Diploma in Law

Lecture 15: Pleas

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Date: Thursday 30th May 2024

Diploma in Law (Malta)

Introduction

- A plea is defined as any means of defence brought by the defendant against the demands of the plaintiff.
- In its simplest and widest meaning the term ‘plea’ is used to include any kind of submissions/defences presented by the defendant, legal or factual, which tend to oppose, nullify, annul or limit the demand advanced by the plaintiff.
- In its widest sense it could mean any means of defence granted to the defendant including a mere denial of the plaintiff’s alleged right.
- In its restrictive sense it means the opposition of a preventive or extinctive fact which excludes the juridical effects of plaintiff’s assertions as a result of the action.
- If it were to be restricted further, a plea would include the opposition of facts which per se don’t exclude the action but which cannot be taken into consideration by the judge ex officio, even though asserted by plaintiff, but only if they were alleged by defendant. Jurisprudence indicates that this is the most adapt meaning of plea.

- A ‘plea’ is a submission of fact or of law that is intended to neutralise or act as an obstacle or bar to the effect of the plaintiff’s claim.
- Such plea may be either procedural or substantive thus it may refer to a defence based on a substantive law or on a procedural issue. An example of a procedural issue is a formal or substantial defect in the writ.
- In order to seek redress against defendant, the plaintiff will start proceedings by filing a writ of summons against him. Following notice of the writ, defendant may seek to oppose the action by showing that, without entering into the merits of the case, the plaintiff’s claim must be rejected as inadmissible on the facts regarding a particular moment in time or in respect of that particular state of things then obtaining.
- Thus, invoking a plea will direct the Court to examine the claim being raised as a plea before the said Court should be taking cognisance of the merits of the case.

Peremptory and Dilatory Pleas

- There are different categories of pleas: PEREMPTORY PLEAS AND DILATORY PLEAS.
- PEREMPTORY PLEAS, which can be either:
- on the merits - they are intended to extinguish the demand and stop its existence like the plea of payment,
- prescription and nullity; or
- on the proceedings - have a great effect on the proceedings and lead to the discharge of the defendant such as incompetence of the person and nullity of the writ.
- Peremptory pleas may be raised at any time, even before the appellate court though they may not have been raised before the Court of First Instance, saving the rules governing the production of evidence. Yet, this rule is subject to two exceptions:

1. The plea of desertion of a cause shall be deemed to have been waived if not raised before any other peremptory plea;
2. The plea as to jurisdiction of the Court by reason of the subject-matter of the claim or of the value of the thing in issue cannot be pleaded nor raised ex officio in an appellate court.

- The second type of pleas are:
- DILATORY PLEAS, which can be either:
- on the merits - cause a delay on the exercise of the right like the plea that the term has not yet elapsed; or
- on the proceedings - suspend the proceedings until the performance of some particular procedure, and once this is performed, proceedings continue such as the calling in co-debtors regarding invisible debt.

- There can be pleas on the merit and pleas on the proceeding itself.
- PLEAS ON THE MERIT refer to the defect in the action itself, which if valid the judgement will absolve the defendant from the demand.
- PLEAS ON THE PROCEEDINGS refer to the way the action is brought, which if accepted gives place to a judgement that discharges the defendant from complying with the proceedings. This leaves room for a fresh proposal of the demand.
- PLEAS ON THE MERITS MAY BE REAL OR PERSONAL REAL PLEAS are those that effect the right itself such as: the plea of the nullity of the obligation on the ground of the absence of the subject-matter or of the unlawfulness of the causa, whilst personal pleas are those which are founded on personal motives such as the status of minority or vice of consent of any of the co-debtors.
- One has to also note that whilst real pleas can be pleaded by all the co-debtors, personal ones can only be pleaded by the person they refer to.

Pleas may be real or personal

- REAL PLEAS are those that effect the right itself such as the plea of the nullity of the obligation on the ground of the absence of the subject-matter or of the unlawfulness of the causa, whilst
- PERSONAL PLEAS are those which are founded on personal motives such as the status of minority or vice of consent of any of the co-debtors.
- One has to also note that whilst real pleas can be pleaded by all the co-debtors, personal ones can only be pleaded by the person they refer to.
- PERPETUAL OR TEMPORARY
- PERPETUAL PLEAS may be pleaded at any stage of the proceedings such as all peremptory pleas on the merit.
- TEMPORARY OR PRELIMINARY PLEAS are those, which can only be pleaded in limine litis and may be considered abandoned unless they are pleaded before the court begins to examine the merits of the case.
- Pleas which are peremptory on the merits are perpetual; all dilatory are temporary. Pleas may be classified as being of various kinds but in respect to their effectiveness a distinction has been delineated between peremptory and dilatory pleas both being either pleas on the merits or pleas on the proceedings.
- In general terms, dilatory pleas are those that only postpone the issue while peremptory pleas are those that have a bearing on the merits.

- DILATORY PLEAS are those pleas that delay the decision on the merits. There are:
- 1. dilatory pleas on the proceedings; and
- 2. dilatory pleas on the merits
- Dilatory pleas on the proceedings suspend the proceedings until the performance of some procedure, and once performed, the proceedings continue. They could be could be questions of form, nullity or of jurisdiction [foreign court, foreign jurisdiction, arbitration, etc.
- Dilatory pleas on the merits are those which cause a delay on the exercise of the right for example, the plea that the amount is not yet due i.e. intempestivita', so the demand is momentarily rejected.
- PEREMPTORY PLEAS have the effect of extinguishing not only the cause in which they are raised, but also the action itself. Hence there are two types of peremptory pleas, namely:
- 1. Peremptory pleas of the procedure; and
- 2. Peremptory pleas of the merits.

- Therefore the peremptory pleas of procedure are those pleas by which the defendant asks the court to reject the plaintiff's demand, because it was not regularly formulated. These pleas, if upheld, would not extinguish the plaintiff's action, but he would be able to formulate his demand afresh. Thus the effect of these pleas is to delay a decision on the merits. Hence in a way they are also of a dilatory nature.
- A peremptory plea on the proceedings is a form of plea that has the effect similar to that of a dilatory plea on the proceedings. They lead to the discharge of the defendant such as incompetence of the person or nullity of the writ.
- Peremptory pleas of merits are those that would extinguish the action e.g. payment, prescription and nullity. If such a plea is raised and is upheld by the Court, the Court will not examine the merits of the case and throw the case out, for example in cases of payment, prescription, res judicata, set-off, novation etc. These are all pleas that extinguish the merits or a judgment of the merits. Unlike in the case of peremptory pleas of procedure, in this case, the plaintiff would have no right to start the action afresh because his right of action is extinguished.
- The distinction between dilatory and peremptory pleas results mainly from two aspects:

1. Their effect on the action instituted; and
2. The order in which pleas may be raised.

Temporal Effect

- DILATORY PLEAS ON THE MERITS have been held to be of temporary effect in that their effectiveness lies in postponing the action to a later time and cause a delay on the exercise of the right. They are raised at the beginning of the proceedings and the plea may not be raised on appeal.
- PEREMPTORY PLEAS ON THE MERITS (eccezzjonijiet perentorji tal-mertu) are intended to definitely extinguish the action. Examples of such pleas include the pleas of payment, nullity and prescription.
- PEREMPTORY PLEAS ON THE PROCEEDINGS have the same effect as dilatory pleas on the merits in that although defendant may be held to be non-suited (liberat mill-osservanza tal-gudizzju), the law allows for a rectification of the demand and a fresh demand may be submitted.
- DILATORY PLEAS ON THE PROCEEDINGS have the effect of suspending temporarily the proceedings because once there is compliance with or rectification of the defect raised, the proceedings may carry on.

The stage where the pleas could be raised

- Our Courts have constantly ruled that dilatory pleas must be raised in limine litis i.e. before the pleas on the merits, both in the written and in the oral stage.
- If the proceedings are solemn, the dilatory pleas must therefore be alleged in the answer, before all the other pleas and the same rule must be observed during the hearing. If proceedings are summary, the dilatory pleas are raised in the first part of the statement of the defence; similarly in the hearing of the suit the defendant must start by pleading these exceptions.
- The reason for this is that if a dilatory plea is accepted, the parties cannot proceed to the merits of the suit.
- On the other hand, peremptory pleas on the merits nonetheless may be raised at any time even during an appeal, notwithstanding that they may not have been raised in the first instance (saving the rules governing the production of evidence).

- Subsequent pleas can only be raised with the court's permission and for the court to grant permission the court has to be satisfied that there is a justification for not raising the plea in the beginning.
- In 1995 there was an amendment saying pleas that are not raised in the response won't be considered by the court but in article 1880 it says peremptory pleas may be raised at any stage of the proceedings, even the appeal stage.
- Other articles of this title indicate as to whether and how the court is to proceed on dilatory or ancillary issues or merits.
- A dilatory plea on competence or jurisdiction extinguishes the action not the claim that is, it could potentially halt the action not the merits since nothing bars the court, after person having paid costs of first case [otherwise you will be faced with plea of desertion i.e. abandonment of second case as well], since the court has discretion whether to decide on dilatory plea alone or decide the merits with the dilatory plea, together.

- Although the general rule is that no such other pleas may be raised at a later stage, following the 1995 amendments to the COCP by virtue of Article 728 (2), the Court has now discretion to allow the setting up of additional pleas by the defendant or respondent upon a filing of an application. The Court must be satisfied in this case that there were valid reasons for not including them in the note of pleas or answers. The idea was to avoid this time-wasting game by filing additional pleas that one wants to get new evidence, etc. Therefore, one may only file additional pleas at a later stage if authorised by the court on the basis that there are valid grounds justifying or allowing such pleas.
- Article 728 stipulates that one has to state all the pleas upon filing a statement of defence.
- Now, another exception to the rule that dilatory pleas must be heard in limine litis is laid down in Article 729 - If the court deems it expedient, before proceeding further, to deal with the dilatory plea, the court may hear the merits so far as the same may affect the decision on the preliminary issue. Therefore, this exception is subject to the Court's discretion. The hearing of the merits of the case is limited only to what may concern the preliminary issue that has been raised.

- Furthermore the provisions of Article 728 are subject to another exception found under Article 731.
- Article 731 holds that the provisions of Article 728 regarding dilatory pleas or those touching the merits shall not apply to such pleas as by an express provision of the Code might be raised at any stage of the proceedings or to pleas the reason for which arises during the trial. One must note that this provision was substituted in 1995.
- The law thus is itself making an exception to the rule that dilatory pleas or pleas touching the merits under Article 728 must be raised in limine litis. Nonetheless this exception may only be invoked in those circumstances whereby the Code specifically provides for such pleas to be raised at any stage of the proceedings or in those circumstances whereby the reason for the plea arises during the trial.
- In the case of Article 731 one may raise the pleas without the necessity of any court's authorisation as provided in Article 728 (2) and Article 729.
- With respect to the term 'this code' in Article 731 there has been a discussion as to whether it refers to pleas emerging from Chapter 12 (COCP) or else from Chapter 16 (Civil Code). For instance, the plea of prescription may be raised at any stage even at appeal so the better view is that this is not limited to pleas that arise from the COCP.
- Thus the better view is that pleas that may be raised at any stage of the proceedings are admissible whether or not they emerge from Chapter 12.

JURA NOVIT CURIA

- Although the parties in the law suit are primarily those who raise the pleas under examination, one should ask whether there is a right inherent in the court whether to raise any plea ex officio when the parties themselves would not have referred to any pleas and if such right exists, whether the court's power in this respect is restricted or otherwise. The issue here is whether, the civil process is a means whereby the private party's interest is realised or protected or whether the civil action is the application of the law through the magistrate as a medium as he is the organ of the state.
- The principle of Jura Novit Curia poses a further problem being the effective "knowledge" of the judge in that the norm which the judge must apply is that applicable at the time of the delivery of the judgement. In other words, the judge must take into account of any eventual jus superveniens during the proceedings and this is the ground on which those favouring the principle of Jura Novit Curia base their convictions.
- Our Courts have nonetheless traditionally opposed the principle of Jura Novit Curia on the basis that by invoking this principle the Court would be going against the principles of natural justice. The only instance where the law allows the court to ex officio raise pleas would be those instances where the power to raise pleas ex officio emanate from the provisions of the COCP i.e. where pleas would clearly be raised and would be fuori discussione.
- There are conflicting judgments on whether the principle of Jura Novit Curia applies in Malta. The reason for this uncertainty arises from the fact that in Malta, we do not have an express provision that determines the issue.
- Thus, in the absence of a clear-cut provision regulating the issue, the question of whether the principle of Jura Novit Curia applies in Malta remains an undecided one.

Challenge of Judges and Magistrates

- As a general rule, a judge or magistrate cannot be challenged or abstain from sitting in any cause which comes before him.
- However, the law admits of certain exceptions.
- Article 734 of the COCP provides a list of exceptions when a judge may be challenged or may abstain from sitting in a cause.
- These include:
- If the judge is related by consanguinity or affinity in the direct lineIf the judge, or his spouse, is directly or indirectly interested in the event of the suit
- If the advocate or legal procurator pleading before the judge is the son, daughter, sibling, spouse or ascendant of such judge

- When a judge becomes aware of the existence of any of the grounds mentioned in Article 734, he/she shall make a declaration to such effect, either verbally and in open court or in writing. Notice of such declaration shall be served on the parties to the suit. However, should the parties consent that the judge in question shall hear and determine the cause, the judge may do so provided that, in the particular circumstances of the case, he doesn't deem it so appropriate.
- It is not only the judge who has a right to abstain but also the parties to the cause who have the right to voice their objection based on the same grounds listed in Article 734. In such case, the objection shall be raised in open court. Where the court consists of only one judge and such judge is objected to, it shall be that same judge that shall decide on the alleged ground of challenge and no appeal shall lie against his decision. It is to be noted that, in some other jurisdictions, a different judge will usually decide such matters.
- The challenge of a judge shall be raised in limine litis, unless the ground of challenge shall have arisen subsequently or unless the party raising his objection, or his advocate shall declare upon oath that he / she was not aware of such ground at the start of the trial.

Pleas to Jurisdiction

- The plea of jurisdiction may be raised in three instances
- **1. When the action is not within the jurisdiction of the Courts of Malta**
- Article 742 precisely lays down when the Civil Courts of Malta have jurisdiction to try and determine an action. The law states that the Civil Courts shall have jurisdiction to determine cases concerning:

1. all Maltese citizens,
2. all citizens, provided that they are in Malta,
3. all persons when the case is in relation to property situated in Malta,
4. any person who has contracted an obligation in Malta, or if the obligation is contracted outside Malta but has agreed to have such obligation executed in Malta,
5. any person who contracted an obligation in favour of a Maltese citizen or Maltese resident or a body corporate, or association registered in Malta, and
6. any person who expressly or tacitly submits to the jurisdiction of Malta. It is to be noted that the local courts may still exercise jurisdiction in relation to the above matters even though a foreign court is deciding the same fact. Moreover, the jurisdiction of the courts is not excluded simply because the parties inserted an arbitration clause, and thereby agreed to refer any dispute to arbitration.

- **2. When the action, although one within the jurisdiction of the Courts of Malta, is brought before a court different from that by which such action is cognisable.**
- Article 745 lays down the rules as to the jurisdiction between the several Courts of Malta. Citizens of Malta and persons domiciled in Malta shall be presumed to be resident in their last place of abode in Malta. Minors subject to parental authority or any person under the care of a tutor or curator shall be presumed to reside in the place where the parent or tutor, respectively reside. The wife is presumed to reside in the place of residence of the husband. As for vacant inheritances, the competent court shall be the last place of abode of the deceased.
- Where the plea of jurisdiction of a particular court depends on the value of the thing in issue (ratione valoris), the following rules shall apply. In the case of a request for payment of a fixed sum, the value of the thing can be easily ascertained and determined by such demand. Where the value of a thing cannot be easily ascertained from the demand, then the law provides certain rules in order that such value is determined in particular cases.
- Therefore, for example, where the value of an immovable property is not ascertainable from the demand itself, then it shall be determined by the net amount of the rent of the last preceding year multiplied by twenty five. In the case of a claim for maintenance, the value of the claim shall be the equivalent to the amount of maintenance claimed to be due in five years.
- In the case of actions relating to the termination of a lease and evictions of tenants, the value is determined by the total amount of the rent in respect of the period remaining for the completion of the contract.
- It is to be noted that, in the case of an uncertain or indeterminate value, such as actions touching honour, actions regarding filiation, adoption or tutorship, shall always fall within the competence of the First Hall Civil Court, since the law states that it shall always be deemed to be outside the jurisdiction of a court of limited jurisdiction.

- **3. When the privilege of being sued in a particular court is granted to the defendant.**
- This privilege is generally referred to as the privilegium fori.
- Article 767 states that parties residing in Malta are to be sued in the Courts of Malta, whereas those residing in Gozo are to be sued in Gozo.
- Where there is more than one defendant and a number of them reside in Gozo and other reside in Malta, then the following rules shall apply. If the number of defendants residing in Malta exceeds that of the defendants residing in Gozo, then the former may deny the jurisdiction of the courts of Gozo, and vice versa. Where the number of the defendants residing in Malta is equal to that of the defendants residing in Gozo, then the privilegium fori shall cease.
- It shall also cease where the action touches an obligation which, according to the agreement, was to be carried out in any one particular island. The privilegium fori may be waived, and if not claimed then it shall be deemed to have been waived.

- The plea of jurisdiction may also be raised by the court ex officio.
- In the case Galea vs. Pisani (2005), the Court of Appeal held that the court shall have the right to raise any plea which affects public order, and one such plea is that relating to the jurisdiction of the court. However, the plea of jurisdiction ratione materiae or ratione valoris may not be raised in the appellate stage, neither by the parties nor by the court ex officio.
- This is specifically stated in the proviso to Article 774 and confirmed by our courts, in the cases Borg vs. Pisani (1952) and CSB Ltd vs. Grima Communications Ltd (2004). In the latter case, the Court of Appeal held that it is a well known principle that, unless the plea of jurisdiction is raised limine litis, then it is presumed that the defendants renounced it. It furthermore held that, notwithstanding the fact that such plea is one of public order and therefore may be raised by the court ex officio, in the event that the inferior court did not raise such plea, then it cannot be raised in the appellate stage.
- Any plea of jurisdiction shall be decided by the Court under a separate head, either together or before the decision on the merits. The non observance of this rule will bring about the nullity of the judgment. This has been confirmed by our courts in the case Mangion vs. Gauci (1955).
- If two or more courts have declared lack of jurisdiction, then it shall be the Court of Appeal to determine which of such courts is competent, notwithstanding the fact that no appeal from the decision had been brought before the appellate court in the ordinary way. Where the Court of
- Appeal declares a court of first instance competent to take cognisance of the case, then such court must hear and determine the case.

Pleas as to the Capacity of Plaintiff and Defendant

- Such plea may be raised if the plaintiff or defendant is:
- either under any legal disability to sue or be sued or,
- if the parties sued or have been sued in the name and on behalf of another without having been lawfully authorised for such purpose.
- In the event that a plea as to the capacity of plaintiff or defendant is successful, then the action is extinguished, and therefore such plea is deemed to be a peremptory plea and not a dilatory plea.
- This has been confirmed by our courts in the case Valentino noe vs. Vassallo et (1957).

- The following persons may not sue or be sued:
- Minors – As a general rule a minor cannot sue or be sued except in the person exercising parental authority, or, in the absence of such parent, in the tutor or curator. However, in the event that the minor has been emancipated to trade or is bringing the action against his/her parent, then the said minor may sue and be sued. In the latter case, the minor is to be represented by a curator ad litem.
- Lunatics or Insane persons – Again, an insane person cannot sue or be sued except in the person who is lawfully entrusted with the authority over such person or a curator ad litem.
- It shall not be lawful to raise the plea of capacity against:

1. the Economo or other official performing an equivalent function at the Curia;
2. the Attorney General, or
3. a public official in Gozo.

- Article 787 specifically states that any judicial act performed by, or against any person who is under disability to sue or be sued is null.
- Moreover, any nullity arising from minority may only be raised by the minor himself or his heir. Any nullity from want of assent of the parent, may only be alleged by the parent.
- However, the defect of nullity may be cured if the parent exercising parental authority or the curator affirms the act.

Pleas of Nullity of Judicial Acts

- The plea of nullity of judicial acts is admissible:

A. if the nullity is expressly declared by law;

B. if the act emanates from an incompetent court;

C. if the act contains a violation of the form prescribed by law, even though not on pain of nullity, provided such violation has caused to the party pleading the nullity a prejudice which cannot be remedied otherwise than by annulling the act;

D. if the act is defective in any of the essential particulars expressly prescribed by law:

- Provided that such plea of nullity as is contemplated in paragraphs (a), (c) and (d) shall not be admissible if such defect or violation is capable of remedy under any other provision of law.
- Where before an appellate court the plea of nullity of a judgment appealed from is raised, such plea shall not be entertained if the judgment is found to be substantially just, unless such plea is founded on the want of jurisdiction, or the incapacity of the parties, or on the judgment of the Court of First instance being extra petita or ultra petita or on any defect which prejudices the right to a fair hearing.

Pleas in Spoliation Suits

- The actio spolii is granted to the possessor of whatever kind, whether in good or bad faith, and also to the simple holder of any thing, whether movable or immovable, who has been violently or clandestinely deprived of his possession.
- It brings about reintegration and is to be brought into action within two months from the spoliation.
- The actio spolii is termed a privileged action. This is due to the fact that defendant's pleas are limited, according to Article 791 of the COCP, which states that such defendant cannot bring forward any pleas other than dilatory pleas, such as a plea of jurisdiction.
- Moreover, not only is the defendant prohibited from pleading ownership, but he is also debarred from pleading vitiations on the possession of plaintiff.
- The inquiry of the Court in the action of spoliation must limit itself simply to the fact of possession or detention, and to the fact of spoliation.
- The inquiry cannot extend to other circumstances. When spoliation has been shown to the satisfaction of the Court, the defendant is condemned to restore the thing to the plaintiff, and if he caused any damage, he must restore the thing to its former condition.

Plea of Lis Alibi Pendens and plea of Connection of Actions

- The plea of lis alibi pendens may be raised where an action is brought before a competent court after another action in respect of the same claim has already been brought before another competent court, the second action may be transferred for trial for such other court.
- In the case Sammut vs. Spiteri (2003), the Court of Appeal held that the plea of lis alibi pendens is based on the same three elements of the plea of res judicata,

1. eadem res, i.e. the identity of the object or subject matter
2. eadem causa petendi, i.e. the identity of a cause and
3. eadem personam, i.e. the identity of the person.

- The plea of connection of actions may be raised when two or more actions brought before one and the same court are connected in respect of the subject-matter thereof, or if the decision on one of the actions might affect the decision on the other action or actions.
- In such cases it shall be lawful for the court to order that the several actions be tried simultaneously. The plea of lis alibi pendens or of connection of actions may be raised at any time until judgment is delivered. The court shall determine the plea; and if such plea is disallowed, the court may at the same time decide on the merits of the action.

The Plea of Benefit of Discussion

- The benefit of discussion shall come into play in the event that the surety of a debt is being sued further to the default of payment on the part of the principal debtor.
- The defendant who pleads the benefit of discussion shall present a list showing distinctly the property situate in Malta, possessed by the principal debtor which shall be sufficient to satisfy the claim of the plaintiff.
- If the plea of discussion is admitted, the defendant shall, within the time fixed by the court, deposit in favour of the plaintiff a sum to meet the costs which will be occasioned by the discussion, and bind himself to provide the plaintiff with such further sum as may become necessary for the purpose.
- Upon such deposit, the court shall order that the proceedings of the cause in which the plea of discussion has been raised, be suspended indefinitely or for a fixed time, according to circumstances.
- If, on the contrary, the defendant fails to comply within the said time, the cause shall be proceeded with irrespective of the plea of discussion.

- This shall also apply in the case where the plaintiff shall not succeed in recovering the whole amount of his claim out of the property of the principal debtor.
- Nevertheless in any such case, the defendant may be allowed to indicate other property, if he shows to the satisfaction of the court, that at the time of the decree suspending the proceedings of the cause he was not aware of the existence of such other property.
- It shall be lawful for the defendant to waive the plea of discussion previously raised by him, and demand that the cause be disposed of even though the plaintiff may have already commenced the procedure of discussion.

Plea of Falsification

- The plea of falsification may be raised not only by the party to whom the document is attributed but also by any other party against whom the document is produced.
- When the cause can be decided independently of the document averred to be false, the court shall decide on the merits, irrespective of the plea of falsification.
- The plea of falsification shall be determined independently of any criminal action. If, at any stage of the proceedings, it shall appear to the court that there are strong grounds to suspect the falsification of any document, it shall of its own motion order the party suspected of such falsification to be arrested and brought before the Court of
- Magistrates, in order that he may be dealt with according to law.

Plea of Change of Parties by Death

- In the case of death pendente lite of any party to a suit, the heir or executor of such party, or any other person interested may make an application for an order enabling him to continue the suitin substitution for the party deceased.
- Where no application is made by any person to continue the suitin substitution for the deceased party, it shall be lawful for the other party, by means of an application, to demand thatthe suit be continued in the name ofthe presumptive heir or heirs ofthe deceased party, if known. Such application shall by order ofthe court, be served on the presumptive heir or heirs who shall have the time of one month within which to declare whether he or they are prepared to continue the suit.
- If no such declaration is made, then the court shall of its own motion proceed to appoint a curator ad litem to representthe interests ofthe deceased in the suit. The curator shall take all the necessary measures to identify and locate the heirs ofthe deceased and when such are identified, the curator shall requestthe courtto notify them aboutthe pendency ofthe case ordering him or them to declare within a specified time whether he or they are prepared to continue the suit.

- The default ofthe heir or executor to continue the suit shall notimply renunciation ofthe inheritance or executorship; and it shall be lawful for the heir or executor, by application, upon proving his title to the court, to assume at any time the continuation ofthe suit, and cause the effect ofthe appointment of curators to cease in regard to further proceedings.
- The application shall be served on the curators and the other parties in the suit.
- In the case of any other change of parties to the suit other than by the death pendente lite of any party to the suit, the person who wishes to take up the case shall file an application requesting authorisation to assume the acts ofthe case in addition to or instead ofthe party concerned, and any judgment shall also bind such party assuming the acts.

Plea of Parties Due to Other Causes

- This discussion is divided in two aspects:

1. those where there is a change to the parties by reason other than decease; and
2. the procedure is that the new party is to file an application (rikors biex jassumi l-atti) and the change therefore is ordered by the court and a judgement is binding also on such new parties.

- This plea is sometimes confused with the plea of change of status (legitimazzjoni ta' l- atti) whereby due to a change of parties to the suit, the party intending to take up the case is to file an application (or more often, a note) requesting authorisation to assume the acts of the case in addition to or instead of the party concerned (e.g. change in Government Ministries may lead to a change of parties to a suit involving such a Ministry).

- For example:
- one may have members of a committee who have changed or the interested parties have changed.
- Now the general procedural rule is that the original parties during a case do not change except through a third-party being called into the case or where there is the application of this rule.
- The rule is that parties may change because there is a change in status, for example an administrator changes or committee members change.
- Here we have the Maltese legitimazzjoni (legitimation). This is an extension of the rule of the autonomy

21 ACADEMY

Diploma in Law (Malta)

CAMILLERI PREZIOSI

ADVOCATES

Introduction: Pleas Nullity of Judicial Acts and Judgments

- One can say that there are two types of pleas:

1. Pleas which aim at proving that a claim is unjust in itself i.e. difesa di merito; and
2. Pleas which do not enter into any question as to the merits but which point at the inadmissibility of the claim at

- that point in time i.e. Eccezzjoni. The eccezioni di procedura can be relative, absolute or mixed:
- relative when the focus is on the private interest of the party entitled to raise such plea
- absolute i.e. an element of public policy -
- mixed when private interest and public policy are combined

- Pleas can be either peremptory or dilatory.
- The plea of nullity is a peremptory plea (may be raised at any stage of the proceedings even on appeal), which if accepted, brings to an end the proceedings, saving the rights of the plaintiff to institute fresh proceedings in a proper manner.

Nullity

- Where a judicial act can be saved or remedied, it is remedied unless it is incapable of remedy either through an express provision of the law. For example, the law expressly says that one has to file an application and file a writ of summons, or if it can be shown that the other party suffers prejudice which is incapable of remedy. Nullity implies grave consequences.
- A judicial act cannot be considered null unless it is contrary to law and such nullity may be express or tacit.

- Our Courts have made it clear in a number of judgements that: -
- Nullities are of strict law and cannot be supplemented by judge-made law.
- Nullity of a judgment that has become res judicata cannot be raised neither by an action nor by plea. There are extreme remedies for this in the forms of restitutio in integrum or new trial.
- What is null ab initio cannot become valid simply by lapse of time.
- A judicial act is null if it is missing those necessary conditions that are expressly stated by law, even if there is no express provision saying that they are required on pain of nullity.

Plea of Nullity of Judicial Acts

- Article 789 states that the plea of nullity of judicial acts is admissable if:

1. NULLITY IS EXPRESSLY DECLARED BY LAW.

- This means that nullity results from an express provision of the law. There are 5 cases of express nullity that are included in the COCP:
- An act by the court of voluntary jurisdiction in such parts that require authorisation.
- Plea as to the capacity of one of the parties such as lunatics and minors.
- Interdicted or incapacitated persons.
- Article 922 deals with the nullity of acts that are filed by the party having the benefit of legal aid, if such acts are not in accordance with the terms of admission. However, the advocate who is assigned to such party may bring the action in a manner different from such terms if he deems it expedient, and in the interest of the party. Provided that he shall not in the process substantially change the claims in the report of the Advocate for Legal Aid.
- Nullity of submission to arbitration made by any administrator, or by any person who is not at liberty to dispose of the thing to which the dispute refers, is null.

- **2. ACT EMANATES FROM AN INCOMPETENT COURT**

- This plea can be raised at any stage of the proceedings and that if the plea is successful it would result in the absolute nullity of all the proceedings.
- The court could raise the plea ex officio such as when the action is not one within the jurisdiction of the Maltese courts, the subject matter or value is not within the competence of the court.
- The incompetence of the court on the grounds of privilegum fori is a relative plea which if not raised limine litis shall be deemed to be waived.

- **3. ACT CONTAINS A VIOLATION OF THE FORM**

- Violation of the form prescribed by law, and accompanied by 3 conditions:
- Violation has caused prejudice to the other party
- Cannot be remedied otherwise than by annulling the act.
- Party pleading nullity must raise issue in limine litis.

- **4. ACT IS DEFECTIVE IN ANY OF THE ESSENTIAL PARTICULARS EXPRESSLY PRESCRIBED BY LAW**
- The law does not define these essential particulars. The fact that the essential particulars are referred is to ensure that the nullity is absolute and irremediable.
- In the case Vella vs Camilleri, the court held that there was plea of nullity by defendant since the declaration accompanied by writ of summons was not confirmed on oath. Court held that such plea was an extreme situation therefore applied for grave reasons.
- Some cases have stated that for a collective judgment to be admissible not only must the issue to be decided upon be identical for every plaintiff, but the interest too must be common. The court may not raise its inadmissibility ex officio. If these elements do not exist, the court would have to declare nullity.
- Courts have also assessed the nullity of the service of judicial acts and concluded that the service of a judicial act is to be made at the defendant's house and if it is served at the defendants place of work in the hands of someone who is neither a member of the defendant's family nor to someone who is not in the defendant's service, then such service is null. If the defendant's surname is indicated differently, the service would be null. What has to be complied with is the form of the procedure that is laid down by the law, to reach the effect desired. The plea will not succeed if it is established that it is capable of remedy under any other provision of the law.

Plea of Nullity of Judgments

- Article 790 states that where before an appellate court the plea of nullity of a judgment appealed from is raised, such plea shall not be entertained if the judgment is found to be substantially just.
- This rule does not hold however where the plea is based on:
- Want of jurisdiction; or
- Default of citation; i.e. the lack of service.
- The incapacity of the parties; or
- On the judgment of the court of first instance being extra petita or ultra petita; Extra petitum means when the court gives one something which was not asked for. Ultra petitum is when he is granted in excess of what he has asked for.
- Any defect that prejudiced the right to a fair hearing. In such case one cannot say that the judgment is substantially just if one can show that there has been a violation of the rules of fair hearing.
- So if the court of appeal finds that any of the above causes of nullity exists, then the judgment being attacked will be annulled. If such plea had to become customary procedure, even at earliest stages of an action, procedure rather than substantive justice would become the measuring rod of validity of judicial act.

Introduction: The Plea of Res Judicata

- Res Judicata is a peremptory plea as to the merits i.e. if successful has the effect of barring the action of defence. It is not a formal defect in the writ but an obstacle to it since it extinguishes the merits of the case.
- Res Judicata is a Latin maxim for “the thing has been judged”, meaning the issue before the court has already been decided by another court, between the same parties and that a final judgement of a competent court is conclusive upon the parties in any subsequent litigation involving the same cause of action.
- A decree of a court of voluntary jurisdiction is not a res judicata obstacle to a claim before a court of contentious jurisdiction. It should follow, but it is nowhere expressly stated, that an arbitral award should be an obstacle to a claim before the ordinary courts, if the other requirements are satisfied. It should follow a fortiori that a judgement before the ordinary courts should be an obstacle before an arbitral tribunal.
- Regulation 44/01 does acknowledge the existence of a res judicata and in some instances this could also be a bar to the registration of a judgement obtained in another member state. A Res Judicata also prevents a plaintiff from suing on a claim that already has been decided and prevents the defendant from raising any new defence to defeat the enforcement of an earlier judgment.

- A judgement is the answer of the Court to the demand made by the plaintiff; which answer may either accept or dismiss the demand of plaintiff.
- The judgement is that act which concludes the judicial process and it is to be binding on all the parties concerned and on private persons in relation with the issue at stake.
- As a general rule a judgement is law between the parties but only between those parties who were parties in the matter. There are exceptions to this rule namely:

1. where the question decided upon refers to an interest which is essentially dependent on the outcome of the litigation that is what was decided by the res judicata e.g. if I purchase from X and judicially it is established that the title of my predecessor in title is defective then mine too is defective or where the title is determined/resolved it will obviously have to be effective also vis-à-vis third parties;
2. in situations of solidarity that is joint and several liability; and
3. in situations of co-ownership. The test is whether the two judgements can stay together. In the sense that if for some reason the judgments can be differentiated, then in all likelihood the plea will not succeed.

The Sources

- There is no formal definition of the plea of res judicata in the Code so one has to refer to judgments and writings of authors.
- There is however reference under pleas i.e. the plea of ‘res judicata’. The plea of res judicata can be raised when the judgment is final and binding (for certainty and adherence to judgement), and one cannot seek res judicata where there is the possibility of appeal or where is still the possibility of a retrial as seen in the case Dr. Herrera vs. Cassar 1992.
- This plea is seen in the COCP but there is no set of rules that specifically regulate it.
- The issue of res judicata must be tackled attentively and with intelligence in that for a judgement to have effect it is necessary that all postulates to the proceedings concur because any defect makes the judge bound to declare the defendant non-suited in which case plaintiff’s demand would be provisionally dismissed.

- In a judgment given in first instance, since it may be impugned by means of appeal, its binding force becomes definitive only on the expiration of the term for lodging an appeal, and also where the right of appeal is not exercised. With regard to judgments pronounced on appeal, these may be impugned only by the extraordinary remedy of rehearing and on specific grounds.
- Once this remedy is exhausted or the term for its exercise lapses the judgment would constitute not only a judicatum but becomes final and irrevocable.
- The pleas of res judicata may not be raised by the Court ex officio but only by the parties. Res-judicata applies only to contentious jurisdiction. It does not therefore extend to questions of voluntary jurisdiction. There is debate whether arbitration proceedings are included.
- Res judicata requires a valid judgment. The plea will succeed in the case of a judgment that is annullable or vitiated, but does not extend to judgements that are null or inexistent.

- One may also point out that today literature distinguishes between a formal and a substantial res judicata.
- A formal res judicata is one that from the formal aspect presents a total identity of the parties and the issue at stake (i.e. the merits).
- A substantial res judicata is one which may not necessarily present the same identity but which nevertheless mix the two judgments together incompatibly.

The Requisites

- Under Roman law there where three requisites of the plea of res judicata.
- IRREVOCABILITY: under modern law is not a requisite since a judgement produces the effect of a res judicata subject to be revoked by the timely exercise of the means for impugning a judgement or until such term for impugnment expires.
- VALIDITY: under Roman Law the nullity of the judgment through any defect operated ipso iure; it was not necessary to impeach the validity of the judgment and its nullity could be availed of at any time. Under Modern Law there is no such thing as nullity ipso iure. Every judgment must have effect and its nullity is healed on the expiration of the time during which it may be impugned or when the means for annulling it are exhausted. Modern doctrine however, distinguishes between the invalidity and the inexistence of a judgment. In the latter case, such inexistence may be availed of at any time, notwithstanding that theapparent judgment has not been annulled by the means and within the terms prescribed by law.

- DEFINITIVENESS: according to modern doctrine, only those judgments that decide on the merits of the case in whole or in part constitute a res judicata. The thing acknowledged to one of the parties by a judgment which has become res judicata cannot be questioned any longer by others.
- This is required by public order and by the stability of rights. It is only the judgments on the merits that affect the thing claimed by both parties.
- The other decisions establish in favour of one of the parties some advantage in connection with the proceedings in the course of which they are given. This is the reason why their efficacy should be limited to such proceedings and cannot be invoked in different proceedings.
- Such decisions are binding on the parties and on the judge, however in the proceedings in which they are given, because otherwise, they would be entirely useless and would go against the fundamental rule that during the proceedings what is done cannot be gone over again. One must distinguish between a judgment and a decree in that a decree has neither a substantive nor a formal efficacy, not even limitedly to the proceedings in which they are issued, and may at any time be revoked contrario imperio.

- Nowadays the requisites have changed, and are also three-fold:

1. Same Identity of the Parties;
2. Same Identity of the Cause of the Claim; and
3. Same Identity of the Object.

- If all three concur the Court will refrain from going into the merits of the case.
- The requisites of the plea are a manifestation of the principle of the relativity of the res judicata. This principle in fact proposes that the authority of a res judicata is limited both subjectively and objectively. This means that its efficacy extends only to the parties to it and only so far as the object of the new demand is identical to that which has previously been judged upon and that the cause is also the same.
- In the case Fenech vs. Axiaq, 1852, the Court held that in order to accept the defence of res judicata, three elements need to be satisfied: (1) object of the demand in both cases need to be the same; (2) between the same parties; and (3) on the same merits.

The Identity of Parties (Eadem Personam)

- This means that in order to have a res judicata one need to have had a judgment between the same persons. Thus one has to have the total identity of the conflicting parties. This requirement extends to personal successors and should also by implication extends to company mergers and reconstructions.
- In the case Grixti vs. Schembri, the judgment clearly and simply spells out the requisite of identity of the parties for the success of the plea res judicata. The three requisites are essential and not alternate. The reason behind the requisite of identity of the parties is a very straightforward one. A judgment which has become a res judicata between the two parties remains a res inter alias judicata for any third party and therefore the plea of res judicata cannot be raised against such third party.

- There is a general rule that a judgment does not benefit or prejudice third parties except those claiming under the original parties i.e. those having an interest essentially dependant on the parties, for example, title, or in the case of joint and several liability or undivided objects. A third party who is actually given the possibility to air his views, would be bound by the res judicata judgment in so far as it deals with the issues on which he has made his submissions and counter-arguments.
- What is clear is that the res judicata appears to bind universal successors in title. However it is less clear or less of a contestation, where there are particular successors in title, for example purchasers, legatees, assignees, etc. Local jurisprudence, while upholding the general maxim holds that the intervenor and the joinder can also be bound to a certain extent by the authority of res judicata. There are old cases that strangely assimilate the intervenor to the status of a full party and therefore bound by res judicata. The issue here is whether the intervenor in a case may raise a plea that a point was already decided in a case where he was a party and that thus no judgment may oppose it. Today such reasoning would be open to serious questions. However it is clear that in the case of the joinder the party is bound by being a joinder in the case.

What constitutes the identity of the parties?

- When establishing identity of the parties, the Court is concerned with the juridical identity of the parties. Therefore even if the parties are physically different from those of the case now constituting a res judicata, the plea of res judicata can still succeed if juridically the personalities concur.
- Juridical personality transcends physical personality in that it can be vested in another person by means of representation. In Juridical personality what counts is the quality in which the parties are acting. Judicial representation is also present in the relationship between the decujus and his heirs.
- However the same does not hold as between co- heirs. What counts is not the physical identity between the parties but rather the quality in which they are acting.

Identity of the Object

- There has to be identity between the reasoning in the sense of the issue examined by the court and the basis of the claim as alleged by planitff. The eadem res is that the res judicata has to be specifically on the same merits.
- This refers not only to the object or issue or right under contestation, but it has a twofold test i.e. the object, tangible or intangible and claim or liability at issue, but also one has to have the identity in the demand/claim. This means that the demand must be identical ant not merely that a merit is connected with another.
- A judgment constituting a res judicata cannot impede a new demand from being proposed before the Court, if it is directed at obtaining something different from that which was obtained or refused by a prior demand determined by such judgment. If the court's judgement were to extend to objects not covered by the demand put forward to it, this would result in an unjust situation of ultra or extra petita.

What constitutes the identity of the object?

- Ample case law shows that the requisite of identity of the object is fully satisfied as soon as juridical identity is established.
- There need not be an absolute and material identity of the object, but merely a juridical identity for this requisite to be fulfilled.
- Nowadays, there is common agreement that there is no need to have an absolute and material identity between the object of the previous judgment and the demand made in the subsequent lawsuit but it is enough for there to be a juridical identity between the two objects.

How should the identity of the object be established?

- When tackling this question, Laurent focuses on the very object of the plea of res judicata.
- This requires that what had been decided in one manner by a Court should not be upset in subsequent proceedings. Therefore, the problem of identifying the object boils down to what has been decided in the first judgment.
- Laurent further elaborates his argument saying that if the second judgment can coexist with the first without contradicting it or changing it, then the object must necessarily be different.
- In Herrera vs. Cassar, 1992, the Court, by quoting Laurent and Aubry et Rau, held that the plea of res judicata should be accepted even where the object being sought in the ulterior case is distinct from that object of the previous case.

Identity of the Cause of the Claim (Eadem Causa Petendi)

- Some people opine that the eadem res and the eadem causa petendi are not really distinct at all but that in substance they should be assimilated together because there is no real distinction. Both the object in dispute and the nature of the dispute find total identity.
- NATURE OF THE CAUSA PETENDI
- This requisite demands that the cause of the claim contained in a new demand be the same as that of a previous demand settled by a judgment constituting a res judicata.
- Like in Italian Law, in the COCP, the cause of Eadem Causa Petendi is listed as one of the contents of the sworn application, but unfortunately, the law does not provide a definition thereof.
- Therefore the courts have relied on the most authoritative jurists to determine its parameters.

- The cause of the claim must be differentiated from the object itself.
- The causa petendi is also distinct from the means of proof thereof. Therefore, the plea of res judicata cannot be overcome by the mere production of proof that is different from that produced in the previous demand between the same parties and having the same object and cause of action.
- New proof does not frustrate a plea of res judicata unless it is such as to give rise to a new cause of action. The only limited exception to this rule is found in:
- Article 811 (k): This states that if a conclusive document is found after a res judicata judgment is given this gives rise to a ground of re-trial if and only if it is proved that the party producing such document had no knowledge of it or could not with the means provided by law, produce it before the judgment.
- The cause of action must also be differentiated from the actual action instituted. The same cause can give rise to more than one action. Although the action would be different, the plea of res judicata would still succeed if the two actions were based on the same causa petendi. Lastly, the causa petendi should not be confused with the purpose behind it.

The Effects of Res Judicata

- The effect of the authority of a res judicata is that a disputed point determined by a judgment that constitutes a res judicata (i.e. it is irrevocable, valid and definite) can no longer be re-proposed in subsequent judicial proceedings.
- It is in the interest of society that judgments constituting res judicata be upheld and respected, thus making no difference whether this guarantee is protected by the successful or unsuccessful party.
- The plea of res judicata is held to be a peremptory plea and as such it can be raised at any stage of the proceedings, even before the appellate Court.
- A decision thereon must be given under a separate head of judgment.

The Effects of a Judgments Upholding the Plea of Red Judicata

1. The judgment declares but does not create rights; it is retrospective from the day of the demand.
2. If the judgment accepts the demand it gives rise to a judicial hypothec, in the cases where this effect is attributed by law to a judgment.
3. A res judicata is an executive title.
4. A judgment gives rise to a new action, that is, actio judicati which is subject to a prescription of its own that is 30 years.
5. If the judgment dismisses the demand it destroys the interruption of prescription effected by the judicial demand.
6. A res judicata constitutes a judicatum and attributes the exceptio rei judicatae for preventing a new judgment on the same merits.

- To ascertain the effects of a judgment res judicata, one must distinguish between a situation where the plaintiff is successful from where the outcome is unfavourable for him. If judgment is in favour of plaintiff, it constitutes an executive title, on the basis of which an executive warrant can be sued out and enforced in satisfaction of the plaintiff's claim.
- If the Court dismisses the plaintiff's claim by a judgment that obtains res judicata, he cannot by a subsequent demand put forward the same claim because the defendant would have the right to raise the plea of res judicata. If the second court acknowledges the plea as well founded, it would throw away the action without considering the merits thereof.
- The only remedy for the plaintiff here would be to demand a new trial, but before allowing this, the Court would check whether the judgment complained of has any of the defects contemplated as grounds warranting retrial. If no such grounds exist, res judicata would stand. If demand for new trial is accepted, judgment is set aside and the causes heard again. The institute of new trial constitutes an exception to the authority of res judicata. The legislator considered the defects contemplated as grounds for a demand of new trial, serious enough to warrant a departure from the authority of res judicata.
- The legislator decided to list exhaustively the grounds of new trial instead of allowing this matter within the discretion of the Courts.

The Effects of Res Judicata in Relation to Third Parties

- Article 237 states that a judgment shall not operate to the prejudice of any person who neither personally nor through the person under whom he claims, nor through his lawful agent was party to the cause determined by such judgment.
- Third parties would still be affected by the judgment given in a cause between other persons but only in so far as the relations between the two persons are concerned. It is important to emphasise that third parties must respect a judgment inter alios only to the extent that it regulates between the parties. It follows that such judgment would not have the authority of res judicata in relation to any dispute which a third party might have with one of the parties because he cannot be prejudiced by such judgment.
- How can the court decide on the rights of a third party when such rights were never claimed and discussed before it? This shows exactly how absurd it would be to extend the efficacy of a judgment res judicata to a third party who was never heard by the court, before it reached its decision.

- This principle would apply also in situations where there is a new lawsuit, and only one of the parties is different. It is not relevant for the purposes of res judicata that one of the parties is the same as that of a previous dispute, so long as the other party is different. It is so because the latter never had the opportunity of being heard by the court in the previous lawsuit and consequently, there is no cosa judicata in relation to his claim.
- An exception to the rule that a judgment cannot have the effect of res judicata in relation to third parties is created by Article 851 of the Civil Code which states that a person who, by a judgment of the competent court has been declared to be the heir, or has been condemned expressly in such capacity, shall be deemed to be the heir with regard to all the legatees and creditors of the inheritance. It is obvious that this rule goes contrary to the principle of subjective relativity of res judicata because in terms of Article 851, the effects of the judgment are not limited to the contending parties but are extended to third parties incl.. the legatees and creditors of the inheritance; it is clear that this rule is contrary to the principle of relativity of res judicata.

Conclusion

- A third party, while unable to bring new evidence to attack a judgment constituting res judicata pronounced inter alios, can support that judgment or attack it but only with means of proof derived from the proceedings themselves.
- Now there are two final points that unfortunately do not have a definite reply. These regard the following questions:
- Is the plea of res judicata one that can be raised by the court ex officio?
- Can it be renounced to? One can renounce to the effects of a judgment, and as we know there are three particular articles under compromise, being Articles 1729, 1731 and 1733 that say that, where there is a compromise in respect of a judgement which is unknown to the parties, this compromise is null. On the contrary a compromise in respect of a judgement that is still open to appeal, but of which the parties have no knowledge is valid. To be invalid therefore the compromise has to be final. So on the basis of this it would appear that res judicata may be renounced to.
- Can the court raise ex officio the plea of res judicata i.e. without being pleaded by the parties? The argument in this context is that this is a matter of public order and if the judge knows about it he is to raise the matter. As against this, there is the argument that a res judicata is something that may be renounced to and therefore unless proven and pleaded before the court is not an obstacle to the demand; this has remained a grey area.

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