

G.V.A. 32

30, 1954

No. 32 of 1953.

In the Privy Council.

ON APPEAL FROM THE COURT OF APPEAL MALTA

UNIVERSITY OF LONDON
W.C.L.
20 MAR 1955
INSTITUTE FOR ADVANCED
Appellant L STUDIES

BETWEEN
ANTONIO CASSAR TORREGGIANI, nominee
(Plaintiff)

AND

PAUL and EMMANUELE PISANI (Defendants) . Respondents.

38090

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Case for the Appellant.

RECORD.

1. This is an Appeal from the Judgment of the Court of Appeal of Malta dated the 12th December, 1952, which reversed the judgment of H.M. First Hall Civil Court of Malta of the 31st October, 1951, allowing the Plaintiff's claim to pre-emption of the property hereinafter described. pp. 63-71.
pp. 36-41.

2. By a Writ of Summons issued in the said H.M. First Hall Civil Court on the 19th February, 1949, the Appellant claimed that the Respondents should show cause why they should not be condemned to resell to the Appellant certain immovables in Malta, consisting of a block of stores and warehouses (Nos. 25 to 38 inclusive) in Church Wharf, Marsa, with all the titles and appurtenances thereof, which had been sold to the Respondents for a consideration of £15,200 by deed enrolled in the records of Not. Victor Bisazza of the 26th June, 1947. pp. 5-6.

3. By a schedule of pre-emption and deposit dated 26th June, 1948, the Plaintiff as the owner of St. George's Flour Mills, Church Wharf, Marsa, claimed to exercise the right of pre-emption of the said immovables by reason of neighbourhood and as the owner of a contiguous tenement enjoying an easement over the tenement sold, and by any other lawful title whatsoever according to the laws of Malta. P's Exhibits
p. 83.

4. The Appellant duly deposited to the credit of the Respondents the sum of £15,964 5s., being the purchase price and interest according to law to the date of filing of the schedule of pre-emption. P's Exhibits
pp. 84-85.

P's Exhibits
" E " p. 91.

5. The property in respect of which it is sought to exercise the right of pre-emption is contiguous to and abuts on the Appellant's property on two sides. On one side it adjoins the St. George's Flower Mills and on the other side it adjoins a field belonging to the Appellant which lies at a higher level than the Respondent's property. The right of pre-emption arises by reason of neighbourhood and the existence of an easement or easements over the tenement sold.

6. The said easement or easements arise out of—

p. 23, l. 40.

(1) The percolation and overflow from the Appellant's said field of water which is and has for some 50 years or more been led away through draining holes and conduits in a wall dividing the said field from the property of the Respondents, the said conduits and draining holes being such as to affect each and every the stores and warehouses of the Respondents contiguous thereto ; and 10

p. 22, ll. 15-25.

(2) Eavesdrop, that is to say, the fall of water through visible spouts from the catchment area of the roofs of the said St. George's Flour Mills.

7. In fact, on the roofs of the Appellant's property, there are two sets of water spouts— 20

p. 24, ll. 20 30.

(1) A spout or spouts built some fifty years ago on the roof of the oldest warehouse and throwing water into a yard belonging to third parties whence it flows into and through the property of the Respondents in a channel running the whole length of the warehouses and thence through other channels to a central channel and to the sea ;

(2) Other spouts which throw water into a channel that has been in existence since 1913 and that was lawfully extended at the time of building additional warehouses some twenty seven years ago, the rain water through such channel and its extension falling into the property of the Respondents through a draining hole or holes in a two-foot dividing wall and continuing its flow along the whole length of the property in respect of which the right of pre-emption is sought to be exercised. Such alteration and change of direction of the old channel did not increase the burden on the tenement of the Respondents and was within the lawful power and right of the Appellant and it is submitted did not in law affect the identity of the old channel. 30

p. 23, ll. 15-25.

p. 39, ll. 2-10.

8. According to the findings of the Referee appointed by H.M. Civil Court First Hall and the finding and judgment of the said Court it seems that at one time a rubble wall stood in the place of the present two-foot wall and that, at that time, the water collecting in the Appellant's field flowed into and over the adjoining property of the Respondents' predecessors which it is now sought to recover. It also seems that the Respondents' said predecessors, wishing to build and building warehouses on their said property, found it necessary or convenient to replace the former rubble 40

wall by the present wall, and, with a view to arresting and diverting the water that used to fall and flow from the Appellant's field and overflow into their said property, constructed the existing water channel and provided a new dividing wall with a number of draining holes at the level of the Appellant's field these draining holes leading to the conduit left in the thickness of the wall and descending vertically to join the water channel in the warehouses. The rain water which had flowed naturally all along the length of the old rubble wall now flowed through a regular system of drainage, through nine holes, one foot thick by one foot wide, going vertically down within the two-foot dividing wall to the lower level of the Respondents' property and connecting at the foot with a regular channel leading to the sea.

9. It is submitted (in accordance with the Report of the above-named Referee and the judgment of H.M. Civil Court First Hall) that the introduction into the dividing wall of a draining system whereby the surface and underground flow from the said field through natural channels was restricted and limited to a flow through the conduits and draining holes changed the old natural flow into an artificial flow through the said holes and conduits and channels effected by the agency or the act of man.

10. In speaking of the agency or act of man, the Appellant submits that the Legislature had in mind the work or construction whereby the water in the higher tenement is discharged into the lower tenement and (apart from the decision of the Court of Appeal in the present case) the decisions of the Courts in Malta are in line with this interpretation of the relevant sections of the Code (ss. 1508-1529, S. 1512).

11. Assuming, without admitting, that "the test to apply is to see whether the water reaches the servient tenement as the result of natural gravitation or whether it reaches the servient tenement artificially, in such a way that naturally, it would not reach that tenement," it is submitted that in this instance, the water reaches the servient tenement artificially, in such a way that naturally it would not reach the tenement, and that the Court of Appeal was in error in the answer it made to the proposed test.

12. In respect of the easement or easements by way of eavesdrop the Court of Appeal disregarded the finding of the Referee and of H.M. Civil Court First Hall that the Respondents' warehouses and the two-foot dividing wall together with the various holes and conduits had been in existence for more than thirty years before the exercise of the right of pre-emption; and that, after as well as before the construction of new buildings by the Appellant it was the same channel that drained the rain water catchment from the roofs of the Appellant's building, the only alteration being that when the new buildings were constructed, the water was diverted into that channel in a different way.

13. By judgment given on 12th December, 1952, H.M. Court of Appeal reversed the judgment of H.M. First Hall Civil Court given on 31st October, 1951, and dismissed the Appellant's claim as well as his Cross Appeal in respect of the payment of costs.

p. 74.

14. On 6th March, 1953, a decree of the Court of Appeal was made granting conditional leave to Appeal and on 26th June, 1953, a decree of the Court of Appeal was made granting final leave to appeal.

p. 78.

The Appellant submits that the judgment of the Court of Appeal dated 12th December, 1952, is wrong, and should be reversed or set aside with costs for the following among other

REASONS

- (1) BECAUSE on the facts found by the Referee and by the Court of First Hall or otherwise admitted, the Appellant was entitled to exercise a right of pre-emption in respect of the Respondents' property and regularly exercised his right by a schedule of 26th June, 1948. 10
- (2) BECAUSE on the facts found by the Referee and by the Court of First Hall or otherwise admitted the Appellant was at all material times the owner of a contiguous tenement enjoying over the tenement sold an easement or easements created by the act of man.
- (3) BECAUSE the Court of Appeal was wrong in law in holding that the diversion of the pre-1914 channel to take in the additional stores built 27 years ago constituted a new easement. 20
- (4) BECAUSE the judgment of the Court of Appeal dated 12th December, 1952, was wrong and ought to be reversed or set aside.
- (5) BECAUSE the judgment of the Court of First Hall given on the 31st October, 1951, was right and ought to be restored.

RICHARD O'SULLIVAN.

J. PACE.

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TORREGGIANI, nominee
(Plaintiff) Appellant**

AND

**PAUL and EMMANUELE
PISANI (Defendants) . Respondents.**

Case for the Appellant.

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