid.

*or other opinion, national or social origin, association with a national minority, property, birth or other status.”*⁴¹

It was further argued that any form of discrimination is frowned upon under the convention, including discrimination between different kinds of landlords; this was based on the reasoning followed in the judgement of *Berger Krall and Others vs. Slovenia*.⁴²

Eventually, the ECHR came to a unanimous conclusion that Article 1 of the First Protocol of the Convention was indeed violated, however, pronounced that there was no such violation of Article 14, and the state was ordered to pay €610,000 in damages.⁴³

1.4. Anna Galea v. L-Avukat Generali u St. Julians Band Club

The same conundrum was witnessed in the judgement concerning *Anna Galea v. L-Avukat Generali u St. Julians Band Club*.⁴⁴ This case dealt with the St. Julians band club located in St. George’s Street; the latter had been under a title of lease with the rent fixed at an annual rate of €100.16. Due to the protection afforded to the tenant under Chapter 69, the landlords were obliged to respect the conditions of the verbal contract, prohibited from increasing the rent and from terminating the lease. The landlords of the premises filed constitutional proceedings against the tenants, imploring that the court recognizes that such conditions impinge on the fundamental rights of the landlords under article 1 of the First Protocol of the ECHR. Furthermore, the landlords argued that they should be given the freedom to exercise the peaceful enjoyment of their property and that the tenants should provide

⁴¹ Article 14 of the European Convention on Human Rights

⁴² *Berger Krall and Others v. Slovenia* App no. 14717/04

⁴³ *Ibid* 39.

⁴⁴ *Anna Galea v L-Avukat Generali u St. Julians Band Club*, FHCC, 8 February 2019.

adequate compensation in damages. Naturally, the Attorney General as well as the St. Julians Band Club contested their opposing views to the court.⁴⁵

With the amendments brought about by Legal Notice 195 of 2014, the rent was increased from €100.16 to €1,007.34 however, this was still regarded as a pitiful amount compared to the market value of the premises. This was herein stated:

*“...l-atturi xorta qisuh bħala ammont miżeru u redikolu tenut kont tal-valur tal-proprjeta’ u tal-valur lokatizju tagħha fis-suq u għalhekk baqgħu ma jaċċettawx il-kera”.*⁴⁶

The court appointed multiple architects to provide their expert opinion on an estimation of the property, one such architect noted in her evaluation on the 26th June 2013 that; *“It is my professional opinion that the market value of the property in its present state and freehold stands at €2,600,000.”*⁴⁷ Furthermore, Costanzi went on to state that *“The rental value of the premises as organized today having a bar, a restaurant and a band club, would stand at €162,000 per annum.”*⁴⁸ Eventually, the court came to the conclusion in favour of the landlords and ordered the Attorney General to compensate the landlords a sum amounting to €300,000.⁴⁹

1.5 Evelyn Montebello v. L-Avukat Generali u s-Socjeta Filarmonika Maria Mater

Gratiae

⁴⁵ Ibid 44.

⁴⁶ Ibid 44. Pg. 13

Translation: “... the landlords still perceived it to be a miserable and ridiculous amount considering the value of the property and the value of the location in the market, and therefore continued to refuse to accept the rent.”

⁴⁷ Ibid 44. Pg. 14

⁴⁸ Ibid 44. Pg. 14

⁴⁹ Ibid 44.

Another prominent judgement which dealt with a similar situation was that of *Evelyn Montebello v. L-Avukat Generali u s-Socjeta Filarmonika Maria Mater Gratiae*.⁵⁰ This band club is situated in Haz-Zabbar and has been under a title of lease since the 1st November 1926 and the rent stipulated in the contract is an annual payment of €279.52. Due to the restrictions under Chapter 69, such rent could not be increased and the landlord was obliged to renew the rent upon expiration. The landlords requested the Court to recognize that such fixed legislation breaches the lessors' fundamental rights under Article 1 of the First Protocol of the ECHR and states that they should regain possession of their property, along with compensation for the time during which their rights were being impinged.⁵¹

The Court came to the conclusion that Article 3,4 and 9 of Chapter 69 as well as Article 1531J of the Civil Code breach the lessors fundamental rights and therefore deem them moot. This was due to the fact that although the new amendments were incorporated into legislation with regards to Act X of 2009, band clubs still fell under the old law and therefore the amendments did not apply to them. Moreover, after a valuation of the property took place, it was deemed to be worth €885,000 in 2013. Therefore the landlords were not receiving adequate rent considering the value of the property and such amount received was deemed to be less than 1% of the value of the property.⁵² Moreover, the Court ordered the Attorney General to compensate the sum of €180,000 in pecuniary damages and €10,000 additional damages.⁵³ The Attorney General and tenants of the club subsequently filed an

⁵⁰ Evelyn Montebello vs. L-Avukat Generali u s-Socjeta Filarmonika Maria Mater Gratiae, FHCC 7 October 2016

⁵¹ Ibid.

⁵² Ibid 50.

⁵³ Ibid 50. Pg. 14

appeal, however the parties concluded a note of court settlement resulting in the appeal actually never having been decided.

The applicants subsequently brought the case under constitutional jurisdiction and the Attorney General argued a number of reasons why the rent imposed was fairly balanced and that it should not be increased. As seen in other judgements, the Attorney General stated that the applicants had entered into the lease agreement of their own accord and knew the consequences which would result decades down the line. Furthermore, it was stated that since the applicants did not raise this argument regarding unfair rent earlier on, then they could not have felt any financial effects. The court disagreed with such notions stating that:

“...din il-qorti ma taqbilx illi s-sitwazzjoni li jinsabu fiha l-atturi kienet “self-imposed.” Kif ingħad aktar ’il fuq il-kirja nħolqot fl-1926 meta sid-il kera ma kienx marbut li jkompli jgedded il-kiri għal żmien indefinit, u għalhekk ma jstax jingħad illi meta krew il-fond fl-1926 l-atturi kienu liberament irrinunzjaw għall-jedd tagħhom li jieħdu lura l-fond fi tmiem il-kiri jew li jbiddu l-kundizzjonijiet tal-kiri oriġinali, fosthom li jgħollu kera.”⁵⁴

The court also noted how the period in which the applicants brought the situation to light is also irrelevant and should only be considered in matters regarding prescriptive measures.

This was noted wherein the court stated that:

⁵⁴ Evelyn Montebello vs. L-Avukat Generali FHCC (Constitutional Jurisdiction) 13 July 2018
Translation: “...this court does not agree that the situation the applicants find themselves in was “self-imposed”. As stated above, the lease was entered into in 1926 when the owner was not obliged to continue to renew the rent for an indefinite period, therefore it may not be stated that when the premises was rented in 1926, the applicants liberally renunciated their right to take back their property at the end of the lease or to change the conditions of the original lease, amongst which increasing the rent.”

“Il-mogħdija ta’ żmien jista’ jkollha relevanza biss għall-għanijiet ta’ preskrizzjoni u, għalhekk, sakemm l-azzjoni ma tkunx waqgħet bi preskrizzjoni, iż- żmien meta l-atturi għażlu li jressqu l-azzjoni ma għandux jitqies bħala fattur kontra tagħhom.”⁵⁵

The court came to a unanimous conclusion that the previous compensation the Attorney General was ordered to pay must be increased from €180,000 to €200,000 and declared that the band club may no longer follow the regime imposed under Chapter 69 as well as article 1531J of the Civil Code.⁵⁶

These salient judgements portray the dire situations band clubs owners were faced with, proving that although there were numerous amendments brought about by Act X of 2009, further legislation was required. It is also noteworthy that even though certain court decisions have been declared unconstitutional and in breach of the peaceful possession of one’s property, the landlord still does not obtain repossession of their property, such notion was a vital reason why further amendments were essential.

One may note that the only remedy which the court provides with regards to the excessive restrictions placed upon landlords is a form of compensation. Whilst this is a necessary act given by the court to not discriminate against landlords, such compensation is a pitiful amount considering the market value of the property in itself. This brings forth the question of what constitutes an adequate sum of compensation, and is such compensation alone satisfactory considering the financial burden legally imposed on the landlords? Whilst the

⁵⁵ Ibid.

Translation: “The passing of time could have a relevance only for prescriptive purposes, and therefore, unless the actions have not expired by prescription, the time when the applicants decided to bring forth the action should not be considered as a factor against them.”

⁵⁶ Ibid 54.

courts aim is to reach a compromise in providing compensation to the landlord whilst retaining the clubs integrity within the village for cultural purposes, one must consider whether this compromise favours one side more than another and if it indeed violates Article 14 in conjunction with Article 1 of the First Protocol of the European Convention.

CHAPTER 2 – A EUROPEAN PERSPECTIVE

Upon analysing multiple judgements, it is apparent that the landlords to such clubs perceive the legislation currently available under Maltese law to be in breach of certain EU laws, specifically Article 1 of the First Protocol as well as Article 6 of the European Court of Human Rights. This chapter shall examine such articles and shall discuss how they are applied vis-à-vis local and ECHR judgements. It shall then study the notion of general interest and the requirements which must be met in order to satisfy this criteria.

2.1. Article 1 of the First Protocol of the European Court of Human Rights

The Constitution of Malta stipulates under article 37(1) that:

“No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where provision is made by a law applicable to that taking of possession or acquisition...”⁵⁷

This crucial article must be read in conjunction with Article 1 of the First Protocol to the European Convention which also states that:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”⁵⁸

Therefore, upon examining the law it seems almost apparent that the government is breaching both the Constitution of Malta as well as the ECHR by implementing such

⁵⁷ Constitution of Malta, Article 37(1)

⁵⁸ Article 1 of the First Protocol of the European Court of Human Rights

legislation. Enacting new legal framework which reverses court judgements leads to a profound decline in the prestigious operation of the court, giving the impression that some are above the law.⁵⁹ This in turn breaches the fundamental principles of the rule of law, revoking the decision of a court judgement anytime it may pose to be more convenient for the government at hand. This element of breach in peaceful possession of property as well as the breach to a right to a fair hearing has been discussed in multiple judgements and it is imperative to review the stance taken in order to develop a clearer understanding of such laws.

2.2. Avukat Leslie F. Grech Et v. Nicolo' Isouard Band Club Et

A landmark judgement where the court delved into Article 1 of the First Protocol of the ECHR is *Avukat Leslie F Grech Et v. Nicolo' Isouard Band Club Et*.⁶⁰ This case dealt with the Nicolo' Isouard Band Club which has been used as such prior to 1995. The landlords brought an action before the Civil Court stating that the legislation available with regards to leases entered into prior to 1st June 1995 impinge on their right to the peaceful enjoyment of their property, in turn breaching Article 37 of the Constitution of Malta as well as Article 1 of the First Protocol to the ECHR. Moreover, the landlords stated that such laws violate Article 6 of the ECHR which states that:

*"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"*⁶¹

⁵⁹ Ibid.

⁶⁰ Avukat Leslie F. Grech Et vs. Nicolo' Isouard Band Club Et, FHCC, 15 July 2014

⁶¹ Article 6 of the European Court of Human Rights

The landlords therefore expressed their views that the court should pronounce that such legislation violates the fundamental rights of the lessor on various merits, and requests the court to recognize that the rent currently being paid is not up to par with the index inflation of property present at the time. Furthermore, the lessors requested that the court condemns the tenants of the club to pay compensation for all the years they had to endure such breach.⁶²

The Court evaluated each request presented by the landlords and decided on the merits. With regards to the alleged breach of Article 6 of the ECHR, the court stated that this argument cannot be upheld due to the fact that new legal framework has been promulgated, leading to the automatic increase in rent. This automatic increase now aids the lessor as he will no longer have to file proceedings to the rent regulation board in order to gain an adequate sum of rent.⁶³

The Court then moved on to the request to recognize the breach of Article 1 of the First Protocol to the ECHR. The Attorney General in this regard noted that this alleged breach is highly incorrect by stating that:

“Dwar in-natura tal-fond bħala każin tal-banda, l-intimat jgħid li dan qatt ma kien jitqies bħala fond kummerċjali, imma bħala fond li jaqdi għan soċjali.”⁶⁴

The court also addressed the notion of increasing the rent so as to be up to par with the current market value. The court noted that in so declaring such increase, it would be acting

⁶² Ibid 60.

⁶³ Ibid 60.

⁶⁴ Ibid 60.

Translation: “Regarding the nature of the property as a band club, the tenant states that this was never regarded as a commercial premises, but as a premises that served a social purpose.”

out of its competence and such action would not be permissible. However, the court founded for a sufficient remedy due to the fact that their fundamental rights were indeed breached. As a remedy, the court ordered the tenants to pay a sum of €50,000 as compensation, this was confirmed in the third section wherein stated:

“il-Qorti ssib li ladarba qiegħda ssib li r-rikorrenti ġarrbu ksur tal-jedd tagħhom kif imħares bl-artikolu 1 tal-Ewwel Protokoll tal-Konvenzjoni, ma huwiex biżżejjed li tieqaf b’sempliċi dikjarazzjoni bħal dik. Għalkemm ir-rimedju xieraq mhuwiex lanqas u tabilfors il-kundanna ta’ ħlas ta’ kumpens bħallikieku l-ħaġa li dwarha seħħ il-ksur kienet inbiegħet, xi għamla ta’ kumpens huwa mistħoqq u doveruż”⁶⁵

However, it was confirmed such compensation was not being awarded under the title of damages, this was wherein stated:

“Ta’ min ifakkar li r-rikorrenti ma ressqu l-ebda prova tad-danni li jippretendu li ġarrbu. L-istima tal-perit maħtur minnhom ma tistax isservi bħala kejl tajjeb biżżejjed għal dan il-għan u dan minħabba l-mod approssimativ kif saret u kif l-kriterji meħuda mill-istess perit u minnu mfissrin waqt l-għoti tax-xhieda tiegħu. Minbarra dan, il-Qorti taqbel mas-sottomissjonijiet magħmula mill-intimat Avukat Ġenerali dwar l-għoti ta’ rimedju bħal dan minn din il-Qorti fis-setgħat u kompetenza attwali tagħha.”⁶⁶

⁶⁵ Ibid 60.

Translation: “The Court holds that since it finds the landlords to have undergone a breach in their will as observed in article 1 of the first protocol of the convention, it is not to simply end with such a simple declaration. Although the favourable remedy is not mandatorily a condemnation of payment of compensation as if the breach which revolved around the thing was sold, some form of compensation is due.”

⁶⁶ Ibid 60.

Translation: “It is to be reminded that the landlords did not provide any proof of the damage that they pretended to have endured. The opinion of the Architect appointed by them cannot serve as adequate enough for this purpose, and such is due to how the approximations were taken and how the criteria was fulfilled by the same architect. Apart from this, the court is in agreement with the submissions made by the Attorney General in regards to the donation of such remedies from this court in all its current capabilities and competencies.”

However, on the 26th June 2015 a different stance was taken, as the court decided in favour of the Attorney General and adopted a similar stance taken in the King's Own Band Club judgement. In such a case, the Attorney General stated that since the lease agreement was entered into willingly by the parties, the latter could not allege a violation of their rights under Article 1 of the First Protocol as they could for-see the consequences of their actions. Due to this reason, the court did not award any compensation in favour of the applicants. Moreover, the constitutional court later adopted a different approach with regards to the lease agreements and stated that the agreement entered into on the 14th August 1978 was a substitution in place of the contract entered into in 1923. The court therefore held that in the former year, legislation regarding lease agreements were already in force and the applicants entered into such agreement out of their own free will under complete understanding of the future consequences. The court concluded that due to the circumstances of the case, the owners could not plead a breach in their property rights as they had wilfully entered into the agreement.

The judgement was subsequently brought before the ECHR where the applicants argued that the principle of proportionality was being breached and there was no balance between the rights of the landlords and the tenants. Furthermore, they stipulated that although there was an increase in rent with the new amendments added in 2014, the amount was still not up to par with market value which is estimated at an annual sum of 75,000 euro.

The government on the other hand emphasised on the significant cultural importance band clubs hold in Maltese society and stated that such clubs “increase and stimulate the local musical talents”.⁶⁷ Furthermore, they argued that the rent received from 1978 amounting in

⁶⁷ Grech and Others vs Malta App no. 62978/15

302 euro was sufficient and that any other amount would be too high considering the age of the property. Moreover, they stipulated that since the owners ancestors had known about such restrictions and entered into the agreement willingly, the effects were not unforeseeable and their rights were not breached.

The court ultimately concluded that whilst band clubs are a highly important part of Maltese society and serve a cultural purpose, the landlords rights with regards to peaceful possession of their property were indeed violated. The court went on to state that although the owners ancestors may have entered into the lease agreement willingly, there is no plausible way in which they could have foreseen the increase in inflation decades down the line. Furthermore, the court stated that a fair balance is expected to be imposed on the landlords and the tenants and this was not present in this scenario. The current rent received by the landlords is considerably disproportionate and although the amendments were introduced in 2014 this still only amounted to 2% of the value which the appointed architect had suggested for the premises. Therefore, in such a case, the court sided in favour of the applicants and confirmed that Article 1 of the First Protocol to the Convention was breached and ordered the state to pay an estimated 300,000 euro in pecuniary and non-pecuniary damages to the applicants within 3 months.⁶⁸

2.3. The Principle of Proportionality

From the majority of the judgements analysed, one can note that the principle of proportionality is repeatedly emphasised throughout. Whilst it is understood that the state has the right to limit the free enjoyment of property through legislation if this is in the

⁶⁸ Ibid.

public interest, and whilst the state is afforded a wide margin of discretion since it is best placed to understand the social, financial and cultural needs of the country, such legislation must be proportionate. The major concern with regards to such leases is not just the limitation on one's right but the fact that the lease received is a pittance and therefore no balance is struck between the State's right to legislate and the owner's right to property. With the current amendments, the rent can't be increased to reflect the growth in the value of the property, moreover, the increases stipulated by virtue of Act X of 2009 still do not strike a balance. This notion was discussed in the prominent judgement of *Cassar & Others vs Malta*.⁶⁹

2.4. Cultural Implications and the Notion of General Interest

Although multiple breaches of the law ensued as a consequence of the reversal of the court judgement, there are multiple economic and social implications to consider prior to contesting such a controversial decision. Had the government not implemented amendments in order to reverse the court judgement, this would have been the start of a cultural downfall. Due to the fact that various landlords of clubs are in similar positions, multiple lessors would easily regain access to their property and band clubs would cease to exist. The removal of such clubs would not only cause significant economic and financial losses, especially during the time-frames in which the local village feast is to occur; but it would also signify an insurmountable loss in Maltese culture, tradition and lifestyle. A large portion of Malta's social and cultural identity would be diminished, trampling on traditions formed over decades across the islands.

⁶⁹ *Cassar & Others vs Malta* App no 50570/13 (ECHR, 30 January 2018)

Therefore, due to this problematic situation it is essential to delve deeper in article 1 of the First Protocol as it goes on to state that:

“The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”⁷⁰

Therefore, it is within the states discretion to control the possession of a property if it is believed that such action is in conformity with the general interest of the public. However, in the methods constructed to protect the general interest, the state must also provide a balance between the latter and the enjoyment of the property by the lessor. This was confirmed in Anthony Aquilina v. Malta⁷¹ wherein stated that:

“...tali kontroll huwa ġustifikat biss jekk jintwera, inter alia, li huwa fl-interess ġenerali; u fil-miżuri li jaddotta l-istat biex jiproteġi l-interess ġenerali hemm bżonn ta’ bilanċ bejn l-interess ġenerali u l-jedd tas-sid għat-tgawdija tal-proprjeta’ tiegħu.”⁷²

Moreover, in the judgement of the De Paule Band Club, one may argue that the government acted in conformity with Article 1 of the First Protocol due to the fact that such amendments were promulgated for the general interest of the public, and such fair balance has been introduced through the requirements necessary under Act XXVII of 2018. It has also been stated that the authorities possess a higher knowledge regarding the society and interests of the public therefore, it should be left within their discretion to decide the most

⁷⁰ Article 1 of the First Protocol of the European Court of Human Rights

⁷¹ Anthony Aquilina vs. Malta App no 3851/12 (ECHR, 11 December 2014)

⁷² Ibid.

Translation: “... said control is justified only if it can be proved, inter alia, that it is in the public interest; and in the measures the state adopts to protect the general interest, there is need for a balance between the general interest and the will of the landlord in the enjoyment of his property.”

feasible outcome. This was confirmed in the *Hutten-Czapska vs Poland*⁷³ judgement where it was noted that *“Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the “general” or “public” interest.”*⁷⁴

It is also imperative to note that numerous constitutional judgements have throughout the years recognized the social importance of band clubs, and have considered expropriation or requisition of property for use as a band club in the public interest even if it is not used by a public authority. A judgement where this principle was reiterated was that of *Josephine Mary Vella vs Direttur tal-Akkomodazzjoni Soċjali*⁷⁵ which dealt with the San Leonardu Band Club in Hal-Kirkop, where it was considered that:

*“F’dan il-kaz ir-rekwizzjoni harget fl-interess pubbliku u l-iskop kien biex il-proprjeta` tintuza mill-intimat Kazin San Leonardo. L-interess pubbliku jinkludi kull aspett tal-hajja soċjali tal-pajjiz u fond ikun qed jintuza fl-interess pubbliku jekk jintuza ghal skopijiet kulturali. Fir-rigward tal-espressjoni “interest generali” il-Qorti ta’ Strasbourg taccetta li “it will respect the legislature’s judgment as to what is in the “public” or “general” interest unless that judgment is manifestly without reasonable foundation”*⁷⁶

The court also went on to note that:

⁷³ *Hutten-Czapska v. Poland* App no 35014/97 (ECHR, 19 July 2006)

⁷⁴ *Ibid.*

⁷⁵ *Josephine Mary Vella vs. Direttur tal-Akkomodazzjoni Soċjali, FHCC (Constitutional Jurisdiction)* 25th May 2012

⁷⁶ *Ibid.* Translation: “In this case, the requisition concerns the general interest and the aim was for the property to be used by the Saint Leonard Band Club. Public interest includes every aspect of the social life of the country and a premises is deemed to be used in public interest if used for cultural purposes. With regards to the expression “general interest” the Court of Strasbourg accepts that...”

“Fil-fehma ta’ din il-Qorti l-ordni ta’ rekwiżzjoni harget fl-interess pubbliku billi l-ghan ahhari tal-Kazin hu wiehed soċjali u kulturali li jsewdaq l-identita` generali tal-lokalita` u jizviluppa t-talent muzikali fil-lokal, u dan indipendentement mill-fatt li dan is-servizz qed jinghata mill-privat u mhux mill-Gvern.”⁷⁷

It is apparent that the new amendments brought about by Act XXVII of 2018 strived to provide an alternative solution to the quandary faced by landlords whilst also aiming to conform to the general interest of the public. However, such amendments only took into consideration the latter whilst ignoring the lessors’ rights once again. Whilst it is imperative to preserve the cultural influence band clubs pose, this must not be done subject to an individuals’ right to their own property as this arguably portrays the notion that the law is only available to protect certain members of society.

⁷⁷ Ibid 75.

Translation: “In the opinion of this Court, the requisition order was ordered in the public interest due to the ultimate aim of the Club being a social and cultural one, that enshrines the general identity of the locality and the growth of local musical talent, and this is independent from the fact that this service is given privately and not by the government.”

CHAPTER 3 – ACT XXVII OF 2018

Throughout the course of time due to the abundance of case law that was infiltrating the courts of Malta, it was deemed necessary for there to be amendments with regards to lease provisions. On the 1st of August, Act no. XXVII of 2018 was promulgated entitled the “Housing (Decontrol) Ordinance (Amendment) Act” in virtue of Legal Notice 259 of 2018. Although there were a vast amount of necessary amendments, this dissertation shall focus specifically on article 1531J (2) and (3) which first introduced a number of conditions which must be satisfied.

3.1 Amendments under Act no. XXVII of 2018

Article 1531J(2)⁷⁸ and (3)⁷⁹ are arguably the most crucial amendments under this Act; the conditions stipulated are deemed to apply to all clubs which are proven to fulfill such conditions. Article 1531J(3) stipulates that when a band club fulfills all of the conditions stipulated under the previous sub-article, they shall be given authority to continue making use of the said premises under a title of lease. Such conditions stipulate that the band club (and no other form of club) must have been in existence for at least thirty years on the 1st March 2018, the band club must have occupied the same property as its principal quarters under a title of lease or emphyteusis (or both) for at least thirty years. Furthermore, the band club must still be in occupation of the premises and such is the only premises being made use of for such purpose, except for stores not used as a club, on the 1st March 2018. Lastly, the most crucial condition stipulates that when a final judgement of the Rent

⁷⁸ Civil Code, Chapter 16 of the Laws of Malta, Article 1531J(2)

⁷⁹ Civil Code, Chapter 16 of the Laws of Malta, Article 1531J(3)

Regulation Board or a Court has ordered the eviction of the band club for any other reason other than the failure to pay rent on time, this shall also fall under such category.⁸⁰

Article 1531J (3) goes on to state that when such conditions are satisfied, the club shall continue to make use of the property under a title of lease as long as a number of conditions are adhered to. In order to continue occupying such lease, the rent must be ten times the amount of rent payable to the amount which was already being paid prior to the Court eviction. Moreover, this rent will not be subject to the further increases bestowed under article 2 of the ‘Conditions Regulating the Leases of Clubs Regulations’, however the additional 5% is still effective. Lastly, the rent due may not be less than €5000 per annum⁸¹ and shall not amount to more than 1% of the value of the said premises as on the 1st January 2018.⁸²

Article 1531J(4)⁸³ stipulates that the landlord of such premises is authorized to contest the fulfilment of any of the conditions stipulated under sub-article 2 to the Rent Regulation Board. Such landlord may also contest any form of disproportionality which may be encountered after the application of sub article 2 and 3. Article 1531J (5) deals with the notion of structural repairs; stating that when the tenants are evicted due to any structural repairs made without the consent of the landlord, when the premises is the *“principal quarters of a band club, the Rent Board or the Court shall not order the eviction from such premises where the structural alterations consist of works related to the philharmonic or social activities or to the activities performed by the band club ... ”*⁸⁴

⁸⁰ Ibid 78.

⁸¹ Civil Code, Chapter 16 of the Laws of Malta, Article 1531J(3)

⁸² Ibid.

⁸³ Civil Code, Chapter 16 of the Laws of Malta, Article 1531J(4)

⁸⁴ Civil Code, Chapter 16 of the Laws of Malta, Article 1531J (5)

Due to the fact that the amendments are fairly recent, as of yet, there is limited case law regarding such provisions. However, a landmark judgement which has emerged from such amendments is *Lanzon Carmen Mary Et v. Boffa Joseph Et*. This highly important judgement has caused an insurmountable degree of controversy and the outcome from the new legislation has been discredited by many; prominently landlords of clubs.

3.2. Lanzon Carmen Mary Et v. Boffa Joseph Et.

This judgement concerned the Socjeta' Filarmonika G.M Fra Antoine de Paule band club⁸⁵ located in Paola. Such lease had been entered into by the parties on the condition of Lm450 annual rent with the first payment being effected on the 1st June 1984. The lease agreement was entered into for a period of twelve years which expired on the 30th May 1996, but was tacitly renewed under the same conditions of lease due to the protection afforded by Chapter 69. The issue surrounding this judgement is that the contract signed by both parties stipulated under clause 9 that no form of structural repairs may be carried out onto the premises apart from those mentioned in the said lease agreement. However, the tenants carried out various repairs which had not been authorized by the landlords; stating that they were essential due to the state of deterioration of the building. This is the first argument which was made in their defence where it was stated that:

*“Mhuwiex minnu li l-intimati nomine ghamlu alterazzjonijiet strutturali fil-fond lokat izda biss riparazzjonijiet ta' natura straordinarja minhabba l-istat deterjorat tal-bini kif fil-fatt l-istess intimati kienu obbligati li jaghmlu skond il-ftehim ta' lokazzjoni”.*⁸⁶

⁸⁵ Lanzon Carmen Mary Et vs. Boffa Joseph Et., Court of Appeal (23rd April 2018)

⁸⁶ Ibid.

Furthermore, the defendants argued that any form of structural repairs which took place on the premises not only preserved the premises in the sense that no further damage was inflicted, but that such repairs increased the value of the property significantly. The landlords highly disagreed with the defences presented by the tenant, stating that they had not been informed that any kind of repairs would be taking place. Furthermore, the architect of the premises Michael Falzon also confirmed that such repairs were prohibited by the current authority present at the time.⁸⁷

The Board came to the conclusion that when the landlords had sold their property to the tenant, they had only given them permission to conduct certain repairs;

*“...kienet biss illi jinfetah il-bieb ta’ l-injam li kien jifred iz-zewg fondi u li kien maghluq b’katnazz u mhux li jitnehha kompletament il-hajt u li l-fondi jigu amalgamati f’wiehed”.*⁸⁸

Moreover, the court decided that the onus of proof was on the tenants to prove that they obtained adequate permission to conduct such repairs; and the court deemed that no such proof was provided. Therefore, the court held that the tenants breached the contract by carrying out structural repairs without the permission of the landlords and were ordered to provide sufficient compensation to the lessors.

This judgement was subsequently appealed on the 23rd April 2018⁸⁹; however, the Court upheld the stance taken in the former judgement and declared that such structural repairs

Translation: “It is not true that the tenants constructed structural alterations in the located premises but only reparations of an extraordinary nature due to the deteriorated state of the building, as the same tenants were instructed to do according to the agreement of the location.”

⁸⁷ Ibid 85.

⁸⁸ Ibid 85.

Translation: “... it was only that the wooden door should be opened, which divided the two premises and was locked with a bolt, and not for the complete removal of the wall and the premises to be amalgamated into one.”

⁸⁹ Lanson Carmen Mary Et vs. Boffa Joseph Et., Court of Appeal, 23 April 2018

were not permissible, and ordered the De Paule Band Club to be evicted from the premises, and such eviction must be finalised by September of the same year. However, although this judgement seemed to put an end to a twenty year long legal battle, such triumph was short-lived as on the 10th July 2018 the new Civil Code amendments were enforced reverting the court judgement back to its initial stages.⁹⁰ Considering the fact that Article 1531J (2)(iv)⁹¹ states that any judgement which deals with issues relating to the lease agreement other than the failure to pay rent shall still retain a title of lease even though an eviction was ordered by the Court or Board, this in turn reversed the judgement and the stance decided by the Court of Appeal. Such reversal caused outrage for a number of landlords, lawyers and academics, whom stated that such amendments were unconstitutional and did not adhere to the principles of the rule of law. Due to such events, the lessors filed proceedings in the Constitutional Court against the De Paule Band Club and the Attorney General. The press release published on behalf of the landlords stated that

*“This proposed legislation is intrinsically and fundamentally, legally, politically and morally incorrect as it rewards persons who breach the nation’s own laws. It is also discriminatory as it singles out a section of society and through specific legislation, disadvantages only this section.”*⁹²

Such continued to state that if the government and society value band clubs so highly and believe that they are necessary to preserve our cultural identity, a suitable alternative would be that the community provides a monetary sum to relieve the burden from the lessors.

⁹⁰ Matthew Agius, ‘Band Club property owners file constitutional case to protest unfair law’ (Times of Malta, 18 November 2018) https://www.maltatoday.com.mt/news/court_and_police/90998/band_club_property_owners_file_constitutional_case_to_protest_unfair_law#.XKEEDpj0nic accessed 21 March 2019

⁹¹ Civil Code, Chapter 16 of the Laws of Malta, Article 1531J(2)(iv)

⁹² Hugh Peralta, Press Release issued: 4th June 2018, <<https://theshiftnews.com/wp-content/uploads/2018/07/Paola-band-club-owners.pdf>>

Furthermore, it confirmed that the amendments which have been added to the Civil Code are not only unconstitutional but have also been reprimanded by the European Court of Justice; and even concluded that “... *it makes a mockery of the judiciary and the rule of law.*”⁹³

3.3 Critical Analysis of the Amendments under Act XXVII of 2018

The new amendments to the Civil Code under Article 1531J have caused an outburst of conflicting ideas and criticism with regards to band clubs. Prior to passing any form of judgement regarding the stance taken by Minister Owen Bonnici when promulgating such remedies, it is imperative to critically analyse each article in detail. Such analysis should be directed from a constitutional point of view in order to acquire a clear understanding of each clause.

The first condition states that the rent due must be tenfold to the amount already being paid prior to the court judgement. Although this portrays to be a large amount of money on paper, in practice this still does not suffice. This was noted in the press release published with regards to the previously mentioned judgement, wherein it was stated that:

“This bill proposes that the owners would be entitled to a higher rent, yet not reflecting the real rental value of the property, while the Band Club retains possession of the premises. The premises are worth a substantial sum.”⁹⁴

⁹³ Ibid.

⁹⁴ Ibid 92.

The Justice Ministry stated that such conditions had been meticulously planned and the increase in rent was deemed to be reasonable compared with the market value, however this does not seem to be the case.⁹⁵

Upon analysing the new amendments, it is immediately evident that whilst certain solutions are provided with regards to the amount of rent which the landlord is entitled to gain, there is no prospect of such landlords ever regaining possession of their property. As long as the band club remains in existence, the lease shall remain valid. There is an immediate message that the law is limiting landlords from the free enjoyment of their property as it is overburdened excessively by the need for band clubs. This lack of free enjoyment is reinforced wherein stated that even after a court judgement, the landlord can't regain possession of the property. This in turn communicates the idea that one has a lease relationship imposed on them by the law and not out of their own choice and such imposition is independent from what the court decides. The government is not providing landlords with any form of choice, as the laws imposed force them to remain in a lease agreement, disregarding that they are not being able to utilize their property in a way that they deem fit. Whilst band clubs are imperative in Maltese society and they must be preserved due to the valuable cultural aspects they pose, the landlord is being greatly discriminated against and is not being protected by the law of their own state as their needs with regards to their own property are being overlooked.

⁹⁵ NA, 'Controversial 'band club law' comes into force- De Paule Band Club was ordered to vacate its premises after a legal battle with its landlords' (Times of Malta, 12 July 2018) <https://www.timesofmalta.com/articles/view/20180712/local/controversial-band-club-law-comes-into-force.684165> accessed 21 March 2019

The second sub-article requires that such rent shall not be requested to increase in accordance with the regulations stipulated under the Conditions Regulating the Leases of Clubs Regulations. This condition poses to be highly unfair on the landlords since not only will they not be able to reacquire their property but they will also lose any further increase which should be received annually along with the rent. Furthermore, one immediately refers to Article 1 of the First Protocol of the ECHR and notes the inconsistencies in such laws. Sub-article 3 states that the rent due shall not be less than €5,000 annually or amount to more than 1% of the value of the premises on the 1st January 2018. Apart from the fact that the lack of free enjoyment of one's property is highly unjust, an excessive burden is placed on the landlord and the principle of proportionality is being breached. This is due to the fact that 1% of the value of the premises is by far less than the amount which would be received on the market. Court appointed architects generally note that an average of 3.5% - 5% of the property should be the ideal lease value; this was noted in the prominent judgement of *Baldacchino Holdings Ltd v Avukat Generali*.⁹⁶ Therefore, this clause is highly unjust on the landlord and they are unable to divert from such laws due to the fact that they are imposed by the government and must be abided by.

Furthermore, upon analysing such articles, one immediately makes reference to Article 6 of the ECHR. Having a judgement awarded in a landlords favour and not being able to execute it because of a law created to stop them from exercising their right over their own property is grossly unjust and falls under the category of an unfair hearing. Moreover, upon analysis it is clear that the law only caters for band clubs specifically and not any other form of club in general such as sporting or political clubs. It is quite plain that the law was

⁹⁶ *Baldacchino Holdings Ltd v Avukat Generali*, FHCC, 1 November 2019 (pending)

created specifically for the Paola Band Club, which in turn puts them above the law which should never be permissible.

Upon critically analysing the new amendments, a recurrent question arises when pondering any form of plausible solution; should taxpayers provide financial support to upkeep the existence of band clubs and relieve the burden from the lessor? Any form of logical solution would result in this outcome however, this may also cause a considerable amount of predicaments. It would be questionable whether such notion is a fair distribution of public funds, representing the community and placing such funds to a beneficial and culturally important organisation. Furthermore, one must also consider that if such support is provided to band clubs, this would give rise to the owners of political, social and sporting clubs opting for the same protection and financial aid from taxpayers. Not only would this cause more problematic situations but new legislation would also be required, stipulating certain conditions which must be satisfied for any form of club to receive such financial aid. Moreover, demographically, there may be inconsistencies as to the different localities which would be interested in financing clubs.

3.4 Alternative Solutions

There are a number of plausible alternatives which may have been considered prior to the publishing of this Act. A list of alternative solutions which the government may have looked into prior to enacting such laws was devised; it may be concluded that such stringent clauses should have been utilized as a last resort and not upon the decision of a judgement to provide a 'quick fix' to the dilemma at hand. Furthermore, creating new laws to provide a remedy to existing problems in turn creates further complications, whereas finding solutions within existing laws would be more reasonable.

One such alternative is that the government may expropriate the property and in turn must pay the landlords the actual market price of the premises. In this way the burden shall be relieved from the landlord, yet they would not be left empty handed. Furthermore, due to the fact that the government has authority to expropriate such property in serving the public interest, it would be addressing the fact that band clubs are a large part of Malta's culture which should be preserved. This can be further noted under Chapter 573 of the Laws of Malta, where the law stipulates the definition of public purpose and when the government may intervene to take possession of such property for a public use.⁹⁷ Another solution following a similar notion is that the government may expropriate the properties used as band clubs and in turn may sell or lease such premises to clubs at lower rates. Such ideas would be beneficial for the landlords as they would be fully compensated for the value of the property, as well as for the public interest as the state of the band club shall be preserved.

Furthermore, another solution which is being widely discussed by various academics is that the band club may apply for a subsidy from the government to be able to buy the premises and return the monetary sum over a period of time. A solution would be for the government to enforce new legislation with regards to band clubs facing eviction due to the 1995 laws and provide this remedy.⁹⁸ This would ensure that the band club is not evicted from the premises, and the landlord would be paid the sum owed to them in return for the property.

⁹⁷ Government Lands Act, Chapter 573 of the Laws of Malta

⁹⁸ Simon Mercieca, 'The De Paule's Band Club cannot be saved by a sloppy bill' (Malta Independent, 18 June <<http://www.independent.com.mt/articles/2018-06-18/blogs-opinions/The-De-Paule-s-Band-Club-cannot-be-saved-by-a-sloppy-bill-6736191916>> accessed 27 July 2019

Furthermore, a plausible solution is that the community in which the band club is situated must provide an annual monetary sum in order to preserve the club and to relieve the financial burden off of the landlord. In regards to situations where there is more than one band club in the same locality, a fee may be paid by the members that affiliate to a certain club in order to keep a necessary balance. Moreover, the members involved with such clubs should be required to pay a membership fee in order to add an additional layer of financial protection to ensure that the costs are not placed on the landlord. This would be an excellent initiative due to the fact that it would truly be run by the community and would be a finer reflection of the village due to it being run by the said village. The band club could also create a fund from permits and licences given by the police and other authorities for feast related activities. Such amount may be pooled together which would create quite a substantial sum once accumulated.

Moreover, the most plausible solution is for the immediate removal of the clause stating that a judgement ordering eviction can't be executed. Such clause is not only unconstitutional and gives the impression that some are above the law, but also breaches the right to peaceful possession of ones' property. It also discredits the decision of the Court of Appeal drastically as it gives the impression that if a court judgement is disagreed with, it can simply be overturned by new legislation. The government may also create amendments applicable to all band clubs and not only those who have been evicted, in order to ensure that a balance is reached and there is no form of discrimination.

Furthermore, regarding the amount enlisted in the Conditions Regulating the Leases of Clubs Regulations, instead of paying 5% of the income received through activities, such amount could be raised to 15% which would raise the amount of income significantly.

Another arguably excellent initiative is that the government may find alternative accommodation for band clubs through the Lands Authority; this would be a highly beneficial compromise due to the fact that the cultural element of the band club will be preserved, with just a slight change in location.

CONCLUSION

Throughout the course of time, it has been transparent through amendments in the law that legislators strive to protect band clubs. The extensive list of salient case law which emerged prior to Act XXVII of 2018 are proof to the fact that whilst lawmakers strive to eradicate lease agreements entered into prior to 1st June 1995, this has not been extended to band clubs as they were still given the ultimate protection. Act XXVII of 2018 and the crucial judgement of *Lanzon Carmen Mary et. v. Boffa Joseph et.* shall hold paramount importance due to the fact that it was the first judgement to ever be overturned in a matter of months by an amendment to the law.

Band clubs are a highly fundamental aspect of Malta's history and culture, and that preservation of such an important cultural heritage is essential in order to hold on to traditions and the characteristics which such clubs bring. However, landlords are being highly discriminated against as they are unable to enjoy peaceful possession of their property and are prohibited from increasing the rent to the correct market value; having to bear extortionate costs due to such outdated laws. Arguably the most fundamental implication of the new amendments is that the principle of proportionality has been disregarded, as the requirements of a lease amounting to less than 1% of the value of the property is not up to par with the current base value pertaining to a lease agreement. Furthermore, whilst the government is acting in the general interest of the public, it is also disregarding the right to peaceful possession of the landlords property; in turn arguably breaching numerous fundamental principles and most importantly; the rule of law.

Whilst taking the reader through an analysis of the law throughout the course of time, this dissertation portrayed how such legislation was incorporated into judgement whilst stricing to highlight the importance of such amendments and the future implications they shall have. Multiple aspects of why such amendments may pose to be problematic in the future, and certain solutions which legislators may have taken prior to enforcing such measures. The issue of whether taxpayers should provide financial aid is highlighted, discussing the repercussions which may result from this notion. This dissertation aims to shed light on the fact that multiple landlords are suffering excessive burdens due to such laws, and the amendments which are enforced are not providing a solution.

The alternative solutions stipulated under the third chapter aim to provide a different perspective to legislators, proving how there are various alternatives to solving the situation with regards to the De Paule band club judgement rather than creating new legislation to cater for such scenarios. Whilst some solutions are innovative, others are already being discussed by certain academics due to the fact that such amendments caused insurmountable controversy. Legislators must aim to look into the matter from a purely constitutional point of view whilst finding an amicable solution within the existing laws, rather than further legislating. New laws and requirements pave the way for further conflicts rather than solutions and instill the notion in individuals that when a court judgement is difficult to implement, new laws may simply be created.

After the decision of the ECHR with regards to the De Paule Band Club, it is imperative that legislators provide an amicable solution to the situation at hand. It is crucial that the principle of proportionality is upheld and that the landlords obtain peaceful possession of their own property, or the full amount of the current market value of the property. The

clause stating that judgements should be overturned should be removed instantly and a logical solution must be formed in order to provide landlords with financial relief after decades of an excessive burden as well as to upkeep the tradition of band clubs which have become an integral part of Maltese history.

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