

Issues Surrounding the Redemption of a Perpetual Emphyteusis

ANDREW SCIBERRAS

In this article, **Andrew Sciberras** speculates on potential issues that could arise upon the redemption of a perpetual emphyteusis which have rarely been the subject of court judgments.

TAGS: Civil Law; Emphyteusis; Redemption

Andrew Sciberras is a 3rd year LL.B. (Hons) student, with a particular interest on the procedural aspects of the law. Upon entering the law course, he was immediately drawn to student activism, first occupying the role of Policy Officer within GhSL in his second year and subsequently moving on to the role of Secretary General, a role which he occupies presently.

1. Introduction

The institute of emphyteusis is one of the remnants of Roman Law in Malta, which is a long lease which takes the form of a real right in favour of the emphyteuta against the direct owner of the tenement. Such emphyteusis may be perpetual in nature and last for an indefinite amount of time. This is where the concept of redemption comes into play, where the emphyteuta can choose to redeem the ground-rent and become the direct owner of the property.

Article 1501 of the Civil Code,¹ introduced in 1981, provides for a form of redemption by means of a schedule filed in the First Hall of the Civil Court. This is a more straight-forward form of redemption when compared to redeeming the ground-rent by means of a public deed, which requires the emphyteuta to agree with all co-owners of the property, a difficult task when often it is not easy to even identify the direct owners of the tenement.

2. Limitation on Redemption due to Revision

The proviso in sub-article (2) puts a limit on the rights of the emphyteuta to redeem the ground-rent. Where the contract establishing the emphyteusis states that the ground-rent is to be revised at a specified time or on the happening of a condition, the redemption may only take place within one year following the revision. The purpose behind this clause is clear: the legislator wants to allow the direct owner to receive an amount of ground-rent without the emphyteuta redeeming it immediately. This functions as intended when the revision takes place, for example, every five, ten, or twenty years.

Where the emphyteuta misses his chance, the next chance will always come up. If, however, the revision is to take place once, following twenty years for example, and the amount shall never be revised again, as the law stands, the emphyteuta, if he does not redeem within the year following the revision, may not redeem the ground-rent by means of a schedule of redemption. This lacuna may clash with sub-article (5) of the same Article, which provides that any clause in an agreement where the right of redemption under Article 1501 is limited shall be considered null and void. At present such an emphyteusis, following the year after revision, can never be redeemed by schedule, and runs counter to the purposes behind the introduction of the schedule of redemption.

¹ Chapter 16 of the Laws of Malta.

3. Servitudes

*the emphyteuta [...] shall have the option to redeem the ground-rent.*²

It is the ground-rent which is being redeemed, and nothing else. This means that the relationship between the emphyteuta and the bare owner is not necessarily dissolved completely. The redemption has the effect of removing the need to pay the ground-rent to the direct owner, and while this is the primary element of the emphyteutical relationship, other conditions may be present. Say, in the grant of emphyteusis the bare owner places a condition that the garden of a tenement must remain undeveloped. If the emphyteuta redeems the ground-rent, does this condition also cease to exist, together with the obligation to pay ground-rent? Does the redemption have the effect of transferring the tenement to the former emphyteuta '*liberu u frank*', or do such conditions remain active?

On the one hand, the payment of ground-rent is the cornerstone of the emphyteutical relationship, without which there would be no emphyteusis to speak of. On the other hand, however, the imposition of a condition in the contract of emphyteusis can be considered as independent from the emphyteusis itself. Such a condition may be similar to the one mentioned above, the obligation not to build over a part of the tenement, or the creation of a servitude, or any other condition which may be imposed by the direct owner when creating the emphyteusis.

An often-quoted case, which was instituted soon after the addition of the schedule of deposit (*čedola ta' depožitu*), is the ***Joseph G. Coleiro noe vs Maria Felicita Cremona*** judgment, which has been the basis upon which all subsequent cases on this issue have been decided.³ A tract of land was given on title of emphyteusis, and within the contract establishing such emphyteusis there was a condition limiting where the emphyteuta may build. The emphyteuta subsequently claimed that by redeeming the ground-rent, all conditions set in the contract of emphyteusis were also dissolved, including this condition in question. The defendant on the other hand was arguing that such a condition was extraneous to the emphyteusis and should still be honoured. The First Hall of the Civil Court found in favour of the defendant, and said that all conditions not immediately related to the paying of ground-rent should remain valid following redemption. The Court of Appeal had a different view of the matter. Quoting Ricci, as well as making reference to a Court of Cassation judgment of the 3 May 1897, the Court of Appeal limited the scope of the judgment of the First Hall by stating that only those reservations which have an element of ownership are those which remain

² *ibid* Article 1501.

³ 1466/80 *Joseph G. Coleiro noe vs Maria Felicita Cremona*, Court of Appeal 14 October 1987.

valid following redemption. As was said by the court:

għalkemm isir il-fidi taċ-ċens fil-bejgħ, il-konċedent li jkun irriżerva favur tiegħu drittijiet li għandhom fihom elementi ta' proprjetà, dawn id-drittijiet jibqgħu veljanti nonostante l-fidi taċ-ċens.

Extensively quoting the *Coleiro* judgment, the Court of Appeal in *Testaferrata Moroni Viani vs Mifsud*⁴ followed this line of thinking, stating that only those conditions which have an element of ownership (*element ta' proprjetà*) can survive post-redemption. This is a very vague qualifier, but the gist is that such conditions must be to the benefit of someone to subsist after the redemption. The obligations cannot be imposed *in vacuo*, but must be in favour of some person, either the original bare owner pre-redemption or even a third-party. Such is the case of a servitude, when established in the contract of emphyteusis in favour of a neighbouring tenement. It would be highly unfair if such servitude would be dissolved if the ground-rent is redeemed. Since there is no definition of what a condition with an element of ownership truly means, it must be examined on a case by case basis, which may lead to confusion as different judges give a slightly different spin to the definition.

4. Removal of Obligation to Pay Ground-Rent, or Dissolution of the Contract Entirely?

So far, the author is unaware of this concept being tested in the courts, however, it would do well to keep this in mind in case the legislator wishes to make further amendments to the law and make it more straight-forward. Articles 1515 and 1518 speak of the tenement returning to the direct owner in cases of deterioration of the tenement, either through a fortuitous event or through the want of care of the emphyteuta.⁵ Since we have come to the conclusion that redemption does not terminate the emphyteutical relationship, and simply removes the obligation to pay ground-rent, these requirements are still valid and may still be enforced by the bare owner in order for him to take back the tenement. While most bare owners following redemption will simply stop keeping up to date with the property, a careful bare owner may, if the emphyteuta leaves the tenement in disrepair, attempt to take back the property. It must be restated that any such cases remain unknown to the author and it is unclear how this would play out in court.

5. Conclusion

It is clear that this millennia old institution has morphed considerably over the years, and in fact is falling out of favour due to the price of land. The legislator would do well to clarify these issues through amendments to the

⁴ *Salvino Testaferrata Moroni Viani vs Hubert Mifsud*, Court of Appeal 22 November 1995.

⁵ Civil Code, Chapter 16 of the Laws of Malta, Articles 1515, 1518.

law in order to make sure that it is as clear and straight-forward as possible for people to understand and as equitable for all parties involved. It must be noted that a number of these issues do not come up in the cases of termination of emphyteusis by public deed, as the parties may add any conditions and explanations as they may deem convenient, and may clearly specify that the whole relationship is being terminated, and not just the obligation to pay ground-rent. It is when redemption is affected by schedule of deposit that these issues crop up, due to it being forced on the bare owner by the emphyteuta against their will.

ghsl
olj online
law
journal